Substantive Due Process Through the Just Compensation Clause: Understanding *Koontz*'s "Special Application" of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine's History

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Koontz v. St. Johns River Water Management District[1] recently resolved, at least to some extent, a question hounding judges, land use lawyers, developers, and commentators since the Supreme Court decided *Nollan v. California Coastal Commission*[2] and *Dolan v. City of Tigard*[3] in 1987 and 1994 respectively.[4] In *Koontz*, a five-justice majority held that in addition to real property, money exacted from a property owner during the land use permitting process must satisfy *Nollan*'s essential nexus test, as well as *Dolan*'s rough proportionality test.[5] The Court based its decision on the doctrine of "unconstitutional conditions,"[6] a doctrinal dinosaur that has staved off extinction since its judicial invention in the 1800s through a protean evolution in different contexts and areas of the law.[7] Understanding the Court's trilogy of decisions in *Nollan*, *Dolan*,

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1. 133 S. Ct. 2586 (2013).
2. 483 U.S. 825 (1987).
3. 512 U.S. 374 (1994).
4. *Cf.* Lauren Reznick, *The Death of* Nollan *and* Dolan*: Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. REV. 725, 738 (2007) (describing the state-level litigation and disagreement over whether *Nollan* and *Dolan* apply to monetary exactions immediately after the Court's decisions).
5. *See Koontz*, 133 S. Ct. at 2603.
6. *See generally id.* at 2594-603 (explaining the doctrine and how it applies to permit denials and monetary exactions).
7. *See* Cass R. Sunstein, *The Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 620 (1990) (calling the doctrine an "anachronism[,]" crude, general, and incompatible with

and *Koontz* requires understanding the doctrine of unconstitutional conditions, which in turn requires tracing its development.

In its basic formulation—although the Court has applied the doctrine in a remarkably inconsistent fashion over the years, when it has applied it at all[8]—the doctrine says that "the government may not deny a benefit to a person because [that person] exercises a constitutional right."[9] The doctrine may be used to stop the government from punishing one who exercises a constitutional right or pressuring someone to waive a constitutional right.[10] In other words, the doctrine prohibits the government from doing indirectly what it cannot do directly,[11] so that even if the government may withhold a benefit altogether, it generally cannot condition the benefit on the beneficiary's relinquishment of a constitutional right.[12] Benefits protected by the doctrine include things like business licenses,[13] tax exemptions,[14] employment contracts,[15] medical care,[16] unemployment benefits,[17] food stamps,[18] pre-trial release from jail,[19] and building permits.[20]

Since the mid-1800s the Court has applied the doctrine in different contexts and with different rationales to laws alleged to burden constitutional rights.[21] The Court's application of the doctrine in different settings varies—like a "quilt" of individual segments within a

making sense of our modern government); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415-17 (1989) (describing the doctrine and its development through the major "divisions and shifts of temperament of the Court").

8. *See* Sullivan, *supra* note 7, at 1416.

9. *Koontz*, 133 S. Ct. at 2594 (quoting Regan v. Taxation With Representation, 461 U.S. 540 (1983)).

10. Sullivan, *supra* note 7, at 1416-17.

11. Lynn A. Baker, *The Price of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1193-94 (1990); Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 (1988).

12. Sullivan, *supra* note 7, at 1415; Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 321 (1935).

13. *E.g.*, Doyle v. Continental Ins. Co., 94 U.S. 535, 537 (1876).

14. *E.g.*, Speiser v. Randall, 357 U.S. 513, 514-15 (1958).

15. *E.g.*, Perry v. Sindermann, 408 U.S. 593, 597-98 (1972).

16. *E.g.*, Memorial Hosp. v. Maricopa Cnty., 415 U.S. 250, 252 (1974).

17. *E.g.*, Sherbert v. Verner, 374 U.S. 398, 410 (1963).

18. *E.g.*, Lyng v. Castillo, 477 U.S. 635, 635-36 (1986).

19. *E.g.*, U.S. v. Scott, 450 F.3d 863 (9th Cir. 2005).

20. *E.g.*, *Koontz*, 133 S. Ct. at 2592.

21. *See* Baker, *supra*, note 11, at 1186 n.4; Sullivan, *supra* note 7, at 1415-17. Perhaps the first case in which the Court applied the doctrine's rationale is *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1855) (concluding that the State of Ohio could place conditions on the right of foreign corporations to engage in business in the state so long as they were constitutional). Baker, *supra* note 11, at 1186 n.4.

broader doctrinal border.[22] Scholars describe the doctrine as "riven with inconsistencies[,]" "a minefield to be traversed gingerly[,]" and say that it "confound[s] courts" and suffers from an "unfortunate lack of clarity . . . ."[23]

In Parts I through III, this paper discusses the Court's evolution in formulating the doctrine by focusing on the absolute-power versus germaneness themes, especially in the early corporate rights cases, some law enforcement cases, and federalism cases. Part IV looks at the doctrine applied to the Free Speech and Free Exercise Clauses, focusing on the Court's framing of conditions as coercive or as penalties, versus non-subsidies. Part V addresses the Court's application of the doctrine to certain un-enumerated rights. Part VI takes a step back and tries to make sense of the doctrine based on the cases discussed in Parts I through V. Then, Part VII focuses on land use exactions, explaining what they are, and how the doctrine applies to them through the Just Compensation Clause; that discussion focuses on the Court's trilogy of decisions in *Nollan*, *Dolan*, and *Koontz*. In Part VIII, this paper contends that the Court's application of the doctrine to land use exactions is a new form of substantive due process through the guise of a takings analysis in which the Court pulls land use planning decisions that traditionally received more judicial deference into a stricter, substantive review, expanding the Just Compensation Clause's protection of property rights. Part IX discusses the doctrine's current formulation to land use exactions after *Koontz* and potential agency responses to *Koontz*, and Part X briefly concludes.

I. Absolute Power Versus Germaneness

Whether a condition is germane often decides unconstitutional conditions cases.[24] However, what exactly that means is not always clear.[25] Commentators describe germaneness as a "heuristic device" to weed out conditions meant to pressure constitutional rights that deserve heightened scrutiny.[26] Generally, the less germane a condition, the

22. Baker, *supra* note 11, at 1196.

23. *Id.* at 1186; Sullivan, *supra* note 7, at 1416; Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs, 692 F.3d 343, 349 (5th Cir. 2012).

24. Brooks R. Fudenberg, *Unconstitutional Condition and Greater Powers: a Separability Approach*, 43 UCLA L. REV. 371, 413 (1995).

25. *Id.*

26. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 92 (2001); Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051, 1084-85 (1995).

more strictly the Court will review the condition.[27] Some, like Justice Scalia, contend a condition is germane when the government's justification for imposing the condition is the same justification that the government could rely on to withhold the benefit.[28] That is a narrow idea of germaneness relative to that in the Court's decision in *South Dakota v. Dole*, authored by Justice Rehnquist, in which the Court formulated germaneness as a rational relationship between the condition and a broadly defined legitimate government interest.[29] This debate is an important theme in unconstitutional conditions cases.

Criticism of germaneness is that its application can be manipulated and it is unclear whether the degree of connection should receive heightened judicial review, or whether a general rational relationship between the two is sufficient.[30] What level of review to use in different situations is the primary battle fought in unconstitutional conditions cases.[31] It seems a fair assertion that no judicial officer is immune from the attack that the doctrine is often used to advocate for heightened judicial review in some areas (and not others) based on personal policy preferences.[32]

A. *Early Cases*

The Court invented the doctrine of unconstitutional conditions during the *Lochner* era[33]—although it did not always state the doctrine by that name—and first used it as a means to invalidate states' regulation of corporations.[34] The Court's early decisions were inconsistent in that

27. Sullivan, *supra* note 7, at 1458.
28. *Id.* at 1457; *see Nollan*, 483 U.S. at 836-37.
29. Fudenberg, *supra* note 24, at 414 (citing South Dakota v. Dole, 483 U.S. 203 (1987)). Although Justice Rehnquist supported a broader interpretation in that case, which addressed the Spending Clause, he supported a narrower interpretation in the context of property rights and the Just Compensation Clause in *Dolan*.
30. Fudenberg, *supra* note 24, at 414.
31. *See id.* at 394.
32. *Id.* at 379 & n.46 (providing examples of that and commenting that "[v]irtually every justice" who has been involved in unconstitutional conditions cases is inconsistent regarding the greater-lesser rationale, arguing for a more absolute view of it when in service of policy choices they approve of and a narrower view when they want to more critically review legislation).
33. The term "the *Lochner* era" refers to the period roughly between 1880 and 1940 in which the Court used the Fourteenth Amendment Due Process Clause to evaluate the substance of economic regulation, much of which it invalidated under the theory that it violated individual's constitutional right to be free from excessive government interference. Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 379-80, 442 (1988). The name comes from the famous case characteristic of that approach, *Lochner v. New York*, 198 U.S. 45, 62-64 (1905), in which the Court ruled that New York's law that established maximum hours that bakers could work in a week interfered with their freedom of contract and, therefore, violated the Due Process Clause. *Id.*
34. *See* Sullivan, *supra* note 7, at 1505; Baker, *supra* note 11, at 1186 n.4.

the Court first rejected any kind of germaneness requirement, and then reversed track.[35] The first view the Court adopted was the "absolute power" formulation of the greater-lesser rationale, in which no condition is unconstitutional.[36] *Doyle v. Continental Insurance Co.*[37] is characteristic of that view.

In *Doyle*, the plaintiff corporation challenged Wisconsin's law that a foreign corporation wanting to do business in the state had to give up its right to remove lawsuits from state to federal court.[38] The benefit to the corporation was the business license.[39] The right to be relinquished was the corporation's right under the Judiciary Act to remove lawsuits from state to federal court, which is a constitutional right.[40] In *Doyle*, the Court reasoned that the state's greater inherent power to give permission to particular businesses to operate within its borders necessarily included the lesser power to give that permission conditioned on the corporation's waiver of its right to remove lawsuits from state to federal court.[41] According to the Court, the corporation had the option of whether to accept the state's offer, so even if it voluntarily relinquished the right, the corporation was not being unconstitutionally compelled to do so.[42] The Court upheld the condition.[43]

However, that absolute view of the greater-lesser rationale was heavily criticized and the opposite principle ultimately became the favored approach—that the greater power does not necessarily include the lesser power to attach unconnected conditions to the receipt of a benefit.[44] *Terral v. Burke Construction Co.*,[45] which has similar facts to *Doyle*, shows the Court's reversal. In *Terral*, the plaintiff challenged Arkansas' statute that, likewise, required foreign corporations

35. Sullivan, *supra* note 7, at 1458.
36. *Id.*
37. Doyle v. Cont'l Ins. Co., 94 U.S. 535 (1876).
38. Fudenberg, *supra* note 24, at 433. For an example, see *Doyle*, 94 U.S. at 537-41.
39. *See Doyle*, 94 U.S. at 540 (describing the corporation's complaint detailing how the state could revoke its license).
40. *Id.* at 538. The Judiciary Act guarantees foreign defendants a right to remove lawsuits to federal court, which courts have interpreted as based in Article III of the United States Constitution because it was necessary to implement the Constitution's concept of federal diversity jurisdiction. Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U.L. REV. 609, 613-14, 618 (2004).
41. *Id.* at 540-42 ("If the [s]tate has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.").
42. *Id.* at 542; Sullivan, *supra* note 7, at 1429.
43. *Doyle*, 94 U.S. at 542.
44. *Cf.* Frost & Frost Trucking Co., v. R. R. Comm'n, 271 U.S. 583 (1926); W. Union Tel. Co. v. Kansas, 216 U.S. 1 (1910).
45. Terral v. Burke Constr. Co., 257 U.S. 529 (1922).

doing in-state business to relinquish their right to remove lawsuits to federal court.[46] In striking down the statute, the Court rejected its earlier greater-lesser reasoning and stated the following:

> [t]he principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not.[47]

The Court restated and elaborated on the doctrine in *Frost & Frost Trucking Co., v. Railroad Commission of the State of California*[48] when it said:

> [i]t is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[49]

In *Frost*, the State of California conditioned a foreign corporation's use of the state highways on requiring the foreign corporation to purchase common-carrier liability insurance even though its business was unrelated to that of a common carrier.[50] The California Supreme Court approved, reasoning the state could impose whatever conditions it saw fit because it had the greater power to deny access to the highways.[51] Like the Court's conclusion in *Terral*—that the condition exacted a waiver from the corporation—in *Frost*, the Court concluded that the corporation had no meaningful choice other than to purchase the insurance and become a common carrier so as to gain the state's business; the corporation would rather take a small profit than none at all.[52] According to the Court, the condition was un-germane to regulating the use of the highways and, instead, was a way to control the competitive conditions in the common-carrier market.[53] Because of that suspicion, the Court

46. *Id.* at 530-33.
47. *Id.* at 532.
48. 271 U.S. 583 (1926).
49. *Id.* at 593-94.
50. *Id.* at 589-90.
51. *Id.* at 593.
52. *See id.* at 593 (noting that doing in-state business might be necessary for the corporation's survival).
53. *See id.* at 591 ("It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the businesses of those who are engaged in using them.").

reviewed the condition more strictly and ultimately concluded that the coercive condition violated the corporation's due process rights.[54]

Generally speaking, the absolute power formulation of the greater-lesser rationale was abandoned in favor of a more nuanced germaneness theory. However, the Court has described its application of the doctrine since the *Lochner* era in terms of the greater-lesser rationale, so that logic is still relevant.[55]

B. *The Greater-Lesser Rationale Returns in* Posadas

In *Posadas de Puerto Rico Associates v. Tourism Co.*,[56] Puerto Rico banned certain casino advertising to Puerto Rican residents but allowed such advertising in publications directed at tourists.[57] Plaintiffs argued that the law effectively conditioned the right to operate a casino on the operator's surrender of its Free Speech Clause rights.[58] Writing for a majority of the Court, Justice Rehnquist reasoned that because "the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether . . . the greater power to completely ban casino gambling necessarily included the lesser power to ban advertising of casino gaming . . . ."[59]

Although the Court seemed to rely on an absolute power formulation of the greater-lesser rationale, perhaps the Court could have upheld the ban using germaneness because the advertising prohibition arguably served the same purpose that a total ban on gambling would serve,[60] which was a desire to reduce gambling by Puerto Ricans.[61] In dissent Justice Brennan wanted to apply strict scrutiny to the commercial speech regulation and argued that even if the restrictions were supported by a substantial government interest, the state failed to show its regulation directly advanced that interest and that it was the narrowest means of doing so.[62] Even when the Court does not use a broad formulation of the greater-lesser rationale, in other contexts the rationale's reasoning is still relevant

54. *Id.* at 596-600.
55. *Cf.* Posadas de P. R. Assoc. v. Tourism Co. 478 U.S. 328, 345-46 (1986) (concluding that the State of Puerto Rico's greater power to prohibit gambling advertising included the lesser power to regulate certain gambling advertising).
56. *Id.*
57. *Id.* at 330-32.
58. *Id.* at 337-38.
59. *Id.* at 345-46.
60. Sullivan, *supra* note 7, at 1464.
61. *Posadas,* 478 U.S. at 341.
62. *Id.* at 351, 355-56 (Brennan, J., dissenting). The balancing test the Court used—which is the Court's rationale for regulating commercial speech—is embodied in Central Hudson Gas & Elect. Corp. v. Pub. Serv. of N. Y., 447 U.S. 2343 (2005).

II. Law Enforcement Monopoly Power

The Ninth Circuit Court of Appeals discussed and rejected the greater-lesser rationale in *United States. v. Scott*,[63] a more recent Fourth Amendment search and seizure case. The court cited *Doyle* to note the temptation of the broad greater-lesser rationale's logic.[64] In *Scott*, as a condition of a prisoner's pre-trial release from jail following his arrest on a drug charge, the prisoner waived his Fourth Amendment right to be free from unreasonable searches and seizures by consenting to warrantless drug testing and warrantless searches of his home for drugs.[65] Because the government could have kept him in jail until trial, the court noted it naturally seemed fair to allow him to trade his Fourth Amendment rights to be otherwise free until then.[66] However, focusing on the government's monopoly power in the law enforcement context, the court reasoned that "[g]iving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections."[67] Accordingly, the Court ignored his waiver of rights and went on to analyze the reasonableness of the search, concluding it was unreasonable and, therefore, violated the Fourth Amendment.[68]

In another Fourth Amendment case, the First Circuit Court of Appeals concluded that a prison unconstitutionally conditioned all visits to prisoners on the guests' submission to strip searches.[69] Focusing on the unreasonableness of the search and rejecting the state's argument that the visitors were free to choose whether to submit to the search, the court reasoned "it is *the very choice to which [the plaintiff-guest] was put* that is constitutionally intolerable . . . ."[70] Invalidating the plaintiff-guest's consent, the Court concluded the search violated the Fourth Amendment.[71]

The doctrine is also used to protect the Fifth Amendment right against self-incrimination in various contexts.[72] In *Lefkowitz v. Cun-*

63. 450 F.3d 863 (9th Cir. 2005).
64. *Id.* at 866 (citing *Doyle*, 94 U.S. at 542).
65. *Id.* at 865.
66. *Id.* at 866.
67. *Id.* at 889.
68. *Id.* at 866-75.
69. Blackburn v. Snow, 771 F.2d 556, 559, 568 (1985).
70. *Id.* at 568 (emphasis in original).
71. *Id.*
72. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); Garrity v. New Jersey, 385 U.S. 493, 497 (1967).

ningham[73] the Court invalidated the State of New York's law conditioning political party officers' employment on waiving their right against self-incrimination after the state fired an officer for asserting his right against self-incrimination and he refused to testify. The Court stated, "[W]hen a [s]tate compels testimony by threatening to inflict potential sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendmen and cannot be used against the defendant in a criminal prosecution."[74] Likewise, in *Garrity v. New Jersey*,[75] the Court concluded that the state violated several police officers' rights against self-incriminatio when the state told the officers they would be fired if they refused t testify. The Court compared the state's coercion of the officers to th coercion states used to impermissibly induce corporations to waiv their right to remove lawsuits to federal court or engage in interstat commerce, which were unconstitutional conditions.[76] Because the offi cers waived their privilege at the time and only objected to use o their testimony later, the Court held that their statements could n be used.[77] Implicit in that holding is the fact that if the officers had ob jected to the condition and been fired, the state, like in *Lefkowit* would have directly violated their Fifth Amendment rights agains self-incrimination.

Unconstitutional conditions claims in contexts involving allegatio of coercion related to states' law enforcement power are unsurprising b cause of the vast and monopolist nature of law enforcement power an have, in some circumstances, proven successful. Attempts to use the c ercion argument in the context of the state-nation relationship have, ho ever, for the most part, failed.[78]

III. The Broad View of Germaneness in Federalism Cases

The Tenth Amendment provides: "[t]he powers not delegated to t United States by the Constitution, nor prohibited by it to the State

73. *Lefkowitz*, 431 U.S. at 801, 802-03.
74. *Id.* at 805.
75. *Garrity*, 385 U.S. at 493, 494.
76. *Id.* at 498, 500.
77. *Id.*
78. *Cf.* South Dakota v. Dole, 483 U.S. 203, 205 (1987) (rejecting the state's ar ment that the condition placed by Congress on a state's receipt of federal funds fringed on the state's ability to regulate the drinking age).

are reserved to the States respectively, or to the people."[79] There are a number of cases in which the federal government allocates funds to states but attaches conditions that intrude in areas normally reserved for states to legislate. More often than not, the Supreme Court liberally construes the scope of Congress's spending power.[80] As such, states' attempts to characterize federal spending conditions as coercive have been mostly unsuccessful;[81] the Court uses a broad view of germaneness to uphold conditions that the Court concludes have a rational relationship to a government interest.[82]

United States v. Butler,[83] the first case to apply the unconstitutional conditions doctrine in that context, however, provides one exception to the rule. In *Butler*,[84] the Court used the doctrine to hold Congress's regulation of state agricultural crops through the Agricultural Adjustment Act of 1933[85] as beyond Congress's authority. In *Butler*, to raise the overall value of farm crops, the law authorized the Secretary of Agriculture to pay farmers to reduce their crop production.[86] Some farmers thought the effect of the program was to dilute the value of their crops, and the Court described the issue like the fake-choice as in *Frost*: i.e., whether to accept the government's payment (a benefit), was really involuntary.[87] Although the Court saw the choice as fake, its primary concern was stopping Congress from reaching a result through the Spending Clause that the Commerce Clause and the Tenth Amendment prohibited it from doing directly.[88] At that time, the Court found that Congress did not have the authority to directly regulate intra-state agricultural crops, a power reserved to the states.[89]

Ultimately, the Court's decision in *Butler* proved to be an anomaly. Next, to the contrary, the Court repeatedly concluded that federal con-

79. U.S. CONST. amend. X.
80. *See* Aviam Soifer, *Truisms that Never Will be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 800 (1986) (noting that over the years the Congress's spending power has seemed to expand while the Tenth Amendment has seemed to disappear).
81. *See* Sullivan, *supra* note 7, at 1432 (commenting that the Court pays "lip service" to the one successful case applying the doctrine in this context).
82. *Cf. Dole*, 483 U.S. at 209 (describing the condition as "reasonably calculated to address" the states asserted interest).
83. United States v. Butler, 297 U.S. 1 (1936).
84. *Id.* at 78.
85. Pub. L. No. 73-10, 48 Stat. 31.
86. *Butler*, 297 U.S. at 34.
87. *See id.* at 72.
88. *Id.* at 68, 70-72, 78. ("At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.").
89. *Id.*; Sullivan, *supra* note 7, at 1431.

ditions on states incentivized, but did not rise to the level of coercing states and that the conditions were within the scope of legitimate federal regulatory authority.[90] Characteristic of that approach is *Steward Machine Co. v. Davis*.[91] In *Steward Machine*, the unemployment compensation provisions of the Social Security Act of 1935[92] set up a national tax structure that required, in part, the cooperation of states to enact state-level unemployment laws collecting payroll tax to be deposited into the federal treasury and distributed nationally in participating states.[93] One of the arguments against the law was that rather than merely intending to collect revenue, the federal government's ulterior motive was to interfere with states' autonomy and that states were coerced into complying with the law.[94]

The Court discussed and distinguished its decision in *Butler* from the year before, concluding that it could draw a line between temptation and coercion.[95] The Court said that the laws attackers "confuse[d] motive with coercion[,]"[96] and the Court saw the state's choice to participate in the federal program as real:

> [E]very rebate from a tax when conditioned upon conduct is in some measure a *temptation*. But to hold that *motive* or *temptation* is equivalent to *coercion* is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. . . . Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.[97]

By describing the conditions as inducements or temptations and noting the state-nation relationship, the Court seemed to question whether federalism and the Spending Clause is an appropriate context in which to apply the doctrine at all.

In *South Dakota v. Dole*,[98] the Court's decision indicated these concerns are not overriding, or at least that the lowest level of scrutiny

90. *Cf.* Steward Mach. Co. v. Davis, 301 U.S. 548, 585 (1937) ("[T]he excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."); Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 144 (1947).
91. *Steward Machine*, 301 U.S. at 553-54.
92. Pub. L. No. 74-271, 49 Stat. 620.
93. *Steward Machine*, 301 U.S. at 573-75.
94. *Id.* at 578, 585-86 ("[S]tates in submitting to [the law] have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.").
95. *Id.* at 586, 590 ("Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, . . . at times, perhaps, of fact.").
96. *Id.* at 589.
97. *Id.* at 589-90 (emphasis added).
98. 483 U.S. 203 (1987).

applies. In *Dole*, Congress conditioned South Dakota's receipt of federal highway funds on the state's raising of its drinking age to twenty-one.[99] The state used the *Butler* argument—that the federal government was orchestrating an end run around the Twenty-First Amendment and that the state had no real choice but to accept the condition and relinquish part of its sovereign authority because it needed the funding.[100]

The Court upheld the condition.[101] Even if Congress could not directly mandate a minimum nationwide drinking age, Congress could, effectively, do just that through the Spending Clause.[102] The majority viewed the condition as sufficiently germane to the government's underlying basis for the condition in that there was a rational relationship between requiring the higher drinking age and highway safety generally.[103] Justice O'Connor, in her dissent, more narrowly viewed the conditions as un-germane to the program's purpose of funding highway construction and an invalid exercise of the spending power because it was really meant to regulate alcohol sales, which amounted to an end run around the Twenty-First Amendment.[104]

The majority emphasized the uniqueness of Congress's taxing and spending power, citing the Court's precedent that indicates such power is not limited in the same way as the United States Constitution's other delegations of powers.[105] Apparently referencing its decisions like *Butler* and *Steward Machine*, the Court said "[t]he language in our earlier opinions stands for the unexceptionable proposition that the [taxing and spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[106] Although the Court acknowledged that the state's potential loss of five-percent of its highway funds encouraged the state to increase its minimum drinking age, the potential loss did not coerce the state to make that choice and did not violate another constitutional right.[107]

99. *Id.* at 205.
100. *See id.* at 205-06, 209, 211 ("'Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment.'") (quoting Brief for Petitioner at 52-53). The state pointed to the federal government's success in getting states to raise their drinking ages with the spending condition as evidence of its coerciveness. *Id.* at 211.
101. *Id.* at 211-12.
102. *Id.* at 206.
103. *Id.* at 208-09.
104. *Id.* at 212 (O'Connor, J., dissenting).
105. *Id.* at 206-07.
106. *Id.* at 210.
107. *Id.* at 210-11.

The Court has been more receptive to individual's arguments that state and federal laws coerce them into relinquishing rights protected by the Bill of Rights, or, effectively, penalize them for refusing to relinquish those rights.[108]

IV. Coercion, Penalties, Non-subsidies, and Individual Liberties

A. *The Free Speech and Free Exercise Clauses*

Although the Court has applied the unconstitutional conditions doctrine to protect individual liberties since the 1950s, the Court has not used one consistent theory in doing so.[109] Cases with similar fact patterns may well come out differently.[110] In *Speiser v. Randall*,[111] California created a property-tax exemption for veterans conditioned on the veterans' giving an oath not to advocate for the overthrow of the United States government.[112] In contrast to the federalism cases discussed above, the *Speiser* Court viewed the condition more critically using a heightened standard of judicial review.[113] The Court declined to impose the usual burden on a plaintiff challenging a government's taxing authority, concluding both that the condition that veterans take the loyalty oath penalized the veterans' Free Speech Clause rights by denying them the property-tax exemption if they exercised their Free Speech Clause rights, and that it coerced the veterans into relinquishing their rights in order to obtain the benefit of the exemption.[114] Finding no compelling government interest to justify the condition, the Court held it violated due process.[115]

108. Sullivan, *supra* note 7, at 1505 (describing the Court's perpetuation of the doctrine from the corporate rights context to protect personal liberties).
109. *Cf., e.g.*, Speiser v. Randall, 357 U.S. 513, 529 (1958) (invalidating California statute violating Free Speech Clause); Sherbert v. Verner, 374 U.S. 398 (1963) (invalidating South Carolina statute violating Free Exercise Clause); Sullivan, *supra*, note 7, at 1433.
110. *Compare Sherbert*, 374 U.S. at 408-10 (concluding that withholding unemployment benefits from Seventh Day Adventist because she refused to work on her Sabbath coerced her into giving up her Free Exercise Clause rights), *with* Emp't Div., Dep't., of Human Res. of Or. v. Smith, 494 U.S. 872, 874-75, 890 (1990) (refusing to apply the Court's holding in *Sherbert* to unconstitutional conditions claim by members of Native American Church who were fired for using peyote as part of their religious practice and subsequently denied unemployment benefits).
111. *Speiser*, 357 U.S. at 513 (1958).
112. *Id.* at 514-15.
113. *Id.* at 520-21 ("[T]he more important the rights at stake the more important must be the procedural safeguards surrounding those rights.").
114. *Id.* at 518-19, 524-25.
115. *Id.* at 528-29.

The Court used identical reasoning in a Free Exercise Clause-based challenge in *Sherbert v. Verner*.[116] In *Sherbert*, the state denied Plaintiff unemployment benefits because she refused to work on Saturdays, which, as a Seventh Day Adventist, was her Sabbath on which she felt religiously prohibited from working.[117] Similar to the phrasing of the Court's application of the doctrine in *Speiser*, the Court in *Sherbert* said that denying Plaintiff her unemployment benefits unconstitutionally burdened her Free Exercise Clause rights both by "forcing her to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of her precepts of her religion in order to accept work . . . ."[118] Further, it penalized her choice to freely exercise her religion by denying her unemployment benefits if she did so.[119] Regarding the penalty, the Court opined that even indirect fines could have the same effect as imprisonment, criminal fines, or taxes; and that the denial of unemployment benefits was effectively equivalent to the state directly fining the woman for worshipping.[120] Rejecting the state's asserted interests as less than compelling, the Court held the denial of benefits unconstitutional.[121]

In another Free Exercise Clause-based challenge, *Thomas v. Review Board of Indiana Employment Security Division*,[122] the Court reasoned that even indirect pressure on someone's religious exercise could be substantial and that when the state denies a benefit because of someone's religiously motivated conduct, the state burdens religious exercise. In *Thomas*, a Jehovah's Witness who conscientiously objected to war quit his job after his employer transferred him to a department within the company in which he had to make tank turrets.[123] The Court treated the condition as a First Amendment violation because the state lacked a compelling interest and noted the record lacked evidence that there were enough people that were forced to choose between their religious beliefs and unemployment benefits so as to create large-scale unemployment.[124]

Compared to those cases, however, not all of the Court's other First Amendment unconstitutional conditions cases easily square.

116. Sherbert v. Verner, 374 U.S. 398 (1963).
117. *Id.* at 410.
118. *Id.* at 403-04, 406.
119. *Id.*
120. *Id.* at 404 & n.5.
121. *Id.* at 406-10.
122. Thomas v. Review Bd. of Ind., 450 U.S. 707, 717-18 (1981).
123. *Id.* at 709-10.
124. *Id.* at 719.

In *United States v. Lee*,[125] the Court's application of the doctrine focused on the government's interest and found any potential coercion insufficient to violate the Free Exercise Clause. In *Lee*, an Amish employer claimed that the federal government's collection of social security taxes violated his and his Amish workers' Free Exercise Clause rights.[126] According to the Amish belief, it is considered a sin "not to provide for [one's] own elderly and needy."[127] Therefore, the Amish employer argued that it necessarily followed from the Court's precedent in *Sherbert* that the government's collection of Social Security taxes unconstitutionally penalized his and his workers' Free Exercise Clause rights. The Court heavily weighed the government's "very high" interest in maintaining a continuous, compulsory national social security system and concluded that accommodating the Amish's belief had to "yield to the common good."[128]

The Court's reasoning in *Lee* looks more like the Court's later application of the doctrine in *Employment Division Department of Human Resources of Oregon v. Smith*,[129] in which the Court focused on the government's interest in enacting "generally applicable criminal law[s]" and avoiding widespread religious exemption from "almost every conceivable [civic obligation]."[130] In *Smith*, the Court downplayed the potential burden of a denial of unemployment benefits on Native American church members' Free Exercise rights, which included using peyote as part of their religious exercise.[131] The Court distinguished *Sherbert* on the ground that the Court had avoided extending its holding in *Sherbert* beyond the employment compensation field and that it developed in the context of an individualized determination of employment benefits that looked at the applicant's specific circumstances, unlike this generally applicable law.[132]

125. United States v. Lee, 455 U.S. 252 (1982).
126. *Id.* at 254-55.
127. *Id.* at 255.
128. *Id.* at 257-59 ("Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'") (citing Braunfield v. Brown, 366 U.S. 599, 606 (1961)) (internal citations omitted).
129. *Emp'l Div.*, 494 U.S. at 874, 878-88 (1990).
130. *Id.*
131. *See id.* at 874, 885-90.
132. *Id.* at 883-84. *Bob Jones University v. Texas*, 461 U.S. 574, 578-83, 603-04 (1983), is a similar case in which the Court focused on the strong governmental interest in eradicating racism from educational facilities to reject two universities' unconstitutional conditions claims that were denied tax exempt status because they either racially discriminated against applicants or imposed racial dating bans, which they argued were part of their sincere religious beliefs.

Comparing cases like *Speiser*, *Sherbert*, and *Thomas* to cases like *Lee* and *Smith* show how the doctrine can be manipulated in different contexts by weighing some factors more heavily than others in a balancing test. Perhaps trying to distinguish the Court's results in the First Amendment cases is why the doctrine is considered "wonderfully inconsistent."[133] The Court's reliance on measuring coercion and determining whether a condition penalizes a right is problematic and leads to that inconsistency.[134] When the Court calls a condition coercive, the Court is merely asserting a conclusion.[135] Further, that conclusion is normative in that it represents a value judgment by the justices about a particular condition or the effect of a condition.[136] Thus, applying the unconstitutional conditions doctrine is ripe for manipulation, whether conscious or not. In some circumstances however, the Court frames the issue so as to avoid analyzing conditions as coercive or as penalties at all, which is perhaps normative in its own way.

B. *Framing Penalties as Non-subsidies*

In *Regan v. Taxation With Representation of Washington*,[137] Justice Rehnquist added another layer to the Court's application of the doctrine in the First Amendment context with the non-subsidy rationale. Taxation With Representation (the group) was a nonprofit, taxation-oriented group organized to promote the "public interest."[138] The Internal Revenue Service (IRS) denied the group 501(c)(3) status because the IRS found that the group's activity would substantially consist of lobbying for legislative changes, which IRS rules prohibited 501(c)(3) groups from doing with subsidized funds.[139] The group argued that the IRS rules violated the group's Free Speech Clause rights by, effectively, coercing the group into abstaining from

133. Fudenberg, *supra* note 24, at 373-74.
134. *Cf.* Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 859-60 (1995) (noting that using a coercion theory is problematic because coercion references a sanction, like a fine, and that the typical unconstitutional conditions case is better viewed through a "waiver" lens in which the discretionary benefit gives the person more rather than fewer options).
135. Sullivan, *supra* note 7, at 1505-06.
136. *See id.* at 1506 ("Constitutional reasoning here lags behind the recognition, in both philosophy and private law, that coercion in the absence of physical compulsion or force is not an empirical concept but a normative one that necessarily refers to value lying beyond the value of autonomy itself.").
137. 461 U.S. 540 (1983).
138. *Id.* at 541-42.
139. *Id.* at 543.

lobbying;[140] and citing *Speiser*, that the IRS's denial of the group's 501(c)(3) application penalized the group's Free Speech Clause rights by prohibiting it from receiving tax-deductible contributions just because it lobbied.[141]

The Court rejected the group's comparison to *Speiser* and avoided discussing coercion by relying on its precedent that the Free Speech Clause does not require Congress to subsidize lobbying.[142] Rather than coercing the group, the IRS rule represented the policy choice not to subsidize lobbying with taxpayer money.[143] Accordingly, the Court asserted that it did not need to remove impediments to peoples' exercise of rights that it did not put in place.[144]

The Court's characterization of conditions as subsidies in *Regan* shows how the unconstitutional conditions framework can be altered depending on how the condition is viewed.[145] The Court in *Regan* assumed as a baseline not that all nonprofit activities are subsidized, but that no lobbying activities are subsidized.[146] The Court's framing of the issue in that way allowed it to pay less attention to the potential deterrent effect of the IRS rule on the group's lobbying activities; if the baseline is no subsidies for lobbying activities, it is logically impossible to conclude that the policy choice to subsidize one group's form of lobbying over another penalized the group that was not subsidized.[147] As the Court makes clear in the next case, however, for purposes of the non-subsidy issue, it mattered that the group in *Regan* could have received 501(c)(3) status if it was willing to segregate its money and actions.[148]

Four years later, this time rejecting non-subsidy phrasing, the Court decided *Federal Communications Commission v. League of Women Voters of California*.[149] After Congress passed the Public Broadcasting Act,[150] the Corporation for Public Broadcasting formed to disburse

140. *See id.* at 545 (describing the groups argument as relying on *Speiser*, and quoting the Court's penalty language from *Speiser*, 357 U.S at 518).
141. *See id.*
142. *Id.* at 545-46 (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)).
143. *Id.* at 546.
144. *See id.* at 550-51.
145. *Cf.* Sullivan, *supra* note 7, at 1441 (discussing the different levels of scrutiny that could have been applied to the condition in *Regan* depending on whether the condition was categorized as a ban on lobbying activities or as a tax benefit).
146. *Id.*
147. *Id.*
148. *Id.* at 1465 (noting that the group could be set up as a 501(c)(3) organization for its non-lobbying activities and a 501(c)(4) organization for its lobbying activities if it kept those parts separate, which the group had done in the past).
149. FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).
150. Pub. L. No. 90-129, 81 Stat. 365.

federal money to media companies.[151] However, no funds could be distributed to companies that engaged in editorializing.[152] Framing the question presented as an unconstitutional conditions challenge, Justice Brennan writing for the Court asked whether the benefit—the disbursement of federal funds—coerced recipient groups into relinquishing their Free Speech Clause rights.[153] The Federal Communications Commission (FCC) argued that the case was like *Regan*, i.e., that the FCC was simply choosing not to subsidize certain speech rather than restricting the organization's speech.[154] However, the Court distinguished *Regan* by reasoning that here, even if the organization's budget was only one-percent federal funding, the organization was prohibited from editorializing because it could not segregate its regulatory and funding functions.[155] Disposing of the FCC's non-subsidy argument,[156] the Court characterized the provision as a suppressive ban on speech that was too broad to support the asserted government interest.[157]

The Second Circuit Court of Appeals also recently rejected framing a Free Speech Clause unconstitutional conditions challenge as a non-subsidy in *Alliance for Open Society International, Inc. v. U.S. Agency for International Development*,[158] calling it "well beyond what the Supreme Court" has upheld as constitutional conditions on funding. There, the government interpreted a provision of the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act[159] to require groups that received funding to vocally oppose prostitution and sex trafficking.[160] The court cited the Supreme Court's non-subsidy line of cases and concluded that rather than prohibiting certain conduct to receive funding, the Act "compel[led] recipients to espouse the government's viewpoint[,]"[161] which is reminiscent of the *Speiser* line of cases in that the condition directly violated the First Amendment.

151. *League of Women Voters*, 468 U.S. at 366.
152. *Id.* at 380. The rationale was that public broadcasters could be subjected to additional constraints that private broadcasters were not subjected to because the constraints were meant to assure the public would "receiv[e] a balanced presentation of views on diverse matters of public concern.
153. *See id.* at 366.
154. *Id.* at 399.
155. *Id.* at 400; *Regan*, 461 U.S. at 544.
156. In dissent, joined by Justice White, Justice Rehnquist thought the Court's decision in *Regan* decided the case the other way. *League of Women Voters*, 468 U.S. at 405 (Rehnquist, J., dissenting) ("[In Regan, w]e squarely rejected the contention that Congress'[s] decision not to subsidize lobbying violates the First Amendment, even though we recognized that the right to lobby is constitutionally protected.").
157. *Id.* at 391, 395, 398.
158. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 234 (2d Cir. 2011), *reh'g denied*, 678 F.3d 127 (2012), *aff'g*, 133 S. Ct 2321 (2013).
159. Pub. L. No. 108-25, 117 Stat. 711.
160. *Alliance for Open Soc'y Int'l Inc.*, 651 F.3d at 223, 231-33.

V. Various Applications For Constitutionally Recognized Rights

A. *Legislative Refusal to Subsidize Abortions*

Courts' phrasing of certain conditions as non-subsidies rather than as penalties is not unique to the Free Speech Clause context.[162] One of those rights not explicitly listed in the Constitution to which the Court has applied the doctrine is abortion. After the Court's decision in *Roe v. Wade*,[163] plaintiffs used the unconstitutional conditions doctrine to challenge state and federal laws that limited funding for indigent women's abortions and limited access to abortion-related counseling.[164]

Such an unconstitutional conditions challenge arose in *Maher v. Roe*[165] after the State of Connecticut Welfare Department limited the receipt of state Medicaid benefits to women whose abortions were performed in the first trimester and were medically necessary.[166] The plaintiffs relied on *Shapiro* to argue that the restriction penalized women who chose to exercise their right to have an abortion.[167] Rejecting that characterization and setting out the non-subsidy rationale that the Court used in *Regan*[168] and *League of Women Voters*[169] discussed above, the Court reasoned that the right to abortion does not limit a state's authority "to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of

161. *Id.* at 223. For an example of a condition found not to unconstitutionally compel speech, see *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 51, 60 (2006), in which the Court concluded that a condition on law school funding that required law schools to allow military recruiters the same on-campus access as nonmilitary recruiters was constitutional because Congress could constitutionally compel the same result.
162. *E.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980) (applying the non-subsidy rationale to an unconstitutional challenge to a restriction on abortion).
163. Roe v. Wade, 410 U.S. 113, 153 (1973). In *Roe*, the Court based its holding on the constitutionally recognized right to privacy. *Id.* The Court found that right in the Fourteenth Amendment, while acknowledging the Court's precedents finding privacy interests protected by the First, Fourth, Fifth, and Ninth Amendments in different contexts. *Id.* at 152-53.
164. Maher v. Roe, 432 U.S. 464, 467 (1977); Rust v. Sullivan, 500 U.S. 173 (1991).
165. 432 U.S. 464 (1977).
166. *Id.* at 466.
167. *Id.* at 474 n.8.
168. *Regan*, 461 U.S. at 545.
169. *League of Women Voters*, 468 U.S. at 399-400.

public funds."[170] The Court acknowledged that being indigent makes it hard for poor women to get an abortion but that being indigent itself puts barriers on women's access to abortion, not the law.[171] As such, the law did not penalize a constitutional right.[172]

The Court repeated that reasoning in *Harris v. McRae*.[173] According to the Court in *Harris*, a woman's freedom of choice does not include "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[174] Congress could choose to subsidize nothing—not childbirth either—and then indigent women would have the same choices.[175] The Court's characterization of states' choices to subsidize childbirth but not abortion as non-subsidies proved fatal to unconstitutional conditions claims in this context.[176] The abortion cases show, again, how conceptualizing the unconstitutional conditions challenges can influence the outcome. In the abortion cases, for purposes of determining whether the right is penalized, instead of assuming as the baseline that all medical needs are subsidized to those who qualify, the Court assumes as a baseline that there is no subsidization of one specific procedure, abortion.[177]

Framing conditions as non-subsidies allowed the Court to be more deferential to legislative decisions than when it framed conditions as penalties. Similar to the Court's unwillingness to second-guess Congress's and states' policy choices favoring childbirth over abortion, the Court was unwilling to disturb Congress's policy choices regarding implementing its family-welfare distribution program.[178]

170. *Maher,* 432 U.S. at 474.
171. *Id.* ("An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the state's] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.").
172. *See id.*
173. Harris v. McRae, 448 U.S. 297 (1980).
174. *Id.* at 316.
175. *Id.* at 316-17. For another example, see *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Court used the non-subsidy rationale to quickly reject an unconstitutional conditions challenge to restrictions on funding for women's family planning services that included abortion-related planning, and citing *League of Women Voters*, concluded that the group could separate its functions and funding to retain its Free Speech Clause rights.
176. *See* Sullivan, *supra* note 7, at 1439; *see also Planned Parenthood*, 692 F.3d at 350 (citing *Rust* to hold constitutional the Texas law that had an expressed policy of only using public funds to subsidize non-abortion related family planning services and of excluding abortion-related speech).
177. Sullivan, *supra* note 7, at 1440.
178. *Cf.* Lyng v. Castillo, 477 U.S. 635, 638-39 (1986) (rejecting unconstitutional conditions claim in family welfare case to legislative policy choice); Bowen v. Gilliard, 483 U.S. 587, 601-02 (1987) (same).

B. *Rational Basis for Conditions on Familial Privacy*

Although the Court recognized a constitutional right to familial privacy in *Moore v. East Cleveland*,[179] a majority of the Court rejected using the doctrine of unconstitutional conditions to apply strict scrutiny to legislative decisions defining what a family is for purposes of family welfare assistance, preferring to review such policy decisions for a rational basis. In *Lyng v. Castillo*,[180] families challenged the Food Stamp Act of 1964,[181] which based the determination of food stamp benefit awards on a household basis.[182] Congress amended the definition of "household" to differentiate between parents, children, siblings, and relatives and whether food was purchased and eaten together.[183] Families that bought and prepared food as "separate economic units" but lived under one roof stood to lose or have their benefits reduced due to the changed definition because they would be treated as one household.[184] The plaintiffs challenged the constitutionality of the law's definition of "household," arguing that when the government interferes with "choices involving family life, it must face special scrutiny . . . ."[185] The Court disagreed.[186]

Writing for the Court, Justice Stevens rejected reviewing the definition under a stricter standard of review and concluded that Congress had a rational basis for defining household in that way, which was in part, to prevent fraud and easily administer the program.[187] Opining that most large families would want to dine together anyway, the Court downplayed any possible coercive effect of the definition and concluded that the definition of family did not "order or prevent any group of persons from dining together . . . ."[188]

179. 431 U.S. 494 (1977).
180. *Lyng*, 477 U.S. at 635-36.
181. Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. § 2012 (2012)).
182. *Lyng*, 477 U.S. at 636 & n.1; 78 Stat. 703 (codified as amended at 7 U.S.C. § 2012 (2012)).
183. *Lyng*, 477 U.S. at 636-37 & n.1 (citing section 101(1) of the Omnibus Budget Reconciliation Act of 1981, Pub L. 97-35, 95 Stat 358; Omnibus Budget Rehabilitation Act of 1982, Pub L. 97-253, 96 Stat. 772).
184. *Id.* at 637.
185. *Id.*; Brief for Appellee at 18, Lyng v. Castillo, 477 U.S. 635 (1986) (No. 85-250), 1985 WL 669378.
186. *Lyng*, 477 U.S. at 637-38.
187. *Id.* at 638-40 ("[T]he Legislature's recognition of the potential for mistake and fraud and the cost-effectiveness of case-by-case verification of claims that individuals ate as separate household unquestionably warrants the use of general definitions in this area.") (footnotes omitted).
188. *See id.* at 638.

Similarly, in *Bowen v. Gilliard*,[189] again writing for the Court, Justice Stevens rejected a claim that amendments to the law establishing Federal Aid to Families with Dependent Children,[190] which effectively reduced benefits to families with kids who receive financial support from noncustodial spouses, imposed an unconstitutional condition. Like in *Lyng*, the plaintiffs argued for heightened judicial scrutiny because the law affected their constitutional familial right to privacy and the plaintiffs presented evidence that it caused families to intentionally break up to avoid benefit reductions.[191] Rejecting that claim and the alleged coercion, the Court said "[t]hat some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect is to 'intrud[e] on choices concerning family living arrangements,' nor into an effort 'to foist orthodoxy on the unwilling.'"[192] Dissenting, Justice Brennan argued for more than "a mere rational basis" of review of a law that hurt the protected parent-child relationship.[193]

Like the abortion cases, *Lyng* and *Bowen* are examples of how the Court can acknowledge some deterrent effect in a condition, yet defer to the legislature and conclude that the government's responsibility for the deterrent is insufficient to invalidate the law, or that rationally based policy reasons support it.[194] Those cases are further examples of the normative nature of the value judgments the justices make and how analyzing conditions for their coerciveness, or lack thereof, leads to inconsistent results.

C. *Strictly Scrutinizing Conditions on the Right to Travel*

Whereas the abortion and familial privacy cases are examples of the Court declining to impose heightened scrutiny to laws implicating constitutionally recognized rights, the Court was more willing to do

189. 483 U.S. 587, 589-91 (1987).
190. *Id.* (Title IV of the Social Security Act of 1935, 49 Stat 627, established the AFDC program. Congress amended the family eligibility provisions in Title IV in the Deficit Reduction Act of 1984, 98 Stat 494).
191. *Bowen*, 483 U.S. at 601-02 & n.16.
192. *Id.* at 601-602 (quoting Califano v. Jobst, 434 U.S. 47, 54 n.11 (1977)) (citation omitted).
193. *Id.* at 611 (Brennan, J., dissenting).
194. Sullivan, *supra* note 7, at 1437-38.

so with the right to travel.[195] A majority of the Court was successful in characterizing legislative policy decisions that used residency requirements as a basis for determining who obtains government benefits as worthy of stricter review using the unconstitutional conditions doctrine, substantive due process, and the Equal Protection Clause.[196]

In *Shapiro v. Thompson*,[197] two states and the District of Columbia enacted statutes conditioning the receipt of welfare benefits on the recipients having lived in the state for at least a year. Writing for the majority, Justice Brennan described the right to travel as "a right so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union of the Constitution created . . . ; [the] freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."[198]

The Court characterized the laws as intending to keep people from travelling just for the purpose of receiving benefits and, therefore, the laws treated people differently based on an "invidious classification."[199] Accordingly, the Court invalidated the laws by applying stricter scrutiny through the Equal Protection Clause and substantive due process.[200] The Court rejected the state's various asserted interests and concluded that the laws both deterred people from exercising their constitutional right to travel freely and that they penalized people who exercised their right by denying them welfare benefits.[201] Justice Harlan's dissent rejected applying strict scrutiny to legislative classifications beyond racial ones and objected to the erosion of the "long established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective."[202]

Nevertheless, the Court extended *Shapiro* in *Memorial Hospital v. Maricopa County*[203] to recognize the right to temporary travel, not just travel to establish a new residence. An Arizona statute required people to live in the state for a year before they could receive nonemergency medical care and hospitalization at the county's expense.[204]

195. *See* Memorial Hosp. v. Maricopa Cnty., 415 U.S. 250, 269 (1974) (employing heightened scrutiny); Shapiro v. Thompson, 394 U.S. 618, 641(1969) (employing heightened scrutiny).
196. *See Shapiro*, 394 U.S. at 641.
197. *Id.* at 621-26.
198. *Id.* at 630-31.
199. *Id.* at 627-29, 633.
200. *Id.* at 638, 641-42.
201. *See id.* at 641-42.
202. *Id.* at 658-59 (Harlan, J., dissenting).
203. *Memorial Hosp.*, 415 U.S. at 254-55.
204. *Id.* at 252.

The Court reasoned that because medical care is as important as welfare benefits to indigent people, which are rights related to basic sustenance, they have "greater constitutional significance than less essential forms of government entitlements."[205] It held the residency requirement unconstitutional for the same reasons as in *Shapiro*, concluding that the law was unrelated to the asserted interest of protecting the medical program's fiscal health and that the requirement created an invidious classification infringing the right to travel.[206] Justice Rehnquist objected to such a strict standard of review and would have upheld the law because he thought it was rationally related to the states' justification for protecting its economy and adopting a rule of thumb for determining residency.[207]

VI. Making Sense of the Doctrine

Comparing the unconstitutional conditions cases in the different contexts leads to the inevitable conclusion that identifying exactly where a condition crosses the line from somewhat coercive to impermissibly coercive or what makes the Court weigh some government interests or policy choices in different contexts more heavily than others is tough. The Court's varying formulations of the doctrine for different benefits frustrates drawing consistent connections or a unifying theme throughout all the unconstitutional conditions cases. The doctrine is framed in vague language, so the result of each case can be manipulated by focusing on the government's interest, the source of the burden on the right, or just concluding that although a right might be pressured, it is not sufficiently so to cross the line to be unconstitutional. The doctrine arose out of the substantive due process regime in the *Lochner* era corporate rights cases, which is a fitting origin. Since then, the Court has used the doctrine as a tool to take a closer look at government action that leaves—or at first glance appears to leave—a bad taste in the mouth of the members of the court.

VII. The Doctrine and Land Use Exactions

Although local governments have used land use exactions as a land use planning technique for decades before 1987;[208] until then, the

205. *Id.* at 259.
206. *Id.* at 268-69.
207. *See id.* at 287-88 (Rehnquist, J., dissenting).
208. *See* Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 517 (2012) (discussing the history of land use exactions).

Court never applied the unconstitutional conditions doctrine in the land use context.[209] In the land use exaction cases the Court draws on its formulations of the doctrine in different contexts.[210] Important themes include a narrower interpretation of germaneness associated with stricter scrutiny,[211] protecting against the abuse of coercive government monopoly power,[212] and stopping the government from doing things indirectly that the federal Constitution prohibits it from doing directly.[213] First is a general discussion of land use exactions followed by a discussion of the Court's trilogy of decisions applying the doctrine to exactions.

A. *Land Use Exactions*

A land use exaction exists when a local government conditions the right to develop land on the developer's relinquishment of a property interest or money to be used for public infrastructure.[214] Exactions are a land-use planning tool for shifting the development costs of infrastructure from the public to the developer responsible for the growth, and limiting the potential negative impacts of development like increased traffic, noise, or environmental harm.[215]

In the early 1900s large subdivisions sprung up, and because developers were not held responsible for building the public infrastructure improvements that the growing communities inevitably needed, local governments turned to exactions, which the United States Department

209. *See* Merrill, *supra* note 134, at 861 (describing *Dolan* as applying the doctrine of unconstitutional conditions to the Just Compensation Clause for the first time).
210. *See Koontz*, 133 S. Ct. 2586 (2013) (citing, among other cases, *Memorial Hosp.*, 415 U.S. at 250, in which the Court applied the doctrine to the right to travel in the context of a county's residency requirement); *Dolan*, 512 U.S. 374, 385 (1994) (citing, among other cases, Perry v. Sindermann, 408 U.S. 593 (1972), in which the Court applied the doctrine to a terminated college professor's Free Speech Clause rights).
211. *See generally Nollan*, 483 U.S. 825 (1987) (arguing over the broadness of the required relationship between the government's justification for regulating and the government's ability to deny the development, the majority's narrower formulation trumping the dissent's proposed broader, more deferential, formulation).
212. *See Dolan*, 512 U.S. at 387 (discussing the government's "extortion[ate]" motivations in *Nollan*) (citation omitted).
213. *Cf. id.* at 384 (saying that if the government took the landowner's property outside of the permitting process it would clearly be a taking).
214. Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 478-80 (1991).
215. *Id.* at 479, 482-83 (noting that when local governments impose exaction on new development, it is normally part of the subdivision process); *see also* Edward J. Sullivan & Isa Lester, *The Role of the Comprehensive Plan in Infrastructure Financing*, 37 URB. LAW. 53, 61 (2005) (noting that when local governments impose exaction on redevelopment, it is normally before approving the necessary permits).

of Commerce recommended in its Standard City Planning Enabling Act of 1928.[216] Exactions became common by the mid-1900s.[217] On-site exactions include dedication of land by a developer within a subdivision to the local government so that the local government can build streets, sidewalks, schools, fire stations, and other public facilities.[218] Alternatively, the developer could be required to build those types of facilities itself and dedicate them to the community.[219]

After World War II, some local governments also started imposing off-site exactions on development, and that practice increased in the 1970s and 1980s as an alternative to raising property taxes, which local governments historically used to fund those off-site infrastructure projects.[220] Off-site exactions require a developer to provide similar amenities and facilities as on-site exactions, but elsewhere in the community rather than on the developer's land.[221]

Another common practice is for local governments to require developers to pay equivalent cash fees in-lieu of those physical projects.[222] With those fees, local governments fund the same types of infrastructure projects mentioned above.[223] Relatedly, some local governments require developers to set aside affordable housing as part of an inclusionary zoning policy, which could take the form of linkage fees that require developers to contribute money to building, or build themselves, low-income housing for the area's expected population increase from the development to give low-income residents their fair share of housing.[224]

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216. *See* Mulvaney, *supra* note 208, at 516-17.
217. *Id.*
218. Been, *supra* note 214, at 479-80.
219. *Id.* at 479.
220. Mulvaney, *supra* note 208, at 518; Sullivan & Lester, *supra* note 215, at 57.
221. Sullivan & Lester, *supra* note 215, at 57-58.
222. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 201-03 (2006).
223. *Id.*
224. Daniel L. Siegel, *Exactions after* Lingle*: How Basing* Nollan *and* Dolan *on the Unconstitutional Conditions Doctrine Limits its Scope*, 28 STAN. ENVTL. L.J. 577, 601 (2009); Sullivan & Lester, *supra* note 215, at 61 (providing the City of San Francisco's program as an example in which the city requires developers to build.9 housing units per every 50,000 square feet or more of office space the developers build). In *California Building Industry Assoc. v. City of San Jose*, 157 Cal. Rptr.3d 813, 815-16 (Cal. App. 2013), *reh'g denied* July 1, 2013, *cert. granted*, 307 P.3d 878 (Cal. 2013), builders in California facially challenged a city's affordable housing ordinance, which provided that new development with 20 or more units must set aside fifteen percent of its units—on or off site—as below-market rate affordable housing. The trial court held the city failed to meet its burden of demonstrating the required reasonable relationship between the negative externalities of the new development and the set aside or fee in lieu of condition. *Id.* at 818. Disagreeing, and

Municipal governments can impose exactions based on a legislatively established, nondiscretionary basis, or on a case-by-case, discretionary basis.[225] Legislatively established fees are sometimes called impact fees,[226] which are a one-time payment that municipal governments require a developer to pay at the time of project approval and are often based on an administratively set rate schedule.[227] Impact fees fund capital improvement projects off site that new development generates a need for; they are popular because unlike in-lieu-of fees, local governments can impose impact fees on all permits rather than just those in which dedications of land would have been alternatively appropriate.[228]

B. *Unconstitutional Conditions Doctrine Applied to Exactions using the Just Compensation Clause*

Because exactions involve taking property and money, the Fifth Amendment's Just Compensation Clause is implicated.[229] The Just Compensation Clause is concerned with compensating property owners who have property taken from them for public use under the rationale that individuals should not be forced to bear burdens alone that the public as a whole should bear.[230] The Just Compensation Clause is applicable to the states and local governments through the Fourteenth Amendment's Due Process Clause.[231]

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treating the builders' facial challenge like a substantive due process challenge, the appellate court concluded that the builders had the burden of rebutting the presumption that the condition was "reasonably related" to the city's legitimate rationale for imposing the exaction—ensuring a sufficient supply of affordable housing in the community. *Id.* at 825. The court remanded the case to the trial court to determine whether the builders did so. *Id.* The Appellate Court issued its decision on June 6, 2013, the United States Supreme Court decided *Koontz*, 133 S. Ct. 2586 (2013), on June 26, 2013, and on September 11, 2013, the California Supreme Court granted review of the Appellate Court's decision, 307 P.3d 878. The state supreme court's decision will be important because it will determine—post-*Koontz*, discussed infra—what standard of review California courts must apply to facial challenges of affordable housing ordinances imposing on- or off-site physical, or, alternatively, monetary exactions.
225. Mulvaney, *supra* note 208, at 533.
226. Rosenberg, *supra* note 222, at 204-05.
227. *Id.*
228. *Id.* at 205; *see* Sullivan & Lester, *supra* note 215, at 62.
229. The Just Compensation Clause is also implicated by purely monetary exactions after *Koontz*. The Just Compensation Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend V.
230. *Dolan*, 512 U.S. at 374, 383-84 (1994) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)). The Just Compensation Clause's author, James Madison, drafted it in response to the colonial and pre-revolutionary American acceptance of private property being taken without payment. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694 (1985).
231. *Dolan*, 512 U.S. at 383-84 (citing Chicago B & Q.R. Co. v. Chicago, 166 U.S. 226, 239 (1897)).

Historically, local governments have received deference in regulating land use against constitutional attacks by property owners so long as the regulations are rationally related to furthering the public health, safety, morals, and welfare.[232] Throughout much of the 1900s, when landowners did attack legislative land use regulations, their attacks were based in substantive due process, arguing that land use regulations went "too far" and were arbitrary, and not rationally related to the general health, safety, morals, or welfare of the community.[233] However, in the 1980s and 1990s the Court used the Just Compensation Clause and the unconstitutional conditions doctrine to more closely review local government's exactions of property from property owners in the land use permitting process.[234] Land use permits are a discretionary benefit, which is why the unconstitutional conditions doctrine is implicated.[235]

Two dangers identified with exactions are that (1) local governments can redistribute wealth by overcharging developers relative to the harm their development causes, and (2) local governments may be incentivized to overregulate so as to receive more benefits or money than they would otherwise have.[236] A common way those concerns are voiced is by accusing local governments of using exactions as an end run around the Fifth Amendment eminent domain requirement that the government provide just compensation for property it takes for public use.[237] In the first land use exaction case that the Court applied the doctrine in, *Nollan*,[238] the Court did not explicitly

232. *Cf.* Village of Euclid, Ohio v. Amber Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (reasoning that exercises of the police power must be in furtherance of the "health, morals, or safety of the community" in order to be constitutional).

233. *See* Edward J. Sullivan, *Substantive Due Process Resurrected Through the Takings Clause:* Nollan, Dolan, *and* Ehrlich, 25 ENVTL. L. 155, 157 (1995); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

234. *Cf. Lingle*, 544 U.S. at 547 (describing *Nollan* and *Dolan* and their tests for exactions).

235. James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 TEX. TECH. L. REV. 73, 117 n.228 (1996).

236. Been, *supra* note 214, at 504.

237. *E.g.*, Brief for Breezy Point Cooperative, Inc. as Amicus Curiae Supporting Appellant at 15, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (No. 86-133), 1986 WL 720590 ("The Coastal Commission may argue that it is acquiring the access easements pursuant to a valid statutory program; however, if it chooses to do so, it must do so as an exercise of its eminent domain function through just compensation and not through this "back-door" policy of requiring dedication of property as a condition for the granting of a building permit.").

238. 483 U.S. 825 (1987).

say it was applying the doctrine, but the Court applied the doctrine's framework and in later cases said that *Nollan* is an unconstitutional conditions case.[239]

C. Nollan v. California Coastal Commission

In *Nollan*,[240] the California Coastal Commission (the Commission)—the local government agency responsible for land use permitting in the area—conditioned the issuance of a building permit for the demolition and rebuilding of the applicant's beachfront rental property on the exaction of an easement across the applicant's property. The Court assumed the Commission could have denied the building permit outright, yet it also could not have taken the easement outright without giving the homeowners just compensation for the property interest taken.[241] In exacting the easement, the Commission had to be legislating in furtherance of a legitimate state interest[242] and the state interest had to be connected to the regulation, both of which the Court acknowledged that it had never defined the limits of in the land use permitting context.[243]

The Commission asserted several interests in conditioning the grant of the building permit on exacting the public easement along the beach of the homeowners' property: (1) the public's need and ability to see the beach, (2) the "psychological barrier" to using the beach created by the proposed development, and (3) preventing congestion on public beaches.[244] According to Justice Scalia, "[T]he Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end."[245] Although that sounds like the absolute power formulation of the greater-lesser rationale rejected long ago, Justice Scalia is getting at his idea of germaneness in this circumstance—the greater power to deny the building

239. Merrill, *supra* note 134, at 866-67.

240. *Nollan*, 483 U.S. at 827-28.

241. *Id.* at 831, 834.

242. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) was good law when the Court decided *Nollan* and held that one way the Just Compensation Clause is violated is when the government fails to legislate in furtherance of a legitimate state interest. As is elaborated infra, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005), the Court turned that test into a substantive due process test but said that *Nollan* and *Dolan* are still good law and represent the takings test for exactions.

243. *Nollan*, 483 U.S. at 834.

244. *Id.* at 838.

245. *Id.* at 836.

permit includes the lesser power to condition its issuance on a germane exaction. His idea of germaneness in this context is narrow and characteristic of stricter scrutiny.

Ultimately, the Court concluded that the easement exacted was ungermane in that it was too attenuated from the asserted government interest.[246] The Court acknowledged that the Commission probably exacted the easement because of its belief that the easement would serve the public interest, but the Court said that was insufficient to pass constitutional muster; and that essentially, the Commission was attempting an end run around the eminent domain requirement to pay the applicant for taking its property by doing it through the permit process.[247]

The Court described the required connection between the asserted government interest and the exaction as an "essential nexus."[248] As an example in *dicta*, Justice Scalia said that based upon the Commission's asserted interest of viewing the ocean and the Commission's power to withhold permit approval, the Commission could have conditioned its approval of the permit on the applicant's dedication of a public viewing spot on their property overlooking the beach.[249] In other words, the viewing spot would be germane to what would be the government's basis for rejecting the permit outright—the development's visual impairment of the beach.[250] The public easement was about beach access, not viewing, and therefore un-germane to the asserted government interest.[251]

Dissenting, Justice Brennan argued that the scope of the germaneness inquiry should be broader in this context and look at the general interest of providing for the public's use and enjoyment of the beach.[252] Such a

246. *See id.* at 838-39 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the [applicant's] property reduced any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers and 'psychological barrier' to suing the public beaches or how it helps to remedy any additional congestion on them caused by the construction of the [applicant's] new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.") (footnote omitted).

247. *See id.* 841-42 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose[]';but if it wants an easement across the [applicant's] property, it must pay for it.") (citation omitted).

248. *Id.* at 836-37.

249. *Id.* at 836.

250. *See id.*

251. *See id.* at 836-37.

252. *Id.* at 848 (Brennan, J., dissenting).

broader view of germaneness is characteristic of the idea of germaneness articulated by Justice Rehnquist in *Dole*, where the condition that the State of South Dakota raise its drinking age as a condition of receiving highway funds just had to be rationally related to broad legitimate government interests. Perhaps the spending power and the police power, and property rights and states' rights are sufficiently different to warrant different treatment—which would explain why Justice Rehnquist supported the narrow interpretation here but the broad interpretation in *Dole*—but making those distinctions seems to lead to a "mini-unconstitutional doctrine for each power, a mini-doctrine for each right, and a micro-doctrine for the intersection of each power and each right."[253] Justice Brennan noted that the Commission was caught off guard by the majority's strict view of germaneness in this circumstance and that the Commission's justification for the exacted easement was not merely visual access, but also public beach access generally, which would meet the traditional standard of review.[254]

Upon determining the condition was not germane, Justice Scalia said the Court could not view the condition as a proper exercise of the state's land use planning authority; rather, he saw it as arbitrary.[255] At this point in the opinion the Court cites to the *Agins v. City of Tiburon*[256] "substantially advance" test, which the Court in a subsequent opinion redefined as purely a substantive due process test, discussed infra; however Justice Scalia appeared skeptical of the substantially advance test in this context.[257] He said that the Just Compensation Clause is "more than a pleading requirement, and compliance with it [is]more than an exercise in cleverness and imagination[,]" and that the Court was "inclined to be particularly careful" about applying the substantially advance test where a permit is conditioned on conveying property, which includes the attendant high risk that the government is being deceitful about its stated reason for imposing the condition and really is trying to avoid having to pay the property owner as the Just Compensation Clause requires.[258]

In *Nollan*, the Court demonstrated its willingness to review local governments' land use permitting decisions more closely for that

253. Fudenberg, *supra* note 24, at 414-15 (footnote omitted).

254. *Nollan*, 483 U.S. at 850 & n.4 (Bennan, J., dissenting).

255. *Id.* at 839.

256. 447 U.S. 255, 260 (1980).

257. *Nollan*, 483 U.S. at 840-41.

258. *Id.* at 841.

kind of abuse, which Justice Scalia described as " 'out-and-out extortion[ate]' "[259] of property right. Although the Court adopted the essential nexus test to address germaneness, in doing so, the Court left unanswered the question of the required degree of connection between the exaction and the land use effects of the applicant's development. The Court did not reach that issue in *Nollan* because it ended its analysis at the first stage when it concluded that the essential nexus was missing; however, the Court answered the second question in *Dolan v. City of Tigard*.[260]

D. Dolan v. City of Tigard

In *Dolan*, unlike in *Nollan*, the Court explicitly said that it was applying the unconstitutional conditions doctrine:

> [u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.[261]

In *Dolan*, the applicant owned a plumbing and electric supply store on property near a creek, which was part of the city's 100-year floodplain.[262] She applied for a permit to double the size of her store, pave a 39-spot parking lot, and add an additional on-site structure.[263] The city issued her a building permit conditioned on her (1) dedication of a portion of her property within the floodplain zone to improving storm drainage along the creek by constructing a public greenway and (2) her dedication of a 15-foot strip of adjacent land as a pedestrian and bike path.[264] The easements covered about ten percent of her property.[265] Framing her argument as an unconstitutional conditions challenge, the Court understood the applicant to contend "that the city . . . forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements."[266]

Like in *Nollan*, simply taking easements for the public greenway and bicycle path would violate the Just Compensation Clause.[267]

259. *Id.* at 837 (quoting J.E.D. Assocs. Inc. v. Atkinson, 121 N.H. 581, 584 (1981)).
260. 512 U.S. 374 (1994).
261. *Id.* at 385.
262. *Id.* at 379.
263. *Id.* at 379.
264. *Id.* at 379-80.
265. *Id.* at 380.
266. *Id.* at 385-86.
267. *Id.* at 384.

The first question was whether there was an essential nexus between the asserted government interest and the exactions.[268] The asserted government interests were mitigating the flood risks that would result from the increased impervious surface from the expanded parking lot and offsetting traffic congestion in the business district in which the applicant's property was located.[269] At the first step, the Court determined that there was clearly an essential nexus.[270]

Then, the Court described the second step as determining whether the "degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of [the applicant's] proposed development."[271] The Court discussed tests adopted by different states, the intermediate level of review of those tests being the "reasonable relationship" test.[272] The Court said that test is close to what the federal Constitution requires, but that due to its name's confusing similarity to the less stringent "rational basis" test, the term "rough proportionality" best describes the Fifth Amendment's requirements in this context.[273] According to the Court, "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[274]

Rejecting Justice Stevens' assertion that this type of business regulation deserves "a strong presumption of validity[,]" the Court asserted that there is no reason why the Fifth Amendment shouldn't be treated the same as the First or Fourth Amendments.[275] There, the Court signaled its intent to promote the Just Compensation Clause's status and perhaps, that the level of review the Court applies to First Amendment

268. *Id.* at 386. The Oregon Land Use Board of Appeals, the Oregon Court of Appeals, and the Supreme Court of Oregon all concluded that after *Nollan* the test was still whether there was a "reasonable relationship" between government interest and the exaction. *Id.* at 382-83. The United States Supreme Court granted certiorari because *Nollan*'s "essential nexus" standard is a stricter standard than a "reasonable relationship" standard. *See id.* at 383.
269. *Id.* at 387.
270. *Id.*
271. *Id.* at 388.
272. *Id.* at 389-91.
273. *Id.* at 391.
274. *Id.* (footnote omitted).
275. *Id.* at 392. Justice Stevens said he hoped that the Court was not disavowing the rational basis standard of review of land use decisions and returning to the substantive due process based "super-legislative power the Court exercised during the *Lochner* era." *Id.* at 409 (Stevens, J., dissenting). He obviously thought it was when he said, "In its application of what is essentially the doctrine of substantive due process, the Court confuses the past with the present." *Id.* at 410 (Stevens, J., dissenting).

cases could serve as guide.[276] Applying the rough proportionality test, the Court concluded that the city failed to show a sufficient relationship between the public floodplain easement and the effects of the applicant's proposed development.[277] The city never explained why it demanded a public greenway when a private greenway would work just as well for the purpose of the exaction, which was to reduce flood risk caused by the increased impervious surface.[278] The Court saw the public easement as interfering with the applicant's property rights to exclude others to the extent that they would be "eviscerated."[279]

The Court's decision in *Dolan* marked a new application of the unconstitutional conditions doctrine in which the tests in *Nollan* and *Dolan* are one takings formula, specifically for exactions, out of the four different takings formulas that the Court uses in the land use context.[280] However, at the time, the majority and dissent were divided on whether the doctrine should apply at all in the land use permitting context. Justice Stevens argued that the doctrine had traditionally been used with the First Amendment, which is a "fragile and easily 'chilled' constitutional right[,]" and it should not apply in the context of land use law with the traditional leeway given to local governments to regulate development.[281]

Moreover, the Just Compensation Clause itself makes applying the doctrine in this situation conceptually different. If the government wants property for a legitimate public purpose and it uses the right procedures it can take that property and the only question is what constitutes just compensation.[282] One argument is that in situations like in *Nollan* and *Dolan*, "[t]he building permit furnishes in-kind compensation for the easement[,]" and that the property owner's acceptance of the permit with the conditions provides strong evidence that the property

276. Merrill, *supra* note 134, at 866. Merrill notes that it's unclear whether Justice Rehnquist meant that only the Just Compensation Clause should receive the same treatment, or whether he meant that other rights like the Second and Seventh Amendment, for example, should receive the same treatment. *Id.*
277. *Dolan*, 512 U.S. at 394-95.
278. *Id.* at 393.
279. *Id.* at 394. The Court acknowledged that the applicant was operating a store, so she obviously wanted people to come onto her property at certain times; however, the Court noted the easement was permanent and recreational in nature. *Id.*
280. *Cf. Lingle*, 544 U.S. at 548 (naming the four different categories: (1) physical occupation takings, (2) *Lucas*-style total regulatory takings, (3) *Penn-Central* regulation-goes-too-far takings, and (4) *Nollan* and *Dolan* exaction takings).
281. *Dolan*, 512 U.S. at 407 n.12 (Stevens, J., dissenting).
282. *Cf.* Sullivan, *supra* note 7, at 1505 (commenting that the Takings Clause does ...hibit all forced transfers of property to the state and is about compensation).

owner considers the compensation adequate.[283] If so, then the government's conditional offer of the building permit does not seem to affect a constitutional right, which would mean the unconstitutional conditions doctrine is actually inapplicable. That was one of Justice Stevens' points, which led him to assert that the majority's use of the doctrine was "novel, and arguably incoherent."[284]

However, perhaps that argument conflates adequate compensation with the idea that one thing is worth more than the other,[285] (meaning, perhaps the property owner's acceptance of the exaction shows only that, to the property owner, the value of the building permit exceeds the loss in value of the exaction, so there is still a net gain even though the property owner may not feel justly compensated for relinquishing the property right).[286] The assumption that the government could have denied the permits outright that the Court made in *Nollan* and *Dolan*, i.e., assuming that the government's asserted justification for denying the permits is legitimate, also raises problems with whether a property owner's acceptance of the permit is evidence of compensation.[287]

Cynically, there is an alternative situation in which the government has no basis to deny the permit outright but proposes a sham reason for denying it to get the property owner to concede to the exaction—making the property owner purchase the permit—which would mean that the property owner's acceptance of the condition could not be appropriately characterized as compensation because the property owner would have a right both to the building permit and to the property exacted.[288] In that scenario, the unconstitutional conditions doctrine *is* applicable because property would be taken without compensation, the Just Compensation Clause applies, and the government would be coercing and extorting the property owner into relinquishing that right.[289] Justice Scalia's and Rehnquist's assumptions that the government could have denied the permits outright in *Nollan* and *Dolan* foreclose that line of analysis, although the Court still concluded that the property owner's acceptance of the permits was not evidence of just compensation.

283. *Id.*
284. *Dolan*, 512 U.S. at 409 (Stevens, J., dissenting).
285. *See* Fudenberg, *supra* note 24, at 501 & n.446, for this argument.
286. *Id.*
287. *See id.*
288. *See id.* at 502 for this hypothetical.
289. *Id.* at 502 & n.453.

The effect of *Nollan* and *Dolan* is that the burden is on the local government to prove that the conditions it attaches to approving a permit are appropriately connected to the government's asserted basis for imposing the conditions in the first place, and that the exaction is proportionate to the negative externalities of the development.[290] In 2005 the Court took the opportunity to clarify its takings law doctrine generally and to explain how *Nollan* and *Dolan* fit in to the changed landscape.

E. Lingle v. Chevron U.S.A., Inc.[291] *"Explains"* Nollan *and* Dolan

In *Lingle*,[292] the Court modified its takings law jurisprudence by overruling the "substantially advance" test stated in *Agins v. Tiburon*.[293] According to the *Agins* substantially advance test, a taking occurred when either (1) the government regulation failed to substantially advance a legitimate state interest, or (2) it denied an owner all economically viable use of his or her land.[294] In *Lingle*,[295] the Court reasoned that the substantially advance test focuses on the government's asserted justification for regulating and is unconcerned with the effect of the regulation, which is addressed by the Fifth Amendment Just Compensation Clause. Accordingly, the Court held that the substantially advance test is a substantive due process test and is inapplicable for determining whether there is a Fifth Amendment taking.[296]

The Court acknowledged that, arguably, the substantially advance test "played a role" in *Nollan* and *Dolan* and that those decisions quoted *Agins*, but that *Nollan* and *Dolan* did not actually apply the test and that they establish an "entirely distinct" rule.[297] The Court said *Nollan* and *Dolan* represent a special test for "dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings."[298] The Court said that rather than examine whether the exactions advanced "*some* legitimate state interest[,]" *Nollan* and *Dolan* examined "whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether[,]" which the Court considered "worlds

290. See *supra* Parts VII.C, VII.D.
291. 544 U.S. 528 (2005).
292. *Id.* at 545.
293. *Agins*, 447 U.S. at 260.
294. *Id.*
295. *Lingle*, 544 U.S. at 547.
296. *Id.* at 545.
297. *Id.* at 546-47.
298. *Id.* at 547.

apart."[299] The Court restated that *Nollan* and *Dolan* are unconstitutional conditions cases, but it did not elaborate on the doctrine and focused on *Nollan* and *Dolan* being equivalent to takings.[300]

F. Koontz v. St. Johns River Water Management District

In *Koontz*, the Court recently turned *Nollan* and *Dolan* into a trilogy and expanded their scope. The facts in *Koontz* were relatively similar to those in *Nollan* and *Dolan*, with a few important twists. In *Koontz*, the applicant owned a 14.9-acre lot on partial wetlands in the State of Florida.[301] He sought the necessary permits from the St. Johns River Water Management District (the District)—the relevant government permitting authority—in hopes of dredging portions of the wetlands to develop a 3.7-acre portion of his lot.[302] Florida law provided that such a permit could include "reasonable conditions" that were "necessary to assure" that the development would not harm the water resources of the district.[303] Accordingly, the District regularly required applicants who wished to build on wetlands to offset the environmental harm they caused by paying to preserve, enhance, or otherwise protect off-site wetlands.[304] The applicant offered to offset the environmental effects of his development by deeding a conservation easement on eleven of his acres that he did not plan to develop.[305] The District rejected that offer and presented alternative counteroffers: (1) the applicant could reduce the size of his planned development to one acre and deed a conservation easement on the property's remaining 13.9 acres to the District, or (2) he could develop the 3.7 acres like he initially proposed, deed a conservation easement on the property's remaining 11.2 acres to the District, and pay for improvements to land several miles away owned by the District.[306] The District proposed several different off-site projects that the applicant could pay for as part of the latter offer, and the District said that it would be open to suggestions of equivalent off-site work proposed by the applicant.[307]

299. *Id.* (emphasis in original).
300. *Id.* at 546-47.
301. *Koontz*, 133 S. Ct. at 2591-92.
302. *Id.* at 2593.
303. *Id.* at 2592 (citing 1972 Fla. Laws § (4)(1), at 1118 (codified as amended at FLA. STAT. § 373.413(1)(2014))).
304. *Id.* at 2593.
305. *Id.*
306. *Id.*
307. *Id.*

Considering the District's offers unreasonable, he declined to propose alternative mitigation projects and, instead, filed suit in state court under a Florida law, which provided money damages for plaintiffs subjected to an unreasonable use of the state's police power that resulted in an uncompensated taking.[308] The lower state court granted the District's motion to dismiss, but that decision was remanded, and on remand the lower state court concluded that the District needed to, but had not, satisfied either *Nollan*'s essential nexus requirement or *Dolan*'s rough proportionality requirement. The state appellate court affirmed,[309] but the Florida Supreme Court reversed.[310] The Florida Supreme Court found the present case distinguishable from *Nollan* and *Dolan* on two grounds.[311] First, unlike in *Nollan* and *Dolan*, the District did not approve the applicant's permits with conditions but, instead, it denied his requested permits because the applicant rejected the proposed conditions and decided not to offer his own equivalent alternatives.[312] Secondly, the District proposed to exact a cash payment in one of its offers rather than just a property interest,[313] which the state court acknowledged there was a division of authority on whether *Nollan* and *Dolan* apply.[314] The United States Supreme Court accepted certiorari to resolve those two questions.[315]

The Court began by stating the familiar unconstitutional conditions language " 'that the government may not deny a benefit to a person because he exercises a constitutional right.' "[316] The Court cited *Perry*[317] and *Memorial Hospital*[318] as examples of its unconstitutional conditions cases.[319] Then, the Court described *Nollan* and *Dolan* as a "special application" of the unconstitutional conditions doctrine in the land

308. *Id.*; FLA. STAT. § 373.617(2) (1994).
309. St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 12 (Fl. Dist. Ct. App. 2009), *quashed*, 77 So. 3d 1220 (Fla. 2011), *reversed*, 133 S.Ct. 2586 (2013).
310. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1231 (Fla. 2011), *rev'd*, 133 S.Ct. 2586 (2013).
311. *Id.* at 1230.
312. *Id.*
313. *Id.*
314. *Id.* at 1229.
315. *Koontz*, 133 S. Ct. at 2594.
316. *Id.* at 2594 (quoting *Regan*, 461 U.S. at 545).
317. Perry v. Sindermann, 408 U.S. 593, 594-95, 598 (1972) (concluding that withholding a college professor's employment contract because the professor was outspoken against college administration could penalize and violate professor's Free Speech Clause rights).
318. Memorial Hosp. v. Maricopa Cnty., 415 U.S. 250, 261-62 (1974) (concluding that state's residency requirement, denied people medical benefits and that, accordingly, it penalized and violated their right to travel).
319. *Koontz*, 133 S. Ct. at 2594.

use context that protects "special[ly] vulnerab[le]" landowners from the "[e]xtortionate demands" of local governments.[320] The Court asserted: "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."[321]

The Court's analysis of whether a condition is germane to its regulatory justification probes the transaction for those sorts of alleged extortionate tactics. The less germane a condition is, the more like manipulation or extortion it is viewed as, which leads to a higher level of scrutiny.[322] Like Justice O'Connor in her dissent in *Dole*, in which she viewed the government's conditioning of the State of South Dakota's highway funding on raising its drinking age as an extortion of the state's power to regulate alcohol,[323] the majority in *Nollan*, *Dolan*, and *Koontz* expressed distrust of local governments and their potential extortionate motives in the land use permitting process. Despite framing their motives that way, the Court in *Koontz* still acknowledged the benefit of exactions in that they do work to offset the public costs that accompany land development, and that *Nollan* and *Dolan* represent a policy of balancing their need with their potential for abuse.[324]

1. THE DOCTRINE APPLIES TO PERMIT DENIALS

On the question of whether the government must approve a permit with conditions rather than have denied the permit because an applicant refused to accept the conditions for an unconstitutional conditions claim to arise, the Court said it did not matter.[325] The Court reasoned that its holdings in other unconstitutional conditions cases "recognize that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."[326]

That just quoted principle is how the Court reasoned that the District violated the Just Compensation Clause without taking anything,

320. *Id.* at 2594-95, 2603.
321. *Id.* at 2595.
322. Sullivan, *supra* note 7, at 1420.
323. South Dakota v. Dole, 483 U.S. 203, 212 (1987) (O'Connor, J., dissenting).
324. *Koontz*, 133 S. Ct. at 2595 ("*Nollan* and *Dolan* accommodate both realities. . . .").
325. *Id.* ("The principles that undergrid 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.") (emphasis in original).
326. *Id* at 1294.

which is an ironic result. Because the applicant believed that the District's proposed conditions, if imposed, *would* require him to bear such a disproportionate burden that it would violate the *Nollan* and *Dolan* takings tests, plaintiff chose to keep the property, reject the conditions, and deal with the consequences when the District denied the permits.[327] The Florida Supreme Court questioned how the Just Compensation Clause could be violated when no property was taken,[328] but the Court's majority explained the result as follows:

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause *not because they take property but because they impermissibly burden the right not to have property taken without just compensation.* As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.[329]

Insofar as the Court held that *Nollan* and *Dolan* apply to permit denials, that holding was unanimous. Justice Kagan in dissent said as follows:

> I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interests (*i.e.*, imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require.[330]

Justice Kagan did not explain why she thought *Nollan* and *Dolan* apply to a permit denial however.

The District argued that applying *Nollan* and *Dolan* to a permit denial would wrongly extend those holdings beyond their context and revive the *Agins*[331] "substantially advance" theory to takings law in the context of permit denials.[332] Because the District denied the permit and it took no property, the District contended that the applicant should have asserted a *Penn Central Transportation Company v. City of New York*[333] or a *Lucas v. South Carolina Coastal Council*[334] style regulatory takings claim, or a due process or equal protection clause violation arguing that the permit denial was arbitrary and irrational.[335] Further, the District argued that the requirement in *City of Del Monte Dunes v. Del Monte Dunes at Monterey, Ltd.*,[336] that there be a final deal with a required dedication on the table before *Nollan* and *Dolan* can apply was absent here since the District and the applicant were in back-and-forth negotiations that the applicant walked away from. As a policy consideration, the District stressed that reviewing the different offers in a negotiation process for compliance with *Nollan* and *Dolan* would be practically difficult; a reviewing court would have to apply the tests to every proposal in the negotiation to see if one passed the tests.[337]

One of the Court's two justifications for why *Nollan* and *Dolan* apply to permit denials was the practical policy argument that it would be too easy to evade *Nollan* and *Dolan* if they did not apply, and *Nollan* and *Dolan* would become a dead letter.[338] Although probably true, that argument begs the question of whether the two situations are legally the same.[339] For legal support, the majority argued that the Court's unconstitutional conditions precedent justifies applying *Nollan* and *Dolan* to permit denials.[340] Citing *Perry* and *Memorial Hospital*, the majority argued that the doctrine prohibits denials of government benefits in a way that infringes a constitutional right because the doctrine does not care whether the government "ultimately

327. *See id.* at 2593 (explaining why the applicant filed suit).
328. *Koontz*, 77 So. 3d at, 1225, *rev'd* 133 S. Ct. 2586 (2013).
329. *Koontz*, 133 S. Ct. at 2596 (emphasis added).
330. *Id.* at 2603 (Kagan, J., dissenting). According to Justice Kagan, the difference between the two types of conditions is that when the property owner rejects a proposed exaction and his application is denied, the appropriate remedy is to have the condition removed and the property owner can only seek monetary relief if available in state law.
331. *Agins*, 447 U.S. at 260.
332. Brief for Respondent at 34, Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 6694053.

333. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (setting out the Court's general balancing test for regulatory takings in which the Court examines the regulation's economic impact on the applicant, the applicant's reasonable investment backed expectations, and the character of the government's act).
334. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1998) (setting out the *per se* takings test for when a landowner is denied "*all* economically beneficial uses" of his or her land) (emphasis in original).
335. Brief for Respondent, *supra* note 332, at 36-37.
336. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 703 (1999).
337. Brief for Respondent, *supra* note 332, at 41-42.
338. At oral argument Justice Alito commented that if *Nollan* and *Dolan* did not apply to permit denial, then they would apply only to "really stupid" districts that structured their exactions as conditions subsequent to permit approval rather than as conditions precedent. Transcript of Oral Argument at 52-53, Koontz v. St. Johns River Water Mgt. Dist., 133 S.Ct. 2586 (2013) (No. 11-1447).
339. John Echeverria, *The Very Worst Takings Decision Ever?* 22 (Vermont Law School, Working Paper No. 28-13, 2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316406. Echeverria asserts that logically they cannot be if the applicant never accepts the conditions after a permit denial and that interpreting *Nollan* and *Dolan* to apply in that circumstance is a "revisionist reading." *Id.*
340. *Koontz*, 133 S. Ct. at 2595.

succeeds in pressuring someone into forfeiting" the right by "coercively withholding benefits from those who exercise them."[341]

In John Echeverria's searing critique of the Court's decision in *Koontz*, he contends that the Court's decisions in *Perry*, *Memorial Hospital*, and its other unconstitutional conditions cases show that the Court requires a particular constitutional provision to be violated, which is different than being burdened, and that the Court's use of the doctrine in *Koontz* is novel and "does not apply any version of [the] unconstitutional conditions doctrine previously recognized by the Court."[342] Is he correct?

Echeverria seems to be correct, but that could depend on how one views the rights in the Just Compensation Clause. *Perry*, discussed supra, was the case in which the college professor's contract was revoked, assumedly because he exercised his First Amendment right to vocally criticize the college's administrators.[343] The Court affirmed the Fifth Circuit Court of Appeals, which reversed a summary judgment order that dismissed the professor's claim because if the college did revoke the professor's contract for that reason, presumably, it violated the First Amendment.[344] Arguably, like the teacher who chose to exercise his First Amendment right and was penalized for it by the state by denying him his contract, in *Koontz*, the applicant chose to exercise his right to Just Compensation by rejecting proposed exactions that he believed *would* be takings under *Nollan* and *Dolan*, and the District penalized him for it by denying his permit. That comparison works if one can assert one's Fifth Amendment right to just compensation before the property is taken, or if the Just Compensation Clause can be directly violated by being "burdened" without the property ever being taken.

The other case the Court cited, *Memorial Hospital*, discussed supra, supports the argument that an unconstitutional conditions claim can

341. *Id.*
342. Echeverria, *supra* note 339, at 20-22. Echeverria also contends that Justice Alito misrepresented *Nollan* and *Dolan* by describing them as centrally concerned with "'the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality *to the effects of the proposed new use of the specific property at issue—thereby diminishing without justification the value of the property.*'" *Id.* at 28 (emphasis added) (quoting *Koontz*, 133 S. Ct. at 2600) (emphasis added). Echeverria forcefully argues that Justice Alito's switches *Nollan* and *Dolan*'s focus from determining whether the government took an exacted property interest to focusing on the regulation's effect on the underlying land being regulated. *Id.*
343. *Perry*, 408 U.S. at 594-97.
344. *Id.*; Sindermann v. Perry, 430 F.2d 939, 940-42, 945 (5th Cir. 1970), *rev'd*, 408 U.S. 593.

arise only when a right is directly violated. In *Memorial Hospital*, the Court concluded that Arizona's year residency requirement as a condition precedent of receiving medical care penalized the constitutional right to travel and that because the state lacked a compelling government interest, the condition violated the Equal Protection Clause.[345]

The Court's other First Amendment cases agree with the interpretation of *Perry* above. In *Sherbert*,[346] discussed supra, the state's denial of the Seventh Day Adventist's unemployment benefits burdened her religious exercise, and after determining the state lacked a compelling government interest in doing so, the Court concluded it violated the First and Fourteenth Amendments, i.e., it had the effect of "prohibiting [her] free exercise" within the meaning of the First Amendment.[347] Similarly, in *Thomas*,[348] the state's denial of the pacifist worker's unemployment benefits burdened the pacifist worker's First Amendment rights, and after determining the state lacked a compelling government interest held that it violated the First Amendment, i.e., it had the effect of "abridging [his] freedom of speech" within the meaning of the First Amendment.[349]

Cases discussed in other contexts also show that the Court considered the right at issue directly violated or there was another underlying direct constitutional violation. In *Frost*, the Court concluded that the state's requirement that the foreign corporation purchase the unnecessary common-carrier insurance as a condition of being allowed to operate within the state was an unconstitutional condition, but the underlying constitutional violation was the Fourteenth Amendment's Due Process Clause.[350] In *Lefkowitz* and *Garrity* the Court considered the political party officers and the police officers' Fifth Amendment rights against self-incrimination directly violated by the conditions of their employment that they could be fired if they refused to testify about alleged on-the-job malfeasance, because they were compelled in a

345. *Memorial Hosp.*, 415 U.S. at 252, 261-62, 269.
346. Sherbert v. Verner, 374 U.S. 398, 404, 406-09 (1963).
347. U.S. CONST. amend I.
348. United States v. Scott, 450 F.3d 863, 718-19 (2005).
349. U.S. CONST. amend I.
350. Frost & Frost Trucking Co., v. R. R. Comm'n, 271 U.S. 583, 599 (1926). In the corporate rights context, see *Terral v. Burke Construct. Co.*, 527 U.S. 529, 530-33 (1922), discussed supra note 45, in which the Court said that the state's requirement that foreign corporations wanting to do in-state business waive their right to diversity jurisdiction violated Article 3 Section 2 of the United States Constitution and substantive due process.

criminal case to be a witness against themselves within the meaning of the Fifth Amendment.[351]

As Echeverria argues, by conflating "burdening" the Just Compensation Clause with directly violating it—or any other constitutional provision—the Court in *Koontz* avoided the issue of the proposed exactions not being a direct constitutional violation, while still relying on the language of its precedent to find a "constitutionally cognizable injury."[352] Because no "private property [was] taken for public use. . ."[353] by the District within the meaning of the Just Compensation Clause, and no other constitutional violation was presented, regardless of the proposed exaction's failure to meet the nexus and rough proportionality requirements of *Nollan* and *Dolan*, there is no direct violation of a constitutional provision. Seemingly, the only way to explain the Court's unanimous holding relative to the Court's precedent is to accept that there are "mini and "micro" unconstitutional doctrines for different powers and rights, which Brooks Fudenberg mused,[354] or that Court is expanding the Just Compensation Clause's protection.

2. THE DOCTRINE APPLIES TO MONETARY EXACTIONS

Settling a question courts, lawyers, and commentators have debated for decades,[355] the Court extended *Nollan* and *Dolan*'s protection of property dedications to money.[356] In so holding, the Court necessarily implied that monetary exactions, if imposed outside of the land use permitting process, are *per se* takings.[357] That extends the reach of the Just Compensation Clause into a new realm.

Relying on *Eastern Enterprises v. Apfel*,[358] the District argued that the Court had already foreclosed that possibility.[359] In *Eastern Enterprises*, four justices[360] concluded that a law[361] that retroactively required a coal company to pay for lifetime health insurance costs of retired workers was unconstitutional because it violated the Just Compensation Clause.[362] Justice Kennedy was the swing vote in agreeing that the law was unconstitutional, but in his opinion, because it violated substantive due process.[363] According to Justice Kennedy, the Just Compensation Clause did not apply because the law did not affect a particular property interest like a lien or an interest in intangible property like intellectual property, "or even a bank account or accrued interest."[364] Because the statute was indifferent regarding how the company had to pay the benefits, Justice Kennedy reasoned that it simply imposed a general obligation to pay money similar to other laws not recognized as takings.[365]

The four dissenting justices[366] thought the law was constitutional and that the Just Compensation Clause was inapplicable.[367] Because Justice Kennedy's concurrence was the dispositive opinion, some courts and commentators interpret Justice Kennedy's concurrence combined with the four justices' dissenting opinion as a "second majority holding" that payments of money are not property for purposes of Fifth Amendment takings claims,[368] which is what the District argued in *Koontz*.[369] However, other commentators questioned the assumption that that principle would necessarily apply in the land use permitting context because of the underlying property interest at issue in the transaction.[370]

The latter commentators proved right when the Court rejected that argument and held monetary exactions must satisfy *Nollan* and *Dolan* just like exactions of property.[371] To begin, the Court again relied on a

351. Lefkowitz v. Cunningham, 431 U.S. 801, 802-03 (1977); *see* Garrity v. New Jersey, 385 U.S. 493, 494, 498, 500 (1967). In *Scott*, 450 F.3d at 865-75, the Ninth Circuit Court of Appeals ignored a prisoner's waiver of his Fourth Amendment rights because they were an unconstitutional condition, but only found a cognizable constitutional violation because the underlying search violated the Fourth Amendment's reasonableness standard.

352. Echeverria, *supra* note 339, at 20; *Koontz*, 133 S. Ct. at 2596.

353. U.S. CONST. amend VI.

354. Fudenberg, *supra* note 24, at 414-15 (footnote omitted).

355. *See* Reznick, *supra* note 4, at 738 (describing the disagreement about whether *Nollan* and *Dolan* apply to monetary exactions). *Compare* McCarthy v. Leawood, 894 P.2d 836 (Kan. 1995) (rejecting application of *Dolan* to impact fees) *with* Ehrlich v. City of Culver City, 12 Cal. 4th 854, 881 (Cal. 1996) (applying *Dolan* to monetary exaction).

356. *Koontz*, 133 S. Ct. at 2603.

357. *Cf. id.* at 2598-99 (acknowledging *Nollan* and *Dolan* held as such); *Lingle*, 544 U.S. at 547 (same).

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

359. Brief for Respondent, *supra* note 332, at 46-49.

360. Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas.

361. Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 (2012).

362. *E. Enters.*, 524 U.S. at 504-05.

363. *Id.* at 540, 550.

364. *Id.* at 540.

365. *Id.*

366. Justice Breyer, Justice Stevens, Justice Souter, and Justice Ginsburg.

367. *E. Enters.*, 524 U.S. at 554, 567-68 (Breyer, J., dissenting) (arguing that the Takings Clause was not triggered because "an ordinary liability to pay money . . . to third parties" was at issue rather than a physical or intellectual property interest).

368. Siegel, *supra* note 224, at 592.

369. *Koontz*, 133 S. Ct. at 2599.

370. Reznick, *supra* note 4, at 755; *see also* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 WASH. & LEE L. REV. 373, 390 (2002) (noting the "growing recognition" that *Nollan*'s and *Dolan*'s logic apply to monetary exactions).

371. *Koontz*, 133 S. Ct. at 2603.

practical policy argument that a contrary rule would allow local governments to sidestep *Nollan* and *Dolan*.[372] The Court acknowledged that its holding was based, in part, on that policy rationale.[373] Then, the Court distinguished *Eastern Enterprises*.[374] The Court tied the monetary exaction to the applicant's property by reasoning that the monetary exaction burdened the applicant's specific 14.9-acre parcel because the District imposed the exaction through the land use permitting process, while the monetary exaction in *Eastern Enterprises* was completely disconnected from any specific property.[375] The Court analogized the exaction's relationship to the specific property interest to the appropriation of a lien on a discrete piece of property, which the Court has held is a taking.[376] The Court did not foresee problems in, or elaborate upon, distinguishing between such monetary land use exactions and property taxes or other user fees, which are not takings.[377]

The dissent disagreed that the District's order to pay money was tied to a specific piece of property and thought that *Eastern Enterprises* foreclosed finding a taking here.

> Because the government is merely imposing a 'general liability to pay money'[378]—and therefore is 'indifferent as to how the regulated entity elects to comply or the property it uses to do so,'[379] the order to repair wetlands, viewed independent of the permitting process, does not constitute a taking. And that means the order does not trigger the *Nollan-Dolan* test, because it does not force [the applicant] to relinquish a constitutional right.[380]

372. *See id.* at 2599 (commenting that because only one option that the local government gives an applicant must pass the *Nollan* and *Dolan* tests, the local government could always rely on an in-lieu-of fee).

373. *See id.* ("For that [policy] reason and those [reasons] that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.").

374. *Id.* at 2599-600.

375. *See id.*

376. *Id.* at 2601 (citing Armstrong v. United States, 364 U.S. 40 (1960)). Echeverria criticizes the majority for shifting the focus from the property interest exacted to the underlying land to be developed, which turns the *Nollan/Dolan* analysis upside down and allows the Court to use the Just Compensation Clause where it otherwise would not apply. *See* Echeverria, *supra* note 339, at 25.

377. *Koontz*, 133 S. Ct. at 2600-01 (citing *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 243 n.2 (2003)). The majority asserted, "We need not decided at precisely what point a land-use permitting charge denominated by the government as a 'tax' becomes 'so arbitrary . . . that it was not the exertion of taxation but a confiscation of property.'" *Id.* at 2602 (quoting Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24-25 (1916)).

378. *Id.* at 2606 (Kagan, J., dissenting) (quoting *E. Enters.*, 524 U.S. at 555 (Breyer, J., dissenting)).

379. *Id.* (Kagan, J., dissenting) (quoting *E. Enters.*, 524 U.S at 540 (Kennedy, J., concurring)).

380. *Id.* at 2606 (Kagan, J., dissenting).

Further, the dissent rejected the majority's policy rationale that local governments would rig their permitting systems to evade *Nollan* and *Dolan* by offering a monetary exaction, reviewed less strictly, that the government would then use to purchase the property interest that the government was prohibited from exacting under the stricter *Nollan* and *Dolan* standards.[381] If there was evidence of that abuse—of which it noted no one presented any—then the dissent said courts could impose *Nollan* and *Dolan*.[382] However, according to the dissent, that unjustified fear and the majority's "yen for a prophylactic rule" did not justify extending *Nollan* and *Dolan* over all monetary exactions when the Court's *Penn Central* takings framework, the Due Process Clause, and, often, state law all provide a ready remedy for property owners.[383]

The dissent predicted the majority's holding would cause "practical harm" by failing to provide any guidance for distinguishing its application between taxes and fees and that, as such, it "threatens the heartland of local land-use regulation and service delivery . . . ."[384] According to the dissenters, "[t]he Federal Constitution . . . will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly."[385] The majority disagreed that there would be much change and noted that some states already apply *Nollan* and *Dolan*, or similar standards, to monetary exactions.[386] We will see who is right.

3. THE REMEDY

The disagreement between the majority and the dissent in *Koontz* demonstrates that applying the unconstitutional conditions doctrine to the Just Compensation Clause, especially with monetary exactions, becomes a tricky task.[387] For instance, what is the remedy when the

381. *See id.* at 2608 (Kagan, J., dissenting).

382. *Id.*

383. *Id.* at 2608-09.

384. *Id.* at 2607, 2609.

385. *Id.*

386. *Id.* at 2602 (majority opinion) (citing N. Ill. Home Builders Ass'n. v. Cnty of Du Page, 649 N.E.2d 384, 388-89 (Ill. 1995); Home Builders Ass'n. v. Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000); Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 640-41 (Tex. 2004)).

387. Courts already criticize the *Nollan* and *Dolan* tests as abstract and difficult to apply, *e.g.*, Homebuilders Ass'n. of Metro v. City of Portland, 62 P.3d 404, 408 (Or. Ct. App. 2003) (calling the rough proportionality "test vague, abstract, and elastic"), and adding monetary exactions to the equation does not make judges' jobs easier. *Cf.*

Just Compensation Clause is burdened but not triggered? Only when there is an actual taking must just compensation be paid under the Just Compensation Clause. When there is no taking, there is no general federal remedy; so the landowner must look to whatever law the landowner's cause of action is based on.[388] In *Koontz*, that was Florida state law and, as such, the Court left the remedy issue for the Florida courts to decide on remand.[389] Justice Kagan clarified that on top of whatever state law remedy is or is not available, courts can still require a local government to remove conditions from a permit denial that violate *Nollan* and *Dolan*.[390] Interestingly, the majority did not foreclose the possibility that there could be a federal remedy for a proposed exaction that does not pass *Nollan* and *Dolan*'s tests; rather, the majority did not address that issue because the applicant brought the lawsuit pursuant to state law.[391]

VIII. Substantive Due Process Through the Just Compensation Clause

At first glance, the Court's use of the doctrine to review exactions in the land use permitting process is reminiscent of the other settings in which the Court used the doctrine to police transactions between people, or corporations, and the government when the Court worries about the government abusing its power.[392] But looking closer, the Court's application of the doctrine in the land use context is unique. In other contexts in which the Court applies the doctrine, there is some direct constitutional violation—either an independent constitutional violation like the Due Process or Equal Protection Clauses, or the Court treats the condition equivalent to a direct constitutional violation.[393] Because the Court applies the doctrine to *proposed* exactions to find a cognizable violation of the Just Compensation Clause before a local government actually takes a landowner's property and there is no other underlying constitutional violation, the Court's use of the doctrine in this setting is special.

E. Enters., 524 U.S. at 556 (Breyer, J., dissenting) (noting that applying the Just Compensation Clause to monetary exactions "bristles with difficulties").
388. *Koontz*, 133 S. Ct. at 2596.
389. *Id.*
390. *Id.* at 2603 (Kagan, J., dissenting).
391. *Id.* at 2597.
392. *See generally supra* Parts II–III, V.A.
393. *See supra* Part VI.

Through this unique use of the doctrine, the Court engages in a heightened substantive due process style of judicial review under the guise of takings jurisprudence.[394] The Court stated in *Lingle* that, together, *Nollan* and *Dolan* are stand-alone takings tests despite their connection to *Agins*, which the Court simultaneously redefined as a purely substantive due process case, not a takings case;[395] but that statement is unsatisfying in understanding *Nollan*, *Dolan*, and now *Koontz* as distinct from substantive due process. The Court's reasoning in *Lingle* that *Nollan* and *Dolan* apply to exactions that would be *per se* takings outside of the permitting process, which, after *Koontz* extended *Nollan* and *Dolan*, should awkwardly mean that an exaction of money outside of the permitting process is also akin to a *per se* taking, squarely clashes with *Eastern Enterprises*, in which a majority of the Court said a freestanding requirement to pay money is not a taking.[396] That conflict evidences the Court's forcing what is due process review into its takings jurisprudence.[397] The need to address that conflict between the Court's explanation of *Nollan* and *Dolan* in *Lingle* and the Court's decision in *Eastern Enterprises* called, at least, for a concurring opinion from Justice Kennedy, but he was nowhere to be found.

Regardless of what the Court said in *Lingle* about *Nollan* and *Dolan* being "worlds apart" from a traditional substantive due process analysis, in *Nollan*, *Dolan*, and *Koontz*, the theme of the applicants' arguments sounds inherently like the type of argument at home in a substantive due process framework. In the trilogy of cases, in substance, the applicants argued that the exactions were arbitrary in relation to the governments' asserted basis for imposing them, or arbitrary in their size, and therefore not supported by the local government's authority to regulate land use in furtherance of the community's general health,

394. Using substantive due process to review economic regulation is generally disfavored unless a fundamental right is involved. Stuart M. Weiner, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 TEMP. L.R. 1467, 1471 (1996) (providing Moore v. City of E. Cleveland, 431 U.S. 494, 498-500 (1977), about family privacy, as an example of when the Court will use substantive due process in land use cases involving a fundamental right).
395. *See supra* notes 296–99 and accompanying text.
396. *See supra* notes 297, 359–68 and accompanying text. Echeverria, *supra* note 339, at 29, identifies *Koontz*'s conflict with *Eastern Enterprises* in that regard, and notes that the majority does not attempt to address it.
397. Echeverria, *supra* note 339, at 24 ("The Court in Koontz has committed the same category mistake the Court acknowledged and corrected in *Lingle*: treating as a takings issue a claim that logically does not fit in takings doctrine but that naturally

safety, and welfare.[398] Although the general criticism of using substantive due process to second guess legislative decisions is applicable to using the doctrine in *Nollan*-, *Dolan*-, and *Koontz*-style cases in that, arguably, it provides judges with too much discretion to act as super legislatures making value judgments,[399] perhaps in cases where the government is singling someone out to regulate individually on a discretionary basis—like in the adjudicative setting that those three cases arose in—there is more risk for abuse and heightened review is justified.[400] Such exactions will always receive judicial review in some form, but the Court's choice to impose a stricter standard of review in this context gives courts more discretion to substitute their judgment for that of the local governments than courts had in the past. This is a policy choice.

Important for landowners using the doctrine to get a judge to scrutinize an exaction, opposed to traditional due process review in which a court will review the government's action for a rational basis and put the burden on the challenger to prove the government abused its power,[401] *Nollan*, *Dolan*, and *Koontz* start with a suspicion of the

398. *See* Brief for Appellants at 17, 25-26, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (No. 86-133), 1986 WL 720589 (arguing that the government's exaction is unrelated to the negative externalities of the applicant's development or anything the applicant will gain, and that it goes too far); Brief for Petitioner at 19, Dolan v. City of Tigard, 512 U.S. 374 (1994) (No. 93-518), 1994 WL 249537 (arguing that the government's exaction "violates basic principles of fairness" because it imposes burdens on the applicant disproportionate to the applicant's development, which are burdens that should be borne by the public as a whole); Brief for Petitioner at 44, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 5940280 (arguing that the government's exaction was unrelated to the effects of the applicant's development and that rather than using legitimate land use planning tools, the government was extorting the applicant).

399. *See Lingle*, 544 U.S. at 544 (criticizing the *Agins* substantive due process test on the grounds that it is "untenable as a takings test" and that it would allow and "often require courts to substitute their predictive judgments for those of elected legislatures and expert agencies."); *cf.* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, Comment, 90 YALE L. J. 1063, 1086 (1983) (opining that one of the problems of substantive due process review in *Lochner* was that the Court relied on its own normative idea of liberty, which may not have squared with a majority of people's idea of liberty at that time).

400. *Cf.* Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (en banc) ("One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system. When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary conditions as a condition of development.").

401. *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926) (placing the burden on the plaintiff with a substantive due process claim to prove that the government acted arbitrarily and unreasonably, the regulation "having no substantial relation to the public health, safety, morals, or general welfare").

government's action by placing the burden on the government to justify both the exaction relative to its basis for imposing the exaction, and the size of the exaction.[402] This review has considerably more bite than the traditional rational basis review. Similar to the Court's normative decision-making in the First Amendment unconstitutional conditions context in which the Court labeled certain laws, but not others, as coercive,[403] in the land use permitting context, by ascribing an improper government motive or an applicant's lack of power to take on the local government, with the aid of crafty attorneys, courts can use the doctrine to come to any desired result. Because this review can occur before the government actually takes property, this is substantive due process through the Just Compensation Clause.

IX. The Doctrine's Current Formulation for Land Use Exactions

What does the doctrine applied to the Just Compensation Clause and exactions look like after *Koontz*? A public body cannot attach to a permit approval an exaction that "leverages its legitimate interests in mitigation to" coerce out of an applicant an exaction that lacks either an essential nexus to the government's asserted justification for regulating, or rough proportionality to the external effects of the development.[404] Accordingly, there has to be some sort of "concrete" or "specific" demand before a court will take a closer look at the proposed exaction because *Del Monte Dunes* says that a pure "denial of development" does not lead to an unconstitutional conditions claim.[405] *Koontz* provides no help with that.

In *Koontz*, the District proposed two alternative mitigation plans, mentioned above, one with off-site mitigation work and one without it, along with the statement that the District would "also favorably consider" other "equivalent" off-site mitigation projects that the applicant

402. *See Dolan*, 512 U.S. at 395 (requiring the local government to put forth evidence supporting its proposed exaction); Mulvaney, *supra* note 208, at 278 (describing the large burden that *Nollan* and *Dolan* put on local governments to justify exactions).

403. *See supra* Parts V.A and VII.

404. *Cf. Nollan*, 483 U.S. at 836 (agreeing with the government's argument that a permit condition on development is not a taking if it "serves the same legitimate police-power purpose as a refusal to issue the permit . . . ," which is the essential nexus test); *Dolan*, 512 U.S. at 391 (explaining the rough proportionality test); *Koontz*, 133 S.Ct. at 2595 (explaining how the rules in *Nollan* and *Dolan* are meant to make landowners "internalize the negative externalities of their conduct . . .").

405. *Koontz*, 133 S. Ct. at 2598; City of Monterey v. Del Monte Dunes, 526 U.S. 687, 703 (1999).

proposed to the District.[406] The Court declined to decide whether that was "too indefinite" for purposes of triggering an unconstitutional conditions claim under *Nollan* and *Dolan* because the Florida Supreme Court did not rule on that issue and, instead, relied on the Florida Court of Appeals' treatment of the District's behavior as a sufficient demand.[407] After *Koontz*, that issue remains to be teased out at the state level, which is important because it is problematic if local governments can get into trouble by contemplating, rather than imposing, a disproportionate exaction. The Court's failure to address that issue in *Koontz* is one of the most troubling parts of the decision because it leaves much uncertainty for local governments and landowners as to where that line is.

Once sued by an applicant opposing a proposed exaction with the doctrine of unconstitutional conditions, the local government has the burden of overcoming the presumption that it is extorting the applicant and must articulate an essential nexus to the governments' would-be basis for denying the development and show some sort of individualized determination that the exaction is roughly proportional to the negative externalities of the proposed development. Although in *Nollan*, *Dolan*, and *Koontz* the exactions were all imposed in an adjudicative proceeding, the Court has not said the rules in those cases apply equally to exactions imposed legislatively.[408] Local governments will argue for courts to draw the adjudicative-legislative distinction so that legislatively imposed exactions receive judicial deference like run-of-the-mill zoning cases, in which the applicant has the burden to prove the government action is not fairly debatably in furtherance of the community's general health, safety, or welfare.[409] The Court already rejected certiorari of a case presenting that question,[410] so lower courts and the states are left to figure it out themselves.

406. *Koontz*, 133 S. Ct. at 2593 (internal quotation marks and citation omitted).
407. *Id.* at 2598 (citing *Koontz*, 77 So.3d 1220, 1224 (2011), *rev'd*, 133 S. Ct. 2586 (2013)).
408. For arguments that adjudicative and legislative exactions should receive heightened review, see *Parking Ass'n of Georgia v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of certiorari) ("A city council can take property just as well as a planning commission can."); Breemer, *supra* note 370, at 401 ("There is as little to support a lower level of scrutiny for exactions levied pursuant to legislative acts as there is to justify an exception from essential nexus review for monetary exactions.").
409. *See, e.g.*, Cal. Bldg. Indus. Ass'n v. City of San Jose, 157 Cal. Rptr. 3d 813, 815-16 (Cal. Ct. App. 2013), *reh'g denied*, July 1, 2013, *rev'w granted*, 307 P.3d 878 (Cal. 2013) (explaining judicial review of legislative land use decisions).
410. *Parking Ass'n of Ga.*, 515 U.S. at 1116 (rejecting certiorari).

A. *Potential Agency Responses*

In states making the adjudicative-legislative distinction, local governments may adopt policies that calculate impact fees based on a legislative formula that takes away discretion that could be interpreted—or misinterpreted—as extortion. However, that would not be applicable to physical dedications, which are still a useful planning tool necessary to offset certain negative externalities of new development. Perhaps the haziness of determining exactly when a good-faith negotiation turns into extortion will cause the city and developer's roles to switch and the developer will propose exactions to the local government. The majority of the Florida Court of Appeals, the decision with which the Court ended up agreeing, considered that result in its discussion of the unfortunate "uncertainty and unpredictability" of the doctrine.[411]

> It is hard to imagine that a landowner could invoke the doctrine of unconstitutional conditions and claim a taking if the landowner, and not the government, initiates the bargaining process and makes all of the offers. This role reversal accomplishes little, but seems a possible outcome given the uncertainty inherent in the doctrine of unconstitutional conditions to land use/development decisions rather than more traditional takings jurisprudence.[412]

Unfortunately, that prediction from 2009 is still valid today after the Court's opinion purportedly settling the issues on appeal.

Likely, to get through the permitting process quickly, the applicant—who probably knows the site better than anyone else—will address potential mitigation measures in its development application. Anything included in the application should be deemed conceded by the applicant, and a baseline should be established. Then, the local government may contend that additional mitigation measures are necessary to offset the development's externalities; but in doing so the local government risks the applicant seeking judicial review of the exactions in court. The first judicial review will often be in state court.

Many states provide quicker—and less expensive—avenues for applicants to receive judicial review of exactions than federal litigation.[413] In California, Cal. Gov. Code § 66005 requires exactions "not [to] exceed the estimated reasonable cost of providing the service for which the . . . exaction is imposed[]"; and Cal. Gov. Code § 66001 puts additional requirements on California's local governments to justify

411. *Koontz*, 5 So.3d 8, 14 (Fla. Ct. App. 2009) *quashed*, 77 So.3d 1220 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013).
412. *Id.* at 15.
413. CAL. GOV. CODE §§ 66000-66008 (West 2014); OR. REV. STAT. § 197.796 (2013).

monetary exactions. In Oregon, ORS 197.796(1)-(2) allows an applicant to accept a condition, then challenge the condition at the Land Use Board of Appeals,[414] or, if pleading damages, in circuit court.

If an applicant is unsuccessful in using state law to challenge the exaction—if properly preserved—it can still do so in federal court, arguing that the local government's counteroffer is an unconstitutional condition burdening the applicant's Just Compensation Clause rights. In court, local governments have the burden of justifying the exaction.[415] In evaluating whether a particular impact fee is too high for instance, the developer and the local government will likely call in dueling expert witnesses to present their findings and analysis, and attempt to persuade the court as to which expert is correct.[416] A cost-benefit analysis may dissuade some developers from challenging an exaction they think is disproportionate in federal court. Similarly, and perhaps what may be the most significant result of *Koontz*, risk-averse local governments may be overly conservative in their mitigation offers to avoid litigation.

X. Conclusion

Since the Court invented the doctrine of unconstitutional conditions in the 1800s, the Court has inconsistently applied it to different rights and different benefit in various contexts; no unifying rationale or theme is articulable from the Court's different applications of the doctrine[417] The fight in most cases is over what level of judicial review to apply, something akin to strict scrutiny, or something like rational basis review. While a bloc of Justices had a majority in the Court to use the doctrine to strictly scrutinize laws they thought infringed peoples' freedoms of speech, religion, or the right to travel in the 1950s, 1960s, and 1970s,[418] beginning in the 1980s through today, a new bloc of Justices have a majority of the Court to using the doctrine to more closely scrutinize local government land use planning decisions they

414. The Land Use Board of Appeals is an administrative board created by statute to efficiently and consistently resolve land use disputes in Oregon. LAND USE BOARD OF APPEALS, http://www.oregon.gov/LUBA/Pages/about_us.aspx (last visited May 20, 2014).

415. *Cf. Dolan*, 512 U.S. at 390 (describing what type of evidence the local government must produce to meets its burden of production). Mulvaney, *supra* note 208, at 288 (saying that the government has the burden of showing the condition complies with *Nollan* and *Dolan*).

416. Echeverria, *supra* note 339, at 36.

417. *See generally supra* Parts I.A–V.C.

418. *See supra* Parts IV.A and V.C.

see as infringing property rights. The result is a more powerful Just Compensation Clause that property owners can wield—or implicitly threaten to wield—as a club against local governments' exaction proposals in the land use permitting process.

The Court's attempt in *Lingle* to reclassify *Nollan* and *Dolan* as takings cases that are entirely distinct from *Agins* and substantive due process is unpersuasive—by clasping on to the Just Compensation Clause through the unconstitutional conditions doctrine, the Court engages in the same type of substantive review. Going full steam ahead after *Nollan* and *Dolan*, *Koontz* extends the stricter scrutiny that the Court applies to exactions of property through the Just Compensation Clause to proposed exactions and says that money is property in the permitting context; that pulls more land use planning decisions that are not traditional takings into a stricter, substantive judicial review and away from the historic deference afforded land use planners. Again, this is a policy choice. In land use law, the doctrine of unconstitutional conditions is the age-old substantive due process game with a different name.