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A Half-Baked Law: How the Supreme Court's Decision in *Koontz v. St. Johns River Water Management District* Misses a Key Ingredient to Fifth Amendment Protection

Property owners received a welcome boost to private-property protection when the Supreme Court decided *Koontz v. St. Johns River Water Management District*.[1] Although the Supreme Court's decision in *Koontz* clarified parts of the "mess"[2] and "muddle"[3] that is the current state of "exaction law,"[4] there is still a key ingredient missing from Fifth Amendment Takings Clause protection.[5] In regard to exaction law, the Supreme Court has added Takings Clause protection in a piecemeal manner since its decision in *Nollan v. California Coastal Commission*, which held that an exaction must have an "essential nexus" to the reason for requiring the developmental permit.[6] The Court's piece-by-piece clarification of exaction law continued in *Dolan v. City of Tigard*, which held that an exaction must also be "rough[ly] proportional[ ]" to the harm caused by the new land use and the benefit obtained by the condition.[7] Such action by the Court has led to an untenable

1. 133 S. Ct. 2586, 2588 (2013). *See A Property Rights Victory; Government can't use permitting to extort from landowners*, WALL ST. J. (June 27, 2013, 7:24 PM), http://online.wsj.com/news/articles/SB10001424127887323683504578567670559475816; Douglas Halsey et al., Koontz v. St. Johns River Water Management District No. 11-1447, *570 U.S. __ (2013)*, LEXOLOGY (June 28, 2013), http://www.lexology.com/library/detail.aspx?g=921c30e2-e6ed-4827-8414-9740e986924e (describing the *Koontz* decision as a "significant win for property owners").

2. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 279 (1992).

3. Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984).

4. The precise definition of what constitutes an "exaction" is still debated by courts and commentators alike. For the purposes of this Note, I will use the definition given by the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Limited Partnership*: "[A]ny requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction." 135 S.W.3d 620, 625 (Tex. 2004) (internal citation omitted).

5. The Takings Clause of the Fifth Amendment reads, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend V.

6. 483 U.S. 825, 837 (1987).

7. 512 U.S. 374, 398 (1994) (Stevens, J., dissenting). For the purposes of this Note, I will refer to the tests from *Nollan* and *Dolan* collectively as "*Nollan/Dolan*."

application of principles by the lower courts, much of which is contradictory.[8] While the *Koontz* decision addresses large parts of the confusion regarding exaction law application,[9] ultimately the Court continued its piece-by-piece interpretation by leaving a substantial and controversial issue regarding the "legislative" vs. "adjudicative" distinction[10] untouched.[11] This Note argues that the only way to pay proper deference to the Constitution is to apply the *Nollan/Dolan* test to all exactions, regardless of their origin or character,[12] and the Court missed an opportunity to establish this standard in the *Koontz* decision.[13]

8. *Compare* Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995) ("Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property."), *with* Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999–1000 (Ariz. 1997) (declining to apply the *Nollan/Dolan* heightened scrutiny standard to "a generally applicable legislative decision," in part because *Dolan* "involved a city's adjudicative decision") (emphasis omitted).

9. *Koontz* clarified two aspects of exaction law: (1) "money" or "in-lieu-of fees" are subject to the heightened scrutiny of the *Nollan/Dolan* test, and (2) the *Nollan/Dolan* test should still be applied whether the exaction is based upon a "condition precedent" or a "condition subsequent." Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2596, 2599 (2013).

10. *See* Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 251–57 (2000) (examining lower court cases considering the *Nollan/Dolan* standard for exactions "to show the confusion and inconsistency the Court created by invoking the [legislative/adjudicative] distinction").

11. The legislative/adjudicative distinction was arguably not properly before the Court in *Koontz*. However, given the Court's ruling on "monetary exactions," the legislative/adjudicative distinction was clearly implicated. Even if the Court could not have addressed the legislative/adjudicative distinction with binding authority, it could have, at the very least, given guidance and direction to the courts below with persuasive dicta.

12. An argument can be made that the only way to truly give deference to the text of the Fifth Amendment would be to do away with exactions completely; however, if a development is going to cause negative externalities, the landowner or developer should bear the burden of that cost. In this way the exaction is not really "taken for public use"; rather, it ensures the proper party is bearing the burden of the development. The *Nollan/Dolan* test ensures the burden imposed through the exaction is not unduly harsh or unconstitutional.

13. If a court decision deprives landowners and developers of property rights, is that a taking? The question remains unsettled as the Supreme Court has not yet decided whether "judicial takings" exist. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 713–15 (2010). In a four-person plurality, Justice Scalia suggested courts could, by judicial decision, cause an actionable taking. *Id.* Because the existence of "judicial takings" is unclear (although it is likely that if a proper question came before the Supreme Court the existence of "judicial takings" would be found), it is likewise unclear which test, if any, the Court would apply to analyze the taking. A "judicial taking" would most likely be found outside of the developmental permit context because in the developmental permit context the question of whether there is an unconstitutional taking or not would rely heavily on what the

Currently, many lower courts try to draw a "bright line" between exactions that are based on legislative decisions and those that are based on adjudicative decisions. This distinction first arose when the Court decided *Dolan*,[14] a major exaction case following *Nollan*. In *Dolan*, the Court added another layer of Takings Clause protection by holding that the demands of an exaction need to demonstrate "rough proportionality" to the expected harm caused by granting the developmental permit, in addition to the "essential nexus" standard already required under *Nollan*. The *Dolan* Court went on to justify this heightened scrutiny by characterizing the exaction at issue as an "adjudicative decision," as opposed to a "legislative" act likely warranting judicial deference.[15] While many courts and commentators have tried to follow this distinction, others have pointed out the inherently false premise it presents. Because "[m]ost [land use] decisions are made through *a combination* of legislative and adjudicative acts[,] a bright-line dichotomy is false,"[16] and therefore unworkable as a rational standard.

Even if it were possible to draw a bright line between legislative and adjudicative decisions in the exaction law context, this proposed rule would miss the point. Nowhere in the text of the Fifth Amendment is there a distinction made between legislative and adjudicative takings.[17] By applying the *Nollan/Dolan* test to all exactions the courts will have a clear standard to work from, thereby creating coherent guidance for governments, landowners, and developers to follow for permitting purposes. Also, by applying the *Nollan/Dolan* standard to all exactions the very real threat of

permit condition or exaction is, and therefore the presiding court would most likely just apply the *Nollan/Dolan* test.

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

15. Part of the confusion regarding the application of the *Dolan* Court's analysis is that it is often not taken in proper context with the rest of the sentence, and the *Dolan* Court did not completely clarify what it meant by the distinction. The sentence reads: "First, they involved essentially legislative determinations *classifying entire areas of the city*, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit *on an individual parcel*." *Id.* at 385 (emphasis added). It is beyond dispute that governments have zoning powers that can restrict certain uses of land. But it is another question entirely when you consider allowing governments to take property, whether real property or money, in a way they never could under zoning law. The *Dolan* Court needed to clarify the latter point, rather than relying on the geographic specifications of the ordinance in question.

16. Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 501 (2006).

17. *See* U.S. CONST. amend V.

government extortion will come under judicial review,[18] thus safeguarding the requesting landowner or developer's Fifth Amendment right.[19]

Part I of this Note will focus on a history of the development of exaction law under the Supreme Court's guidance. Part II will explore the current theories posited by the courts for the use of a legislative/adjudicative distinction and the divergent outcomes these theories create. Part III will focus on why the legislative/adjudicative distinctions posited by the courts fail. And Part IV will consider how eliminating the legislative/adjudicative distinction altogether, specifically after the Court's ruling in *Koontz*, and utilizing the *Nollan/Dolan* test in all exaction contexts will provide a uniform standard for lower courts to develop exaction laws that more fully protect the constitutional right guaranteed under the Takings Clause of the Fifth Amendment.

I. A HISTORY OF *NOLLAN* AND *DOLAN*: THE TWO-PART TEST EXPLAINED

To fully comprehend the current state of exaction law, an understanding of how the law developed and where it derived is essential. Each section of this Part will detail an important aspect of the creation of exaction law and the legislative/adjudicative distinction: Section A will briefly discuss the development of "zoning" laws and why they are important to exaction analysis. Section B will analyze the similarities and differences between zoning and exactions. Section C will analyze the Court's ruling in *Nollan* and the change that ruling made to exaction law. Section D will analyze *Dolan* and the further modifications the Court made to exaction law. And section E will describe the questions left open by *Nollan* and *Dolan* and how the Court addressed some of those concerns in *Koontz*.

A. Zoning Authority: Village of Euclid v. Ambler Realty Co.

In the first major "zoning" case to reach the Supreme Court, the Court gave broad deference to the legislative branch and its ability to

18. The possibility of government extortion was a strong concern for Justice Scalia in the *Nollan* decision. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

19. The "unconstitutional conditions" doctrine is a tenet preventing the government from conditioning a person's receipt of a government benefit upon the waiver of a constitutionally protected right.

regulate land use.[20] In the opinion, the Court reviewed state court decisions to justify its holding that zoning was an acceptable use of the police powers to regulate land use. Quoting the Louisiana Supreme Court, the U.S. Supreme Court wrote:

> If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.[21]

The constitutionality of zoning ordinances is not up for debate. Zoning ordinances are usually the result of a legislative act, and as such, are presumed to be valid by the courts.[22] If local constituents are not happy with a zoning scheme, their redress is to be found at the ballot box, not the courthouse.[23] However, there are glaring differences between zoning laws and developmental exactions.

Zoning is wrought by the police power of the state, employed to protect health, safety, welfare, and morals.[24] Through zoning, a municipality can set the rules by which neighbors know how to interact with one another, specifically in the land-use context, with a hope of reducing nuisance claims. For example, local governments use zoning "to regulate . . . the height, . . . and size of buildings and other structures, . . . the size of yards, courts, and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence, or other purposes."[25] Another important characteristic of zoning is that it is

20. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 393–95 (1926).

21. *Id*. at 393 (quoting State *ex rel*. Civello v. City of New Orleans, 97 So. 440, 444 (La. 1923)).

22. *See* Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 384–85 (2004).

23. However, there are other forms of zoning-redress in certain situations. One example is a landowner seeking judicial relief by proving that she is subject to a discriminatory zoning scheme. Also, zoning depriving the owner of "all economic viability" may be subject to the Takings Clause. However, this "occur[s] only in the most extraordinary of circumstances." Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RESOURCES & ENVTL. L. 1, 30 (2006).

24. ANDERSON'S AMERICAN LAW OF ZONING § 1.14 (Kenneth H. Young ed., 4th ed. 1996).

25. Jane C. Needleman, Note, *Exactions: Exploring Exactly When* Nollan *and* Dolan *Should Be Triggered*, 28 CARDOZO L. REV. 1563, 1571 n.55 (2006) (citation omitted).

typically a "generally applicable" ordinance, applying to any and all landowners within a certain district, even those who are already established,[26] usually in the form of some type of restriction based on the classification of the land, as opposed to an ad-hoc determination either granting or denying discretionary benefits.

Put simply, the burdens of zoning ordinances are to be shared by all, and the benefits, hopefully, are to be shared by all as well. Although zoning restrictions implicate the landowner's ability to exercise complete dominion over their land, the local government should not be "gaining" anything for public use from zoning. Through zoning, nothing is "taken" in the Fifth Amendment understanding of the term from the landowner and given to the public for use.

B. Exactions and Zoning: Peas in a Pod?

Although legislatures wield great power through zoning ordinances, almost to the point of depriving land of all economic value,[27] zoning ordinances can only go so far in accomplishing local governmental goals. There are many benefits a local government cannot gain through zoning. For example, municipalities and local governments cannot have a road repaired through zoning. Nor can they have a traffic light installed, acquire a public easement, or lay curb and gutter.[28]

All of these benefits, however, can be acquired by a local government or permitting authority in the context of granting a land development permit. When a local government conditions the approval of the permit upon the bestowal of the benefit, the local government can impermissibly gain something it otherwise would have had to purchase. The condition that needs to be satisfied for the approval of the permit is known as an exaction. The precise definition of what constitutes an exaction is still debated,[29] but put simply, it is any requirement that a developer provide or do something as a condition to receiving municipal approval, even if that condition is the payment of money in the form of an "impact

26. *See* Green, *supra* note 22, at 386 ("[S]tandard zoning enabling acts require that zoning ordinances apply uniformly to all property within a district.") (citation omitted).

27. *See* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124 (1978).

28. *See* Needleman, *supra* note 25, at 1586.

29. *See supra* note 4 and accompanying text.

fee."[30] Because local governments and permitting authorities can condition the approval of development permits, they can also force developers to make a choice: either succumb to our demands or the demands of the local permitting authorities (which might be unconstitutional)[31] or withdraw your request.

On its face, this type of dilemma raises the "unconstitutional conditions" doctrine, which forbids the government from conditioning a person's government benefit upon the waiver of a constitutionally protected right.[32] In the exaction context, the benefit of a development permit is conditioned upon the landowner or developer giving up some form of private property for public use without just compensation, thereby implicating the Fifth Amendment's Takings Clause. Takings Clause protection has been described by the Court to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[33]

On the other hand, while landowners and developers should not be forced to bear public burdens alone, the same is true for the public. The public at large should not be forced to bear negative externalities caused by private development. Because of this tension, exaction cases are not easily decided on pure policy grounds.

In *Koontz*, the Court addressed the tension found in exaction cases with two main points,[34] each addressing one side of the public burdens versus private externalities dichotomy. First, developers are especially vulnerable to the type of coercion the unconstitutional conditions doctrine seeks to prevent.[35] That is, "the government often has broad discretion to deny a permit that is worth far more

30. An impact fee is when a local government or permitting authority conditions the grant of a development permit upon a monetary fee, instead of the acquisition of real property. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013) (holding that "monetary exactions," also termed "'in lieu of' fees," "must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*"). For an example of a court analyzing the constitutionality of an impact fee see Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999 (Ariz. 1997) (holding an impact fee for water development did not come under *Nollan/Dolan* review, overruled in part by *Koontz*).

31. Local permitting authorities may be authorized by the legislature to impose such demands or the demands may come from the legislature itself.

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

33. Armstrong v. United States, 364 U.S. 40, 49 (1960). This phrase is known as the "Armstrong Principle."

34. *See* 133 S. Ct. at 2594.

35. *Id.*

than [the] property it would like to take."[36] Because the developer often values the permit more than the exaction, the local government can obtain a benefit it otherwise would have had to purchase, for nothing.[37]

Second, the Court was quick to point out that a "reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset."[38] Negative externalities, or public costs, are a reality of property development, and the Court recognized this. Just as it is not fair for a developer to bear the burden of losing private property for public use, the public should not be forced to bear the burden of private development costs. Some examples of negative externalities include increased traffic congestion, increased pollution, or the loss of wetlands, as was the case in *Koontz*.[39] In concluding this thought, the *Koontz* Court alluded to the decision in *Village of Euclid v. Ambler Realty Co.*, stating that "landowners internaliz[ing] the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."[40]

The dichotomy of how to balance Takings Clause concerns and negative externalities existed long before *Koontz*. Through the years, the Court has looked for ways to accommodate both sides of the argument. Through the development of the *Nollan/Dolan* test, the Court has found a way to "enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out . . . extortion' that would thwart the Fifth Amendment right to just compensation."[41]

36. *Id.*

37. Justice Scalia's opinion in *Nollan* emphatically warns against this type of government "extortion." *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

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

39. *Id.* at 2592. Other negative externalities include speedier deterioration of infrastructure from increased use, loss of water from increased consumption, and loss of visibility, as was the case in *Nollan*.

40. *Id.* at 2595 (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

41. *Id.* (citation omitted).

C. The Appetizer: Nollan v. California Coastal Commission

In *Nollan*, the Court held that, when the government conditions the approval of a development permit upon the dedication of a public access easement, the exaction amounts to an unconstitutional taking unless there is an "essential nexus" between the government's interest in the easement and the reason for requesting the permit.[42] The Nollans owned beachfront property in California and wanted to build a bigger house on their lot.[43] Accordingly, they applied to the California Coastal Commission ("CA Commission") for a building permit.[44] The CA Commission agreed to grant the permit, on the condition that the Nollans dedicate a portion of their land as a public easement, so the public could more readily access the parks and beaches that bordered the Nollans' property.[45] The Nollans appealed the condition, but the CA Commission found "that the new house would increase blockage of the view of the ocean," resulting in a "psychological barrier" to the public's beach access.[46] The CA Commission also found the exaction "would . . . increase private use of the shorefront,"[47] thereby justifying the condition. The Nollans eventually appealed the decision all the way to the Supreme Court.[48]

In a 5-4 decision, the Court sided with the Nollans, holding that the demand for a public easement across the Nollans' land was unconstitutional. In an opinion delivered by Justice Scalia, the Court identified some of the main concerns exactions create:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.[49]

While the *Nollan* Court recognized the CA Commission's condition would have "no doubt" constituted a taking if it had

42. The term "essential nexus," regarding exaction and takings law, was first introduced in *Nollan*. 483 U.S. at 837.

43. *Id.* at 828.

44. *Id.*

45. *Id.* at 828–29.

46. *Id.* at 828, 835.

47. *Id.* at 829.

48. *Id.* at 825.

49. *Id.* at 831.

simply been an order to the Nollans to create an easement,[50] the CA Commission argued the permit condition was based upon legitimate police powers and therefore should not be found as a taking.[51] The *Nollan* Court recognized the CA Commission may have had legitimate concerns regarding the public's visual access to the beach, but the Court ultimately concluded that requiring an easement across the Nollans' land would not resolve the viewing problem.[52] Rather, the CA Commission would have gained an easement without paying just compensation for the land. Had the CA Commission's requirement actually remedied the stated public cost associated with the Nollans' new house—i.e., not being able to view the beach—the Court would likely have found the "essential nexus" between the exaction and the development permit satisfied.[53]

D. The Entrée: Dolan v. City of Tigard

Seven years after the Supreme Court's essential nexus framework was explained in *Nollan*, the Court clarified how far an "essential nexus" could extend. In *Dolan*, the Court stated that its purpose in granting certiorari was "to resolve a question left open by our decision in *Nollan,*"[54] specifically "what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development"?[55]

In *Dolan*, the Court determined that if an exaction is found to have the essential nexus required under *Nollan*, that same exaction must also demonstrate "rough proportionality" to the expected development's "projected impact."[56] This determination requires the government to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[57]

50. *Id.*

51. *Id.* at 837.

52. *Id.* at 838.

53. *Id.* at 835–42.

54. Dolan v. City of Tiguard, 512 U.S. 374, 377 (1994).

55. *Id.*

56. *Id.* at 388.

57. *Id.* at 391 (footnote omitted). While making this determination, "[n]o precise mathematical calculation is required." *Id.* at 395. The standard implemented in *Dolan* is a "quantitative" approach, whereas the standard under *Nollan* is more of a "qualitative" approach.

Florence Dolan owned a plumbing and electrical supply store and the land it stood on in Tigard, Oregon.[58] A creek ran across the southwest corner of Dolan's land, and, in its "comprehensive plan," the city of Tigard had previously determined a flood risk existed along the creek.[59] As such, the city recommended in the comprehensive plan that the area around the creek remain preserved as greenways and free from structures.[60] Dolan desired to redevelop her site with a bigger store and parking lot. Accordingly, she applied for a development permit from the City Planning Commission.[61] The commission conditioned the approval of her permit upon the requirements in the Community Development Code,[62] thereby requiring the dedication of two portions of her land to the city as a public access pedestrian/bicycle pathway. One portion fell within the floodplain, and the other was a fifteen-foot strip adjacent to the floodplain.[63] Dolan, not wanting to give up her property in exchange for a development permit, fought the commission's ruling all the way to the Supreme Court.

The Court held that even though the essential nexus required by *Nollan* was met, the exaction requirements were still too burdensome, and therefore unconstitutional as a taking.[64] In the majority opinion, Chief Justice Rehnquist explained that an exaction could still create an unconstitutional condition even if the essential nexus was satisfied.[65] According to the Chief Justice, there was no reason why the greenway or pedestrian pathway needed to be public instead of private.[66] The *Dolan* Court held the exaction requirements did not demonstrate "rough proportionality" to the state interest at hand,[67] and by so holding, the *Dolan* opinion added a quantitative approach to an already qualitative test.

58. *Id.* at 379.

59. *Id.* at 377–80.

60. *Id.*

61. *Id.*

62. *Id.* at 379–80. The Community Development Code is considered a legislative document.

63. *Id.* at 380.

64. *Id.* at 394–95.

65. *See id.* at 393–95 ("The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").

66. *Id.* at 393.

67. *Id.* Chief Justice Rehnquist explained that: "It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's

E. An Unsatisfying Dessert: Questions Left Open after Nollan *and* Dolan

The Supreme Court's decisions in *Nollan* and *Dolan* greatly enhanced landowners' rights in battling unconstitutional exactions. In no small part, the Court has set up the equivalent of a rebuttable presumption favoring the landowner and requiring the permitting authority—government or otherwise—to show the exaction has an "essential nexus" to a state interest, and the exaction demonstrates "rough proportionality" to the expected cost.[68] The rough proportionality of the exaction must be based on an "individualized determination" made by the government that is specific to the development and public costs involved.[69] However, even with the *Nollan/Dolan* test in place, the possibility of government extortion in exaction law is still a problem, specifically because lower courts disagree on when to apply the *Nollan/Dolan* test.

After *Nollan* and *Dolan*, there emerged three main areas of concern regarding exaction law and government extortion, and the lowers courts are split on how to handle them:[70] (1) whether asking for money instead of real property constitutes a taking;[71] (2) whether it matters if the exaction is proposed as a condition precedent or condition subsequent;[72] and (3) whether it matters if the exaction is imposed by a legislative or an adjudicative body.[73]

The first two concerns were recently addressed by the Court in *Koontz*.[74] In *Koontz*, landowner and developer Coy Koontz, Sr.,

legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request." *Id*.

68. *See supra* Part II.C–D.

69. Dolan, 512 U.S. at 391.

70. *See* Haskins, *supra* note 16, at 490; Needleman, *supra* note 25, at 1565.

71. This also includes such terms as "in lieu of fees," "impact fees," or "monetary exactions." *See* Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999 (Ariz. 1997) (holding an impact fee for water development did not come under *Nollan/Dolan* review); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 689 n.1 (Colo. 2001) (considering whether a development fee for "triplexes" should come under *Nollan/Dolan* review); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 625 (Tex. 2004) (finding a development fee should come under *Nollan/Dolan* review).

72. *See* St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1223 (Fla. 2011) (holding an exaction could not be found when the condition is imposed as a condition precedent), *rev'd*, 133 S. Ct. 2586 (2013).

73. *See* Reznik, *supra* note 10, at 255.

74. While there were other exaction-type cases to come before the Supreme Court—*see* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); San Remo Hotel Ltd. P'ship v. City &

sought a permit to develop 3.7 acres on the northern part of his 14.9-acre property.[75] Although the northern portion of the property is isolated from the southern portion by a drainage ditch and power lines, the northern portion of the property drains well, and other constructions are nearby, almost the entire property is designated by Florida as wetlands. Because of the wetlands designation, Koontz offered to mitigate the damage his development would create by "foreclos[ing] any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property."[76]

The St. John's River Water Management District ("District") found the proposed 11-acre easement inadequate.[77] Instead, the District proposed Koontz pick between two exactions to obtain the development permit:[78] he could reduce the size of his development to one acre and deed the remaining 13.9 acres to the District as a conservation easement; or, he could build on the 3.7 acres, as he originally desired, if he also agreed to make improvements to District-owned land several miles away.[79] The improvements the District sought would have "enhanced approximately 50 acres of District-owned wetlands."[80] Rejecting both options, Koontz filed suit in state court under a Florida statute.[81]

After a two-day bench trial, the Florida Circuit Court found the District's proposed conditions were unlawful under the decisions in *Nollan* and *Dolan*.[82] The Florida Supreme Court, however, reversed on two grounds.[83] First, the Florida Supreme Court distinguished the *Koontz* case from *Nollan* and *Dolan* because "the District did not approve petitioner's application on the condition that he accede

Cnty. of S.F., 41 P.3d 87 (Cal. 2002)—*Koontz* was the first time the Supreme Court issued a holding addressing head-on some of the questions surrounding exaction law.

75. Koontz owned a 14.9-acre tract of land on the south side of Florida State Road 50, a four lane highway east of Orlando. The property is less than 1,000 feet from a tolled expressway and main thoroughfare of Orlando. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591–92 (2013).

76. *Id*. at 2592–93.

77. *Id*. at 2593.

78. *Id*.

79. *Id*.

80. *Id*.

81. *Id*.

82. *Id*. The Florida District Court (the appeals court) affirmed the Circuit Court's decision.

83. *Id*. at 2593–94.

to the District's demands; instead, the District denied his application because he refused to make concessions."[84] The U.S. Supreme Court took issue with this ruling, stating "[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so."[85] A holding otherwise would allow government to skirt any *Nollan/Dolan* review by simply phrasing the demands as a condition precedent to approval.

The second distinction made by the Florida Supreme Court was that *Nollan* and *Dolan* were based upon a demand for interest in real property, whereas in *Koontz* the property owner was only asked to forfeit money.[86] As with the condition precedent versus condition subsequent distinction noted above, the U.S. Supreme Court rejected the real property versus money distinction as well. The Court determined that under this reasoning, governments and permitting authorities could evade *Nollan/Dolan* review "simply [by] giv[ing] the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[87] In practical terms this is no choice at all; the cost to the landowner or developer is the same either way. It was pivotal to the U.S. Supreme Court's analysis that the demand for money was predicated upon "'an identified property'" interest.[88] There was a "direct link" between the demand for money and a specific piece of property, thereby "implicat[ing] the central concern of *Nollan* and *Dolan*"—governmental extortion.[89]

While the two main holdings in *Koontz* will certainly help clarify exaction law and guide courts in the right direction, the Supreme

84. *Id.* at 2953 (citing St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1230 (Fla. 2011)). This is a prime example of a court making a distinction between a "condition precedent" and a "condition subsequent."

85. *Id.* at 2595 (emphasis omitted). This type of power could obviously lead to extreme forms of government extortion, including "take it or leave it" demands.

86. *Id.* at 2594 ("The majority [referring to the Florida Supreme Court] acknowledged a division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*, and sided with those courts that have said it cannot.").

87. *Id.* at 2599. This is an example of an "in lieu of" fee.

88. *Id.* (citation omitted).

89. *Id.* at 2600. The dissent worried that this holding would impact a government's ability to tax. But in *Koontz*, the monetary exaction at issue was not a tax and could not be considered a tax because the permitting authority had no power to tax. *Id.* at 2601. Taxing is further discussed *infra* in Part IV of this Note.

Court missed an opportunity to clarify the exact scope of its "monetary exactions" holding, and ultimately exaction law overall. By stating nothing about the legislative/adjudicative distinction, even though it is usually implicated when considering monetary exactions, the Court left lower courts to wonder about when to apply the monetary exactions holding. Whether *Nollan/Dolan* applies to monetary exactions derived from legislative decisions, as well as adjudicative ones, is still anyone's guess. As Justice Kagan noted in her dissent, "The majority might . . . approve the rule . . . that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. . . . [T]hen again, maybe not."[90] Because the majority "refus[ed] 'to say more' about the scope of its new rule[,][91] [its new rule] now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money."[92] Justice Kagan is right; because the majority opinion does not address what is often the dispositive issue in an exaction case—the legislative/adjudicative distinction—lower courts are still on their own to determine if and when the *Nollan/Dolan* test should apply.

In most instances, the legislative/adjudicative distinction surfaces under the analysis of whether "impact fees" (monetary exactions) are based on a legislative or adjudicative decision.[93] With the Court now recognizing that "monetary exactions" are to be scrutinized under *Nollan/Dolan* review,[94] it makes little sense to keep the legislative/adjudicative distinction around in any other aspect of exaction law, precisely because monetary exactions are always tied to some form of real property. Monetary or not, the core of an exaction is real property, which is specifically protected under the Fifth Amendment.

The next logical step in takings law is to do away with the legislative/adjudicative distinction altogether. The Court should

90. *Id*. at 2608 (Kagan, J., dissenting).

91. The dissent is referring specifically to the majority's application of the *Nollan/Dolan* test to monetary exactions, which the dissent argued will affect local government's ability to tax.

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

93. *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997); San Remo Hotel Ltd. P'ship v. City & Cnty. of S.F., 41 P.3d 87 (Cal. 2002); Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001).

94. *See Koontz*, 133 S. Ct. at 2599.

have stated in *Koontz* that all exactions, regardless of their origin or character, are subject to Fifth Amendment Takings Clause protection, and therefore *Nollan/Dolan* review.

II. CURRENT THEORIES POSITED BY COURTS REGARDING THE LEGISLATIVE/ADJUDICATIVE DISTINCTION

The legislative/adjudicative distinction has proved very difficult for lower courts to apply consistently.[95] Complicating matters further, some courts do not attempt to apply the legislative/adjudicative distinction at all; rather, they favor using the *Nollan/Dolan* test despite the legislative deference argument.[96] To say that the split among lower courts has produced divergent results would be an understatement. While the lower courts have given many reasons for following or not following the legislative/adjudicative distinction, the most common approaches can be grouped into two main categories: "formal" and "functional."[97]

A. A Formal Approach to Exaction Law

Courts adopting the formal approach to the legislative/adjudicative distinction take the distinction at "face value,"[98] denying *Nollan/Dolan* review to legislative exactions.[99] These courts give great weight to the "source" of the exaction,[100] showing deference to the legislature.[101] This section will consider the three general reasons courts give for following the formal approach: (1) the knowledge of the legislature regarding specific topics, (2) the

95. *See* Christopher T. Goodin, Comment, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference,"* 28 U. HAW. L. REV. 139, 148–57 (2005) (reviewing the varied approaches to the legislative/adjudicative distinction employed by courts); Reznik, *supra* note 10, at 251.

96. *See, e.g.*, Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995); J.C. Reeves Corp. v. Clackamas Cnty., 887 P.2d 360 (Or. Ct. App. 1994); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004).

97. Matthew Baker, Comment, *Much Ado About* Nollan/Dolan*: The Comparative Nature of the Legislative-Adjudicative Distinction in Exactions*, 42 URB. LAW., no. 1, 2010 at 171, 178–80.

98. *Id.* at 178.

99. *See* Reznik, *supra* note 10, at 256.

100. Baker, *supra* note 97, at 179.

101. This approach has been adopted by the majority of jurisdictions. D.S. Pensley, Note, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 CORNELL L. REV. 699, 707 (2006).

general applicability of legislative decisions, and (3) the accountability of the legislature to the electorate. Part III will analyze why these three reasons ultimately fail under Fifth Amendment Takings Clause scrutiny.

In *Lingle v. Chevron U.S.A., Inc.*, Justice O'Connor highlighted the knowledge of the legislature argument by exhibiting the wariness courts have about imposing judicial review on legislative acts.[102] In the majority opinion, Justice O'Connor stated "courts are not well suited" to "scrutinize" every "regulation of private property."[103] The majority opinion also opined that we should not allow "courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[104] According to the majority, "[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established."[105] Thus, it seems courts who apply the knowledge of the legislature approach start off in good company.

The "general applicability" argument was endorsed by the Arizona Supreme Court in *Home Builders Association of Central Arizona v. City of Scottsdale*.[106] In *Home Builders*, the court was asked to determine the validity of a water resources development fee, and whether the fee should implicate *Nollan/Dolan* review.[107] Through a local study, the City of Scottsdale determined the current water resources available to the city were not enough to support new growth and development, and the city did not have the monetary resources to remedy the problem.[108] The city decided to levy a hefty fee for development permits to raise the capital needed to alleviate the water problem.[109] This approach was ultimately adopted by the local legislature.[110] In dicta, the Arizona Supreme Court determined

102. 544 U.S. 528, 544 (2005).

103. *Id.*

104. *Id.*

105. *Id.* at 545. In *Ehrlich v. City of Culver City*, Justice Mosk of the California Supreme Court shared similar thoughts regarding the knowledge of the legislator in a concurring opinion stating, "[i]t is the role of the legislative body, rather than the courts." 911 P.2d 429, 461 (Cal. 1996) (Mosk, J., concurring). *See also* Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 996 (Ariz. 1997) (stating legislative acts "c[o]me to the court cloaked with a presumption of validity").

106. 930 P.2d at 996.

107. *Id.* at 994.

108. *Id.*

109. *Id.* at 995.

110. *Id.*

the exaction fee did not warrant *Nollan/Dolan* review, distinguishing the case from *Dolan* based on the legislative/adjudicative distinction.[111] The court stated that "[b]ecause the Scottsdale case involves a generally applicable *legislative* decision by the city, the court of appeals thought *Dolan* did not apply. We agree . . . ."[112]

Closely tied to the reasoning that "generally applicable" exaction laws are beyond the courts' purview and that courts should defer to the knowledge of the legislature, is the idea that courts should not re-write legislation from the bench. With many judges receiving lifetime appointments,[113] accountability to the electorate is not readily apparent.[114] The idea of laws being passed and enforced by an accountable government is seriously jeopardized if judges and justices only apply the parts of the law they find appealing.[115]

In *San Remo Hotel Limited Partnership v. City and County of San Francisco*, the California Supreme Court gave credence to the "accountability" argument, noting, that if "[a] city council . . . charged extortionate fees for all property development . . . [that council] would likely face widespread and well-financed opposition at the next election."[116] But, unlike the supposed "city council" in *San Remo*, most judges and justices, at least those on the federal bench, do not face "well-financed opposition" threatening their jobs when they issue a ruling the electorate does not agree with. Notwithstanding this flaw in logic, the *San Remo* court alluded that voters themselves are best situated to fight against unwieldy "generally applicable" exactions.

Underlying the reasoning behind all three justifications of the "formal" approach to the legislative/adjudicative distinction[117] is the argument that the "heightened risk of [] 'extortion[]' . . . to

111. *Id.* at 999–1000.

112. *Id.* at 1000 (emphasis in original).

113. Federal district court judges and federal appellate court justices all receive lifetime appointments during "good Behaviour." U.S. CONST. art. III, § 1.

114. The argument for or against lifetime appointments for judges and justices is beyond the scope of this Note.

115. However, the court system also plays an important role in ensuring that constitutional, statutory, and other rights are protected.

116. 41 P.3d 87, 105 (Cal. 2002).

117. Specifically: paying deference to the "knowledge of the legislature in determining legislation," the "generally applicability" of the statute or regulation, and the "accountability to the electorate" arguments.

exact unconstitutional conditions is not present"[118] when applying the formal approach. That is, "[t]he risk of [governmental] leveraging does not exist when the exaction is embodied in a generally applicable legislative decision."[119] Put simply, when the risk of government extortion is low, because the exaction is not being made on an ad hoc basis and therefore should apply equally to everyone, courts are reluctant to encroach upon the authority of the legislature.[120] While there are some redeeming qualities to the formal approach, the weaknesses of this approach will be addressed in Part III.A.

B. A Functional Approach to Exaction Law

While some courts are concerned with the "source" of the exaction law,[121] other courts are more concerned with the "nature" of the law itself. Courts adopting a "nature" of the law approach are said to follow a "functional" approach to the legislative/adjudicative distinction.[122]

The functional approach applies *Nollan/Dolan* review to both legislative and adjudicative decision-making bodies, focusing instead "on the character of the exaction and whether it applies broadly or conditions development of particular property."[123] Meaning that, practically speaking, functional courts are concerned with outcome, not process.

Courts employing the functional approach also concern themselves with whether the character of the exaction is generally applicable.[124] However, unlike the formal approach, legislative acts

118. Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996). Extortion was a central concern in the Supreme Court's rationale in *Nollan*. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

119. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997). *See also San Remo*, 41 P.3d at 105 (repeatedly stating that generally applicable laws are not subject to *Nollan/Dolan* review).

120. *See* Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (distinguishing *Nollan/Dolan* on the grounds that the "risk of leveraging or extortion . . . is virtually nonexistent in a fee system").

121. Courts following this rationale are said to follow a "formal" framework for analyzing exactions. *See supra* Part II.A.

122. Baker, *supra* note 97, at 178–80. *See* Dudek v. Umatilla Cnty., 69 P.3d 751, 756 (Or. Ct. App. 2003).

123. Baker, *supra* note 97, at 180.

124. *See generally* Pensley, *supra* note 101, at 713–14.

are not presumed to be generally applicable. The Oregon Court of Appeals noted that "whether it is legislatively required or a case-specific formulation[,] [t]he nature, not the source, of the imposition is what matters."[125] The broader the application (the nature of it), the more likely the act will escape *Nollan/Dolan* review.

A main concern of functional courts is the degree of discretion the law allows the permitting authority.[126] In *Dudek v. Umatilla County*, the Oregon Court of Appeals took exception with a seemingly legislative ordinance because of the degree of discretion it required on a case-by-case basis.[127] The *Dudek* court held that because "there appears to be a risk of leveraging[,] . . . the ordinance at issue [] should be subject to the heightened takings clause standard articulated in *Nollan* and *Dolan*."[128] When there is little discretion offered to the permitting authority to make decisions on a case-by-case basis, a court applying the functional approach will typically find the legislative act beyond *Nollan/Dolan* review.[129] If, however, the permitting authority has discretion on how to implement and execute the act based on an individualized application of the law to a specific parcel of land, the act is more likely to warrant *Nollan/Dolan* review. While functional courts do an admirable job at trying to target governmental extortion, like formalist courts, they also fail at fully protecting landowners' and developers' Fifth Amendment rights.

125. J.C. Reeves Corp. v. Clackamas Cnty., 887 P.2d 360, 365, 365 n.1 (Or. Ct. App. 1994) ("A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed.").

126. *Dudek*, 69 P.3d at 751 (applying *Nollan/Dolan* to an ordinance that was seemingly legislative, but allowed for a significant degree of discretion in application); *see also* Reznik, supra note 10, at 259 (recognizing "[i]n the exactions context, the functional approach blends together with the discretionary approach, which differentiates legislation from adjudication according to the amount of discretion possessed by the body applying the exaction").

127. *Dudek*, 69 P.3d at 756 ("Thus the determination of the applicability of this ordinance and, if applicable, the specific conditions that must be imposed under the ordinance, requires an assessment of the particular circumstances and an exercise of discretion by the county.").

128. *Id*. *But see* Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 698 (Colo. 2001) (holding *Nollan/Dolan* should not apply because the fee was based on legislation and was "generally applicable," despite the fact the legislative exaction allowed individual discretion by the district manager).

129. *See* Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997).

III. WHY THE CURRENT APPROACHES TO THE LEGISLATIVE/ADJUDICATIVE DISTINCTION FAIL

Courts have failed to come up with a consistent framework to analyze when the *Nollan/Dolan* test should be utilized, especially when considering the legislative/adjudicative distinction. Many courts have chosen to follow a "formal" framework, focusing on the source of the ordinance. Other courts have chosen a "functional" approach, focusing instead on the outcome the ordinance produces. Over time, both approaches have proven problematic for courts to apply consistently.[130] With differing opinions on when to even apply *Nollan/Dolan*, lower courts lack the guidance necessary to develop a clear exactions standard.[131]

However, questioning whether there is a set standard for exactions analysis misses the point. The formal approach and the functional approach are inherently flawed because each approach allows private property to be in violation of the Fifth Amendment. This Part will analyze how both the "formal" and the "functional" approaches fail to fully ensure takings protection in the exaction law context.

Takings law protection is written directly into the Constitution. The Fifth Amendment guarantees private property shall not "be taken for public use, without just compensation."[132] As previously noted, the Supreme Court has stated that Fifth Amendment Takings Clause protection is designed to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[133] Such protections are in place to guard against the inherent greedy nature of man. Government, it has been said, is "force,"[134] and as such,

130. *See* 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, 405–07 (2002) ("[T]he rule is extremely difficult to apply in the land use context."); Pensley, *supra* note 101101, at 709–14 (stating "[t]he formal approach reaches inconsistent results," while the functional approach remains "fuzzy" and "puzzl[ing]"); Reznik, *supra* note 10, at 247, 257–66 ("[T]he distinction is prohibitively difficult to make and is misplaced in the context of local government.").

131. *See supra* note 8.

132. U.S. CONST. amend V.

133. Armstrong v. United States, 364 U.S. 40, 49 (1960).

134. George Washington is credited with this quote. However, it is unsure when, or if, he actually said it. *See* Eugene Volokh, "*Government Is Not Reason, It Is Not Eloquence—It Is Force*," THE VOLOKH CONSPIRACY (Apr. 14, 2010, 7:26 PM),

must be constrained. Thomas Jefferson addressed this topic when he wrote: "In questions of power, then let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."[135] It is the role of the judiciary to make sure constitutional rights are protected, even if the attack is coming from our elected representatives.[136]

The "unconstitutional conditions doctrine" makes no distinction between laws or acts that are legislative and those that are adjudicative in nature.[137] While the unconstitutional conditions doctrine stands independent of the Takings Clause, exaction law provides a perfect scenario to analyze the application of the doctrine. Whether it is a local permitting agency or a state legislature demanding a landowner give up a constitutional right, the violation of a constitutional right is the same.

A. Why the Formal Approach to Exaction Law Fails

Taking the law at "face value" assumes that laws written by the legislature are always constitutional. And although courts are wary of finding laws unconstitutional, the fact remains that sometimes courts must make that determination. If a court is not willing to protect the rights of citizens against elected or appointed government officials, who will? As previously noted, exaction law differs from zoning law,[138] so the issue is not whether the government can regulate land

http://www.volokh.com/2010/04/14/government-is-not-reason-it-is-not-eloquence-it-is-force/.

135. Breemer, *supra* note 130, at 404 n.190 (citation omitted).

136. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 166,178 ("The judicial power of the United States is extended to all cases arising under the constitution.").

137. Many federal unconstitutional condition cases deal with challenges to statutorily imposed conditions. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 203 (1991) (permitting Congress to condition health care funding on restrictions on speech encouraging abortion); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550–51 (1983) (upholding the power of Congress to condition tax-exempt status for nonprofit groups upon their willingness to give up lobbying). And many federal unconstitutional condition cases have found legislation unconstitutional. *See, e.g.*, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 457 (1995) (striking down a federal statute banning certain federal employees from accepting compensation for making speeches or writing articles); Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272–77 (1991) (striking down a federal law conditioning disposal of federal property in a way that undermines executive branch power); FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984) (holding Congress may not condition broadcasting grants on an agreement not to broadcast editorials).

138. *See supra* Part I.A. Exactions are more closely tied to "spot zoning." Needleman, *supra* note 25, at 1586 n.140. Spot zoning is a form of small scale zoning giving developers

use. Rather, the core exaction law issue is how the government can regulate land use under the purview of the Constitution. Other than the *Nollan/Dolan* test, which, as this Note has argued, is inconsistently applied, there is little other recourse for a landowner or developer threatened with an unconstitutional condition. While courts should respect the knowledge of the legislature when it comes to making policy decisions regarding land-use planning, courts must also stand ready to protect constitutional rights when they come under attack, even under the guise of policy.

A key assumption made by courts who espouse the formalist approach is that the political process will protect the rights of all people.[139] After all, a common response to complaints of a local government passing exaction laws that are extortionate in nature is *vote 'em out!*[140] This approach is flawed for many reasons. First, legislatures are able to pass laws targeting individuals, even if the law is described as "generally applicable." For example, in the development permit context governments can gain specific benefits, like land or money from specific individuals, which the government could not otherwise gain without paying for them. If a legislature passes a law regarding development in a certain geographic area, but there is only one landowner or developer in that geographic area, the law will only affect one individual even though the law is "generally applicable" in nature. Because it is an individual landowner or developer who feels the burden of such an exaction, rather than society as a whole, it is unlikely this wrong will be worked out through the legislative process.[141] The majority of people living in nearby areas will not mind gaining a windfall benefit (i.e., whatever the exaction is, such as a public access easement) at the expense of a landowner or developer they do not know. There may be instances where a well-financed group of developers can generate enough political muscle to affect an election, but on the whole, this type of political effort is unrealistic for most local developers. As California Supreme Court Justice Janice Rogers Brown pointed out in a dissenting opinion in *San Remo*: "[T]he majority's exception for

sweetheart deals by allowing them to build on, or otherwise use, land that would not be permitted for the proposed use under current zoning regulations. *Id.* Spot zoning presents the reverse issue of exactions, but the same need for stricter review. *See id.*

139. *See supra* Part II.A and accompanying notes and text.

140. *See* San Remo Hotel Ltd. P'ship v. City & Cnty. of S.F., 41 P.3d 87, 105 (Cal. 2002).

141. *See* Needleman, *supra* note 25, at 1586.

legislatively created permit fees is mere sophism, particularly where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked."[142] It is up to the courts to ensure the rights of "relatively powerless group[s]"[143] are protected.

Another major flaw with the formalist approach is the structure of local government.[144] Local governments are not required to follow the separation of powers doctrine "requiring independent legislative, executive, and judicial branches with distinct roles."[145] For smaller local governments these roles will often "overlap,"[146] with "[l]egislative bodies perform[ing] various administrative functions, and administrative bodies exhibit[ing] legislative qualities."[147] Without proper separation of powers principles, the "cloak[ ] . . . of validity"[148] often extended to legislative acts may feel more like a shroud of darkness.[149]

In this same vein, another concern about giving judicial deference to local government is that "[a] small group of prominent local citizens may be single-handedly running the legislature."[150] This small group could enact laws that specifically target certain individuals, again under the pretext of general applicability. With little fear of recourse from the courts, and a successful political attack unlikely, local governments may be free to engage in the type of "extortion" that Justice Scalia addressed in the *Nollan* opinion.[151] In *Town of Flower Mound v. Stafford Estates Limited Partnership*, the

142. *San Remo*, 41 P.3d at 124 (Brown, J., dissenting).

143. *Id*. (Brown, J., dissenting).

144. Reznik, *supra* note 10, at 257.

145. *Id*. at 260.

146. Pensley, *supra* note 101, at 709.

147. Reznik, *supra* note 10, at 260.

148. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 996 (Ariz. 1997).

149. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 855–56 (1983) ("In a small-scale government . . . there may be no clash of multiple interests leading to at least temporary stasis and ultimately to an adequate and careful consideration of the public well-being. . . . [T]here may not be enough items of political interest to permit the development of coalitions and the benefit-trading and mutual forbearance they entail. Thus, a local representative council cannot (or cannot always) be trusted to act with the 'legislative due process' envisioned by *The Federalist* No. 10 in a larger legislature.") (footnotes omitted).

150. *See* Needleman, *supra* note 25, at 1588–89.

151. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

Texas Supreme Court recognized the possibility of local government extortion as follows:

> While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.[152]

Without the ability to seek redress from the courts, it is entirely plausible that landowners and developers could be forced into an unconstitutional conditions dilemma by local governments and permitting authorities.

Closely tied to the structure of local government is how land-use regulations and ordinances, especially those passed by the legislature, are executed. Courts using a formal approach to determine whether the *Nollan/Dolan* test should apply, fail to acknowledge that many "legislative" acts are inherently "discretionary,"[153] and therefore may not be applied in a generally applicable manner. Legal critics argue that "there is no logically consistent way to pinpoint the source of an exaction because [exactions] typically reach the landowner only after the involvement of both legislative and adjudicative bodies."[154] Courts are not justified in applying judicial deference to legislative acts passing through adjudicative (i.e., discretionary) means in the exaction context precisely because in the application of the ordinance to the individual actor the risk for extortion is not diminished at all; rather, the risk of extortion is heightened in such a case.[155]

Justice Souter identified this quandary in his *Dolan* dissent: "The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions, but the permit conditions were imposed pursuant to Tigard's Community Development

152. 135 S.W.3d 620, 641 (Tex. 2004).

153. Needleman, *supra* note 25, at 1588–89.

154. Breemer, *supra* note 130, at 405.

155. Judge Orme of the Utah Court of Appeals noted "'local governments are not structured under strict separation of powers principles' and 'the nature of the land use decision-making process relies on *flexibility* and *discretion*.'" B.A.M. Dev., L.L.C. v. Salt Lake Cnty., 87 P.3d 710, 728 (Utah Ct. App. 2004) (Orme, J., dissenting) (emphasis added) (citations omitted), *rev'd in part*, 128 P.3d 1161 (Utah 2006).

Code,"[156] which was legislative in nature. The fact that some courts—those following a formal approach—do not take into account the amount of discretion offered by the legislative act to the permitting authority is troubling. How can we be assured our Fifth Amendment rights are protected if the legislative act is implemented in a discretionary manner?[157]

Another reason to reject formal deference to legislative acts is that many of the acts allow "unelected adjudicative bodies . . . [to] negotiate development[al] exactions."[158] This is precisely what happened in *Koontz*. Florida law requires anyone developing on wetlands "to provide 'reasonable assurance' that proposed construction on wetlands is 'not contrary to the public interest.'"[159] Consistent with this law, the District is allowed to require permit applicants to create, enhance, or preserve wetlands elsewhere.[160] Koontz's initial offer of "foreclos[ing] any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property" was deemed inadequate by the District. [161] At this point, the District began suggesting mitigation measures of their own.[162] Allowing adjudicative bodies like the District in *Koontz* to negotiate with potential permit users does not suggest any sense

156. Dolan v. City of Tigard, 512 U.S. 374, 413 n* (1994) (Souter, J., dissenting) (citations omitted). The Development Code in question is considered legislative in nature.

157. Some courts have applied the *Nollan/Dolan* test when the legislative act allows for discretionary implementation and other courts have not. *Compare* Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995) (holding that even if the ordinance at issue was "legislative," the dedication requirement "was clearly site-specific and adjudicative in nature"), *and* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) (finding a category of exactions "based on general authority taking into account individual circumstances") where the *Nollan/Dolan* test was applied, *with* Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 694, 696 (Colo. 2001) (acknowledging the "legislative function . . . involves many questions of judgment and discretion," but not holding the act to *Nollan/Dolan* review because it was a "legislatively based development fee"). The main concern, however, is not that some courts are willing to put legislative acts through *Nollan/Dolan* review, but rather, that there are "legislative acts" that do not function legislatively at all; hence the need for *Nollan/Dolan* review of all exactions.

158. Pensley, *supra* note 101, at 710.

159. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2592 (2013) (quoting Henderson Act, FLA. STAT. ANN. § 373.414 (West 2012)) (citations omitted).

160. *Id.*

161. *Id.* at 2592–93.

162. *Id.*

of general applicability within the law, even if the ordinance at issue was passed by an elected legislature.

Legislative acts allowing permitting authorities and other adjudicative bodies to impose unconstitutional conditions do not deserve judicial deference. The threat of government extortion is in no way relieved because the legislature approves the act. If Koontz had been more eager to have the development permit, he might have caved to the District's unconstitutional wishes without putting up a legal fight. Logic dictates, and the Fifth Amendment proscribes, that "a municipality should not be able to insulate itself from a [Takings Clause] challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property."[163]

B. Why the Functional Approach to Exaction Law Fails

As described above in Part II.B, some courts approach exaction law using a functional and pragmatic approach. If the ordinance or legislative act is imposed generally and there is little discretion exercised by the permitting authority, the law is presumed constitutional and beyond *Nollan/Dolan* review. The problems with this approach are inherent in the difficulty of application. How broad must the law be to be considered "generally applicable"? How much "discretion" is too much discretion? Often these two questions blend together, and because the functional approach struggles with answering these types of questions legal critics have dubbed the functional approach "fuzzy,"[164] meaning that it often leads to inconsistent results.

In *Krupp v. Breckenridge Sanitation District*, developers sought *Nollan/Dolan* review of a decision made by the Breckenridge Sanitation District ("Breckenridge") regarding a development fee.[165] The issue in *Krupp* was whether Breckenridge could apply a higher fee to a "triplex" housing unit as opposed to a "duplex" unit of roughly the same size, even though the legislation did not take into account "a conversion category for triplexes."[166] Noting that Breckenridge had "the powers necessary to implement state and

163. Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995).
164. Pensley, *supra* note 101, at 713.
165. 19 P.3d 687, 692 (Colo. 2001).
166. *Id.* at 691.

federal regulations,"[167] the Colorado Supreme Court allowed the development fee to stand without *Nollan/Dolan* review because the fee was a "generally applicable, legislatively based development fee."[168] Although the *Krupp* court recognized "the setting of rates and fees . . . involves many questions of judgment and discretion,"[169] and the "District Manager is authorized to assign [fees] to triplexes,"[170] because the fee was authorized by the legislature, and the discretion used to determine the fee was guided by legislative direction, the court would "not set aside the methodology"[171] used to determine the fee or bring it under *Nollan/Dolan* review.

By contrast, in *Dudek*, the Oregon Court of Appeals applied *Nollan/Dolan* review to a legislative ordinance because "the practical reality is that application of this ordinance to a particular case requires a significant exercise of discretion."[172] In determining each case, the local municipality had to assess "whether the land division 'will serve four or more lots and will likely serve additional parcels due to development pressures in the area, or likely be an extension of a future road as specified in a future road plan[.]'"[173] Because this process was not "mechanical," and there appeared to be a "risk of leveraging or singling out"[174] applicants, the ordinance was brought under *Nollan/Dolan* review.[175]

These two cases highlight a general weakness in the functional approach. Each court considered the "discretion" given to the local authority by the legislative act—seemingly very similar discretion—and each court came to a different conclusion. Although the facts and schemes in each case were different, the general weakness of where to draw the line is apparent. As with any legal bright line, it is difficult for courts to determine when the amount of discretion offered in a legislative act is too much discretion.

And while line drawing is a glaring weakness, it is not the main problem with the functional approach. The main problem with the

167. *Id.* at 690.
168. *Id.* at 696.
169. *Id.* at 694.
170. *Id.* at 691.
171. *Id.* at 694.
172. Dudek v. Umatilla Cnty., 69 P.3d 751, 756 (Or. Ct. App. 2003).
173. *Id.* (emphasis omitted) (citation omitted).
174. *Id.*
175. *Id.*

functional approach is it also allows a taking to occur, so long as the ordinance allowing the exaction is not too discretionary. In the exactions context, as opposed to zoning or taxes, whether the ordinance is discretionary should not matter.[176] Just because the legislature gives a district manager authority to take land, that does not make the taking constitutional.

C. "General Applicability" is Not a Reason to Deny Fifth Amendment Protection

A common argument among courts denying *Nollan/Dolan* review to legislative acts is that "[t]he risk of [governmental] leveraging does not exist when the exaction is embodied in a generally applicable legislative decision."[177] This sort of reasoning begs the question: Does the Fifth Amendment allow private property to be taken for public use so long as the vehicle used to do so is "generally applicable" to other property owners as well? The answer is no. The text of the Fifth Amendment makes no exceptions for laws that are "generally applicable" to all landowners.

In a dissent from the Supreme Court's denial of certiorari in *Parking Association of Georgia, Inc. v. City of Atlanta*, Justice Thomas eloquently captured the absurdity of the "generally applicable" argument as follows:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[178]

176. Another criticism of the functional approach includes the ability of exactions to "morph simply when the number of applicants increases or decreases." Pensley, *supra* note 101, at 713. Also, focusing on discretion "provides no solution because most local land use decisions, including exactions, must be tailored to fit an individual development at some point." Breemer, *supra* note 130, at 406.

177. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997).

178. 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissenting).

Because the legislative/adjudicative distinction is a "distinction without a constitutional difference,"[179] and because it has proven problematic to apply, it would behoove the Court to strike the legislative/adjudicative distinction altogether. Applying *Nollan/Dolan* review to all exactions will still protect legitimate government interests without unduly burdening landowners and developers.

While there may be good arguments for laws of "general applicability" in some contexts, exaction law is not one of them.[180] Every time a law is passed that affects an interest in real property, regardless of whether it is generally applicable, the Fifth Amendment is implicated to some degree. Given that protecting property owners from shouldering an unfair burden of public use is written in the Constitution, landowner protection should be a high priority for our nation's courts. Just because multiple landowners may have their land taken by the same ordinance does not make the ordinance effectuating the taking constitutional.

IV. AFTER *KOONTZ*: APPLYING *NOLLAN/DOLAN* REVIEW TO ALL EXACTIONS IS THE BEST ANSWER FOR FIFTH AMENDMENT PROTECTION

The Supreme Court's ruling in *Koontz* has generally been considered a win for property owners' rights.[181] By eliminating any distinction between whether the permit is "*approve[d]* . . . on the condition that the applicant turn over property[,] or *denie[d]* . . . because the applicant refuses to do so," the Court has ensured that governments cannot evade the unconstitutional conditions doctrine "simply by phrasing [the] demands for property" in a favorable light.[182] This holding bolsters Fifth Amendment protection by allowing landowners and developers an opportunity to negotiate on more just terms.[183] Also, by holding that monetary exactions "must

179. *Id.* at 1118.

180. Zoning classifications may be an example of a generally applicable property law that is not subject to *Nollan/Dolan* review. Typically, however, zoning limits the use of land; it does not "take" it for public use. For a discussion on the differences between exactions and zoning, see Part I.A *supra*.

181. *See* discussion *supra* note 1.

182. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013).

183. In Justice Kagan's dissent, she pointed out this holding may have unintended consequences because determining when negotiations stop and demands start can be a slippery proposition. *Id.* at 2610 (Kagan, J., dissenting).

satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*,"[184] the Court bolstered Fifth Amendment protection by ensuring that the exaction is not the money equivalent of an easement or other taking the government has no right to take without paying the property owner just compensation.

But even with the holdings in *Koontz*, Fifth Amendment protection from government extortion is still missing a key ingredient. The question of whether judicial deference should be given to legislative acts in the permitting and exaction contexts is still alive.[185] This Part will analyze how the Court's recent monetary exactions holding in *Koontz* relates to the legislative/adjudicative distinction, and ultimately why the distinction is no longer needed. First, monetary exactions and their relation to legislative acts will be analyzed. Next, the failures of the formal and functional approaches, in light of the *Koontz* holding, will be discussed. Finally, this Part will evaluate the general applicability argument, specifically in relation to taxes.

By holding monetary exactions subject to *Nollan/Dolan* review, the Court concomitantly dealt a glancing blow to the legislative/adjudicative distinction. Monetary exactions are repeatedly a focal point in exactions law litigation, and a dispositive factor is often whether the exaction is based on general legislation or an ad-hoc adjudicative decision.[186] Calling into question the "cloak[]"[187] of presumed legitimacy for monetary exactions simultaneously raises a question about which type of judicial deference, if any, should be allotted to other legislative acts in the permitting and exaction contexts. And, without "say[ing] more"[188] about the scope of the new rule regarding monetary exactions, lower courts will quickly find tension between applying *Nollan/Dolan* review to monetary exactions and paying judicial deference to

184. *Id*. at 2599.

185. In the *Koontz* dissent, Justice Kagan pointed out that this distinction is untouched by the majority opinion and therefore still relevant, even in light of the Court's two holdings. *Id*. at 2608 (Kagan, J., dissenting).

186. *See e.g.*, Rogers Mach., Inc. v. Wash. Cnty., 45 P.3d 966, 977 (Or. Ct. App. 2002) (holding the traffic impact fee in question was not subject to *Nollan/Dolan* review because the fee was not adjudicative in nature).

187. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 996 (Ariz. 1997).

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

legislative acts of general applicability—many of which are monetary in nature.[189]

The failures of the formal approach to the legislative/adjudicative distinction are also highlighted in *Koontz*, namely the tension between the monetary exaction holding in the case and the policy of judicial deference to legislative ordinances often applied by the courts. Although the monetary exaction in *Koontz* was not specifically designated from a legislative act, monetary exactions oftentimes are derived from specific legislative guidance. The fact the Court is willing to bring all monetary exactions under *Nollan/Dolan* review is precisely why the Court should have extended the ruling to all exactions, regardless of their source. While the *Koontz* holding seriously dents the judicial deference argument, it leaves enough ambiguity to keep the lower courts in limbo.

If the Court had extended the holding to all legislative exactions, it would have created a constitutionally sanctioned standard for all lower courts to start their analysis. Such a holding would also create clear guidance for local governments to follow when implementing developmental mitigation ordinances. Such a holding would also assure landowners and developers that if they felt their Fifth Amendment right to just compensation was being violated they could turn to the courts for relief, as opposed to a political process that may be inefficient.[190]

Extending the *Koontz* holding to include all legislative acts still allows local governments to have developers internalize the negative externalities associated with the sought-after development; indeed, that is precisely what *Nollan* and *Dolan* aim to achieve. And at the same time, landowners' and developers' Fifth Amendment property rights are more fully protected by not allowing governments to legislate exaction benefits they otherwise could not receive.

189. For a nonexhaustive list of cases discussing monetary extraction issues, see *Home Builders Ass'n*, 930 P.2d at 993; San Remo Hotel Ltd. P'ship v. City & Cnty. of S.F., 41 P.3d 87 (Cal. 2002); Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001); Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000); Dudek v. Umatilla Cnty., 69 P.3d 751 (Or. Ct. App. 2003); *Rogers*, 45 P.3d 966 (Or. Ct. App. 2002); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004).

190. As it stands now, in situations qualifying for *Nollan/Dolan* review the judicial system is a source of relief, but by no means is *Nollan/Dolan* review guaranteed in all exaction contexts.

Applying the *Nollan/Dolan* test to all exactions, regardless of the source, also alleviates the problems with the functional approach. Specifically, line-drawing questions about how much discretion is too much discretion are gone. While the holding in *Koontz* may not have addressed the issue of discretion specifically, other recent lower court cases highlight why the functional approach fails.

Courts following the functional approach to the legislative/adjudicative distinction are practically applying the *Nollan/Dolan* standard already, specifically regarding the *Dolan* "rough proportionality" test. For example, in *Rogers Machinery Inc. v. Washington County*, a land developer petitioned for a writ of review to challenge a county ordinance that assessed a traffic impact fee to fund improvements to city streets.[191] The Oregon Court of Appeals held *Nollan/Dolan* review did not apply, finding the traffic impact fee had "a hybrid quality" to it, both acting like a fee (adjudicative) and a tax (legislative).[192] The fee was to be assessed after classifying the type of development from a large list, a list the court determined was "very comprehensive."[193] Then, based on the proposed usage, a set of legislative calculations generated the fee amount that could be charged for the particular development.[194] Because different land uses and classifications "vary in the burden they place on [the] street,"[195] the fee would be adjusted based on those differences.

By the time the *Rogers* court had gone through the process of determining whether: (1) the ordinance in question was discretionary, and if so, how discretionary; (2) the ordinance applied broadly or narrowly; and (3) to apply the *Nollan/Dolan* test or not, it could have just applied the *Nollan/Dolan* test and been done with it. The standard under *Dolan* does not require precise mathematical calculations when determining if the proposed exaction demonstrates rough proportionality to the anticipated harm caused by the development. It can be argued that the process the legislature went through in *Rogers* to come up with the list of possible classifications, and the guidelines for the calculation of the fee, was individualized

191. 45 P.3d at 967.
192. *Id.* at 972.
193. *Id.* at 980–81.
194. *Id.* at 981.
195. *Id.*

enough to satisfy *Dolan*,[196] assuming the fee was then roughly proportional.[197]

Another example is found in *Krupp*. In *Krupp*, developers sought *Nollan/Dolan* review of a decision made by the Breckenridge Sanitation District regarding a development fee.[198] In calculating the fee to be imposed, Breckenridge "first calculat[es] the project's peak effluent flow."[199] Breckenridge then uses the "specific"[200] assessment in determining the impact the development will have on the local infrastructure.[201] Breckenridge even went so far as to commission an independent expert to evaluate the system of calculating the fees based on the proposed development.[202] Although the Colorado Supreme Court eventually decided that the *Nollan/Dolan* test did not apply, the legwork for a *Nollan/Dolan* analysis was already complete. It would have been just as easy for the *Krupp* court to determine that *Nollan/Dolan* did apply, and that the standard was met,[203] as opposed to going through the analysis of determining whether to apply *Nollan/Dolan* review at all.

While it is certainly possible that not all local governments conduct the detailed analysis the governments did in *Rogers* and *Krupp*, these cases show that it is not too much to ask for local governments to conduct some sort of detailed analysis pertaining to the exaction ordinance at issue, and by so doing, comply with the *Dolan* test. These cases also show the amount of analysis performed by the courts will not increase by applying *Nollan/Dolan* review to all exactions.

As discussed in Part III.C of this Note, the general applicability argument in favor of deference to legislative acts is hollow in the exaction law context. Why allow a constitutional right, specified in

196. In *Town of Flower Mound*, the Texas Supreme Court noted the *Dolan* standard needed to be "measure[d] . . . in a meaningful, though not precisely mathematical, way." Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 644 (Tex. 2004).

197. The *Rogers* court did not hold the traffic impact fee assessment met the *Dolan* standard; rather, the *Rogers* court held *Dolan* did not apply at all. *Rogers*, 45 P.3d at 983.

198. Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 689 (Colo. 2001).

199. *Id.* at 691.

200. *Id.* at 694.

201. *Id.*

202. *Id.* Interestingly, the independent expert actually advised the Breckenridge Sanitation District to raise their fees. *Id.* at 692.

203. In fact, the trial court that first heard the *Krupp* case determined that if *Nollan/Dolan* review were applicable, "[Breckenridge] satisfied the test because the [fee] is roughly proportional to the impact of the project on the [local] facilities." *Id.*

the Fifth Amendment, to be taken away by elected officials? If Koontz had not decided to appeal the Florida Supreme Court's decision, his rights under the Fifth Amendment would have been violated. The *Nollan/Dolan* test does not preclude the government from getting the land or other benefit it seeks, it simply ensures the government does not take the land without just compensation.[204] While the application of reviewing all exactions under the *Nollan/Dolan* framework seems straightforward and efficient, there is one area of the law that remains unsettled: taxes.

In *Koontz*, the Court downplayed the significance of the monetary exactions holding regarding taxes. After acknowledging the dissent's argument that, based on the Court's holding, "there will be no principled way of distinguishing impermissible land-use exactions from property taxes," the *Koontz* Court stated that "[w]e think [the dissent] exaggerate[s] both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain."[205] The *Koontz* Court also noted that "[i]t is beyond dispute that '[t]axes and user fees . . . are not takings,'"[206] but that taxes and user fees may constitute a taking if not obtained through proper taxing channels.[207] Without elaborating further on the taxing issue,[208] the *Koontz* Court concluded by stating that "the power of taxation should not be confused with the power of eminent domain," and that "we have had little trouble distinguishing between the two."[209] Because only certain entities have the power to tax, and because the Court has long held that "property the government could constitutionally demand through its taxing power can also be taken by eminent

204. Interestingly, if both conditions of the *Nollan/Dolan* test are met, the government actually receives the benefit it seeks, paying nothing for it because no taking is found.

205. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013).

206. *Id.* (citations omitted).

207. *Id.*

208. *Id.* at 2602 (speaking of taxes, the *Koontz* Court stated "[t]his case does not require us to say more.").

209. *Id.* (citation omitted). A further analysis of the similarities and differences between takings and taxes is beyond the scope of this Note. See Eric Kades, *Drawing the Line between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189 (2002), for a more detailed analysis.

domain,"[210] the monetary exactions holding in *Koontz* will not work a revolution if extended to all legislative acts, taxes included.

V. CONCLUSION

The *Koontz* holding clarifies a great deal of confusion regarding exaction law. However, by refusing to "say more"[211] about when the *Nollan/Dolan* test should apply, the Supreme Court has left out a key ingredient of Fifth Amendment protection. The *Koontz* Court should have extended the holding that monetary exactions are subject to *Nollan/Dolan* review to all exactions, irrespective of their source or the nature of their imposition. Since both legislative and adjudicative exactions can violate the unconstitutional conditions doctrine, and since the Fifth Amendment makes no qualifications regarding legislative or adjudicative acts, it makes little sense to evaluate exactions under different sets of rules. By eliminating the legislative/adjudicative distinction altogether and holding that all exactions, regardless of where they come from, are subject to *Nollan/Dolan* review, the Supreme Court can add the key ingredient that is missing from full Fifth Amendment Takings Clause protection.

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210. *Koontz*, 133 S. Ct. at 2601. If local governments want to take money through taxation, then they should take money through taxation, not through developmental permitting authorities.

211. *Id.* at 2608 (Kagan, J., dissenting).

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