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Rise of the Super-Legislature: Demanding a More Exacting Monetary Exaction

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Rise of the Super-Legislature: Demanding a More Exacting Monetary Exaction

*Koontz v. St. Johns River Water Management District*¹

I. INTRODUCTION

Koontz v. St. Johns River Water Management District was a recent decision by the United States Supreme Court on the subject of land-use regulations and their interaction with the Takings Clause of the Constitution's Fifth Amendment. In this case, the petitioner, Koontz, sought to drain and build on a section of his property that had been designated as protected wetlands by the state of Florida.² To do this, he needed to apply for permits. In Florida, applicants were required to help mitigate or offset the environmental effects of their proposed improvements.³ One of the options for doing so was by "creating, enhancing, or preserving wetlands elsewhere."⁴

The question the Court addressed in this case was whether a monetary exaction can give rise to a claim under the seminal *Nollan*⁵ and *Dolan*⁶ cases in Fifth Amendment Takings Clause jurisprudence. The Court held that such exactions must be in accordance with the principles set out in *Nollan* and *Dolan* – meaning: if monetary exactions are demanded as a condition of a land-use permit, then they must have an essential nexus and rough proportionality to the adverse impacts of the proposed development.

This case is important because it seems to complicate the process by which land-use regulations are enforced and further limits local governments' authority to control how their communities are shaped. Though not all

¹ 133 S.Ct. 2586 (2013).

² *Id.* at 2591. Coy Koontz, Jr., the petitioner in this case, represented the estate of Coy Koontz, Sr., the owner of the land in question. For ease of reference, the Court and this casenote will refer to both men as "petitioner" or "Koontz." *Id.* at 2591 n. 1.

³ *Id.* at 2592.

⁴ *Id.*

⁵ *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825 (1987).

⁶ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

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consequences are known at this time, the instant decision seems to give further power to the individual landowner, who may now have an easier time ignoring the negative externalities that his developments have on the surrounding community. There is also the possibility that this decision actually only creates inefficiencies in the process of obtaining land-use permits. I will argue that both of these issues are likely to arise because of this holding in the comment section of this casenote.

II. FACTS AND HOLDING

In 1972, Petitioner Koontz purchased a 14.9-acre piece of land on the south side of Florida State Road 50.⁷ The property was located less than 1,000 feet from that road's intersection with Florida State Road 408.⁸ A drainage ditch runs along the property's western edge, and high-voltage power lines bisect the property into northern and southern sections.⁹ The 3.7-acre northern section of Petitioner's property is isolated from the 11-acre southern section by the ditch, a the 100-foot wide area kept clear for the power lines, the highways, and other construction on nearby land.¹⁰

Respondent was the St. Johns River Water Management District (District), created in 1972 as a part of Florida's Water Resources Act, which divided the state into five water management districts.¹¹ The Act authorized the five districts to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state."¹² The Act forced a landowner that wanted to partake in such construction to obtain from his relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are

⁷ *Koontz*, 133 S.Ct. at 2591-92.

⁸ *Id.* at 2592.

⁹ *Id.*

¹⁰ *Id.* at 2592-93.

¹¹ *Id.* at 2592.

¹² *Id.* (citing 1972 Fla. Laws ch. 72-299, pt. IV, § 1(5), pp. 1115-16 (codified as amended at Fla. Stat. § 373.403(5) (2010)).

“necessary to assure” that construction will “not be harmful to the water resources of the district.”¹³

In 1984, seeking to protect the state’s diminishing wetlands, the Florida Legislature passed the Henderson Wetlands Protection Act, which made it illegal for anyone to “dredge or fill in, on, or over surface waters” without a Wetlands Resource Management (WRM) permit.¹⁴ In keeping with the Henderson Act, Respondent-District (the district with jurisdiction over Koontz’s land) required that applicants wanting to build on wetlands “offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.”¹⁵

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for the MSSW and WRM permits.¹⁶ In order to mitigate the environmental effects of his proposal, Koontz offered to foreclose any possible future development of the 11-acre southern section of his land by deeding a conservation easement over that portion of his property to the District.¹⁷

The District responded that the 11-acre conservation easement would be inadequate and informed Koontz that it would approve the project “only if he agreed to one of two concessions.”¹⁸ The District’s proposals involved

¹³ *Id.* (citing 1972 Fla. Laws § 4(1), at 1118 (codified as amended at Fla. Stat. § 373.413(1))).

¹⁴ *Id.* (citing 1984 Fla. Laws ch. 84-79, pt. VIII § 403.905(1), pp. 204-05).

¹⁵ *Id.*

¹⁶ *Id.* “Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot.” *Id.*

¹⁷ *Id.* at 2592-93.

¹⁸ *Id.* at 2593. In the dissent, Justice Kagan, citing Koontz’s testimony at trial, pointed out that these options were presented “only in broad strokes, [n]ot in any great detail.” *Id.* at 2610 (Kagan, J., dissenting) (citing App. at 103). The District also “made it clear that it welcomed additional proposals from Koontz” and asked “if he ‘would be willing to go back with the staff over the next month and renegotiate this thing and try to come up with a solution.’” *Id.* at 2611 (Kagan, J., dissenting) (citing App. at 37). It was at this time that the District finally denied his applications. *Id.*

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Koontz reducing his development to one acre and deeding an easement to the District for the remaining 13.9 acres or, alternatively, he could build the development as proposed if he would pay for improvements to the District-owned land several miles away.¹⁹ Those improvements involved replacing culverts or filling ditches, with the outcome enhancing “approximately 50 acres of District-owned wetlands.”²⁰ When applicants are given the option to fund offsite mitigation work, the District’s policy is “never to require any particular offsite project[;]” rather, the District, as it did here, will inform applicants that it “would also favorably consider” alternatives to its suggested projects if petitioner proposed something “equivalent.”²¹

Koontz believed the District’s mitigation demands to be excessive in proportion to the environmental effects that his building would have caused and filed a suit in state court.²² The District found that Koontz’s applications “did not preserve wetlands or protect fish and wildlife to the extent Florida law required.”²³ Instead of rejecting the applications outright, however, the District suggested ways Koontz could modify the applications so that they could meet the legal requirements.²⁴ Koontz argued, among other things, that he was “entitled to relief under Fla. Stat. § 373.617(2), which allows an owner to recover monetary damages if a state agency’s action is ‘an

¹⁹ *Id.* “To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly stormwater management system beneath the building site. The district also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.” *Id.* Kagan summed up the situation: the “District never made a demand or set a condition – not to cede an identifiable property interest, not to undertake particular mitigation project, not even to write a check to the government. *Id.* at 2610-11.

²⁰ *Id.* at 2593.

²¹ *Id.* (citing Joint Appendix at 75, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013) (No. 11-1447), 2012 WL 7687918, at *75).

²² *Id.*

²³ *Id.* at 2610 (Kagan, J., dissenting).

²⁴ *Id.*

unreasonable exercise of the state's police power constituting a taking without just compensation."²⁵

After the Florida Circuit Court granted the District's motion to dismiss because Koontz had not exhausted his state-administrative remedies, the Florida District Court for the Fifth Circuit reversed and remanded.²⁶ After a two-day bench trial, the Circuit Court held the District's actions violated *Nollan* and *Dolan*.²⁷ After hearing testimony from several experts who examined petitioner's property, the Circuit Court found that "the property's northern section had already been 'seriously degraded' by extensive construction on the surrounding parcels."²⁸ The Circuit Court concluded, "any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction."²⁹

This ruling was affirmed by the Florida District Court in 2009 but then reversed by the Florida Supreme Court in 2011, which distinguished this case from *Nollan* and *Dolan* on two grounds.³⁰ The first significant distinction was that "unlike *Nollan* or *Dolan*, the District did not approve petitioner's application on the condition that he accede to the District's demands; instead, the District denied his application because he refused to make concessions."³¹ The Florida Supreme Court also found a distinction between "a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money."³² After acknowledging a "division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*, Florida's Supreme Court "sided with those courts that have said it cannot."³³ The Supreme Court granted the petition for a writ of

²⁵ *Id.* at 2593 (citing Fla. Stat. Ann. § 373.617(2) (West 2013) (outlining the judicial review options for petitions relating to permits and licenses)).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (citing Petition for Writ of Certiorari, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013) (No. 11-1447), 2012 WL 1961402, at *3).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* (internal citation omitted).

³² *Id.* at 2594 (citation omitted).

³³ *Id.* (citation omitted).

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certiorari because the issue was a federal constitutional question that has divided the lower courts.³⁴

In the instant decision, the Court reversed the Florida Supreme Court's holding. The Court addressed both distinctions the Florida Supreme Court relied on to allow denial of the permit and remanded the case for further proceedings to determine if the District's actions complied with the principles set forth in the opinion and *Nollan* and *Dolan*.³⁵ The Supreme Court held that when a government agency decides whether and how a permit applicant is required to mitigate the impacts of a proposed development, "it may not leverage its legitimate interest in mitigation to pursue government ends that lack an essential nexus and rough proportionality to those impacts."³⁶

III. LEGAL BACKGROUND

For this case, it is important to have background information on both the broad category of modern regulatory takings and the more specific category of land-use exactions, and also a brief history of the police powers and economic substantive due process law.

Modern Regulatory Takings

Modern regulatory takings laws have been shaped primarily by the paramount cases of *Mahon*,³⁷ *Penn Central*,³⁸ *Lucas*,³⁹ and *Loretto*.⁴⁰ Previous to *Mahon*, the typical taking requiring "just compensation" was only for a "direct government appropriation or physical invasion of private property."⁴¹ Justice Holmes, writing for the *Mahon* Court, "charted a

³⁴ *Id.*

³⁵ *Id.* at 2603.

³⁶ *Id.* at 2595.

³⁷ *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

³⁸ *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978).

³⁹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁴⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁴¹ *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 537 (2005).

significant new course ... when he opined that a state law making it ‘commercially impracticable to mine certain coal’ had ‘very nearly the same effect for constitutional purposes as appropriating or destroying it.’⁴² That Court held that “[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁴³ The question, as Justice O’Connor pointed out in *Lingle*, “has been – and remains – how to discern how far is ‘too far.’”⁴⁴

The Supreme Court has found two categories of regulatory action that are generally considered “*per se* takings for Fifth Amendment purposes.”⁴⁵ The first is laid out in *Loretto*, which held that “permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”⁴⁶ A second category of government action considered a taking was laid out in *Lucas*, which held that when an owner of real property is “called upon to sacrifice *all* economically beneficial uses in the name of the common good... he has suffered a taking.”⁴⁷ The government must pay just compensation for these “‘total regulatory takings,’ except to the extent that ‘background principles of nuisance and property law’ independently restrict the owner’s intended use of the property.”⁴⁸

If regulatory takings claims fall outside these two limited categories and the “special context of land-use exactions,” they are governed by the standards set forth in *Penn Central*, in which the Court “acknowledged that it had hitherto been unable to develop any set formula for evaluating regulatory takings claims.”⁴⁹ The Court identified “several factors that have particular significance,” with the most important being “the economic impact of the

⁴² *Dolan v. City of Tigard*, 512 U.S. 374, 406 (1994) (Stevens, J., dissenting) (citing *Mahon*, 260 U.S. at 414).

⁴³ *Mahon*, 260 U.S. at 415.

⁴⁴ *Lingle*, 544 U.S. at 538.

⁴⁵ *Id.*

⁴⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

⁴⁷ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original).

⁴⁸ *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1026-32).

⁴⁹ *Id.*

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regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.”⁵⁰

Land-Use Exactions

Land-use exactions present a special type of Fifth Amendment takings question because they address whether a regulation that places a condition on proposed development of private property is constitutional. The foundation of this law in the paramount *Nollan* and *Dolan* cases has been as contentious as the case in question now, which extends those holdings. *Nollan* and *Dolan* held that the government “may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.”⁵¹ These holdings were premised on the doctrine of unconstitutional conditions, which states that the government:

may not require a person to give up a constitutional right – here, the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.⁵²

The basics of a typical *Nollan/Dolan* test are as follows: A court must “first determine whether the ‘essential nexus’ exists between the ‘legitimate state interest’ and the permit condition exacted by the city.”⁵³ If that nexus is found, the court must then decide “the required degree of connection between the exactions and the projected impact of the proposed development.”⁵⁴ The *Dolan* Court thought that the term “rough proportionality” best encapsulated the requirement of Fifth Amendment. The Court stressed that “[n]o precise mathematical calculation [was] required,”

⁵⁰ Penn Central Trans. Co. v. New York City, 438 U.S. 104,124 (1978).

⁵¹ Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586, 2695 (2013).

⁵² *Dolan*, 512 U.S. at 385.

⁵³ *Id.* at 386 (citing *Nollan*, 483 U.S. at 837).

⁵⁴ *Id.*

but rather the government must make some sort of “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”⁵⁵

The Court considered land-use exactions again in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*⁵⁶ In that case, a city government repeatedly denied proposals by a builder to develop a piece of land, each time “imposing more rigorous demands on the developers.”⁵⁷ The Court addressed, among other things, “whether the Court of Appeals erred in assuming the rough-proportionality standard of [*Dolan*] applied....”⁵⁸ The *Del Monte* Court found that it had never “extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the *dedication* of property to public use.”⁵⁹ The Court emphasized that the proportionality test “was *not designed to address*, and is *not readily applicable* to, the much different questions arising where ... the landowner’s challenge is based not on excessive exactions but on *denial of development*.”⁶⁰

The question and extension of law in the instant case addressed the use of monetary exactions, which are situations in which the government “conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money.”⁶¹ In *Eastern Enterprises v. Apfel*,⁶² the

⁵⁵ *Id.* at 391. See *B.A.M. Dev., L.L.C. v. Salt Lake County*, 282 P.3d 41 (Utah 2012) (Affirming a trial court’s finding that the County’s “highway dedication” ordinance, which imposed as a condition of a construction permit for any developer seeking permits for any “parcel of land [abutting a] public street which does not conform to current county [road] width standards,” forced the developer to dedicate and improve the additional street width necessary for conformity with the county road-width standards). The Utah Supreme Court found that the “County’s purpose for imposing the exaction was to alleviate B.A.M.’s impact (increased traffic) on a state-owned – and state-funded – highway... Because the County’s purpose for imposing the exaction was to alleviate the development’s impact on a state-funded road, the state’s costs of improving that road are a proper measure of the development’s impact.” *Id.* at 47.

⁵⁶ 526 U.S. 687 (1999).

⁵⁷ *Id.* at 693-94.

⁵⁸ *Id.* at 702.

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Id.* at 703 (emphasis added).

⁶¹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2603 (2013) (Kagan, J.,

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Court addressed whether a federal statute that required a former mining company to pay a large sum of money for the health benefits of retired employees created an unconstitutional taking, as applied to that petitioner.⁶³ The Court held: “the government may impose ordinary financial obligations without triggering the Takings Clause’s protections.”⁶⁴ Five members of a divided *Apfel* Court determined that the law “did not effect a taking, distinguishing between the appropriation of a specific property interest and the imposition of an order to pay money.”⁶⁵ Justice Kennedy, in an opinion concurring in part and dissenting in part to the plurality’s holding, wrote that the federal statute “[did] not operate upon or alter an *identified property interest*.”⁶⁶ He continued, “[t]he law simply imposes an obligation to perform an act, the payment of benefits.”⁶⁷ Justice Kennedy also pointed out that “[t]o the extent it affects property interest, it does so in a manner similar to many laws; but until [that day], none were thought to constitute takings.”⁶⁸ Before recapping the many Supreme Court cases that addressed whether a regulatory taking occurred, Justice Kennedy reiterated that the “one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a *specific property right or interest* has been at stake.”⁶⁹ He cautioned that the Court has “been careful not to lose sight of the importance of identifying the property allegedly taken, lest *all government action* be subjected to examination against taking without just compensation, with the attendant potential for money damages.”⁷⁰ In *Apfel*, the statute in question “neither target[ed] a specific property interest nor depend[ed] upon any particular property for the operation of its statutory mechanisms.”⁷¹ Acknowledging that the cost imposed on the coal company

dissenting).

⁶² 524 U.S. 498 (1998).

⁶³ *Id.* at 503-04.

⁶⁴ *Koontz*, 133 S.Ct. at 2603-04 (Kagan, J., dissenting).

⁶⁵ *Id.* at 2605.

⁶⁶ *Apfel*, 524 U.S. at 540 (J. Kennedy concurring in part and dissenting in part) (emphasis added).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 541 (emphasis added).

⁷⁰ *Id.* at 543 (emphasis added).

⁷¹ *Id.*

will “no doubt reduce its net worth and its total value,” Kennedy pointed out that “this can be said of any law which has an adverse economic effect.”⁷²

Police Powers and Economic Substantive Due Process

In the seminal *Carolene Products*⁷³ case, the Court held that “exercise of police power [would] be upheld if any state of facts either known or which could be reasonably assumed afford[ed] support for it.”⁷⁴ Dissenting in *Nollan*, Justice Brennan pointed out that in the arena of police power, which connotes the “time-tested conceptional limit of public encroachment upon private interests[,]” the Court generally refrained from announcing any standard except that of “reasonableness.”⁷⁵ The typical statement of the rule was that “it must appear, first, that the interest of the public ... require government interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.”⁷⁶ More important to the inquiry in the instant case is that the Court “has often said that ‘debatable questions as to reasonableness are not for the courts but for the legislature....’”⁷⁷

Carolene Products ended what was commonly known as the *Lochner*⁷⁸ era – a period during which the Due Process Clause was used by the Court to “strike down laws which [it] thought were unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.”⁷⁹ In *Skrupa*, Justice Black announced that the Court had “returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative

⁷² *Id.*

⁷³ *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁷⁴ *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (citing *Carolene Products*, 304 U.S. at 154).

⁷⁵ *Nollan v. Cal. Coastal Comm’n.*, 483 U.S. at 843 n.1 (1987) (Brennan, J., dissenting) (quoting *Goldblatt*, 369 U.S. at 594-95).

⁷⁶ *Id.* (quoting *Goldblatt*, 369 U.S. 594-95) (citations omitted).

⁷⁷ *Id.* (citing *Sproles v. Binford*, 286 U.S. 374, 388 (1932); *Goldblatt*, 369 U.S. 590, 594-95 (1962)) (emphasis added).

⁷⁸ *Lochner v. N.Y.*, 198 U.S. 45 (1905), *overruled by Ferguson v. Skrupa*, 372 U.S. 726 (1963).

⁷⁹ *Skrupa*, 372 U.S. at 729.

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bodies, who are elected to pass laws.”⁸⁰ Without mincing any words, Black announced:

We refuse to sit as a superlegislature to weigh the wisdom of legislation, and we *emphatically refuse* to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. Nor are we willing to draw lines by calling a law ‘prohibitory’ or ‘regulatory.’⁸¹

IV. INSTANT DECISION

Writing for the majority in a 5-4 decision, Justice Alito analyzed the framework of Fifth Amendment Takings Clause case law laid out in *Nollan* and *Dolan* as applied to the facts of this case.⁸² The Court began its analysis by discussing the doctrine of unconstitutional conditions, which “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”⁸³ In this situation, the Court found the District’s “demands” were prohibited by the unconstitutional conditions doctrine because they “frustrate[d] the Fifth Amendment right to just compensation.”⁸⁴

The instant case was distinguished from the *Nollan* and *Dolan* cases in one way. It addressed a government order written as “condition precedent” to permit approval, as opposed to “condition subsequent” to approval.⁸⁵ Under the Florida Supreme Court’s holding, a “government order stating that a permit is ‘approved if’ the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words ‘denied until’

⁸⁰ *Id.* at 730.

⁸¹ *Id.* at 731-32 (internal quotations and citations omitted).

⁸² *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2595 (2013).

⁸³ *Id.* at 2594.

⁸⁴ *Id.* at 2595.

⁸⁵ *Id.*

would not.”⁸⁶ The Court pointed out that “unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent” and that doing so now would effectively render *Nollan* and *Dolan* a “dead letter.”⁸⁷

The Court next confirmed that the Takings Clause could be violated despite no property actually being taken.⁸⁸ It held that “[e]xtortionate demands” for property during the land-use permitting process can violate the Takings Clause “not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”⁸⁹ The Court found that just as in other unconstitutional conditions cases in which someone refused to give up a constitutional right, the “impermissible denial of a governmental benefit is a constitutionally cognizable injury.”⁹⁰

There is a relevant difference, however, between a “consummated taking” and the refusal of a permit based on an “unconstitutionally extortionate demand.”⁹¹ The Court pointed out that, “[w]hile the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy* – just compensation – only for takings.”⁹² The Court reasoned that “[i]n cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action – whether state or federal – on which the landowner relies.”⁹³ The Court found that because *Koontz* filed his claim under state law, the Court

⁸⁶ *Id.* at 2595-96.

⁸⁷ *Id.* at 2596.

⁸⁸ *Id.* (internal quotations omitted).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 2597.

⁹² *Id.* (emphasis in original). On this point, Justice Kagan, writing for the dissent, agreed; Kagan pointed out that a property owner is “entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property.” *Id.* at 2603 (Kagan, J., dissenting).

⁹³ *Koontz*, 133 S.Ct. at 2597.

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would not discuss the remedies that might be available for a *Nollan/Dolan* violation.⁹⁴

The District made several other arguments that mostly raised questions of Florida procedural law, which the Court determined were not for it to decide.⁹⁵ However, the Court also held, “to the extent . . . that the posture of this case creates some federal obstacle to adjudicating petitioner’s unconstitutional conditions claim, [the Court] remand[s] for the Florida courts to consider that argument in the first instance.”⁹⁶

The District argued that this Court did not need to decide whether its suggested offsite mitigation satisfied *Nollan* and *Dolan* because the District gave Koontz another option for obtaining permit approval.⁹⁷ The District also argued that “regardless of whether its demands for offsite mitigation satisfied *Nollan* and *Dolan*, [the Court] must separately consider each of the petitioner’s options, one of which did not require any of the offsite work the

⁹⁴ *Id.*

⁹⁵ *Id.* The District argued the Court could affirm on procedural grounds that “the petitioner brought his unconstitutional conditions claim in the wrong forum. *Id.* However, only “[t]wo members of the Florida Supreme Court credited” this argument, with “four others refusing to address it.” *Id.* The Court “decline[d] respondent’s invitation to second-guess a State Supreme Court’s treatment of its own procedural law.” *Id.*

The District also asked the Court to affirm the Florida Supreme Court’s ruling because “petitioner sued for damages but is at most entitled to an injunction ordering his permit issue without any conditions.” *Id.* The Court found that it did not need to decide whether “*federal law* authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state law*.” *Id.* (emphasis in original). The Court differs to that as an issue of state law, which the Florida Supreme Court “did not address and on which [the Court] will not opine.” *Id.* at 2598.

Similarly, the Court did not address the District’s argument that its demands were “too indefinite to give rise to liability under *Nollan* and *Dolan* because that question was “beyond the scope” of the questions that the Court agreed to review. *Id.* It noted that if preserved, that issue “remains open on remand for the Florida Supreme Court to address.” *Id.*

⁹⁶ *Id.* at 2597.

⁹⁷ *Id.* at 2598. The District would have approved a “revised permit application” if petitioner had reduced the size of his construction site “from 3.7 acres to 1 acre and placed a conservation easement on the remaining 13.9 acres of petitioner’s land.” *Id.* The dissent pointed out that the District made it clear that additional proposals were welcome. *See supra* note 17.

trial court found objectionable.”⁹⁸ The Court found this argument flawed because the District’s alternative suggestion “misapprehends the governmental benefit that petitioner was denied.”⁹⁹ Koontz sought to build on the full 3.7 acres of land, but the District “in effect told petitioner that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands.”¹⁰⁰ Because “petitioner claims he was wrongfully denied a permit to build on those 2.7 acres . . . , [the District]’s offer to approve a less ambitious building project does not obviate the need to determine whether the demand for offsite mitigation satisfied *Nollan* and *Dolan*.”¹⁰¹

The second major issue that the Court addressed in the present case is the Florida Supreme Court’s alternative holding that Koontz’s “claim fails because respondent asked him to spend money rather than give up an easement on his land.”¹⁰² The Court started this section of its holding by stating that a “predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.”¹⁰³ The Court then announced, “if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking.”¹⁰⁴

The Court held that monetary exactions must satisfy *Nollan* and *Dolan*’s nexus and rough proportionality requirements.¹⁰⁵ It found that without this requirement, it would be easy for the government to evade the limitations of those cases.¹⁰⁶ The Court feared that a government could simply give the permit-requesting owner a choice between surrendering an

⁹⁸ *Koontz*, 133 S.Ct. at 2598.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2598-99.

¹⁰⁵ *Id.* at 2599.

¹⁰⁶ *Id.* The government would only need to “provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards.” *Id.*

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easement or making a payment equal to its value.¹⁰⁷ Because these sorts of “in lieu of” fees were “utterly commonplace” and “functionally equivalent to other types of land use exactions[,]” the Court held that “monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”¹⁰⁸

Both the majority and dissent addressed *Eastern Enterprises v. Apfel*. The majority distinguished the instant case from *Apfel* by finding that unlike the financial obligation in *Apfel*, the demand here “operate[d] upon ... an identified property interest” by requiring the owner of a “particular piece of property” to make a payment.¹⁰⁹ The Court found this situation similar to cases “holding that the government must pay just compensation when it takes a lien – a right to receive money that is secured by a particular piece of property.”¹¹⁰ It reasoned that the “fulcrum this case turns on is the direct link between the government’s demand and a *specific* parcel of real property,” and that

[b]ecause of that direct link, this case implicates the central concern of *Nollan* and *Dolan* : the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.¹¹¹

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The dissent suggested that this is a “prophylaxis in search of a problem” because no evidence was brought forward that suggests local governments are evading *Nollan* and *Dolan* by “extort[ing] the surrender of real property interest having no relation to a development’s costs.” *Koontz*, 133 S.Ct. at 2608 (Kagan, J., dissenting). Kagan continued, saying that court could use the “*Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan*, that simply go too far.” *Id.* at 2609.

¹⁰⁹ *Koontz*, 133 S.Ct. at 2599 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in part and dissenting in part)).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2600 (emphasis added). The dissent viewed this issue differently and focused

Addressing the dissent's proposition that this situation calls for a *Penn Central* test, rather than a *Nollan/Dolan* one, the majority stated that Koontz did not ask the Court to hold that the government could commit a "regulatory taking by directing someone to spend money."¹¹² Rather, it said that Koontz's claim rested on the

more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest, such as a bank account or parcel

on the fact that Koontz claimed the District ask that he spend money to improve public wetlands, and "... *not that he hand over a real property interest.*" *Id.* at 2605 (Kagan, J., dissenting) (emphasis added). The dissent believed the key question to be: "Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation?" *Id.* The dissent found that this question has already been answered "no" in *Apfel* where Kennedy's controlling opinion explained that the law "did not operate upon or alter a *specific and identified property or property right.*" *Id.* (internal quotes and citations omitted) (emphasis added). Rather, "the law simply impose[d] an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Id.* (internal quotes and citations omitted). It follows then that requiring a person pay money to repair public wetlands is not a taking because that order "does not affect a *specific and identified property or property right*; it simply imposes an obligation to perform an act... that costs money." *Id.* at 2606 (internal quotes and citations omitted) (emphasis added). Thus, the dissent concluded that because the District is only requiring a "general liability" to pay money and is "indifferent as to how the regulated entity elects to comply or the property it uses to do so," therefore the order does not constitute a taking and does not trigger the *Nollan/Dolan* test. *Id.* (internal quote and citations omitted).

¹¹² *Id.* at 2600. The dissent pointed out that this test "fits to a T a complaint (like Koontz's) that a permitting condition makes it inordinately expensive to develop land" because it specifically "protects against regulations that unduly burden an owner's use of his property." *Id.* at 2609 n. 3 (Kagan, J., dissenting). Kagan continued: the Due Process Clause provides an "additional backstop" against excessive permit fees by preventing "a government from conditioning a land-use permit on a monetary requirement that is 'basically arbitrary.'" *Id.* (citing *Apfel*, 524 U.S. at 557-58 (Breyer, J., dissenting)). The dissent summarized that *Nollan* and *Dolan* stop "governments from using the permitting process to do what the Takings Clause would otherwise prevent – *i.e.*, *take* a specific property interest without just compensation," but that those cases were not applicable when governments "impose a *general financial obligation* as part of the permitting process." *Id.* at 2609 (Kagan, J., dissenting).

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of real property, a ‘*per se* [takings] approach’ is the proper mode of analysis under the Court’s precedent.¹¹³

The majority also noted that Koontz’s claim “[did] not implicate ‘normative considerations about the wisdom of government decisions,’” and was not “concerned with whether it would be ‘arbitrary or unfair’ for respondent to order a landowner to make improvements to public lands that are nearby.”¹¹⁴ Ultimately, the Court concluded that “[w]hatever the wisdom of such a policy,” because “it would transfer an interest in property from the landowner to the government . . . , any such demand would amount to a *per se* taking similar to the taking of an easement or a lien.”¹¹⁵

The majority then addressed and dismissed the dissent’s contention that there would be no “principled” way to distinguish unconstitutional land-use exactions from property taxes if monetary exactions were subject to the *Nollan/Dolan* test.¹¹⁶ The Court reaffirmed that it is “beyond dispute that taxes and user fees . . . are not takings,” and declared that this case did “not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.”¹¹⁷

The Court acknowledged that it had found takings where the government, “by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax.”¹¹⁸ But it dismissed this dissent critique by stating that this issue is “not a creature of [its] holding today,” but rather “inherent” to the “long-settled view that property the government could constitutionally demand through its taxing power can also be taken by

¹¹³ *Id.* at 2600 (citing *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003)).

¹¹⁴ *Id.* (internal citations omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.* The majority believed the dissent “exaggerate[d] both the extent to which that problem is unique to the land-use permitted context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.” *Id.*

¹¹⁷ *Id.* at 2600-01 (internal quotations and citations omitted).

¹¹⁸ *Id.* at 2601.

eminent domain.”¹¹⁹ The Court disposed of this question easily, finding that much like the government in *Brown*,¹²⁰ here, the District never argued that its requests were a tax because Florida law does not allow the District to impose a tax.¹²¹

Finally, the majority addressed the dissent’s belief that this decision would hinder local governments from charging reasonable permitting fees.¹²² It dismissed this notion, stating that “[n]umerous courts” have utilized the *Nollan/Dolan* test over the past twenty years, “[y]et the ‘significant practical harm’ the dissent predicts has not come to pass.”¹²³ The majority suggested that the dissent actually argues to overrule *Nollan* and *Dolan*, however, “[m]indful of the special vulnerability of land use permit applicants to extortionate demands for money,” the Court rejected the dissent’s contention that “other constitutional doctrines leave no room for the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”¹²⁴

Summarizing the majority’s holding, Alito reiterated that the “government’s demand for property from a land-use must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.”¹²⁵ The Court did not come to a conclusion on the merits of Koontz’s claim, but reversed the Florida Supreme Court’s judgment and remanded the case for further proceedings not inconsistent with the opinion.¹²⁶

V. COMMENT

I found problematic issues both specific to the analysis of the regulatory takings claim in the instant case and the family of land-use

¹¹⁹ *Id.*

¹²⁰ *Brown v. Legal Foundation of Wash.*, 538 U.S. 216 (2003). In *Brown*, the government body acting as respondent was the State of Washington’s Supreme Court, which was not allowed to levy a tax. *Id.* at 228.

¹²¹ *Koontz*, 133 S.Ct. at 2601-02 (citing Fla. Stat. §§ 373.503, 373.109).

¹²² *Id.* at 2602.

¹²³ *Id.* (quoting the dissent at 2607).

¹²⁴ *Id.* at 2602-03.

¹²⁵ *Id.* at 2603.

¹²⁶ *Id.*

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exaction cases extended by this ruling. First, I will address problems with the depiction of the instant case. Second, I will explain how this new limitation on a local government's ability to regulate land-use by the manner in which a State Legislature has prescribed illustrates a rise of the Court acting as a super-legislature. Finally, I will explain the likely consequences of the Court's decision, which includes injury to the general public and obstruction to legislatively enacted environmental sustainability efforts because private landowners will be allowed to ignore the negative externalities created by their actions.

In this case, the District believed that Koontz's dredging and building on his private Florida wetlands would adversely affect the surrounding public. In attempting to enforce the Henderson Wetlands Protection Act, passed by Florida's legislature, the District responded to Koontz's permit application by entering into negotiations with him as to appropriate mitigation options to offset the damage his construction would cause.¹²⁷

It was in the midst of these discussions that Koontz broke off discussions and filed a Takings Clause claim. Instead of simply rejecting Koontz's applications, the District suggested ways he could modify them in order to meet the state's legal requirements.¹²⁸ In addition to proposing that Koontz reduce the size of his proposed development or modify the design to

¹²⁷ Upon reading the dissent's more complete version of the facts and the Florida Department of Environmental Protection's brief, we learn that this sort of negotiation is typical. The brief explained:

... [E]nvironmental permitting involves a series of interactions between the permitting agency and the developer, requiring numerous and complicated degrees of analysis and negotiation to ensure that statutory compliance is maintained and that growth and resource protection are balance. Given the tightly-regulated and site-specific nature of environmental permitting, and in an effort to bring efficiency to the process, applicants are strongly encouraged to consult with agency staff before and during the process to identify appropriate mitigation options that will permit the project to proceed.

Brief for Fla. Dept. of Environ. Prot. et al. as Amici Curiae Supporting Respondent, *Koontz* 133 S.Ct. 2586 (2013) (No. SC09-713), 2009 WL 4761534, at *9.

¹²⁸ See *supra* page 4-5.

lessen its adverse impact on the wetlands, the District “raised several options for ‘off-site mitigation’ that Koontz could undertake in a nearby nature preserve, thus compensating for the loss of wetlands his project would cause.”¹²⁹ Kagan’s dissent further noted that the District never made any specific demand with regard to an off-site project and made clear that it “welcomed additional proposals” from Koontz to mitigate his plan’s damage to the wetlands.¹³⁰ Kagan summed up the situation: the “District never made a demand or set a condition – not to cede an identifiable property interest, not to undertake a particular mitigation project, not even to write a check to the government.”¹³¹ Rather, the District simply denied his permit in its current form and made a few suggestions to Koontz as to how his applications could conform to state law.

One of the most detrimental aspects of the majority’s holding is its description of the District’s actions in this case. Consider the majority’s framing of those actions: the District told Koontz that it would approve construction “*only if* he agreed to one of two concessions,”¹³² against the description of the interaction laid out by Kagan and the Joint Appendix of the parties. Also consider the Florida Department of Environmental Protection’s description of the process and rationale for it, highlighting the encouraged communication between parties to “increase efficiency” of the process.¹³³

The majority’s depiction of the District’s actions puts a local government in a precarious situation when attempting to enforce its land-use permitting process. Simply by suggesting ways Koontz could modify his application to meet Florida’s legal requirements, the majority found that District has made a “demand,” possibly worthy of Fifth Amendment Takings Clause protection. This severely limits a government lawyer’s actions in these types of cases. Echoing parts of Justice Kagan’s dissent, Professor John Echeverria of Vermont Law School wrote that the Courts’ decision “will very likely encourage local government officials to avoid any discussion with developers related to permit conditions that, in the end, might have let both

¹²⁹ See *supra* page 4 and note 21.

¹³⁰ See *supra* page 4 and note 18.

¹³¹ See *supra* page 4 and note 18; *Koontz*, 133 S.Ct. at 2611 (Kagan, J., dissenting).

¹³² See *supra* note 18 and accompanying text.

¹³³ See *supra* p. 19 and n. 127.

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sides find common ground on building projects that are good for the community and environmentally sound.”¹³⁴ Echeverria continued: “Rather than risk a lawsuit through an attempt at compromise, many municipalities will simply reject development applications outright – or, worse, accept development plans they shouldn’t.”¹³⁵

Assuming *arguendo* that the District made a demand on Koontz’s permit request, the question then is: When a government seeks to place a condition on the development of private land, should the government bear the heightened burden of proving to a court that there is nexus rough proportionality between the government interest justifying denial of the permit and the demand on the applicant?

The majority claims that the District and dissent’s suggested course of action would lead to governments being able to circumvent the *Nollan* and *Dolan* test by simply asking for monetary exactions in place of real property exactions when giving land-use permits. I believe, however, that this holding actually further circumvents previous Supreme Court precedent, outlined in *Skrupa*, which *emphatically* refused to allow courts to use the Due Process Clause acts as a “superlegislature” in this type of situation. It is proper to recognize that a state’s environmental sustainability laws are a direct product of that state’s “economic or social philosophy.”¹³⁶ Florida’s Henderson Wetlands Protection Act is a legitimate use of this power, helping further its interest of reducing the negative externalities that come with unfettered private property development.

To completely understand the consequences of the Court’s extension of *Nollan* and *Dolan*, it is helpful to look at the concerns expressed when those rulings occurred. Critics of those rulings, including Justice Stevens, believed those cases to mark the “resurrection of a species of due process

¹³⁴ John Echeverria, Op-Ed., *A legal blow to sustainable development*, N.Y. TIMES, June 26, 2013, available at <http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html>.

¹³⁵ *Id.*

¹³⁶ See *supra* note 79 and accompanying text.

analysis that [was] firmly rejected decades ago.”¹³⁷ Stevens recognized this in *Dolan*, where he hoped that the Court’s reliance on “First Amendment cases, and its candid disavowal of the term ‘rational basis’ to describe its new standard of review, d[id] not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era.”¹³⁸ The Court previously abandoned the economic substantive due process doctrine and deferred to legislatures to decide what was economically best when the *Lochner* era ended with the *Carolene Products* ruling.¹³⁹

Economic substantive due process has not consistently been recognized as being equivalent or even similar to the topic of regulatory takings; indeed the majority does not even mention it in the instant ruling. However, Stevens found that the regulatory takings doctrine, first imagined by Holmes in *Mahon*,¹⁴⁰ had an “obvious kinship with the line of substantive due process cases that *Lochner* exemplified.”¹⁴¹ Stevens pointed out that in addition to having similar ancestry, both doctrines are “potentially open-ended sources of judicial power to invalidate state economic regulations....”¹⁴²

Land-use regulatory cases like *Nollan*, *Dolan*, and now *Koontz* have supplied little real explanation why land-use regulations require an “independent layer of protection,” as compared to all other regulatory takings situations.¹⁴³ The majority’s explanation that the essential nexus and rough proportionality test stops the government from “exploiting the landowner’s permit application to evade the constitutional obligation to pay for the property” falls short considering the *Penn Central* test already protects real

¹³⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting).

¹³⁸ *Id.* at 409 (Stevens, J., dissenting) (omitting internal citations).

¹³⁹ See *supra* notes 73-81 and accompanying text.

¹⁴⁰ See *supra* note 42 and accompanying text.

¹⁴¹ *Dolan*, 512 U.S. at 406-07 (Stevens, J., dissenting).

¹⁴² *Id.* at 407.

¹⁴³ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2856, 2604 (2013) (Kagan, J., dissenting).

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property owner's land value by protecting against regulations that "unduly burden an owner's use of his property."¹⁴⁴

Consider all regulatory takings claims, except those that are *per se* takings due to permanent physical occupation and governed by *Loretto*, as simply addressing the reduction in value to the owner's private property. This idea is consistent with the Supreme Court regulatory takings opinions since *Mahon*, which acknowledged Holmes' observation that "Government hardly could go on if to some extent *values* incident to property could not be diminished without paying for every such change in the general law."¹⁴⁵ All regulations, whether on real property like land or personal property like cars, affect the economic value of that property. The Court recognized in *Lingle* that "government regulation – by definition – involves the adjustment of rights for the public good."¹⁴⁶ Supreme Court decisions since *Mahon* have effectively been trying to build rules that best determine how far is "too far."¹⁴⁷

Though the Court acknowledged that there was no set formula for evaluating takings claims, all major factors addressed the economic position of the claimant. The *Lingle* Court succinctly sums up the Court's consistent look at takings as a matter of economics and value to the property owner:

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.... In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. And the *Penn Central* inquiry turns in

¹⁴⁴ See *supra* note 112.

¹⁴⁵ *Penn Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (emphasis added).

¹⁴⁶ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

¹⁴⁷ *Id.*

large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with the legitimate property interests.¹⁴⁸

This logical and understandable test of economic loss suffered by a property owner made a lot of sense, even if *Lucas* gave the government too much lee-way and *Penn Central* did not offer a set formula. It is disingenuous to the original and reasonable regulatory takings justifications to create a separate, higher burden for economic regulations on real property, as compared to other commerce. It is even worse to create a higher burden that puts land-use regulations in the same category as the *Lochner*-era legislative economic regulations where courts are given the ultimate "superlegislative" power.

After reading the Court's disagreement over the applicability of *Apfel* to the instant case, it is still not clear whether *Apfel* was intended to affect land-use regulatory situations.¹⁴⁹ The existence of that debate, however, illustrates the ridiculousness of using a heightened scrutiny standard for economic land-use regulations, as compared to other economic regulations. Even if the phrase "specified property" was intended to refer to the *reason* someone is paying an exaction, as the majority suggests, instead of the *item of value* with which a property owner is paying, it still makes more sense to maintain consistency in terms of how all property is treated in the exactions realm.

The consequences of the instant decision that were predicted by Stevens in *Dolan* bring us closer, once again, to a *Lochner* era Court. Despite Stevens' warning, the Court has clawed back more of the "superlegislative" power it once wielded during the *Lochner* era. Now that a monetary exaction, or even the suggestion of a monetary exaction, has been conflated with a real property taking, it is difficult to see how this path to substantive economic due process will be altered. Why would the Court not consider the next legislatively enacted economic burden on an individual with the same heightened scrutiny that the District is now facing?

¹⁴⁸ *Id.* at 539-40.

¹⁴⁹ *See supra*, 16-17 for the majority and dissent's complete argument.

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In the meantime, it is easy to imagine governments shying away from utilizing monetary exactions, even when they make sense in situations like the instant case. Ilya Somin, professor of Law at George Mason University School of Law, questions whether *Koontz* will impede beneficial regulation. Somin believes there is “no way to definitely prove that such risk aversion will never lead to the abandonment of potentially beneficial regulatory policies.”¹⁵⁰ He does predict, however, “this constraint is likely to lead to better, rather than worse, regulatory policies.”¹⁵¹ He suggests that “[f]orcing governments to internalize the costs that their regulations impose on landowners, will strengthen incentives to adopt only those regulations whose benefits are likely to exceed their costs.”¹⁵²

While forcing governments to internalize costs sounds catchy and appealing, it is not what is occurring in actuality. In fact that statement attacks the very goal of exactions, which is to specifically save those (external) costs from being the burden of the government and community. Instead of allowing the individual landowner to burden the entire community via environmental or actual monetary costs, the government is forcing the individual landowner to bear the actual costs his development creates.

Somin’s view is that whereas previously officials “did not need to consider costs imposed on landowners in their calculus – unless the landowners could force them to do so through political lobbying – compensation requirements will impose tighter discipline and incentivize officials to concentrate regulatory expenditures in areas where they are likely to do the most good.”¹⁵³ This very narrow view is of course only taking into consideration the one individual landowner who is being affected when a monetary exaction is demanded. It ignores how the surrounding community of landowners, land-renters, and anyone else who might enjoy the air and water, might be affected by that individual’s decision. Somin does, however,

¹⁵⁰ Somin, Ilya, *Two Steps Forward for the 'Poor Relation' of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, CATO SUPREME COURT REVIEW 215 at 234, 2013, available at <http://ssrn.com/abstract=2325529>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

correctly describe how a landowner might appropriately fight this type of legislatively created statutory rule. A landowner may do so the same way it was enacted when the Florida legislature decided it was a priority to save wetlands in 1972 and 1984 and gave control of wetland preservation to community water districts throughout the state.¹⁵⁴

Monetary exactions – like all exactions – are useful to governments and society because they shift the costs of some development off of community infrastructure and the local environment. These costs are shifted more directly onto those individuals responsible for straining them. The individual’s negative externalities are internalized so that society as a whole is not forced to pay for individual property owner’s land-use decision.

Being allowed to ignore the damages that an individual’s actions cause the surrounding community does indeed strengthen personal property rights, but does so at too high a cost. It is possible that local governments will shift their tactics to offsetting these costs by raising taxes on the entire community, thus spreading out the costs that have been created by just a few individuals. Or local governments will simply discontinue environmentally friendly efforts, to the detriment of everyone in the community.

This is perhaps the most consequential aspect of the *Koontz* ruling because it is unknown what will come from placing the *Nollan/Dolan* burdens onto permit conditions requiring the general expenditure of money. Professor Echeverria pointed out that many cities and towns “routinely attach fees and other payment obligations to permits, for example to support wetlands mitigation banks, to finance roads, to pay for new schools or to build affordable housing.”¹⁵⁵ Though these mandates always had to be “reasonable under the Constitution,” the new standard raised the “burden on the government to justify the mandates. . . .”¹⁵⁶ This approach is “contrary to the traditional court approach of according deference to elected officials and technical experts on issues of regulatory policy.”¹⁵⁷

¹⁵⁴ *Supra* notes 11, 14 and accompanying text.

¹⁵⁵ Echeverria, *supra* note 134.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

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Additionally, this will result in many more expensive legal challenges to local regulations by developers.¹⁵⁸ Prior to this ruling, “judges typically deferred to local governments in such cases.” After *Koontz*, however, “developers have a potent new legal tool to challenge such charges because now the legal burden of demonstrating their validity is on the communities themselves.” In summary, Echeverria suggests that the “cost of protecting a community from a harmful building project now lies *not* with the developer but *with the local residents and taxpayers*.”¹⁵⁹

I will wrap up the comment section with one final quote from Justice Stevens, writing in dissent of the *Dolan* ruling:

When there is doubt concerning the magnitude of [the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms], the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action's constitutionality. That allocation of burdens has served us well in the past.¹⁶⁰

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (emphasis added). For further examination of the evolution of exaction jurisprudence through *Koontz*, including examining the potential underlying considerations and looking ahead to potential limits on future holdings, see Lee Anne Fennell & Eduardo M. Penalver, *Exactions Creep*, SUPREME COURT REVIEW (2013), available at <http://ssrn.com/abstract=2345028>.

¹⁶⁰ *Dolan v. City of Tigard*, 512 U.S. 374, 411 (1994) (Stevens, J., dissenting).

VI. CONCLUSION

One of the purposes of the Fifth Amendment's Takings Clause is "to bar Government from forcing some people alone to bear *public* burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁶¹ It was never intended to prevent the Government from compelling an individual to bear or help compensate for the burdens that the individual placed on the public by his private actions. As is sometimes the case, however, the Court has made it more difficult for local governments to protect their communities from the actions of individuals in the name of protecting one person's individual liberty. Koontz should have used the political tools that America's founders intended for this type of situation if he was upset about regulations instead of asking for the Court to overturn the actions of a democratically elected legislature.

I will conclude by briefly addressing how I believe the case should be ruled on remand. The Court has remanded the case for the Florida courts to decide in the first instance whether the proposed demand on Koontz satisfies the *Nollan* and *Dolan* tests. The Florida Department of Environmental Protection listed some examples in their brief to the Supreme Court of Florida supporting the Government of what it felt were appropriate mitigation demands during a permit negotiation.¹⁶² One example was: if an applicant proposed building a home that impacted a bay swamp, appropriate mitigation would be the creation of a new area of bay swamp or to restore the conditions of an adversely-impacted, previously-existing bay swamp.¹⁶³ Suggestions like this are not just reasonably related to Florida's interest in preserving its important wetlands, but also reach the higher burden of having an essential nexus with this goal. Whether the District's request is properly proportional to the damage that Koontz's development will create is a question I do not have sufficient facts to answer. It will be up to the Florida courts and scientists to decide both aspects of this test.

¹⁶¹ *Id.* at 383 (quoting *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960)).

¹⁶² Amicus Brief for Fla. Dept. of Environ. Prot., *supra* note 126 and accompanying text.

¹⁶³ *Id.*

RISE OF THE SUPER-LEGISLATURE: DEMANDING A MORE EXACTING
MONETARY EXACTION

I believe a monetary exaction, when addressing the type of environmentally injurious project that a private citizen seeks a permit for, fulfills the essential nexus aspect of the *Nollan/Dolan* test. Many possible projects that addressed environment rehabilitation could be funded by a monetary exaction from Koontz and should qualify as addressing the state's environmental sustainability goal. Nearly all would seem to satisfy the essential nexus between the "legitimate state interest" of protecting wetlands like those being destroyed and "the permit condition enacted," which in this case would be demanding money to be used to help build or save similar wetlands in the area.¹⁶⁴ Once it was determined where the money would go, all that would be required is to figure out what amount would create a rough proportionality between the degree of damage done and the exaction demanded.

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¹⁶⁴ *Dolan*, 512 U.S. at 386-87 (internal quotations omitted).

