

2014

## The New Per Se Takings Rule: Koontz's Implicit Revolution of the Regulatory State

Michael Castle Miller

*American University Washington College of Law*

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Miller, Michael Castle. "The New Per Se Takings Rule: Koontz's Implicit Revolution of the Regulatory State." *American University Law Review* 63, no.3 (2014): 919-947.

This Notes & Casenotes is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

---

# The New Per Se Takings Rule: Koontz's Implicit Revolution of the Regulatory State

## **Keywords**

Impact fees, Privatization -- United States, Municipal government -- United States, Municipal budgets -- United States, Real property -- United States, Eminent domain -- United States, Due process of law -- United States

## NOTE

# THE NEW PER SE TAKINGS RULE: KOONTZ'S IMPLICIT REVOLUTION OF THE REGULATORY STATE

MICHAEL CASTLE MILLER\*

### TABLE OF CONTENTS

|   |     |
|---|-----|
| Introduction.....   | 920 |
| I. Background: The Takings Clause and Exactions .....                                   | 924 |
| A. Takings Versus Taxes .....   | 924 |
| 1. The evolution of regulatory takings of real property and the “per se” rules .....    | 924 |
| 2. The (difficult) distinction between takings of cash and taxation .....               | 926 |
| B. Exactions.....   | 928 |
| 1. The rise of impact fees.....   | 928 |
| 2. Judicial scrutiny of exactions.....  | 930 |
| a. <i>Nollan</i> and <i>Dolan</i> : The nexus and rough proportionality tests.....      | 930 |
| b. Unconstitutional conditions .....  | 932 |
| c. Monetary exactions: <i>Koontz v. St. Johns River Water Management District</i> ..... | 934 |
| i. Background .....   | 935 |
| ii. Reasoning: Cash as a per se taking.....   | 936 |
| II. Demystifying <i>Koontz</i> and Deriving the New Per Se Rule.....                    | 939 |

---

\* Senior Staff, *American University Law Review*, Volume 63; J.D. Candidate, 2014, *American University, Washington College of Law*; M.A., Candidate International Politics, 2014, *American University, School of International Service*; B.F.A., Drama, 2004, *New York University, Tisch School of the Arts*. I want to thank my wife, Joanna Castle Miller, whose creativity and compassion inspire me. Thanks also to Jorge Contreras, my property law professor, who suggested several helpful ideas. I am also grateful for the hard work and talent of the *AULR* staff, especially Meghan Quinn and Katie Wright, who substantially improved this Note, as they do with all the articles in this volume. I wrote this piece in the hope that it would help cities grow into active, just, and peaceful communities in which people thrive.

|  |     |
|--|-----|
| A. The Rationale for the New Per Se Rule ..... | 940 |
| B. Distinguishing Taxes .....                  | 943 |
| Conclusion: The Impact of <i>Koontz</i> .....  | 945 |

#### INTRODUCTION

Cities are becoming increasingly privatized.<sup>1</sup> This phenomenon is demonstrated by the prevalence of gated communities and homeowner associations, which are essentially private governments for the benefit of a subset of city residents.<sup>2</sup> Less noticeable, however, is the increasing privatization of municipal finance and spending.<sup>3</sup> Rather than drawing from general tax revenue, city projects increasingly rely on payments from residents who either most benefit from them or make them most necessary.<sup>4</sup>

This “user pays” philosophy is especially manifest in the use of exactions, or, more specifically, impact fees, on new developments.<sup>5</sup> Exactions are concessions demanded of landowners before local authorities will approve building permits.<sup>6</sup> Traditional exactions take the form of physical dedications of real property, such as building roads within a subdivision or deeding the public an easement for a bike path or for the preservation of wetlands.<sup>7</sup> Much more common today are impact fees, which are monetary exactions to help pay for improvements to off-site, system-wide infrastructure or even affordable housing projects or job training.<sup>8</sup>

---

1. See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 10–11 (1994) (highlighting the rise in self-governed developments since the end of World War II).

2. See generally *id.* at 122–49 (describing homeowner associations as private governments).

3. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 S.M.U. L. REV. 177, 181 (2006).

4. See *id.* at 182, 202–04 (describing how local governments have embraced the idea that “growth should absorb its own fiscal impacts” and have begun funding infrastructure projects through fees imposed on the entities that make the infrastructure necessary).

5. See *id.* at 210 (explaining that if impact fees are in proportion to the true cost of providing public services and are included in housing prices, new home buyers will internalize the positive and negative effects of their new homes).

6. *Id.* at 181.

7. See *id.* at 199–201, 206 (noting that traditional exactions can be conceptualized “as being tied to the specific site under development”).

8. *Id.* at 191 n.43, 205 n.100. Impact fees go by various names, such as “in lieu of fees, mitigation fees, water and sewer connection charges, excise taxes, privilege tax[es], low income housing replacement fees, linkage fees, standby fees, and transportation utility fees.” *Id.* at 245–46 (footnotes omitted).

Exactions are justified as methods of internalizing the costs of new growth to the developers promoting the growth.<sup>9</sup> For example, new development leads to increased water use, sewage, traffic, stormwater runoff, school enrollment, and fire coverage, among other things—all of which will increase costs for the city.<sup>10</sup> Without exactions, these costs would be externalized, forcing taxpayers to bear them even though only a few developers may make them necessary.<sup>11</sup>

This user pays logic should be attractive to those who lean libertarian on economic matters.<sup>12</sup> From the libertarian perspective, members of society should not be forced to fund services from which they do not derive a proportionate benefit.<sup>13</sup> In other words, each person's contribution to services should be carefully tailored to his or her benefit from those services.<sup>14</sup> In the context of municipal services, improved infrastructure more heavily benefits developers than average individual taxpayers because the improvements increase the city's capacity to accommodate new residents and make

---

9. Joseph A. Dane, Recent Development, *Maui's Residential Workforce Housing Policy: Finding the Boundaries of Inclusionary Zoning*, 30 U. HAW. L. REV. 447, 453 (2008).

10. *Id.* at 453–54, 462.

11. *See id.* at 453.

12. *See, e.g.,* *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (regarding exactions that “[i]nsist[] that landowners internalize the negative externalities of their conduct” as “a hallmark of responsible land-use policy”). This opinion was authored by Justice Alito, *see id.* at 2951, who is known to have libertarian tendencies, *see* Ilva Somin, *Alito's Libertarian Streak*, AM. SPECTATOR, <http://spectator.org/articles/47794/alitos-libertarian-streak> (Nov. 9, 2005) (contrasting Justice Alito with the conservative Justice Scalia and outlining various areas of the law where Justice Alito takes a libertarian stance); *see also* Simon Lazarus, *Alito Shrugged: Libertarianism Has Won Over the Supreme Court Conservatives*, NEW REPUBLIC (July 28, 2013) (describing Justices Alito, Scalia, Roberts, Thomas, and Kennedy's growing acceptance of libertarian social and economic positions).

13. *See, e.g.,* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 5 (1985) (asserting that when the government takes value from an individual, the just compensation provision requires the government to give that individual “a fair equivalent” in exchange).

14. *See id.* at 195, 197–99 (explaining Frank Michelman's famous implicit in-kind compensation doctrine, which justifies regulations when they generate long-term benefits for the parties burdened, but claiming that “[i]n a world of perfect knowledge and costless measurement,” everyone would benefit in exact proportion to his or her contribution, with the excess benefits of net gainers distributed to compensate for the losses imposed on net losers); *see also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1179, 1225 (1967) (arguing that the just compensation requirement helps ensure that, over the long run, the total net benefits conferred on society by government action exceed the total net losses by correcting immediate harms to some individuals).

subsequent developments more valuable.<sup>15</sup> Thus, developers should shoulder a greater burden for financing these improvements than the average taxpayer.

The same philosophy, however, has also driven a somewhat conflicting legal current that limits exactions—the expanding application of the Fifth Amendment Takings Clause. The Takings Clause states that “private property [shall not] be taken for public use, without just compensation.”<sup>16</sup> Since the end of the *Lochner* era,<sup>17</sup> economic libertarians have sought to apply this Clause to limit economic regulations with redistributive effects—that is, regulations that force some people to confer more benefits on the public than they receive in return.<sup>18</sup> The Court signaled some support for this view in *Armstrong v. United States*,<sup>19</sup> when Justice Black stated that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>20</sup> Some scholars, including Richard Epstein, propose that the Takings Clause applies to all regulations and taxes; the effect of which would prevent the government from demanding more money from individuals than it dispenses in “in-kind” benefits to them.<sup>21</sup> While this view has not

---

15. See Rosenberg, *supra* note 3, at 212–13 (indicating that developers derive financial benefit from the new infrastructure in the form of increased property values).

16. U.S. CONST. amend. V.

17. In *Lochner v. New York*, 198 U.S. 45, 52–53 (1905), the Supreme Court held that state wage and hour regulations violated employees’ due process right to “liberty” because they limited workers’ right to freely contract to work under the conditions to which they voluntarily consented. Over the next few decades, several cases that followed *Lochner* applied a similarly strict level of scrutiny to other economic regulations that supposedly limited the freedom to contract. See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525, 540, 543, 553–54 (1923) (applying the Due Process Clause’s protection of liberty to assert the right of women and children to contract to work for less than minimum wage).

By 1938, however, the Court had effectively reversed *Lochner* under pressure from President Roosevelt’s New Deal. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798 (2006) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); and *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) as “the three cases that overturned *Lochner*” (footnote omitted)). Since then, the Court has firmly held that economic regulations satisfy the Fourteenth Amendment as long as they have some “rational basis”—a standard nearly all regulations satisfy. *Id.* at 799. *But c.f.* *Hettinga v. United States*, 677 F.3d 471, 481–83 (D.C. Cir. 2012) (Brown, J., concurring) (lamenting the departure from *Lochner*-era protections of economic liberties), *cert. denied*, 133 S. Ct. 860 (2013).

18. See J. Freitag, Note, *Takings 1992: Scalia’s Jurisprudence and a Fifth Amendment Doctrine To Avoid Lochner Redivivus*, 28 VAL. U. L. REV. 743, 778–79 (1994) (describing the use of the Takings Clause to combat redistributive measures).

19. 364 U.S. 40 (1960).

20. *Id.* at 49.

21. EPSTEIN, *supra* note 13, at 195–97, 284.

taken hold in modern jurisprudence, the U.S. Supreme Court has gradually expanded the Takings Clause to apply to a larger scope of economic regulations.<sup>22</sup> As this has happened, the Takings Clause has emerged as a potential surrogate for the rejected *Lochner*-era reliance on the Due Process Clause as a tool to question government regulations.<sup>23</sup>

At the end of the October 2012 term, these two trends converged in dramatic fashion in *Koontz v. St. Johns River Water Management District*.<sup>24</sup> On its surface, the case requires impact fees to be subject to the nexus and rough proportionality tests that already govern in-kind exactions.<sup>25</sup> To arrive there, however, the Court applied reasoning that implicitly and dramatically extended the reach of the Takings Clause sub silentio.<sup>26</sup>

This Note argues that the *Koontz* Court implicitly created a new and broad per se takings rule: whenever a government attaches a monetary obligation to specifically identified assets and the obligation is not a “tax,” a per se taking has occurred requiring just compensation.<sup>27</sup> This rule will likely find explicit use in future Takings Clause challenges to regulations.

To support this argument, Part I of this Note provides background on the various practical and theoretical issues at play in the *Koontz* decision. Part II analyzes the *Koontz* majority opinion to explain how Justice Alito’s careful word choice and reasoning lead to the implicit establishment of a new per se takings rule. It also argues that, although defining taxes is conceptually challenging, (perhaps even more so after the Court’s 2012 Affordable Care Act decision<sup>28</sup>) distinguishing them from takings will not be extraordinarily difficult in practice.

---

22. See Freitag, *supra* note 18, at 746–47 (suggesting that the regulatory takings doctrine has been used to apply strict scrutiny in cases in which the government regulates land use and real estate development).

23. *Id.* at 746–50 (explaining the transition from the *Lochner* Court’s use of the Due Process Clause to limit government regulation to the modern Court’s use of the Takings Clause).

24. 133 S. Ct. 2586 (2013).

25. See *id.* at 2598–99; see also *infra* Part I.B.2.a (describing the nexus and rough proportionality tests).

26. See *infra* Part II (describing how Justice Alito’s majority opinion creates a new per se takings rule that differs from the Court’s reasoning in previous regulatory-monetary takings cases).

27. See *infra* note 149 and accompanying text (explaining that this new per se taking rule goes beyond the previous affirmation by the Court that seizures of discrete objects are per se takings).

28. See generally *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

## I. BACKGROUND: THE TAKINGS CLAUSE AND EXACTIONS

*Koontz* lies at the confluence of multiple emerging historical and legal trends, touching upon both practical concerns in real estate development and municipal finance and broader concerns over the theoretical distinctions between takings, taxes, and legitimate police-power regulations. This Part first briefly explains the recent evolution of the takings doctrine and its awkward relationship with long-standing assumptions regarding taxation. It then describes the rise of exactions as a land-use regulatory policy and the Court's parallel development of safeguards against "extortionate" exactions. Finally, it summarizes *Koontz* and the contribution the case makes to exactions jurisprudence.

### A. Takings Versus Taxes

#### 1. The evolution of regulatory takings of real property and the "per se" rules

Historically, the Takings Clause has had limited applicability to land-use regulations and related exercises of authority, such as decisions to grant or deny permits and impose conditions on those permits. The Court has generally considered such activities to be within state and local governments' Tenth Amendment police powers to regulate in the interest of public health, safety, and welfare.<sup>29</sup> Prior to the early twentieth century, the Takings Clause rarely applied to situations other than wholesale seizures of real property.<sup>30</sup>

The Takings Clause first emerged as a limitation on regulatory authority in *Pennsylvania Coal Co. v. Mahon*.<sup>31</sup> In that case Justice Holmes explained that the Takings Clause requires just compensation for not only "direct appropriation of property,"<sup>32</sup> but also regulations that "go[] too far" in burdening interests in real property.<sup>33</sup> The Court did not provide a clear standard for determining when regulations went "too far" until *Penn Central Transportation Co. v. New York City*.<sup>34</sup> In that case, the Court developed a rough framework for scrutinizing particularly burdensome regulations.<sup>35</sup> Under *Penn Central*, regulatory takings could be

---

29. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389–90 (1926) (upholding zoning ordinances as a legitimate exercise of police power).

30. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) as the turning point).

31. 260 U.S. 393 (1922).

32. *Lucas*, 505 U.S. at 1014 (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)) (internal quotation marks omitted).

33. *Pa. Coal Co.*, 260 U.S. at 415.

34. 438 U.S. 104 (1978).

35. See *id.* at 124 (recounting relevant factors from previous Court decisions).



found by analyzing three factors: (1) the regulation's economic impact on the property owner, (2) the regulation's interference with the owner's "investment-backed expectations," and (3) the regulation's character.<sup>36</sup>

However, since *Penn Central*, the Supreme Court has repeatedly expressed dissatisfaction with its regulatory takings analysis as a "difficult and uncertain rule" that requires courts to engage in "essentially ad hoc, factual inquiries" to determine whether a taking has occurred.<sup>37</sup> Consequently, the Court has begun fashioning per se rules for determining when a regulation imposed on real property constitutes a taking.<sup>38</sup> The per se rules apply in only a subset of takings situations, but they help reduce the overall level of uncertainty in takings questions by identifying certain government actions that will always constitute takings.<sup>39</sup>

The Court established its first per se takings rule in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>40</sup> in which the Court held that a permanent, physical invasion, no matter how small, is always a taking requiring just compensation.<sup>41</sup> The second per se rule was announced in *Lucas v. South Carolina Coastal Council*,<sup>42</sup> which provided that a regulation that denies virtually all economically beneficial use of property is always a taking unless the regulation prevents a common law nuisance.<sup>43</sup> Aside from these per se rule

---

36. See *id.*; see also Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 341–42 (2006) ("[T]hese factors are often referred to as the *Penn Central* test . . . (internal quotation marks omitted)).

37. *Penn Central*, 438 U.S. at 124; see, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (refusing to apply the *Penn Central* test) (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)).

38. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1030–31 (1992) (establishing the "total taking" per se rule); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 432 (1982) (establishing the "permanent physical occupation" per se takings rule); see also Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2195 (2004) (describing the Court's adoption of per se takings rules as an effort to combat the "indeterminacy" of the *Penn Central* test).

39. See Peñalver, *supra* note 38, at 2195–96.

40. 458 U.S. 419 (1982).

41. See *id.* at 436–38 & n.16, 441 (holding that a city ordinance requiring landlords to permit the installation of a cable television equipment on their apartment buildings was a taking, even though the equipment only occupied roughly one and a half cubic feet of the property).

42. 505 U.S. 1003 (1992).

43. See *id.* at 1008–09, 1027–32 (holding that South Carolina's Beachfront Management Act, which prohibited the "construction of occupiable improvements" in designated coastal areas, constituted a taking because it deprived the plaintiff's land of all economically beneficial use and thus, in effect, deprived the plaintiff of the land itself).

situations, however, landowners can only bring Fifth Amendment challenges against regulations under the *Penn Central* analysis.<sup>44</sup>

2. *The (difficult) distinction between takings of cash and taxation*

To a more limited degree, courts have applied takings law not only to real property interests but also to personal property, such as cash, as long as the cash is taken from “a specific, separately identifiable” source of assets.<sup>45</sup> For example, seizing a security interest, such as a lien, is a taking because a security interest represents a right to receive money by attachment to a specific piece of property.<sup>46</sup> Also, the Court has considered seizing interest earned from specifically identified bank accounts a “per se taking.”<sup>47</sup>

However, general financial obligations imposed without reference to discrete assets are not takings.<sup>48</sup> This principle was illustrated in *Eastern Enterprises v. Apfel*,<sup>49</sup> in which five Justices declined to apply the Takings Clause to the Coal Industry Retiree Health Benefit Act of 1992<sup>50</sup> (“Coal Act”). Pursuant to the Coal Act, a mining company was required to pay into a benefit fund for its former miners.<sup>51</sup> Justice Kennedy’s opinion, which is the controlling opinion on the question,<sup>52</sup> explained that monetary obligations could only be takings

---

44. See *id.* at 1015 (explaining that a regulatory challenge will be analyzed under *Penn Central*’s “case-specific inquiry,” unless the particular regulatory action fits into one of the designated categories covered by a per se rule).

45. See *E. Enters. v. Apfel*, 524 U.S. 498, 554–55 (1998) (Breyer, J., dissenting) (citing *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)).

46. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 46–48 (1960) (ship lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935) (home mortgage).

47. See, e.g., *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 234–35 (2003) (interest earned from funds in IOLTA accounts); *Webb’s Fabulous Pharmacies*, 449 U.S. at 164–65 (interest accrued on an interpleader fund while in a court’s registry). Calling such takings “per se takings” should not be confused with the per se taking rules described *supra* Part I.A.1. The latter apply to regulations affecting real property, not individual seizures of personal property, such as bank accounts.

48. See generally Peñalver, *supra* note 38, at 2206–08 (discussing the distinction the Court has made between general financial obligations and obligations attached to discrete assets).

49. 524 U.S. 498 (1998).

50. See *id.* at 553–54 (Breyer, J., dissenting) (explaining that his opinion, which was joined by three other Justices, as well as Justice Kennedy’s concurring opinion, both argued that the Takings Clause did not apply).

51. See *id.* at 516–17 (plurality opinion).

52. In *Koontz*, the Supreme Court quietly resolved a significant division of authority on which *Eastern Enterprises* opinion was controlling on this issue. Compare *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) (relying on Justice Kennedy’s opinion to evaluate whether monetary obligations can be takings), with Peñalver, *supra* note 38, at 2208 & n.115 (collecting cases on the lower court split over the controlling opinion in *Eastern Enterprises*).

when “a specific property right or interest [was] at stake.”<sup>53</sup> The Coal Act, however, “d[id] not operate upon or alter an identified property interest,” nor was it “applicable to or measured by a property interest.”<sup>54</sup> Justice Kennedy explained that extending the takings doctrine to general financial obligations such as the one at issue would potentially interfere with taxation and other governmental actions traditionally granted wide discretion based on their necessity to effective governance.<sup>55</sup>

Despite the nearly identical nature of taxes and regulatory takings in some instances, the Court has granted taxes a much more deferential standard of review than takings, whereby taxes are upheld as long as they are not arbitrary and irrational.<sup>56</sup> Courts employ this level of deference even for special assessments, which are taxes intended to recover the costs of public projects from a narrow group of taxpayers who most benefit from them.<sup>57</sup> As long as the taxpayers receive some benefit from the projects, the Court has not regarded assessments as takings.<sup>58</sup>

---

53. *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part). A four-Justice plurality (Justices O’Connor, Rehnquist, Scalia, and Thomas) believed that general financial obligations, such as this one, should be subject to Takings Clause scrutiny. *See id.* at 503–04. Justice Kennedy concurred in the result because he believed the obligation violated due process but declined to apply the Takings Clause. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part). The remaining four Justices (Breyer, Stevens, Souter, and Ginsburg) also rejected application of the Takings Clause. *Id.* at 554 (Breyer, J., dissenting).

54. *Id.* at 540.

55. *See id.* at 543 (warning against the expansion of the Takings Clause to the point of “los[ing] sight of the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation, with the attendant potential for money damages”).

56. *See, e.g.,* *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24–25 (1916) (declaring that a tax would have to be “so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property” before the Court would find it unconstitutional); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) (explaining that the structure of the government would prevent abuse of the power to tax because the taxpayers could vote); *see also* Peñalver, *supra* note 38, at 2199 (explaining that the Supreme Court has repeatedly denied Takings Clause challenges to allegedly excessive taxes).

57. Peñalver, *supra* note 38, at 2202; *see, e.g.,* *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 262 (1915) (asserting that a state legislature was free to apportion the cost of installing drainage among the counties in which the improvements were to be made).

58. *See, e.g.,* *Houck*, 239 U.S. at 265 (finding, in contrast to Epstein’s view, that “there is no [constitutional] requirement . . . that for every payment there must be an equal benefit”); *see also* Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 *Nw. U. L. Rev.* 189, 258 (2002) (“[E]ven a slight, tenuous correlation between the amount paid in taxes or assessments on the one hand, and the benefits received on the other hand, is

The extension of the Takings Clause to include government-imposed financial obligations has made it very difficult to find a consistent normative framework to distinguish taxes from takings.<sup>59</sup> Nevertheless, as this Note demonstrates, there are functional solutions to the problem that, while not conceptually attractive, appear adequate to serve their purpose.<sup>60</sup>

### B. Exactions

As the takings doctrine has expanded, it has gradually subjected exactions to greater judicial scrutiny. Exactions have simultaneously expanded in force to become a primary application of local governments' police powers and, indirectly, their ability to raise revenue.

#### 1. *The rise of impact fees*

While exactions have been employed in some form since the colonial period,<sup>61</sup> they have become especially prevalent in the late twentieth century.<sup>62</sup> Significantly, exactions have been considered land-use regulations and therefore arise out of the police power to regulate in the interests of public health, safety, and welfare—not out of the power to tax.<sup>63</sup> Monetary exactions, or impact fees, therefore, are principally justified as regulatory mechanisms for dealing with new growth; though, practically speaking, they have become a crucial source of revenue.<sup>64</sup>

Over the last few decades, impact fees have become increasingly prevalent for several reasons.<sup>65</sup> Perhaps most significantly, traditional sources of local government revenue, such as transfers from state governments and taxation, have dried up considerably as voters have

---

sufficient to shield a measure from a takings challenge.”); *supra* notes 12–15, 21 and accompanying text (describing Epstein’s libertarian viewpoint).

59. See Peñalver, *supra* note 38, at 2183–91 (covering scholars’ attempts to consistently distinguish between taxes and takings, concluding that the distinction is impossible under the Court’s precedent, and arguing that courts should therefore scale back their application of the Takings Clause); see also EPSTEIN, *supra* note 13, at 283–84 (agreeing that the distinction is impossible but instead concluding that taxes should be subject to the Takings Clause).

60. See *infra* Part.II.B (describing various functional solutions for distinguishing taxes from takings).

61. Rosenberg, *supra* note 3, at 192–93 (listing the various ways in which colonial communities exercised regulatory control over land usage).

62. See *id.* at 201–04 (indicating that this shift began “in the post-World War II era”).

63. *Id.* at 204.

64. See *id.* at 209–10.

65. A Government Accountability Office survey from 2000 showed that 59.4% (564) of cities with populations over 25,000 and 39% (238) of metropolitan area counties used impact fees. *Id.* at 207. States with impact fee enabling legislation increased from three in 1986 to twenty-four by 2002. *Id.* at 207 n.106.

pushed for lower taxes at both the state and local level.<sup>66</sup> Moreover, local governments have acquired more autonomy through “home rule” movements,<sup>67</sup> which have increased those governments’ regulatory and revenue-raising authority.<sup>68</sup> Twenty-eight states have enacted legislation specifically empowering local governments to charge impact fees,<sup>69</sup> and, in many states, local governments have charged impact fees even in the absence of such legislation.<sup>70</sup> Local governments impose impact fees as either part of a broad legislative scheme or “ad hoc”—that is, in the course of negotiations with individual landowners.<sup>71</sup>

Additionally, impact fees allow for much more efficient city planning than traditional possessory dedications of land. Unless developments are very large, possessory dedications are often too small and inadequately placed to address the burdens imposed by new developments to any substantial degree.<sup>72</sup> Most of the effects of new development are felt system-wide, requiring improvements to water and sewage treatment plants, roads and public transportation, schools and fire stations, and other infrastructure for which easements would be inadequate.<sup>73</sup> Having cash upfront also allows local governments to begin making these improvements in advance of the new residents arriving.<sup>74</sup>

Finally, on perhaps a more cynical note, impact fees are a more politically achievable method for local governments to raise

---

66. *Id.* at 180, 188 & n.36 (observing that local taxes as a percentage of total locally generated government revenue have dropped from nearly 43.6% in 1960 to 34.1% in 2002).

67. The home rule movement is a recent trend that allows local governments to obtain more authority over local matters. *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 71 (1982) (Rehnquist, J., dissenting).

68. See Rosenberg, *supra* note 3, at 188 (citing miscellaneous non-tax charges as a significant source of local government revenue).

69. Clancy Mullen, *State Impact Fee Enabling Acts 1*, IMPACTFEES.COM (Aug. 21, 2012), [http://www.impactfees.com/publications%20pdf/state\\_enabling\\_acts.pdf](http://www.impactfees.com/publications%20pdf/state_enabling_acts.pdf); see, e.g., ARIZ. REV. STAT. ANN. § 9-463.05 (2012) (“A municipality may assess development fees to offset costs to the municipality associated with providing necessary public services to a development . . . .”); CAL. GOV’T CODE § 66001 (West 2007) (establishing that local agencies may “impos[e] a fee as a condition of approval of a development project” provided the agency fulfills certain requirements); 53 PA. STAT. ANN. § 10505-A (West 2000) (enabling municipalities to adopt impact fee ordinances).

70. Rosenberg, *supra* note 3, at 207 n.106 (noting that Florida has a history of court challenges to impact fees imposed without specific enabling authority and that Virginia localities use the rezoning process to obtain “voluntary” cash exactions from land developers).

71. Mark S. Dennison, Annotation, *Zoning: Challenge to Imposition of Development Exactions*, 36 AM. JUR. PROOF OF FACTS 3D 417, § 3 (2013).

72. *Id.*

73. See Rosenberg, *supra* note 3, at 209–10.

74. See *id.*

revenue.<sup>75</sup> Impact fees disproportionately affect people outside the voting constituencies of city officials because they are imposed on new developments.<sup>76</sup> Imposing charges on new developments will typically constrain the supply of new housing despite rising demand, requiring “outsiders” to pay more to purchase property in the city.<sup>77</sup> These outsiders, however, will have no control over the derivation of city revenues until they become voting residents.<sup>78</sup> Once they become residents, they have an incentive to support the very development charges that made it difficult for them to purchase property because the charges will continue to keep the supply of housing low, driving up the value of their newly purchased homes.<sup>79</sup>

## 2. *Judicial scrutiny of exactions*

### a. *Nollan and Dolan: The nexus and rough proportionality tests*

Consonant with its expanded application of the Takings Clause, the Supreme Court has sought to reign in “extortionate” exactions to ensure that they do not exceed the amount required to internalize the costs imposed on the public by development. First, in *Nollan v. California Coastal Commission*,<sup>80</sup> the Court demanded that an exaction

---

75. See *id.* at 208–09.

76. See *id.* (noting that impact fees enable “local governments [to] simultaneously achieve a series of attractive political objectives, and [that] they do so without having to consider any potential objections from interest groups unrepresented in the existing voting populace”).

77. Richard A. Epstein, *The Spurious Constitutional Distinction Between Takings and Regulation*, ENGAGE: J. FEDERALIST SOC’Y PRAC. GRPS., Dec. 2010, at 11, 13–14 (arguing that local residents can rally political support to prevent new arrivals much more easily than developers); see also Rosenberg, *supra* note 3, at 182 & n.21 (describing scholars’ arguments that impact fees lead to exclusion). Additionally, there is some evidence that developers pass on some of the impact fees to the new residents in the form of higher sale prices. See Rosenberg, *supra* note 3, at 211–14 (listing various empirical studies analyzing the economic effects of development impact fees).

78. See Epstein, *supra* note 77, at 14.

79. See *id.* (explaining that the political process behind property regulations allows existing residents to become “a group of privileged incumbents who can raise the value of their own homes at the expense of [outsiders] who are forced to find very marginal accommodations at extremely high rents”); see also Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 177 (2001) (describing how controls on growth benefit existing homeowners by limiting the supply of housing and passing the costs to new arrivals). But see Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE: J. POL’Y DEV. & RES., no. 1, 2005, at 139, 146–47 (observing that there is little empirical evidence that impact fees exclude the poor or minorities). There is, of course, a countervailing force encouraging local governments to allow development: new development brings more economic activity and jobs and accompanying increases in tax revenue. See *Kelo v. City of New London*, 843 A.2d 500, 520 (Conn. 2004) (determining that urban redevelopment plans have a public purpose because of the increased taxes and jobs that result from economic development), *aff’d*, 545 U.S. 469 (2005).

80. 483 U.S. 825 (1987).

have a “nexus” to its stated objective.<sup>81</sup> In that case, the Nollans, homeowners owning a portion of beachfront property, sought a building permit from the California Coastal Commission (“CCM”) to expand their home.<sup>82</sup> In response, the CCM conditioned approval of the permit on the Nollans’ granting an easement across a portion of the beach running along the back of their property so that the public could walk freely along the beach.<sup>83</sup> The CCM claimed that the easement would compensate the public for the loss of “visual access” to the beach that the Nollans’ proposed expansion would cause.<sup>84</sup>

Writing for the majority, Justice Scalia noted that the easement had no rational connection to the purposes the CCM said it would serve.<sup>85</sup> An easement across the beach would only allow those patrons already walking along the beach to continue walking along the portion that crossed the Nollans’ property.<sup>86</sup> Such an easement would not improve these patrons’ visual access to the beach because they were already on the beach.<sup>87</sup> Thus, the exaction imposed by the CCM had no “nexus” to any purported burden the housing improvements would cause.<sup>88</sup> The Court explicitly reserved judgment on the precise degree of nexus required because, in *Nollan*, absolutely no nexus was present.<sup>89</sup>

The answer to the degree of nexus question came in *Dolan v. City of Tigard*,<sup>90</sup> in which the Court determined that an exaction must have a “rough proportionality” in degree to the burden it mitigated.<sup>91</sup> In that case, the City of Tigard, Oregon, conditioned a building permit for the expansion of a hardware store on the owner’s granting an easement for a greenway<sup>92</sup> and bike path along the adjacent floodplain of a creek.<sup>93</sup> The City Planning Commission explained that the greenway would mitigate the damage of stormwater runoff from the increase in impervious surface area and that the bike path would reduce the increase in traffic that the development would

---

81. *See id.* at 837–38.

82. *Id.* at 827–28.

83. *Id.* at 828.

84. *Id.* at 838.

85. *Id.* at 838–39.

86. *Id.* at 838.

87. *Id.*

88. *Id.* at 837.

89. *Id.* at 838.

90. 512 U.S. 374 (1994).

91. *Id.* at 386, 391.

92. A greenway is a strip of land preserved for recreational use or environmental preservation. *Greenway Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/greenway> (last visited Feb. 1, 2014).

93. *Dolan*, 512 U.S. at 379–80.

cause by providing people with a greater ability to ride their bicycles to the store.<sup>94</sup> The Court held that while the obligations the city imposed on the land owner, Dolan, had a nexus to the burdens her development would cause to the community, the city had not provided sufficient data to demonstrate that the exaction was roughly proportional in degree to the burden it addressed.<sup>95</sup>

*b. Unconstitutional conditions*

The Court in *Dolan* grounded the nexus and rough proportionality tests on the doctrine of unconstitutional conditions.<sup>96</sup> Under this doctrine, the “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”<sup>97</sup> Prior to the New Deal, the doctrine was used to protect economic liberties, though its primary application post-1930s has been in the First Amendment context.<sup>98</sup> For example, a public college cannot decline to renew a professor’s contract (a type of government benefit) on the condition that she stop criticizing the college’s administration, which is her right under the First Amendment’s protection of speech.<sup>99</sup> Even if the college has no obligation to renew the contract in the first place, it cannot condition renewal on the surrender of her First Amendment rights.<sup>100</sup>

In the exactions context, the unconstitutional conditions doctrine means that a government cannot condition a building permit (a benefit) on the landowner’s surrender of constitutional rights.<sup>101</sup> The constitutional rights surrendered in *Nollan* and

---

94. *Id.* at 381–82.

95. *Id.* at 394–96.

96. *See id.* at 385.

97. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

98. *See id.* at 1416 (“Untouched by the falling rubble as the New Deal leveled and rebuilt the substantive priorities of constitutional liberty, the doctrine of unconstitutional conditions reemerged under the Warren Court to protect personal liberties of speech, association, religion, and privacy just as it once had protected the economic liberties of foreign corporations and private truckers.”); *see also Dolan*, 512 U.S. at 407 n.12 (Stevens, J., dissenting) (arguing that this doctrine, most frequently arising in First Amendment cases, is not as “well settled” as the majority makes it seem because it has been applied inconsistently throughout its history).

99. *Cf. Perry v. Sindermann*, 408 U.S. 593, 595–97 (1972) (applying the doctrine of unconstitutional conditions where a college declined to renew the contract of a professor who was an outspoken critic of the college).

100. *See id.*, at 596–97 (explaining that the doctrine precludes the state from achieving indirectly that which it could not achieve directly by conditioning a benefit on the forfeiture of a constitutional right).

101. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594, 2598–99 (2013) (providing, as an example how the doctrine applies in the



*Dolan* were the landowners' Fifth Amendment rights to just compensation for takings.<sup>102</sup>

Discovering how the landowners were required to give up this right can be somewhat nuanced but is crucial for understanding how the Supreme Court has reshaped takings law. To determine whether the government has asked landowners to surrender their right to just compensation, courts must first decide whether a Fifth Amendment taking would have occurred if the government, instead of asking for the thing it wanted (such as an easement or money) in exchange for permit approval, simply took the thing outright by force, regardless of whether the government granted (or the landowner sought) a permit in return.<sup>103</sup> In *Nollan* and *Dolan*, both permit conditions were for easements.<sup>104</sup> Forcing a property owner to provide an easement is a per se taking—an action for which the government would need to exercise eminent domain<sup>105</sup> to condemn the easement and compensate the property owner for its value.<sup>106</sup> Thus, conditioning building permit approval on the surrender of an easement without paying just compensation is essentially conditioning a government benefit on the surrender of a constitutional right.<sup>107</sup> The government would be acquiring for free that for which it is ordinarily constitutionally obligated to pay.<sup>108</sup>

Thus, from *Nolan* and *Dolan*, the Court reasoned that conditioning permit approval on the surrender of an easement violates the doctrine of unconstitutional conditions. Rather than banning the practice altogether or requiring the local government to pay the value of the easement, the Court permitted such exactions but

---

exactions context, a state's "conditioning a building permit on the owner's deeding over a public right-of-way" in order to "pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation").

102. *Id.* at 2594.

103. *See id.* at 2598–99.

104. *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987).

105. "Eminent domain" is "[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking." BLACK'S LAW DICTIONARY 601 (9th ed. 2009). The Supreme Court has characterized the Takings Clause as "a tacit recognition of [this] preexisting power to take private property for public use, rather than a grant of new power." *United States v. Carmack*, 329 U.S. 230, 241–42 (1946).

106. *Dolan*, 512 U.S. at 384.

107. *See id.* at 384–85 (articulating the violated constitutional right as the "right to receive just compensation when property is taken for a public use").

108. *See id.* at 384–85 (detailing the requirement for the government to pay for land it acquires).

subjected them to the nexus and rough proportionality tests.<sup>109</sup> Essentially, the exactions must have a nexus and be roughly proportional to the degree of harm the exaction would mitigate from the development to pass constitutional muster.<sup>110</sup>

*c. Monetary exactions: Koontz v. St. Johns River Water Management District*

*Dolan* left unanswered a significant question for local governments: should courts apply the nexus and rough proportionality tests arising from *Nollan* and *Dolan* to impact fees? The exactions in *Nollan* and *Dolan* were possessory dedications of real property interests—in those cases easements—not exactions of money.<sup>111</sup> The Court finally

---

109. This decision was not arbitrary. The nexus and rough proportionality tests, at least theoretically, ensure that the exactions provide in-kind substitutes for just compensation: To satisfy these tests, an exaction must (1) impose (roughly) no more of a burden on the landowner than necessary to offset the burdens the development imposes on the community; (2) confer special benefits on the landowner that are (roughly) equal to or greater than the value of the exaction; or (3) both. If it does these things, the landowner essentially *is* receiving just compensation. In the first situation, the exaction merely makes the landowner compensate for externalized costs that, if not prevented, would be justly owed to his or her neighbors. In the second, the landowner receives “in-kind” benefits roughly equaling the monetary value of the exacted property. See Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 477, 489–90 (1995) (acknowledging that the nexus and rough proportionality tests help ensure regulations deliver benefits that at least partially compensate affected landowners but arguing that, as a practical matter, the benefits will generally not equal full just compensation).

110. See *Dolan*, 512 U.S. at 386, 391.

111. Rosenberg, *supra* note 3, at 256. State courts were significantly divided over this question. Compare *Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (en banc) (distinguishing *Dolan* and holding that the nexus and rough proportionality tests are inapplicable to monetary exactions), *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (same), and *Waters Landing Ltd. P’ship v. Montgomery Cnty.*, 650 A.2d 712, 724 (Md. 1994) (same), with *Ehrlich v. City of Culver City*, 911 P.2d 429, 433 (Cal. 1996) (holding that monetary exactions are subject to the nexus and rough proportionality tests), and *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 635–40 (Tex. 2004) (same).

The *Dolan* Court also left a second, equally important question unaddressed. In both *Nollan* and *Dolan*, the exactions were ad hoc adjudicative decisions made in the context of individual negotiations with landowners. Would the nexus and rough proportionality tests also apply to exactions made under a broadly applicable legislative plan? In *Ehrlich v. City of Culver City*, the California Supreme Court addressed both questions at once when it held that individually negotiated monetary exactions were subject to the nexus and rough proportionality tests, while legislatively imposed fees were subject to a less stringent “reasonable relationship” test. *Ehrlich*, 911 P.2d at 433.

With the exception of Texas, states have spoken with a much more uniform voice on the second question. Compare *Home Builders Ass’n of Cent. Ariz.*, 930 P.2d at 1000 (holding that the tests are inapplicable to legislatively enacted exactions), *San Remo Hotel L.P. v. City & Cnty. of S.F.*, 41 P.3d 87, 105 (Cal. 2002) (same), *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695–96 (Colo. 2001) (en banc) (same),

confronted this question in June 2013 in *Koontz v. St. Johns River Water Management District*.

*i. Background*

In 1994, Coy Koontz sought permission to develop 3.7 of his 14.9 acres of property near Orlando, Florida.<sup>112</sup> Because most of his property was technically classified as wetlands, Koontz had to apply to the St. Johns River Water Management District (“the District”) for special permits, even though the section he wanted to develop had virtually no standing water or diverse wildlife to protect.<sup>113</sup> Koontz approached the District offering to deed eleven acres of the property to the state as a conservation easement, which would have foreclosed any future development of those acres.<sup>114</sup>

The District rejected his offer and suggested other concessions he might provide in return for the permit.<sup>115</sup> Specifically, it said he could either limit his development to one acre, add certain on-site improvements to mitigate stormwater runoff, and deed a conservation easement for the remaining 13.9 acres; or he could develop the full 3.7 acres and pay approximately \$10,000<sup>116</sup> for improvements to fifty acres of District-owned wetlands several miles away.<sup>117</sup>

---

Greater Atlanta Homebuilders Ass’n v. DeKalb Cnty., 588 S.E.2d 694, 697 (Ga. 2003) (same), *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (same), and *Homebuilders Ass’n of Metro. Portland v. Tualatin Hills Park & Rec. Dist.*, 62 P.3d 404, 409 (Or. Ct. App. 2003) (same), with *Town of Flower Mound*, 135 S.W.3d at 640–41 (declining to limit the tests to legislatively enacted exactions but acknowledging that, to the court’s knowledge, every other state high court disagrees). Courts in the former category have granted more deference to legislatively imposed fees because they are typically applied more uniformly, which leaves less room for extortion, and because they are more subject to the democratic process. See *San Remo Hotel*, 41 P.3d at 105; *Tualatin Hills*, 62 P.3d at 409–10.

112. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591–92 (2013).

113. *Id.* at 2592–93 (explaining that the only standing water in the section of property that Koontz planned to develop had collected in tire ruts along an unpaved road). This condition was caused by development around Koontz’s property, including development undertaken by the government itself. See *Petition for Writ of Certiorari* at 3–4, *Koontz*, 133 S. Ct. 2586 (No. 11-1447).

114. *Koontz*, 133 S. Ct. at 2592–93.

115. *Id.* at 2593.

116. See *Petitioner/Appellant’s Initial Brief on the Merits* at 39, *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011) (No. SC09-713) (referencing an appraisal that devalued the property at this amount based on the mitigation requirements). Koontz supplied another expert who estimated that the work would have cost between \$90,000 and \$150,000. *Petition for Writ of Certiorari*, *supra* note 113, at 4.

117. *Koontz*, 133 S. Ct. at 2593. Thus, as Justice Alito explained, the actual exaction was the requirement to pay cash (to improve the District’s land) in return for the right to develop on 2.7 acres, because the District’s first option had already permitted Koontz to build on one of the acres without paying cash. *Id.* at 2598.

Koontz declined both options and filed a lawsuit in which he argued that the conditions the District placed on his permit approval were excessive.<sup>118</sup> The state trial court evaluated the offsite mitigation requirement under the nexus and rough proportionality tests and found that the conditions failed to meet either.<sup>119</sup> On appeal, the Florida Supreme Court reversed the decision, holding, in relevant part, that the nexus and rough proportionality tests should only apply to exactions of real property interests, not to monetary exactions.<sup>120</sup> The U.S. Supreme Court granted certiorari to resolve this question.<sup>121</sup>

*ii. Reasoning: Cash as a per se taking*

Just as it did in previous exactions cases, the Court in *Koontz* invoked the unconstitutional conditions doctrine.<sup>122</sup> Following the reasoning discussed above,<sup>123</sup> Justice Alito, writing for the majority, observed that an exaction only qualifies as an unconstitutional condition if a simple outright seizure of the thing requested (in this case money) would constitute a Fifth Amendment taking.<sup>124</sup> Thus, he analyzed whether the government would have committed a taking if

118. *Id.* at 2593. The dissenting Justices in *Koontz* based their opinion partly on a different understanding of the facts. According to the dissent, the District merely offered suggestions in the course of negotiating with Koontz, but these suggestions never materialized into an actual condition. *See id.* at 2610–11 (Kagan, J., dissenting). From the dissent’s perspective, Koontz simply walked out and sued before any final demand was given. *Id.* at 2611. The dissent and several commentators have observed that this feature may mean that *Koontz* will have a severe chilling effect on local governments’ willingness to negotiate at all with developers lest their offers be construed as final conditions over which property owners sue them. *See id.* (“If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, [a] lawyer [representing a local government] can give but one recommendation: Deny the permits, without giving [the applicant] any advice—even if he asks for guidance.”); *see, e.g.*, John D. Echeverria, Op-Ed., *A Legal Blow to Sustainable Development*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html> (siding with the dissent and arguing that local officials will avoid all discussion related to permit conditions).

119. *Koontz*, 133 S. Ct. at 2593; *see Koontz v. St. Johns River Water Mgmt. Dist.*, No. CIO 94-5673, 2002 WL 34724739 (Fla. Cir. Ct. 2002).

120. *Koontz*, 133 S. Ct. at 2593–94; *see Koontz*, 77 So. 3d at 1229–30.

121. *See Koontz*, 133 S. Ct. at 2593–94; Petition for Writ of Certiorari, *supra* note 113, at i–ii. The Court also addressed another significant question that is not central to the purpose of this Note: whether the fact that Koontz never accepted the District’s offer, thus never submitting to any taking of his property, meant that he could not bring a claim under *Nollan* and *Dolan*. *See Koontz*, 133 S. Ct. at 2595–96. The Court decided unanimously that he could. *See id.* (holding that landowners do not have to accept an extortionate exaction to challenge it as unconstitutional); *see also id.* at 2603 (Kagan, J., dissenting) (agreeing with the majority with respect to this issue).

122. *Koontz*, 133 S. Ct. at 2594, 2598–99.

123. *See supra* Part I.B.2.b (explaining the application of the unconstitutional conditions doctrine).

124. *Koontz*, 133 S. Ct. at 2598–99;

it simply forced Koontz to pay instead of making payment a condition for permit approval.<sup>125</sup> As demonstrated earlier, previous cases have only considered such monetary obligations to be takings when they “operate[d] upon or alter[ed] an identified property interest” or were “applicable to or measured by a property interest,” such as interest derived from a specifically identified bank account.<sup>126</sup>

The “fulcrum” in *Koontz*, Justice Alito explained, “turn[ed] on . . . the direct link between the government’s demand and a specific parcel of real property.”<sup>127</sup> He explained that, unlike in *Eastern Enterprises*, the demand for money “*did* ‘operate upon . . . an identified property interest’ by directing the owner of a particular piece of property to make a monetary payment” such that “the monetary obligation burdened petitioner’s ownership of a specific parcel of land.”<sup>128</sup> The link between the “demand and a specific parcel of real property” invoked use of the *Nollan* and *Dolan* tests to prevent the government from “diminishing without justification the value of the property.”<sup>129</sup>

Justice Alito’s reasoning perplexed Justice Kagan, who could not see how, if the money had been demanded outright—that is, not as a permit condition—it would have been in any way “linked” to a specific parcel of land sufficient to qualify as a Fifth Amendment taking.<sup>130</sup> According to her dissent, the link could not be that the money opened up the opportunity to build on the land; such a determination would entail viewing the demand within the permit context instead of as a simple outright requirement.<sup>131</sup> The unconstitutional conditions doctrine required the Court to ask whether the demand for money would be a Fifth Amendment taking if made by itself (not in exchange for a government benefit), which, under previous cases, could only be established if it was somehow attached to a specific parcel of property.<sup>132</sup> Justice Kagan explained that Koontz could have paid the money out of any source he chose; he did not need to dispose of a specific real property interest or derive money out of any other identified property source to make the

---

125. *Id.* at 2598–99.

126. *E. Enters. v. Apfel*, 524 U.S. 498, 540–41 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *see supra* notes 45–55 and accompanying text (discussing the cases in which the Court has held that a taking occurred).

127. *Koontz*, 133 S. Ct. at 2600.

128. *Id.* at 2599 (emphasis added) (quoting *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part)).

129. *Id.* at 2600.

130. *See id.* at 2605–07 (Kagan, J., dissenting).

131. *Id.* at 2606–07 & n.1.

132. *Id.*

payment.<sup>133</sup> Thus, the requirement to pay would have simply been a general monetary obligation, falling squarely outside the limits Justice Kennedy imposed in *Eastern Enterprises*.<sup>134</sup> Therefore, according to Justice Kagan, no underlying taking existed on which to base the doctrine of unconstitutional conditions.<sup>135</sup>

In response, Justice Alito attempted to clarify by explaining that “[t]he unconstitutional conditions analysis requires us to set aside petitioner’s *permit application*, not his ownership of a particular parcel of real property.”<sup>136</sup> Justice Kagan, in turn, called this sentence “mysterious”<sup>137</sup> and reiterated that the unconstitutional conditions doctrine only applies “if imposing a condition directly—*i.e.*, independent of an exchange for a government benefit—would violate the Constitution,” and *Eastern Enterprises* held that it would not.<sup>138</sup>

Justice Kagan also observed how conceptually difficult it would be to distinguish taxation from the characterization of takings Justice Alito was advancing.<sup>139</sup> A property tax, after all, is a monetary obligation placed on a specific parcel of property—the very thing Justice Alito considered to be a taking.<sup>140</sup> Justice Alito dismissed this argument by observing that taxes had been categorically excluded from takings scrutiny for some time and that courts have had little difficulty distinguishing between taxes and takings case-by-case.<sup>141</sup>

Justice Kagan is not alone in her mystification over Justice Alito’s reasoning. Since *Koontz*, scholars seem to interpret Justice Alito’s opinion in the same way—viewing the building permit as the link between the money and the land.<sup>142</sup> As demonstrated by Justice

---

133. *Id.* at 2605–06.

134. *Id.*

135. *Id.* at 2604–07.

136. *Id.* at 2600 n.2 (majority opinion).

137. Understandably, in this author’s opinion.

138. *Koontz*, 133 S. Ct. at 2607 n.1 (Kagan, J., dissenting).

139. *Id.* at 2607–08.

140. *Id.* (“The question . . . ‘bristles with conceptual difficulties.’ And practical ones, too: How to separate orders to pay money from . . . well, orders to pay money, so that a locality knows what it can (and cannot) do.” (citation omitted) (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting))).

141. *Id.* at 2601–02 & n.3 (majority opinion); *see also infra* notes 177–82 and accompanying text (describing how courts have made this distinction).

142. *See, e.g.*, Edurardo Peñalver, *A Few More Thoughts About Koontz*, PRAWFSBLAWG (June 26, 2013, 4:39 PM), <http://prawnsblawg.blogspot.com/prawnsblawg/2013/06/takings-and-taxes-after-koontz.html> (interpreting the money’s role in acquiring the permit as its link to the land and noting that Alito’s opinion brings the permit application, rather than the demand, to the forefront); Tejinder Singh, *Opinion Recap: Broadening Property Owners’ Right To Sue*, SCOTUSBLOG (July 1, 2013, 2:53 PM), <http://www.scotusblog.com/2013/07/opinion-recap-broadening-property-owners-right-to-sue> (claiming that the link between the demand and the property arises out of the permitting process).

Kagan's dissent, however, this cannot be the case; the link to the land must be something else to make the doctrine of unconstitutional conditions applicable.<sup>143</sup> The next section argues that Justice Alito's (admittedly opaque) wording suggests a different understanding—one that both explains why monetary exactions violate the doctrine of unconstitutional conditions and creates a new per se takings rule that dramatically advances the Takings Clause as a tool for challenging economic regulations.

## II. DEMYSTIFYING *KOONTZ* AND DERIVING THE NEW PER SE RULE

The link Justice Alito saw between *Koontz*'s property and the monetary obligation had nothing to do with the permitting process. Instead, the link simply had to do with the obligation's attachment to the owner of a specific parcel of property.

To understand this reasoning, assume the hypothetical required by the unconstitutional conditions test is true: the District approaches *Koontz* and requires him to pay money *simply because he owns that specific parcel of property*, not because he seeks a building permit and not under any taxation authority. In Justice Alito's view, the words "because he owns that specific parcel of property" would be the only link that is necessary to establish the connection to the land.<sup>144</sup> In other words, the financial obligation is a taking simply because it is made *in reference to* a specific piece of property, burdening whomever owns the property, and, therefore, burdening the property itself.

This is a looser connection than the Court has previously accepted in "regulatory-monetary takings" cases like *Eastern Enterprises*. Previously, the surrender of money corresponded to the surrender of an interest or right in a piece of property.<sup>145</sup> In this hypothetical, however, the monetary obligation merely places a burden on whoever owns the property but does not require the surrender of any identifiable interest or right in the property.<sup>146</sup> Additionally, in

---

143. *Koontz*, 133 S. Ct. at 2607 & n.1, 2611 (Kagan, J., dissenting) (lambasting the majority's application of the unconstitutional conditions doctrine to "a run-of-the-mill denial of a land-use permit").

144. *See id.* at 2599–2600 (majority opinion) (explaining that the demand would constitute a taking because it would be "directing the owner of a particular piece of property to make a monetary payment").

145. *See E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (explaining that in previous monetary takings cases, "a specific property right or interest had been at stake," such as air rights for high rises, the right to mine coal, and liens on real property).

146. *See Koontz*, 133 S. Ct. at 2605–06 (Kagan, J., dissenting) (noting that the District did not require *Koontz* to surrender a real property interest). *But cf. id.* at 2600 (majority opinion) (explaining that the obligation does diminish "the *value* of the property" (emphasis added)).

previous cases, the demand for money identified particular assets as the *source* from which the money had to be derived.<sup>147</sup> Here, the landowner could choose whether to satisfy the demand by using the specifically named assets or some other desired source.<sup>148</sup>

These differences from previous “regulatory-monetary takings” cases demonstrate that the Supreme Court has implicitly accepted a new *per se* takings rule: *a government-imposed monetary obligation attached to specifically identified assets is a per se taking, unless it is a tax.*<sup>149</sup> In other words, any time the government requires the owner of property X to pay Y, and Y is not a tax, Y is a taking requiring just compensation. The Court appears to have created this rule *sub silentio* simply by “begging the question,” that is, assuming the rule’s existence and relying on it to derive its holding in *Koontz*.

#### A. *The Rationale for the New Per Se Rule*

This new *per se* rule can first be found under a careful reading of Justice Alito’s words in *Koontz*. Justice Alito explained that the hypothetical direct demand for money would satisfy the requirements of *Eastern Enterprises* “by directing the owner of a particular piece of property to make a monetary payment.”<sup>150</sup> This word choice suggests that the key feature of this particular monetary obligation was that it attached to a piece of land, regardless of who owned it. Justice Alito also explained that the Court’s key concern was that the monetary obligation would “diminish[] . . . the value of the property.”<sup>151</sup> He thereby highlighted how the monetary obligation attached to the property and therefore burdened the property even if it passed to a new owner.<sup>152</sup> Justice Alito also viewed this kind of monetary obligation as a *per se* taking: “when the government commands the relinquishment of funds linked to a specific, identifiable property

---

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

148. See *id.* at 2606–07 (distinguishing the situation in *Koontz* from previous cases in which a taking occurred because *Koontz* was free to use “whatever source he chose—a checking account, shares of stock, a wealthy uncle”—to satisfy the required payment).

149. This rule is one degree removed from Professor Thomas Merrill’s proposed distinction between taxes and takings, which states that only seizures of “discrete asset[s]” are Fifth Amendment Takings. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 974 (2000). This appears to be the position propounded in *Eastern Enterprises*, and it is further supported after *Koontz*. *Koontz* seems to leap even further ahead—not only are seizures of discrete assets *per se* takings, but monetary obligations attached to discrete assets are as well.

150. *Koontz*, 133 S. Ct. at 2599 (emphasis added).

151. *Id.* at 2600.

152. *Koontz* presented an appraisal to show that the obligation had in fact reduced the value of his property by \$10,000. Petitioner/Appellant’s Initial Brief on the Merits, *supra* note 116, at 39.



interest such as a bank account or parcel of real property, a ‘*per se* [takings] approach’ is the proper mode of analysis under the Court’s precedent.”<sup>153</sup>

Acknowledging this rule also demystifies Justice Alito’s response to Justice Kagan that “[t]he unconstitutional conditions analysis requires us to set aside petitioner’s *permit application*, not his ownership of a particular parcel of real property.”<sup>154</sup> Clearly, Justice Alito’s focus was on the fact that the monetary obligation was imposed merely because Koontz owned the specific property that he did; not because he applied for a building permit. The new *per se* rule applied, therefore, because the financial obligation was made with reference to the owner of a particular, identified piece of land and it was not a tax.

Once this *per se* rule is acknowledged, holding that monetary exactions are subject to the nexus and rough proportionality tests follows by way of the doctrine of unconstitutional conditions. Since a direct obligation to pay the money would be a taking entitling Koontz to just compensation, conditioning permit approval on Koontz’s surrender of his right to just compensation amounts to conditioning a government benefit on the surrender of a constitutional right.<sup>155</sup> Under *Dolan*, exactions that impose such unconstitutional conditions must have a nexus and be roughly proportional to the ends they seek to accomplish.<sup>156</sup>

Second, Chief Justice Roberts’ questions at oral argument suggest he was thinking about the case in a similar way to the reading proposed in this Note. To describe what an outright demand for money in Koontz’s case would have looked like, Chief Justice Roberts analogized the situation to a requirement that an owner of a particular piece of property pay \$1 million to build a football stadium.<sup>157</sup> The property owner, he stated, should not “have to pay for the football stadium[] simply because he owns property.”<sup>158</sup> The demand would be linked to a discrete asset because, he explained, the government would in effect be saying, “you are the

---

153. *Koontz*, 133 S. Ct. at 2600 (alteration in original) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)).

154. *Id.* at 2600 n.2.

155. *See id.* at 2598–99 (determining that the exaction was an unconstitutional condition).

156. *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994).

157. Transcript of Oral Argument at 31–32, 36–37, 49; *Koontz*, 133 S. Ct. 2586 (No. 11-1447), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-1447.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1447.pdf).

158. *Id.* at 37.

owner of *this property*, and if you want to develop it, you've got to build a football stadium."<sup>159</sup>

Third, even though this reading of *Koontz* expands the Court's previous holdings on monetary takings, it is not inconsistent with those holdings. The monetary obligation in *Koontz* satisfied Justice Kennedy's test in *Eastern Enterprises* because it "operate[d] upon . . . an identified property interest" and "encumber[ed] an estate in land," in the sense that it reduced the property's value.<sup>160</sup> This application of Justice Kennedy's words was apparently acceptable enough to satisfy Justice Kennedy himself, as he joined the majority opinion in *Koontz*.<sup>161</sup> It is also worth noting that *Eastern Enterprises* already had four Justices willing to embrace the idea that the Takings Clause applied to general demands for money that lacked any connection to specifically identified assets.<sup>162</sup> Thus, the demand in *Koontz* really only needed just enough of a connection to *Koontz*'s land to attract one additional vote.<sup>163</sup>

The Court's prior holdings do not confine this new per se rule only to real property; the rule could also apply to monetary obligations attached to any specifically identified asset. The Court has found takings in confiscations of trade secrets,<sup>164</sup> liens on ships,<sup>165</sup> and bank accounts<sup>166</sup> as

---

159. *Id.* (emphasis added).

160. *E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment but dissenting in part); see *Koontz*, 133 S. Ct. at 2600 (noting the diminished value of the property at issue).

161. See *Koontz*, 133 S. Ct. at 2591.

162. See *E. Enters.*, 524 U.S. at 503, 522–23 (plurality opinion) (holding, in an opinion joined by Justices O'Connor, Rehnquist, Scalia, and Thomas, that a general financial obligation could be a taking).

163. Some Justices still appear to cling to the idea that demanding money, disconnected from any discrete property interest, should qualify as a taking, even though that position did not prevail in *Eastern Enterprises*. At oral argument, Justice Scalia repeatedly interrogated the counsel for the District about why cash could not be considered a taking. See Transcript of Oral Argument, *supra* note 157, at 34–35 ("As I understand your position, cash is magical, right? The . . . government can come . . . into my house, take all of the cash that's there, and that is not the basis for a takings claim, right? Because cash is . . . not a taking. Does that make any sense?").

164. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984) (determining that "health, safety, and environmental data" submitted to a federal agency contained protected property rights).

165. See *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (holding that the government's destruction of the value of liens "had every possible element of a Fifth Amendment 'taking'").

166. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 220, 234–35 (2003) (finding that the seizure of interest earned from lawyers' trust accounts constitutes a taking because that interest was the property of the principal's owner); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65 (1980) (holding that a county's keeping the interest earned on interpleader funds required to be temporarily deposited with the court constituted a taking).

long as they are specifically identified.<sup>167</sup> Thus, if it is a taking to seize these types of properties, then seizing money by reference to similar discrete assets would also be a taking under *Koontz*.

### B. Distinguishing Taxes

The per se rule proposed in the previous section leaves an exception for fees categorized as taxes. This exception is necessitated by Justice Alito's emphatic reaffirmation of the principle that the Takings Clause does not apply to taxes and his assertion that the distinction has not been difficult to make in practice.<sup>168</sup>

Determining just what a "tax" is has proven to be a contentious issue in recent years. *National Federation of Independent Business v. Sebelius*,<sup>169</sup> in which the Court decided the constitutionality of the Affordable Care Act, dispelled the notion that the distinction could be based on whether the legislature calls it a tax or something else<sup>170</sup>—a position that Justice Alito and three of the other Justices in the *Koontz* majority strongly opposed in *Sebelius*.<sup>171</sup> *Sebelius* therefore prevents courts from determining whether a monetary obligation is subject to a takings analysis or is exempt as a tax by simply relying on whether the legislature called the obligation a tax.

However, while *Sebelius* arguably worsens the already existing conceptual difficulties inherent in distinguishing between taxes and regulatory fees,<sup>172</sup> certain practical considerations regarding the nature of taxation may render finding a conceptually satisfying distinction largely unnecessary. First, local governments will rarely, if ever, cloak a regulatory fee in the guise of taxation to avoid the *Nollan* and *Dolan* tests. State legislatures regulate local government taxation much more strictly than regulatory fees.<sup>173</sup> For example, states often prohibit local governments from imposing new taxes except through

---

167. *E. Enters.*, 524 U.S. at 541–42 (Kennedy, J., concurring in the judgment and dissenting in part).

168. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600–01 (2013) (finding it "beyond dispute that [t]axes . . . are not 'takings'" and therefore holding that the case did not negatively affect local governments' abilities to impose taxes or user fees that could impose financial burdens on property owners (quoting *Brown*, 538 U.S. at 243 n.2 (Scalia, J., dissenting))).

169. 132 S. Ct. 2566 (2012).

170. See *id.* at 2594 (holding that the Affordable Care Act's exaction imposed on non-purchasers of health insurance was a "tax" despite being called a "penalty" in the law).

171. See *id.* at 2651–55 (Scalia, J., dissenting) (arguing, in an opinion joined by Justices Kennedy, Thomas, and Alito, that the provision mandating a "penalty" should be interpreted on its face as a penalty and not a tax).

172. See *supra* Part I.A.2 (observing scholars' and courts' inability to establish a consistent normative framework for distinguishing taxes from takings).

173. Rosenberg, *supra* note 3, at 218–19.

voter approval by super majority but allow them to implement impact fees through administrative action alone.<sup>174</sup> Accordingly, local governments often try to make the exact opposite argument of the government in *Sebelius*—they try to convince state courts that a fee is *not* a tax.<sup>175</sup> *Koontz*, therefore, actually complements these state-level checks on local government revenue practices by placing limits on regulatory fees that escape categorization as a tax. Furthermore, once a local government successfully argues that a fee is not a tax for the purposes of state law, the government is barred by judicial estoppel from subsequently arguing that it is a tax to avoid the nexus and proportionality requirements of *Nollan* and *Dolan*.<sup>176</sup>

Second, state courts and scholars have identified certain methods for distinguishing taxes from regulatory fees that work reasonably well within individual jurisdictions, even if they are not consistent with the rules in other jurisdictions. Generally, states tend to look to the projects that the financial obligations are intended to fund to determine whether the obligations should be defined as taxes or fees.<sup>177</sup> Charges are more likely to be taxes if they confer benefits widely on the public,<sup>178</sup> but are more likely to be regulatory fees if they confer benefits to, or mitigate harms from, an individual or a limited group of people.<sup>179</sup> Scholars, on the other hand, tend to

---

174. *Id.* at 249.

175. *See id.* at 249–52 (describing how litigants often challenge fees by asserting that they are ultra vires taxes).

176. *See generally* *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (explaining that judicial estoppel prevents parties from maintaining an argument after succeeding with a contradictory argument at prior phase of a proceeding).

177. *See* Rosenberg, *supra* note 3, at 249–52 (providing examples of cases that classified municipal impact fees as taxes or regulatory fees).

178. Defining taxes in this way directly counters Epstein's position that taxes should fund services that benefit taxpayers in proportion to their individual contributions. *See supra* notes 12–15, 21 and accompanying text (discussing Epstein's argument). Nevertheless, to counter Justice Kagan's dissent in *Koontz*, Epstein argues that taxes can be distinguished in this way for practical purposes. *See* Richard Epstein, *Koontz v. St. Johns River Water Management District: Of Issues Resolved—and Shoved Under the Table*, POINTOFLAW.COM (June 26, 2013, 1:07 PM), <http://www.pointoflaw.com/archives/2013/06/koontz-v-st-johns-river-water-management-district-of-issues-resolved-and-shoved-under-the-table.php>.

179. *See, e.g.,* *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 902 P.2d 1347, 1350 (Ariz. Ct. App. 1995) (signaling that regulatory fees should be reasonably related to the needs of a new development and should confer a benefit on the land they are imposed upon), *aff'd en banc*, 930 P.2d 993 (Ariz. 1997); *Bldg. Indus. Ass'n of Cleveland & Suburban Cntys. v. City of Westlake*, 660 N.E.2d 501, 504 (Ohio Ct. App. 1995) (differentiating a fee from a tax on real property and specifying that if the measure is construed as a fee, it may not exceed the cost of providing the service in question); *Trimen Dev. Co. v. King Cnty.*, 877 P.2d 187, 192 (Wash. 1994) (*en banc*) (explaining that a charge that helped fund the provision of open space and recreation was a fee and not a tax because taxes are intended to raise general revenue).

maintain that the distinction rests on how the charges are applied. For example, they claim that charges are more likely to be taxes if they originate from a legislature, extract money from a broad class of people, or are applied in a rational or uniform manner.<sup>180</sup> They are more likely to be regulatory fees if they originate from administrative discretion, extract money from an individual or a limited class of people, or are applied inconsistently.<sup>181</sup>

Courts are free to draw from any of these principals to fashion a distinction applicable in their jurisdictions. As Justice Kagan observed in *Koontz*, courts have not all agreed on the same rule,<sup>182</sup> but when it comes to defining local government fees, perhaps a fifty-state solution is unnecessary.

#### CONCLUSION: THE IMPACT OF *KOONTZ*

At oral argument in *Koontz*, Deputy Solicitor General Edwin Kneedler, who argued as amicus curiae in favor of St. Johns River Water Management District, had an illuminating exchange with Chief Justice Roberts on the potential reach of the case.<sup>183</sup> Kneedler explained that if monetary obligations imposed on property owners were subject to a takings analysis, a wide range of commonly accepted regulations would be swept in along with them.<sup>184</sup> For example, coal-fired power plants are always required to build scrubbers to mitigate the air pollution they contribute, but imposing this requirement as a condition for a building permit would amount to a monetary exaction.<sup>185</sup> Chief Justice Roberts quickly dismissed this concern by

---

180. See Peñalver, *supra* note 38, at 2219–27 (elaborating on various scholarly attempts to distinguish taxes from regulatory fees, such as the degree to which the charges originate from the political process, single out individual property owners, and allow affected parties to organize and protect their interests); see, e.g., John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1038 (2003) (highlighting that taxes are typically imposed on a broad population).

181. See *supra* note 179. For this reason, the Supreme Court may side with the consensus of states that do not subject monetary exactions that are legislatively imposed and broadly applicable to *Nollan* and *Dolan* scrutiny. See *supra* note 111 (recognizing the large proportion of states that have adopted this position). Such exactions take on the character of taxes; thus the Court may choose to consider them as such and avoid the difficult work of venturing even further into the limbo between taxes and takings.

182. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2607–08 (2013) (Kagan, J., dissenting) (citing state court decisions that come to opposite conclusions despite nearly identical fees).

183. See Transcript of Oral Argument, *supra* note 157, at 46, 48–49, 52–53.

184. *Id.* at 46–48.

185. *Id.* at 48.

noting that requiring scrubbers would obviously meet the nexus and rough proportionality tests.<sup>186</sup>

However, Chief Justice Roberts's response belies the true impact of *Koontz*. First, even subjecting regulatory exactions like the one Kneedler raised to a nexus and rough proportionality test is a significant step—one that will undoubtedly invalidate several regulations that are much closer to the line than scrubbers on coal plants. Second, Justice Roberts's reply only considers the impact *Koontz* will have when such measures are imposed as conditions for a permit, not when they are demanded by themselves. Because the Court has implicitly recognized that monetary obligations attached to specifically identified pieces of property are per se takings, pollution control regulations imposed directly on power plants—not as a condition for permit approval—might require the government to compensate the power companies.

Pollution control regulations are just one category. Countless regulations are applied directly to the owners of specific parcels of property requiring them to spend money, not to acquire a building permit, but just because of the property they own.<sup>187</sup> *Koontz* therefore, has the power to greatly alter the regulatory state.

But it is also important to understand the limits of *Koontz*. First, the case will not make it impossible for governments to regulate in the public interest.<sup>188</sup> At most, the case will require some regulations to compensate property owners in-kind for the costs they impose.<sup>189</sup> Thus, agencies will need to more carefully analyze the costs and benefits of regulations to justify them. Second, *Koontz* does not eliminate impact fees or any other type of exaction.<sup>190</sup> Rather, it requires impact fees to do no more than accomplish their objective—force developers to internalize the negative externalities of their developments.<sup>191</sup> If local governments adequately demonstrate that the costs imposed on a developer are no greater than what is

---

186. *Id.* at 49.

187. See Brief of the Florida Department of Environmental Protection et al. as Amici Curiae Supporting Appellant at 6–9, *Koontz*, 133 S. Ct. 2586 (No. SC09-713) (noting that several environmental regulations must be site-specific).

188. See *Koontz*, 133 S. Ct. at 2595, 2600–01 (maintaining that state and local governments will still be able to impose property taxes, user fees, and other regulations that place a financial burden on property owners).

189. See generally EPSTEIN, *supra* note 13, at 263–73 (arguing that all regulations should meet this standard).

190. *Koontz*, 133 S. Ct. at 2601.

191. *Id.* at 2595.

required to address the burdens the developer is causing, the costs will withstand judicial scrutiny.<sup>192</sup>

At the very least, *Koontz* helps reduce the inherent hazard of letting the political process influence impact fees.<sup>193</sup> The nexus and rough proportionality tests will place a check on the power of residents to shift too much of the cost of financing public improvements to newcomers who have no ability to vote.<sup>194</sup> Thus, it represents a step toward achieving the ideal the Takings Clause represents—“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.”<sup>195</sup>

---

192. *Id.*

193. *See supra* notes 75–79 and accompanying text (explaining how impact fees enable local governments to achieve political objectives at costs largely borne by people who are not yet residents but would like to be).

194. *See generally* *Philips v. Town of Clifton Park Water Auth.*, 730 N.Y.S.2d 565, 567 (App. Div. 2001) (striking down an impact fee because of the financial abuse it imposed on “newcomers”).

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