

# The Continuing Struggle Against Government Extortion, and Why the Time Is Now Right to Employ Heightened Scrutiny to All Exactions

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*"I'm going to make him an offer he can't [afford to] refuse"*

—The Godfather

*THE GODFATHER*, FRANCIS FORD COPPOLA'S 1972 blockbuster, is a timeless classic.<sup>1</sup> In addition to its legacy as one of Hollywood's most successful motion pictures, *The Godfather* exemplifies a theme that roots itself in the very fabric of human nature: extortion. What is central to *The Godfather* has parallels, nuanced and more subtle, to land use regulation. Through a pervasive scheme of exactions, governments are coercing property owners. This coercion may neither be as blatant nor as repugnant as finding a horse's decapitated head in one's bed, but, nevertheless, it exists and mandates judicial oversight. Indeed, in 1987 the United States Supreme Court warned against the risk of municipal plans of "out-and-out. . . . extortion."<sup>2</sup>

The Supreme Court has made efforts to inhibit government extortion in the context of exactions. In two well-known cases, *Nollan*<sup>3</sup> and *Dolan*,<sup>4</sup> the Court crafted a framework that subjected exactions to heightened scrutiny. This framework, known as the "dual rationality test,"<sup>5</sup> measures the constitutionality of modern-day exactions.

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\* Juris Doctor, 2014, Quinnipiac University School of Law; LLB (Hons), 2009, Nottingham Law School, England. I am forever grateful to my wonderful wife, Ali, and to my entire family for their unwavering love and support. This article represents solely the author's personal views and should not be attributed to any of his employers—past, present, or future. Dedicated to my uncle, David Beckman.

1. *The Godfather* (Paramount Pictures, 1972). Strong caveat required: "depending on one's audience" (mostly for the benefit of my wife, who leaves the room whenever the film is playing).

2. *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825, 837 (1987) (internal citations omitted).

3. *Id.*

4. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

5. *See infra* Part IV.

Since *Nollan* and *Dolan*, the Supreme Court has had little opportunity, or rather, has declined, to provide further guidance on the precise contours of the dual rationality test. This article focuses on the Court's most recent exactions decision: *Koontz v. St. Johns River Water Management District*.<sup>6</sup> *Koontz*—advanced by private property rights advocates as a resounding victory<sup>7</sup>—expanded the dual rationality test to *monetary* exactions, an issue that had plagued lower courts for decades.<sup>8</sup> Yet despite *Koontz*'s ability to provide some much-needed clarity, the decision left an important question unanswered: whether heightened scrutiny—the legacy of *Nollan and Dolan*<sup>9</sup>—is equally applicable to both *legislative* and *adjudicative* exactions,<sup>10</sup> i.e., generally applicable exactions and individually tailored exactions, respectively.

“[S]ome of the most frequently litigated issues in this area are whether the rules established in [*Nollan and Dolan*] apply to legislative or adjudicative exactions.”<sup>11</sup> Judicial fragmentation in the lower courts is rife. While some argue that “*Nollan and Dolan* cannot be read as limited to discretionary, case-by-case conditions,”<sup>12</sup> others advocate

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6. 133 S. Ct. 2586 (2013).

7. See, e.g., Jonathan Stempel & Lawrence Hurley, *U.S. Top Court Backs Florida Property Owner in Land-Use Case*, REUTERS (June 25, 2013), <http://www.reuters.com/article/2013/06/25/us-usa-court-property-idUSBRE9500XM20130625>.

8. See LEE ANNE FENNELL & EDUARDO M. PENALVER, EXACTIONS CREEP 8 (2013) (“Before *Koontz*, the Supreme Court had not intervened to decisively resolve [the] debate.”).

9. See *Nollan*, 483 U.S. 825; see also *Dolan*, 512 U.S. 374.

10. See Steven Eagle, *Koontz in the Mansion and the Gatehouse*, 46 URB. LAW. 1, 6 (2014); D.S. Pensley, *Real Cities, Ideal Cities: Proposing A Test of Intrinsic Fairness For Contested Development Exactions*, 91 CORNELL L. REV. 699, 706 (2006) (providing a concise explanation of the distinction between legislative and adjudicative (ad hoc) decision making). Essentially, the distinction rests on the underlying *process* utilized to implement governmental policy: legislative decision-making is formulated via the law-making process, and, necessarily, has universal application. Adjudicative decision making, on the other hand, “sometimes called ‘quasi-judicial’ proceedings, are a hybrid between a purely legislative enactment and a full judicial proceeding.” Jane C. Needleman, *Exactions: Exploring Exactly when Nollan and Dolan Should Be Triggered*, 28 CARDOZO L. REV. 1563, 1574 n.76 (2006). Such decision-making involves individualized and tailor-made exercise of legislative authority. See *id.*; see also Catherine Buchanan Lehmann, *Dolan v. City of Tigard: A Heightened Scrutiny of the Fifth Amendment*, 32 HOUS. L. REV. 1153, 1176 (1995) (suggesting that there are three different tests that courts usually employ to distinguish legislative acts from adjudicative acts).

11. W. Andrew Gowder, Jr. & Bryan W. Wenter, *Recent Developments in Exactions and Impact Fees: Who Pays for New Schools, Fair Housing, and Clean Air?*, 42 URB. LAW. 615 (2010).

12. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 226 (1998); see also Fred P. Bosselman, *Dolan Works*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 351 (Thomas E. Roberts ed., 2002); see also J. David Breemer, *The Evolution of the “Essential Nexus”*: How State and Federal Courts Have Applied Nol-

that “[t]here is language in Supreme Court decisions suggesting that *Nollan* and *Dolan* (and hence *Koontz*<sup>13</sup>) should be limited to [adjudicatory] fees.”<sup>14</sup> The answer to this question is tremendously important for landowners. With no *explicit* guidance from the Supreme Court, landowners cannot assert whatever constitutionally preserved rights they may have, and protect their property interests from government extortion. This article supports the equal treatment of legislative and adjudicative exactions: both should be subject to *Nollan* and *Dolan*’s heightened scrutiny analysis.

Part I of this article briefly examines the history of the Takings Clause, tracking its transatlantic voyage and its eventual re-birth in the United States. It then delineates the framework for a modern-day exactions analysis, discussing the Supreme Court’s decisions in *Nollan*<sup>15</sup> and *Dolan*,<sup>16</sup> and the subsequent reactions to those decisions in the lower courts. Finally, after analyzing the Court’s decision in *Koontz*,<sup>17</sup> this article argues that the answer to the above-proposed question is an emphatic yes—heightened scrutiny is, or ought to be, applicable to legislative exactions. A bifurcated approach (one that treats legislative and adjudicative decisions differently) is perversely artificial and unworkable. To be sure, we do not want local municipalities making offers that landowners, in the words of Marlon Brando, “can’t refuse.”<sup>18</sup> In addition, it would be remiss if this writing failed to spend some time discussing the level of scrutiny imposed by heightened review—in particular whether, as its label suggests, heightened review mandates exacting scrutiny.

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lan and *Dolan* and *Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 381(2002) (“When one looks beyond the bare facts of *Nollan* and *Dolan* and examines the purposes underlying the essential nexus standard, it becomes apparent that the test cannot easily be limited to exactions of real property and/or exactions imposed administratively.”).

13. *Koontz*, 133 S. Ct. 2586.

14. John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, Vermont Law School Paper No. 28-13, 45 (Feb. 4, 2014) (forthcoming in N.Y.U. ENVTL. L.J.), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2316406](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316406); see also FENNELL & PENALVER, *supra* note 8, at 2.

15. *Nollan*, 483 U.S. 825.

16. *Dolan*, 512 U.S. 374.

17. *Koontz*, 133 S. Ct. 2586.

18. *The Godfather*, *supra* note 1.

## I. Historical (and Very English) Underpinnings of the Takings Clause

An understanding of American takings jurisprudence requires a brief journey across the Atlantic Ocean (“The Pond”).<sup>19</sup> Sir Edward Coke, an English jurist who boasts an illustrious stature analogous to Learned Hand, declared: “the house of everyone is to him as his castle and fortress, as well for his defence [*sic*] against injury and violence as for his repose.”<sup>20</sup> This libertarian-esque philosophy of personal freedom revered, and sought to protect, the sacrosanct natural right of autonomy over one’s property<sup>21</sup>—a philosophy that ultimately motivated the drafting of the takings clause.

Coke advocated his theory four centuries after the *Magna Carta Charter* was signed and sealed under the reign of King John. The *Charter* was a direct response to the King’s common and arbitrary abuse of his sovereign power.<sup>22</sup> In pertinent part, it stated: “[n]o freeman shall be taken . . . or in any way destroyed . . . except by the lawful judgment of his peers and by the law of the land.”<sup>23</sup>

The adoption of the *Charter* “marked the dawn of the modern era of land law in England.”<sup>24</sup> And, with the passage of time, it eventually led to a general practice of providing compensation when one’s title or possession of property was transferred to the government by force of law.<sup>25</sup> This practice “preserved horizontal equity among property owners”<sup>26</sup>—i.e., it ensured that any burdens placed upon some property owners would be offset by compensation, thus restoring equality among similarly situated landowners. Inevitably, with the advent of colonization, this practice, too, travelled across the Atlantic before firmly cementing itself as the “legal status quo.”<sup>27</sup> The “brainchild of James Madison” was to codify this status quo, and accordingly,

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19. *But see* WILLIAM A. FISCHER, REGULATORY TAKINGS 101 (1995) (suggesting that tracking the historical underpinnings of the takings clause, while useful, is not dispositive).

20. *Semayne’s Case*, 77 Eng. Rep. 194, 195; 5 Co. Rep. 91a, 91b (K.B. 1604).

21. *See* GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT 99-102 (1998).

22. Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23, 41 (2007).

23. MAGNA CARTA CHARTER, art. 39.

24. RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW AND PUBLIC POLICY 51 (2004).

25. William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 575-79 (1972); DANA & MERRILL, *supra* note 12, at 16.

26. Stoebuck, *supra* note 25, at 584.

27. DANA & MERRILL, *supra* note 12, at 15.

he instigated its discussion at the state conventions.<sup>28</sup> Madison's successful efforts are evident in the Federal Constitution. Interchangeably referred to as the Eminent Domain Clause, Just Compensation Clause, and the Takings Clause,<sup>29</sup> the Fifth Amendment reads in pertinent part: "nor shall private property be taken for public use, without just compensation."<sup>30</sup>

## II. Takings 101

A "taking" ordinarily means to acquire possession or control of something.<sup>31</sup> From an originalist's viewpoint, the ratifiers of the Fifth Amendment most probably understood "taking" as referring to government action that typically transfers *possession* or *control* of private property to the state.<sup>32</sup> This practice—eminent domain—does not define the limits of the takings clause.<sup>33</sup> As American takings jurisprudence has developed, so has its complexity. Takings jurisprudence can be classified into several categories: *per se* takings, regulatory takings, and exactions.

### A. *Per se* Takings

A *per se* taking may manifest itself in one of two ways: permanent physical invasion or complete economic deprivation. As to the former, "[w]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."<sup>34</sup> As to the latter, a regulation that "completely deprive[s] an owner of all economically beneficial use of her property," similarly entitles such owner to compensation.<sup>35</sup>

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28. *Id.* at 13.

29. FISCHER, *supra* note 19, at 1.

30. U.S. CONST. amend. V.

31. DANA & MERRILL, *supra* note 12, at 86.

32. *Id.*

33. BARLOW BURKE, UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS 12-13 (2d. ed. 2009).

34. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (citing *Loretto v. Teleprompter Manhattan CTV Corp.*, 458 U.S. 419, 435-38 (1982), where New York law authorizing cable television company to place equipment within petitioner's building constituted a physical invasion of her property. The United States Supreme Court held that any physical occupation of private property, authorized by the government, requires just compensation. (*Id.* at 441.)).

35. *Lingle*, 544 U.S. at 538 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), where South Carolina statute imposed developmental restrictions upon petitioner's property that "denie[d] all economically beneficial or productive use of land," and was thus a taking. (*Id.* at 1015.)).

### B. *Regulatory Takings*

*Regulatory* takings, on the other hand, are less categorical—they demand a fact-intensive, multi-factored inquiry into whether the governmental action amounts to an unreasonable interference with one’s private land rights, as to trigger the takings clause.<sup>36</sup> In *Penn Central Transportation Company v. New York City*,<sup>37</sup> the United States Supreme Court delineated several dispositive factors (“The Penn Central Factors”) that have particular significance to a takings analysis: (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 government action.<sup>38</sup> “The Penn Central factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within [the per se takings framework.]”<sup>39</sup>

### C. *Exactions*

While *per se* and *regulatory* takings jurisprudence have been subject to extensive development by the Supreme Court, the law pertaining to exactions is still, relatively speaking, in its infancy. An exaction describes a quid pro quo between the state and a private landowner.<sup>40</sup> As described below, when negotiation becomes fiction, and exchange becomes involuntary, the takings clause is triggered.

Exactions are commonplace.<sup>41</sup> Governments often require developers to mitigate the potential adverse impacts of their projects by exacting something in return for an approval.<sup>42</sup> There are several types of exactions: on-site land dedications, off-site land dedications, money

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36. See *Lingle*, 544 U.S. at 538 (citing *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978)).

37. 438 U.S. 104 (1978).

38. *Id.* at 124.

39. *Lingle*, 544 U.S. at 539.

40. DANA & MERRILL, *supra* note 12, at 86.

41. See generally ALAN A. ALTSHULER, JOSÉ A. GÓMEZ-IBÁÑEZ & ARNOLD M. HOWITT, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS (1993); see also Ann E. Carlson, *Takings on the Ground: How the Supreme Court’s Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 119 (2001) (noting that “[l]ocalities in California have used exactions for an array of purposes including streets, parks, school construction, sewage, public art, low income housing, environmental litigation mitigation and child care centers.”).

42. See FENNELL & PENALVER, *supra* note 8, at 11 (“Land use deal making frequently takes the form embodied in the Court’s exactions cases: regulators have discretion to block or permit a project to go forward, and they bargain with the landowner over the terms on which they will approve the project.”).

payments, and other conditions. The government essentially seeks to obtain a variety of public improvements, infrastructure, and facilities through a process of bartering. “The most common (and expensive) facilities include street[s] and street improvements, water and sewage facilities, affordable housing, parks and recreation, and schools.”<sup>43</sup> Traditionally, the burden of providing such infrastructure was spread among existing residents.<sup>44</sup> However, “there has been a dramatic change in regimes in the United States, so that newcomers must pay all of the cost of infrastructure to serve them, *plus* shar[e] in the cost of infrastructure of existing residents through real estate taxes.”<sup>45</sup> The current increase in government exactions evinces a trend of “exclusionary fiscal policy.”<sup>46</sup>

Rich or poor, professional developer or not,<sup>47</sup> anybody is susceptible to government exactions. Borrowing from one author’s proposed formulaic representation of a typical exaction, consider the following:<sup>48</sup> John owns a magnificent two-story property by the beach. His ownership interest grants him certain rights and benefits. Those rights include the right to use, possess, and enjoy the land. We shall label those benefits as “A.” Incident to ownership, John must also endure certain burdens, such as compliance with zoning regulations, and payment of property taxes. Those burdens shall be labeled “B.” Thus, “A” + “B” = the status quo land use package. After several years of ownership, John wishes to develop his beachfront property. He proposes to add a third floor to his home. The planned addition will add approximately 15 feet to the property’s height, and 10 feet to its width. This proposal shall be labeled “C.” Naturally, one’s benefit often inures to another’s misfortune, and John’s proposed development burdens the local municipality—the increased height specifications cast a large shadow upon the beach, imposing an encumbrance upon avid sunbathers. This burden shall be labeled “D.” After seeking development permission from the local municipality, he is informed

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43. DAVID L. CALLIES ET AL., *DEVELOPMENT BY AGREEMENT: A TOOL KIT FOR LAND DEVELOPERS AND LOCAL GOVERNMENTS* 4 (2012).

44. Jan K. Brueckner, *Infrastructure Financing and Urban Development: The Economics of Impact Fees*, 6 J. PUB. ECON. 383, 384 (1997) (“Historically, infrastructure financing in U.S. cities relied on the cost-sharing approach.”).

45. See Eagle, *supra* note 10, at 10.

46. See *id.*

47. See *id.* at 15 (“Broadly speaking, land development applicants might be classified in two categories. The first is professional developers, who see property rights in instrumental terms. The second is home and small business owners, who see land ownership in personal and subjective terms.”).

48. FENNELL & PENALVER, *supra* note 8, at 13-18.

that, despite his compliance with zoning regulations, he must pay a “development impact fee” of \$10,500 before he can proceed with the desired extension. The fee, according to the municipality, will be utilized to fund a public transportation project, enabling those wishing to sunbathe to take advantage of a shuttle bus that will transport them to a different beach. We shall label this condition “E.”

In light of the above, John has two options available to him. First,—“A” + “B”—which gives John the status quo of land ownership. Second,—“A” + “B” + “C” + “D” + “E”—granting John his desired development, but conditioned upon his payment. This second option is a quintessential example of an exaction. It is essentially a bargain between two parties looking to strike a deal; “[o]n the one hand, we have a developer who wants to build something. On the other hand, we have a local government that is in the business of providing services and facilities.”<sup>49</sup> The Supreme Court has established a framework to analyze the constitutionality of exactions: there must be an “essential nexus”<sup>50</sup> between the alleged burden and the government-imposed condition in order for the exaction to pass constitutional muster, i.e., there must be a substantial relationship between the burden imposed by John’s development—aggravating avid sunbathers—and the city’s proposed solution.

This framework provides a safety mechanism that protects against “thinly-disguised schemes for extortion.”<sup>51</sup>

### III. The United States Supreme Court: Passivism and Activism Toward Land Use Regulation

Before delving into the legal patchwork of exactions, one must answer a gateway question: namely, whether land development is a right or a privilege. This question has provoked extensive controversy over the years; not least in California, where the California Supreme Court has often found itself supporting the latter position.<sup>52</sup> On the opposite end of the spectrum, perhaps under a Hegelian perspective, land development is viewed as more of a right. The United States Su-

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49. Bosselman, *supra* note 12, at 345.

50. *Nollan*, 483 U.S. at 837 (“essential nexus” is directly attributable language to this landmark Supreme Court decision).

51. Eagle, *supra* note 10, at 9.

52. See Daniel J. Curtin, Jr., *How the West Was Won: Takings and Exactions—California Style*, in *TRENDS IN LAND USE LAW FROM A-Z: ADULT USES TO ZONING* 193, 214 (Patricia E. Salkin ed., 2001).



preme Court has of late aligned itself more with this view.<sup>53</sup> It adopted this philosophy during an era known as “The Renaissance of Land Use.”<sup>54</sup> The word ‘renaissance’ conveys the Court’s progression from abandonment to reengagement—from the 1920s to the 1970s, various stimuli provoked the Court to take a prolonged absence from land use issues.<sup>55</sup> One plausible explanation for this passivism is that the Court may have reasoned that land use is a “State and local concern,”<sup>56</sup> and no business of the federal judiciary. Nevertheless, a new period of judicial activism ushered in throughout the latter part of the twentieth Century, with the Supreme Court taking an “unusual interest” in exaction theory.<sup>57</sup> One academic describes this period as “spectacular” for land use.<sup>58</sup> This writing agrees with such a proposition; for it was in this period that the Supreme Court conveyed intolerance toward the regulatory state to which many had become naturally accustomed.<sup>59</sup>

#### **IV. A Legal Framework: The Unconstitutional Conditions Doctrine and *Nollan/Dolan***

##### *A. The Unconstitutional Conditions Doctrine*

*Nollan v. California Coastal Commission*<sup>60</sup> and *Dolan v. City of Tigard*<sup>61</sup> are at the heart of any modern exactions analysis. The Supreme Court viewed those cases as an ideal opportunity to clarify the constitutional safeguards against unlawful governmental interference with private land rights. The Court advanced its dual rationality test, and, in doing so, “broke new ground.”<sup>62</sup>

The dual rationality test is a derivative of the unconstitutional conditions doctrine. This doctrine buttresses the proposition that “the government may not deny a benefit to a person because he exercises a

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53. *Nollan*, 483 U.S. at 833 n.2 (“But the right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’”).

54. See generally SKOURAS, *supra* note 21, at 49-64.

55. See *id.* at 40.

56. See *id.*

57. See FISCHER, *supra* note 19, at 11.

58. SKOURAS, *supra* note 21, at 59.

59. *Id.* (“The Supreme Court with the addition of Justice Scalia attempted to chart a new course for land use law, by attempting to halt the expansion of regulatory government.”).

60. 483 U.S. 825.

61. 512 U.S. 374.

62. SKOURAS, *supra* note 21, at 60.

constitutional right.”<sup>63</sup> Thus, it follows that the government may not condition the granting of a discretionary benefit upon one’s agreement to relinquish a constitutionally protected right.<sup>64</sup> To illustrate, a public university may not, under the unconstitutional conditions doctrine, condition the renewal of a faculty member’s contract upon his promise to forego his public criticism of its current administration, without violating the Constitution. Such temptation could conceivably unduly coerce a faculty member who values the assurances of a consistent salary over his rights to free expression. Essentially, the doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”<sup>65</sup>

In the land use context, permit applicants are especially vulnerable to the types of coercion that the unconstitutional conditions doctrine seeks to inhibit. Typically, applicants value a development permit a lot more than their own property; consequently, the government is in prime position to pressure an applicant into “giving up property for which the Fifth Amendment would otherwise require just compensation.”<sup>66</sup>

Cue *Nollan*<sup>67</sup> and *Dolan*<sup>68</sup>: when the government conditions its approval upon an applicant’s agreement to burden his property, an accession that may otherwise require compensation under the Fifth Amendment, the dual rationality test prohibits the government-imposed condition if it unduly coerced a property owner into forfeiting his Fifth Amendment right to compensation, i.e., there is no essential nexus between the negative externalities of the proposed development and the government-imposed condition. As will be seen below, the dual rationality test is eerily reminiscent of the unconstitutional conditions doctrine.

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63. *Koontz*, 133 S. Ct. at 2594 (internal citations omitted).

64. For a more detailed discussion on the unconstitutional conditions doctrine, including its limitations and virtues, see Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U.L. REV. 989 (1995); and Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

65. *Koontz*, 133 S. Ct. at 2594.

66. *Id.*; see also Needleman, *supra* note 10, at 1570-71 (“A heightened level of scrutiny is necessary because, when a municipality requires an exaction as a condition to grant of a permit, the risk increases that the municipality is simply trying to deprive the landowner of a property right for which it would otherwise have to provide compensation.”); *Nollan*, 483 U.S. at 841 (“When the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.”).

67. *Nollan*, 483 U.S. 825.

68. *Dolan*, 512 U.S. 374.

1. *NOLLAN v. CALIFORNIA COASTAL COMMISSION*

A beachfront lot in Ventura County, California, provided the backdrop as the Supreme Court first defined the constitutional limits of an exaction. The owners of the beachfront lot, the Nollans, proposed to demolish their existing property and replace it with a three-bedroom house.<sup>69</sup> Before building, the Nollans were required to obtain a development permit from the California Coastal Commission.<sup>70</sup> After submitting a proposal, the Commission conditioned its approval on the Nollans' agreement to grant a public easement over a portion of their property.<sup>71</sup> The easement, according to the Commission, would alleviate the burden placed upon the public's beach access—which, the Commission claimed, included “psychological” and “visual” access—by, the Nollans' proposed construction.<sup>72</sup> The Nollans refused to accede to such demands. The case ultimately reached the United States Supreme Court. The Court recognized that ordinarily, if a local government obtains an easement over private land, under a traditional Fifth Amendment analysis, the government is obligated to pay compensation.<sup>73</sup> However, in *Nollan*, the precise issue before the Court was whether requiring the easement to be conveyed *as a condition* altered the outcome.

Central to its analysis, the Court identified two separate, mutually exclusive, acts: the petitioner's *proposed development* and the government's *condition*.<sup>74</sup> The Court assumed, without deciding, that under a substantive due process analysis,<sup>75</sup> the government could have lawfully denied the Nollans' proposal; it entertained the Commission's assertion that such denial had legitimately sought to preserve the public's view of the beach.<sup>76</sup> With this assumption firmly rooted, it then asked whether the condition substituted for the denial “fails to further the end advanced as the justification for the [denial].”<sup>77</sup> In other words, whether there is an “essential nexus”—or logical connection—between

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69. *Nollan*, 483 U.S. at 828.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 830.

74. *Id.* at 834.

75. See *Lingle*, 544 U.S. at 541 (A substantive due process analysis subjects municipal exercise of the police power—*inter alia* zoning regulations, permit approvals and denials—to a very deferential standard of review. As long as the exercise of the police power “was not clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare*,” it will pass constitutional muster.).

76. *Id.* at 837.

77. *Id.*

the conditioned public easement and the alleged burdens on the public's beach access. The Court made it clear that when there is no essential nexus, there is no constitutional propriety, and compensation must be paid.<sup>78</sup> Applying this framework, the Court deemed it "impossible" to understand how an easement across the Nollans' property alleviates the alleged viewing burden created by the development.<sup>79</sup> "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'"<sup>80</sup>

## 2. *DOLAN v. CITY OF TIGARD*

The Court in *Nollan* had articulated what later became known as less than a decade later, in *Dolan*, the Supreme Court revisited the exaction issue, clarified *Nollan*'s essential nexus test, and added another layer of judicial scrutiny. The Court explained that *Nollan*'s essential nexus test was merely the first step in the analysis; the second part of the analysis requires a court to determine whether the degree of the exactions demanded by the government bore the required relationship to the projected impact of the petitioner's proposed development.<sup>81</sup> This, adopting the parlance of the Court, is the rough proportionality test.<sup>82</sup> The framework enunciated in *Nollan* and *Dolan* has been described as an "insurance policy" against municipal racketeering.<sup>83</sup> Together, the tests form the dual rationality test.

While the Court unambiguously articulated a framework, it declined to *explicitly* communicate a formal standard of review.<sup>84</sup> Was "rough proportionality" and "essential nexus" to be synonymous with strict scrutiny? Or, rather, were they to be equated with rational basis review? One author, relying on Chief Justice Rehnquist's opinion in *Dolan*, has suggested that *Nollan* and *Dolan*'s framework is *not* synonymous with strict scrutiny.<sup>85</sup> It should be recalled that in *Dolan*, Chief

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78. *Id.*

79. *Id.* at 838.

80. *Id.* at 837. The Court borrowed this phraseology from the New Hampshire Supreme Court's decision in *J.E.D. Assocs., Inc., v. Atkinson*, 121 N.H. 581, 584 (1981).

81. *Dolan*, 512 U.S. at 386.

82. *Id.* at 391.

83. See *CALLIES ET AL.*, *supra* note 43, at 2-3.

84. See Eagle, *supra* note 10, at 5 ("Notably, the opinions in neither *Nollan*, nor *Dolan*, nor *Koontz* explicitly refer to *Nollan/Dolan* as employing a heightened scrutiny standard of review.").

85. Needleman, *supra* note 10, at n.50 ("It is important to note that although a heightened scrutiny is necessary, the Court does not demand (in either *Nollan* or *Dolan*) the strictest scrutiny usually applied in situations like discrimination cases."). Indeed, Justice Rehnquist, in *Dolan*, explained that "very generalized state-

Justice Rehnquist outwardly rejected the rigors of “exacting [or strict] scrutiny,”<sup>86</sup> but cautioned against a standard of review that was “too lax.”<sup>87</sup> Instead, he endorsed a test that demanded an intermediate position—one “requiring the municipality to show a ‘reasonable relationship’ between the required dedication and the impact of the proposed development.”<sup>88</sup> In an oft-cited passage, the Chief Justice summarized the required standard of review: “[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.”<sup>89</sup> Despite its cryptic overture, Rehnquist’s analysis is widely accepted as subjecting exactions to heightened, or intermediate, review—a standard that is less demanding than strict scrutiny, but more demanding than rational basis scrutiny.<sup>90</sup> Practically, what does this mean for an exaction’s litigant? John Echeverria suggests, based on an empirical analysis, that “the rough proportionality test, in operation, is only somewhat less demanding than the strict scrutiny test applied in other contexts.”<sup>91</sup> After surveying various appellate opinions across the country, Professor Echeverria’s research revealed that the government “flunk[ed] the [rough proportionality] test about half the time.”<sup>92</sup> Thus, *Nollan* and

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ments as to the necessary connection between the required dedication and the proposed development . . . [are] too lax.” *Dolan*, 512 U.S. at 389. But, he continued, “The Federal Constitution [does not] require such exacting scrutiny.” *Id.* at 390. Rather, he suggested that an “intermediate position” was most apt. *Id.*; see also STEVEN J. EAGLE, REGULATORY TAKINGS §7-10(b)(4) (5th ed. 2012) (highlighting that Chief Justice Rehnquist “seemed to have [initially] contemplated . . . a standard of ‘rational basis in fact,’ or meaningful rational basis.”).

86. *Dolan*, 512 U.S. at 390.

87. *Id.* at 389; see also Lehmann, *supra* note 10, at 1166 (“The [Dolan] Court . . . delved into the various state court decisions dealing with land use regulations . . . [s]ome states required only a very generalized finding of a necessary connection between the required dedication and the proposed development.”).

88. *Dolan*, 512 U.S. at 391.

89. *Id.*

90. See *Koontz*, 133 S. Ct. at 2603 (Kagan., J. dissenting) (“*Nollan* and *Dolan* prevent the government from exploiting the landowner’s permit application to evade the constitutional obligation to pay for the property. They do so, as the majority explains, by subjecting the government’s demands to heightened scrutiny.”); see also Ehrlich v. City of Culver City, 911 P.2d 429, 438 (“In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address [exactions.]”); Needleman, *supra* note 10, at 1570 (“*Nollan* and *Dolan* [demand] that heightened scrutiny should be applied when examining takings challenges in the development permit context.”); EAGLE, *supra* note 85, at §7-10(b)(4); Echeverria, *supra* note 14, at 12 (“*Nollan* and *Dolan* plainly establish a distinctive, heightened standard of review for the review of land use exactions under the Takings Clause.”).

91. Echeverria, *supra* note 14, at 8 n.39.

92. *Id.* at 7 (citing to numerous cases that formed his research and opinion); see also Robert J. Hopperton, STANDARDS OF JUDICIAL REVIEW IN THE SUPREME COURT LAND USE

*Dolan's* rough proportionality test is evidently a little more venomous than Justice Rehnquist initially envisioned.

As discussed above, exactions are pervasive in a contemporary society. There is no doubt that commercial land development requires a surrounding infrastructure of facilities and services. While at one time local governments were obligated to bear the principal cost of development improvements and facilities, now—for the past several decades—local governments have been charging land developers for at least a portion of the cost of public facilities.<sup>93</sup> Such charges have manifested themselves in the form of fees—“impact fees”—and land dedications. Exactions have also been utilized in the context of affordable housing; local governments have conditioned the granting of a development permit upon the developer's agreement to provide low-income or affordable housing.<sup>94</sup> Notwithstanding the commercial context, *Nollan's* and *Dolan's* heightened level of scrutiny is equally applicable. To illustrate, in *Commercial Builders of Northern California v. City of Sacramento*, an ordinance was enacted that required developers to pay a fee to offset the anticipated burdens of attracting low-income workers to the city.<sup>95</sup> The Ninth Circuit held that *Nollan's* essential nexus test *had* been satisfied because the fee had been designed to further the city's legitimate interest in housing low-income workers.<sup>96</sup> In contrast, in *Building Industry Association of Central California v. City of Patterson*, a development agreement that conditioned a permit upon the payment of a fee did not pass constitutional muster.<sup>97</sup>

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Opinions 71 (1997), available at [https://law.wustl.edu/journal/51/Hopper\\_.pdf](https://law.wustl.edu/journal/51/Hopper_.pdf) (“Notwithstanding Chief Justice Rehnquist's characterization of this new test as one akin to an ‘intermediate position,’ the rough proportionality test is an activist standard of review because it reverses the presumption of validity and places the burden of proof on the non-judicial decision maker.”); Breemer, *supra* note 12, at 381 (“In the years since *Dolan*, lower courts consistently have applied the essential nexus test . . . [T]he essential nexus standard is routinely enforced beyond the halls of the High Court.”).

93. CALLIES ET AL., *supra* note 43, at 2-3.

94. See Peter Salsich, *State and Local Regulation Promoting Affordable Housing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT ch. 4, (Tim Iglesias and Rochelle E. Lento, eds., 2011) (exploring the constitutional issues that pepper legislative responses to shortages of affordable housing); see also the CALIFORNIA COALITION FOR RURAL HOUSING (“CCRH”), <http://www.calruralhousing.org/publications> (last visited May 21, 2014), as evidence of California's increasing use of inclusionary zoning techniques. The number of jurisdictions employing inclusionary zoning is growing. See, e.g., MONTGOMERY COUNTY, MD. CODE §25A; MONTEREY COUNTY, CAL. CODE § 18.40.090 (2003); N.J. ADMIN. CODE tit. 5, §§ 5:94-6.1-6.18 (2005); LA. REV. STAT. ANN. §§ 33:5001-5003 (2009).

95. 941 F.2d 872, 873 (9th Cir. 1991).

96. *Id.* at 876.

97. 90 Cal. Rptr. 3d 63, 72-4 (Cal. Ct. App. 2009).

## V. Adjudicative vs. Legislative Exactions

*Nollan* and *Dolan* delineated a framework for analyzing government exactions: unless the exaction satisfies the judicially created essential nexus and rough proportionality tests (collectively, the dual rationality test), the government's conduct is treated as a taking. There were, however, unanswered questions in the Court's analysis. First, was *Nollan/Dolan* applicable to monetary exactions, in addition to physical land dedications? Or, as local governments regularly argued, was the analysis limited to *physical* dedications?<sup>98</sup> As discussed below, the United States Supreme Court has now settled this issue, explaining that *Nollan* and *Dolan*'s analysis is indeed applicable to impact fees.<sup>99</sup> A second, and somewhat more fundamental, question is whether *Nollan* and *Dolan*'s analysis was applicable to *legislative* exactions.<sup>100</sup> Below, it is posited that such analysis is, or ought to be, applicable to both legislative and adjudicative exactions. Disparate treatment is illogical and leads to troubling results.

A narrow reading of *Dolan* might suggest that its analysis was limited to adjudicative decision-making. In its opinion, the Court, via a footnote, firmly distinguished legislative decision-making from adjudicative decision-making.<sup>101</sup> Moreover, the Court emphasized the *adjudicative* nature of the exaction at issue.

Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.<sup>102</sup>

One might argue that because the *Dolan* Court highlighted the adjudicative character of the challenged exaction, it is reasonable to conclude that the Court limited its analysis to adjudicative exactions.

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98. See *Ehrlich*, 911 P.2d 429 (finding that *Nollan* and *Dolan*'s tests were applicable to monetary exactions).

99. See *Koontz*, 133 S. Ct. at 2599; see also Echeverria, *supra* note 14, at 39 (attacking the Court's decision to expand *Nollan* and *Dolan*'s analysis beyond the realm of physical land dedications).

100. See DAVID L. CALLIES, BARGAINING FOR DEVELOPMENT 22 (2003); see also Bree-mer, *supra* note 12, at 381 ("Even as the split over monetary exactions begin to favor applying *Nollan* and *Dolan*, a controversy over the applicability of the nexus test to legislative acts continues to retard judicial consistency in application of that test.").

101. *Dolan*, 512 U.S. at 391 n.8.

102. *Id.* (internal citations omitted).

This proposition is flawed. The Court's reference to adjudicative/legislative decision-making ought not be afforded great significance—it merely clarified the allocation of the burden of proof. As is evident from the above excerpt, the Court placed the burden of proof *upon the government* because the challenged exaction was adjudicatory in nature. This burden allocation essentially reversed traditional constitutional doctrine<sup>103</sup>—when economic and non-fundamental rights are implicated, the post-*Lochner* Court “generally defers to legislatures,”<sup>104</sup> placing the burden of proof upon the petitioner. This burden shift was unexpected,<sup>105</sup> and, to the delight of some,<sup>106</sup> “set up a constitutional obstacle course for local governments.”<sup>107</sup> In highlighting the adjudicatory character of the challenged exaction, the *Dolan* Court was merely justifying its decision to depart from its previous pro-legislature stance—quite simply, the distinction was required by doctrinal necessity.<sup>108</sup> Thus, the above passage ought not to be construed as indicative of *Nollan* and *Dolan*'s limited applicability; it was, rather, an attempt to legitimize its burden allocation.

To further muddy the waters, Justice Souter, in his dissent, argued that the exaction at issue in *Dolan* was actually *legislative* in nature.<sup>109</sup> The permit conditions were, after all, imposed pursuant to Tigard's

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103. The Court was merely acknowledging that when a government engages in *legislative* decision-making, there is often an abundance of judicial deference and the burden of proof properly rests on the moving party. However, in the context of *adjudicative* decision-making, the burden properly rests on the government. See Lehmann, *supra* note 10, at 1171 (“[T]he Court strayed from the presumption of constitutionality of such economic regulations and imposed a much higher scrutiny.”). See generally Marshall S. Sprung, *Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard*, 71 NYU L. Rev. 1301 (1996) (discussing the interesting proposition that, unlike in *Nollan*, the *Dolan* Court shifted the burden of proof upon the defendant); see also Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 243-44 (2000).

104. Reznik, *supra* note 103, at 250; see also Lehmann, *supra* note 10, at 1170, n.138 (“In *Lochner*, the Court struck down a New York law that limited the hours a bakery employee was allowed to work to 10 per day and 60 per week as an abridgement of liberty of contract and thus a violation of [substantive] due process.”).

105. See Georgette C. Poindexter, *Comment – Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994): *The Poor Relation Theory*, 29 REAL PROP. PROB. & TR. J. 451, 456 (1994).

106. See Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL EST. L.J. 214, 226 (1997) (“In terms of constitutional theory, *Dolan* was of prime importance. Reversing decades of judicial disparagement of private property rights in the constitutional scheme of things, Chief Justice Rehnquist's majority opinion obverted the burden of proof (by placing it on the regulators) . . .”).

107. See Poindexter, *supra* note 105, at 457.

108. Reznik, *supra* note 103, at 250.

109. *Dolan*, 512 U.S. at 413; see also Lehmann, *supra* note 10, at 1175.



Community Development Code.<sup>110</sup> According to Justice Souter, “[t]he [only] adjudication here was of Dolan’s requested variance from the permit conditions.”<sup>111</sup>

If, *arguendo*, the *Dolan* Court did limit its dual rationality test to ad hoc determinations, it is arguable that ad hoc assessments occur *whenever* a local government implements legislative policy to particular land parcels, and therefore, the “potential for the unconstitutional placement of disproportionate burdens” is present in legislative decision-making, too.<sup>112</sup> Consider the following: if town X passes ordinance Y, the town will be required to implement the ordinance on an individual basis. Moreover, if a property owner challenges the ordinance, the town will be required to adjudicate. Accordingly, notwithstanding the ordinance’s original legislative character, its mandate will inevitably be facilitated through individual application; by their very nature, legislative acts fuel adjudicative proceedings. This paradox has been appropriately labeled as “The Dolan Misstep”<sup>113</sup> and further deprives the legislative/adjudicative distinction of credibility.<sup>114</sup>

Predictably, the legislative/adjudicative distinction has been debated in the lower courts that continue to apply the dual rationality framework. While many, if not most, courts have concluded that the analysis is restricted to ad hoc determinations, some judicial opinions cite approval for a blanket application.<sup>115</sup> California, on the other

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110. *Dolan*, 512 U.S. at 377.

111. *Id.* at 413 n.\* (Souter, J., dissenting).

112. See Douglas W. Kmiec, *The “Substantially Advance” Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?*, in *TAKING SIDES ON TAKINGS ISSUES* 374 (Thomas E. Roberts ed., 2002).

113. See *id.*

114. See Breemer, *supra* note 12, at 405 (“There is no logically consistent way to pinpoint the source of an exaction because they typically reach the landowner only after the involvement of both legislative and adjudicative bodies.”).

115. Compare cases that have adopted a bifurcated approach, such as *Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997); *Waters Landing Ltd., v. Montgomery Cnty.*, 650 A.2d 712 (Md. 1994); *Arcadia Dev. Corp., v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (“[The *Nollan/Dolan*] analysis, however, applies only to adjudicative determinations that condition approval of a proposed land use on a property transfer to the government, which, standing alone, would clearly constitute a taking.”); *Rogers Mach., Inc., v. Washington Cnty.*, 45 P.3d 966 (Or. Ct. App. 2002), with cases that render the distinction irrelevant, such as *N. State Home Builders Ass’n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Amoco Oil Co. v. Vill. of Schaumburg*, 661 N.E.2d 380, 390-91 (Ill. App. Ct. 1995); *J.C. Reeves Corp. v. Clackamas Cnty.*, 887 P.2d 360, 365 (Or. Ct. App. 1994) (emphasizing that the nature of land use regulations, and not the source, is most dispositive for a constitutional analysis.); *Curtis v. Town of S. Thomaston*, 708 A.2d 657 (Me. 1998); *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. Ct. App. 2000); see also Julian Conrad Juergensmeyer & Thomas E. Roberts, *LAND USE PLANNING AND DEVELOPMENT* §10:5 (2007).

hand, appears to have *settled* the issue.<sup>116</sup>

In *Ehrlich* and *San Remo Hotel*, the California Supreme Court rejected the suggestion that *Nollan* and *Dolan* are applicable to legislatively borne exactions.<sup>117</sup> In *Ehrlich*, the petitioner fell victim to a legislative “ransom.”<sup>118</sup> Following his request to build a 30-unit condominium, valued at \$10,000,000, to replace his financially inept sports and tennis club, Culver City conditioned approval upon the following: (1) the payment of \$280,000 to be used for additional public recreational facilities as directed by the City Council; and (2) the payment of an exaction under the city’s “art in public places program” that would require the petitioner to provide artwork in an amount equal to one percent of the total building valuation, or pay for the city to provide it.<sup>119</sup> Such demands reflect an inverted perception of legislative responsibilities; it is as though the legislature viewed itself with innate entitlement to a profit-sharing scheme. As succinctly put by one critic, “[t]o say that these conditions were startling would be an understatement.”<sup>120</sup> The petitioner sued the city under a takings theory. The trial court invalidated the \$280,000 fee, but it declined to set aside the “art in public places” fee.<sup>121</sup> The appellate court found that there was a “‘substantial nexus’ between the proposed condominium project and the \$280,000 exaction. ‘The mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City’s approval of the townhome project and for the burden to the community resulting from the loss of recreational facilities.’”<sup>122</sup> Granting *certiorari*,<sup>123</sup> the California Supreme Court reversed the appellate court’s approval of the \$280,000 mitigation fee, but affirmed the legality of the art in public places fee.<sup>124</sup> While an in-depth analysis of the court’s decision is beyond the scope of this

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116. See *San Remo Hotel L.P. v. City and Cnty. of San Francisco*, 41 P.3d 87 (Cal. 2002); *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (legislative exactions need not be exposed to heightened scrutiny).

117. See *San Remo Hotel*, 41 P.3d 87; *Ehrlich*, 911 P.2d 429.

118. Kanner, *supra* note 106, at 214.

119. *Ehrlich*, 911 P.2d at 435. The local government valued the petitioner’s project at \$3.2 million, and therefore he would be required to pay \$33,200 in lieu of providing the artwork.

120. See Kanner, *supra* note 106, at 214.

121. *Ehrlich*, 911 P.2d at 450.

122. *Id.* at 436

123. Initially, the California Supreme Court declined to review the case, but in light of the United States Supreme Court’s decision in *Dolan*, it reneged on its original decision. See Kanner, *supra* note 106, at 214.

124. *Ehrlich*, 911 P.2d at 450 (“The requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose.”). This decision demonstrated “unabashed nullification of [the Supreme Court’s]

article,<sup>125</sup> it is noteworthy for present purposes that the California Supreme Court drew a firm distinction between legislative and adjudicative decision-making, and limited *Nollan* and *Dolan*'s application to the latter.

It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.<sup>126</sup>

Thus, the California Supreme Court concluded that because the risk of extortion is far more likely when the exaction is imposed on an individual basis, *Nollan* and *Dolan* are only applicable to ad hoc decisions.<sup>127</sup> According to the Court, ad hoc decisions present "an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation."<sup>128</sup>

More recently, the California Supreme Court took a similar approach in *San Remo Hotel v. City & County of San Francisco*.<sup>129</sup> As discussed below, limiting *Nollan* and *Dolan* to individualized determinations is untenable. Instead, it is more doctrinally consistent for *Dolan*'s test to be applied universally to both ad hoc and legislative determinations. There exists a significant reason: in its most recent takings decision, *Koontz v. St. Johns River Water Management District*,<sup>130</sup> the Supreme Court has implicitly signaled that both legislative and adjudicative exactions are deserving of heightened scrutiny. Adopting the parlance of Judge Alex Kozinski of the Ninth Circuit, a contrary approach

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Nollan decision." Gideon Kanner, *In California, a Land Owner Loses Again*, WALL ST. J., Feb. 8, 1995, at A15.

125. See Kanner, *supra* note 106, at 214 (offering an interesting perspective on the court's decision).

126. *Ehrlich*, 911 P.2d at 439.

127. *Id.*

128. *Id.*; see also Daniel Curtin, *Applying Nollan/Dolan to Impact Fees: A Case for the Ehrlich Approach*, in *TAKING SIDES ON TAKINGS ISSUES* 333, 339 (Thomas E. Roberts ed., 2002) ("In the more common situation when exactions are imposed pursuant to a general legislative act or rule, cities act within their traditional police powers.")

129. 41 P.3d at 105 ("We decline plaintiffs' invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction we drew in *Ehrlich* . . . between ad hoc exactions and legislatively mandated, formulaic mitigation fees. While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process.")

130. *Koontz*, 133 S. Ct. 2586.

merely reflects courts' "thinly disguised contempt" for landowners' constitutional rights.<sup>131</sup>

## VI. *Koontz*: The Supreme Court's Renewed Vindication of Private Land Rights

*Koontz* has caused turbulence in an already volatile and uncertain area.<sup>132</sup> Critics have attempted to undermine its analysis with pointed cynicism, sarcasm, and rhetoric.<sup>133</sup> Coy Koontz, Sr., the petitioner,<sup>134</sup> had purchased an undeveloped 14.9 acre tract of land in his home state of Florida. Keen on developing 3.7 acres, he applied to the District for the appropriate development permits.<sup>135</sup> To offset the perceived environmental impact from his planned development, Koontz offered to deed 11 acres to the District as a conservation easement.<sup>136</sup> Despite this concession, the District considered the conservation easement "inadequate," and conditioned its approval upon Koontz' acceptance of one of the following conditions: (1) reduce his proposed development to one acre and deed to the District the remaining 13.9 acres as a conservation easement; or (2) permit as originally planned, but only if Koontz *also* agreed to hire contractors to make improvements to District-owned land several miles away (i.e., to fund offsite public projects).<sup>137</sup>

After Koontz refused to accede to the District's demands, his application was rejected.<sup>138</sup> In an attempt to vindicate his Fifth Amendment right to compensation, he sought judicial redress. His chief argument in the Florida District Court was that the District's proposed exaction constituted a taking without just compensation.<sup>139</sup> The district court sided with Koontz and awarded him \$376,154 in compensation.<sup>140</sup> Its decision was affirmed in the Florida District Court of

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131. *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331, 1346 (9th Cir. 1990).

132. See David L. Callies, *Koontz Redux: Where We Are and What's Left*, 65 PLAN. & ENVTL. L. 7 (2013).

133. See, e.g., Echeverria, *supra* note 14.

134. Actually, Coy Koontz, Jr., his son, represented the estate in the proceedings, but for ease of reference, Coy Koontz, Sr. shall be treated as the petitioner and applicant.

135. *Koontz*, 133 S. Ct. at 2592.

136. *Id.*

137. *Id.* at 2593.

138. *Id.*

139. *Id.*

140. Petition for Writ of Certiorari at 7, *Koontz v. St. John's River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 1961402, at \*7.

Appeals. Exercising its discretionary reviewing authority, the Florida Supreme Court reversed on two grounds: (1) the mere *denial* of a permit application—as opposed to an acceptance with conditions—does not trigger the protection afforded by the Fifth Amendment; and (2) a demand for *money*, as opposed to land, cannot constitute a taking under the Fifth Amendment.<sup>141</sup>

In an opinion authored by Justice Alito, the United States Supreme Court reversed the Florida Supreme Court, and remanded. It concluded that there is no substantive difference between the denial and acceptance of an application permit.<sup>142</sup> It recognized that a contrary conclusion would encourage untenable results; essentially, it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions *precedent* to permit approval. Specifically, “[u]nder the Florida Supreme Court’s approach, a government order stating that a permit is ‘approved if’ the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words ‘denied until’ would not.”<sup>143</sup> Rather, articulated the Court, the unconstitutional conditions doctrine declines to attach significance to the distinction between conditions precedent and conditions subsequent. Second, the Supreme Court held that “so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”<sup>144</sup> *Koontz* undoubtedly provided two clear-cut answers to two very specific questions.<sup>145</sup> Yet, the Court did not provide an *explicit* answer as to whether *Nollan*

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141. *Koontz*, 133 S. Ct. at 2594.

142. *Id.* at 2597.

143. *Id.* at 2595-96.

144. *Id.* at 2599. As alluded to above, the Court’s decision has come under fierce criticism. Most notably, John D. Echeverria has vehemently criticized the decision. See generally Echeverria, *supra* note 14.

145. *But see* Echeverria, *supra* note 14, at 32 (describing the Court’s expansion of *Nollan/Dolan* to encompass monetary exactions as “convoluted, illogical thinking”). According to Professor Echeverria, the mandated payment of a fee does not trigger the Takings Clause because an exactions analysis requires one to assess whether the exaction, viewed independently, constitutes a taking. Relying on the Supreme Court’s analyses in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) and *Nollan and Dolan*, he asserts that the payment of a fee, viewed independently, is not a taking. To respond to Professor Echeverria’s observation, I suggest that the fundamental philosophy that underlies the Court’s exactions jurisprudence is a consistent observation of the unconstitutional conditions doctrine. See *infra* Part VII. That doctrine seeks to protect *propriety* from unwarranted governmental coercion, notwithstanding the nature of that coercion. Accordingly, Echeverria’s concern is not dispositive to the analysis. What is most troubling about Professor Echeverria’s approach is that a government could avoid an exaction analysis by simply requiring the payment of a fee, instead of a land dedication.

and *Dolan*'s analysis is limited to ad hoc exactions.<sup>146</sup> It is submitted, nevertheless, that *Koontz* provides ample justification for including generally applicable legislative exactions within the penumbra of *Nollan* and *Dolan*'s framework.<sup>147</sup>

A. *The Court Implicitly Conveyed a Universal Application of Nollan and Dolan*

Unlike its previous opinion in *Dolan*, the *Koontz* Court declined to define the exaction at issue.<sup>148</sup> If, as proponents of disparate treatment suggest, the *type* of exaction is indispensable to a court's constitutional analysis, then surely the Court would have ensured that its opinion clearly conveyed it. *Koontz* was, after all, decided almost 20 years after the Court expounded its exactions analysis in *Dolan*. Given the timing of the decision, and the disharmonious muddle percolating in the lower courts, one may assume that the Court would have drawn attention to the type of exaction if it was relevant to the constitutional analysis. The Court did not do so.<sup>149</sup>

Second, in writing for the Court, Justice Alito was presumably aware of the disparate treatment of the issue in the lower courts. Indeed, almost two decades prior, Justice Thomas had pointed out that "the lower courts are in conflict over whether [*Dolan*] . . . should be applied in cases where the alleged taking occurs through an act of the legislature."<sup>150</sup> Thomas, in his dissent, suggested that any distinction between legislative and adjudicative acts was artificial.<sup>151</sup> Furthermore, if Thomas's dissent had not captured Alito's attention, then Kagan's dissent, in *Koontz*, surely did. In her passionate dissent, Kagan requested that the majority clearly articulate its stance: "[t]he majority might, for example, approve the rule, adopted in several states, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable . . . [m]aybe

146. See Eagle, *supra* note 10, at 6 ("The major issue regarding unconstitutional conditions and land development approvals left unanswered after *Koontz* is whether the doctrine applies to legislative determinations as well as adjudicative decisions by administrators.").

147. *But cf.* Callies, *supra* note 132, at 7.

148. *Dolan*, 512 U.S. 374; *Koontz*, 133 S. Ct. 2586.

149. John M. Baker, *Koontz* Decision and Its Impact on Municipal Land Use Decisions, Panelist at Minnesota Association of City Attorneys Educational Conference (Feb. 7, 2014) ("The *Dolan* court may have cared about the difference between legislative and adjudicative exactions. However, in *Koontz*, Justice Alito seemed generally concerned about exactions.").

150. *Parking Ass'n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting).

151. *Id.*

today's majority accepts [a] distinction; or then again, maybe not."<sup>152</sup> In light of the surrounding uncertainty, the *Koontz* majority had an ample opportunity to endorse different treatment of legislative exactions. Yet since it declined to do so, it is conceivable, maybe even quite likely, that the Court deemed the distinction completely irrelevant to its constitutional analysis; the omission implicitly reveals the Court's refusal to endorse a novel and unsound proposition.<sup>153</sup>

B. *An Expansive Application of Koontz Remains Faithful to the Court's Current Agenda*

It is difficult to deny that *Koontz* provides an expansive interpretation of the Fifth Amendment's taking provision.<sup>154</sup> It is this sort of expansive analysis that has prompted vehement criticism.<sup>155</sup> As mentioned above, the Supreme Court reengaged with land use issues in the 1970s, crafting "a new course for land use law, by attempting to halt the expansion of regulatory government."<sup>156</sup> If one traces the Court's takings jurisprudence over the past several decades, it is evident that the Court has set forth a conservative agenda of vindicating private land use rights.<sup>157</sup> Consistent with its previous jurisprudence, the *Koontz* Court remained faithful to that agenda in its expansive interpretation of the Fifth Amendment. In light of this private property rights agenda, it is entirely plausible that the Court intended for its *Koontz* opinion to convey disaffection toward a non-universal application of *Dolan*.

With no definitive answer on the issue, at least outside of California, lower courts are, theoretically, at liberty to employ different approaches.

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152. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

153. See Echeverria, *supra* note 14, at 46 (arguing that "the Court's language [suggests that it has] . . . reserved the question of whether *Nollan* and *Dolan* can or should extend beyond *ad hoc* exactions.").

154. See *supra*, pp. 20-1.

155. See Echeverria, *supra* note 14, at 1 ("The case of *Koontz v. St. Johns Water Management District* is one of the worst—if not the worst—decision in the pantheon of Supreme Court takings decisions.").

156. SKOURAS, *supra* note 21, at 59; see, e.g., *First English Evangelical Church v. Cnty. of L.A.*, 482 U.S. 304 (1987); *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374; *Lucas*, 505 U.S. at 1019.

157. For example, see *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 for an additional example of the Court's expansive, conservative agenda. The Court held that government-induced temporary flooding is not categorically exempt from the scope of the Fifth Amendment. It provided a "unanimous victory for property rights." See Brian T. Hodges, *Arkansas Game & Fish Commission v. United States: A Temporary Fix for Temporary Takings*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 38, 38 (2013).

Yet under its state constitution, California appears to have settled this issue. In two separate opinions, the California Supreme Court has conveyed its preference for a bifurcated approach. One might cite to *California Building Industry Association v. City of San Jose*<sup>158</sup> as a prophetic indication of change on the “Golden Coast.” This litigation was triggered by an inclusionary housing ordinance requiring developers to set aside fifteen percent of their dwelling units as affordable housing. The trial court declared the ordinance invalid under a *Nollan/Dolan* analysis,<sup>159</sup> and the appellate court reversed.<sup>160</sup> In a disjointed and flawed opinion, the appellate court demonstrated great deference to the municipality—despite the ordinance’s resemblance to a quintessential exaction, the court declined to analyze it as such.<sup>161</sup> Remarkably, the court opined that “the Ordinance should be reviewed as an exercise of the City’s police power,”<sup>162</sup> and accordingly framed the issue as whether the ordinance was “arbitrary, discriminatory, and without a reasonable relationship to a legitimate public interest.”<sup>163</sup> This analysis—a typical substantive due process analysis—is far more deferential than an exactions analysis.<sup>164</sup> The case is currently pending resolution by the California Supreme Court; perhaps the court is preparing to seize the opportunity to signal a revolutionary change in judicial policy.

It would be disingenuous to suggest that the argument in favor of universal application is an easy sell. Quite frankly, it is not. The general consensus among courts is that *Nollan* and *Dolan*’s exaction framework is inapplicable to legislatively imposed exactions.<sup>165</sup> For sure, as discussed above, California leads the way in advancing this anti-property-right philosophy.<sup>166</sup> A recently published memorandum

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158. 157 Cal. Rptr. 3d 813 (Cal. Ct. App. 2013).

159. *Id.* at 816.

160. *Id.* at 825.

161. *Id.* at 823 n.8 (“The case before us involves neither an asserted taking nor a land-use challenge governed by *Nollan* and *Dolan*.”).

162. *Id.* at 824.

163. *Id.*

164. The United States Supreme Court has explained that a substantive due process analysis is separate and distinct from a takings analysis. *Lingle*, 544 U.S. 528, 545-548 (2005). See Steven Eagle’s suggestion that while an ordinance passes constitutional muster under a substantive due process analysis, it does not necessarily pass constitutional muster under a takings analysis. Eagle, *supra* note 10, at 20 (“While the court of appeal viewed the [Housing Ordinance] as a legitimate way of effectuating the state’s policy of furthering affordable housing, that holding goes to the [ordinance’s] legitimacy, and not whether it constitutes a taking.”).

165. See *supra* Part V.

166. According to some academics, California has had the greatest role in takings jurisprudence over the past two decades, even shadowing the United States Supreme Court. Thus, perhaps California’s approach is indicative of the “correct” approach. See



from the deputy city attorney of San Diego accurately captures the harmful overture for California property owners.<sup>167</sup> Attorney Keely Halsey, responding to a request by the San Diego Housing Commission, was asked this question: is a legislative fee proposal for non-residential developers subject to heightened review, in light of *Koontz*?<sup>168</sup> Her response is as follows.

Not likely. In *Koontz*, the Court did not specifically state a legal standard for the adoption of legislatively enacted fees. Parties may raise this issue in future litigation. Unless the question is further addressed by the courts, however, it is reasonable to conclude that the state of the law in California with respect to legislatively enacted fees remains as it existed prior to *Koontz*, under which heightened scrutiny would not apply to the Fee.<sup>169</sup>

Citing to *San Remo Hotel* and *Ehrlich*,<sup>170</sup> the memorandum advanced the classic rhetoric alluded to above—that legislative exactions are less deserving of exacting scrutiny given the availability of a democratic political process.<sup>171</sup> The deputy city attorney acknowledged that “[i]n failing to specifically address the issue of whether *Nollan/Dolan* applies to generally applicable legislatively enacted fees, *Koontz* opened the door for future litigation on that issue.”<sup>172</sup>

## VII. Any Distinction between Legislative and Adjudicative Acts is Artificial, Unworkable, and Illogical

Notwithstanding *Koontz*, attempts to apply differential treatment to legislative and adjudicative decisions defy two essential pillars of sound legal theory: logic and historical underpinnings. As discussed above, those courts adopting a narrow reading of *Dolan* view the Supreme Court’s opinion as truly indicative of its intent to limit its analysis to ad hoc exactions.<sup>173</sup> Yet this proposition is problematic due to two fundamental failings of such a narrow reading.

An oft-cited justification for a bifurcated approach is that “extortion [is] more likely when the exaction is imposed on an individual

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Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court’s Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS. L. REV. 103, 108 (2001).

167. Memorandum from the Office of the City Attorney of the City of San Diego (Oct. 25, 2013), available at <http://docs.sandiego.gov/memooflaw/MS-2013-13.pdf>.

168. *Id.* at 4.

169. *Id.*

170. *San Remo Hotel*, 41 P.3d 87; *Ehrlich*, 911 P.2d 429.

171. Memorandum, *supra* note 167, at 10.

172. *Id.* at 13.

173. See Needleman, *supra* note 10, at 1574.

basis. . . . [and] abusive behavior is more likely in an adjudicative setting because the decision-making process is discretionary in nature.”<sup>174</sup> Essentially, proponents of that thesis view the underlying democratic political process as an adequate safety mechanism against abuse.

[T]hey consider heightened scrutiny for adjudicative exactions a solution to the “extortion” problem because it forces local governments to “improve the substantive formulation of standards for discretionary review.” Legislative enactments, on the other hand, which affect many people, are less likely to violate the Takings Clause because the legislative and political processes will protect landowners.<sup>175</sup>

While worthy of consideration, this proposition fatally assumes that all communities function according to the representative democracy model, naturally applicable to *larger* governments.<sup>176</sup> Yet, as recognized by one author, *smaller, local* governments are inherently incapable of true representative democracy<sup>177</sup>—a lack of electoral diversity inhibits the “coalition-building safeguard” inherent in larger governments, and thus minorities are not protected from majoritarian oppression.<sup>178</sup> Those interests that *Dolan* seeks to protect belong to “precisely the kind of minority whose interests might actually be ignored.”<sup>179</sup>

For example, consider a small town, located in an extremely affluent suburb. The town, a commuter town, is home to many influential corporate personalities, and upper-echelon employees of a nearby energy conglomerate. The town boasts low-density zoning and, unsurprisingly, its poorer residents are confined to a small area. In light of a shortage of affordable housing, some residents are pushing for the local legislature to encourage developers to build more affordable housing. Yet wealthier residents are opposed to such plans. A local legislature that recognizes the value of affluence will undoubtedly cater to

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174. Reznik, *supra* note 103, at 268; see also *San Remo Hotel*, 41 P.3d at 105.

175. See Reznik, *supra* note 103, at 270; see also *San Remo Hotel*, 41 P.3d at 105 (acknowledging that “[w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process”); Craig R. Habicht, *Dolan v. City of Tigard*, 45 CATH. U. L. REV. 221, 265 (1995).

176. See Reznik, *supra* note 103, 270-72; see also Breemer, *supra* note 12, at 401-04 (“[P]rocedural mechanisms designed to protect the minority often break down in the legislature as well as in the administrative context. Indeed, as the branch most accountable, and thus most responsive, to the majority, the legislature may be especially prone to extort disproportionate amounts of property from under-represented groups.”).

177. Reznik, *supra* note 103, 271.

178. *Id.*; see also Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 405-07 (1977).

179. Reznik, *supra* note 103, 271; see also Needleman, *supra* note 10, at 1586.

the majority's interests, without appearing to overtly discriminate against poorer communities. This town passes an ordinance that decreases density requirements, but in an effort to dissuade low density development, it imposes a relatively large exaction upon new affordable housing development. Alas, legislative exactions are similarly prone to political abuse.<sup>180</sup> Ironically, an application of *Dolan*<sup>181</sup> that hinges upon the character of the government action may only *exacerbate* the evil of government overreaching: legislative bodies are just as capable of extortion as adjudicative bodies. Moreover, in light of the protections afforded by procedural due process, adjudicative decision-making, in contrast, is subject to an inherent safeguard that decreases the possibility of extortion.

Thus, "if legislative decisions are shielded from the 'rough proportionality' standard and adjudicative decisions are subjected to it, the result may be that extortionate behavior is granted deference, while fair processes are overscrutinized."<sup>182</sup> To further illustrate this unwarranted paradox, consider a legislative ordinance that is overbroad. In an effort to abate a relatively minor nuisance, a local government might employ overindulgent, non-tailored measures that negatively impact a majority of the populace. Such legislative action ought not to be afforded deference by virtue of its legislative nature; to do so oversimplifies the issue. Other academics have similarly suggested that a legislative/adjudicative distinction may be "under and over inclusive."<sup>183</sup> Specifically, they suggest—following research on the subject—that excessive exactions are most likely to be exercised in "communities with large, unmet infrastructure needs who have failed to spread costs among earlier developments, especially nearly built out communities. In addition, municipalities with unique amenities, such as beach towns, and perhaps communities that have adopted strong growth control measures fall into the 'likely to demand excessive exactions category.'"<sup>184</sup> By contrast, they posit, "communities with available developable land that is somewhat fungible and that are now engaged in long-term

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180. See also Eagle, *supra* note 10, at 6.

181. *Dolan*, 512 U.S. 374.

182. Reznik, *supra* note 103, 270. Also, consider that legislative exactions—by virtue of their universal application—may effectuate a completely disproportionate response to a relatively small problem, i.e., the legislative action might *unnecessarily* affect the rights of private property owners. The protections afforded by the takings clause must be utilized to lessen this risk. This consideration raises further doubts about the plausibility of a distinction.

183. Carlson & Pollak, *supra* note 166, at 131.

184. *Id.*

planning to spread anticipated infrastructure costs” are less likely to indulge in excessive exactions.<sup>185</sup> Thus, it follows that in the former context the risk of extortion ostensibly affects both ad hoc *and* legislative exactions; while in the latter context, the lower risk of extortion renders heightened scrutiny superfluous. Once again, we see the doctrinal flaws of a legislative/adjudicative distinction.

Quite simply, a legislative label must not be afforded a protective “presumption of validity” because even in the legislative context, there still exists a grave and real risk that local governments may abuse the privilege of public governance.<sup>186</sup> Thus, any suggestion that legislative decision-making is unworthy of the judicial protection afforded under *Dolan*’s analysis is indefensible and illogical. “It is unclear why courts believe human nature or legislators have changed so much that an invasion of property rights by ‘men and women of our choice’ should be scrutinized with more ‘confidence’ today.”<sup>187</sup>

Justices Thomas and O’Connor have expressed their disapproval of different treatment of legislative and adjudicative decision-making in the land use context. In *Parking Association of Georgia Inc., v. City of Atlanta*, both Justices voiced their discontent in their respective dissents to *certiorari* denial.<sup>188</sup> In *Parking Association of Georgia*, the Georgia Supreme Court declined to invalidate a zoning ordinance that imposed an exaction upon parking lot owners; characterizing the exaction as “legislative,” the court refused to apply *Dolan*.<sup>189</sup> In the United States Supreme Court’s denial of *certiorari*, Justice Thomas questioned the logic of why a Fifth Amendment takings analysis should depend on “the type of government responsible for the taking.”<sup>190</sup> Expressing his frustration, he declared:

It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property.<sup>191</sup>

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185. *Id.*

186. Breemer, *supra* note 12, at 394.

187. *Id.* at 404.

188. 515 U.S. at 1117.

189. *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (applying substantive due process analysis instead of takings analysis).

190. *Parking Ass’n of Ga.*, 515 U.S. at 1117-18.

191. *Id.* at 1117-18 (Thomas, J., dissenting); *see also Amoco Oil Co.*, 661 N.E.2d at 389 (“[A municipality could] skirt its obligation to pay compensation . . . merely by having the Village Board of trustees pass an ‘ordinance’ rather than having a planning

This article has traced the historical underpinnings of the Court's exactions analysis to its affirmative obligation to adhere to the unconstitutional conditions doctrine—a product of primary constitutional jurisprudence. Given that the doctrine, in its original form, failed to distinguish between adjudicative and legislative determinations, it would be improper and disingenuous to read such a distinction as necessary for an exactions analysis.<sup>192</sup>

### VIII. Conclusion

The Supreme Court never intended to limit the outer boundaries of its *Dolan* analysis to ad hoc exactions.<sup>193</sup> Those advocates of disparate treatment for legislative and adjudicative decision-making fail to recognize the problematic import of their thesis: the distinction fatally fails to identify, and protect against, unruly governmental overreaching. Furthermore, that position disregards the historical underpinnings of the Court's exaction analysis. Consequently, "one may draw the conclusion that the 'rough proportionality' standard should be applied to all exactions without making the legislative/adjudicative distinction."<sup>194</sup>

*Koontz* displays the Court's most recent vindication of individual rights. This article has suggested that the decision implicitly communicates judicial intolerance toward an approach that discriminates between legislative and ad hoc exactions. Moreover, as discussed above, dissimilar treatment produces various inconsistencies and untenable results. As the Supreme Court continues to weigh in on the classic standoff between individual rights and the limits of the takings clause, it has the ability to change its course. However, at least for the time being, it has adhered to a Madisonian philosophy—revering individual land rights. *Koontz* enabled the Court to clarify the outer limits of *Nollan* and *Dolan*'s analysis, and its position on the unlawful exercise of the police power by governmental units. Despite its critics, the Court's *Koontz* opinion is of monumental importance, and clearly signals a robust intolerance for municipal racketeering.

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commission issue a permit."); James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 ENVTL. L. 143, 150 (1995).

192. DANA & MERRILL, *supra* note 12, at 227.

193. *But cf.* Reznik, *supra* note 103, at 274 ("However, such an extension of heightened scrutiny would be inconsistent with the *Dolan* Court's reasoning. The *Dolan* Court itself explained its creation of the 'rough proportionality' standard, which places the burden on the local government to justify the exaction, by limiting it to adjudication, as opposed to legislation which carries a presumption of constitutional validity.").

194. *Id.*

*Koontz*'s significance should not be underestimated; its effect ought to be felt in lower courts around the nation. As constitutional jurisprudence often does, takings doctrine has come around full circle. The future promises a new renaissance for individual rights—one that should inhibit municipal extortion.<sup>195</sup>

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195. Perhaps in direct response to *Koontz*, the Florida legislature has enacted a statute that shall take effect in July, 2014. The statute—HB 1077—explicitly prohibits municipalities from imposing “on or against any private property a tax, fee, charge, or condition or require any other development exaction, either directly or indirectly. . . that is unrelated to the direct impact of the proposed development, improvement project, or the subject of an application for a development order or administrative approval. . . . This section does not prohibit a county, municipality, or other local government entity . . . from [i]mposing a tax, fee, charge, or condition or requiring any other development exaction that serves to mitigate the direct impact of the proposed development and that *has an essential nexus to, and is roughly proportionate to,* the impacts of the proposed development upon the public, private, or public-private infrastructure or facility that is maintained, owned, or controlled by the county, municipality, or other local governmental entity.” H.B. 1077, 2014 H. of Reps, Reg. Sess. (Fla. 2014), available at [http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=\\_h1077\\_\\_.docx&DocumentType=Bill&BillNumber=1077&Session=2014](http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1077__.docx&DocumentType=Bill&BillNumber=1077&Session=2014) (emphasis added). Note there is absolutely no distinction made between legislative and adjudicative exactions. The Florida legislature has appropriately suggested its intolerance toward a bifurcated approach.