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By Sam Sturgis[*]

> *". . . [W]henever the legislators endeavour to take away and destroy the property of the people . . . they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience . . . ."*[1]

In 1772, the colonists of Weare, New Hampshire, were given a choice: cede all white pine trees grown on their lands to the King of England or pay a hefty fine. It was an odious decree—one that struck at the very ideal of the American colonies. Imbued as they were with a sense of divine right to property, the colonists refused, taking up arms to lead a gallant revolt. In a burst of righteous fury, they sheared the King's horses, flogged his enforcement officials, and paraded both through the streets and out of town. Known as the "Pine Tree Riots," these events bled into the American Revolution and became immortalized in the "Appeal to Heaven Flag"—an enduring if little known tribute to liberty, natural rights, and the American spirit. Their staunch Lockean convictions matched only by their fervor for freedom, the early colonists were unwilling to yield even a stick of pine to the throes of regulatory tyranny.

With events like those in Weare County no doubt in the back of mind, the drafters of our Constitution were determined to forge a protection against government overreach. They did so with the Fifth Amendment's "Takings" Clause, which guarantees that private property shall not be taken except for public use—and not without just compensation. As tyrannical tree taxes faded in the rearview mirror, Fifth-Amendment Takings doctrine appeared poised to protect landowners from abuse, and takings jurisprudence was able to keep pace with increasingly inventive governmental attempts to "take" property.

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[1] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 109 (Crawford B. Macpherson ed., 1980) (1690).

But in the two-hundred and fifty years since the Pine Tree Riots, the nemesis of the property owner has become, not the tyrant across the sea, but the tyrant in city hall. The enforcement of modern exactions has placed modern landowners in a position little-better than their eighteenth-century counterparts; as city planners find more ways to take property from landowners, the need to evolve commensurate protections for private-property rights has grown desperate. Two seminal Supreme Court cases, Nollan v. California Coastal Commission, *483 U.S. 825 (1987), and* Dolan v. City of Tigard, *512 U.S. 371 (1994), have provided a test that would do much to solve this problem, but a refusal to extend them has left property owners helpless to respond against municipal encroachment. The situation is dire: if property owners are to be protected, Fifth Amendment takings jurisprudence must adapt.*

In response, this Article proceeds in seven parts to plead for an extension of Nollan/Dolan *protections to the sphere of legislative exactions: a solution that would benefit cities and property owners alike. Such a move would give cities the clarification they need to craft proper regulatory measures; at the same time, it would protect property owners by ensuring that valid ordinances do not overstep their authority. A refusal to extend, however, will prevent landowner protections from keeping pace with the steady march of regulatory creep—leaving the modern landowner hardly better off than those New Hampshire colonists forced to surrender their white pines over two centuries ago.*

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INTRODUCTION

In 1690, England was a land of few trees, and a land of few trees furnished few raw materials to build ship masts—an embarrassment for a country boasting the world's most powerful navy. In response to this gaping need, King William and Queen Mary turned hungry eyes to the American colonies. Bountiful and bucolic, the New World was ripe for harvest, and England wasted no time claiming its trees for herself. By royal decree, all mature white pines were reserved as crown property to mast the royal navy.[2] Thirty-two years later, the English Parliament declared that the cutting of certain trees would incur a fine, and all lumber therefrom was declared forfeit to the king.[3]

So it was that in 1772, when the Sherriff of Weare County, New Hampshire, and his deputy arrested Ebenezer Mudgett for cutting the King's royal timber, the people revolted mightily.[4] A raging mob of over twenty men captured the Sherriff and his deputy, beating them nearly to death with a scourge of painfully ironic tree branches.[5] After cropping the ears and shearing the tails of the two men's steeds, the crowd sat the Sherriff and his deputy atop the beasts and paraded them down the road and out of town in what has fittingly been dubbed the "Pine Tree Riot."[6]

But why so much ado over a simple tree tax? Surely there were other injustices more worthy of such indignation? What drove these ordinary men—whose forbears had crossed the waters at Plymouth to forge a raw and rugged land into a beacon of democracy—to downright revolt over a tree ordinance? The answer is simple: they revolted because they understood the right to private property was as vital to freedom as life itself.[7] Their staunch Lockean convictions matched only by their fervor for freedom, these men were unwilling to yield even a stick of pine to the throes

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[2] WILLIAM LITTLE, THE HISTORY OF WEARE, NEW HAMPSHIRE 1735-1888 185 (Stone, Huse, & Co. 1888).

[3] *Id.* at 186. For settlers, this meant that before a man could clear his own land, he had to confer with the King's agents—called Surveyors of the Woods—who would inspect his land and decide which trees could be kept and which would require payment of a fine in order to be cut. If the landowner chose not to ignore this decision, he risked fines or imprisonment.

[4] *Id.* at 189.

[5] *Id.*

[6] *Id.*

[7] *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 350, 358 (2015) (stating that "[t]he colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property").

of regulatory tyranny.[8] In the end, the Pine Tree Riot gave birth to forces that would sweep into the Boston Tea Party.[9] It served as a signpost to liberty, and was memorialized as a symbol of American resistance in the form of the beloved (if rarely understood) "Appeal to Heaven" flag.[10]

With events like those in Weare County no doubt in the back of mind, the drafters of our Constitution were determined to forge a protection against government overreach. They did just that with the Fifth Amendment's "Takings" Clause, which guarantees that private property shall not be taken except for public use—and not without just compensation.[11] As tyrannical tree taxes faded in the rearview mirror, Fifth-Amendment Takings doctrine appeared positioned to protect landowners from abuse, and takings jurisprudence was able to keep pace with increasingly inventive governmental attempts to seize property. But as the years have worn on and property safeguards grown thin, the nemesis of the property owner has become, not the tyrant across the sea, but the tyrant in city hall.

This Article seeks to explain how, exactly two-hundred-and-fifty years after the original "appeal to heaven," the enforcement of modern exactions has placed landowners in a position little-better than their eighteenth-century counterparts. As city planners find more and more ways to take property from landowners, the need to evolve a commensurate level of protection for private-property rights has grown dire. Two seminal Supreme Court cases, *Nollan v. California Coastal Commission*[12] and *Dolan v. City of Tigard*,[13] have provided a test that would do much to solve this problem, but a refusal to extend them has left property owners helpless to respond against municipal encroachment.

In response, this Article will proceed in seven parts to plead for an extension of *Nollan* and *Dolan* protections to legislative exactions: a

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[8] See *The Declaration of Independence and Natural Rights*, CRF-USA.ORG, https://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html (last visited Dec. 10, 2020) (espousing the idea that under the Lockean viewpoint, humans are endowed with fundamental and unyielding rights, among them the right to property).

[9] *The New England Pine Tree Riot of 1772*, NEWENGLANDHISTORICALSOCIETY.COM, https://www.newenglandhistoricalsociety.com/new-hampshire-pine-tree-riot-1772/ (last visited December 10, 2020).

[10] *Id.* The "Appeal to Heaven" flag depicts a green pine tree on a white background beneath the words "AN APPEAL TO HEAVEN."

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

[12] 483 U.S. 825 (1987).

[13] 512 U.S. 371 (1994).

solution that would benefit cities and property owners alike. Such an extension would provide cities the clarification they need to craft proper regulatory measures; at the same time, it would protect property owners by ensuring that valid ordinances do not overstep their authority. A refusal to extend, however, will prevent landowner protections from keeping pace with the steady march of regulatory creep—leaving the modern landowner hardly better off than those colonists forced to surrender their white pines over two centuries ago.

Part I of this Article will provide a case-specific overview of Fifth Amendment land-use jurisprudence, showing how a regulation can violate the constitution by going too far and becoming a taking. Part II will introduce the concepts of exactions and unconstitutional conditions, and consider the Supreme Court's responses thereto in the seminal cases of *Nollan* and *Dolan*. Part III will examine the difference between a legislative exaction and an administrative one—describing the courts' reluctance to uniformly apply *Nollan/Dolan* protections to the legislative sphere and chronicling the confusion thus engendered. Part IV will highlight the absurdity of the courts' specious approach by introducing two examples of legislatively imposed exactions that exist in the "twilight zone" between the legislative and administrative spheres: tree ordinances and critical area buffers. To resolve this dilemma, Part V will propose that *Nollan* and *Dolan* should be extended to cover legislatively as well as administratively imposed exactions. Part VI will address counterarguments to this proposal and explain why each fall short in their objections to its merits. Finally, Part VII will reiterate the absolute necessity that courts recognize *Nollan*/*Dolan* extension and conclude with a warning lest they fail to do so.

I. BACKGROUND OF TAKINGS LAW

A. A Brief History of Land-Use Controls and the Foundation of Takings Jurisprudence

Government regulation of private land is nothing new. In fact, the Anglo-American tradition of land-use controls can trace its origins as far back as the Elizabethan era.[14] Its history is one born of necessity; as people began to crowd into cities, it became necessary for local governments to

[14] *See, e.g.*, DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 2 (West Academic Publishing 7th ed. 2017) (explaining how the Elizabethan Parliament, in an effort to "arrest urban congestion and untrammeled growth," enacted restrictive legislation, issued royal proclamations to prevent overcrowding, and disallowed the building of certain houses).

exercise some level of authority to abate nuisance-like behaviors.[15] With time, however, the need for municipal intervention grew to be much more all-encompassing.[16] As early as 1672, in a movement away from reliance upon common-law nuisance, the American colonies began to enact building laws with such expressly divergent purposes as protecting the public health and aesthetic.[17]

Fast forward to the modern era, and government control of land use has grown wide indeed. It includes restrictions on building area, height, and appearance; sensitive habitat zones; riparian and ecological setbacks; and a host of other limitations put in place to maintain the status quo.[18] This expansion of the government's land-use powers, though necessary to address the needs of a burgeoning urban populace, has brought with it widespread concern that private property is becoming increasingly

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[15] *See, e.g.*, STEEN EILER RASMUSSEN, LONDON: THE UNIQUE CITY 67-68 (The M.I.T. Press 1st ed. 1974) (citing an early Pennsylvania law in which the Queen, "perceiving the state of the City of London . . . where there are such a great multitude of people brought to inhabit . . . [and] whereof a great part are seen very poor," realized that "if one plague or popular sickness should, by God's permission, enter amongst these multitudes, that the same would not only spread itself and invade the whole city and confines, but that a great mortality would ensue the same"); *see also* Eric R. Claeys, *Takings, Regulation, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1576 (2003) (admitting that even the Lockean state of nature leaves mankind in an imperfect system wherein courts must regulate based on certain common laws of nuisance, and legislatures based on the police power); *see also* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls As Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 839 (1983) ("Modern land use law, with its roots in the turn-of-the-century City Beautiful movement, was intended to deal especially with the growing population concentrations of urban localities.").

[16] *See* James S. Burling, *The Constitutionality of Legislatively Imposed Exactions*, 8 BRIGHAM-KANNER PROP. RTS. J. 211, 212 (2019) ("Government's power to freely regulate land use to prevent nuisances is broad. And indeed, governments have generously interpreted the power to regulate land use well beyond traditional understandings of nuisances. The demands on modern government . . . include the demand of the people that government do far more with the regulation of modern property than simply prevent nuisances and similar palpable external harms.").

[17] *See* CALLIES, *supra* note 14, at 3-4, *citing* 2 PA. STAT. § 66, Ch. 53 ("Every owner or inhabitant of any and every house in Philadelphia, Newcastle, and Chester shall plant one or more tree or trees, viz., pines, nonbearing mulberries, water poplars, lime or other shady and wholesome trees before the door of his, her, or their house and houses, not exceeding eight feet from the front of the house, and preserving the same, to the end that the said town may be well shaded from the violence of the sun in the heat of summer and thereby be rendered more healthy.").

[18] Burling, *supra* note 16, at 212.

vulnerable to government overreach.[19] Fortunately, property owners have an ally: the Fifth Amendment.

B. The Fifth Amendment and the Emergence of Regulatory Takings Doctrine

The Fifth Amendment to the United States Constitution guarantees that "private property [shall not] be taken for public use, without just compensation."[20] Known as "Takings doctrine," this assurance was "designed to bar the 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."[21] To that end, the Fifth Amendment limits the government's power to appropriate private property—be it through eminent domain[22] or otherwise—for any reason other than public use.[23] Even a proper appropriation requires the government to pay just compensation to a landowner for the loss of his property.[24]

Much of that seemed to change, however, with the seminal case of *Village of Euclid v. Ambler Realty Company*.[25] In it, the Supreme Court gave local governments the green light to expand their regulatory powers, allowing them to enact zoning ordinances based in police power.[26] Not surprisingly, cities got greedy. Zoning boards and town councils began looking to these powers to support increasingly attenuated regulatory

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[19] *See id.*; *see also* Rose, *supra* note 15 ("From the beginning . . . localities and governments were implicitly deemed the appropriate agencies for planning and ordering the physical development associated with their own startling growth. But during the last two decades, judges and legal scholars have shown increasing doubt that local governments make land development decisions fairly and rationally—that is, with a reasonable distribution of burdens among individuals, and with the care and deliberation commensurate with the long-term implications of land development.").

[20] U.S. CONST. amend. V.

[21] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[22] Under the Fifth Amendment, the government may not take private property without just compensation. This language presupposes the fact that the government *can* take private property, as long as it does so by paying just compensation. The owner's consent is not required, and the property must be taken for public use. This is known as eminent domain and is a form of direct condemnation of property.

[23] *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005).

[24] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that although the underlying purpose of government regulation at issue was valid, its restriction of property rights had gone too far and required payment of just compensation).

[25] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[26] *Id.* Euclid's basis of zoning power, and really of all municipal land-use control, was based in the police power, meaning that a city may act to restrict the property interests of its citizenry when it is in the interest of the health, safety, and public welfare.

restrictions—tossing, as it were, the dearly held "bundle of sticks" into the fire of municipal overreach.[27] Eminent domain and direct condemnation, it is true, were protected by the Fifth Amendment's requirement of just compensation, but regulatory measures faced no such scrutiny and seemed poised to gnaw away private land interests.[28] Left unchecked, cities began taking more and more sticks from the bundle, leaving landowners helpless to watch as their sacred rights of ownership were cleverly drafted away.

And then, in 1922, the Supreme Court took a case which would stop regulatory overreach in its tracks.[29] In *Pennsylvania Coal v. Mahon*, the Pennsylvania Coal Company challenged a law—known as the Kohler Act—that prevented it from mining subsurface pillars of anthracite coal.[30] The company alleged that Kohler Act had stretched municipal police powers too far, "depriv[ing] it of property without due process of law, t[aking] its property without just compensation, and impair[ing] the obligation of contract."[31]

Writing for the Court, Justice Holmes began by admitting that diminution of property rights due to government regulation was simply unavoidable.[32] "Government hardly could go on," he conceded, "if to some extent values incident to property could not be diminished without paying for every such change in the general law."[33] But Holmes could not ignore the dangers of his conclusions, and he cautioned that "when [private property] is found to be qualified by the police power, the natural tendency

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[27] *See* Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV 247 ("The modern legal understanding of property ownership in the United States is expressed through a metaphor as a 'bundle of rights' or a 'bundle of sticks.'").

[28] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887) (denying petitioner's claim that a state law prohibiting manufacture and sale of intoxicating liquor robbed his brewery of value and was therefore a taking).

[29] *See, e.g.*, CALLIES, *supra* note 14, at 245 ("In [*Pennsylvania Coal Co. v. Mahon*], the regulatory-taking doctrine was born."); STEVEN J. EAGLE, REGULATORY TAKINGS § 1-1, at 2 (1996) ("The Supreme Court . . . never had found governmental activities short of a physical invasion to constitute a taking. This changed abruptly with Justice Holmes's famous declaration in *Pennsylvania Coal Co. v. Mahon*."); DANIEL R. MANDELKER, LAND USE LAW § 2.11, at 29 (3d ed. 1993) ("*Pennsylvania Coal Co. v. Mahon*, a landmark decision, was the first Supreme Court case to hold a land-use regulation unconstitutional under the taking clause."); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1086 (1993) ("[I]n *Pennsylvania Coal Co. v. Mahon* . . . the Court for the first time struck down a regulation as an uncompensated taking.").

[30] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).

[31] Robert Brauneis, "*The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal v. Mahon, 106 YALE L.J. 613, 620 (1996); *Mahon*, 260 U.S. at 412-13.

[32] *Mahon*, 260 U.S. at 413.

[33] *Id.*

of human nature is to extend the qualification more and more until at last private property disappears."[34] This, he warned, could not be allowed to happen.[35]

Holmes therefore concluded that although local government may—when acting within the proper scope of its police powers—regulate the property interests of its citizenry, such regulation may extend further than allowed and go "too far."[36] If it does, the regulation will be recognized as a taking and require the government either to forego its intrusion or pay the property owner just compensation.[37] Holmes ended by suggesting that "a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[38] In short, if the government plans to take private property through regulation, it must do so *lawfully*, with just compensation.

Though *Mahon*'s recitation of takings doctrine was by no means novel, its remarkability lay in the fact that here, for the first time, the Supreme Court was affirming that the government, through *regulation*, could intrude so far into ownership interests as to effect a taking.[39] This was monumental; it meant the Court finally recognized that a mere connection to a valid public purpose does not allow a city to regulate away an interest in property without just compensation. The opinion was a milestone for protecting private property rights against regulatory overreach, and has worthily been dubbed "the seminal regulatory takings case."[40]

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[34] *Id.* at 415.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 416.

[39] *See id.* at 415 ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *see also* CALLIES, *supra* note 14, at 245 ("In [*Pennsylvania Coal Co. v. Mahon*], the regulatory taking doctrine was born."); Eagle, *supra* note 29, at 2 (1996) ("[T]he Supreme Court . . . never had found governmental activities short of a physical invasion to constitute a taking. This changed abruptly with Justice Holmes's famous declaration in *Pennsylvania Coal Co. v. Mahon*."); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) ("In 1922 . . . [t]he Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon* established a new takings regime.").

[40] Brauneis, *supra* note 31, at 618; *Mahon*, 260 U.S. at 412-13.

C. So, When Does Regulation Become a Taking?

Mahon declared that regulation could go too far and become a taking, but "offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far.'"[41] Over the years, the Supreme Court has identified four situations in which a regulation may go too far and require compensation as a taking.

1. Regulation That Goes "Too Far" and the *Penn Central* Balancing Test

The first way a regulation may be found a taking is by performing an ad hoc inquiry to determine whether the regulation has simply gone too far.

In 1978, the Supreme Court heard the landmark case of *Penn Central Transportation Co. v. City of New York.*[42] In that case, the owners of the Grand Central Station Terminal brought suit against the City of New York, alleging that a landmark-preservation law that denied Penn Central's development proposal had effectively taken Penn Central's property.[43] In analyzing the claim, the Court developed a three-factor test to determine whether an individual landowner's subjection to stifling regulation had disproportionately forced him to bear a burden that should have been borne by the public.[44] The test directs courts to consider (1) the economic impact of the regulation on the claimant; (2) the extent to which regulation has interfered with the claimant's distinct, investment backed expectations; and (3) the character of the governmental action.[45] This framework, the Court reasoned, would provide a practical way to sort through claims to determine whether regulation had, in the oracular words of Justice Holmes, simply gone "too far" and become a taking.[46]

2. Per Se Regulatory Takings

Additionally, a regulation may require payment of just compensation if it is held to be a taking *per se*—meaning it will categorically effect a taking each and every time it occurs. Because they are always held a taking, per se takings do not require case-specific

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[41] *Lucas*, 505 U.S. at 1003 (discussing *Mahon*, 260 U.S. at 415).
[42] 438 U.S. 104 (1978).
[43] *Id.* at 107.
[44] *Id.* at 124.
[45] *Id.* at 124-25.
[46] *Id.* at 124.

analysis. To date, the Supreme Court has identified three situations in which government regulation will be deemed a per se taking.

i. Permanent Physical Occupation Under *Loretto*

First, regulation will be deemed a taking per se if it involves a permanent physical invasion of property.[47] In *Loretto v. Teleprompter Manhattan CATV Corporation*, the owner of a New York apartment building claimed that a law requiring her to keep cable television facilities on her property was a taking without just compensation.[48] Because it forced her to keep "plates, boxes, wires, bolts and screws" belonging to the television company on her building, the law indeed formed a permanent physical invasion of Loretto's property, and the Supreme Court had no trouble finding it a taking. [49]

Writing for the Court, Justice Marshall noted that in any case where governmental regulation involves a "permanent physical occupation of property, [the Court's] cases uniformly have found a taking."[50] By destroying the rights to "possess, use and dispose of property,"[51] such an intrusion effectively "chops through the 'bundle' [of property rights], taking a slice of every strand."[52] Accordingly, the Court affirmed that any regulation which effects a permanent physical invasion of property will form a categorical taking, requiring the government to pay just compensation to the property owner.[53]

ii. Denial of All Beneficial or Productive Economic Use Under *Lucas*

Second, in *Lucas v. South Carolina Coastal Council*, the Supreme Court decreed that any regulation denying a property owner all beneficial or productive use of his land will be a taking per se.[54] In *Lucas*, David Lucas purchased land along the South Carolina coast intending to develop it as beachfront housing—that is, until the South Carolina legislature passed

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[47] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that the imposition of a cable box was a taking and that any such physical invasion—being an abrogation of the right of the property owner's rights to occupy, control, or meaningfully dispose of the property—would categorically result in a taking).

[48] *Id.* at 421.

[49] *Id.* at 438.

[50] *Id.* at 434.

[51] *Id.* at 420.

[52] *Id.* at 435 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1982)).

[53] *Id.* at 437-38.

[54] *Lucas*, 505 U.S. at 1003.

a law prohibiting erection of any habitable structure along the coastline.[55] Lucas challenged the law as a taking without just compensation, but the South Carolina Supreme Court found otherwise and held that because the regulation was based in a desire to protect the beach, it was a valid exercise of police power, not a taking.[56]

Writing for the Supreme Court, however, Justice Scalia stated unequivocally that the mere fact that a regulation is based upon legitimate police power does not immunize it from takings scrutiny.[57] Scalia continued that "where the state seeks to sustain regulation that deprives land of all economically beneficial use . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[58] Put simply, if a regulation (even one with a valid purpose) effectively restricts all economic use of a property in a way that did not inhere with the original title, then such regulation will be a taking whenever and wherever it occurs.[59]

iii. Government Acquisition of Real or Constructive Title Under *Horne*

Finally, under *Horne v. Department of Agriculture*, a per se taking occurs where the government acquires real or constructive title to private property.[60] In *Horne*, a government regulation aimed at controlling market prices forced raisin growers to "set aside a certain percentage of their [raisin] crop for the account of the [g]overnment, free of charge."[61] The government would then distribute, donate, or sell those raisins in a noncompetitive arena in an effort to promote market stability.[62] Any profits left over after the government subtracted its expenses would then be returned to the growers.[63] The growers fought the law all the way to the Supreme Court.[64]

In delivering the Court's opinion, Chief Justice Roberts stripped away the law's finery to reveal that it was, at its core, nothing more than a creative attempt to avoid the requirements of the Takings Clause. The

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[55] *Id.* at 1006-07.
[56] *Id.* at 1009-10.
[57] *Id.* at 1015.
[58] *Id.* at 1027.
[59] *Id.* at 1015.
[60] 576 U.S. 350 (2015).
[61] *Id.* at 351.
[62] *Id.*
[63] *Id.*
[64] *Id.*

government argued that by allowing growers to recover proceeds from the sale of their goods, the law kept property interests intact and required no compensation.[65] Roberts and the majority held otherwise.[66] That the law reserved to the property owner a contingent interest mattered not—it was a physical appropriation of property all the same.[67] The government's attempt to avoid its duty of just compensation was untenable, and the Court held that it could not be maintained as anything other than what it was: a categorical taking.[68]

Each of the foregoing categorical takings is a recognition that a governmental entity may not, by regulation, intrude so far upon a property interest as to hamper the owner's use without paying just compensation for that intrusion. Together, they form a shield by which a property owner may fend off regulatory frowardness and preserve his autonomy of ownership. However, as often happens, when one door is shut against government abuse, another readily opens.

II. EXACTIONS, UNCONSTITUTIONAL CONDITIONS, THE *NOLLAN* AND *DOLAN* TESTS AND THEIR PARTIAL CLARIFICATION IN *KOONTZ*

Despite the protections of *Penn Central*, *Loretto*, *Lucas*, and *Horne*, there is still an alternative, back-door route by which a city may acquire property without just compensation: exactions.

When granting a permit for the use or development of a parcel of land, a municipality may require a property owner to meet certain conditions or perform certain actions—ostensibly as an offset against a perceived externality or foreseeable harm caused by the granting of that permit.[69] Known as an exaction, this occurrence is founded in the economic realities of development, for with each new building project, a city is forced to bear the consequences of expansion.[70] Schools, roads, sewers, and other

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[65] *Id.* at 363-64

[66] *Id*.

[67] *Id.* at 363.

[68] *Id.* at 364.

[69] *See* William A. Fischel, *From* Nectow *to* Koontz*: The Supreme Court's Supervision of Land-Use Regulation*, THE NEW ECONOMICS OF ZONING LAWS 22 (2014); *See also* Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. 105, 106 (2016) (stating that such exactions may take the form of either physical-dedication requirements or monetary demands).

[70] *See* CALLIES, *supra* note 14 at 568-69 (suggesting that in light of the "continuing exportation of capital to new development [and] the massive economic and fiscal crises facing our states and cities," states have turned to exactions such as "dedication of land; money-in-lieu-of-land dedications; impact fees; mitigation fees;

capital facilities do not simply appear; these projects must be paid for.[71] A city may fund such externalities either by levying additional taxes—thus imposing the cost of development on the city as a whole—or by shifting costs to the developer in the form of exactions.[72] Practically speaking, this means that if a developer desires to come into a community, he must offset any negative consequences of his development by alleviating the burdens he creates.[73] This approach is not illogical: it meets an admittedly legitimate municipal interest and is quite in line with the Fifth Amendment's requirement that individuals bear no more than their fair share of societal burdens.[74]

But fact that the government has a legitimate interest does not absolve it of the need to ensure its exactions are proper. This requirement is largely based in what is called the "unconstitutional conditions" doctrine, which ensures that the government does not force individuals to waive a constitutionally protected right in exchange for a government benefit.[75] Sprung from a series of protectionist state laws, the doctrine prowls the outer limits of state authority to ensure that the government does not extort its citizens.[76] As the Supreme Court put it:

> "[T]he power of the state . . . is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees

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excise taxes; increased use of public improvement district assessment; bonds and taxation; and utility rate structures" to raise capital).

[71] *Id.* at 567-68.

[72] *See* Frona Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DEPAUL L. REV. 635, 635-36 (1990) (maintaining that the lack of resources available to cities to pay for capital facilities needed to offset increasingly onerous development has driven municipal governments to look to exactions for such funding).

[73] *See* CALLIES, *supra* note 14, at 570.

[74] *See, e.g.*, Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) ("The need for some general planning and control [in response to external consequences of modern development] is apparent, and makes manifest the wisdom underlying the delegation of [exaction] powers to the cities.").

[75] Brian T. Hodges, *Are Critical Area Buffers Unconstitutional? Demystifying the Doctrine of Unconstitutional Conditions*, 8 SEATTLE J. ENVTL. L. 1, 26 (2018).

[76] *Id.*

> embedded in the Constitution of the United States may thus be manipulated out of existence."[77]

Essentially, the unconstitutional conditions doctrine holds that "even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."[78] Through a series of prominent cases, the Supreme Court has made clear that the unconstitutional conditions doctrine applies to protect the rights of private property owners against improper exactions and declared that any such attempt by a city will result in a taking.[79] But when exactly do municipal exactions demand unconstitutional conditions and become a taking? Three Supreme Court cases have done much to clarify that.

A. Nollan v. California Coastal Commission

In *Nollan v. California Coastal Commission*, Patrick and Marilyn Nollan were told their plans to rebuild an existing beach house would be approved so long as they agreed to dedicate a public easement across the back of their lot.[80] The Coastal Commission, determined to provide the public access to beaches across the entire coastline, justified its request as a legitimate exaction designed to facilitate access to a public beach that lay further down the coast.[81] The Commission wanted a portion of every piece of property along the coast to serve as a lateral public easement and, if given its way, would have grabbed up easements across every beachfront home along the coast.[82] But the Nollans objected, claiming the condition was nothing more than an attempt to take their property without just compensation and that it could not be imposed without proof their development would directly harm beach access.[83] The dispute was bitter and raged all the way to the Supreme Court.

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[77] Frost v. R.R. Comm'n. of Cal., 271 U.S. 583, 593-94 (1926).

[78] RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 5 (Princeton University Press 1st ed. 1993).

[79] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 602 (2013) (citing *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831); *see also* Burling, *supra* note 16, at 214 (explaining that in the context of land use, the doctrines of regulatory takings and unconstitutional conditions are inextricably intertwined).

[80] 483 U.S. at 828.

[81] Burling, *supra* note 16, at 216.

[82] *Id.*

[83] *Nollan*, 483 U.S. at 828.

Writing for the majority, Justice Scalia first observed that had the city simply taken the easement through eminent domain, there would be no question that a taking had occurred and just compensation would clearly have been required.[84] The right to exclude others, he noted, is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," and a complete imposition into that right (such as an easement) must be properly recompensed.[85] Though he acknowledged that, under the generally accepted theory of municipal exactions, a city *could* condition the grant of a permit upon some concession by the owner, Scalia nonetheless maintained that such condition would be unconstitutional if it failed to further the ends advanced as justification for the city's action.[86] In other words, cities cannot use unrelated conditions to extort property owners for the grant of a permit.

In order for a city to intrude upon a property owner's interests, its action must be based upon a legitimate government purpose.[87] If, to achieve such a purpose, a city seeks to impose a condition upon grant of a permit, that condition must bear a reasonable causal connection to the city's otherwise legitimate interest.[88] This causal connection forms what Scalia referred to as an "essential nexus," the presence of which is essential if a government is to successfully impose a condition without paying just compensation.[89]

Simply put, if a city, under a valid purpose, seeks to impose an exaction on development, that exaction must bear an essential nexus to the negative effects of the proposed development. Eliminate that nexus, and the condition becomes nothing more than a disguised attempt at an uncompensated taking, requiring the government either to renege on its condition or else pay just compensation.[90] In the Nollans' case, there was no such nexus.[91] The promotion of public beach access—an admittedly legitimate public purpose—was not palpably connected to the harm caused by the Nollans' proposed development.[92] Consequently, the majority held that the Commission's exaction was nothing more than "an out-and-out

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[84] *Id.* at 831.
[85] *Id.* (quoting *Loretto*, 458 U.S. 419 (1982)).
[86] *Id.* at 837.
[87] *See* Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928); *see also* Lingle v. Chevron, 544 U.S. 528 (2005).
[88] *Nollan*, 483 U.S. 836-37.
[89] *Id.* at 837.
[90] *Id.*
[91] *Id.* at 838-39.
[92] *Id*.

plan of extortion."[93] If the city wanted the easement, it would have to pay for it.[94]

B. Dolan v. City of Tigard

In *Nollan*, the Supreme Court held that to avoid becoming a taking, proper exactions must bear an essential nexus to a legitimate government purpose which justifies the condition sought. The Court did not, however, specify the degree of connection that must exist to form such a nexus. It was not until seven years later, in *Dolan v. City of Tigard*, that the Court took up the challenge.[95]

In *Dolan*, landowner Florence Dolan sought a permit to expand her hardware store and pave thirty-nine parking spaces.[96] The City of Tigard, Oregon, agreed to approve the permit, but only on the condition that she dedicate a portion of her land as a public greenway and build a public bicycle path.[97] Dolan challenged this condition, arguing that the city had not identified any "quantifiable burdens" created by her development that could "justify the particular dedications required from her."[98] The city, in response, claimed its requirement was vitally connected to its goal of flood prevention.[99] In support of this assertion, the city relied upon "rather tentative findings" claiming that Dolan's development would lead to increased stormwater runoff and add to the overall need to manage the floodplain.[100]

To settle the debate, the Supreme Court was tasked with determining whether the city's purported nexus bore the required degree of connection to the projected impact of Dolan's development.[101] In Goldilocks fashion, the Court examined three state-court approaches to determining the necessary degree of connection: one harsh, one easy, and one somewhere in between.[102] Chief Justice Rehnquist authored the

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[93] *Id.* at 837.

[94] *Id.* at 842.

[95] 512 U.S. at 374.

[96] *Id.* at 379.

[97] *Id.* at 379-80.

[98] *Id.* at 386.

[99] *Id.* at 388-89. The city had required Dolan to "dedicate 'to the city as Greenway all portions of [her property] within the existing 100-year floodplain . . . and all property 15 feet above [the floodplain] boundary.'"

[100] *Id.* at 388.

[101] *Id.* at 375.

[102] *See id.* at 389-91 (detailing the two approaches the Court declined to adopt: the first, more lenient approach required nothing more than "very generalized statements

opinion and concluded that the middle ground—requiring a "reasonable relationship" between the condition and the negative impact of proposed development—represented the best approach.[103] The Court decided, however, that the phrase "reasonable relationship" sounded too similar to the low standard of "rational basis" (a standard which would almost always yield to municipal interests), and accordingly held that the requirement of the Fifth Amendment was best expressed as "rough proportionality."[104]

This rough proportionality, in Rehnquist's words, does not require a defendant to make any "precise mathematical calculation."[105] What it *does* require is some sort of individualized determination that the required exaction is related to both the nature and extent of the impact of proposed development.[106] Plainly stated, this means that in order for a city to condition permit approval upon the meeting of a legitimate demand, the city must substantiate the connection between its demand and the harm it seeks to offset with more than mere conclusions.[107] The required degree of connection between the condition and the valid public purpose—or, put another way, the validation for the essential nexus—demands a city make some *quantifiable finding* to show that the condition imposed bears a roughly proportional connection to the expected harm of proposed development.[108] This was a mouthful, but it made sense.

The *Dolan* Court's decision vested *Nollan*'s nexus protection with real teeth. No longer could cities rely on perfunctory rationalizations or clever wordsmithing to substantiate a valid exactions purpose; rough proportionality must be *proven*. Through that requirement, *Dolan* ensured that developmental exactions would sit evenly across the scales from the harm they sought to offset—providing another layer of protection to property owners in the arms race of municipal takings.

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as to the necessary connection between the required dedication and the proposed development;" the second, referred to as the "specifi[c] and uniquely attributable test," demanded a "very exacting correspondence.").

[103] *Id.* at 391.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 393-96.

C. Koontz v. St. Johns River Water Management District—*An Imperfect Clarification of* Nollan *and* Dolan

In *Koontz v. St. Johns River Water Management District*, the Supreme Court considered a challenge to a monetary exaction.[109] When Coy Koontz Sr. applied for a wetland permit to develop a shopping center on his land, the St. Johns River Water Management District demanded he finance the drainage of district-owned property over five miles away, at a cost of up to 150,000 dollars.[110] Koontz refused, and the permit was denied.[111] Koontz then sued, arguing the demand was a taking in violation of *Nollan* and *Dolan*.[112]

The first question was whether *Nollan* and *Dolan* applied to proposed exactions, or whether its strictures were limited to those exactions which had already been imposed. Writing for the Court, Justice Alito pointedly answered that the *Nollan/Dolan* test—a test which had admittedly been developed in the context of imposed exactions—applied with equal force to *proposed* exactions.[113]

But the real question in *Koontz* was a whether *Nollan* and *Dolan* treatment applied to *monetary* exactions demanded in lieu of physical property.[114] It was well-settled law that land dedications or physical restrictions required *Nollan/Dolan* scrutiny, but what about monetary penalties? Did such exactions have to meet *Nollan/Dolan* standards? In a 5-4 majority, the Court held that they did.[115] Justice Alito, penning the opinion, declared that the Court's *Nollan/Dolan* framework "provide[s] important protection against the misuse of . . . land-use regulation"[116] which applies just as robustly to monetary exactions as physical ones.[117] The form of an exaction does not change its nature, and if a city wants to levy monetary requirements in lieu of actual property, it still has to pay for it.

The Court could very well have "identified alternative constitutional bases for challenges to monetary conditions."[118] It could, for example, have treated the case as a due-process claim based on the inherent impropriety of the act—a challenge which would have been reviewed under a more lenient

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[109] 570 U.S. at 602.
[110] *Id.* at 606.
[111] *Id.* at 611.
[112] *Id.* at 595.
[113] Saxer, *supra* note 69.
[114] *Koontz*, 570 U.S. at 611-12.
[115] *Id.* at 612.
[116] *Id.* at 599.
[117] *Id.* at 612.
[118] Saxer, *supra* note 69, at 107.

rational-basis standard.[119] It might have also reviewed the act's application under the *Penn Central* factors.[120] But the Court rejected both approaches,[121] holding that the "direct link between the government's demand and a specific parcel of real property" required a heightened level of scrutiny—something that could only be found in the *Nollan/Dolan* test.[122] The Court sensibly determined such scrutiny was necessary to address "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use."[123] In short, because monetary exactions contain the same potential for abuse as exactions requiring a dedication of physical property, they should be subject to *Nollan/Dolan* scrutiny.

III. THE CURRENT LANDSCAPE—HOW THE LEGISLATIVE/ADMINISTRATIVE DISTINCTION HAS COURTS SPLIT ON *NOLLAN*/*DOLAN* APPLICATION

The *Nollan* and *Dolan* tests represent a development in Takings Clause jurisprudence that cannot be overstated. Together, they guarantee that the government does not unfairly extort property owners by conditionally granting permit approval on something it would otherwise have to take by payment of just compensation. This guarantees two things: first, that the unconstitutional-conditions doctrine is not violated, and second, that the due-process rights of landowners are respected. Unfortunately, despite their deep significance, the practical implications of *Nollan* and *Dolan* have remained unclear, and courts have wasted decades grappling over their applicability.

To understand the dilemma this confusion creates for both city governments and landowners, one must first understand its backdrop. To that end, this Article will highlight three indispensable concepts. First, it will explain the distinction between legislative and administrative actions. Second, it will discuss the level of deference typically afforded to each. And third, it will reveal the uncertain world this distinction has created for *Nollan* and *Dolan* and, by implication, for city planners and landowners trying to understand their rights.

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[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Koontz*, 570 U.S. at 614.
[123] *Id.*

A. Legislative Versus Administrative Actions—What's the Distinction?

When a city council, zoning board, or other agency enacts an ordinance of general applicability, it is making a legislative decision. Such decisions include the adoption, amendment, and denial of zoning ordinances, as well as a plenitude of other measures commonly put in place by local governments to restrict the use of land. Traditionally, legislative decisions have been accorded a presumption of validity and received limited judicial review.[124] This treatment is based on the assumption that the decisions of an agency, being democratically developed and generally applied, are immune to individual bias or undue discrimination.[125] Consequently, when a legislative decision is challenged in court, it is generally treated with rational-basis scrutiny.[126] This treatment affords town councils and zoning boards a mighty level of deference, and their decisions almost always pass constitutional muster.[127]

Historically, nearly all land-use decisions were considered legislative.[128] But as the years wore on, administrative boards and planning commissions began making more and more decisions on what looked like an ad hoc basis, leading to heightened concern that land-use decisions might indeed be subject to the whims of individual prejudice.[129] To address these

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[124] Highly deferential review tends to confer virtually unrestrained power on local legislative bodies. *See* CALLIES, *supra* note 14, at 2.

[125] *See* Rose, *supra* note 15, at 854-55 ("Where the constituency is large, action is possible only through persuasion and coalitions of interest groups. Through a pattern of shifting alliances and vote trading, every interest can obtain at least partial satisfaction in the legislation . . . . Because of these factors, then, the courts can safely trust the larger legislature to make fair and careful decisions under most circumstances, and can give broad leeway to those decisions.").

[126] Fasano v. Bd. of Cty. Cmm'rs of Washington Cty., 507 P.2d 23, 26 (1973) ("Ordinances laying down general principles without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority.").

[127] In the land-use context, legislative decisions typically contain a prima-facie assumption of validity and will not be overturned unless shown to be an arbitrary or unreasonable exercise of city authority, having no substantial relationship to the public health, safety, or general welfare.

[128] *See* Rose, *supra* note 15, at 842 ("Traditionally, they were tested only within the ample girth of a loose reasonableness standard."); *see also* Roderick M. Bryden, *Zoning: Rigid, Flexible, or Fluid?*, 44 J. URB. L. 287, 301 (1967).

[129] *See, e.g.*, Ward v. Village of Skokie, 186 N.E.2d 529, 533 (1962) (Klingbiel, J., specially concurring) ("It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door

mounting (and legitimate) fears that land-use regulation was becoming increasingly arbitrary, the Oregon Supreme Court set down the influential case of *Fasano v. Board of County Commissioners of Washington County*.[130]

In *Fasano*, the Oregon Supreme Court heard a challenge to a city zoning board's amendment of its zoning ordinance.[131] In a break from the traditional legislative assumption, the court held that the decisions of a zoning board were not automatically entitled to legislative deference; such decisions could be treated as quasi-judicial when and if they applied to individualized applications.[132] This was a vast step forward, and the first recognition that zoning boards and land-use committees often make decisions as an adjudicative, rather than legislative, body.[133] Fittingly, such decisions are referred to as "administrative" actions.

Unlike their legislative counterparts, administrative actions are subject to intense judicial review.[134] They involve decisions that occur upon application: things like rezoning, conditional-use permitting, and variance grants. In deciding whether a given action is legislative or administrative, the question is "whether [the] action produces a general rule or policy which is applicable to an *open* class of individuals, interests, or situations, or whether it entails the application of a general rule of policy to *specific* individuals or situations."[135] If the former, then the government action at issue is legislative; if the latter, it is administrative.

Because they require application of an existing ordinance to specific instances and individual parcels, administrative actions are more akin to judicial decision making than uniform legislation.[136] As such, they carry increased risk that officials will act according to their own whims instead

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completely to arbitrary government."); *see also*, Rose, *supra* note 15, at 842 (lamenting that cities have been able, through piecemeal increments, to shave away individual property rights).

[130] 507 P.2d at 23.

[131] *Id.*

[132] *Id.* at 26.

[133] *See* Rose, *supra* note 15, at 851-53.

[134] *See, e.g.*, *Fasano*, 507 P.2d at 26 ("At this juncture we feel we would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life.").

[135] *Id.* at 27 (emphasis added).

[136] *See* Rose, *supra* note 15, at 841.

of the general good.[137] Accordingly, courts have become less hesitant to get involved and will apply heightened scrutiny when reviewing a challenged administrative action.[138] This heightened level of review ensures that municipal actions reflect general principles of equity and fair dealing rather than individual caprice, and makes adjudicative decisions much easier to invalidate.

B. Why Does the Legislative/Administrative Distinction Matter?

So, how does this distinction play into in the *Nollan* and *Dolan* saga? The unfortunate truth is that it creates an absolute mess. Courts are confused as to whether *Nollan/Dolan*'s rough-proportionality test should apply to legislative as well as administrative decisions. While both *Nollan* and *Dolan* occurred in the context of administrative exactions, the Court's opinions therein did not preclude application to the legislative sphere—an application that, for many reasons hereinafter discussed, makes a great deal of sense. The question therefore remained: should *Nollan/Dolan* protections be limited to those exactions imposed through administrative decision-making, or should they be expanded to include legislatively imposed exactions as well? It was a question with massive implications.

In *Lingle v. Chevron*, the Supreme Court seemed poised to answer the question.[139] Presented with the question of whether an imposition on lease charges formed an uncompensated taking, the *Lingle* Court appeared to ground the constitutional underpinnings of both *Nollan* and *Dolan* strictly in the unconstitutional-conditions doctrine.[140] The Court also seemed to conclude that both *Nollan* and *Dolan* had occurred within the context of administrative bargaining.[141] As such, *Lingle* hinted that *Nollan*

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[137] *See id.* (asserting that these kinds of individual land decisions amount to deals with landowners which gut the generality of the local plan, becoming merely "ad hoc impulse choices that neither safeguard the surroundings for present and future residents, nor enable those residents and would-be developers to predict future actions").

[138] *See* Rose, *supra* note 15, at 839 ("[D]uring the last two decades, judges and legal scholars have shown increasing doubt that local governments make land-development decisions fairly and rationally—that is, with a reasonable distribution of burdens among individuals, and with the care and deliberation commensurate with the long-term implications of land development.").

[139] 544 U.S. at 528.

[140] Daniel L. Siegel, *Exactions After* Lingle*: How Basing* Nollan *and* Dolan *on the Unconstitutional Conditions Doctrine Limits Their Scope*, STAN. ENVTL. L. J. 577, 580 (2009).

[141] *Lingle*, 544 U.S. at 546; *but see* Southeastern Legal Foundation *Amicus Brief for F.P. Development* at 7-8 (positing that the Supreme Court's decisions in *Nollan, Dolan,*

and *Dolan* might apply only to administrative exactions imposed on a case-by-case basis, not those which are legislatively required and ministerially applied.[142] The case did not, however, move beyond inference to definitively answer the question.[143] The mystery remained unsolved, and courts and commentators were left to wade through its practical implications on their own.[144]

C. The Current Split on Nollan/Dolan *Application*

So the question remains: should legislatively imposed exactions be subject to *Nollan*/*Dolan* scrutiny? State and federal courts are currently

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and *Koontz* were not adjudicative, but legislative pronouncements, and that any assertion those cases made regarding adjudicative determinations is incorrect).

[142] *See* Siegel, *supra* note 140, at 580-81; *but see* Luke A. Wake & Jarod M. Bona, *Legislative Exactions After* Koontz v. St. Johns River Management District, 27 GEO. INT'L. ENVTL. L. REV. 539, 573 (2015) (contending that although, at first blush, *Lingle* seemed to say that legislative exactions should be treated differently and excepted from *Nollan*/*Dolan* scrutiny, O'Connor essentially founded the rationale for a taking in a government regulation's "going too far"). This seems to ground the basis for a taking, not in where it came from, but in the practical effects of its burden. Accordingly, since there is no real distinction in the burden created by a legislatively imposed exaction, there is no reason to treat them differently. *See also* Burling, *supra* note 16, at 227 ("What matters is the exercise of governmental power, not the source of that power.").

[143] *See* Lee Anne Fennel & Eduardo M. Penalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 289 (2013) [hereinafter *Exactions Creep*] (observing that the Court "left the domain of [*Nollan/Dolan*] scrutiny wholly undefined").

[144] *See* James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 405 (2009) ("[T]he Supreme Court has not addressed whether legislatively imposed exactions are subject to [*Nollan*/*Dolan*] scrutiny. Lower courts must guess about whether the Supreme Court would include legislative activity within its definition of 'exaction.'").

split on the issue,[145] and legal scholars are similarly divided.[146] Some have declined to extend *Nollan* and *Dolan* to legislative exactions.[147] Others have extended *Nollan* and *Dolan* to reach them, reasoning that "a city council can take property just as well as a planning commission can."[148] The Supreme Court, for its part, has thus far declined to answer.[149]

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[145] The Texas, Ohio, Maine, Illinois, New York, and Washington Supreme Courts, as well as the First Circuit Court of Appeals, do not distinguish between legislatively and administratively imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions. *See, e.g.*, Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004); Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355-56 (Ohio 2000); Curtis v. Town of South Thomaston, 708 A.2d 657, 660 (Maine 1998); City of Portsmouth v. Schlesinger, 57 F.3d 12, 16 (1st Cir. 1995); Northern Ill. Home Builders Ass'n v. City of Du Page, 649 N.E.2d 384, 397 (Ill. 1995); Manocherian v. Lenox Hill Hosp., 643 N.E. 2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); and Trimen Dev. Co. v. King Cty., 877 P.2d 187, 194 (Wash. 1994). Meanwhile, the Ninth Circuit, with its internal divide over legislative/administrative treatment, illustrates the confusion engendered by refusal to adopt a uniform approach. *See* Mead v. City of Cotati, 389 F. App'x. 737, 639 (9th Cir. 2010) (*Nollan* and *Dolan* do not apply to legislative conditions); Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 874-76 (9th Cir. 1991) (adjudicating a *Nollan*-based claim against an ordinance requiring developers to provide affordable housing); Garneau v. City of Seattle, 147 F.3d 802, 813-15, 819-20 (9th Cir. 1998) (plurality opinion with the court divided equally on whether *Nollan* and *Dolan* apply to legislative exactions).

[146] For differing opinions, *see* Burling & Owen, *supra* note 144, at 397, and Siegel, *supra* note 140, at 577.

[147] *See, e.g.*, Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist., 62 P.3d 404 (Or. Ct. App. 2003) (heightened scrutiny not applicable to legislative exaction); *see also* Saxer, *supra* note 69, at 105 (advocating for *Nollan/Dolan* limitation to administrative decisions only).

[148] *See* Parking Ass'n of Georgia v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari); *see also* Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E. 2d 330, 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."); 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, 401-07 (2002) (arguing against the legislative/adjudicative distinction); Brian T. Hodges, *supra* note 75 (contending that "there is simply no basis in the U.S. Supreme Court's unconstitutional-conditions case law to conclude that conditions imposed pursuant to an act of generally applicable legislation are exempt from the nexus and proportionality requirements.").

[149] *See* David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Cases*, 54 WASHBURN L. J. 43, 48 (2015) (concluding that the Supreme Court has not yet had occasion to "decide whether [a legislative exaction] also requires review under the 'essential nexus' and 'rough proportionality' tests of *Nollan* and *Dolan*"); *see also* Burling & Owen, *supra* note 144, at 403 ("The Supreme Court's reluctance to adopt

As a result, cities have found increasingly inventive ways to avoid *Nollan/Dolan* scrutiny by persuading courts that challenged exactions are more legislative than adjudicative.[150] By blurring the lines between legislative ordinance and administrative application, city-planning commissions leave modern landowners bewildered and in the dark as to their rights.

In light of these uncertainties, solid footing is hard to come by. Exactions come at a high cost to individual property owners, who are left to grope through the murk of the legislative versus administrative conundrum to determine whether or not they have a protected interest (a task, it should be noted, which has repeatedly made fools of even the most learned judicial minds). The problem is that the real-world distinction between legislative and adjudicative decisions is often much more abstract than it is practical. What styles itself as legislative may in truth be more of an ad hoc application, particularly when it comes to mitigation fees and individual permitting assessments.[151] But property owners are not the only ones who grieve this lack of clarity; cities face a problem of their own.[152] For who can say whether a proposed regulation will be upheld under generous legislative deference, or struck down as an unconstitutional exaction under heightened scrutiny? The resulting confusion is a thorn in the side of cities and property owners alike, and the current lay of the land, with its varied multitudes of extortionary measures and lack of agreement over how they should be treated, has engendered nothing but chaos. The Supreme Court's reluctance to adopt a bright-line standard has done nothing to help either. In fact, it has created a paradox.

D. The Paradox Created by Judicial Reluctance to Extend Nollan *and* Dolan *to Legislatively Imposed Exactions*

Improperly structured exactions, like countless other forms of regulation issued by city planning commissions, can run afoul of

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bright-line rules to define the scope of regulatory takings has led to a legal regime dominated by alternative tests.").

[150] CALLIES, *supra* note 14, at 48.

[151] Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 514 (2006) (emphasizing the difficulty in drawing a line between legislative and administrative decision making in the land-use context).

[152] *See, e.g.*, EDWARD ZIEGLER, 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 20:67 (4th ed.) (giving cities that seek to enact tree-protection regulations four suggestions for how to proceed, none of which affords absolute certainty to the city that its regulations will not be successfully attacked).

Constitutional due-process requirements by failing to adequately recognize property rights.[153] The *Nollan*/*Dolan* test recognizes that fact and enshrines the protections of the Fifth Amendment within its "nexus" and "rough proportionality" requirements. A failure to apply these protections to legislative exactions conveniently allows overzealous cities to tuck unconstitutional measures inside legislative ordinances, creating what can only be designed as a mess.

The truth is that the very name "legislative exactions" is misleading. A legislative exaction is not a zoning law based on *Euclidean* expansion of police power; it is a much more insidious animal. It allows a city to improperly take property for itself by conditioning the grant of a permit on the meeting of a condition. Justice Alito recognized this in *Koontz* when he mourned the vulnerability of landowners put in the position of choosing between the grant of a permit and the retention of a constitutional right.[154] This is not an isolated observation; it is a clear outcropping of a much deeper recognition: legislative exactions are capable of inhabiting a twilit world between legislative and administrative action, making a pre-supposed level of heightened deference not only ill founded, but also inadmissible.[155]

To prove this, let us suppose a hypothetical city with an ordinance requiring all landowners to give up a constitutional right in order to secure a certain type of permit. Clearly, this would be an exaction. This particular exaction would require landowners to pay a fee as mitigation for taking certain actions on their property. Let us further assume that the exaction is born of a legitimate public purpose (say the elimination of some nuisance-like behavior) which satisfies the *Lingle* test. Now, suppose a landowner seeks to challenge this ordinance as an unconstitutional condition, arguing that the imposition of mitigation fees does not meet the *Nollan/Dolan*

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[153] *See, e.g.*, *Exactions Creep*, *supra* note 143, at 294 (positing that there is such a duplicative overlap between due-process and takings jurisprudence as to make the *Nollan/Dolan* inquiry unnecessary for purposes of exactions analysis); *see also* Wake & Bona, *supra* note 142, at 564, for a brief discussion of how the exaction at issue in *Koontz* could have also been brought as a due process claim, inferring that the travesty of a takings is vitally connected, though distinct from, a property owner's due process rights.

[154] *Koontz*, 570 U.S. at 605, 619.

[155] Many courts have noted that otherwise-legislative decisions revolving around highly individual ownership interests hardly fit the normal conception of generalized legislation. *See, e.g.*, Hyson v. Montgomery Cty. Council, 217 A.2d 578, 586 (Md. Ct. App. 1966); *see also* Rose, *supra* note 15, at 842 (lamenting that certain "small changes," made at the local level by zoning authorities, are capable of slicing away property rights on an individual basis but are scrutinized according to a wholly inadequate reasonableness standard); Haskins, *supra* note 151 (describing the difficulty of delineating between legislative and administrative decisions in the land-use context).

requirement of rough proportionality and is therefore nothing more than a taking.

But here is the catch: by challenging the means through which the exaction is *applied*—something presumptively ad hoc in nature—the landowner is actually challenging the ordinance *itself*. Since the means of its application have been built into the ordinance legislatively, any challenge to the mitigating process of an ordinance is more truly a challenge to the ordinance's legislative structure. This creates a problem: the ordinance's application cannot be scrutinized without calling into question the very mechanisms of the ordinance as enacted (i.e., legislative decisions); but many courts—holding that *Nollan* and *Dolan* apply only to administrative decision-making—refuse to impose heightened scrutiny on anything that arises out of the legislative process. Our hypothetical ordinance, therefore, if challenged in such a court, would remain on the books even though its every application is unconstitutional.

The absurdity that results is outlandish. A landowner forced to mitigate development with an unconstitutional condition remains unable to mount a facial challenge to the law which imposes that condition. It matters not that the law will be found unconstitutional each and every time it is enforced; it will remain on the books within the safe harbor of legislative validity. Even if a landowner manages to win a challenge to the law's individual application to himself, the law will live on. Each and every member of the community to whom the law applies will be forced to relitigate the same issue, forcing great expense on members of the community and ladening courts with needlessly duplicative suits. Cities remain free to enact laws that meet neither the nexus nor rough-proportionality requirements, relying on the fact that either its courts will fail to invalidate them or its citizens will prefer to pay up rather than endure litigation. And even if the city loses, it can continue to enforce the law elsewhere. Landowners are thus left exposed to, and chilled by, laws that are completely incapable of constitutional application. Landowners cry out, but the municipal tyrant only laughs.

IV. TWO EXAMPLES OF LEGISLATIVE EXACTIONS THAT REQUIRE ADMINISTRATIVE SCRUTINY

To further expose the practical implications of the Supreme Court's refusal to uniformly extend *Nollan* and *Dolan* to the sphere of legislative exactions, this Article will now introduce two real-world examples of legislatively imposed exactions that exist in the "twilight zone" between legislative and adjudicative action: tree ordinances and critical-area buffers.

Though by no means exhaustive, they provide a useful lens through which the absurdities of current *Nollan/Dolan* application become clear.

A. Tree Ordinances

There is an emerging awareness of the value of trees. Not only do they provide aesthetic advantages, but they have value from a practical standpoint as well.[156] To guarantee that trees are able to survive in a rapidly urbanizing environment, communities across America have adopted tree protection ordinances. Though initially geared toward public spaces, tree ordinances have increasingly been aimed at private land.[157] In 2008, for example, the United States Conference of Mayors revealed that of one-hundred and thirty-five surveyed cities with a population of at least thirty-thousand, ninety-five percent had adopted ordinances concerning care and management of trees.[158] This explosion of initiatives to prioritize tree protection reflects the growing public sentiment that it is not enough to require good landscaping or preservation of the occasional historic tree—regulations are needed to ensure that developers "walk softly and leave as few tread marks as possible."[159] Ordinance enforcement takes a number of forms, usually requiring on-site tree replacement, in-lieu payments to tree-replacement funds, or offsite-mitigation efforts.[160]

But problems can occur when enforcement mechanisms run afoul of rough-proportionality requirements. Landowners who remove trees from their property, for example, are usually forced either to replace trees at a predetermined ratio, or else pay mitigation fees at a rate prescribed by law. In both cases, enforcement procedures often contain a disturbing lack of accountability to ensure cities make individualized assessments unique to offending properties.

Take, for instance, the case of hypothetical landowners A and B, both of whom live in the same city. A clears fifty mature, healthy trees from his property; B clears fifty rotten, scrawny specimens from his. If the city has adopted a tree-protection ordinance that requires tree replacement

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[156] *See* ZIEGLER, *supra* note 152, at § 20.1 ("[trees] improve air quality by removing pollutants and lowering air temperatures, mitigate the impact of climate change, improve water quality and management by aiding with stormwater control and treatment, abate noise, enhance wildlife and biodiversity, remediate soil, raise property values, and improve individual and community well-being.").

[157] *Id.*

[158] U.S. Conference of Mayors, *Protecting and Developing the Urban Tree Canopy: a 135-City Survey* (2008).

[159] ZIEGLER, *supra* note 152, at § 20.1.

[160] *Id.* § 20.67.

at a one-to-one ratio without requiring the city to make any sort of individualized assessment of affected property—a relatively common requirement in tree ordinances—then B will be required to take the *same* mitigating actions as A, even though A's removal caused a great deal more harm. Despite the fact that A and B engaged in very different forms of tree removal, their mitigation requirements look identical. Clearly, something is off.

Some courts have recognized this problem and demanded that such ordinances meet the rigors of *Nollan* and *Dolan*.[161] Others have allowed the ordinances to retain traditional legislative protections, making it impossible for property owners to mount a facial takings challenge. The problem is that even though fines or remedial replacement requirements are determined on an individual administrative basis, they are assessed through a procedure set forth in the ordinance—a legislative decision given a great deal of deference. Thus, despite being unconstitutional each and every time it is applied, the mechanism by which the action is enforced remains on the books as a legislative act. The city is free to enforce the ordinance against any individual seeking to remove trees on their property, and the rationale behind the traditional legislative/administrative distinction disappears in a circus of senseless enforcement and duplicative litigation.

B. Critical-Area Buffers

Another paragon of legislative/administrative absurdity is the critical-area buffer. A critical-area buffer is essentially a strip of land contiguous to a sensitive natural area like a wetland, stream, or shoreline.[162] Such areas are vegetated with native trees and shrubs and zoned to disallow all land-use activities.[163] The idea behind them is twofold.[164] First, buffers keep human activity away so the land can remain unspoiled.[165] Second, if the area is large and, ecologically speaking, rich enough, a buffer can mimic

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[161] *See, e.g.*, F.P Dev., LLC v. Charter Twp. of Canton, 456 F. Supp. 3d 879 (2020) (finding that a tree ordinance violated *Nollan/Dolan*'s rough proportionality test because there was no site-specific analysis performed by the city in determining mitigation fees).

[162] Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wash. 2d 415, 430 (2007).

[163] *Id.*

[164] Hodges, *supra* note 75, at 22.

[165] *See* A.J. Castelle et al., *Wetland and Stream Buffer Size Requirements—A Review*, 23 J. ENVIRON. QUAL. 878, 878 (1994).

natural processes that might exist if the surrounding land was left undisturbed.[166] Numerous ecological benefits can result.[167]

Buffers are typically imposed as a condition to permit approval by having residential developers file a binding site plan and notice to title that delineates the buffer zone.[168] The owner of the underlying estate may retain some rights to the designated buffer area, but is generally proscribed from any development or use of property that might disturb its natural state.[169] From a real-property perspective, a buffer substantially affects an owner's valuable interest in property.[170] Not surprisingly, the U.S. Supreme Court has applied the unconstitutional conditions doctrine to invalidate government demands for buffers in both *Dolan* and *Koontz*.[171]

Oftentimes, these critical area buffers are set down in city ordinances as mandatory conditions to permit approval, allowing them to receive soft rational-basis scrutiny if challenged.[172] This presents a problem, however, as such ordinances often fail to restrict the size of the buffer to what is needed to mitigate the impacts of the affected property owners use.[173] And here lies the problem: in order to challenge the imposition of a buffer demand, a landowner must argue that its application is improper under *Nollan* and *Dolan* for failing to contain a roughly proportional nexus. But if challenged in a court that refuses to apply the test to legislatively imposed exactions, the ordinance will be upheld as long as it has a rational basis, and it almost always will. True, a particular landowner challenging a particular application of the ordinance as a taking may prevail; but the ordinance will still remain on the books, allowing the city to continue extorting its citizens each time a permit is sought. Individual landowners are thus forced to shoulder the burden of costly, often unaffordable litigation, and the courts are forced to retry the same

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[166] *See id.*

[167] Hodges, *supra* note 75, at 23.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Dolan*, 512 U.S. at 393-94; *Koontz*, 570 U.S. at 595.

[172] *See, e.g.*, Common Sense Alliance v. Growth Mgmt. Hearings Bd., 189 Wash. App. 1026 (Wash. Ct. App. 2015) (affording legislative deference to an ordinance which required, as a mandatory condition to permit approval, that all shoreline property owners dedicate a portion of their shorefront property as a conservation area).

[173] *See, e.g., id.* (in which the critical-use buffer demanded as a condition to permit approval was based upon the need to offset increased development-based pollution but did nothing to apportion the size of the buffer to the actual pollution created by affected owners).

issue each time the ordinance is challenged, since it cannot be invalidated on its face.

V. THE PROPOSAL: EXTEND *NOLLAN*/*DOLAN*'S "NEXUS" AND "ROUGH PROPORTIONALITY" REQUIREMENTS TO INCLUDE LEGISLATIVE EXACTIONS

If landowner protections are to keep pace with regulatory creep; if cities are to properly put developmental exactions mechanisms on the books; if private property owners are to find any success challenging governmental overreach, then Takings Clause jurisprudence must progress. The restriction of *Nollan* and *Dolan* to administrative exactions needs to be recognized for the outrage it is, and the rough-proportionality test must be extended to protect against the dangers of legislative exactions.

For years, property owners have been at odds with the government over the limits of land-use regulation, and the battle is fierce. On one side stand those opposed to any form of government intrusion—ready to oppose the groping hands of government. Nearly any regulation is too much, and they see no reason the government should do more than defend, in true Lockean fashion, their private property interests.[174] On the other side stands the government, ready to assert that its regulations fit squarely within the penumbral authority of the public welfare. This may seem hyperbolic, but it is not; it has spawned enough litigation to fill numerous textbooks. It is a point of very real contention that requires a very real solution—one that recognizes the legitimacy of each side's opinions but is capable of deciding when the line has been crossed.

It is this problem for which the *Nollan/Dolan* test is so aptly fitted. Under its guidance, courts have an opportunity to analyze both sides of the issue—balancing the sanctity of private property with the legitimate need for government intervention. The *Koontz* Court may have said it best: "*Nollan* and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal."[175] A court need not fret over abstractions, nor be so afraid of setting precedent that it shies away from imparting justice on

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[174] *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 150 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("And 'tis not without reason, that [man] seeks out, and is willing to join in Society with others who are already united, or have a mind to unite for others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.").

[175] *Koontz*, 570 U.S. at 605-06.

individual applications; it can assess individual situations in context as they arise. But against this flexibility, the *Nollan/Dolan* test also balances a very predictable framework of regulatory limits, providing clarity so that cities can craft proper ordinances and landowners can abolish improper ones. It gives where it needs to give and takes where it needs to take, all the while weighing issues in light of the very real implications to, and needs of, actual property. In the war between legitimate government interests and property rights, *Nollan/Dolan* stands as impartial arbiter to administer results both equitable and efficient—the savior property owners need and deserve.

An extension of the *Nollan/Dolan* test to include legislative exactions is not just logical; it is absolutely necessary. If the Court cannot clarify the discord created by its lack of precision, land-hungry planning commissions will be free to draft clever ordinances that wrangle away property without compensation. The failure to recognize impropriety when a legislative ordinance fails to provide adequate fee procedures cannot be allowed to go unnoticed. Takings analysis must adapt.

Under *Lingle*, an act with a valid public purpose cannot be challenged, but the mere fact that an act has a valid public purpose does not mean it satisfies Fifth Amendment requirements. Regulations with a valid purpose routinely fail to do so—imposing penalties that are neither roughly proportionate with, nor connected by a nexus to, the purpose such regulations seek to further. It is essential that courts allow affected landowners a method of rebutting such penalties. To do otherwise would give governments the upper hand, allowing illegitimate and unconstitutional exactions to remain comfortably ensconced in legislative deference.

Refusal to extend also has the potential to burden courts with meaningless litigation, forcing courts to make repetitive individual assessments of a law that by its own terms is incapable of constitutional application. This is neither just nor efficient, and can be avoided if courts will simply extend the *Nollan/Dolan* test to legislative exactions.

VI. POTENTIAL ARGUMENTS AGAINST *NOLLAN*/*DOLAN* EXTENSION

A. Challenges to Legislatively Imposed Exactions are More Properly Brought under Penn Central *or* Lingle

Some commentators believe there is no need to extend *Nollan* and *Dolan* to legislative exactions because such harm can be redressed under

the *Penn Central* balancing test.[176] After all, they contend, isn't the *Nollan*/*Dolan* rough proportionality test just another way of determining when regulation goes "too far?" If this solution seems too simple, that is because it is.

In the first place, *Penn Central* cannot do what *Nollan* and *Dolan* can. *Nollan* and *Dolan* address a very real void in constitutional protection—a void *Penn Central* simply cannot fill. If *Penn Central* was capable of providing the requisite measure of protection against exactions, there would have been no need to demand an essential nexus or rough proportionality in the first place. Landowners need these protections, and *Penn Central* cannot provide them.

Furthermore, most attempts to challenge unconstitutional conditions imposed through legislative exactions would fail, like the claim in *Penn Central*, under the "parcel as a whole" approach.[177] Examining individual takings claims in this way essentially precludes challenges that do not diminish property interests in the entirety of the parcel. In the context of exactions, this is highly problematic. Municipal demands rarely diminish the value of an entire lot, preferring instead a piecemeal approach that strips off a little here, a little there.[178] As a result, cities remain able to take from property owners by leaving the interests in a majority of the property intact. Constitutionally violative takings schemes thus remain in place, and property owners are left unable to overturn these "small" impositions.

The final and perhaps largest failing of the *Penn Central* test is its inability to provide a predictable framework. While it is possible the *Penn Central* factors may protect individual property owners on particular applications, they do little to further a uniform standard by which cities or citizens can judge the validity of government action. The *Penn Central* balancing test, by its very nature, is pliable and fact specific, providing only for ad hoc determinations. Such a highly fact specific analysis is admirable in its flexibility, but seriously lacks the kind of concrete uniformity cities need to plan and enact constitutional regulations. *Nollan* and *Dolan*, on the other hand, offer an approach that is simple, straightforward, and

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[176] Saxer, *supra* note 69, at 113.

[177] *See Penn Cent. Transp. Co.*, 438 U.S. at 130-31 ("Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .").

[178] *See* Rose, *supra* note 15, at 841 ("These small adjustments are the everyday fare of local land-use regulations.").

predictable in its requirements, making it easier for cities to plan and for landowners to feel secure.

Another host of commentators suggests that challenges to legislatively imposed exactions should be brought under *Lingle*.[179] While the *Lingle* test might seem an appropriate avenue for a landowner seeking to invalidate an unconstitutional exaction, the obvious shortfalls of this contention make rebutting it a relatively simple affair. *Lingle* is not a takings test, but a substantive due process requirement that will uphold a city's action so long as it advances a substantial government interest.[180] Consequently, *Lingle* offers little to no help to the aggrieved property owner in a takings scenario, a fact well-illustrated by the real-world examples previously mentioned.[181] Neither tree protection ordinances nor critical area buffers—no matter how unconstitutional their exactions—could be invalidated on their face under *Lingle* since they "substantially serve a valid public purpose."[182] In such instances, *Lingle* leaves property owners helpless to watch as their pockets and property are picked clean by specious schemes that serve valid interests.

B. Nollan/Dolan *Extension will Improperly Hamper Legitimate Land-Use Controls*

Perhaps the most common argument against extending *Nollan* and *Dolan* is that doing so will curtail the effectiveness of legitimate government regulation. The thought is that a *Nollan/Dolan* extension will cut the legs from under municipal agencies by taking away their authority to apply regulations, ordinances, and a vast array of other generally accepted land-use controls.[183] In *Koontz*, for example, the dissent warned

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[179] *See* Saxer, *supra* note 69, at 116-17.

[180] *See* Burling & Owen, *supra* note 144, at 408.

[181] *See, e.g.*, Coniston Corp. v. Vill. of Hoffman Ests., 844 F.2d 461 (7th Cir. 1988) (where Judge Posner noted the unfriendliness of courts to land-use claims involving substantive due process); *see also* Saxer, *supra* note 69, at 117 ("A landowner who complains of being treated unfairly by local land-use officials will typically frame a judicial challenge as a violation of substantive due process. Federal courts are generally unfriendly to such challenges.").

[182] *Lingle*, 544 U.S. at 528-29.

[183] *See, e.g.*, *Koontz*, 570 U.S. at 620 (Kagan, J., dissenting) (in which Justice Kagan expresses concern that the extension and uncertain application of the *Nollan/Dolan* test "threatens to subject a vast array of land-use regulations, applied daily in States and localities across the country, to heightened constitutional scrutiny"); *see also* Saxer, *supra* note 69, at 110 (positing that the application of *Nollan/Dolan* requirements to "monetary fees imposed legislatively" would improperly subject a plethora of land-use regulations to heightened scrutiny); *and Exactions Creep*, *supra* note 143, at 300 (stating that such an

that the holding could destroy land-use as we know it—threatening the "flexibility of state and local governments to take [even] the most routine actions to enhance their communities."[184]

At first glance, this concern appears reasonable; one might very well fear that under *Nollan/Dolan* every land-related decision could become susceptible to impractical judicial scrutiny.[185] But this is simply not the case. The *Nollan/Dolan* test would not eliminate legitimate land-use controls, it would clarify them. It would give cities predictable boundaries to enact sustainable regulation that can withstand scrutiny. Thus, the angst about the future of land-use, far from being prescient, is simply ill-informed. Unfounded fears should not hinder necessary progress,[186] and doom-and-gloom augury should not be the reason courts limit necessary protection.[187]

The *Koontz* Court recognized this when it took the necessary step of extending *Nollan* and *Dolan* requirements to monetary exactions. Well aware of concerns that a *Nollan/Dolan* extension would doom viable land-use regulation, the Court nonetheless held otherwise.[188] *Nollan/Dolan* extension, the Court reaffirmed, would neither "work a revolution in land use law [n]or unduly limit the discretion of local authorities to implement *sensible* land use regulations."[189] The Court saw a logical, constitutional need to extend a necessary protection and took its opportunity to do so; today's Court must do the same. The time has come for Takings doctrine to grow a new branch: property owners must be protected, unruly legislation must be pruned, and the *Nollan/Dolan* test must be extended to include legislative exactions.

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understanding would allow "wide-ranging heightened judicial scrutiny to land-use regulation generally")*.*

[184] *Koontz*, 570 U.S. at 627 (Kagan, J., dissenting).

[185] *Exactions Creep*, *supra* note 143, at 342.

[186] See Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 36-37 (2012), for a similar assertion where Justice Ginsburg, citing United States v. Causby, 328 U.S. 256, 275 (1946), an earlier takings case, wisely opined that "[t]ime and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest . . . . The sky did not fall after *Causby*, and today's modest decision augurs no deluge of takings liability." The same can be said of a *Nollan/Dolan* extension.

[187] Certainly, naysayers would have expected there to be a flood of unregulated development after the *Koontz* decision extended *Nollan* and *Dolan* to monetary exactions; but no such downpour has occurred. The oft-predicted post-*Koontz* explosion of unbridled development never came. *See* Burling, *supra* note 16, at 223.

[188] *Koontz*, 570 U.S. at 597.

[189] *Id.* (emphasis added).

Such a step will not gut the power of local governments and regulatory agencies; it would simply ensure that their vast power is properly directed and serves its intended purpose.[190] The vagaries of modern land-use have only grown under the pressures of society, and many city agencies charged with promulgating land-use measures have disregarded the aims to which such measures should be put. The fact is, the power held by local zoning boards, city councils, and federal agencies has become far too expansive to be encompassed within the original Euclidean grant of power. Justice Holmes predicted as much in *Pennsylvania Coal* when he warned that a shorter than constitutional means of appropriating private property must be guarded against at all costs.[191] While Holmes and others have recognized that government has a legitimate interest in regulating property, granting municipalities an unchecked power to do so is absolute folly.[192]

This is not to say that government authority should remain fixed; adaptation is necessary if regulation is to remain effective. But adaptation and unencumbered expansion are too very different things. Regulatory power should expand under a grant of authority which enables it to carry out its proper purpose—no more.

The *Nollan*/*Dolan* test stands ready to see that this is so. It provides cities the leeway to properly regulate while ensuring that landowners do not fall prey to the pitfalls of local whim. It touches property law at the canopy and at the roots: philosophically consistent with high minded property rights, yet practical enough to get its hands dirty. It is rigid yet flexible—ideal for the varied needs of municipal government.

The worst its opponents can point out is that an extension of the test would apply heightened scrutiny to a panoply of other land-use controls—but is that a bad thing? It is worth remembering, after all, that expanding the *Nollan/Dolan* test to include a broader range of land-use ordinances

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[190] *See also* Wake & Bona, *supra* note 142, at 566, *quoted in* Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law:* Koontz, Arkansas Game & Fish, *and the Future of the Takings Clause*, 2013 CATO SUP. CT. REV. 215, 216 (2013) ("'In practice . . . governments can deal with the danger of lawsuits by restricting the demands they impose on landowners to those that are unlikely to violate the Takings Clause—just as they currently try to avoid making demands that would force landowners to give up other constitutional rights.' And even demands implicating the Takings Clause would survive constitutional scrutiny so long as government couples them with adequate compensation.").

[191] *Mahon*, 260 U.S. at 413.

[192] *See, e.g.*, Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 22 (1989) (emphasizing the need to restrict government exercise of the "monopoly power" to issue permits, yet conceding that the power to impose restrictions and exactions does exist when properly limited).

would only further preserve a vitally important constitutional right: that of receiving just compensation when property is taken. This is a noble end, and the Court should not reject it simply for fear of upsetting the status quo.

VII. A FINAL APPEAL

Frankly speaking, there is no good reason to treat legislatively imposed exactions more leniently than those imposed administratively.[193] It matters not whether a city chooses to extort property owners by way of a zoning board bureaucrat who *follows* a law, or a city council that *enacts* a law—the rights of property owners are violated just the same.[194] Numerous legal scholars have found "little doctrinal basis beyond blind deference . . . to limit [the] application of [*Nollan* and *Dolan*] only to administrative or quasi-judicial acts of government regulators."[195] As Justice Thomas put it, a city council can take property just as well as a planning commission.[196] The distinction between the two is as impractical as it is absurd, and those who cling to it—preferring to immobilize takings jurisprudence rather than allow it to progress naturally—do so to the detriment of property owners and cities alike.

The fact is that takings law has been moving in leaps and bounds for decades. It is an extremely complex and capricious animal, one that must be allowed to evolve at least as quickly as its opponent in city hall. Failure to allow such progress will have disastrous effects: it will cut the heart out of the *Nollan/Dolan* test, looking the other way as cities craft rotten exactions that are nothing more than disguised takings. It will make a tyrant of city hall and sanction the very evil that the *Nollan* and *Dolan*

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[193] Hodges, *supra* note 75.

[194] This statement largely sums up what Justices Thomas and O'Connor declared in their dissent from denial of certiorari in *Parking Association of Georgia*, 450 S.E.2d at 200, *cert. denied*, 515 U.S. at 1116, 1118 (Thomas, J., dissenting) ("The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.").

[195] David. L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 567-68 (1999); *see also* Haskins, *supra* note 151; *but see* Glen Hansen, *Let's Be Reasonable: Why Neither* Nollan/Dolan *nor* Penn Central *Should Govern Generally-Applied Legislative Exactions After* Koontz, 34 PACE ENVTL. L. REV. 237, 242 (2017) ("[T]he *Nollan/Dolan* test should *not* apply to legislatively imposed exactions, provided, that such exactions satisfy two key criteria: (1) the exaction is generally-applied; and (2) the exaction is applied based on a set legislative formula without any meaningful administrative discretion in that application.").

[196] *Parking Ass'n of Georgia*, 450 S.E.2d at 200, *cert. denied*, 515 U.S. at 1116 (Thomas, J., joined by O'Connor, J., dissenting).

Courts, like the New Hampshire colonists long ago, fought so hard to avoid. In short, it will wound the Fifth Amendment and leave the door open for continued landowner abuse. If we allow this to happen, we must ask ourselves: are we really better off than those colonial landowners forced to provide masts to the King?