

Fees, Expenditures, and the Takings Clause

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Much of land use, environmental, and natural resources law involves government-administered permitting regimes. For example, someone building a new residential subdivision needs permits from a local government agency approving the subdivision of property and demonstrating compliance with building and zoning codes. Someone building a new factory will need similar local permits, in addition to state and federal permits for the air and water pollution the factory will release. Each of these permits may contain conditions requiring the permit applicant to take steps to ameliorate harm the proposed activity may cause to the public. These conditions are referred to as “exactions.”

Until the Supreme Court’s June 2013 decision in Koontz v. St. Johns River Water Management District, most types of permit conditions received little scrutiny under the Fifth Amendment’s Takings Clause. Courts and scholars often distinguished between conditions that require dedication of an interest in land to the government and those that involve only money. Courts subjected the former category to heightened scrutiny under a pair of Supreme Court cases commonly referred to as Nollan/Dolan, but often applied a more government-friendly test to monetary exactions. The Supreme Court rejected this distinction in Koontz.

This Article argues that not all conditions involving money are the same. Some conditions require a permit applicant to directly transfer money to the government—conditions which this Article refers to generically as “fees.” Other conditions require a permit applicant to spend money to carry out mitigation activities, but do not involve a transfer of property to the government—conditions which this Article refers to generically as “expenditures.”

While the distinction between fees and expenditures has been ignored in the law of exactions, it has a crucial role to play. This Article draws on textual

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signals in the Constitution itself and formal distinctions developed in case law to demonstrate that heightened scrutiny should apply only to fees, and not to expenditures. The Takings Clause is centrally concerned with direct appropriations of property, and fees fit that mold. Expenditures, on the other hand, resemble regulation generally and should receive narrower judicial review.

The Koontz decision threatens to subject permit regimes of all stripes to an exacting and onerous takings standard that substantially aggrandizes the power of the judiciary and distorts the Takings Clause beyond reasonable bounds. Distinguishing between fees and expenditures appropriately insulates many of these regimes from heightened scrutiny, while affording greater protection to property owners subject to direct appropriations of property, thereby allowing regulators to effectively protect the public from the adverse consequences of private development decisions and avoiding a flood of litigation.

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INTRODUCTION

The Fifth Amendment requires the government to pay compensation when taking private property for public use.¹ This obligation sometimes extends to circumstances where the government does not appropriate property outright, but rather, regulates—by imposing either restrictions or affirmative obligations on property owners.² Courts faced with takings challenges to such regulations proceed under the so-called “*Penn Central* test,” an open-ended and ad hoc balancing approach established in *Penn Central Transportation Co. v. New*

1. U.S. CONST. amend. V.

2. See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537–39 (2005).

York City.³ The contours of that test are malleable, and the factual circumstances to which it applies come in near-infinite variation.⁴ But one lesson is clear: the government usually prevails and, unless it settles, often pays no compensation.⁵

Because the *Penn Central* test creates only narrow limitations on regulatory authority, government lawyers argue strenuously for its broad application.⁶ Alternative tests exist under which the government fares less well. One such alternative—the test courts apply to “exactions”—is poised to gain greater significance to takings litigation after the Supreme Court’s 2013 decision in *Koontz v. St. Johns River Water Management District*.⁷

Exactions refer to circumstances in which the government conditions its approval of a permit on an applicant giving something to the government, such as an easement or fee simple interest in real property.⁸ The term is given a

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

4. The Supreme Court’s recent decision in *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012), is a good example of the malleability of the *Penn Central* test. There, the Court identified an array of factors relevant to determining whether government-induced flooding constitutes a compensable taking. *See id.* at 522–23. The factors differ significantly from the traditional tripartite test expressed in *Penn Central* itself. *Compare id.* at 522 (identifying “time,” “the degree to which the invasion is intended or the foreseeable result,” and “the character of the land at issue” as among the factors relevant to deciding if temporary government-induced flooding constitutes a compensable taking), with *Penn Cent.*, 438 U.S. at 235–36 (identifying economic impact, interference with distinct investment-backed expectations, and the character of the government action as factors determining whether a regulatory limitation constitutes a compensable taking). *See also* Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 847 n.40 (2013) (citing Timothy M. Mulvaney, *Takings Case Set for Oral Argument at the SCOTUS on January 15th*, ENVTL. L. PROF. BLOG (Jan. 13, 2013), http://lawprofessors.typepad.com/environmental_law/).

5. *See* Transcript of Oral Argument at 29, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11–1447); *see also* F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL’Y F., 121, 141 (2003) (providing empirical analysis of claims under *Penn Central* and finding that the government prevails 87 percent of the time).

6. This is not to say that the *Penn Central* test and regulatory takings jurisprudence more generally are without effect on government activities. Even the specter of a big-ticket compensation award may substantially chill the behavior of regulators, particularly that of underfunded local governments—the very government entities responsible for the lion’s share of land use regulations. *See, e.g.*, *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 340–41 (1987) (Stevens, J., dissenting) (“Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action.”); Corwin W. Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559, 593–97 (1981) (discussing the chilling effect to local land use regulation of awarding compensation for the duration during which a regulation found to violate the Takings Clause is in force). Such a chilling effect on local regulation is not just speculative. In a study of state legislation making it easier for property owners to recover compensation based on the effect of regulations on property values, Professor John Echeverria and Thekla Hansen-Young identified situations where local governments abandoned regulatory initiatives for fear of compensation awards. *See* John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy’s Laboratories*, 28 STAN. ENVTL. L.J. 439, 462–65 (2009).

7. 133 S. Ct. 2586.

8. *See* JOSEPH W. SINGER, *PROPERTY* 736 (3d ed. 2010) (“Exactions are demands made by cities with which property owners must comply to obtain a government permit to build on their land.”).

capacious definition. Professor Vicki Been, for example, has explained that “[e]xactions require that developers provide, or pay for, some public facility or other amenity as a condition for receiving permission for a land use that the local government could otherwise prohibit.”⁹ In other words, as Professor Lee Ann Fennell has explained, an exaction may occur whenever a landowner provides “a concession” to secure “ease[ing] of land use restrictions.”¹⁰ While the term has its origins in land use planning, it is not conceptually limited to this context. Conditions imposed through permitting regimes that implicate real property—like the Clean Air Act’s provisions requiring factory owners to install air pollution control technology—could also be considered exactions.¹¹

In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court held that courts must give at least some permit conditions heightened scrutiny.¹² Under this heightened scrutiny standard, the government must prove that those conditions bear an essential nexus to and rough proportionality with the effects of the activities subject to permitting. This so-called “*Nollan/Dolan* test” places substantially greater constraints on the government than the *Penn Central* test, in no small part because it shifts the burden of proof from the private property landowner to the government.¹³

In both *Nollan* and *Dolan*, the government demanded that the permit applicant convey an interest in real property in exchange for permit approval.¹⁴ Because courts often afford real property special treatment,¹⁵ it remained unclear whether those cases applied where the government demanded no interest in land, but rather, demanded payment of money or completion of activity to mitigate potential harms.¹⁶ Predictably, property rights advocates

9. Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 478–79 (1991). Professor Mark Fenster provides a similarly broad definition: “Exactions require property owners [seeking a permit] to provide some entitlement, promise, or fee that serves a public need and is related in some way to the expected external costs to the community of the owner’s new use of her land.” Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 734 (2007).

10. Lee Ann Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 3 (2000). As Fennell points out, the very word “exaction” may stack the deck unfairly against the government because it “reflects a belief that the underlying land use regulation is unfair and coercive to start with . . .” *Id.* at 14–15. Nonetheless, the term “exactions” is here to stay.

11. See Transcript of Oral Argument, *supra* note 5, at 48. The potential for exactions law to significantly impede these permitting regimes in the absence of a limiting principle that distinguished between fees and expenditures is discussed *infra* Part IIC.

12. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See also *infra* Part IB.

13. See, e.g., *San Remo Hotel v. City & Cnty. of San Francisco*, 545 U.S. 323, 332 (2005) (discussing proceedings below holding the claims precluded); *Dolan*, 512 U.S. at 391 n.8.

14. See *Dolan*, 512 U.S. at 379–80; *Nollan*, 483 U.S. at 828.

15. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (“[I]n the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.”); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 655 (1996).

16. See *infra* Part IC.

argued for an expansive view of those cases that would encompass all circumstances where the government imposes obligations on a permit applicant. Equally predictably, government agencies and advocates for expansive land use regulation argued that *Nollan* and *Dolan* should apply only where the government conditions a permit on a transfer of an interest in real property to the government, like the easements at issue in *Nollan* and *Dolan*.¹⁷

In *Koontz*, the Court sided with property rights advocates.¹⁸ As understood by most legal commentators and the media, the Court held that the *Nollan/Dolan* test applies where a permit condition would require an applicant to spend money or otherwise expend personal property.¹⁹ The dissenting opinion, written by Justice Elena Kagan, characterized the majority decision in similar terms.²⁰ Under this interpretation of *Koontz*, heightened scrutiny now applies where permit conditions compel an expenditure of money, which will almost always be the case. As counsel for the United States noted during the Supreme Court's oral argument in *Koontz*: "If someone wants to build a power plant . . . he's going to have to install a scrubber to protect the air Constructing that costs money."²¹ *Nollan/Dolan* may thus become an additional hurdle for environmental and land use permitting processes of all stripes.

This Article contends that *Koontz* need not reach so broadly. Rather, the decision should be read to distinguish between conditions that require applicants to transfer property to the government and those that require applicants to fulfill obligations that require the expenditure of funds.²² This distinction will be referred to for the sake of simplicity as the distinction

17. This doctrinal dispute is laid bare in the *amicus* briefs filed in *Koontz*, particularly by comparing the brief filed by the Atlantic Legal Foundation with those filed by the United States and American Planning Association. See Brief of Atlantic Legal Found., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11–1447); Brief of Am. Planning Ass'n, *Koontz*, 133 S. Ct. 2586 (No. 11–1447); Brief of the United States, *Koontz*, 133 S. Ct. 2586 (No. 11–1447).

18. See *infra* Part I.D.

19. See, e.g., John D. Echeverria, *A Legal Blow to Sustainable Development*, N.Y. TIMES, June 26, 2013, http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?_r=0; Michael S. Green & Nicholas J. Boerke, *United States Supreme Court Significantly Limits Government's Ability to Demand Concessions from Real Estate Developers*, NAT'L L. REV., July 2, 2013, <http://www.natlawreview.com/article/united-states-supreme-court-significantly-limits-government-s-ability-to-demand-conc>. *Koontz* has not yet been extensively discussed in the academic literature, but what discussion exists follows suit. For example, Michael Allan Wolf suggests that after *Koontz*, challenges under *Nollan/Dolan* will be brought "to monetary exactions, urban environmental controls such as green building requirements, and in this increasingly ideologically supercharged atmosphere, government bailouts . . ." Michael Allan Wolf, *The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects*, 40 FORDHAM URB. L.J. 1835, 1857–58 (2013); see also Ilya Somin, *Two Steps Forward for the 'Poor Relation' of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2013 CATO SUP. CT. REV. 215, 227 (explaining that the Supreme Court held that *Nollan* and *Dolan* apply "to cases where the burden imposed by the government is a financial obligation . . . as opposed to requiring the owner to allow a physical invasion of his own property").

20. *Koontz*, 133 S. Ct. at 2603 (Kagan, J., dissenting).

21. Transcript of Oral Argument, *supra* note 5, at 46–47.

22. See *infra* Parts II & III.

between “fees” and “expenditures”: I use the term “fees” to refer to permit conditions that require a transfer of real property, money, or other personal property to the government, and I use the term “expenditures” to refer to permit conditions that fall short of requiring such a transfer, but instead require the applicant to spend money to mitigate adverse consequences of the permitted activity.²³

Under this framework, property taxes (and other taxes tied to land ownership) could conceivably be described as fees. Such taxes are, after all, a demand that a landowner transfer money to the government, and taxes could be viewed as a condition imposed by government on the ability of a landowner to own property. In *Koontz*, the Court dismissed the argument that taxes constitute a type of exaction with little explanation, treating taxes as categorically exempt from takings analysis.²⁴ The Justices seem comfortable with a rule that treats obligations that governments impose through their tax power as different in kind from those imposed through their police power.²⁵ This Article will follow the Supreme Court’s lead in this respect and assume that the *Nollan/Dolan* test does not apply to taxes.

Differences in the nature of fees and expenditures mean that courts should treat the two differently. Courts should apply heightened scrutiny under the *Nollan/Dolan* test when a permit condition requires a transfer of property to the government, a situation that resembles a traditional appropriation of property. Courts should, however, apply the deferential *Penn Central* test when a permit condition requires an applicant to engage in activities that do not involve the transfer of property to the government, a situation that resembles traditional regulation.²⁶ This framework would enable government agencies to protect

23. From a permit applicant’s perspective, a “fee” is simply another condition requiring money to be spent, and thus “fees” could be seen as a subset of “expenditures.” The meanings of the terms for purposes of this Article do not overlap: an “expenditure” is defined as a condition requiring money to be spent on something other than a fee.

24. See *Koontz*, 133 S. Ct. at 2600–01 (“It is beyond dispute that taxes and user fees are not takings. This case therefore 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.”) (citations, alterations, and quotation marks omitted).

25. For a discussion of the tension between taxation and takings, and one potential approach to reconciling them, see Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189 (2002); see also generally Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182 (2004) (arguing that takings law should be reconfigured based on principles developed in the taxation context). Kades suggests an innovative approach to identifying which taxes should be subject to takings analysis. Under Kades’ “Continuous Burden Principle,” “a tax must impose burdens such that there are no large jumps—discontinuities, in an imprecise sense—between the burden imposed on any taxpayer and the next-most-burdened taxpayer.” Kades, *supra*, at 190. Whatever the appeal of this framework, the *Koontz* decision suggests a more formalistic approach, whereby any burden called a “tax” is exempt. The Court did not attempt the theoretical work necessary to justify that approach, and this topic lies beyond the scope of this Article’s examination of fees and expenditures.

26. Other federal, state, and local laws may also constrain an agency’s discretion in imposing conditions that require expenditures. See Fenster, *supra* note 9, at 731 (“*Nollan* and *Dolan* . . . apply to a

public values by, for example, preventing pollution of air and water, without overly burdensome supervision by the courts.

Until now, courts and scholars have overlooked the difference between fees and expenditures, perhaps in part because litigation has been dominated by cases involving traditional fees that local governments impose on development activities.²⁷ The existing debate has largely focused on whether courts should distinguish between exactions involving transfers of land and transfers of money,²⁸ or whether courts should distinguish between exactions imposed by legislative bodies and those imposed through permit-specific adjudications.²⁹ Although the issue has yet to be explored, courts could also conceivably afford different treatment to exactions that require permit applicants to engage in on-site mitigation of harmful effects of development and those that require off-site mitigation.³⁰ While *Koontz* forecloses the first of these distinctions, the others remain plausible and worth further exploration by scholars. These other modes of analyzing the application of *Nollan/Dolan* do not, however, undercut distinguishing between fees and expenditures, but rather could serve as useful doctrinal complements to the analysis explicated in this Article.

Distinguishing between fees and expenditures would dramatically simplify application of *Nollan/Dolan* and limit the scope of *Koontz* to those circumstances closest to the heart of the Takings Clause. This distinction matters because permit conditions requiring expenditures are ubiquitous. Environmental law, for instance, is riddled with examples. Permitting regimes, including those promulgated under the Clean Air Act, the Clean Water Act, and the Endangered Species Act, require applicants to take substantial steps to

limited universe of potential exactions . . . [C]ourts review [other] challenged exaction[s] using some lower level of scrutiny: either . . . [under] *Penn Central* . . . or, more likely, an exactions-specific test developed by state courts under state law.”).

27. See, e.g., SINGER, *supra* note 8, at 734.

28. See, e.g., McClung v. Sumner, 548 F.3d 1219, 1228 (9th Cir. 2008) (distinguishing between monetary and real property exactions); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 883–84 (1995) (arguing for differential treatment of exactions involving real property and personal property); Daniel L. Siegel, *Exactions after Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 592–600 (2002) (making a similar argument as Merrill).

29. See, e.g., Ehrlich v. City of Culver City, 911 P.2d 429, 439 (Cal. 1996); Siegel, *supra* note 28, at 607–11 (arguing for differential treatment of legislatively imposed exactions). Some attention has also been paid to perceived differences between conditions imposed through approved permits, and those proposed during a permitting process that result in the denial of a permit. See, e.g., Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277 (2010). That distinction was rejected in *Koontz*. See 133 S. Ct. at 2596.

30. In *Koontz*, the Supreme Court continually referred to the condition proposed by the St. Johns River Water Management District as involving “offsite mitigation.” See 133 S. Ct. at 2593, 2598, 2600 n.2. The Court’s analysis did not appear to turn on the condition’s imposition of obligations off-site, but a court could seize on this language as a means of distinguishing it from a circumstance involving on-site mitigation.

reduce the effect of their activities on the environment.³¹ Mandated expenditures abound in other areas of the law as well. An individual seeking to build a new home may have to draw up design or engineering plans as a condition of applying for a building permit.³² A commercial developer may need to incorporate building features to enable access by disabled individuals.³³ And property owners generally must ensure that buildings meet building and fire codes.³⁴ Each of these conditions, and myriad more, requires expenditures by the permit applicant.

To demonstrate that takings law should differentiate between permit conditions that involve fees and expenditures, this Article proceeds in three parts.

Part I maps the landscape of takings law and identifies the corner of that landscape occupied by exactions. It explains that takings law experiences continual fluctuation between regimes more protective of property and those more protective of regulatory authority. The *Koontz* decision can be understood as the latest ebb in this cycle; differentiation between fees and expenditures would then be the subsequent flow.³⁵ This Part also examines the various ways in which scholars and courts have conceptualized limits for the *Nollan/Dolan* test.

Part II justifies different treatment for fees and expenditures on theoretical and doctrinal grounds. The most fundamental application of the Takings Clause occurs when government *takes* property, meaning that it acquires a property interest from a private party. Regulation of the use of property, on the other hand, receives more lenient treatment. The proposed distinction between fees and expenditures aligns itself with this divide. Practically speaking, treating

31. See, e.g., 16 U.S.C. § 1539(a) (2012) (authorizing incidental take permits to shield individuals, including property owners, from liability for taking an endangered species conditioned upon the applicant developing and implementing a habitat conservation plan); 33 U.S.C. § 1342(a) (2012) (requiring point sources discharging water pollutants to secure a permit that imposes effluent limitations); 42 U.S.C. § 7475(a) (2006) (requiring preconstruction permits imposing emissions limitations before construction or modification of a major source of air pollution).

32. See PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., CONSTRUCTION LAW § 16.1 (2013).

33. See SINGER, *supra* note 8, at 73.

34. See *Third & Catalina Assocs. v. City of Phoenix*, 895 P.2d 115 (Ariz. Ct. App. 1994); BRUNER & O'CONNOR, *supra* note 32, at § 16.2. That property owners could bring takings challenges against these routine and ubiquitous regulatory measures is not fanciful. In *Third & Catalina Associates*, for example, the owner of a commercial building challenged the constitutionality of an ordinance requiring the installation of a sprinkler system in high-rise buildings. The court held that "[m]erely requiring appellant to spend money to comply with the sprinkler retrofit ordinance does not take away any property right." 895 P.2d at 209; see also *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946).

35. Recognizing the cyclic evolution of takings jurisprudence does not mean that the distinction between fees and expenditures should be ephemeral. Rather, during each period of expansion and contraction, permanent changes reshape takings law. The *Koontz* decision and the distinction between fees and expenditures identified in this Article will become part of the landscape of the Fifth Amendment. Future doctrinal ebbs and flows shifting the balance between government power and property rights will occur within the confines of that landscape.

expenditures and fees differently would also avoid substantial burdens for government regulators and prevent a potential flood of new takings claims.

Part III considers *Koontz* itself and argues that the decision can be read as applying only to fees, and not to all expenditures. First, the majority decision never states that the *Nollan/Dolan* test applies whenever a condition requires a permit applicant to spend money.³⁶ Moreover, the language used in the decision suggests that the Court conceived of the case as one involving a direct transfer of property from *Koontz* to the government.³⁷ While the facts on the ground may have suggested otherwise, the Court appeared to view the exaction at issue as a fee, rather than an expenditure.³⁸

Courts, commentators, and advocates will spend years puzzling over the meaning of *Koontz*. This Article points to one as of yet unrecognized path forward. This path provides a pragmatic approach that protects property owners from regulators seeking to leverage permitting authority to pad government coffers and, simultaneously, insulates government regulators from searching and invasive judicial interference in many of their regulatory activities. Jurisprudentially, distinguishing between fees and expenditures would also have the salutary effect of aligning the law of exactions with the greater architecture of takings law.

I. THE LANDSCAPE OF THE TAKINGS DOCTRINE

This Part has four aims. First, it briefly recounts the development of regulatory takings law and the search for doctrines to identify when the burdens associated with regulation become the “functional equivalent” of government actions directly appropriating private property.³⁹ The distinction between regulatory takings and direct appropriations illuminates the disaggregation of expenditures and fees explained in Part II. Second, this Part provides an overview of the law of exactions as set forth in *Nollan* and *Dolan*. Third, it briefly explains existing efforts of courts, scholars, and advocates to identify the limits of those cases. Fourth and finally, it outlines the contours of the *Koontz* case, which represents the Supreme Court’s most recent encounter with exactions law.

A. Direct Appropriations and Regulatory Takings

The history of takings involves cycles of expanding and contracting limitations on government regulatory power.⁴⁰ These cycles often create

36. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

37. *Id.* at 2591.

38. *Id.* at 2591, 2593.

39. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

40. See John D. Echeverria, *From a “Darkling Plain” to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 VT. L. REV. 969, 971–74 (2005) (describing ascendance of strong property-rights protections through the Takings Clause followed by retrenchment).

permanent features of regulatory takings law, features which serve as part of the legal landscape against which the next cycle of expansion and contraction occur. *Koontz* is an example of the expanding mode, and this Article suggests a mechanism for the next wave of contraction.

In the earliest days of the Republic, the Takings Clause, which provides “nor shall private property be taken for public use, without just compensation,” applied only where government appropriated private property for itself or ousted an owner from possession.⁴¹ That understanding of the clause changed in 1922, when Justice Oliver Wendell Holmes, writing for the Supreme Court in *Pennsylvania Coal Co. v. Mahon*, famously explained that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁴² Fifty years later, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court created a framework to provide content to Justice Holmes concern about regulation gone “too far.”⁴³ There, the Court held that regulatory impacts to private property should be analyzed under a fact-based, multi-factor balancing test that examines a regulation’s character, economic impact, and interference with reasonable, investment-backed expectations.⁴⁴ This test is often referred to as the *Penn Central* test.

The virtue—or, depending on one’s perspective, the vice—of the *Penn Central* test is that it permits capacious government regulation without obligating the government to pay compensation to affected landowners. Indeed at the oral argument in *Koontz*, Chief Justice John Roberts asked counsel, “Do you know of any case where the government has lost a *Penn Central* case?”⁴⁵ There are such cases, and counsel identified a few in answer to Chief Justice Roberts’ question.⁴⁶ But examples are rare. A 2002 empirical analysis of 133 cases found that plaintiffs win in only about 13 percent of cases that reach the merits of a takings claim under *Penn Central*.⁴⁷ By way of comparison, plaintiffs prevail more frequently in cases against the federal government involving issues of foreign affairs and national security, circumstances in which deference to the federal government is notably high.⁴⁸ Plaintiffs typically lose

41. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). As Professor William Michael Treanor explains: “The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used.” Treanor, *supra*, at 782.

42. 260 U.S. 393, 415 (1922).

43. See 438 U.S. 104 (1978).

44. See *id.* Courts may also take other situation-specific factors into account in assessing whether a government action requires payment of compensation under *Penn Central*. See *supra* note 4.

45. Transcript of Oral Argument, *supra* note 5, at 29.

46. *Id.* (“*Hodel v. Irving* is a *Penn Central* case, . . . and I think *Kaiser-Aetna* was also a *Penn Central* case.”).

47. Hubbard, *supra* note 5, at 141.

48. See Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 597–99 (2011); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court*

under *Penn Central* because they bear the burden of proof, and courts have generally required them to demonstrate a significant economic impact before obligating the government to pay compensation.⁴⁹

Some members of the Supreme Court are not happy with the government-friendly nature of the *Penn Central* test, and some commentators and lower court judges share this disaffection.⁵⁰ In at least two instances, plaintiff-friendly alternatives to *Penn Central* have threatened to become ascendant.⁵¹ First, in *Agins v. Tiburon*, the Supreme Court announced an often discussed but rarely applied rule that regulation violates the Takings Clause if it “does not substantially advance legitimate state interests.”⁵² Second, in *Lucas v. South Carolina Coastal Council*, the Court held that government commits a *per se* taking and thus automatically owes compensation if a regulation destroys “all economically beneficial uses” of property.⁵³

Applied expansively, these two tests would have caused a sea change in takings law, providing powerful tools for property owners to challenge regulation and secure compensation from the government. Almost inevitably, regulators fearful of judgments requiring payment of compensation would have enacted and applied fewer land-use regulations.⁵⁴ In both instances, however, the Supreme Court changed course, reiterating the primacy of the *Penn Central*

Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 GEO. L.J. 1083, 1144 (2008). The government’s nearly 90 percent win rate in *Penn Central* cases approximates its success in litigation under the Freedom of Information Act, which Professor Margaret Kwoka has described as “astronomical.” Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 187 (2013).

49. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) (identifying 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”); John D. Echeverria, *Making Sense of Penn Central*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,471, 10,473 (2009) (“[I]n the absence of a very significant economic impact, a regulatory taking claim will generally fail . . .”); see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust of S. Cal.*, 508 U.S. 602, 645 (1993) (noting cases that were not takings despite economic diminutions of 75 percent and 87.5 percent).

50. See, e.g., Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 995 (1997) (describing the “‘ad hoc’-edged *Penn Central*” test as “perpetuat[ing] an overly deferential standard of review and proof burdens that undermine the goal of fairly balancing the reciprocally defined concepts of property and police power”). Conflicts between property rights and regulatory authority often fissure the Court along ideological lines, with one wing of the court pro-property and the other pro-regulation. See, e.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 895 (2000).

51. See Echeverria, *supra* note 49, at 10,471 (“At one point, the Court appeared poised to jettison the *Penn Central* analysis altogether.”).

52. 447 U.S. 255, 260 (1980); see also Case Comment, *Regulatory Takings—“Substantially Advance” Test*, 119 HARV. L. REV. 297 (2005); R.S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353 (2004).

53. 505 U.S. 1003, 1017 (1992); see also Kmiec, *supra* note 50, at 1009–10 (arguing that the categorical approach embodied by *Lucas* should apply more broadly).

54. See Echeverria & Hansen-Young, *supra* note 6, at 462–65 (describing the “regulatory chill” that followed passage of a Florida law that required payment of compensation in a wide range of circumstances where regulation reduces property values).

test. In *Lingle v. Chevron U.S.A., Inc.*, the Court wholly repudiated the “substantially advance” test, holding that scrutiny of the legitimacy of government action sounded in due process, not regulatory takings.⁵⁵ In a closely divided opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court limited the *per se* test announced in *Lucas* to circumstances when regulation permanently deprives landowners of all economic use of the entirety of their property.⁵⁶ In the wake of those decisions, *Penn Central* governs virtually all takings claims seeking compensation where regulation impairs property values, causing one of the foremost scholars of takings jurisprudence to pen an essay entitled “The Death of Regulatory Takings.”⁵⁷ That prediction accurately described the state of affairs until the Supreme Court’s decision in *Koontz* substantially expanded the scope of exactions analysis under the *Nollan/Dolan* framework.⁵⁸

B. Exactions and the Takings Clause

Although fundamental principles of regulatory takings law were hotly contested during the period described above,⁵⁹ the Supreme Court’s treatment of exactions remained relatively stable.⁶⁰ Exactions law applies when the government places conditions on permits that affect real property.⁶¹ To illustrate, consider a developer approaching a local zoning board seeking permission to subdivide a 1000-acre parcel into 1000 one-acre parcels, and build a house on each. The zoning board agrees, but only if the developer gives land for a new school that will serve the subdivision’s children. The condition that the developer dedicate land for a new school is an exaction.⁶²

55. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–45 (2005).

56. See 535 U.S. 302, 325 (2002).

57. John D. Echeverria, *The Death of Regulatory Takings*, 34 *ECOLOGY L.Q.* 291, 292 (2007); see also Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 *VT. L. REV.* 157, 157 (2009) (“After nearly three decades of struggling with the problem, the U.S. Supreme Court seems finally to have given up the effort to formulate workable rules for regulatory takings.”).

58. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). In several other cases, members of the Court have suggested that considerations of due process can serve as a check on government regulation of private property where the Takings Clause would not require payment of compensation. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2613–18 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

59. See *supra* Part I.A.

60. Richard Epstein contended that prior to the *Dolan* decision, lower courts “worked a pretty thorough nullification of *Nollan*, which was dutifully confined to its particular facts.” Richard A. Epstein, *Introduction: The Harms and Benefits of Nollan and Dolan*, 15 *N. ILL. U. L. REV.* 477, 492 (1995). The lower courts’ treatment of exactions law, therefore, reflects the same cycle that has played itself out in the Supreme Court’s takings jurisprudence.

61. For a more detailed overview of exactions, see Been, *supra* note 9, at 478–83.

62. The circumstances where property owners must secure permission from local government agencies before altering land use are manifold. See Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences for Clarity*, 92 *CALIF. L. REV.* 609, 623 (2004). The central importance of exactions arises because significant changes in land use typically affect public values beyond the four corners of property being transformed. Exactions “require financial or in-kind provision

Prior to 1987, the Supreme Court paid little attention to the application of the Takings Clause to exactions.⁶³ These permit transactions raise constitutional concerns, at least from the perspective of property rights advocates, because exactions make it possible for government to essentially coerce private property owners to provide public benefits. Professor Richard Epstein articulates the view of exactions as a strong-arm tactic this way:

The usual game works like this: A permit to build frequently increases the value of the affected land by huge margins. The local government treats this private gain as a form of state largess because it knows that under today's capacious definition of the police power, it can impose virtually any restriction on land use. . . . The local government knows that it cannot overstep all bounds but, at the same time, it speculates that the large gains to the new entrant are only inframarginal, so that they can be taxed away without altering the developer's decision to go ahead with the project. The net effect is to try to shift some fraction of the cost of a public improvement that works to the equal benefit of new and old residents onto the new residents.⁶⁴

In *Nollan* and *Dolan*, the Supreme Court embraced the concern of property rights advocates,⁶⁵ explaining in *Nollan* that “unless [a] permit condition serves the same governmental purpose as [a] development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’”⁶⁶ These two cases developed a test to determine the constitutionality of conditions that exact real property from an owner in exchange for a permit.

Nollan and *Dolan* involved exactions similar in nature. In *Nollan*, a coastal landowner sought a permit to demolish a small bungalow and replace it with a three-bedroom house.⁶⁷ The California Coastal Commission agreed to issue the permit if the homeowner dedicated an easement allowing the public to

of infrastructure that will at minimum remedy the proposed project's anticipated negative impacts and at maximum provide whatever conditions a jurisdiction deems necessary to persuade it to approve the project.” *Id.*

63. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

64. Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 615–16 (2008); see also RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 143 (2008) (“As with other police power questions, the Supreme Court’s muddy and inconclusive analysis of exactions has, unfortunately, allowed lower courts to sanction major abuses of the exaction process, thereby forcing newcomers to finance infrastructure improvements that benefit all members of the community.”). Epstein’s view of exactions accords with his overarching theory of land use regulation that would essentially require government to compensate land owners whenever regulation that restricts land use over and above the common law imposes costs that exceed the benefits to that particular landowner. See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 93–104 (1985).

65. See *Nollan*, 483 U.S. at 825; *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

66. *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 482 A.2d 12, 14–15 (N.H. 1981)).

67. See *id.* at 828.

cross the dry sand portion of the property.⁶⁸ In making that demand, the Commission explained that the new house would block public view of the ocean, and therefore, the homeowner needed to provide a concomitant public benefit.⁶⁹ The homeowner filed suit alleging that the condition violated the Takings Clause because the Commission demanded transfer of real property without payment of compensation.⁷⁰ The Supreme Court found the condition unconstitutional because it lacked an “essential nexus” to the harm that the Commission identified—the loss of the public’s ocean view.⁷¹

In *Dolan*, a business owner sought a permit to allow her to expand a store and build a parking lot.⁷² The City of Tigard’s Planning Commission found that the construction desired by the business owner would increase traffic congestion on nearby roads and flooding in a floodplain that crossed the property.⁷³ The Commission agreed to grant the permit only if the business owner gave the City her property within the floodplain (to offset the flood risk) and additional property abutting the floodplain to enable construction of a bike path (to offset the traffic congestion).⁷⁴ The business owner filed suit alleging that the condition violated the Takings Clause.⁷⁵ The Court found that the condition satisfied the “essential nexus” test articulated in *Nollan*, but held that the Constitution also requires a “rough proportionality” between the burden imposed by a permit condition and the public harm threatened by the development.⁷⁶ Because the record before the Court did not establish this “rough proportionality,” the permit condition was deemed unconstitutional.⁷⁷

Nollan and *Dolan* involved exactions requiring dedication of an interest in land to the government imposed through site-specific adjudications. In the wake of those decisions, such exactions violate the Takings Clause unless there is an essential nexus and rough proportionality between the condition and the effects of the activity subject to permitting.⁷⁸ Under these decisions, the

68. *Id.*

69. *Id.*

70. *Id.* The suit began as a petition for administrative mandamus in state superior court. *Id.*

71. *Id.* at 837.

72. *See Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994).

73. *Id.* at 381–82.

74. *Id.*

75. *Id.* at 382. The lawsuit arose as an appeal from an administrative determination of the Land Use Board of Appeals, which appeal lay in the state appellate court. *Id.*

76. *Id.* at 386–95.

77. *Id.*

78. *See id.* at 391; *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987). The requirements of rough proportionality and essential nexus limit the authority of government to condition permit approvals. Professor Kathleen Sullivan has advanced an alternative conceptualization. She argues that where rough proportionality and essential nexus exist, the permit approval constitutes just compensation for the taking wrought by the exaction. *See Kathleen Sullivan, Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1505 (1988). While elegant, Sullivan’s conceptualization falters because it suggests that “[a]cceptance by the homeowner of the trade” of a property interest for a regulatory permission “constitutes the best evidence that the compensation is adequate.” *Id.* That understanding undermines the entire judicial enterprise of giving exactions heightened scrutiny, and thus appears contrary to

government, rather than the permit applicant, bears the burden of proving that a permit condition meets the essential nexus and rough proportionality requirements.⁷⁹ To return to the subdivision developer example, the *Nollan/Dolan* test means that the zoning board could demand the transfer of property for a new school only if building a new school has an essential nexus to and rough proportionality with the effects of the subdivision. The condition would likely meet the essential nexus requirement because the subdivision would likely increase demand for education. But the condition will only meet the rough proportionality test if the board proves that the number of students served by the new school is roughly proportional to the increased demand for educational services created by residents in the subdivision.⁸⁰

There are two important and inherent limitations to the doctrine set forth in *Nollan* and *Dolan*. First, the requirements of “essential nexus” and “rough proportionality” apply only if the government would have committed a compensable taking had it directly imposed the condition on the property owner.⁸¹ The test would apply to the subdivision example, for instance, because the Fifth Amendment would require the municipality to compensate a landowner if it directly appropriated land for a new school. Because the permit condition accomplishes that which would otherwise require the government to pay compensation, it is subject to heightened scrutiny under the *Nollan/Dolan* test.⁸² Second, the *Nollan/Dolan* test has limited application where a permitting authority offers an applicant a menu of options among which to choose. So long as one of those options passes constitutional muster, the local government has not violated the Takings Clause.⁸³ So, for example, consider a permit negotiation in which a zoning board offers to grant a subdivision permit if the

doctrine as it has evolved. See Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 500 (1995) (explaining that under Sullivan’s theory “[w]e have defined ourselves out of the problem”).

79. See *Dolan*, 512 U.S. at 391 n.8.

80. The example parallels the analysis in *Dolan* itself, where the Court acknowledged that the conditions that Tigard sought to impose met the essential nexus test because the development desired by Ms. Dolan would increase flooding and traffic, and preventing flooding and reducing traffic congestion are legitimate public purposes. See *id.* at 387 (“Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld.”). But the hypothetical zoning board, just like the government of Tigard, must also put on evidence that impact of proposed development justifies the extent of the exaction. *Id.* at 391 (“No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

81. See *Nollan*, 483 U.S. at 831.

82. See *id.* at 834; see also Merrill, *supra* note 28, at 861 (explaining that *Dolan* extends constitutional scrutiny “to attempts by local zoning authorities to avoid the just compensation requirement by conditioning the grant of a discretionary building permit on the donation of property to the government”).

83. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013) (“[S]o long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition.”).

developer either provides five acres of land for a new school, or provides two acres of land and funds the construction of a baseball stadium. If the zoning board could prove essential nexus and rough proportionality with respect to the requested five-acre dedication for the new school, a court would not independently assess the constitutionality of the baseball stadium option. In other words, one constitutional option is all that the government need afford a permit applicant.

So far, this Article has treated the *Nollan/Dolan* test as a species of takings doctrine. The essential nexus and rough proportionality tests are tailor-made for the exactions context and involve balancing public regulatory authority with private property rights. The test, however, has another plausible doctrinal home. The Supreme Court has described the *Nollan/Dolan* test as a “special application” of the unconstitutional conditions doctrine,⁸⁴ which Professor Kathleen Sullivan has defined as “hold[ing] that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”⁸⁵ This unconstitutional conditions rule, however, is not absolute: sometimes the government can condition a benefit on the waiver of a constitutional right, and sometimes it cannot. Determining where and how the unconstitutional conditions doctrine applies has stumped generations of lawyers and academics, causing Professor Mitchell Berman to recently describe it as a “ubiquitous puzzle.”⁸⁶ This “puzzle” is particularly confounding because the doctrine lacks an obvious source in the Constitution’s text. As Professor Richard Epstein has explained, the unconstitutional conditions doctrine is not “anchored to any single clause of the Constitution. Like the police power, it is a creature of judicial implication.”⁸⁷ Moreover, the doctrine lacks a consistent animating

84. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005); *see also* Siegel, *supra* note 28, at 558–90.

85. Sullivan, *supra* note 78, at 1415; *see also* RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 5 (1993) (explaining that the “canonical form” of the unconstitutional conditions doctrine “holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of that person’s constitutional rights”).

86. Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1286 (2013); *see also* *Dolan v. City of Tigard*, 387 U.S. 394, 407 n.12 (Stevens, J., dissenting) (explaining that “the ‘unconstitutional conditions’ doctrine has . . . long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question”); EPSTEIN, *supra* note 85, at 9 (describing the unconstitutional conditions doctrine as “roam[ing] about in constitutional law like Banquo’s ghost, invoked in some cases, but not in others”); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism with Particular Reference to Religion, Speech, and Abortion*, 70 B.U. L. REV. 593, 595 (1990) (arguing that the unconstitutional conditions doctrine “is inconsistent with both the realities of contemporary government and the principles that gave rise to it”).

87. EPSTEIN, *supra* note 85, at 9.

theory, although various justifications have been proposed including concerns about consent, coercion, and protection of public goods.⁸⁸

While the unconstitutional conditions doctrine—such as it is—plays an important role in defining the vocabulary that courts use in explaining the constitutional limits on exactions, it is unclear what work the doctrine actually does. Rather, the principles of *Nollan* and *Dolan* logically arise from substantive constitutional principles derived from the Takings Clause.⁸⁹ This Article treats the test in those terms.⁹⁰

C. Doctrine, Theory, and Limiting Principles

In the wake of *Nollan* and *Dolan*, courts and scholars articulated various plausible doctrinal limitations on when, precisely, courts should apply heightened scrutiny to permit conditions. There emerged stark disagreement about whether courts could appropriately apply such scrutiny where the government did not demand an interest in land. Some courts limited the *Nollan/Dolan* test to exactions of real property, and others decided the test also applied to “monetary exactions.”⁹¹ The Ninth Circuit articulated the more limited view in *McClung v. City of Sumner*, explaining that “[a] monetary exaction differs from a land exaction—‘[u]nlike real or personal property, money is fungible.’”⁹² The California Supreme Court took the opposite view in *Ehrlich v. City of Culver City*, explaining that the *Nollan/Dolan* test “limit[s] the government’s bargaining mobility in imposing permit conditions on individual property owners—whether they consist of possessory dedications or the exaction of cash payments—that, because they appear to lack any evident

88. See, e.g., Merrill, *supra* note 28, at 869–79; Been, *supra* note 9, at 485–504; Sullivan, *supra* note 78, at 1419–21. As Lee Ann Fennell has explained, many of the justifications for the unconstitutional conditions doctrine “are well-reasoned and cogent, but none . . . [are] fully convincing.” Fennell, *supra* note 10, at 42–43. In *Koontz*, the Supreme Court appeared to apply a coercion theory, explaining that the unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” 133 S. Ct. at 2594. But if coercion is the animating principle, its application to exactions is difficult to understand. The St. Johns Water Management District didn’t “coerce” Koontz in any ordinary sense of the word. He sought a permit that was within the District’s authority to deny and he and the District negotiated over the contours of that permit. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 135 S. Ct. 2586, 2592–93 (2013).

89. See, e.g., Fennell, *supra* note 10, at 45 (arguing that the unconstitutional conditions doctrine “merely provides a lens for monitoring the things that the government is attempting to receive and give”).

90. See, e.g., Fenster, *supra* note 62, at 631 (“*Nollan* and *Dolan* thus establish takings rules.”).

91. Compare *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008), and *Sea Cabins on the Ocean IV Homeowners Ass’n v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 (S.C. 2001), with *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996), and *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 640–41 (Tex. 2004).

92. *McClung*, 548 F.3d at 1228 (quoting *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989)).

connection to the public impact of the proposed land use, *may* conceal an illegitimate demand”⁹³

In a 1995 article, Professor Thomas Merrill provides theoretical support for treating fungible assets, like money, differently than interests in land.⁹⁴ Merrill argues that the unconstitutional conditions doctrine generally serves to limit government’s ability to condition benefits on a beneficiary’s waiver of constitutional rights in circumstances where preservation of those rights creates positive externalities.⁹⁵ For Merrill, then, unconstitutional conditions cases do not protect the beneficiary—the private property owner in the context of exactions—but rather protect the public in circumstances where a rights holder may sell her rights too cheaply because she does not capture their full value. Understanding the doctrine thus, Merrill argues that courts should limit government authority to exact interests in real property because such exactions risk inefficient resource allocation, thereby harming the public. Because money is fungible, Merrill suggests that monetary exactions pose no similar risk, and therefore, should not receive heightened scrutiny.⁹⁶ Despite the conceptual elegance of Merrill’s theory, *Koontz* rejected the distinction between real property and monetary exactions.⁹⁷

Courts and scholars have also occasionally distinguished between permit conditions *imposed* in an approved permit and those merely *proposed* during negotiations between an applicant and permitting agency where the permit was ultimately denied. In *Lambert v. City of San Francisco*, one California appellate court found this distinction of significance, explaining that “as neither a property right nor money was in fact taken, there is no reason to determine if a taking would have occurred had [the plaintiff] been required to pay \$600,000 as a condition of a use permit, and thus there is nothing requiring review under the *Nollan/Dolan* [test].”⁹⁸ Professor Timothy Mulvaney has further expanded upon the reasons for distinguishing conditions actually imposed from those merely proposed, contending that proposed exactions should not be subject to

93. 911 P.2d at 437.

94. See Merrill, *supra* note 28, at 880–87; see also Fennell, *supra* note 10, at 11 (“Drawing a distinction between concessions of land and other kinds of exactions would be consistent with the distinction drawn in regulatory takings jurisprudence between ordinary regulations and those governmental actions that involve actual physical occupation (however slight).”).

95. See Merrill, *supra* note 28, at 883–84.

96. See *id.* This argument originated from Merrill’s understanding of the unconstitutional conditions doctrine as protecting constitutional rights to the extent they generated public goods. *Id.* at 870–77. Dan Siegel provides a robust doctrinal defense of this distinction. See Siegel, *supra* note 28, at 590–607.

97. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

98. 67 Cal. Rptr. 2d. 562, 569 (Cal. Ct. App. 1997). In a comprehensive discussion of this issue, Tim Mulvaney identifies only four decisions, including the Florida Supreme Court’s decision in *Koontz*, dealing with this issue. See Mulvaney, *supra* note 29, at 278; see also Fenster, *supra* note 62, at 639–41. Only the courts in *Koontz* and *Lambert* decided the *Nollan/Dolan* test shouldn’t apply to conditions proposed by the government in a negotiation that ended with a permit denial. Mulvaney, *supra* note 29, at 290–99.

the *Nollan/Dolan* test both because no property has been taken and because courts are ill-positioned to speculate on the value of a purely hypothetical condition.⁹⁹ Mulvaney also cites practical concerns that militate against application of *Nollan/Dolan* to proposed conditions, worrying that a contrary rule would interfere with negotiations between government agencies and permit applicants.¹⁰⁰ While Mulvaney is certainly correct that scrutinizing proposed conditions creates practical and theoretical difficulties, this distinction, too, is no longer valid in light of *Koontz*.¹⁰¹

Prior to *Koontz*, other courts had held that the *Nollan/Dolan* test applies only to exactions imposed through adjudicative processes, where, for example, a zoning board agrees to grant subdivision authorization in exchange for a \$4000 education impact fee, but not those imposed legislatively, where, for example, a city council passes an ordinance requiring landowners subdividing property to pay a \$500 educational impact fee for each new parcel.¹⁰² In *Homebuilders Association of Central Arizona v. City of Scottsdale*, the Arizona Supreme Court adopted this view, explaining that *Nollan* and *Dolan* protect against “regulatory leveraging that [may] occur when the landowner must bargain for approval of a particular use of its land.”¹⁰³ Exactions imposed by generally applicable legislation, the court reasoned, should be treated differently because “[t]he risk of that sort of leveraging does not exist.”¹⁰⁴ Daniel Siegel has articulated additional theoretical reasons for distinguishing between adjudicated and legislated exactions based on separation of powers concerns.¹⁰⁵ Subjecting legislation to the *Nollan/Dolan* test, argues Siegel, would risk “judicial usurpation of legislative decision making,” and thereby undermine the democratic process.¹⁰⁶ Other scholars disagree. In the view of Professors Carlos Bell and Laurie Reynolds, the “legislative-adjudicative distinction . . . is frequently nebulous and imprecise, . . . [because] the marked division of governmental functions that is constitutionally required at the federal and state levels is often absent at the local level.”¹⁰⁷ As a result, Bell

99. See Mulvaney, *supra* note 29, at 290–99.

100. *Id.* at 311.

101. *Koontz*, 133 S. Ct. at 2595 (“The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.”).

102. See, e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996).

103. 938 P.2d 993, 1000 (Ariz. 1997).

104. *Id.*

105. See Siegel, *supra* note 28, at 608. Matthew Baker agrees that the legislative-adjudicative distinction can serve a useful role in analyzing exactions. See Matthew Baker, *Much Ado About Nollan/Dolan: The Comparative Nature of the Legislative-Adjudicative Distinction in Exactions*, 42 URB. LAW. 171 (2010). While Baker identifies significant confusion in the lower courts about how to apply this distinction, he believes that discernible standards exist that can guide courts. See *id.* at 178–80, 187–88.

106. Siegel, *supra* note 28, at 608.

107. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1562 (2005); see also Inna Reznik, Note, *The Distinction Between*

and Reynolds believe that the *Nollan/Dolan* test should apply to conditions regardless of whether imposed legislatively or through a permit-specific adjudication.

The Supreme Court has not addressed the proper standard courts should apply in reviewing legislatively imposed exactions, and this distinction may have an important role to play going forward. There are, however, reasons for skepticism that the Court will shield legislative action from scrutiny under the *Nollan/Dolan* test. In a recent plurality decision in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, four Justices suggested that the Takings Clause applies equally to all branches of government. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, a unanimous Supreme Court made a similar statement.¹⁰⁸ That logic would seem to undermine the theoretical basis for distinguishing between exactions imposed by legislative and adjudicatory processes.¹⁰⁹

In addition to arguing for and against specific limitations to the *Nollan/Dolan* framework, scholars have advanced more general critiques of the conceptual underpinnings of that framework that are worthy of consideration. Professor Vicki Been, for instance, has led a scholarly effort to bring theories of market competition to bear on exactions law.¹¹⁰ Been argues that competition between local governments disciplines regulators. On this account, "the market for development . . . may be sufficiently competitive to constrain local governments' exactions practices, except in a few narrow circumstances[.]" making judicial intervention unnecessary.¹¹¹ Been acknowledges that her market-based analysis is at odds with the Supreme Court's decision in *Nollan* and *Dolan*, and it similarly runs afoul of *Koontz*. Her analysis, however, would bring the law of exactions into theoretical harmony with other doctrines that consider government regulation through the

Legislative and Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 280 (2000) ("[N]o method exists that would make the line between legislative and adjudicative decisionmaking easy to draw because the reality of most local government structures and of the land use process is in conflict with the distinction.").

108. 449 U.S. 155, 164 (1980) ("Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing [certain funds] as 'public money' because it is held temporarily by the court.").

109. See 130 S. Ct. 2592, 2596 (2010) ("The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . ."). Justices Clarence Thomas and Sandra Day O'Connor have expressed a similar sentiment in an opinion dissenting from a denial of certiorari, suggesting: "It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissenting from denial of certiorari); see also *Lambert v. City & County of San Francisco*, 529 U.S. 1045, 1049 (2000) (Scalia, J., dissenting from denial of certiorari).

110. See Been, *supra* note 9.

111. See *id.* at 478. For a contrasting view, see Richard A. Epstein, *Exit Rights and Insurance Regulation: From Federalism to Takings*, 7 GEO. MASON L. REV. 293 (1999).

lens of market competition.¹¹² In addition to being at direct odds with Supreme Court precedent, Been's theoretical account also runs counter to the experience of exactions law. Courts have largely applied the *Nollan/Dolan* test in the context of disputes between local government authorities and landowners seeking development permits.¹¹³ Yet, the market competition theory suggests that courts should be particularly skeptical of state and federal regulations because the broad geographic application of such regulations means that developers have fewer opportunities for exit.¹¹⁴ In other words, Been's theory would suggest increased judicial scrutiny for the very decisions that have received the least judicial attention under existing exactions law.

D. *Koontz and Heightened Scrutiny*

The Supreme Court returned to the law of exactions in *Koontz v. St. Johns River Water Management District*, making short work of two of the limitations that had taken root in scholarly and judicial treatments of the *Nollan/Dolan* test.¹¹⁵ The Court soundly rejected both the notion that *Nollan* and *Dolan* apply only to real property exactions, and that they apply only to exactions actually imposed in approved permits.¹¹⁶

The case involved Coy Koontz Sr.'s ownership of fourteen acres of land in Orange County, Florida, almost all of which contained protected wetlands.¹¹⁷ Because Koontz wanted to commercially develop his property, he applied to the St. Johns Water Management District (the "District") for a permit to fill 3.4 acres of wetlands.¹¹⁸ The District told Koontz that it would grant the permit if

112. See Been, *supra* note 9, at 475–76. Been explains that notions of "competitive federalism," a concept originally developed by economist Charles Tiebout, justify limited judicial intervention into local and state regulation of issues such as corporate charters and banking practices. *Id.* at 506–09.

113. See, e.g., *Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 77 Cal. Rptr. 3d 432 (Ct. App. 2008) (challenge to mitigation fee imposed as condition of permit to build seawall); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1995) (challenge to condition to special use permit requiring dedication); *W. Linn Corporate Park, L.L.C. v. City of West Linn*, 240 P.3d 29 (Or. 2010) (challenge to development permit condition requiring construction of off-site public improvements).

114. This is true because, as Been explains, "[t]he model for perfect competition requires that there be a large number of producers, offering homogenous product to perfectly informed consumers, in a market in which other producers are free to enter, and there is no collusion among producers." Been, *supra* note 9, at 529. Arguably, local governments are sufficiently numerous and land within their jurisdictions provides sufficiently similar opportunities for development to approximate this model. See *id.* at 531. It is more difficult to make that claim with respect to the federal government. There are, of course, other nations where developers could operate. But most players seeking to develop land may lack information about foreign regulatory regimes and face all manner of constraints that make shifting development activity to foreign soil difficult to achieve.

115. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

116. See *id.* at 2595.

117. See *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1224 (Fla. 2012), *rev'd*, 133 S. Ct. 2586 (2013). Because Coy Koontz, Sr. passed away before the Supreme Court case, his estate was represented by his son, Coy Koontz, Jr. *Id.* at 2591.

118. *Id.*

he would mitigate the loss of wetlands by funding the rehabilitation of other wetlands beyond the borders of his property.¹¹⁹ Koontz refused, and the District denied his permit.¹²⁰

Koontz filed suit in state court alleging the District committed an uncompensated taking under the *Nollan/Dolan* test.¹²¹ After a lengthy legal battle, the Florida Supreme Court disagreed.¹²² That decision rested on two primary pillars. First, the court held that *Nollan* and *Dolan* cannot apply to permit denials because the government has not yet acted to take any property.¹²³ Second, the court held that the test does not apply to monetary exactions.¹²⁴

The Supreme Court granted Koontz's petition for certiorari and reversed the Florida Supreme Court on both grounds. The Supreme Court unanimously held that "[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that applicant turn over property or *denies* a permit because the applicant refuses to do so."¹²⁵ By a vote of five to four, the Court then held that the government cannot insulate itself from the reach of *Nollan/Dolan* by imposing conditions that do not require the applicant to transfer an interest in real property to the government.¹²⁶

II. DIFFERENTIATING BETWEEN FEES AND EXPENDITURES

Before arguing that the *Koontz* decision allows for differential treatment of expenditures and fees,¹²⁷ Part II of this Article defends this distinction on doctrinal, theoretical, and practical grounds.

A. Textual Indicia and the Fifth Amendment

Treating expenditures and fees differently finds support in the text of the Takings Clause itself.¹²⁸ The Fifth Amendment applies when private property

119. *Id.* at 1224–26. The District also offered Koontz the option of reducing the acreage of wetlands he wanted to fill, but this option received no sustained attention by the Supreme Court. *Id.*

120. *See id.*

121. *Koontz*, 133 S. Ct. at 2593.

122. *See St. Johns River Water Mgmt. Dist.*, 77 So. 3d at 1223.

123. *Id.* at 1230–31.

124. *Id.*

125. *Koontz*, 133 S. Ct. at 2595.

126. *See id.* at 2598–99.

127. *See infra* Part III.

128. In his definitive work on the original understanding of the Takings Clause, Professor William Michael Treanor explains that the framers of the Fifth Amendment conceived of the Takings Clause as protecting "against physical seizures, but not against regulations affecting value." Treanor, *supra* note 41, at 782. Moreover, Treanor explains, until 1922 judicial interpretation of the Takings Clause, and state constitutional counterparts, "all indicate that compensation was mandated only when the government physically took property." *Id.* at 798.

is “taken.”¹²⁹ The word “take” has many definitions, but most relevant here, it refers to an action by which a person or entity acquires something.¹³⁰ The word focuses on the taker, not the party taken from. Consider a pedestrian example. If a bully forces a fellow student to hand over her lunch money, the bully took the money. But if the bully orders the lunch money thrown into a pond, or demands that the other student purchase only vegetarian food, it’s less obvious that the bully engaged in an act of *taking*.¹³¹

Consider another example drawn from the United States’ founding era. If the government forces a property owner to turn over her property to the government to build a military barracks, the governmental action plainly falls within the meaning of the word “take” and is subject to the compensation requirement of the Fifth Amendment. If, on the other hand, the government orders a property owner to house soldiers on her land, characterizing this coercive act as a “taking” subject to Fifth Amendment limitations strains the meaning of the word, especially considering the separate restriction on quartering soldiers contained in the Third Amendment.¹³²

The meaning of the word “take” illuminated by the examples above has important implications for the Takings Clause. When the government acquires property, its actions fall into the linguistic heartland of the Fifth Amendment. The government, simply put, is “taking” property. When the government acts to impose obligations on property owners, however, but does not acquire property for itself, its actions fall farther from this plain meaning, even if the effect of the government action on private parties is similar or even identical.

The ordinary meaning of the word “taking” readily applies to circumstances where a permit condition results in government acquiring property for itself. In the *Nollan* case, for example, the California Coastal Commission required dedication of an easement over Nollan’s property to the government.¹³³ Similarly, in *Krupp v. Breckenridge Sanitation District*, the City of Breckenridge acquired money from Krupp by requiring him to pay a fee

129. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

130. See e.g., MERRIAM-WEBSTER COLLEGIATE DICTIONARY 1273 (11th ed. 2003) (defining the word “take” as, *inter alia*, “to get into one’s hands or into one’s possession, power, or control,” “to acquire by eminent domain,” and “to transfer into one’s own keeping”).

131. That is not to say, of course, that the bully in this example did not engage in morally reprehensible conduct. Other values may come into play. Similarly, other constitutional principles like those of the Due Process Clause may constrain government action even where no “taking” has occurred. See *supra* note 58.

132. For a discussion of the interaction between the Third Amendment’s restriction on quartering soldiers and the Fifth Amendment’s restriction on takings of property, see Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 146 (1993). See also Thomas G. Sprankling, Note, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendments Protection of Houses*, 112 COLUM. L. REV. 112 (2012) (arguing that the Fifth Amendment’s prohibition on taking should apply with additional force to takings of homes because of the Third Amendment).

133. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827 (1987).

to fund city infrastructure.¹³⁴ Both situations constitute a circumstance in which the government took property—an easement, or money—from the permit applicant in a traditional sense: before the interaction, something was owned by the permit applicant, and afterwards that same thing was owned by the government. This is not so, however, when a permit condition requires an expenditure of money. In *Town of Flower Mound v. Stafford Estates, Ltd.*, for example, a town issued a construction permit conditioned on a developer modernizing a city street.¹³⁵ The condition plainly required the developer to spend money, but it is less clear that the Town took that money in the ordinary sense of the word. The developer's efforts improved the Town's property, creating public benefits for all that traversed the streets subject to the condition, but, nonetheless, the Town did not acquire that money, or any other property, from the developer.

Fees, then, resemble a classic taking, whereas expenditures look like something else. This linguistic analysis has ramifications for the *Nollan/Dolan* test. Courts should apply heightened scrutiny under *Nollan/Dolan* to exactions that are more closely equivalent to traditional takings—such as fees, through which government acquires money once held by the permit applicant. But courts should apply the more limited review embodied in the *Penn Central* test to exactions that differ markedly from traditional takings—such as expenditures, through which the government compels an applicant to engage in conduct that costs the applicant money, but results in no transfer of property from the permit applicant to the government.

B. Formal Categorization and Takings Law

The second and related reason that distinguishing between fees and expenditures makes sense is analogic. Takings law places significant weight on formal distinctions between direct appropriation of property and regulation, treating these two categories of government action differently.¹³⁶ Much of takings law is based on a threshold categorization of government activity into one of those two formal categories. Distinguishing between fees and expenditures tracks that formal distinction: fees are similar to direct appropriations, and expenditures are similar to regulation.

In the typical takings case, a court must decide whether the government has directly appropriated property or, alternatively, restricted the use of

134. 19 P.3d 687 (Colo. 2001) (Contrary to *Koontz*, the Colorado Supreme Court held the *Nollan/Dolan* test inapplicable to monetary exactions.). For detailed treatment of the early cases interpreting *Nollan* and *Dolan*, see generally J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373 (2002).

135. 135 S.W.3d 620 (2004).

136. See, e.g., Fenster, *supra* note 9, at 773–74. As Mark Fenster explains, “[t]he Court’s exercise in line-drawing in its takings jurisprudence may not be entirely persuasive as a matter of formal logic, but over time their distinctions have calcified into accepted constitutional common law doctrine.” *Id.*

property.¹³⁷ If the government has appropriated property, it must always pay compensation, although various doctrines allow the amount of that compensation to be adjusted even to the point of making it a purely formal obligation.¹³⁸ If the government has instead regulated the use of property, compensation must be paid only if that regulation is “functionally equivalent to a direct appropriation . . . or ouster”¹³⁹ As discussed below, this dichotomy between direct appropriations and negative regulatory restrictions is a false one because it fails to account for the multiplicity of regulatory regimes that impose positive obligations on landowners.¹⁴⁰ Placing government activity in one of these categories is, nonetheless, a significant aspect of takings analysis.¹⁴¹

The Court has routinely distinguished between direct appropriations and regulatory restrictions.¹⁴² In particular, the Court has emphasized that the Takings Clause concerns itself first and foremost with government appropriation of private property. In *Lingle v. Chevron U.S.A.*, the Court described circumstances “in which government directly appropriates private property or ousts the owner from his domain” as “the classic taking.”¹⁴³ In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court explained that where government “acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation,” such activity falls within the “plain language” of the Takings Clause.¹⁴⁴ In *Connolly v. Pension Benefit Guaranty Corp.*, the Court relied on similar logic to hold that a government-imposed financial liability did not violate the Takings Clause, explaining that under the challenged program “the Government does not physically invade or

137. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

138. Where government obtains part of a property interest, it can, for example, invoke the offsetting benefits rule to reduce the compensation it must pay. See, e.g., *Acierno v. State*, 643 A.2d 1328, 1332–33 (Del. 1994). If the benefit enjoyed by the property remaining in the plaintiff's hands is more valuable than the fair market value of what was taken, the government owes no compensation.

139. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 529 (2005); see Lee Ann Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 63 (2012) (explaining that there are two ways that government actions can trigger an obligation to pay compensation: “purposeful exercises of eminent domain, and regulatory actions that are deemed by the court to be the functional equivalent of eminent domain”).

140. See *infra* notes 148–155 and accompanying text.

141. See *Lingle*, 544 U.S. at 529; *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322–23.

142. See, e.g., *Lingle*, 544 U.S. at 537–38 (“The paradigmatic taking . . . is a direct government appropriation or physical invasion of private property . . . [T]he Court recognized that government regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or ouster.”); *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 316 (1987) (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”).

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

144. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321.

permanently appropriate any . . . assets for its own use.”¹⁴⁵ And in *Eastern Enterprises v. Apfel*, eight Justices—four in the majority and four in dissent—viewed it as relevant to the takings analysis that a government program directed payment of funds to a private party, rather than the government itself.¹⁴⁶ The four-Justice plurality explained that under the challenged legislation, “Eastern is permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to [a private entity].”¹⁴⁷ The Court held that the case did “not present the classic taking in which the government directly appropriates private property for its own use.”¹⁴⁸ The four Justices in dissent similarly emphasized that the case involved “an ordinary liability to pay money, and not to the Government, but to third parties.”¹⁴⁹ Justice Anthony Kennedy’s concurrence in *Eastern Enterprises* also suggested that whether the government acquired property for itself could bear on the issue of whether a compensable taking had occurred. Justice Kennedy differentiated between “the usual taking . . . when the government physically acquires property for itself” and regulatory takings that may occur “when property is not appropriated by the government or is transferred to other private parties.”¹⁵⁰ Notwithstanding that contrast, Justice Kennedy then went on to explain that “[t]he circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking.”¹⁵¹ By acknowledging the distinction, however, Justice Kennedy suggests that it could be relevant to analyzing governmental action under the Takings Clause in other circumstances.

The traditional dichotomy between direct appropriations and regulatory restrictions does not apply directly to exactions.¹⁵² Exactions result in neither the government directly appropriating property nor restricting its use. Rather, a property owner seeks permission to use property in a fashion otherwise regulated, and the government conditions such permission on the property owner fulfilling certain obligations—sometimes giving property to the government, and sometimes assuming affirmative obligations to mitigate the potential effects of the permitted activity.

145. 475 U.S. 211, 225 (1986).

146. *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

147. *Id.* at 522–23 (internal quotations omitted).

148. *Id.* (internal quotations omitted).

149. *Id.* at 554 (Breyer, J. dissenting). Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg joined Justice Stephen Breyer’s dissent.

150. *Id.* at 542–43 (Kennedy, J., concurring in the judgment and dissenting in part).

151. *Id.* at 543.

152. In *Lingle*, the Supreme Court described “land-use exactions” as a “special context” apart from either direct appropriations or regulatory takings. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 528 (2005).

Exactions, however, can be divvied up much as the remainder of takings law.¹⁵³ Certain exactions—fees and real property dedications—resemble direct appropriations of property because they result in an interest in property transferring from a private property owner to the government. Other exactions—activities that result in expenditures—resemble regulation because they shape the obligations of a private property owner without transferring property directly to the government. Courts should afford legal significance to these analogic relationships. Courts should apply the *Nollan/Dolan* test to fees because its heightened scrutiny standard prevents the government from excessively appropriating private property through the guise of permitting processes. When, on the other hand, a permit condition obliges a property owner to engage in activities that require an expenditure of money, courts should treat the condition as ordinary regulatory limitations (which also impose economic losses) subject to the *Penn Central* test. This would allow government to advance the public interest without invasive judicial oversight, while respecting the core protection of private property afforded by the Takings Clause.

Critics of distinguishing between fees and expenditures may argue that the distinction may, at times, seem arbitrary, particularly from the property-owner's perspective. A permit applicant told to pay the government a \$400 fee to help fund a water treatment plant faces the same economic loss as an applicant told to install a storm-water settling pond that costs \$400. Under the approach advocated for in this Article, legal challenges brought by these applicants would be governed by different rules. The claim of one applicant would enjoy the heightened scrutiny standard of the *Nollan/Dolan* test, while the deferential *Penn Central* test would govern the other claim. This problem is not, however, unique. The law of takings places great value on formal distinctions, and that emphasis inevitably creates seemingly arbitrary results in application. For example, courts treat differently (indeed, vastly differently) circumstances where the government seizes 30 percent of a person's land and those where government regulation reduces the value of a person's land by 30 percent. A landowner may experience these burdens identically, yet takings law is likely to grant only the former compensation.¹⁵⁴

Moreover, a contrary rule that treated exactions involving fees and those involving expenditures the same could also produce arbitrary results. A landowner whose property loses \$400 in value due to a regulatory restriction faces the same economic loss as a landowner required to install a \$400 settling

153. Professor Lee Anne Fennell made a similar argument to support applying the *Nollan/Dolan* test only to exactions involving transfers of land. See Fennell, *supra* note 10, at 11. She did not address, however, the similarity between fees and direct appropriations of property.

154. Compare *Glosemeyer v. United States*, 45 Fed. Cl. 771, 773 n.4, 781 (2000) (requiring compensation for right-of-way easement over a small portion of a municipalities parcel), with *HFH, Ltd. v. Superior Court*, 542 P.2d 237, 240–44 (Cal. 1975) (requiring no compensation where zoning law reduced value of property from \$400,000 to \$75,000).

pond. If courts extend the *Nollan/Dolan* test to include expenditures, then only the latter landowner would likely receive compensation, however similar the effects of the two government actions.

The Justices have noticed this potential for treating seemingly similar situations, at least from the perspective of the landowner, differently. In his opinion concurring in the judgment in *Eastern Enterprises*,¹⁵⁵ Justice Anthony Kennedy rejected a takings claim brought against a federal law requiring coal companies to fund a health care benefits plan for coal miners,¹⁵⁶ even if a company no longer engaged in coal mining regulated by the law.¹⁵⁷ Justice Kennedy explained that “the burden imposed by the Coal Act may be just as great if the Government had appropriated one of Eastern’s plants, but the mechanism by which the Government injures Eastern is so unlike the act of taking specific property that it is incongruous to call the Coal Act a taking”¹⁵⁸

Critics of the fees-expenditures distinction might also argue that it makes little practical sense to treat differently permit conditions through which the government demands payment directly and those through which the government directs a permit applicant to transfer property to a third party. Smart regulators will simply direct property to third parties in all cases, and thereby avoid heightened scrutiny.¹⁵⁹ As the discussion of *Eastern Enterprises* above suggests, the Justices have suggested that the Takings Clause treats these circumstances differently.¹⁶⁰ Moreover, this argument is premised on the cynical view that government officials make decisions solely to achieve specific ends while evading judicial scrutiny, a view that overlooks the commitment of many government officials to the public interest and the rule of law.¹⁶¹

155. *E. Enters.*, 524 U.S. at 539–53 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

156. *Id.* at 514 (plurality opinion).

157. *Id.* at 517.

158. *Id.* at 542 (Kennedy, J., concurring in the judgment and dissenting in part).

159. As discussed above, the category of fees could be viewed as extending to circumstances where a permit condition directs a transfer of property to a third party, while expenditures describe permit conditions that impose affirmative obligations on applicants other than those involving transfers of property. *See supra* notes 203–206 and accompanying text.

160. *See supra* notes 147–151 and accompanying text.

161. The Supreme Court itself occasionally articulates this cynical view of government. For example, in *Lucas v. South Carolina Coastal Council*, Justice Antonin Scalia’s majority opinion dismisses the suggestion in the dissent that “the test for required compensation is whether the legislature has recited a harm-preventing justification for its action,” because such a rule “amounts to a test of whether the legislature has a stupid staff.” 505 U.S. 1003, 1026 n.12 (1992). The view that legislators will manipulate the decisions they make to evade constitutional constraints directly contradicts the “presumption of regularity” or “legitimacy” that ordinarily attaches to the conduct of government officials. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (identifying a “presumption of legitimacy accorded to the Government’s official conduct”); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 9 (2001) (“[W]e note that a presumption of regularity attaches to the actions of Government agencies . . .”).

Under the theory articulated in this Article, the former circumstances would constitute a fee because the government directly acquires property from the applicant and the latter circumstance would constitute an expenditure.¹⁶² Despite their superficial resemblance, these circumstances are meaningfully distinct. Concerns about government overreaching are somewhat less when the government transfers property to a third party, rather than aggrandizing that property for itself, and this fact ameliorates the need for heightened scrutiny. The Takings Clause also imposes other limitations on the power of government to transfer property from one owner to another through the “public use” requirement, a limitation that has little application when government acquires property for itself.¹⁶³ Notwithstanding the Supreme Court’s decision in *Kelo v. City of New London*,¹⁶⁴ which led some commentators to suggest that the “public use” requirement serves little function,¹⁶⁵ the Supreme Court clearly indicated that the “public use” requirement continues to prevent government from transferring property from one private party to another in order to achieve purely private benefits.¹⁶⁶

162. As discussed *infra* at notes 182–185 and accompanying text, both circumstances could conceivably be treated as fees if the Court took the view that the government formally acquired the property interest and then transferred it to the third party.

163. See U.S. CONST. amend. V.

164. 545 U.S. 469 (2005).

165. See Alberto B. Lopez, *Revisiting Kelo and Eminent Domain’s “Summer of Scrutiny,”* 59 ALA. L. REV. 561, 579 (2008) (explaining that “many legal commentators found [a] requiem” for the “public use” requirement “more than applicable to the post-*Kelo* universe of eminent domain jurisprudence”); Rusty D. Crandell, Comment, *Arizona’s “Public Use” Debate: Statutory and Constitutional Limitations on the Power to Take Private Property*, 38 ARIZ. ST. L.J. 1169, 1195 (2006) (“[T]he United States Supreme Court has not indicated a willingness to place meaningful limitations on the scope of public use under the Federal Constitution . . .”). Other commenters viewed *Kelo* as a perfectly predictable outgrowth of Supreme Court precedent interpreting the “public use” requirement. See, e.g., Joseph L. Sax, *Kelo: A Case Rightly Decided*, 28 U. HAW. L. REV. 365, 365 (2008) (“[T]he intense controversy that the *Kelo* case itself sparked within the Court . . . came as a surprise to many of us who follow this specialized area of the law.”); Julia D. Mahoney, *Kelo’s Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 103 (“The most striking thing about *Kelo v. New London* . . . is that there was significant public surprise and outcry at the outcome.”). For an engaging post-decision discussion with the lawyers who argued *Kelo*, see *Kelo in Context: A Discussion with the Advocates*, in EMINENT DOMAIN USE AND ABUSE: *KELO IN CONTEXT* 291 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

166. *Kelo*, 545 U.S. at 477 (“[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”); see also Robert H. Thomas, *Recent Developments in Eminent Domain: Public Use*, 44 URB. LAW. 705 (2012) (examining cases applying the “public use” requirement after *Kelo*); Mahoney, *supra* note 165, at 117 (explaining that the majority opinion “is a far cry from a guarantee that future condemnations for economic development purposes will meet with a favorable reception”). In other words, a permit condition directing payment to a third party for the purpose of benefitting that party, rather than the public interest, would already appear to be constitutionally impermissible, and the *Nollan/Dolan* framework may, therefore, be unnecessary.

C. *Practical Realities and Permitting Regimes*

Koontz extends the *Nollan/Dolan* test to permit conditions that require payment of fees, at least those imposed through permit-specific adjudications.¹⁶⁷ In addition to the doctrinal and theoretical considerations discussed above, extending heightened scrutiny to all expenditures could pose serious practical problems.

Virtually every permitting regime requires applicants to spend money.¹⁶⁸ Subjecting all such regimes to heightened scrutiny—at least where they relate to property rights—would substantially increase the cost to government of regulating. A rule like that would mean that whenever government exercised permitting authority it would need to compile a record demonstrating an essential nexus and rough proportionality between any conditions contained in the permit and the harm threatened by an individual permit applicants desired activities. Consider, for example, a property owner seeking a permit under the Clean Air Act to operate a solid-waste incinerator.¹⁶⁹ The owner would need a permit from the Environmental Protection Agency (EPA) under Title V of the Act, and that permit would impose various emissions control requirements, the implementation of which would cause the property owner to spend money.¹⁷⁰ Under ordinary principles of administrative law, EPA already must explain its decision to issue the permit and impose conditions, and EPA would further need to demonstrate adequate consideration of the environmental effects of its decision.¹⁷¹ That process is time-consuming and costly. Extending *Koontz* to this permitting regime would layer yet more obligations on EPA's administrative process, requiring the agency to develop a record to support the conclusion that the pollution controls imposed by the permit meet the essential nexus and rough proportionality test when implemented with regard to the specific property at issue. In an administrative state already plagued by delay and ossification, courts should hesitate before creating sweeping new requirements for agencies to fulfill before issuing permits.¹⁷²

Requiring a *Nollan/Dolan* demonstration for every permit condition involving an expenditure would also threaten a tidal wave of new litigation,

167. The Supreme Court did not expressly discuss any distinction between adjudicative and legislative action. The case arose, however, out of a permit adjudication. See *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2592 (2013). For a general discussion of the adjudicative/legislative dichotomy and its role in the law of exactions, see Baker, *supra* note 105.

168. See *supra* notes 18–21 and accompanying text.

169. See 42 U.S.C. §§ 7401–7671q (2006).

170. See *id.* §§ 7661–7661f. That permit would include emissions requirements imposed by any applicable state implementation plan and federally imposed requirements under the new source review, new source performance standards, and hazardous air pollutant programs. See *id.* §§ 7410–7412, 7475.

171. These requirements are established by the Administrative Procedure Act, 5 U.S.C. § 554 (2012), and National Environmental Policy Act, 42 U.S.C. § 4332 (2006).

172. See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1354 (2013) (“Fears about bureaucratic overzealousness should . . . be tempered by the tendency for procedural impediments to lead to inertia.”).

since every permit applicant could sue without herself carrying the burden of proving the unconstitutionality of the government's actions.¹⁷³ This threat is particularly acute because shuffling cases from the *Penn Central* test to the *Nollan/Dolan* test does more than simply shift the burden of proof. Bringing a *Penn Central* claim is costly because it requires plaintiffs to put on evidence of economic injury, which often requires hiring expert appraisers.¹⁷⁴ Property owners invoking the *Nollan/Dolan* test can avoid many of these litigation costs because the government must itself put on evidence that the economic loss suffered by the property owner is roughly proportionate to the harm threatened by development.

Applying the *Nollan/Dolan* test to expenditures also poses potentially difficult valuation problems for courts. When a property owner challenges a fee, the cost that the fee imposes is undisputed. Where a condition requires affirmative conduct, rather than payment of a fee, courts would need to estimate the cost that the condition will impose. And ironically, the property owner will have an incentive to inflate estimates of the cost of compliance. This may make the court's job difficult, and, moreover, may lead to inefficient compliance after litigation. Consider, for example, a developer challenging a permit authorizing her to fill two acres of wetlands so long as she improves two other acres of wetlands on her property. The developer will do all she can to make compliance with the condition look expensive, and therefore lacking a rough proportionality to the harm threatened by the development, by arguing, for example, that a costly engineering technique will be required. If she loses at trial, the government regulatory body may hold her to her representation, even if in the absence of litigation, less-costly activities would have satisfied the permit condition. In other words, extending the *Nollan/Dolan* framework to expenditures could perversely increase costs for permit applicants that unsuccessfully challenge permit conditions.

Expanding the scope of *Nollan* and *Dolan* may also fuel privatization of government functions. Land use law has already experienced a degree of privatization, particularly in localities that rely on community benefit agreements, whereby community organizations negotiate with developers to extract concessions in exchange for their support of development projects.¹⁷⁵ Because community benefit agreements are private contracts, they may evade

173. See Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 21 ("Shifting the burden of proof to defendant lowers plaintiff's direct costs of pursuing litigation, thereby promoting litigation.").

174. See generally James E. Holloway & Donald C. Guy, *Cienega Gardens v. United States (Cienega X) and Takings Clause: Utility and Role of Appraisal Approaches to Measure the Value of the Economic Impact of Regulation*, 40 REAL EST. L.J. 176 (2011) (discussing different approaches to using appraisals to demonstrate economic impact under the *Penn Central* test).

175. See Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 7–8 (2010).

the limitations imposed by the *Nollan/Dolan* test.¹⁷⁶ If courts apply heightened scrutiny to all manner of permit conditions—including those involving expenditures—government agencies could rationally respond by increasing their reliance on nongovernmental organizations to protect the public from harms associated with development.¹⁷⁷ While public interest organizations negotiating community benefit agreements may seek to serve the best interests of the public, they inherently lack the democratic accountability of government officials.

Finally, subjecting expenditures to heightened scrutiny could also destabilize regulatory takings law more generally, even where permit conditions are not at issue. As mentioned previously, courts analyzing claims under the Takings Clause distinguish between direct appropriations of property and negative regulatory restrictions, and treat each category of government action differently.¹⁷⁸ But government activities do not always fall neatly into those categories. Regulations often prohibit particular uses, but not always. They sometimes impose various affirmative duties on property owners including, to name a few, cleaning up hazardous substances, destroying mosquito breeding grounds, maintaining the structural integrity of historically important buildings, installing and maintaining fire protection equipment, and providing infrastructure to render facilities accessible to disabled individuals.¹⁷⁹ Local building ordinances requiring a property owner to apply for and secure a permit before construction are themselves affirmative obligations.¹⁸⁰ And each of these obligations requires an expenditure.

Courts considering constitutional challenges to affirmative regulatory obligations of this sort have generally conducted only a limited review. Courts

176. *Id.* at 27–28.

177. Carlos Ball and Laurie Reynolds have argued that exactions corrupt cultural attitudes about government. *See* Ball & Reynolds, *supra* note 107, at 1527–28. They argue that the increasing number of fees levied by government causes citizens “to feel like consumers participating in a market economy,” causing citizens to treat government like any other market actor. Citizens “expect, in other words, to ‘get what they pay for.’” *Id.* at 1528; *see also* Fenster, *supra* note 9, at 738 (“Local governments’ reliance on exactions to finance infrastructure and services has helped transform municipalities into quasi-private, pay-as-you-go service providers.”). This critique of exactions, however, does not extend with equal force to conditions requiring expenditures.

178. *See supra* notes 123–135 and accompanying text.

179. *See, e.g.*, *Third & Catalina Assocs. v. City of Phoenix*, 895 P.2d 115, 117 (Ariz. Ct. App. 1994) (considering constitutional challenge to city ordinance requiring installation of sprinkler systems into existing commercial buildings); 42 U.S.C. § 9606(a) (2006) (authorizing EPA to order property owners to clean up hazardous substances endangering public health and welfare); NATIONAL TRUST FOR HISTORIC PRESERVATION, *DEMOLITION BY NEGLECT* (2009), *available at* <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/resources/Demolition-By-Neglect.pdf> (discussing historic preservation laws that require owners to maintain their property); Mecklenburg County Health Ordinance, § 3 (1999), *available at* <http://charmck.org/MECKLENBURG/COUNTY/HEALTHDEPARTMENT/ENVIRONMENTALHEALTH/RULESREGULATIONSORDINANCES/Pages/Mosquito%20Control%20Ordinance.aspx> (requiring property owners to destroy mosquito breeding grounds).

180. *See* BRUNER & O’CONNOR, *supra* note 32, at § 16.1.

have, for example, routinely rejected takings arguments challenging cleanup obligations imposed by the Comprehensive Environmental Response, Compensation, and Liability Act.¹⁸¹ Similarly, in its 1946 decision in *Queenside Hills Realty, Co. v. Saxl*, the Supreme Court rejected a constitutional challenge to a New York law requiring lodging houses already in operation to install certain fire-protection equipment.¹⁸² The Court explained that “in no case does the owner of property acquire immunity against exercise of the police power because he constructed [a building] in full compliance with existing law.”¹⁸³

Applying heightened scrutiny to permit conditions requiring expenditures wouldn’t necessarily upset these precedents. That is because freestanding regulatory obligations decoupled from specific permitting regimes would appear not to implicate the *Nollan/Dolan* framework. But, as Richard Epstein has explained, virtually all regulation can be recast as conditional permission.¹⁸⁴ For example, “a setback requirement can be viewed as conditioning permission to build on leaving a certain swath of land unbuilt.”¹⁸⁵ Relying on that logic, savvy opponents of government regulation could argue that regulations themselves impose exactions in the form of expenditures, even where no permitting regime exists. Even if courts resist this argument, applying the *Nollan/Dolan* test to conditions imposing expenditures would create a tenuous double standard whereby affirmative obligations imposed by permit conditions receive one tier of scrutiny and those imposed by a general government order or regulation that require no express regulatory permission receive another.¹⁸⁶

III. FEES AND EXPENDITURES UNDER *KOONTZ*

Contrary to the prevailing view, *Koontz* does not foreclose the sensible approach of distinguishing fees from expenditures. In this Part, Section A examines the language used in the decision and explains why it does not

181. See, e.g., *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 550–53 (6th Cir. 2001); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986); see also Robin K. Craig, *Federalism Challenges to CERCLA: An Overview*, 41 SW. L. REV. 617, 624 (2012).

182. 328 U.S. 80, 81 (1946).

183. *Id.* at 83.

184. EPSTEIN, *supra* note 85, at 11. Moreover, “complaints about exactions’ effectiveness, fairness, and efficiency can apply to any regulatory device employed by any regulatory agency, and even more so with respect to any particular tool of land use regulation.” Fenster, *supra* note 9, at 739.

185. Fennell, *supra* note 10, at 10.

186. As Professor Mark Fenster has explained, “The exactions decisions are conceptually, normatively, and sequentially unsatisfactory” Fenster, *supra* note 9, at 732. Those problems have not contaminated takings law more generally because the Court had previously emphasized the limited scope of the *Nollan/Dolan* test. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546–48 (2005). Courts should strive to maintain a clear line of demarcation, and such a line erodes if the *Nollan/Dolan* test applies to expenditures.

foreclose—and could even be read to support—distinguishing fees from expenditures. Section B then demonstrates that the facts of the case, which appear to involve a condition that resembles an expenditure, do not foreclose the distinction advocated by this Article.

A. Koontz's Legal Reasoning

In holding that the essential nexus and rough proportionality tests apply to exactions other than those involving a transfer of real property, the Court roughly outlines three formulations to describe the central issue in the case. None of those formulations necessarily embrace expenditures. Indeed, the majority never utters the word “expenditure” in its decision.¹⁸⁷

The Court first describes its decision as follows: “[S]o-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”¹⁸⁸ The Court does not define the phrase “monetary exaction.” It does, however, provide an illustration of a monetary exaction, and that illustration is a fee, not an expenditure. Specifically, the Court indicates that the term “monetary exaction” includes “a permitting authority . . . [that] give[s] [an] owner a choice of either surrendering an easement or making a payment equal to the easement’s value.”¹⁸⁹

The Court also describes the central issue in the case as involving a circumstance “when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property”¹⁹⁰ The Court uses similar language to describe the *Nollan/Dolan* test generally: “In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.”¹⁹¹

The word “relinquishment” is an odd choice because *Nollan* and *Dolan* never describe their holdings in that fashion, and Koontz never uses the word in his petition for *certiorari* or his briefs on the merits.¹⁹² It also happens not to be

187. In dissent, Justice Elena Kagan suggests that “[t]he majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013) (Kagan, J., dissenting).

188. *Id.* at 2599.

189. *Id.*

190. *Id.* at 2600.

191. *Id.* at 2591.

192. Two amicus briefs use the word to explain that the constitutional conditions doctrine protects individuals from compulsion to relinquish constitutional rights, *see* Brief of Hillcrest Prop., LLP as Amicus Curiae Supporting Petitioner at 28, *Koontz*, 133 S. Ct. 2586 (No. 11-1447); Brief for Cal. as Amici Curiae Supporting Respondent at 6, *Koontz*, 133 S. Ct. 2586 (No. 11-1447); and one amicus brief explains that the condition at issue did not “call[] for the relinquishment of a specific, identifiable fund of money,” Brief of Am. Planning Ass’n as Amici Curiae Supporting Respondent at 31, *Koontz*, 133 S.

the most natural word to use when describing someone spending money. Spending money is usually called spending money, not relinquishing money. This suggests that the Court means something different than expenditures.

Finally, the Court uses the language of classic takings involving direct appropriations of property to characterize the condition imposed upon Koontz. Twice, the Court describes the condition as requiring a transfer of property to the government. First, the Court explains that the District believed it avoided the *Nollan/Dolan* test because “[t]he District did not approve his application on the condition that he surrender an interest in land. [But] [i]nstead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield.”¹⁹³ Then later, in disclaiming any review of the substantive merits of the proposed condition, the Court explains “[w]hatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a *per se* taking similar to the taking of an easement or a lien.”¹⁹⁴

None of these formulations necessarily explains whether “monetary exactions” or “relinquishment of funds” encompass expenditures compelled by a permit condition. But the choice of examples coupled with the discussion of transfers of property seems to suggest that the Court may not have expenditures in mind. What’s most striking, perhaps, is that had the Court meant to extend the *Nollan/Dolan* test to expenditures, it had many words it could deploy that would clearly and precisely communicate that intent, such as “expend,” “spend,” “pay,” or any of the words most commonly associated with money. Yet the Court chose to use none of those words, suggesting that the decision does not require application of the *Nollan/Dolan* test to expenditures.¹⁹⁵

Ct. 2586 (No. 11-1447). Finally, the District’s brief explained that “unlike the agencies in *Nollan* and *Dolan*, the District did not demand that petitioner perform any particular form of mitigation or relinquish any property interest.” Brief for Respondent at 40, *Koontz*, 133 S. Ct. 2586 (No. 11-1447).

193. *Koontz*, 133 S. Ct. at 2591. The District offered to grant Koontz permission to fill a smaller area of wetlands without imposing this condition. Ordinarily, a government agency need only offer one constitutional option to a permit applicant. *Id.* at 2597. The Supreme Court did not apply that rule here because Koontz “sought to develop 3.7 acres, but [the District] in effect told [Koontz] that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands. [Koontz] claims that he was wrongfully denied a permit to build on those 2.7 acres.” *Id.* at 2598.

194. *Id.* at 2600.

195. In the context of statutory construction, the Supreme Court has acknowledged that where language supports multiple interpretations, the existence of alternative, simpler means of conveying one of the possible meanings counsels against its adoption. *See* *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994) (“Congress knew how to impose aiding and abetting liability when it chose to do so.”); *Bailey v. United States*, 516 U.S. 137, 143 (1995) (“Had Congress intended possession alone to trigger liability . . . , it easily could have so provided.”); *see also* *FMC Corp. v. Holliday*, 498 U.S. 52, 66 (1990) (Stevens, J., dissenting) (“If Congress had intended such an irrational result, surely it would have expressed it in straightforward English.”); *In re Hill*, 715 F.3d 284, 298 (11th Cir. 2013) (rejecting one interpretation of the Antiterrorism and Effective Death Penalty Act because had Congress desired that meaning to control it “easily” could have made the text clear); *La.-Pac. Corp. v. ASARCO, Inc.*, 24 F.3d 1565, 1573 (9th Cir. 1994) (rejecting one interpretation of a

B. Koontz's Factual Context

Distinguishing between fees and expenditures offers a theoretically sound and practically useful means of investing the *Koontz* decision with meaning, protecting property owners from governmental expropriation, and avoiding significant new burdens for government agencies seeking to protect the public from the adverse consequences of industrial, commercial, and residential development. There is, however, an obstacle to interpreting *Koontz* in the fashion suggested by this Article. Simply put, the condition proposed by the District looks more like an expenditure than a fee. According to the Supreme Court's description, the District suggested that it would grant Koontz a permit to fill the wetlands he requested if he agreed "to hire contractors to make improvements to District-owned land several miles away. Specifically, [he] could pay to replace culverts on one parcel or fill in ditches on another."¹⁹⁶ This condition requires no direct transfer of property from Koontz to the government, and so would appear to constitute an expenditure, not a fee. For three reasons, however, this is not fatal to this Article's proposed approach of limiting the *Nollan/Dolan* test to fees, and not expenditures.

First, contrary to the facts on the ground, the Court found that the condition at issue required a transfer of property to the government. As discussed in the last section,¹⁹⁷ the Court explained that the District demanded that Koontz "sign[] over [a property] interest," or put another way, "transfer an interest in property from the landowner to the government."¹⁹⁸ The Supreme Court occasionally finds or characterizes facts on its own, and these facts are not always correct.¹⁹⁹ Nonetheless, they should be viewed as a predicate for the Court's decision.²⁰⁰

Second, the Supreme Court's seemingly mistaken characterization of the condition at issue is particularly understandable because neither the parties nor the Florida Supreme Court identified the difference between fees and expenditures as important to exactions law. The Florida Supreme Court viewed the legal issue as whether the *Nollan/Dolan* test applied only to real property exactions or extended "beyond the context of the imposition of real property

statute based, in part, on an explanation that had Congress wanted that meaning to control "it easily could have done so").

196. *Koontz*, 133 S. Ct. at 2593.

197. See *supra* notes 193–94 and accompanying text.

198. *Koontz*, 133 S. Ct. at 2591, 2600.

199. See, e.g., Editorial, *Supreme Slip-Up*, WASH. POST, July 5, 2008, at B6.

200. Similarly, the famous contracts case *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Exch. 1854), is read as establishing a rule of foreseeability predicated on one contracting party failing to disclose its particular sensitivity to a breach of a contract even though the record before the court strongly indicated that such a disclosure did, in fact, occur. See Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 253–54 (1975). Just as that court's decision should be read in light of its stated findings, even though those run contrary to the apparent facts as they actually existed, so too should *Koontz* be interpreted based on the Court's finding that the condition at issue involved a transfer of property to the government.

conditions on real property,”²⁰¹ and explained that it “decline[d] to expand this doctrine beyond the express parameters for which it has been applied by the High Court.”²⁰² In other words, the Florida Supreme Court decided only that the *Nollan/Dolan* test does not apply to conditions other than those that require a dedication of real property, and treated all other conditions as the same. The parties’ briefs largely followed suit. Koontz argued that the *Nollan/Dolan* test applies equally to “[g]overnment demands for real or personal property,” and treated all such demands as involving “confiscations” or property.²⁰³ The District’s brief gestured at the distinction between fees and expenditures when it explained that the condition the District proposed “did not demand a monetary exaction from [Koontz’s] pockets into the government’s coffers.”²⁰⁴ The District also argued that Koontz failed to identify limiting principles that would exclude from heightened scrutiny taxes, administrative fees, and costs incurred to bring an applicant “into compliance with a generally applicable regulatory standard.”²⁰⁵ But the District did no more than identify these potential problems with expanding the scope of the *Nollan/Dolan* test. It did not argue that the Court should distinguish between fees and expenditures.

Third, the condition imposed by the District could be understood to direct a transfer of property (in the form of payment) to the specified contractors. In other circumstances, government entities invoke the power of eminent domain to effectively direct transfer of property from one private party to another.²⁰⁶ These transactions involve a transfer of property to the government, followed by a transfer of property to a private party. *Hawaii Housing Authority v. Midkiff*, for example, involved a legislative scheme that allowed tenants to ask a state agency to condemn the homes in which they lived, and then sell those homes to the tenants.²⁰⁷ The permit condition at issue in *Koontz* could be conceptualized similarly. In other words, by directing payment to specified contractors, the District could be viewed as a middleman. The permit condition would involve a transfer of property to the government followed by a transfer of property to a third party. So conceptualized, the condition imposes a fee. If, however, the condition had imposed on Koontz affirmative obligations “to

201. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1229 (Fla. 2012), *rev’d*, 133 S. Ct. 2586 (2013).

202. *Id.* at 1230.

203. Brief for Petitioner at 13, 21–22, *Koontz*, 133 S. Ct. 2586 (No. 11-1447); *see also id.* at 25 (“Even if the holding in *Nollan* and *Dolan* could be parsed to give the District unbridled power to confiscate property in the permit process, the potential for government abuse of permit applicants would be limitless.”).

204. Brief for Respondent at 43–44, *Koontz*, 133 S. Ct. 2586 (No. 11-1447).

205. *Id.* at 48–49.

206. *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005) (considering Takings Clause challenge to economic redevelopment plan under which city condemned property and intended to sell it to other private parties); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (considering Takings Clause challenge to legislation authorizing state agency to condemn property and sell it to tenants living in that property).

207. *Haw. Hous. Auth.*, 467 U.S. at 234.

replace culverts on one parcel or fill in ditches on another,”²⁰⁸ it would be an expenditure.²⁰⁹

The Supreme Court’s decision, then, should be understood in light of its conclusion that the condition offered by the District involved a transfer of title, and the absence of any arguments in litigation that fees and expenditures are legally distinct. Alternately, the decision has no application to permit conditions that do not direct a transfer of property to a third party. So understood, the Court’s decision extends the *Nollan/Dolan* test only to fees—i.e., conditions that require a transfer of property to the government—and leaves open the question of whether that test also applies to expenditures.

CONCLUSION

In her eloquent dissent, Justice Elena Kagan worries that the *Koontz* decision “threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny.”²¹⁰ I share that worry. Indeed, I worry that much of federal environmental law could become subject to the same scrutiny. The diligent student of takings jurisprudence may dismiss my concern—after all, the Supreme Court once explained that the *Nollan/Dolan* test does not extend “beyond the special context of exactions—land use decisions conditioning approval of development on the dedication of property to public use.”²¹¹ Perhaps there is something unique and distinct about land use regulation that differentiates it from environmental and natural resources regulation.

But I take little comfort in this line of argument. After all, what counts as a “land use decision”? The federal Clean Water Act protects against the filling of wetlands just like the Florida Water Resources Act at issue in *Koontz*.²¹² I find

208. *Koontz*, 133 S. Ct. at 2593.

209. Treating all permit conditions directing transfers of property as fees masks important differences—both conceptual and practical—between conditions directing transfers to the government and those directing transfers to third parties. Conceptually, sweeping such conditions within the scope of fees subject to scrutiny under *Nollan/Dolan*, requires rewriting the transaction in the way discussed. Practically, such a limitation is unnecessary because the “public use” requirement of the Takings Clause already provides meaningful limits, as discussed *supra* notes 153–56 and accompanying text.

210. *Koontz*, 133 S. Ct. at 2603 (Kagan, J., dissenting). Similar concern extends broadly to the categorical rules the Supreme Court occasionally deploys in takings cases. Such rules interfere with the complex business of protecting public values in the land use and environmental setting. As Mark Fenster explained, “[C]ourts, legislatures and regulators are struggling to find acceptable resolutions to complicated land use conflicts—resolutions made more difficult to craft by the relatively blunt instruments of the Court’s categorical takings rules.” Fenster, *supra* note 62, at 616. Fortunately, these categorical rules have largely been relegated to rare circumstances. See *supra* notes 51–56 and accompanying text. After *Koontz*, the question becomes whether the Court will similarly retrench with respect to exactions law and narrow the application of the *Nollan/Dolan* test.

211. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

212. Compare 33 U.S.C. §§ 1311(a), 1344(a) (2012) (prohibiting discharge of fill materials into waters of the United States in the absence of a permit) with Fla. Stat. §§ 373.403(5), 373.413(1) (2011) (requiring permit for any “works” “placed in or across the waters in the state”).

it implausible that the Court would distinguish between two permits addressing the same public harm and imposing the same conditions simply because one was issued by a federal environmental agency and the other by a local land use agency.²¹³ And if the federal and local agencies are treated the same and federal permits authorizing the filling of wetlands are now subject to heightened scrutiny, what insulates permits issued under other federal environmental and natural resources regimes from being subjected to similar judicial treatment?

The specter of *Koontz* transforming the judicial review afforded to every permit applicant unhappy with conditions imposed by a regulatory agency need not come to pass. Both theoretical dimensions of takings law and the *Koontz* decision itself support the approach of distinguishing between fees and expenditures. When a permit condition imposes a fee, it may now be subject to the *Nollan/Dolan* test. When it causes an expenditure, however, no heightened scrutiny is appropriate. Adhering to that distinction would strike the right balance under the Takings Clause by providing greater protection for landowners when government seeks to appropriate property, while avoiding invasive judicial interference with government regulatory activities in service to the public interest.

213. The permits may even be issued by the very same agencies. The Clean Water Act authorizes states to seek and secure delegation of authority to issue permits under section 404 authorizing the filling of wetlands and other waters. See 33 U.S.C. § 1344(g). Few states have taken up this invitation, but that may change in the future. See VA. DEP'T OF ENVTL. QUALITY, STUDY OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF FEDERAL § 404 CLEAN WATER ACT PERMITTING PROGRAM 5 (2012), available at http://www.deq.virginia.gov/Portals/0/DEQ/LawsAndRegulations/GeneralAssemblyReports/404_Feasibility_Study_2012.pdf ("Currently, Michigan and New Jersey are the only States that have assumed the § 404 program.").

