existing precedent laid down in *Nollan v. California Coastal Commission*[4] and *Dolan v. City of Tigard*.[5] *Koontz* recognizes the same two basic ideas recognized in *Nollan* and *Dolan*: (1) the government should not be able to use land-use laws and permit applications to coerce landowners into giving the government what it would otherwise have to pay for; and (2) the government may legitimately require landowners to carry their own weight, mitigating their development plans so that landowners do not impose costs on

decision. Rather, *Koontz* will protect property rights while also protecting the community by ensuring that developers bear the full costs of their projects.

II. LAND-USE E

government is merely ensuring that the developers "internalize" the negative externalities of their development.

Some kinds of impacts may be easy to measure. For example, for many decades cities often required developers to dedicate land for public roads, sidewalks, and sewers that would be needed to serve a new development.[10] But the frequency and types of dedications expanded in the latter half of the twentieth century as sprawling growth patterns and municipal deficits caused government entities to increasingly shift costs to individual developers.[11]

The problem is that some externalities (social costs) are difficult to measext

disproportionate to the extent of the harm. Accordingly, it seems logical to construct safeguards against agencies using the permit process as an opportunity for extortion. Indeed, even before the Supreme Court defined a safeguard, numerous cases sprung up in state courts that recognized that some kind of standard limiting impact fees was necessary.[15] Still, judges largely deferred to the government, and landowners increasingly found themselves at the mercy of agencies that abused the permitting process to fund government projects.[16]

Understandably, judges who review land-use exactions may have a difficult time determining whether the exaction is fair since measuring the social costs of a development can be largely subjective. Without clear legal guidelines, it may become an exercise in subjectivity to decide when an exaction goes too far.

B. Nollan *Required Exactions to Be Directly Related to Mitigating the External Costs of Permitted Development*

The United States Supreme Court first dealt with the limits of land-use exactions when it decided *Nollan v. California Coastal Commission*, twenty-five years ago.[17] In that case, Mary and Pat Nollan needed to upgrade their beach bungalow to a two-story house

15. *See, e.g.*, Ayres v. City Council, 207 P.2d 1, 8 (Cal. 1949) (exaction must be "reasonably related" to the impact of proposed development); *see also* Howard Cnty. v. JJM, Inc., 482 A.2d 908, 921 (Md. 1984) (requiring "reasonable nexus between the exaction and the proposed subdivision"); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574, 576 (Fla. Dist. Ct. App. 1983) (citing Hollywood, Inc. v. Broward Cnty, 431 So.2d 606, 614 (Fla. Dist. Ct. App. 1983) (exactions must "offset, but not exceed, reasonable needs sufficiently attributable to the new subdivision residents" and funds exacted must actually go toward offset); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of City of Danbury, 273 A.2d 880,

in order to exercise an option to buy the house.[18] They applied to the Coastal Commission for a permit.[19] The Coastal Commission did not

property—from the mean high-tide line up to the Nollans' seawall—would increase public access to the beach and make up for that loss. The California Court of Appeals agreed. The court determined the larger house would be another "brick in the wall" blocking public enjoyment of the beach, thus the exaction was reasonably related to the need indirectly created by the Nollans' rebuilding project.[28] Though the larger house alone would not create the need for the easement:

> [T]he justification for required dedication is not limited to the needs of or burdens created by the project. Here the Nollans' project has not created the need for access to the tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access.[29]

Even still, the California court held that the relationship was adequate.

The Nollans' case was not heard again until it reached the U.S. Supreme Court. Four Justices agreed with the California court. But a majority of Justices disagreed, holding that a permit condition must have an "essential nexus" to the impact of an applicant's proposed project.[30] An indirect connection to the impact was not enough. The exaction needed to have a close, causal relationship to the actual impact of the project.[31] Or as Justice Blackmun paraphrased in his dissent, the connection must follow "an 'eye for an eye' mentaon 352 0 0 7.56 2[(O)-1.7(la)8.852 0 0

Justice Scalia, writing for the majority, said that the Commission's permit condition could not meet this higher standard since it would not directly ameliorate the alleged harm of a larger house: "[A] requirement that people already on the public beaches be able to walk across the Nollans' property" did not "lower any 'psychological barrier' to using the public beaches," "reduce[ ] any obstacles to viewing the beach created by the new house," or "remedy any additional congestion."[33] Since the connection between the demand and the alleged burden created by the house was so blatantly insufficient, the Commission's demand amounted to "an out-and-out plan of extortion."[34] The Commission was abusing the permitting process to get an easement across the Nollans' property without paying for it.[35]

The Takings Clause of the Federal Constitution provides that the government can take private property for public use, however, it must pay just compensation.[36] In this way, the Takings Clause uniquely "bar[s] 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."[37] Thus, the Commission could require property

governments would resort to granting permits without conditions, at the expense of the community and the environment.[40] Likewise, most courts missed the meaning of *Nollan* and continued to largely defer to the government's permit conditions.[41]

C. Dolan *Required Exactions to Be Roughly Proportional to the External Costs of Development*

The Court revisited land-use exactions in *Dolan v. City of Tigard*.[42] Florence Dolan had sought a permit from the city to expand her business and parking lot. Pursuant to city code,[43] and armed with a twenty-seven page staff report[44] detailing the need for its proposed exactions, the City of Tigard decided that it would approve her permit application only if she dedicated part of the property for a bike trail and for improvement of the storm drainage system.[45] The City justified the attempted exaction according to its understanding of *Nollan*. It explained that the expanded parking lot would increase the amount of impervious surface, which would negatively affect flooding, thus requiring the dedicated greenway for storm

California Coastal Commission, 102 HARV. L. REV. 448 (1988) (recognizing that *Nollan* couldn't be a physical takings case because *Loretto v. Teleprompter Manhattan CATV Corp.*,

impact of the project.[54] In other words, Justice Blackmun's "eye for an eye" characterization in *Nollan* was more accurate than his contemporaries probably realized.

Moreover, the Court said that the government must bear the burden of justifying the exaction,[55] and the City of Tigard had failed to meet that burden. Admittedly, the greenway would help prevent flooding—the risk of which would grow because of the expansion of impervious surface on the property. But the City had failed to show

Nollan itself did not mention the unconstitutional conditions doctrine, though it cited precedent that did.[61]

The unconstitutional conditions doctrine prohibits the government from requiring an individual to give up a constitutionally protected right as the condition of exercising another constitutional right or receiving a government benefit. *Dolan* cited to *Perry v. Sindermann*, which explained:

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the

across their beachfront" that "would have been a taking."[67]

There was an important distinction, however, between the unconstitutional conditions doctrine in the context of land-use permits versus the context of other rights. As the Court explained in *Nollan*, "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"[68] In that sense, the stakes are higher than in a normal unconstitutional conditions case. In *Perry*, the benefit at issue was public employment—something created by and affirmatively bestowed by the government.[69] In *Nollan* and *Dolan*, the corresponding "benefit" was the lawful use of private property—property that belonged to the landowner, not the government. The permitting process merely allows the government to regulate, within limits, what the applicant would otherwise have an unqualified right to do.

The importance of the unconstitutional conditions doctrine to the decisions in *Nollan* and *Dolan* can best be understood by considering Justice Steven's objection to the majority's use of the Takings Clause in *Dolan*, because Ms. Dolan's property was not actually taken:

> Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation.[70]

This of course misses the point of the unconstitutional conditions doctrine. In *Perry*, the plaintiff's free speech right had not been taken

point more readily if the right at issue had stemmed from the First Amendment, rather than from the Takings Clause.[72] For example, if the government required that all permit applicants give up the right to attend peace rallies as a condition of receiving a permit, then whether or not an applicant accepted the condition, this would be a violation of that individual's First Amendment rights, by way of the unconstitutional conditions doctrine. Attempted extortion is detestable even if it fails to achieve its aim. As the *Dolan* majority explained, because the Takings Clause is no less important than the rest of the Bill of Rights, the rights it protects also come under the protection of the unconstitutional conditions doctrine.[73]

E. Courts and Analysts Could Not Agree on the Proper Scope of Nollan *and* Dolan

Some of the legal community worried that *Nollan* and *Dolan* would hinder negotiations with developers, desirable city planning, and environmental stewardship.[74] Many courts avoided their nexus and proportionality requirements by creating exceptions to their applicability.[75] One stumbling block to granting *Nollan* and *Dolan*

72. For example, Justice Blackmun agreed with the majority in *Perry*, but thought that the Court should have gone further, granting the Plaintiff summary judgment. *Perry*, 408 U.S.

broad applicability was that they did not easily harmonize with the pre-existing takings landscape articulated in *Penn Central*, *Lucas*, and *Loretto*.[76] The government could reject a permit application and be subject to the overwhelmingly deferential standard of *Penn Central*.[77] But if the government granted the permit with conditions then suddenly a stricter scrutiny applied under *Nollan* and *Dolan*—even though granting a permit with conditions might seem more gracious to a landowner than granting none at all.

A clear split developed in interpreting *Nollan* and *Dolan*, notably over whether their nexus and rough proportionality requirements applied to monetary exactions, or only to demands for the conveyance of land.[78] Other splits, focusing on the timing of the permit, or

(*Nollan* and *Dolan* do not apply to demands for money or to legislative exactions); San Remo Hotel L.P. v. City & County of S.F., 41 P.3d 87, 104–05 (Cal. 2002) (generally applicable development fee is not a *Nollan/Dolan* exaction); Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (*Dolan* not applicable to legislative exactions); McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (*Dolan* doesn't apply to impact fees); *but see* Town of Fl83 Td[4821 .7(z)-13.369 Tw (inoun)-10.4(d Tm[([((a)-13.6(Spa)-13.7.9(K)-3.)-10.6n)-14.3oz)-13.36d Es-12.

whether the exaction is legislatively or adjudicatively imposed arose.[79] Two later Supreme Court cases that mentioned *Nollan* and *Dolan* when deciding other property issues fueled the debate.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court considered a case where a municipality teased a developer with the possibility of a permit.[80] There, Del Monte Dunes

> development on the dedication of property to public use. The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.[84]

Some observers argued that this was proof that *Nollan* and *Dolan* applied only when a government agency actually approved a permit application—not when the application was denied.[85] But *Del Monte Dunes* was not a case involving a government attempt to use extortion to get something of value in exchange for a permit. These arguments reappeared in *Koontz*.

In *Lingle v. Chevron U.S.A., Inc.*, the Court again revisited *Nollan* and *Dolan* when deciding whether a taking occurs when a land-use regulation "does not substantially advance a legitimate government interest."[86] The *Lingle* Court rejected the "substantially advance" test, and in the process, it revisited its major Takings cases that referred to such a test. Discussing *Nollan* and *Dolan* as a special application of the unconstitutional conditions doctrine, *Lingle* summarized *Nollan* and *Dolan* as "both involv[ing] dedications of

issue in *Koontz*.

A third source of disagreement, though not raised in *Koontz*

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at the intersection of two highways outside of Orlando, Florida.[98] In 1987, the government condemned part of the property for an adjacent road, leaving Koontz with 14.2 acres.[99] In 1994, Koontz wanted to build on 3.7 acres of his vacant land, so he applied for a permit from the St. Johns River Water Management District.[100] Like countless landowners across the country, he embarked on the permitting process.[101]

According to the District, the property that Koontz wanted to develop contained valuable wetlands, even though the wetlands were "seriously degraded . . . by all of the activity around it."[102] The property was located immediately next to two highways and near significant residential and commercial developments, road construction, and government projects.[103] Florida Power Corporation had a 100-foot wide easement for large power lines running through the property that it kept cleared and mowed.[104] A 60-foot wide government drainage ditch also ran through the property.[105] The only standing water on the property formed in ruts of an access road used for the power lines.[106] But at the District's request, Koontz offered to dedicate the remaining three-quarters of his land to a conservation easement, in exchange for permit approval.[107] The District wanted more, however, and said that unless Koontz agreed to pay for repairs to government lands miles away, it would not approve his permit.[108]

98. *Koontz*, 133 S. Ct. at 2591–92.

99. St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 9 (Fla. Dist. Ct. App. 2009).

100. *Id.*

101. *Koontz*, 133 S. Ct. at 2592.

102. *St. Johns River Water Mgmt. Dist.*, 5 So. 3d at 9 (citing trial court opinion).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Koontz*, 133 S. Ct. at 2592.

107. *Id.* "Florida authorized preservation mitigation through conveyance of a conservation easement and with the limitation that preservation mitigation 'will not be granted [at] a ratio lower than 10:1.'" Brief of Former Members of the National Council Committee on Mitigating Wetland Losses as Amici in Support of Respondent at 29, *Koontz*, 133 S. Ct. 2586, 2012 WL 6762583 at *29 (citing Memorandum from the Florida Department of Environmental Regulations (FDER) Secretary Dale Twachtmann to FDER Permitting Division Director Randy Armstrong, Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988); St. Johns River Water Mgmt. Dist. Applicant's Handbook at § 12.3.2.2(c)).

108. *Koontz*, 133 S. Ct. at 2593. The District did offer to allow Koontz to revise his permit application to develop only 1 acre of his land. *Id.* at 2598. That offer, however, was still a rejection of Koontz's permit application based on his refusal to improve public land. *Id.* at 2598. The Supreme Court explained that the district "in effect told petitioner that it would

Koontz, believing the demand unfair, objected.[109] In response, the District denied his permit application and Koontz sued.

The trial court ruled in favor of Koontz, finding that the offsite mitigation lacked the essential nexus to the impact of Koontz's proposed development required by *Nollan*.[110] Moreover, even if a nexus existed, anything beyond the proposed conservation easement over Koontz's land would exceed *Dolan*'s requirement that the condition be roughly proportional to any external costs of the project.[111] In a subsequent proceeding, the court awarded Koontz damages for the years he was denied his permit.[112] The District appealed, arguing that no exaction had occurred because nothing was taken from Koontz, since the permit application was never approved.[113] Furthermore, the District contended that the demand for money (or services) could not violate *Nollan* and *Dolan*, since those cases supposedly involved only dedications of real property.[114]

The appellate court affirmed, stating simply that the Supreme Court had already answered these questions. The Court explained that the majority in *Dolan* "implicitly rejected" the argument that no taking can occur without an actual transfer of property, because the dissent had made that argument.[115] The Supreme Court also "implicitly decided" the money issue when it vacated and remanded *Ehrlich v. City of Culver City*[116] to be reexamined in light of *Dolan*.[117]

not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands." *Id.* at 2598.

109. *Id.*

110. *St. Johns River Water Mgmt. Dist.*, 5 So. 3d at 10 ("[T]he trial court determined that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the Koontz property.").

111. *Id.* at 12 n.5 ("[T]he trial court decided as fact that the conservation easement

enumerated rights by preventing the government from coercing people into giving them up."[129] Extortion itself—whether it is consummated with an exchange of property or not—is the harm under *Nollan* and *Dolan*

not involve property changing hands.[141] The harm occurred when the government used its coercive permitting power to make an extortionate demand for Koontz's resources in exchange for a permit. "Even if respondent would have been entirely within its rights in denying the permit for some other reason" that authority does not grant the government "power to condition permit approval on petitioner's forfeiture of his constitutional rights."[142] Nor did it matter whether a permit was issued or denied.[143]

The question of whether any property was ever physically taken was relevant only to determining the remedy.[144] The Court explained that when government takes property with an inappropriate permit condition, the Fifth Amendment requires the government to pay just compensation for the property it wrongly exacted.[145] But in *Koontz*, because no property was physically taken, and because damages were awarded under state law, the Court declined to decide "what remedies

C. Koontz Establishes that Nollan *and* Dolan *Apply to Monetary Exactions*

The second important issue resolved by *Koontz* is that monetary

four dissenting Justices concluded that the Takings Clause did not apply where the government's demand affected some "[un]identified property interest."[156] This led some, including the

through the permitting process. Under that scheme, "a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[163]

D. The Dissent's Concerns seem Exaggerated

The *Koontz* dissent worried that applying *Nollan* and *Dolan* to monetary exactions would threaten the government's ability to levy taxes and fees: If "a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible 'exaction,' how is anyone to tell the two apart?"[164] Furthermore, if a demand for money is protected by and

would be nothing new.[166]

Equally untenable are the dissent's concerns that government will not be able to require a new development to mitigate its impact on traffic or the environment. *Koontz*, *Nollan*, and *Dolan* all explicitly provide that permitting agencies may require developers to mitigate their negative impacts. These agencies simply must show that demands for mitigation are closely related and roughly proportional to the development's actual impact. Requiring the government to show how its conditions will mitigate those social costs helps protect property owners from being coerced into providing the community with benefits unrelated to, or grossly disproportionate to, any spillovers created by the use of their property.

Likewise, the taxing power is not implicated. *Koontz* adds nothing new to the difficulty of discerning between a tax and a taking and the Court's precedent "show[s] that teasing out the difference between taxes and takings is more difficult in theory than in practice."[167]

The jurisdictions that had already applied *Nollan* and *Dolan* to monetary exactions have not encountered the sort of problems predicted by the dissent in *Koontz*.[168] "And studies on the impact of *Nollan* and *Dolan* have repeatedly shown that subjecting exactions to heightened scrutiny does not forestall land-use regulation, permitting, or the practice of conditioning permit approvals."[169] Even some government attorneys have concluded that *Koontz* is not earth-

166. *Id.* at 2602 (citing *id.* at 2608409 (Kagan, J., dissenting)).

167. *Id.* at 2601. *See generally* Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189 (2002) (discussing theoretical distinctions between taxes, fees, and takings, and an argument that the government crosses the line into a taking when it unfairly singles out property owners to bear burdens that should be paid by the community as whole).

168. *Koontz*, 133 S. Ct. at 2602 (citing Northern Ill. Home Builders Assn. v. County of Du Page, 649 N.E.2d 384, 388–89 (Ill. 1995)); Home Builders Assn. v. Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d, at 640–41(Tex. 2004)).

169. Brian Hodges, *The Koontz Case: Implications in Washington State*, Washington State Association of Municipal Attorneys 2013 Fall Conference, October 11, 2013, at 13a-7 (citing Steven P. Frank, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 227 (2009)). *See also* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 663 (2001); Ann E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 105 (2001)).

shattering, but simply requires governments not to "overreach," but to tailor mitigation to the actual impact of the project.[170]

The *Koontz* dissent concluded by saying that extending constitutional protections to Koontz was not necessary since no one proved that monetary exactions had become a problem.[171] A similar argument was made by the District's amici: The brief by the National Governor's Association, et al., asserted that there is no need for such Constitutional safeguards because "conscientious local officials work hard on a daily basis to fairly balance the numerous competing demands they confront in the regulatory process."[172] But this argument ignores the many examples of abuse cited by Koontz's amici, Cato Institute, and Institute for Justice.[173] Anyway, if extortion is not a problem, as some claim, then that means that government is usually good at tailoring demands—all the more reason to have confidence that government will continue to require developers to mitigate the actual impact their development would have. As Justice Alito pointed out in *Koontz*, the "argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*."[174] *Koontz* simply is *Nollan* and *Dolan* reasserted and clarified so that government cannot avoid scrutiny by exploiting technicalities.

The doomsday warnings elicited by *Koontz* are nothing new. They commonly attend cases that uphold property rights. For example, in *usually goodny 30022 69es thatCoun13.*

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protected against temporary regulatory takings,[175] the dissent warned that "the policy implications" of the decision were "far reaching," would "generate a great deal of litigation," and would likely cause

IV. CONCLUSION

Koontz is completely consistent with *Nollan* and *Dolan* and the unconstitutional conditions doctrine. No permit was actually issued in any of the cases, since every property owner objected to the government's attempted exaction. Every case recognizes that the government has a right to require landowners to internalize the social costs they would otherwise impose on their neighbors or community. At the same time, they all recognize that government should have to justify its demands for cost internalization, since the temptation to coercively take resources by the permitting process could allow the government to impose community costs onto permit applicants. Government should not be able to avoid justifying its exactions simply by requiring compliance with its demands prior to approving a permit application. Similarly, government should not be able to avoid justifying its exactions by simply assigning a dollar sign to the demand or requiring services instead of demanding the conveyance of land. As the Court explained in *Nolan*, "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."[182] *Koontz* simply reiterates that directive.

182. *Nollan*, 483 U.S. at 839.