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## Takings and Extortion

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## TAKINGS AND EXTORTION

*Daniel P. Selmi*<sup>\*\*</sup>

## Abstract

The Supreme Court has repeatedly employed an extortion narrative in deciding when governmental actions imposing exactions on development projects constitute takings under the Fifth Amendment. In that narrative, local officials act in ever-present bad faith by misusing their regulatory powers to coerce concessions by developers seeking land use approvals. While the extortion narrative has received little attention, it operates as an explanatory device for understanding the Court's takings jurisprudence in the exactions field. The narrative has justified the expansion of exactions takings law beyond real property, substantially altered the deference normally accorded by the Court to local government actions, and allowed the Court to extend takings analysis into pre-decision bargaining. The concept may well lead the Court to further expand the scope of takings.

This Article analyzes the extortion narrative and concludes that it cannot support these changes in takings law. Not only is the narrative based on assumed facts, the factual context of land use exactions does not fit within the legal concept of extortion. Furthermore, use of the term devalues the constitutional status of locally elected officials while altering the function of the Takings Clause from determining when compensation is required to prophylactically preventing local government abuses by monitoring local government decision-making processes. In doing so, this Article concludes, the Court's decisions employing the extortion narrative have departed from the actual language of the Fifth Amendment and intruded into the protections provided by a separate constitutional provision, the Due Process Clause.

INTRODUCTION .....	324
I. THE RISE OF THE EXTORTION NARRATIVE .....	326
A. <i>Origins</i> .....	327
B. Midpoint and Quiescence .....	329
C. Ascension and Triumph.....	331

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II. EXTORTION AS A TAKINGS NARRATIVE.....333  
 A. The Narrative Concept in Law .....334  
 B. The Contours of the Extortion Narrative.....337

III. THE IMPLICATIONS OF THE EXTORTION NARRATIVE .....342  
 A. Transcending Real Property .....342  
 B. Prophylactic Protection .....346  
 C. Deterrence and Non-deference.....349  
 D. Effects on Planning and Bargaining.....352  
 E. De-compartmentalizing Takings Law .....355

IV. THE EXTORTION NARRATIVE AS A RATIONALIZING  
 POSTULATE FOR TAKINGS DOCTRINE .....358  
 A. The Literal Charge of Extortionate Behavior.....358  
 B. Unconstitutional Conditions as an Empty  
 Label.....362  
 C. Devaluing the Status of State and Local  
 Officials .....367  
 D. Textual Failure and Structural Inconsistency.....372

CONCLUSION.....375

INTRODUCTION

In developing the law of regulatory takings under the Fifth Amendment, the U.S. Supreme Court has sought to instill doctrinal rigor into a notoriously vague area of law and to curb what it sees as governmental excesses. Much of the Court’s work has focused on establishing firm boundaries that identify when exactions requiring developers to dedicate land or pay fees to local governments amount to takings.<sup>1</sup> In a series of decisions,<sup>2</sup> the Court seemed to make some headway, even though it did not end the debate over how much authority governments should possess. Those decisions featured a two-part test for

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1. Although “exactions” sometimes refers only to requirements that a developer pay fees, and not to requirements that the developer dedicate land, this Article uses the word to encompass both. *See, e.g.,* Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 141 (2005) (clearing up terminological confusion by explaining that exactions are requirements for dedications, fees, impact fees, and linkage fees); Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill?—The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 *TOURO L. REV.* 455, 458 (2014) (“An exaction is a condition placed on land by the government that requires a property owner seeking to develop his property to mitigate the negative impacts of the owner’s proposed development. This often requires the developer to dedicate land . . . or to pay money . . .” (footnotes omitted)).

2. *See, e.g.,* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 837 (1987).

determining when exactions amount to takings.<sup>3</sup> The quest for doctrinal certainty reached a high-water mark in *Lingle v. Chevron U.S.A. Inc.*,<sup>4</sup> a unanimous 2005 opinion in which Justice Sandra Day O'Connor attempted to rationalize the Court's takings decisions into a cohesive framework.<sup>5</sup>

However, a 2013 decision, *Koontz v. St. Johns River Water Management District*,<sup>6</sup> upset that relative doctrinal stability. The Court ruled that in negotiating with a land developer over a development approval, the St. Johns River Water Management District had violated the doctrine of unconstitutional conditions by demanding exactions that would have constituted takings had the agency actually imposed them.<sup>7</sup> The Court also held that the doctrine encompasses at least some exactions of money as well as of real property.<sup>8</sup> The opinion immediately sparked a vigorous academic debate over the effect of *Koontz* on the takings doctrine and its consistency with the Court's earlier takings decisions on exactions.<sup>9</sup> Much of the reaction was negative. Particularly puzzling was the fact that the Court found a violation of the unconstitutional conditions doctrine, even though the governmental agency had not actually imposed any exactions, because it disapproved of the developer's project.<sup>10</sup>

This Article proposes an explanatory perspective for the Court's recent takings cases on exactions. It identifies a continuing judicial narrative that underlies those cases and then examines the cases in light of it. This narrative sees local governments not as acting in good faith in the public interest, but as fixed on extorting concessions out of developers. It is a narrative of unbridled governmental coercion and, consequently, of extreme judicial distrust of local governments.

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3. The Court must determine (1) whether an "essential nexus" exists between a legitimate state interest and the permit condition exacted by the city (*Nollan*, 483 U.S. at 837) and, if that nexus exists, (2) whether the condition is roughly proportional to the extent of the impact generated by the development (*Dolan*, 512 U.S. at 391).

4. 544 U.S. 528 (2005).

5. *See id.* at 547–48.

6. 133 S. Ct. 2586, 2602 (2013).

7. *Id.* at 2595 ("Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.")

8. *Id.* at 2599.

9. *See, e.g.*, John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 2–3 (2014); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 288; Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 Touro L. REV. 403, 404 (2014) [hereinafter Fenster, *Substantive Due Process*]; Robert H. Freilich & Neil M. Popowitz, *How Local Governments Can Resolve Koontz's Prohibitions on Ad Hoc Land Use Restrictions*, 45 URB. LAW. 971, 971–72 (2013); Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2013 CATO SUP. CT. REV. 215, 216; Tappendorf & DiCianni, *supra* note 1, at 456.

10. *Koontz*, 133 S. Ct. at 2591, 2595.

Viewing the Court's decisions as reflecting this narrative, termed here the "extortion narrative," offers insights into the development of takings law on exactions as it stands through *Koontz*. It explains inconsistencies in the Court's recent takings decisions on exactions and the Court's controversial expansion of takings law in *Koontz*. It also suggests directions that the Court's jurisprudence might well take if the narrative continues to operate as a powerful underlying force. The analysis shows the depth of the Court majority's conviction in the narrative, a conviction that led the Court to a result in *Koontz* that is doctrinally questionable. Finally, this Article analyzes whether the narrative can bear the weight that a majority of the Court has assigned to it in developing exactions law. This Article concludes that it cannot do so for several reasons.

The analysis proceeds as follows. Part I summarizes the ascension of the extortion narrative in the Supreme Court's exactions case law since 1987. Part II explains the idea of judicial narratives and identifies the features of the extortion narrative explicated in exactions case law. In Part III, this Article analyzes how this narrative can explain and predict the outcomes of issues that arise in the area of exaction takings. Finally, Part IV evaluates whether the extortion narrative can offer a foundational principle supporting the development of takings jurisprudence. It concludes that the extortion narrative alone cannot provide that support.

## I. THE RISE OF THE EXTORTION NARRATIVE

This Part traces the rise of the extortion narrative in the Supreme Court's takings cases on exactions since the narrative's origin in 1987. The discussion does not fully summarize the cases nor does it completely explain the development of takings theory. The academic literature contains a surfeit of articles analyzing the cases.<sup>11</sup> Rather, this Part shows how the Court endorsed a narrative theme of local government extortion in imposing exactions.

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11. See generally Daniel J. Curtin, Jr. & W. Andrew Gowder, Jr., *Exactions Update: When and How Do the Dolan/Nollan Rules Apply*, 35 URB. LAW. 729 (2003) (analyzing rules that have emerged from Supreme Court takings decisions); John J. Delaney, *What Does It Take to Make a Take? A Post-Dolan Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 URB. LAW. 55 (1995) (same); Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 STETSON L. REV. 675 (2000) (same); Daniel S. Huffenus, *Dolan Meets Nollan: Towards a Workable Takings Test for Development Exactions Cases*, 4 N.Y.U. ENVTL. L.J. 30 (1995) (same); Edward J. Sullivan, *Substantive Due Process Resurrected Through the Takings Clause: Nollan, Dolan, and Ehrlich*, 25 ENVTL. L. 155 (1995) (suggesting that these decisions resurrect substantive due process through the Takings Clause).

### A. *Origins*

In the mid-1960s, local governments increasingly began to impose extensive conditions on development projects to mitigate project effects and to pay for the cost of new infrastructure serving those projects.<sup>12</sup> These included conditions, known as exactions, that required developers to dedicate real property or to pay fees.<sup>13</sup> For example, local governments required developers to dedicate land within a development for use as streets, school sites, or park sites, or to pay fees that funded improvements to wastewater treatment facilities or roads.<sup>14</sup> The purpose of these exactions was to internalize the costs of impacts caused by the developments, partly in response to increasing constraints on local governments' ability to fund infrastructure.<sup>15</sup> State statutes sometimes governed these exactions, and state courts increasingly faced constitutional challenges to their imposition.<sup>16</sup>

In *Nollan v. California Coastal Commission*,<sup>17</sup> the first in a series of sharply divided decisions on exactions, the Supreme Court took up the question of whether a condition on a project requiring a dedication of an easement violated the Takings Clause.<sup>18</sup> The Court, through Justice Antonin Scalia, first explained the rationale for local governmental power to impose conditions on projects that required developers to dedicate land, dedications that would otherwise amount to takings.<sup>19</sup> The rationale began with the premise that the police power authorized a local government to deny a permit for a project on the basis of a range of impacts implicating recognized state interests.<sup>20</sup> The Court then reasoned

12. See Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 217 (2006).

13. See, e.g., *id.* at 181.

14. See, e.g., MINN. STAT. § 462.358 (2013) (authorizing a municipality to require dedication of land for parks and playgrounds, or payment of fees for those purposes).

15. See Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 263 (discussing “tax revolt[s]” that put increasing fiscal pressure on cities).

16. See, e.g., *Billings Props., Inc. v. Yellowstone Cty.*, 394 P.2d 182, 186 (Mont. 1964) (upholding a statute requiring a subdivision to show land dedicated for parks and playgrounds); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673, 674 (N.Y. 1966) (upholding a statute authorizing dedications and fees); *Jordan v. Menomonee*, 137 N.W.2d 442, 446 (Wis. 1965) (upholding an ordinance requiring the dedication of land for schools, parks, and recreation needs).

17. 483 U.S. 825 (1987).

18. *Id.* at 834.

19. *Id.* at 832 (“Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach[,] . . . we have no doubt there would have been a taking.”).

20. *Id.* at 836. The Court did state that a taking still could occur if the denial of the permit drastically interfered with the Nollans' use of their property. *Id.* at 836–37. The Court cited *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), thereby making it clear that the taking

that if the agency did not deny the project, but instead imposed a condition that served “the same legitimate police-power purpose as a refusal to issue the permit,” then the condition was constitutionally allowable.<sup>21</sup> However, if the condition placed on the project “utterly fails to further the end advanced as the justification for the prohibition”<sup>22</sup>—i.e., the condition bears no nexus to the impact that it is supposedly addressing—then the condition would effect a taking.<sup>23</sup>

Justice Scalia chose vivid language to describe the situation where a nexus did not exist between the condition requiring a dedication and the state interest that would support denial.<sup>24</sup> If the condition was unrelated to the interest, as the Court found under *Nollan*'s facts, then the condition amounted to “an out-and-out plan of extortion” of the developer's real property by the local government.<sup>25</sup> The *Nollan* opinion borrowed this phrase from a decision by the Supreme Court of New Hampshire, which had found a taking when a local government required a developer to deed seven and one-half percent of a subdivision's total acreage to the local jurisdiction.<sup>26</sup>

Seven years later, in *Dolan v. City of Tigard*,<sup>27</sup> the Court took up the related question of how close the connection must be between the condition imposed and the impact that it addressed.<sup>28</sup> In *Dolan*, a municipality had imposed two exaction conditions on the approval of an expanded hardware store.<sup>29</sup> One condition required the owner to dedicate part of a floodplain near an adjacent creek, and a second required the dedication of a fifteen-foot strip next to the floodplain for a bicycle path.<sup>30</sup> After surveying state court decisions on the issue, the Court held that the

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in this instance would occur because of the overall regulatory impact on the use of the property, not because of the individual exaction. *Nollan*, 583 U.S. at 836.

21. *Nollan*, 483 U.S. at 836.

22. *Id.* at 837.

23. *Id.*

24. *Id.*

25. *Id.* (“[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of ‘legitimate state interests’ in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

26. *J.E.D. Assocs.*, 432 A.2d at 13–15.

27. 512 U.S. 374 (1994).

28. *Id.* at 383.

29. *Id.* at 379.

30. *Id.* at 380.

condition had to be roughly proportional to the impact being addressed.<sup>31</sup>

Notably—and for the first time—the *Dolan* Court declared that a condition not meeting its newly enunciated “rough proportionality” test amounted to an “unconstitutional condition.”<sup>32</sup> In doing so, the Court linked its takings cases on exactions to a larger body of law in which the Court on occasion had invalidated governmental actions conferring a benefit on the condition that the benefited person give up a constitutional right.<sup>33</sup> The Court termed this doctrine “well-settled.”<sup>34</sup> The Court also reiterated its statement in *Nollan* that a condition unrelated to the state interest that it was addressing amounted to “an out-and-out plan of extortion.”<sup>35</sup> The absence of a nexus in *Nollan*, said the Court, “left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry.”<sup>36</sup>

Thus, both *Nollan* and *Dolan*, the two landmark decisions establishing the boundaries of local governmental authority to impose exactions, employed the term “extortion” to describe exactions not meeting the Court’s new tests.

### B. *Midpoint and Quiescence*

After *Nollan* and *Dolan*, the development of the extortion narrative entered a quiescent midpoint period.<sup>37</sup> For the next nineteen years, the Court did not decide any case directly addressing when exactions constitute takings. However, the Court did touch upon the issue in several opinions. Most importantly, in *Lingle v. Chevron U.S.A. Inc.*,<sup>38</sup> the Court unanimously disavowed part of the general test for regulatory takings—the part inquiring whether the regulation substantially advanced a legitimate state interest—that it had previously adopted.<sup>39</sup> In doing so, the

31. *Id.* at 390–91.

32. *Id.* at 385; see Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988) (“In its canonical form, this doctrine [of unconstitutional conditions] holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”).

33. *Dolan*, 512 U.S. at 385 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

34. *Id.*

35. *Id.* at 387 (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987)).

36. *Id.* (“No such gimmicks are associated with the permit conditions imposed by the city in this case.”).

37. A number of outstanding issues were left for resolution. One was whether the two cases applied to fees as well as dedications of land. Another was whether they applied to exactions imposed through legislation rather than adjudication.

38. 544 U.S. 528 (2005).

39. *Id.* at 540, 545.

opinion by Justice O'Connor reviewed the legal landscape of regulatory takings as a whole and seemed to place the exaction cases in a particularized category. It saw *Nollan* and *Dolan* as decisions concerned with regulations imposing conditions that require dedications of interests in real property, in contrast to both takings of real property by actual government occupation and general regulatory takings from land use regulations.<sup>40</sup>

Additionally, *Lingle* emphasized that takings law focuses on the regulation's "actual burden imposed on property rights."<sup>41</sup> The *Nollan* and *Dolan* cases, explained the Court, involved "government demands that a landowner dedicate an easement allowing public access."<sup>42</sup> Consistent with this emphasis on the effects of regulation, *Lingle* declared that the purpose of the judicial takings analysis is to ferret out "regulatory actions that are functionally equivalent to a classic taking in which government directly appropriates private property or ousts the owner from his domain."<sup>43</sup> By contrast, the test for due process "probes the regulation's underlying validity."<sup>44</sup> Finally, the *Lingle* Court reiterated that its decisions in *Nollan* and *Dolan* involved "a special application" of the doctrine of unconstitutional conditions.<sup>45</sup> The decision did not mention extortion.

Three other decisions during this midpoint period bear on later developments in the extortion narrative. First, in *Eastern Enterprises v. Apfel*,<sup>46</sup> five members of the Court seemed to agree that the Takings Clause did not encompass the taking of money where that money was not segregated in a specific fund.<sup>47</sup> If so, the holding might have meant that an exaction requiring the payment of a fee would not fall under the *Nollan* and *Dolan* tests. The *Eastern Enterprises* decision also indirectly buttressed *Lingle*'s discussion of the principal exaction cases, *Nollan* and

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40. *Id.* at 546–48. Citing *Nollan* and *Dolan*, the Court stated: "A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Id.* at 539.

41. *Id.* at 543.

42. *Id.* at 546.

43. *Id.* at 539.

44. *Id.* at 542–43.

45. *Id.* at 547 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

46. 524 U.S. 498 (1998).

47. *See id.* at 556 (Stevens, J., dissenting) ("If the [Takings] Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?"); *Id.* at 542 (Kennedy, J., concurring) ("[T]he mechanism by which the Government injures Eastern is so unlike the act of taking specific property that it is incongruous to call the Coal Act a taking . . .").

*Dolan*, as rooted in the taking of real property.<sup>48</sup>

A year later in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,<sup>49</sup> the Court, in an opinion by Justice Anthony Kennedy, found that the U.S. Court of Appeals for the Ninth Circuit had erroneously discussed the rough proportionality test of *Dolan* in deciding a case about damages caused by the denial of a project.<sup>50</sup> The lower court had extended that test “beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.”<sup>51</sup> Thus, consistent with *Lingle*, the Court again seemed to cabin the *Nollan* and *Dolan* tests to a specific context.

Finally, in *Kelo v. City of New London*,<sup>52</sup> a sharply divided Court upheld the city’s decision that the taking of property for a large redevelopment project met the “public use” requirement of the Takings Clause.<sup>53</sup> The decision did not concern exactions, but the Court’s recognition of the role played by state legislatures is important. The majority opinion by Justice John Paul Stevens took pains to point out that state legislatures could provide greater protection than the Constitution requires in this situation and that many states had done so.<sup>54</sup> The opinion thus recognized that legislative solutions were available to perceived overreaching by local governments.

Therefore, at this midpoint, the extortion narrative was quiescent.

### C. *Ascension and Triumph*

The narrative reemerged and triumphed in the 2013 *Koontz* decision, authored by Justice Samuel Alito.<sup>55</sup> After negotiations between the Water District and the landowner failed, the Water District denied the landowner’s permit to develop property, and he brought suit.<sup>56</sup> Among other claims, the landowner sought monetary damages under a state statute allowing damages where a state agency’s action is “an unreasonable exercise of the state’s police power constituting a taking without just compensation.”<sup>57</sup>

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48. *Id.* at 522 (majority opinion) (“This case does not present the ‘classi[c] taking’ in which the government directly appropriates private property for its own use.” (quoting *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982))).

49. 526 U.S. 687 (1999).

50. *Id.* at 700, 703.

51. *Id.* at 702 (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

52. 545 U.S. 469, 488–90 (2005).

53. *Id.*

54. *Id.* at 489.

55. 133 S. Ct. 2586 (2013).

56. *Id.* at 2592–93.

57. *Id.* at 2593 (quoting FLA. STAT. § 373.617(2) (2015)).

The Florida Supreme Court refused any relief under *Nollan* and *Dolan* on two grounds. First, the Water District had denied the project rather than approving it with conditions as in *Nollan* and *Dolan*.<sup>58</sup> Second, the conditions that the Water District had proposed but not adopted involved the payment of money, not the dedication of real property.<sup>59</sup> Accordingly, the Florida court thought that *Nollan* and *Dolan* did not support the landowner's claim for damages.<sup>60</sup>

Justice Alito began his opinion by emphasizing that the *Nollan* and *Dolan* decisions "provide important protection against the misuse of the power of land-use regulation."<sup>61</sup> He characterized the Water District as "believ[ing] that it circumvented" those two decisions by structuring the handling of the permit application as a denial rather than an approval with conditions.<sup>62</sup> The opinion then turned to the conditions. It cited the Court's prior exaction decisions as reflecting a "realit[y] of the permitting process"—"land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take."<sup>63</sup>

The Court held that the principles underlying *Nollan* and *Dolan* do not change depending on whether the government approves a permit with conditions or denies a permit because the applicant refuses to agree to those conditions.<sup>64</sup> Ultimately, however, Justice Alito agreed that no taking had occurred: "Where the permit is denied and the condition is never imposed, nothing has been taken."<sup>65</sup> This conclusion did not end the case, but it affected the possible remedies available to the landowner. While a taking requires just compensation, an excessive demand without a taking does not require damages as a matter of federal constitutional law.<sup>66</sup> Rather, the availability of damages depends on the particular cause of action, whether state or federal, that the landowner alleges.<sup>67</sup> In this

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58. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (2011), *rev'd*, 133 S. Ct. 2586 (2013).

59. *Id.*

60. *Id.* at 1230 ("Accordingly, we hold that . . . the *Nollan/Dolan* rule . . . is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought . . .").

61. *Koontz*, 133 S. Ct. at 2591.

62. *Id.*

63. *Id.* at 2594.

64. *Id.* at 2596 ("Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent.").

65. *Id.* at 2597.

66. *Id.*

67. *Id.*

case, because the landowner had brought a state cause of action, the Court refused to address possible federal remedies for the unconstitutional conditions.<sup>68</sup>

The Court then turned to another key question: Whether an exaction could result in a taking when it required a landowner to pay money rather than dedicate an interest in real property.<sup>69</sup> Distinguishing the two types of exactions, said the Court, would make it “very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*.”<sup>70</sup> The Court rejected the claim that treating monetary exactions as takings would make it difficult to distinguish them from taxes, which are generally exempt from takings analysis.<sup>71</sup> Although the dissent criticized this part of the holding, Justice Alito dismissed the dissent’s position as “really an argument for overruling *Nollan* and *Dolan*.”<sup>72</sup> Finally, the Court ended its decision by circling back to the same extortion narrative with which it began, characterizing itself as “[m]indful of the special vulnerability of land use permit applicants to extortionate demands for money.”<sup>73</sup>

In sum, the *Koontz* Court characterized applicants as individuals at risk of extortion by local government officials and suggested that the Water District had tried to manipulate the Court’s prior decisions to increase its regulatory leverage. Consistent with these concerns, the Court found a violation of the unconstitutional conditions doctrine, even while recognizing that no taking had occurred because the Water District had not actually imposed conditions on a project approval. At the same time, the Court extended the protections of *Nollan* and *Dolan* to at least some, if not all, monetary conditions imposed on a development approval.<sup>74</sup> The holding and reasoning of *Koontz* thus fully reflect the extortion narrative in the context of exactions takings.

## II. EXTORTION AS A TAKINGS NARRATIVE

The extortion narrative operates both as an explanatory device for understanding the Court’s takings law and as a tool for predicting the future direction of that law. This Part first examines the idea of judicial narratives generally and the role that they play in jurisprudence. It then sets forth the basis for and contours of the extortion narrative expounded

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68. *Id.*

69. *Id.* at 2598.

70. *Id.* at 2599.

71. *Id.* at 2600–01.

72. *Id.* at 2602.

73. *Id.* at 2603.

74. The Court did not decide whether its holding applied if the local government established the fees legislatively rather than through adjudication.

in the exaction takings cases.

### A. *The Narrative Concept in Law*

Generally speaking, a narrative is a story,<sup>75</sup> and a large and varied body of scholarship has explored the role that narratives play in the law.<sup>76</sup> This scholarship has demonstrated that the concept of narratives pervades the law.<sup>77</sup> Most prominently, narratives persuade<sup>78</sup> and therefore serve as vehicles for advocates to employ.<sup>79</sup> Lawyers seek to create a story from the facts, perhaps including a familiar pattern, that will incentivize the court to rule in their favor.<sup>80</sup> Narratives can serve other, quite different functions as well, such as providing a means of expressing the viewpoints of silenced minorities.<sup>81</sup>

The scholarship has also shown that narratives play an important role in judicial opinions. In a fundamental sense, judges must narrate the facts upon which their decisions rest—the “story . . . to be judged.”<sup>82</sup> However, it is the relation of those facts to a broader landscape that is relevant here.

75. Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 25 (2014) (“A narrative is, in short, a story. Narrative theory studies not only the composition, but also the transmission and reception of stories.” (footnote omitted)).

76. See, e.g., LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996); ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2002).

77. Peter Brooks, *Narrative in and of the Law*, in A COMPANION TO NARRATIVE THEORY 415, 416 (James Phelan & Peter J. Rabinowitz eds., 2005) (noting “the pervasive presence of narrative throughout the law”).

78. See Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 268–69 (2009) (discussing explanations for the persuasive power of narrative).

79. See, e.g., Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions*, 9 LEGAL COMM. & RHETORIC 99, 102 (2012) (“Narrative reasoning does not supplant the rule-based reason (the law) that allows the court to rule in the client’s favor; rather, it provides a reason for the court to *want* to rule in the client’s favor.”).

80. See *id.*

81. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989); Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989) (“In narrative, we take experience and configure it in a conventional and comprehensible form. This is what gives narrative its communicative power; it is what makes narrative a powerful tool of persuasion and, therefore, a potential transformative device for the disempowered.”).

82. Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611, 613 (1998) (citing as an important foundation of judging, “the crafting of official narrative, the creation of the story of the people and events to be judged”).

Judges will examine the facts of a case, relate them to a larger narrative<sup>83</sup> or interpretive framework,<sup>84</sup> and then use the particular facts of the case that fit into that narrative framework.<sup>85</sup> Thus, an opinion's sense of what happened in a case depends in part on the narrative framework chosen by the opinion writer.<sup>86</sup> From that narrative flows a number of consequences, including the legal consequences that the narrative can justify.<sup>87</sup> Scholars have identified such judicial narratives at work in an array of legal subjects.<sup>88</sup>

This narrative framework has several important features. First, it is culturally based.<sup>89</sup> A judge constructs the narrative backdrop from her perceptions of how the world operates, and that construction affects the judge's choice of legal rules.<sup>90</sup> Second, and relatedly, the narrative serves

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83. Shulamit Almog, *As I Read, I Weep—In Praise of Judicial Narrative*, 26 OKLA. CITY U. L. REV. 471, 473 (2001) (“[J]udges are often overcome by the urge to construct a complete narrative, embellished by personal preferences, selections, and skills.”).

84. J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEGAL COMM. & RHETORIC 67, 69 (2013) (“[T]he facts in a legal contest are seldom self-evident, for they are viewed not in a vacuum, but rather within interpretive frameworks. . . . Facts become meaningful within a story structure, a structure that guides their interpretation.”).

85. Geoffrey Miller, *Narrative and Truth in Judicial Opinions: Corporate Charitable Giving Cases*, 2009 MICH. ST. L. REV. 831, 832 (“An important question for judicial opinions . . . concerns the accuracy of the mapping between the underlying facts and the description of those facts in the narrative.”).

86. Ralph, *supra* note 75, at 34 (“[T]he legal academy is coming to a greater recognition that the sense of what happened in a particular case depends in great part on the choice of a narrative.”).

87. Berger, *supra* note 78, at 265–66 (noting that from the perspective of cognitive theorists, “what matters is how metaphor and narrative work, what perceptions and inferences flow from their use, what interpretations they make possible, and what actions and consequences they justify”).

88. See Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 218–20 (2010) (discussing the “few-bad-apples narrative” in opinions addressing the harsh treatment of detainees). See generally Berger, *supra* note 78 (narratives in child custody law); Mae Kuykendall & David Westbrook, *Introduction: Unsettling Questions, Disquieting Stories*, 2009 MICH. ST. L. REV. 817 (symposium on narratives in corporate law); Erin Sheley, *The “Constable’s Blunder” and Other Stories: Narrative Representations of the Police and the Criminal in the Development of the Fourth Amendment Exclusionary Rule*, 2010 MICH. ST. L. REV. 121 (explaining narratives in search and seizure law); Lawrence S. Zacharias, *The Narrative Impulse in Judicial Opinions*, 23 L. & LITERATURE 80 (2011) (same).

89. Winter, *supra* note 81, at 2270 (“Thus, to tell a story that will be both meaningful and compelling, the judge . . . must make use of preexisting cultural knowledge in ways that will seem natural to those subject to the legal rule because already grounded in social experience and mediated by existing cultural models.”).

90. *Id.* (noting that under this view, “those who comprise the legal hierarchy do exercise substantial power in choosing legal rules or cultural norms”).

an ideological function<sup>91</sup> and can provide moral guidance supporting the outcome.<sup>92</sup> Accordingly, to perhaps a considerable degree, the narrative motivates the Court's decision-making, allowing it to resolve the case in a way that comports with its values.<sup>93</sup> Third, the images chosen for the narrative framework can impel the conclusion that the Court reaches.<sup>94</sup> Finally, while the narrative framework must remain generally faithful to the real world so that it can persuade readers,<sup>95</sup> it nonetheless has a manipulative element. Judges can choose or channel facts in the narrative in a way that evokes a foreseeable response from the reader, thus helping to justify the decision.<sup>96</sup>

In the takings field, a 1988 article identified the important role that narrative was beginning to play in the development of the constitutional jurisprudence on exactions. Professor Gregory Alexander described the early exaction cases as a story of “power and fear,” one about a “perceived imbalance of power” between private landowners and government regulators.<sup>97</sup> He suggested that courts were not generating takings law by a “methodological or theoretical concern, but by the pictures that judges have in their heads about the participants in the public land-use planning arena.”<sup>98</sup> Underlying political visions that are not subject to empirical verification, argued Professor Gregory, shape

91. Berger, *supra* note 78, at 269 (explaining that the frameworks for thinking constructed by story and image “work similarly to religious symbols in serving ideological functions”).

92. Zacharias, *supra* note 88, at 110 (noting that “[n]arrative can provide moral guidance in evaluating surveillance” cases).

93. Susan Bandes, *Searching for Worlds Beyond the Canon: Narrative, Rhetoric, and Legal Change*, 28 LAW & SOC. INQUIRY 271, 285 (2003) (“[T]here are always *multiple* basic stories that can be constructed. No narrative version can be independent of a particular teller and occasion of telling, and, therefore . . . we may assume that every narrative version has been constructed in accord with some set of purposes or interests.” (citation omitted) (quoting Barbara Herrnstein Smith, *Narrative Versions, Narrative Theories*, 7 CRITICAL INQUIRY: ON NARRATIVE 217, 221 (1980))).

94. Winter, *supra* note 81, at 2276 (“One reason for the transformative potential of narrative is its capacity to present forceful images . . .”).

95. Ralph, *supra* note 75, at 30 (discussing the concept of “[n]arrative fidelity” or “similarity to what an audience member knows to be true in the real world”).

96. See, e.g., Almog, *supra* note 83, at 488 (“The creation of every narrative . . . entails a manipulative element . . .”); Backer, *supra* note 82, at 613 (“Courts take the stories they receive as raw material. In their hands, this raw material is transmogrified into something very different.”); Rideout, *supra* note 84, at 87 (discussing “value-motivated cognition,” which is “the tendency of people to resolve factual ambiguities in a manner that generates conclusions congenial to self-defining values” (quoting Dan M. Kahan, David A. Hoffman & Donald Graman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Liberalism*, 122 HARV. L. REV. 837, 903 (2009))).

97. Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1752 (1988).

98. *Id.* at 1753.

these pictures.<sup>99</sup>

Since then, the Court's takings jurisprudence on exactions has reflected the majority's allegiance to a narrative that local governments extort interests in real property and, after *Koontz*, money from property developers. Modern takings literature, however, has overlooked the importance of this narrative, as authors have instead focused on the significant doctrinal inconsistencies in the Court's opinions.<sup>100</sup> This Article suggests that the Court's adherence to and development of the extortion narrative explains the outcomes and that this narrative is likely to drive decisions in future exactions cases. It is time to pay close attention to the narrative.

### B. *The Contours of the Extortion Narrative*

A careful examination of the Court's statements about extortion in its exaction cases reveals a full narrative. The basis of this extortion narrative is that local government officials improperly use their regulatory powers to force developers to give up property. The narrative necessarily connotes a notion of ever-present bad faith on the officials' part, which leads to the Court's consequent distrust of local government actions. Furthermore, in *Nollan*, the Court declared that if the exaction did not meet the "essential nexus" test adopted in that case, then it amounted to "an out-and-out plan of extortion."<sup>101</sup> The modifying phrase "out-and-out" suggests that the entire regulatory process of imposing exactions is extortionate, only becoming publicly exposed as "out-and-out" extortion if the test is not met.

The *Koontz* decision considerably fleshes out the narrative. That decision situates public officials as viewing the Fifth Amendment as an obstacle to avoid by any means possible rather than as a constitutional protection to honor and follow. The Court talked about the Water District deliberately attempting to circumvent the constitutional restrictions of *Nollan* and *Dolan* and about the "misuse of the power of land use regulation."<sup>102</sup> Earlier, in *Dolan*, the Court referred to "gimmickry" utilized by the local government to impose exactions.<sup>103</sup>

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99. *Id.* at 1753–54.

100. See, e.g., Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 12 (2000) ("The conflicts among courts regarding the reach of *Nollan* and *Dolan* suggest larger conceptual inconsistencies.").

101. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

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

103. *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994).

According to the narrative, the government has an incentive to overreach in placing conditions on the approval,<sup>104</sup> and developers will fear opposing such overreaching because the government may react by simply denying the permit. And, as one might expect in a narrative, the Court sees or implies facts that fit the narrative. Its accusation of deliberate circumvention is such an implication.

Finally, the narrative places the Court in the role of protector of a class of litigants rather than an arbiter between competing interests. Instead of merely establishing the dividing line between proper regulation and a taking, the Court's role now is to defend landowners from constant overreaching by local officials. In *Koontz*, the Court does so by inserting itself as a monitor into the bargaining process between landowners and local governments.

Justice Alito never explains the basis for his fundamental premise that governments are prone to misuse their land use power.<sup>105</sup> Nor is such an explanation offered in *Nollan* or *Dolan*, the cases that originated the extortion narrative. The narrative, however, likely originates from a couple of sources.

First, some economic theory posits that local governments will use their authority to overreach in mandating exactions from developers.<sup>106</sup> The extortion narrative owes much to public choice theory, which proposes that, like individuals acting in the private sector, regulators will act largely in their self-interest.<sup>107</sup> In the situation of exactions, political

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104. In *Snyder v. Board of County Commissioners of Brevard County*, a Florida appellate court articulated this theory:

In this context, local governments frequently use governmental authority to make a rezoning decision as leverage in order to negotiate, impose, coerce and compel concessions and conditions on the developer. Such techniques used by local zoning officials as “floating zones,” or “contract or conditional zoning” are more analogous to administrative or executive decision-making than legislative policy-making and would be immediately and justifiably condemned in any proper judicial forum as being unjust and unfair if not extortion.

595 So. 2d 65, 73 (Fla. Dist. Ct. App. 1991) (footnotes omitted), *decision quashed*, 627 So. 2d 469 (Fla. 1993).

105. See *Koontz*, 113 S. Ct. at 2608 (Kagan, J., dissenting) (“No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development’s costs.”).

106. See, e.g., Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 289 (2001) (“Efficiency-based justifications focus on the concern that without compensation, the government will excessively exercise its eminent domain power.”).

107. Zachary J. Gubler, *Public Choice Theory and the Private Securities Market*, 91 N.C. L. REV. 745, 748 (2013) (“Public choice theory views laws and regulations as products that are traded in a political marketplace.”).

actors will seek to increase their chances for reelection by extracting a wider array of benefits for voters from projects proposed by developers. Politicians will suffer little detriment from these actions because the voters who will benefit from them far outnumber developers who will bear the loss.<sup>108</sup> In *Nollan*, Justice Scalia adverted to such concerns in declaring that where a regime could leverage the police power, one would expect “stringent land-use regulation which the State then waives to accomplish other purposes.”<sup>109</sup>

Some land use literature likewise cites overreaching by local governments in regulating new development.<sup>110</sup> However, studies systematically examining conditions that local governments placed on projects and finding that they overreached have not appeared,<sup>111</sup> perhaps because the design of such a study presents considerable difficulty. Furthermore, countervailing arguments exist that reject the idea of municipal extortion. For example, the ability of developers to “exit” from individual jurisdictions if they perceive government overreaching might prevent extortionate demands upon them.<sup>112</sup> Other literature cites the economic power of development interests at the local government level, positing that this power amounts to a “growth machine” that dictates outcomes before municipalities.<sup>113</sup> The extortion narrative necessarily

108. Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVIRONS: ENVTL. L. & POL’Y 189, 200 (2010) [hereinafter Mulvaney, *Remnants of Exaction Takings*] (“The majority perceived the [*Nollan*] case from the vision of a public-choice theorist.”).

109. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 n.5 (1987).

110. See, e.g., Adam J. McLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 56–57 (2012–13) (“Unless states get their local governments under control, these calls [for national legislation or curtailing local planning power] are likely to gain increased support.”); Ronald H. Rosenberg, *When Lochner Met Dolan: The Attempted Transformation of American Land-Use Law by Constitutional Interpretation*, 33 URB. LAW. 663, 665 (2001) (citing “an increasingly visible and vocal sentiment that environmental regulation and land-use control has been unreasonable, unfair and even abusive to some landowners”); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1704 (2013) (developing a theoretical argument for why zoning “has become much more restrictive in our biggest and richest cities, so much so that it has begun harming regional and national economic growth”).

111. There are studies of fees that governments impose. See, e.g., Clancy Mullen, *National Impact Fee Survey: 2012*, IMPACTFEES.COM 1 (Aug. 20, 2012), [http://www.impactfees.com/publications%20pdf/2012\\_survey.pdf](http://www.impactfees.com/publications%20pdf/2012_survey.pdf). But this study is not a systematic survey that would meet the empirical prerequisites for validity.

112. See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 475 (1991); Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 1005–06 (analyzing the possibility of developer exit).

113. See John R. Logan & Harvey L. Molotch, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 1–2, 17–29 (1987); Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976). But see Vicki Been, Josiah Madar &

rejects these ideas, albeit silently.

Other factors likely motivated in part the Court's acceptance of the extortion narrative. One important factor is the expansion in the types of impacts that form the basis for exactions imposed as conditions on projects. As concerns over environmental degradation have expanded over the last forty years, local governments have increasingly responded by conditioning project approvals to minimize impacts on a broader variety of environmental concerns.<sup>114</sup> For example, local governments now condition projects to minimize impacts on wildlife and wetlands, as occurred in *Koontz*.<sup>115</sup> The object of these conditions has also broadened beyond the environment to a variety of socioeconomic impacts, particularly impacts on housing.<sup>116</sup> Ironically, the takings test adopted in *Nollan*, which emphasizes the identification of project impacts and the relationship between those impacts and conditions placed on the project, has in part led to this increase.<sup>117</sup> Moreover, local governments have become more sophisticated in documenting a wider range of specific project impacts.<sup>118</sup>

Another reason for the narrative's rise may lie in the expansion of exactions that has occurred as negotiations have become routine between local governments and developers.<sup>119</sup> The results of these negotiations are often contracts, known as development agreements, setting forth the conditions for developing a project as well as the infrastructure and fees for which developers are responsible.<sup>120</sup> With the rise of development

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Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 228–33 (2014).

114. Paul Boudreaux, *The Impact XAT: A New Approach to Charging for Growth*, 43 U. MEM. L. REV. 35, 57–58 (2012) (noting that “[a]dvocates of impact fees have convinced both legislatures and courts that it is more equitable to charge the developer for the [infrastructure] costs” and discussing other scholars who have advocated such fees).

115. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2610–11 (2013); *Finley v. Inland Wetlands Comm’n*, 959 A.2d 569, 589 (Conn. 2008) (challenging the permit granted by commission subject to conditions).

116. See, e.g., *Commercial Builders v. City of Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991) (upholding an ordinance placing a fee on nonresidential construction to offset impacts of such construction).

117. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987).

118. To date, however, local governments have not attempted to impose conditions on the full range of impacts from projects. Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 737 (2007) [hereinafter Fenster, *Regulating Land Use*] (“Nor do exactions capture the full range of impacts for new development, as non-omnipotent local governments frequently shy away from imposing full-cost exactions or are barred from doing so by their state legislatures.”).

119. See Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 593 (2011).

120. *Id.*

agreements, the parties to such contracts have expanded the scope of possible conditions well beyond those allowed under the Court's exactions jurisprudence. The theory is that in entering into an agreement with a municipality, a developer voluntarily waives its constitutionally based right to compensation for certain conditions on the project that otherwise would constitute a taking under *Nollan* and *Dolan*.<sup>121</sup> Thus, the scope of exactions can exceed the limits set by those cases. Whether such waivers are valid remains uncertain, but the Court may perceive the well-known expansion of the scope of negotiations as a form of governmental extortion.<sup>122</sup>

Third, once the Court began articulating the extortion narrative in *Nollan*, development interest groups perceived an important vehicle both for attracting the Court's attention to appeals and for articulating a theme in briefing them. That tactic is apparent in *Koontz*. The Court began hearing a steady drumbeat about extortion from interest groups that sought to further tighten the constitutional standard for exaction takings and that perceive Fifth Amendment takings law as unfairly tilting toward the government's interests.<sup>123</sup>

Finally, as with other areas of constitutional law, the extortion charge likely aligns with the personal political ideologies of the individual Justices who make up the majority in the exactions cases.<sup>124</sup> In particular, the expansion of environmental concerns addressed by land use conditions has been politically controversial, and any national consensus

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121. *Id.* at 610.

122. According to Professor Vicki Been,

Zoning has moved from a set of rigid prescriptive rules about land use to a more flexible set of standards, which allow the specifics of the requirements imposed on each proposed development to vary with the . . . groups affected by the proposal. That flexibility creates dangers, however, that the negotiations surrounding land use development may be unfair to the developer or to those affected by the development, or that the negotiations may stand in the way of a development that would increase the overall social welfare by producing more benefits than costs.

Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 12 (2010).

123. See, e.g., Petition for Writ of Certiorari at 5, 9, 12, *Koontz v. St. Johns Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447) (using the word "extortion" several times, including three quotes of "out-and-out plan of extortion").

124. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1111 (2008) ("According to studies by political scientists who have developed a so-called 'attitudinal model,' the Justices consistently vote in accordance with their political ideologies; their invocations of precedent are mere window dressing.").

about environmental values is difficult to identify.<sup>125</sup> Given the extent to which the need for environmental protection has become disputed, it is not surprising that the Supreme Court has sharply divided in exaction cases.<sup>126</sup> Indeed, all three key cases—*Nollan*, *Dolan*, and *Koontz*—involved conditions broadly concerning the environment. The force with which the Court articulated the extortion narrative in *Nollan* and *Koontz* suggests that distrust of local government efforts at environmental protection lies near the center of the narrative.<sup>127</sup>

### III. THE IMPLICATIONS OF THE EXTORTION NARRATIVE

The extortion narrative has become a central feature of the Court's current takings jurisprudence on exactions, with the *Koontz* decision illustrating the narrative's importance. It has, however, received little attention, with most observers viewing the language as a form of judicial hyperbole. If the extortion narrative is taken seriously and seen as supplying a framework for addressing takings cases, it has important implications for the development of takings law.

This Part explores those implications. Some of the implications further illuminate the Court's recent holdings, while others suggest its future development. Although the narrative is not necessarily outcome-determinative, the Court's emphasis on it indicates that it could play a large role in evolving takings theory.

#### A. *Transcending Real Property*

Historically, the Fifth Amendment's protections have centered on real property.<sup>128</sup> The language of the amendment itself is neutral on the point: "nor shall private property be taken for public use, without just compensation."<sup>129</sup> However, although scholars dispute the matter, the majority of scholars have concluded that the Framers did not intend the

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125. See, e.g., Naomi Oreskes, *Science and Public Policy: What's Proof Got To Do With It?*, 7 ENV'T & POL'Y 369, 369 (2004) ("In recent years it has become common for informed defenders of the status quo to argue that the scientific information pertinent to an environmental claim is uncertain, unreliable, and fundamentally, unproven. Lack of proof is then used to deny demands for action.").

126. *Nollan*, *Dolan*, and *Koontz* were each 5–4 decisions.

127. However, while the environment may have taken center stage in these cases, the rules apply to all types of exactions. These include infrastructure conditions (such as for roads and playgrounds) that local governments have routinely imposed since the 1960s.

128. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992) (citing the traditional distinction of greater constitutional protection given to real property than personal property); Bridget C.E. Dooling, *Take It Past the Limit: Regulatory Takings of Personal Property*, 16 FED. CIR. B.J. 445, 446 (2007) ("*Lucas* cemented the long-standing, but inexplicit, judicial principle that personal property is less protected from regulatory takings than real property.").

129. U.S. CONST. amend. V.

Fifth Amendment to extend beyond physical takings of real property.<sup>130</sup> Additionally, most modern case law on the amendment concerns real property.<sup>131</sup> Indeed, real property was the starting point for the framework adopted in *Nollan* for evaluating exactions. The California Coastal Commission had conditioned the Nollans' permit approval on the dedication of an easement across the beach, and the Court began by observing that if the government had physically taken such an easement, the Fifth Amendment would require payment for that interest in land.<sup>132</sup>

The extortion narrative, however, suggests that the Fifth Amendment's traditional doctrinal anchor in real property is too narrow.<sup>133</sup> Under that narrative, a chief purpose of the amendment is preventing local governments from using their regulatory leverage to extort property from developers by placing conditions on development.<sup>134</sup> This new purpose allows the Court to expand the reach of takings law in two important ways.

First, as long as the extortion process occurs during the land use process generally, the Court can shape Fifth Amendment doctrine to capture and regulate a wider variety of extortionate actions. After *Nollan* and *Dolan*, scholars debated at length whether those decisions applied to monetary exactions imposed on a development as well as to required dedications of real property.<sup>135</sup> The debate largely focused on whether the

130. See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996); Mulvaney, *Remnants of Exaction Takings*, *supra* note 108, at 194 ("Few scholars interpret historical evidence to support the contention that the Framers of the U.S. Constitution envisioned the Takings Clause to restrict any government action beyond physical invasions." (footnote omitted)); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) ("The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used." (footnote omitted)). *But see* Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 579 (2003) (arguing that "there is historical evidence to support a broad reading of the Takings Clause that would cover regulatory takings").

131. While categorizing takings cases can be subjective, beginning with *Nollan* in 1987, the Court has decided thirteen takings cases that have involved real property, far more than other categories. See ROBERT MELTZ, CONG. RESEARCH SERV., 97-122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY (2015).

132. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach . . . we have no doubt there would have been a taking.").

133. *Id.* at 837.

134. *Id.*

135. Compare Robert H. Freilich & David W. Bushek, *Thou Shalt Not Take Title Without Adequate Planning: The Takings Equation After Dolan v. City of Tigard*, 27 URB. LAW. 187, 201

rationale for the essential nexus and rough proportionality tests in those two cases was limited to real property.<sup>136</sup> Now, however, if a primary focus of takings in the exactions context is constraining extortionate government power, courts could effectuate that purpose by subjecting monetary fees to the *Nollan* and *Dolan* tests.<sup>137</sup> In *Koontz*, the Court did just that, extending its takings holdings to include monetary fees that the Water District seemed to impose on an individual basis. The extortion narrative would plainly support that extension.<sup>138</sup>

Second, the question remains whether the extension to fees includes legislatively established fees. Traditional principles of administrative law treat actions that are quasi-legislative differently from those that are

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(1995) (stating that *Dolan* is limited to exactions of real property), with Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1569–70 (arguing that *Dolan* should also apply to monetary exactions), and Catherine L. Hall, *Valid Regulation of Land-Use or an Out-and-Out Plan of Extortion? Commentary on St. Johns River Water Mgmt. Dist. v. Koontz*, 41 REAL EST. L.J. 270, 291 (2012) (“A survey of state and federal decisions reveals there is considerable disagreement about when the application of *Nollan* and *Dolan* apply to the exactions takings analysis. Many courts have concluded that a condition must be adjudicative or *ad hoc*, as opposed to legislative, to be reviewable under the exactions takings analysis, yet there is still ongoing debate.” (citing Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 501 (2006))).

136. Compare J. David Breemer, *The Evolution of the “Essential Nexus”*: How State and Federal Courts Have Applied *Nollan* and *Dolan* and Where They Should Go from Here, 59 WASH. & LEE L. REV. 373, 395–96 (2002) (“When one looks beyond the bare facts of *Nollan* and *Dolan* and examines the purposes underlying the essential nexus standard, it becomes apparent that the test cannot easily be limited to exactions of real property and/or exactions imposed administratively. Indeed, those purposes logically call for an integrated doctrine that recognizes the constitutional equivalency of monetary exactions. . . .”), with Freilich & Bushek, *supra* note 135, at 201–03 (test only applies to takings of real property).

137. See *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (1996), *cert. denied*, 519 U.S. 529 (1996) (applying *Nollan* and *Dolan* to non-possessory exactions such as fees, which are established adjudicatively, and reasoning that “[u]nder this view of the constitutional role of the consolidated ‘essential nexus’ and ‘rough proportionality’ tests, it matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction”).

138. For an argument for such an extension, see Somin, *supra* note 9, at 238 (“Justice Alito also seeks to distinguish the water district’s demands from taxes, user fees, and other typical financial exactions imposed by the government, by emphasizing that this ‘monetary obligation burdened petitioner’s ownership of a specific parcel of land.’ Here, Justice Kagan makes a good point where she notes that property taxes and some types of fees for public services also burden ownership of a specific parcel of land. Thus, the majority’s attempt to exclude such taxes and user fees from *Nollan-Dolan* scrutiny seems arbitrary. . . .”).

quasi-adjudicative,<sup>139</sup> with more deference given to the former.<sup>140</sup> The extortion narrative, however, casts doubt on whether any distinction should exist between fees that local governments legislatively adopt and fees they impose adjudicatively.<sup>141</sup> Presumably, both legislative and adjudicative decisions can reflect the assumed extortionate motives of municipalities, and those motives would override the types of protections for landowners that some courts have found inherent in the features of the legislative arena.<sup>142</sup>

Furthermore, since staff members report to elected officials, the extortion narrative might suggest that staff cannot be relied upon to offer impartial advice when recommending the imposition of fees. Indeed, the fees challenged in *Nollan* and *Dolan* actually were legislatively adopted fees, further suggesting that this legislative–adjudicative distinction is no longer determinative.<sup>143</sup>

In sum, viewed through the extortion narrative, real property no longer anchors takings theory, at least as far as exactions are concerned.<sup>144</sup>

139. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935) (“In administering the provisions of the statute in respect of ‘unfair methods of competition’—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially.”).

140. See, e.g., *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979) (“Our discussion of the scope of review of agency rulemaking shows that the quasi-legislative nature of rulemaking requires even greater agency freedom to manage and structure decisionmaking than is required in licensing or adjudication.”).

141. But see *Ehrlich*, 911 P.2d at 464.

142. See *Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (“The risk of that sort of leveraging does not exist when the exaction is embodied in a generally applicable legislative decision.”); *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 105 (Cal. 2002) (“While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.”).

143. See, e.g., Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 539 (2012) [hereinafter Mulvaney, *Exactions for the Future*] (“[T]he legislative-adjudicative distinction is arguably belied by *Nollan* and *Dolan*’s facts.”).

144. In a 2015 decision, *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015), the Supreme Court held that the government’s physical taking of raisins, even though part of a broader government regulatory program design to stabilize raising production and prices, constituted a per se taking. *Id.* at 2430. The Court made it clear that it was addressing a physical taking of property, not a regulatory taking. *Id.* at 2428 (noting the “settled difference in [its] takings jurisprudence between appropriation and regulation”). But its explanation for the ruling suggests that, for Fifth Amendment purposes, the Court sees no distinction between the taking of real property and the taking of personal property. After examining the history of the Fifth Amendment, the Court

### B. Prophylactic Protection

Next, to prevent perceived extortion, the Court can now consider whether the Fifth Amendment's protections activate only when the government has actually imposed a regulation on the property itself or instead provide prophylactic protection at even earlier stages of the regulatory process.<sup>145</sup> This issue also implicates the remedy for any violation. The issue lies at the center of *Koontz*, for in that case the government had not actually imposed any conditions. Instead, after negotiations in which the developer refused to agree to the proposed conditions, it denied the project.<sup>146</sup>

The language of the Fifth Amendment—"nor shall private property be taken"<sup>147</sup>—seemingly indicates that the government must actually impose the regulation. It requires compensation only for "taken" property. However, the extortion narrative's premise of government overreaching through leveraging the police power suggests a need to protect landowners during the process that precedes a taking. The argument would be that if the local government improperly uses its leverage during negotiations, then the takings doctrine should protect landowners from that overreach, whether or not the government finally decides to act.<sup>148</sup>

The Court, of course, adopted that prophylactic interpretation in *Koontz*.<sup>149</sup> But aside from the extortion narrative, a certain logic supports at least a narrow extension in that direction. If the Fifth Amendment requires the imposition of conditions before its protections apply, local governments could achieve outcomes and avoid compensation simply through clever lawyering. The *Nollan* and *Dolan* protections certainly apply to an approval with conditions; the landowner receives approval as long as she complies with the conditions. To avoid *Nollan* and *Dolan*, a local government might impose requirements as conditions *precedent* to

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concluded that "[n]othing in this history suggests that personal property was any less protected against physical appropriation than real property." *Id.* at 2427.

145. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2608 (2013) (Kagan, J., dissenting).

146. *Id.* at 2591 (majority opinion) ("[T]he District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield.").

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

148. *Koontz*, 133 S. Ct. at 2595 ("[The government] may not leverage its legitimate interest in mitigation to pursue governmental ends . . .").

149. *Id.* ("[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

the approval.<sup>150</sup> If the landowner does not meet the conditions, then the local government will deny approval, and that denial will fall under the more lenient *Penn Central* test.<sup>151</sup> Acknowledging that logic, both the Water District in *Koontz* and the United States as amicus curiae conceded that a demand could amount to an unconstitutional condition even though the local government never actually imposed that condition.<sup>152</sup>

This holding would amount to a “fix” only for addressing obvious attempts to circumvent *Nollan* and *Dolan*. It presupposes a very specific factual situation in which the agency clearly indicates its final set of conditions and then requires the developer to meet them before the agency would approve the project. It would not open the entire negotiating process to claims of extortion.<sup>153</sup>

Furthermore, if an agency denies a project after a landowner opposes unconstitutional conditions proposed by the public agency, then what is the remedy? The twin *Nollan* and *Dolan* decisions required compensation, but the compensation was for conditions that the government entities actually imposed on the projects and that affected the property at issue in those cases.<sup>154</sup> By contrast, where the government denies the project, it has taken nothing (assuming that its denial will not fail the *Penn Central* test for general regulatory takings). Moreover, the Court has long recognized that the Takings Clause does not substantively constrain land use regulation; rather, it only requires compensation when the regulation has resulted in a taking.<sup>155</sup> The Court confirmed as much

150. See Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277, 300 (2011) [hereinafter Mulvaney, *Proposed Exactions*] (recognizing, as part of an analysis of proposed exactions, that applying the same test to all conceivable exactions, whether proposed prior to an outright permit denial or imposed in a final development approval, “makes intuitive sense” but ultimately rejecting this approach).

151. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (outlining a test determined by “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations”).

152. Transcript of Oral Argument at 32, *Koontz*, 133 S. Ct. 2586 (No. 11-1147) (Mr. Wolfson for Respondent: “[I]f the situation is really exactly the same like *Nollan* and *Dolan*, but the permit is denied but it’s clear that it is a concrete—concrete condition, the landowner can go up through the judicial review process and say, this is—you know, the denial of the permit application is predicated on an unconstitutional condition, and you should set that aside”); *id.* at 50 (Mr. Kneidler for the United States: “[W]e don’t think it matters whether the—whether it’s a permit grant or permit denial. There was no actual taking in the sense compensation would be owed, but it could be challenged as an unconstitutional condition under the *Nollan* and *Dolan* analysis”).

153. *But see* Echeverria, *supra* note 9, at 22–23 (arguing against such a distinction).

154. *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1993); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827–28 (1986).

155. *E.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1986) (stating that the Takings Clause “is designed not to limit the governmental

in its 2007 *Lingle* decision.<sup>156</sup>

This principle supplied the foundation for the Court's earlier key decision on the remedy required when a regulatory taking has occurred. In *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>157</sup> the Court held that if a government regulation results in a taking, the Fifth Amendment requires compensation for whatever period the regulation was in place.<sup>158</sup> The Court rejected the County's argument that once a court found a taking, the available remedy should only be enjoining the regulation in the future.<sup>159</sup> While the local government could rescind the regulation, it still would have to compensate the plaintiff for the interim period in which the taking was in effect.<sup>160</sup>

The holding also logically aligned with the Court's takings decisions explaining the doctrine of ripeness. A plaintiff can bring a takings case only after the local government has definitively decided on a development application.<sup>161</sup> If that decision constituted a taking, then the court could measure the damages only if the government had applied the regulation specifically to the property.<sup>162</sup>

In sum, the case law under the Takings Clause has been concerned principally with determining when a government action has crossed the line into a taking and secondarily with whether the government's action was specific enough to calculate damages for the taking. Under the extortion narrative, however, a primary purpose of the Takings Clause is to prevent local governments from overreaching—from “extorting” benefits from landowners, to use the Court's terminology.<sup>163</sup> Viewed from that perspective, the range of potential remedies for a violation

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interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking”).

156. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005).

157. 482 U.S. at 315.

158. *Id.* at 322.

159. *Id.* at 319–21.

160. *Id.* at 321 (“[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”); *see also, e.g.*, *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 439 (1982) (requiring compensation even though the taking involved a minute physical infringement on the property: the wiring for cable television).

161. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

162. *See* Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623, 640 (2012) (“Only when the agency has specified the exaction can a court know what property has or will be taken. Insofar as the Fifth Amendment's text requires *property* to be taken as a basis for just compensation . . . , *Nollan* and *Dolan* require the identification and finalization of a condition as a predicate to an exactions claim.”).

163. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (“Extortionate demands . . . frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.”).

widens. If an actual taking has occurred, damages are available. But a local government may abuse its power by employing excessive leverage during negotiations that occur before the government decides on a development application.<sup>164</sup> If so, no actual taking has yet occurred, but a plaintiff has an opportunity to seek some sort of remedy for the government's overreaching.<sup>165</sup>

The Supreme Court held as much in *Koontz*,<sup>166</sup> again showing the reach of the extortion narrative. The Court recognized that no violation of the Takings Clause occurred because the Water District never approved the project—a point about the plaintiff's request for damages that had understandably “puzzled” the Florida Supreme Court.<sup>167</sup> Nonetheless, in *Koontz*, Justice Alito reasoned: “Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”<sup>168</sup> The Court continued that “the impermissible denial of a government benefit is a constitutionally cognizable injury,” just as in other unconstitutional conditions cases.<sup>169</sup>

This reasoning is consistent with the extortion narrative, even employing language taken directly from it—“extortionate demands.” If the function of the Takings Clause is to prevent those types of demands, it implies the availability of a compensation remedy if they occur, even if no actual taking occurs.

### C. Deterrence and Non-deference

Acceptance of the extortion narrative has important implications for how the Takings Clause affects judicial review and, relatedly, the deference accorded to local decisions. Traditionally, courts view the Takings Clause as requiring a case-by-case application of the facts in individual cases. The general purpose of the judicial inquiry is to determine whether the government has “singled out”<sup>170</sup> an individual landowner, under a particular set of facts, to bear burdens that society as

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164. Brian T. Hodges, *Koontz v. St. Johns River Water Management District and Its Implications for Takings Law*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 39, 41 (Oct. 2013) (“[T]he Court’s decision to resolve *Koontz* under the doctrine of unconstitutional conditions will provide aggrieved property owners with a cause of action that is substantively and procedurally distinct cause from a regulatory takings claim.”); see *supra* notes 122–23 and accompanying text.

165. See Fenster, *Failed Exactions*, *supra* note 162, at 631–38 (discussing the small number of “failed exaction” cases before *Koontz*).

166. *Koontz*, 133 S. Ct. at 2596.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 131 (1978).

a whole should bear.<sup>171</sup> With respect to general regulatory takings, in contrast to exaction takings, the outcome depends on a variety of circumstances, as reflected in the Court's multifactor general test for takings established in *Penn Central*. Where governments impose conditions, however, the *Nollan* and *Dolan* tests apply and are quite dependent on specific facts.<sup>172</sup>

The extortion narrative proceeds differently. At its core, it assumes that all local government entities will act in a way that unfairly burdens landowners. That assumption, in turn, has led to a focus on rules whose purpose is deterrence, not simply determining whether a right to compensation exists in a specific factual situation. Thus, as discussed above, in *Koontz* the Court was willing to employ the unconstitutional conditions doctrine when the defendant public agency had not actually taken property and when at least some uncertainty existed about the scope of the conditions that the agency sought to impose.<sup>173</sup> The goal was to deter local overreaching.<sup>174</sup>

The deterrence theme is also evident from the Court's placement of the burden of proof. In *Dolan*, the Court placed the burden of proof on the city to justify its actions under the rough proportionality test.<sup>175</sup> This holding departs from the traditional allocation of the burden of proof in land use litigation, which situates that burden on the plaintiff.<sup>176</sup> The Court explained that the burden shifted because the local government was making an adjudicative decision, an explanation unsupported by traditional principles of land use law.<sup>177</sup> But the new burden of proof rule *is* consistent with the extortion narrative, which seeks to deter presumed wrongdoing by local governments.

Another aspect of the focus on deterrence is a marked lessening in the deference given to local decision-making. Longstanding principles of judicial review call for courts to presume that governmental officials are

171. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that the Takings Clause was “designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole”).

172. *See Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

173. *Koontz*, 133 S. Ct. at 2598 (“[W]e decline to reach respondent’s argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan*.”).

174. *Id.* at 2598–601.

175. *Dolan*, 512 U.S. at 391 n.8.

176. *Id.*

177. *See* Jonathan M. Davidson, Ronald H. Rosenberg & Michael C. Spata, *Negotiated Development Denial Meets People’s Court: Del Monte Dunes Brings New Wild Cards to Exactions Law*, 31 URB. LAW. 831, 835 (1999) (noting the traditional allocation of the burden of proof on the challenger in land use cases).

acting correctly in exercising discretion legally assigned to them.<sup>178</sup> While deference has not been a particular theme in takings cases, the Court has in some instances expressed concern about intruding on local governments' land use powers.<sup>179</sup> Such deference, however, is inconsistent with the idea that local governments are extorting property from landowners. Because the extortion narrative views the local governments' imposition of conditions as suspect, deference becomes inappropriate. In its place, the Court substitutes distrust and enhanced scrutiny.<sup>180</sup>

Moreover, the rejection of deference operates without regard to the actual motives of local officials. Dissenting in *Dolan*, Justice Stevens would have found a taking only if the regulatory action was "so grossly disproportionate" to the proposed development's adverse effects that it "manifests motives other than land use regulation on the part of the city."<sup>181</sup> The acceptance of the extortion narrative obviates any need for inquiry into the motives or good faith of local officials.

Taken as a whole, the twin features of deterrence and non-deference rearrange the traditional institutional relationship between courts and local governments. They also call for takings rules that differ fundamentally from those applied in a deferential relationship.<sup>182</sup>

178. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land Use Law*, 24 URB. LAW. 1, 1 (1992) ("Land-use decisions are either local administrative or legislative decisions, both of which are generally accorded a formal presumption of rationality and constitutionality.").

179. See *Rapanos v. United States*, 547 U.S. 715, 737–38 (2006) ("Even if the phrase 'the waters of the United States' were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible. As we noted in *SWANCC* [Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)], the Government's expansive interpretation would 'result in a significant impingement of the States' traditional and primary power over land and water use.' Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power." (citation omitted)). The Court has explicitly noted deference in cases under the "public use" clause of the Fifth Amendment. See *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) ("The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.").

180. See Fennell & Peñalver, *supra* note 9, at 336 ("[The Court] wanted to leave intact all monetary impositions related to land *except extortionate ones*. But sifting through every imposition to identify the bad ones is no trivial exercise; it involves a significant recalibration of the relationship between federal courts and other government actors.").

181. *Dolan*, 512 U.S. at 403 (Stevens, J., dissenting).

182. In this sense, the lack of deference that the extortion narrative calls for leads directly to the Court's adoption of the doctrine of unconstitutional conditions. See *infra* Section III.D.

### D. *Effects on Planning and Bargaining*

Two important features of modern land use law are planning and bargaining. The extortion narrative affects both, but it does so in quite different ways that intersect with the lack of deference just discussed.

The principal assumption of the extortion narrative—unchecked actions by local officials pose significant risks to landowners—has led the Court to adopt more stringent tests circumscribing the discretion exercised by those officials. In particular, the rough proportionality test places the burden of proof on the city and, as a practical matter, requires more specific calculations about the relationship between a project's impact and a mitigation condition.<sup>183</sup> In other words, the effect is to require more planning by local officials.

In a number of important cases, the Supreme Court and some state supreme courts have recognized the importance of planning to address land use problems by affording some deference toward those efforts.<sup>184</sup> In *Dolan*, Chief Justice William Rehnquist even referred to the “commendable task of land use planning.”<sup>185</sup> At the same time, however, land use planning is not an entirely neutral exercise. The fact-finding component of planning does rely on objective technical expertise grounded in professional competence, but the ultimate adoption of policies in land use plans is largely a political choice, albeit one constrained by state statutes.<sup>186</sup> The Court might well conclude that the

183. See *Dolan*, 512 U.S. at 403 (“The Court’s assurances that its ‘rough proportionality’ test leaves ample room for cities to pursue the ‘commendable task of land use planning,’ even twice avowing that ‘[n]o precise mathematical calculation is required,’ are wanting given the result that test compels here.” (citation omitted)).

184. See *Kelo*, 545 U.S. at 483 (“The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts.” (footnote omitted)); *Golden v. Planning Bd.*, 285 N.E.2d 291, 296 (N.Y. 1972) (“The undisputed effect of these integrated efforts in land use planning and development is to provide an over-all program of orderly growth and adequate facilities through a sequential development policy commensurate with progressing availability and capacity of public facilities.”); Nicole Stelle Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443, 444 (2007) (suggesting that planning is a type of “safe harbor” after *Kelo*).

185. 512 U.S. at 396 (majority opinion) (noting that land use planning is “made necessary by increasing urbanization, particularly in metropolitan areas such as Portland”).

186. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 3:5 (3d ed. 2013) (noting that local governments generally possess zoning power, and therefore many factors can influence the power); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment One*, 24 *STAN. ENVTL. L.J.* 3, 9–13 (2005) (discussing zoning history).

chosen planning policies would reflect the underlying power imbalance assumed by the extortion narrative and thus that planning does not deserve the deference often accorded it in the past.<sup>187</sup> In some sense, that is precisely what *Dolan* did by adopting the rough proportionality standard and finding that existing planning for traffic was insufficient.<sup>188</sup>

In short, the extortion narrative cuts two ways with respect to planning. It impels the adoption of more precise and narrower tests, a consequence that encourages—if not demands—more comprehensive planning. At the same time, the Court may view the outcome of that planning as suspect and thus not entitled to deference. Perhaps the language in *Nollan* reflects or at least prefigures the Court’s attitude. The Court held that a condition unrelated to the purpose that would allow a development ban becomes “an out-and-out *plan* of extortion.”<sup>189</sup>

A second feature of modern land use law is bargaining between public agencies and developers. Municipalities and developers are strongly inclined to negotiate solutions to issues raised by land use proposals.<sup>190</sup> Developers would like to avoid the uncertainty associated with the regulatory approval process and perhaps prevent litigation, while local officials perceive opportunities to obtain negotiated benefits for their municipality.<sup>191</sup>

The extortion narrative has important implications for such bargaining. A significant factor in the outcomes reached by bargaining is

187. See Mulvaney, *Remnants of Exaction Takings*, *supra* note 108, at 194 (noting that the *Dolan* Court “declared that the federal Takings Clause placed limits on the deference afforded to governments’ imposition of certain development conditions”).

188. 512 U.S. at 391, 395 (“But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway ‘could offset some of the traffic demand . . . and lessen the increase in traffic congestion.’”).

189. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (emphasis added) (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981), *overruled by Town of Auburn v. McEvoy*, 553 A.2d 317, 320–21 (N.H. 1988) (“To the extent, then, that *J.E.D. Associates, Inc. v. Town of Atkinson* may be read to exempt constitutional property claims from the demands of the appellate process . . . it is overruled.”)).

190. See 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) (“Formal agreements between landowners and local government respecting the use of land have increased substantially over the past twenty-five years.”); Mulvaney, *Exactions for the Future*, *supra* note 143, at 524–25 (examining a hypothetical and concluding that both the developer and the city had incentives to negotiate).

191. Mulvaney, *Exactions for the Future*, *supra* note 143, at 524–25.

the bargaining power that a party brings to the negotiating table.<sup>192</sup> The extortion narrative presumes that local officials have considerable power and will unfairly use it to coerce developers. Thus, the narrative views the bargaining process as suspect, and one would expect that a court following the narrative would shape takings law to discourage bargaining.

The Court fulfilled that expectation in *Koontz*. It concluded that the Water District used its bargaining leverage to impose a “take it or leave it” demand upon the developer—a factual conclusion that corresponds to the extortion narrative—and then denied the project when the developer refused that demand.<sup>193</sup> The Court’s discussion of the negotiating process in the case leaves no doubt that it saw the process as tainted.

By applying the unconstitutional conditions doctrine even though the Water District had never actually approved the project,<sup>194</sup> the Court erected obstacles in the path of negotiated solutions to land use proposals. Under the holding, negotiations over project approvals can turn into violations of the unconstitutional conditions doctrine even if the parties never reach an agreement. Indeed, some have suggested that those obstacles to negotiated solutions are insurmountable,<sup>195</sup> arguing that landowners could later use the negotiations to prove a violation of the unconstitutional conditions doctrine and perhaps to support an award of damages.<sup>196</sup> Some cautious municipalities may decide that, given the risks of liability, they simply will not bargain for conditions that might violate the essential nexus and rough proportionality standards of *Nollan* and *Dolan*. If so, it is conceivable that local governments will deny more projects outright because of unavoidable, adverse environmental impacts.

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192. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 150 (2005) (“Bargaining power disparities . . . can affect the ability of the ‘weak’ party to obtain its preferred terms in a contractual interaction with a ‘strong’ party.”).

193. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2593 (2013) (“The District considered the 11-acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions.”).

194. *Id.* at 2591, 2595.

195. The Florida Supreme Court in *Koontz* suggested that to avoid potential liability for actions during negotiations, agencies will respond by “opt[ing] to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation.” *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (Fla. 2011), *rev’d*, 133 S. Ct. 2586 (2013).

196. Tappendorf & DiCianni, *supra* note 1, at 471 (“In the back-and-forth process of negotiations over land use permits, whenever the government makes a request that the developer does not like, the developer now has the option to drop out of the negotiations and bring a lawsuit against the government for making unconstitutional demands.”); see also Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 205 (2015) (examining why *Koontz* makes land use negotiations less efficient).

However, because the mutual benefits to bargaining are substantial, the parties to land use negotiations are strongly incentivized to devise a way of negotiating that circumvents the obstacles erected by the Court. They likely will mutually agree to conditions under which bargaining can occur without potential municipal liability if the bargaining fails. Furthermore, municipalities will strive to structure the positions that they take in bargaining to prevent their use later in litigation, particularly by avoiding any characterization of those positions as demands. So bargaining will continue, although in a more careful, structured, and lawyer-supervised fashion than before.

The remaining question about bargaining is whether *Koontz* will alter the substantive scope of the negotiated agreements that the parties reach. In the past, the general consensus among practitioners was that parties could reach agreements under which developers would provide benefits exceeding those that a municipality could constitutionally impose under *Nollan* and *Dolan*.<sup>197</sup> The theory was that by voluntarily agreeing to those conditions, developers waived any right to claim that the conditions constituted a taking.<sup>198</sup>

By accepting the extortion narrative, *Koontz* casts some doubt on this practice. The decision heightens the uncertainty about whether, or under what circumstances, developers can voluntarily waive their right to contest unconstitutional conditions and whether municipalities may rely on such waivers. Certainly one can envision an argument in later litigation that courts should not recognize such waivers because municipalities leveraged them, an argument fully consistent with the extortion narrative.

### E. *De-compartmentalizing Takings Law*

As the discussion above has shown, the extortion narrative as implemented has changed the purpose and features of exaction takings law.<sup>199</sup> It could, however, operate even more broadly.

The obvious example is the potential for further extension beyond real property of the takings doctrine governing exactions. The courts and commentators had split on whether the *Nollan* and *Dolan* decisions were based on the local governments' attempt to exact interests in real property

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197. See David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 405 (2007) (providing the example of a Hawaii planning statute).

198. See *id.* at 404 (asserting that development agreements can go further because it “is in theory a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute”).

199. See Alexander, *supra* note 97, at 1772 (“Connecting the narratives and counter-narratives of power in land-use regulation with . . . deeper political visions illuminates methodological arguments.”).

from the developers in those cases.<sup>200</sup> One could certainly read the opinion in *Nollan* to support the narrower interpretation because it emphasized that, if the California Coastal Commission had taken an easement directly without paying for it, the Fifth Amendment would demand compensation.<sup>201</sup> If the two decisions were based on the type of property taken—real property—this fact compartmentalized their reach.<sup>202</sup> In turn, this perceived limitation led some commentators to label *Nollan* and *Dolan* as relatively narrow decisions.<sup>203</sup>

The decision in *Lingle* seemed to support this reading.<sup>204</sup> Both cases, said *Lingle*, “began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking.”<sup>205</sup> Moreover, to date, the exaction cases have occupied a sphere of takings law distinct from general regulatory takings, such as when the government rezones property and greatly reduces its value. The decisions of whether those actions constitute takings, it is agreed, fall under a different sphere of takings law occupied by the *Penn Central* multifactor balancing test.<sup>206</sup>

Compartmentalizing the takings cases in this fashion, however, results in certain anomalies. For one, *Dolan* shifted the burden of proof to the government on the imposition of conditions that could result in a taking.<sup>207</sup> However, the burden remains on the plaintiff in general regulatory takings cases subject to the *Penn Central* test.<sup>208</sup> Moreover, the routine types of conditions placed on developments by municipal ordinances, such as setback provisions and parking requirements, also effectively “take” property from the landowner.<sup>209</sup> Their status is now

200. See generally W. Andrew Gowder Jr., *When Do the Nollan and Dolan Rules Apply to the Regulation and Development of Land Use?*, 65 PLAN. & ENVTL. L. 4 (2013) (discussing the split in the case law).

201. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 830–31 (1987).

202. See *Alto Eldorado P’ship v. County of Santa Fe*, 634 F.3d 1170, 1175 (10th Cir. 2011) (holding that *Nollan* and *Dolan* were a “‘sub-category’ of physical *per se* takings”).

203. Fenster, *Failed Exactions*, *supra* note 162, at 630 (“The exactions decisions constitute a narrow, unique category that operates, both factually and doctrinally, as a distinct inquiry that lies between the *per se* takings categories and the default balancing test.”).

204. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2004).

205. *Id.* at 546.

206. *Id.*

207. *Dolan v. City of Tigard*, 512 U.S. 391, 391 n.8 (1994).

208. Fenster, *Failed Exactions*, *supra* note 162, at 628 (“[T]he Court usually follows the ‘principal guidelines’ and default approach for resolving regulatory takings claims established in *Penn Central*.” (footnote omitted)).

209. See, e.g., Norman Cheng, “*If a Policeman Must Know the Constitution, Then Why Not a Planner?*” *A Constitutional Challenge of the Hawai’i Public Access Statute*, 23 U. HAW. L. REV. 409, 424 (2000); Gwynne Hunter, Note, *Severance v. Patterson: How Do Property Rights Move When the Dynamic Sea Meets the Static Shore?*, 40 ECOLOGY L.Q. 271, 295 n.178 (2013).

clouded with some uncertainty.

Perhaps more importantly, this type of compartmentalization between exaction takings and general regulatory takings seems unrelated to the actual burden imposed on landowners in specific cases. A land use regulation (say, a rezoning) could cause a very large diminution in the value of a landowner's property, perhaps as much as ninety percent or more, but not constitute a taking under *Penn Central*.<sup>210</sup> By contrast, a required dedication of real property could effect a taking under *Nollan* and *Dolan* even though it was quite small and had little actual impact on a development (and perhaps even resulted in a benefit to the landowner).<sup>211</sup> Indeed, *Nollan* found that requiring the dedication of an easement over part of a beach was a taking, but requiring the landowner to maintain a view site on the property—to most landowners, a greater infringement on their rights—would not be.<sup>212</sup>

Doctrinal distinctions may justify these types of disparities caused by the compartmentalization of land use doctrine.<sup>213</sup> The extortion narrative, however, looks at takings scenarios through the very different, overriding lens of protecting the landowner from government overreaching. That perspective would place little importance on the method by which local governments impose the regulation—by exaction or through direct regulation—but would instead focus on responding to the government overreaching.

Thus, with *Koontz* having freed takings law from its tether to real property and from any requirement that the government actually adopt the exaction, the extortion narrative could now justify de-compartmentalizing takings law to provide wider protection against government extortion.<sup>214</sup> For example, a downzoning that greatly

210. See, e.g., Mark W. Cordes, *The Effect of Palazzolo v. Rhode Island on Takings and Environmental Land Use Regulation*, 43 SANTA CLARA L. REV. 337, 341–42 (2003) (“[C]ourts have typically required diminution in value of a property far exceeding fifty percent, and closer to ninety percent, before takings are found.”).

211. Certainly the landowner in *Dolan* would benefit from the overall bike path, and the landowner in *Nollan* would benefit from the series of easements across the ocean side of various other properties. *Dolan*, 512 U.S. at 378; *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 828 (1987).

212. *Nollan*, 483 U.S. at 836 (“[T]he condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.”).

213. Mulvaney, *Remnants of Exaction Takings*, *supra* note 108, at 217 (noting that limited judicial scrutiny of development application denials matched with *Nollan* and *Dolan*'s heightened scrutiny of granted permits with conditions “can diminish the efficiency and effectiveness of land use regulation”).

214. See Fennell & Peñalver, *supra* note 9, at 288 (“By beating back one form of exactions creep—the possibility that local governments will circumvent a too narrowly drawn circle of

diminishes the value of property, perhaps to preserve the rural atmosphere of a local jurisdiction, could appear as more “extortionate” than a condition merely requiring the dedication of an easement over part of the landowner’s property. Viewing the downzoning through the lens of extortionate leveraging would provide a rationale for collapsing the distinction in current law between conditional takings through exactions and general regulatory takings. During the *Koontz* oral argument, Chief Justice John Roberts asked, perhaps presciently: “Do you know of any case where the government has lost a *Penn Central* case?”<sup>215</sup> This question may well imply his skepticism about whether the *Penn Central* test for general regulatory takings sufficiently constrains local regulators.

In short, the extortion narrative has already driven the *Koontz* decision to break through prior doctrinal walls. It could impel even more far-reaching changes.

#### IV. THE EXTORTION NARRATIVE AS A RATIONALIZING POSTULATE FOR TAKINGS DOCTRINE

A majority of the Court has now adopted the extortion narrative, and the Court’s opinions, particularly *Koontz*, reflect its influence. Those opinions, however, have not developed the concept of extortion or explained how it could operate as a motivating postulate for the continued evolution of exactions takings law. Instead, the Court merely assumed the existence of extortion and made almost no effort to further support or explain the idea. Further, the narrative has received little scrutiny from others outside the Court, although litigators seeking to expand takings law have certainly emphasized it. Given the growing importance of the extortion narrative as reflected in the Court’s opinions, this Part analyzes whether it is a concept capable of supporting the further restructuring of takings law.

##### A. *The Literal Charge of Extortionate Behavior*

A logical starting place is an examination of the concept of extortion itself. Extortion is an accusation with extremely negative connotations; it is viewed as a serious, highly immoral crime of corruption.<sup>216</sup> In a 1992 case, the Court described it as “the rough equivalent of what we would

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heightened scrutiny—the Court has left land use regulation vulnerable to the creeping expansion of heightened scrutiny under the auspices of its exactions jurisprudence.”)

215. Transcript of Oral Argument at 29, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (No. 11-1447).

216. See James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1696 (1993) (describing extortion by a public official as “the seeking or receiving of a corrupt benefit paid under an implicit or explicit threat to give the payor worse than fair treatment”).

now describe as ‘taking a bribe.’”<sup>217</sup> Extortion is not a charge brought lightly, yet that was exactly what the Court accused the California Coastal Commission of in *Nollan*.<sup>218</sup> There, the Court concluded that if the regulatory condition imposed on a project was unrelated to the impact that would have allowed the Coastal Commission to disapprove the project entirely, then imposing that condition amounted to “an out-and-out plan of extortion.”<sup>219</sup> The Court’s later repetition of the extortion charge demonstrates that its use was deliberate, not merely one-time, colorful verbiage.

Was the charge merited? The federal Hobbs Act defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>220</sup> Thus, a 1947 case from the U.S. Court of Appeals for the Seventh Circuit found that a person was guilty of extortion under color of office if he “demanded and received money or a thing of value to which he was not entitled.”<sup>221</sup> Public officials certainly can commit extortion, and one might posit that, using the definition in the Hobbs Act, local governments are wrongfully obtaining property under color of their official authority. Furthermore, the definition of extortion in *Black’s Law Dictionary* might seem to apply in the context of land use exactions: “The offense committed by a public official who illegally obtains property under the color of office; esp., an official’s collection of an unlawful fee.”<sup>222</sup>

Nonetheless, a 2007 Supreme Court case demonstrates that the facts in *Nollan* could not have led to a conclusion of extortion. In *Wilkie v. Robbins*,<sup>223</sup> a landowner claimed that federal land management officials were trying to extort a right-of-way from him.<sup>224</sup> He alleged that the agents intended to obtain the right-of-way by carrying out and threatening various administrative actions.<sup>225</sup> The Court rejected the extortion charge,

217. *Evans v. United States*, 504 U.S. 255, 260 (1992).

218. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

219. *Id.* (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

220. 18 U.S.C. § 1951(b)(2) (2006).

221. *United States v. Sutter*, 260 F.2d 754, 756 (7th Cir. 1947); *see also* *United States v. Urban*, 404 F.3d 754, 768 (3d Cir. 2005) (noting that under the Hobbs Act, “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts”); Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENV. U. L. REV. 1231, 1235 (1997) (discussing the distinction between bribery and extortion, and noting that extortion is “whether the defendant was paying to . . . avoid worse than fair treatment”).

222. *Extortion*, BLACK’S LAW DICTIONARY (9th ed. 2009).

223. *Wilkie v. Robbins*, 551 U.S. 537 (2007).

224. *Id.* at 548.

225. *Id.* at 544.

reasoning that “[t]he Hobbs Act does not apply when the National Government is the intended beneficiary of the allegedly extortionate acts.”<sup>226</sup> It cited “the importance of the line between public and private beneficiaries” for extortion both under the Hobbs Act and at common law.<sup>227</sup> Thus, because the defendants’ actions in *Wilkie* were intended to benefit the government rather than them personally, extortion did not apply.<sup>228</sup> The same logic would apply to the vast majority, if not all, local government actions imposing conditions under the land use regulatory process.

Moreover, the extortion claim fails for another reason. In *Nollan*, once the Court concluded that the Coastal Commission’s actions did not meet the essential nexus test, the Court immediately labeled the totality of the actions “an out-and-out plan of extortion.”<sup>229</sup> Thus, the Court seemed to say that even if a local government applied the essential nexus test in good faith, a judicial determination that the government was wrong immediately converts the government action into extortion. The language in *Nollan* admits no middle ground, rejecting the possibility that a local government could, in good faith, adopt a condition that a court later finds is excessive under *Nollan* or *Dolan*.

This concept of extortion per se is plainly insupportable. The Court’s use of the word extortion in the takings context takes no account of whether the local officials were acting in good faith or were attempting to follow the law.<sup>230</sup> Yet neither *Nollan*’s essential nexus test nor *Dolan*’s rough proportionality test is perfectly precise; courts, not to mention local governments, have disagreed over whether the tests were met in particular instances.<sup>231</sup> Mistakenly applying these tests does not automatically equate to intentional extortion.<sup>232</sup>

226. *Id.* at 563.

227. *Id.* at 564.

228. *Id.* at 565.

229. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

230. See William A. Fischel, *From Nectow to Koontz: The Supreme Court’s Supervision of Land-Use Regulation* 44 (July 25, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2471906](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471906) (“The possibility of extortionate motives for regulation . . . seems pretty remote in [*Nollan*, *Dolan*, and *Koontz*].”).

231. See Breemer, *supra* note 136, at 375 n.13, 395–96. In *Dolan*, Justice David Souter’s dissent persuasively argued that the city’s conditions violated the nexus requirement in *Nollan*. *Dolan v. City of Tigard*, 512 U.S. 374, 411–12 (1994) (Souter, J., dissenting). The majority found the *Nollan* nexus requirement satisfied. *Id.* at 387 (majority opinion).

232. An analogous situation arose in *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188 (1998). In that case, the Coastal Commission erred in concluding that it had jurisdiction over a lot-line adjustment, resulting in a two-year delay in development on the property. *Id.* at 1190, 1193. The court held that such an error did not automatically result in a taking under the Fifth Amendment. *Id.* at 1190.

Indeed, the facts of *Nollan* illustrate how the immediate conclusion of “an out-and-out plan of extortion” is unsustainable. In that case, Justice Scalia assumed that a new beach house could have caused impacts on the inland side of the house.<sup>233</sup> Individuals who drove by would be unable to see the beach and would not realize that they had a right to use that beach.<sup>234</sup> Thus, reasoned the Court, a condition directed to that impact, such as requiring a view area on the property, would be sufficiently related to the impact to pass constitutional muster.<sup>235</sup> But the condition actually adopted by the Commission, a lateral easement on the beachside of the house that crossed part of the beach above the high-tide mark, was unrelated to the view impact.<sup>236</sup> Therefore, it amounted to “an out-and-out plan of extortion.”<sup>237</sup>

However, the Court reached this conclusion only because it chose to define the impact of the house more narrowly than the California courts had in finding no taking.<sup>238</sup> If the impact were termed an effect on “access” generally, not just access from the road, then the condition imposed by the California Coastal Commission would have passed the *Nollan* test. So the conclusion of extortion came about only because of the Court’s decision in the case, which at least clarified and may well have changed preexisting law. In other words, if the California Coastal Commission implemented “an out-and-out plan of extortion” in imposing the easement condition, it was a type of after-the-fact extortion that resulted from the reasoning of the five-person majority in *Nollan*. Four dissenting Justices would have found no taking.<sup>239</sup>

The Court thus leveled the denigrating charge of extortion based on assumed extortionate motives by local government officials, a conclusion illustrated by the example Justice Scalia used to explain the essential nexus rule in *Nollan*. He began by recognizing that a ban on shouting “fire” in a theater is an exercise of the police power that can pass the stringent standards for regulation of speech.<sup>240</sup> However, requiring a \$100

233. See *Nollan*, 483 U.S. at 838.

234. *Id.*

235. *Id.*

236. *Id.* at 841.

237. *Id.* at 837 (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)); see Richard A. Epstein, *How to Solve (or Avoid) the Exactions Problem*, 72 MO. L. REV. 973, 985 (2007) (“In [Justice Scalia’s] view, the state’s legitimate interest was solely to protect the ‘viewing spot’ for those who wish to look over the landowner’s property. Unfortunately, the lateral [beach-side] interest was not related to that objective . . . .” (footnote omitted)).

238. *Nollan*, 483 U.S. at 839 (“Our conclusion on this point is consistent with the approach taken by every other court . . . with the exception of the California state courts.”).

239. See *id.* at 843 (Brennan, J., dissenting); *id.* at 865 (Blackmun, J., dissenting); *id.* at 866 (Stevens, J., dissenting). Justice Marshall joined Justice Brennan’s dissent. *Id.* at 843.

240. *Id.* at 837 (majority opinion).

payment to allow a shout of “fire” changes everything.<sup>241</sup> Adding the unrelated payment condition alters the purpose to one that, “while *it may be legitimate*, is inadequate to sustain the ban,” which now becomes extortion.<sup>242</sup> So even if a government agency has a legitimate purpose, that purpose automatically transmutes into an illegitimate, extortionate one because its action fails the essential nexus test.<sup>243</sup>

To summarize, the extortion narrative does not rest on literal proof of extortion, as the Court’s own decisions have defined that term. Rather, extortion is automatically assumed when local governments fail the tests in *Nollan* and *Dolan*, even if they have acted in good faith in applying those tests. The extortion narrative lacks confirmation from the facts of *Nollan*, the case in which it originated. The charge was and remains a verbal construct inappropriately employing a serious criminal allegation to reach a per se conclusion.

### B. *Unconstitutional Conditions as an Empty Label*

A second underpinning of the extortion narrative, as it has developed in the Court’s exaction cases, is the unconstitutional conditions doctrine.<sup>244</sup> The doctrine relates intimately to the extortion narrative because both are based on improper coercion. The Court sees the unconstitutional conditions doctrine as embodying a logical and proportional response to the extortion narrative, and the question now becomes whether the doctrine can fulfill that role. The answer is that it cannot.

The Court first announced in *Dolan* that its holdings there and in *Nollan* reflected a “special application” of the unconstitutional conditions doctrine.<sup>245</sup> Then, in *Koontz*, the Court explained that by granting a conditional permit, “the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.”<sup>246</sup> The reference to pressure corresponds to the underlying premises of the extortion narrative. So the unconstitutional conditions doctrine generally deals with situations where

241. *Id.*

242. *Id.* (emphasis added).

243. See Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 353 (1999) (“[T]he lack of nexus . . . converts that purpose to something other than what it was.”).

244. See Been, *supra* note 112, at 475 (“The *Nollan* Court’s concern that land use regulators will ‘extort’ property owners has its roots in the allegations of coercion and illicit motive that long have animated judicial and academic debate about exactions and more generally, about the unconstitutional conditions doctrine.”).

245. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2004) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

246. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

the government requires a waiver of a constitutional right to gain a benefit, and the Court sees that same situation in the exactions area.

The Court thus views the unconstitutional conditions doctrine as offering a responsive, unifying principle that supports the reshaping of the constitutional law of exactions to deter “extorted” conditions. As a result, the doctrine has been cited as the “logical underpinning” of constitutional exactions law,<sup>247</sup> and one commentator describes the entire field of exactions law as now falling under the unconstitutional conditions doctrine.<sup>248</sup> Another even sees a violation of the doctrine occurring “the moment the government makes an unlawful demand.”<sup>249</sup>

For a number of reasons, however, the doctrine cannot supply the support needed for the extortion narrative. First, the doctrine itself has been the subject of extensive scholarship, which has generally concluded that it lacks logical cohesion.<sup>250</sup> It may operate as a “metadoctrine”<sup>251</sup> or “overarching principle”<sup>252</sup> preventing government coercion in various situations, but its rationale has never been clear.<sup>253</sup> Thus, while the Court in *Dolan* referred to the doctrine as “well-settled,”<sup>254</sup> that statement is inaccurate and has been derided in scholarship.<sup>255</sup> Most recently, scholars

247. Tappendorf & DiCianni, *supra* note 1, at 456.

248. See Fenster, *Substantive Due Process*, *supra* note 9, at 415 (“The entire field of exactions now, apparently, falls under the unconstitutional conditions doctrine rather than the Takings Clause.”).

249. Hodges, *supra* note 164, at 42 (“[T]he demand itself causes the injury . . .”).

250. E.g., Been, *supra* note 112, at 486; Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L. J. 1, 3 (2001); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 480 (2012); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415–16 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594 (1990); see also Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 802 (2003) (noting that the doctrine of criminal waiver and the doctrine of unconstitutional conditions “involve exactly the same fundamental issue” but “deal with the same problem in very different ways”).

251. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1001–02 (1995) (“[T]he unconstitutional conditions doctrine is not itself a substantive doctrine, but a metadoctrine applied to a number of different substantive doctrines, such as freedom of speech, freedom of religion, equal protection, and procedural due process.”).

252. Fenster, *Substantive Due Process*, *supra* note 9, at 407 (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013)).

253. See Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L. J. 577, 609–10, 610 nn.160–61 (2009) (cataloguing quotes about the doctrine’s deficiencies).

254. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

255. See, e.g., Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard’s Exaction Was a Taking*, 72 DENV. U. L. REV. 893, 893–94 (1995) (“[T]he Court is wrong when it categorizes the unconstitutional conditions doctrine as being ‘well-settled.’”)

have suggested that the lack of underlying cohesion has so fragmented the doctrine that it takes different forms depending on the specific constitutional provision at issue—freedom of speech, freedom of association, or here, takings.<sup>256</sup> Thus, the doctrine’s lack of coherence and logical weakness are well established.<sup>257</sup>

Second, the Court has never attempted to explain either the contours of the unconstitutional conditions doctrine in the takings area or how the doctrine melds with explanations of the takings doctrine in the Court’s exactions cases.<sup>258</sup> The Court made no mention of unconstitutional conditions in *Nollan* and merely referred to the doctrine in passing in *Dolan*.<sup>259</sup> Moreover, the issue raised in *Dolan* was the closeness of the relationship between the exaction condition and the impact of the project that the condition was mitigating.<sup>260</sup> The question whether the city had gone too far in adopting such mitigation is a narrower question than the one normally seen in the Court’s unconstitutional conditions cases: Whether the government has *any* power to require a recipient to waive a constitutional right to receive a benefit.<sup>261</sup>

Finally, in *Koontz*, the doctrine played a central role in the decision given that no actual taking had occurred, but the Court again offered no real explanation of it. The Court cited “two realities of the permitting process,” but never explained their relationship to the doctrine.<sup>262</sup>

Given the important role that exactions play in local government land use decisions, the Court’s discussion to date of the unconstitutional

It is a doctrine that has been inconsistently applied over time, varying with the nature of the right the government wants the private party to waive.”)

256. See, e.g., Berman, *supra* note 250, at 5 (“[U]nconstitutional conditions theorizing over the past decade has tended to occupy narrower conceptual spaces. In place of the attempts to provide a unified theory of unconstitutional conditions across diverse doctrinal categories, scholars have offered descriptive and prescriptive theories of unconstitutional conditions limited to particular subject areas, with speech, religion, abortion, takings, plea bargaining, public assistance, and federal funding for states all generating substantial literatures.”).

257. See *id.* at 3 (“The Supreme Court’s failure to provide coherent guidance on the subject [i.e. unconstitutional conditions] is, alas, legendary.”).

258. As one commentator aptly put it, “While the unconstitutional conditions doctrine—such as it is—plays an important role in defining the vocabulary that courts use in explaining the constitutional limits on exactions, it is unclear what work the doctrine actually does.” Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 *ECOLOGY L.Q.* 131, 147 (2014).

259. See *Dolan*, 512 U.S. at 385.

260. See Laitos, *supra* note 255, at 893.

261. *Id.* at 895 (“[T]he *Dolan* case is not, in fact, an unconstitutional conditions case. It is a takings case.”).

262. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594–95 (2013) (“The first [reality] is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits,” and the second reality is that “many proposed land uses threaten to impose costs on the public that dedications of property can offset.”).

conditions doctrine cannot justify its expansion of takings law in this field. Indeed, it is unclear why the doctrine's use in the exactions field is, as the Court stated, a "special application" of it.<sup>263</sup> Readers are left instead with what is essentially an empty label for a conclusion, not a principled doctrine. Coercion was certainly at work in previous Court holdings applying the unconstitutional conditions doctrine to other constitutional rights, and coercion is at work here in the exactions area, according to the Court. More is necessary, however, to explain why the doctrine is appropriate for exactions.<sup>264</sup>

For example, confusion exists over what "right" is burdened when the unconstitutional conditions doctrine applies in the exactions situation. In *Koontz*, Justice Alito declared that the Water District's demand (assuming there was one) "impermissibly burden[ed] the right not to have property taken without just compensation."<sup>265</sup> Others have suggested that exactions can impermissibly burden the "right to develop property"<sup>266</sup> or "to use . . . property,"<sup>267</sup> which are constitutional rights not widely discussed in case law. Moreover, any rights to develop or use property are only indirectly related to the Takings Clause.<sup>268</sup> This confusion strongly suggests a doctrine detached from any constitutional base.

However, an even larger problem exists. The unconstitutional conditions doctrine addresses situations in which the government requires that an individual forfeit some constitutional right to gain a benefit from the government.<sup>269</sup> Put in terms of the extortion narrative,

263. *Id.* at 2594 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005)).

264. The Court's use of the unconstitutional conditions doctrine in the exactions field simply does not compare to the quality of its other work in *Nollan*. There, the Court carefully explained the origins of local government power to condition land use approvals on exactions and then defined the parameters of that authority in terms of a principle: If a local government had authority to deny a permit, then it had some authority, within bounds, to approve a permit with conditions addressed to the same impacts that would have supported denial. While the Court did use the language of extortion, the explanation of the rationale for the authority to condition was logical and clear. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–37 (1987).

265. 133 S. Ct. at 2596; *see also* *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.").

266. Tappendorf & DiCianni, *supra* note 1, at 457 (suggesting that the benefit withheld under the unconstitutional conditions doctrine is "[t]he right to develop property").

267. James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 412–13 (2009) ("To the extent that the ability to use private property is a fundamental right, the requirement that a landowner seeking to develop property give up land or money in order to subsidize housing for unrelated third parties is a problematic proposition." (footnote omitted)).

268. *See* Somin, *supra* note 9, at 240.

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

local governments are “trying to force property owners to surrender their Takings Clause rights as a condition of getting a permit.”<sup>270</sup> But under this logic, when applying the unconstitutional conditions doctrine to exactions, a critical weakness arises because the Takings Clause operates differently than other constitutional provisions to which courts have applied the doctrine.<sup>271</sup>

Assuming the “public use” requirement of the Takings Clause is met, the clause does not prohibit the government from acquiring property. Rather, it mandates that if a taking has occurred, the government must compensate the landowner for that taking.<sup>272</sup> In this sense, the term “unconstitutional condition” is misleading. The condition is not “unconstitutional” in the sense that it is totally prohibited; rather, the only issue is whether the government pays for it.<sup>273</sup> So the unconstitutional conditions doctrine does not align with exactions takings law as it logically does with other constitutional provisions, such as the right to speech secured by the First Amendment.<sup>274</sup>

The unconstitutional conditions doctrine diverges from exactions law in yet another fundamental way. If the government imposes an exaction that transgresses the *Nollan* and *Dolan* boundaries, the landowner does not forfeit any right to contest the taking by accepting the permit. As long as she preserves the takings claim, the landowner can build under the permit and concurrently seek compensation for the taking caused by the exaction. That is precisely what the plaintiffs did in *Nollan*; they proceeded to build their new house while prosecuting a claim that the government had taken an easement on the property.<sup>275</sup> In contrast, when

270. See Somin, *supra* note 9, at 240.

271. See Fennell & Peñalver, *supra* note 9, at 334 (“Substantive takings law contains a unique feature: the payment of just compensation removes the constitutional infirmity associated with an involuntary taking for public use. . . . The takings context thus differs from other contexts in which parties may be asked to waive their constitutional rights in exchange for benefits.”).

272. U.S. CONST. amend. V.

273. Justice Kennedy’s opinion in *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), recognizes as much: “The [Takings] Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.” *Id.* at 545 (Kennedy, J., concurring in judgment and dissenting in part).

274. Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 47 (2011).

275. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 829–30 (1987) (noting that while the litigation was pending, the Nollans “satisfied the condition on their option to purchase by tearing down the bungalow and building the new house”); see also Been, *supra* note 112, at 503 (“Some developers have adopted the strategy of agreeing to an exaction in order to secure a permit, building the development, then suing for a refund of the exaction (or as in *Nollan*, building the development in violation of the permit requirement while litigating the issue).”). Of course, if the permit explicitly required, as yet another condition, that the property owner “waive” any takings claim about the exaction, that waiver would present different questions. One question would be

courts apply the unconstitutional conditions doctrine in other situations, the doctrine's effect is generally to strike down the condition.<sup>276</sup>

In sum, the unconstitutional conditions doctrine and the extortion narrative do share the common bond of responding to government coercion. But the Court's underdeveloped references to that doctrine and its weaknesses when applied to exactions do not support the Court's effort to employ the doctrine as a vehicle for injecting the extortion narrative into the substantive law of takings exactions.

### C. Devaluing the Status of State and Local Officials

The extortion narrative markedly alters the relationship between the courts and state and local governments. It presumes that local governments act coercively toward project applicants and that the Court must fashion takings law to prevent this coercion. The need is seen as urgent. Thus, the Court in *Koontz* applied the unconstitutional conditions doctrine even while admitting that no taking had occurred.<sup>277</sup> The Court also acknowledged that local government might not have even made the demand required to invoke the doctrine.<sup>278</sup> Even further, it was unclear that a remedy existed for the violation.<sup>279</sup>

Moreover, in *Dolan*, the Court placed the burden of proof to uphold the exaction on the city, with the unconvincing explanation that the city was engaged in making an adjudicative decision.<sup>280</sup> The burden in cases

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whether, under state law, a local government has the power to impose such a waiver as a condition. Further, as part of any takings claim, the landowner would argue that not only was the exaction a taking, but the waiver was invalid as not truly consensual. However, permits rarely include such waivers.

276. As others have argued, the “means–ends” test of *Nollan* and *Dolan* is likewise disconnected from the economic impact of the regulation:

The *Lingle* Court confirmed that regulatory takings inquiries center on the economic impact that a governmental action has upon an individual's property value. The exaction takings tests of *Nollan* and *Dolan* seemingly required application of the very substantive analysis rejected in *Lingle* because exactions that result in takings are invalid in the sense that they violate the means-ends nexus and proportionality threshold. Nevertheless, *Lingle* perplexingly preserved *Nollan* and *Dolan*'s tests in the “special context” of exactions.

Mulvaney, *Proposed Exactions*, *supra* note 150, at 304 n.146 (citation omitted).

277. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013) (“Where the permit is denied and the condition is never imposed, nothing has been taken.”).

278. See *id.* at 2598 (“[W]e decline to reach respondent's argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan*.”).

279. See *id.* at 2597 (“But we need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state* law.”).

280. *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994).

challenging local government action usually lies with the plaintiff.<sup>281</sup> Finally, the rhetoric that the Court has deliberately used—“an out-and-out plan of extortion”<sup>282</sup>—evidences a hostility to local government actions that is inconsistent with any notion of deference.

The Court thus views itself as the last bulwark preventing injury to landowners by abusive local governments. Absent Court action, local governments will run amuck. This view, however, fundamentally alters the Court’s past conception of the role that state and local governments are to play both generally and in the land use field specifically.

Local elected officials make most of the important land use decisions. Moreover, state law, passed by elected officials, empowers local elected officials to act. The extortion narrative, then, necessarily assumes that both sets of elected representatives are uniformly insensitive to the rights of landowners. Under the narrative, local officials coerce landowners, and state representatives have not intervened with new legislation designed to prevent that coercion.

In contrast, the Court in other contexts has cited the ability of elected officials to address a land use problem as an important factor in how the Court approaches that problem. In *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>283</sup> the Court refused to apply heightened scrutiny to a claim of discrimination against a center for handicapped persons.<sup>284</sup> Part of the Court’s rationale was that those individuals had sufficient electoral power to vindicate their rights through the legislative process.<sup>285</sup>

Here, the available evidence casts doubt upon the uniform assumption of coercive intent by both state and local government officials. Certainly the occupations of local elected officials do not appear to evidence an overwhelming hostility to landowners; a large percentage of representatives are business owners, managers, or professionals.<sup>286</sup> Moreover, the evidence indicates that development interests are

281. See *Dolan*, 512 U.S. at 391 n.8 and text accompanying note 176.

282. *Dolan*, 512 U.S. at 387 (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987)).

283. 473 U.S. 432 (1985).

284. *Id.* at 442.

285. *Id.* at 443 (“Second, the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.”). The Court overturned the ordinance in this case on equal protection grounds without treating the plaintiffs as a quasi-suspect class, as they requested. *Id.* at 442.

286. See JAMES H. SVARA, NAT’L LEAGUE OF CITIES, TWO DECADES OF CONTINUITY AND CHANGE IN AMERICAN CITY COUNCILS 8 (2003) <http://www.skidmore.edu/~bturner/Svara%20citycouncilrpt.pdf>. For example, two in five city council members have professional or graduate degrees. *Id.* at 1, 8.

substantially represented on local zoning boards.<sup>287</sup> One would not expect consistently extortionate behavior by this group toward development proposals.<sup>288</sup>

The local planning staff is certainly influential in local land use decisions, and perhaps they exhibit extortionate behavior and resist infringements on local discretion. However, here too evidence exists that planning agency staff members are not hostile to the Court's exaction decisions, at least before *Koontz*. A survey of planners found that almost three-quarters of them agreed that *Nollan* and *Dolan* amounted to good planning.<sup>289</sup> This view hardly reflects the type of hostility that would impel local planners to intentionally skirt the Court's limits.

Further, if landowners were repeatedly subject to extortionate demands by local governments, they logically would seek relief through state legislation.<sup>290</sup> Again, the political makeup of state legislatures and the lobbying power of the real estate industry suggest that state legislatures would be receptive to claims that greater regulation of exactions is necessary to prevent extortionate overreaching.<sup>291</sup> For example, state legislatures moved quickly after the Court's controversial

287. See Jerry L. Anderson, Aaron E. Brees & Emily C. Reninger, *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689, 705 (2008) (finding that every member of the New York City Planning Commission "had some sort of vested interest in the development process"); Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447, 450 (2004) ("[A]lthough much depends on interpretation, we conclude that the majority of those sitting on zoning boards stand to benefit, either directly or indirectly, from development.").

288. See Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1832 n.21 (2003) (reviewing WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES* (2001)) (noting that, according to Professor Fischer, "the dominant literature asserts that local politics tends to be driven by prodevelopment elites," and citing some of the literature that supports this theory). Professor Schragger suggests that homeowners may play a larger role in smaller jurisdictions. *Id.* at 1832.

289. Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 142 (2001).

290. See generally Fenster, *Regulating Land Use*, *supra* note 118, at 759 (discussing an "institutional web of local authority and restraint—including decisions made by state and local institutions, as well as by private individuals—that operates alongside the Court's formalist rules").

291. The National Association of Home Builders is a large and active lobbyist at the federal level. *BuilderLink*, NAT'L ASS'N OF HOME BUILDERS, <http://www.nahb.org/en/advocate/builderlink.aspx> (last visited Aug. 30, 2015). At the state level, many states have active home builders associations that lobby. One example is the Home Builders Association of Virginia, whose website states that it has been found to be one of the top five "most effective" lobbying groups in the state and lists the imposition of fees as a major issue about which it is concerned. *About HBVA*, HOME BUILDERS ASS'N OF VA., <http://www.hbav.com/about-hbav/> (last visited Aug. 30, 2015).

decision in *Kelo v. City of New London*,<sup>292</sup> where the Court upheld local government actions that took private property and transferred it to other private entities.<sup>293</sup> They passed a barrage of new laws aimed, in one fashion or another, at limiting local governments' ability to take such action or adopting procedures to regulate that action.<sup>294</sup>

One rebuttal to this idea that a political correction mechanism exists for "extortionate" takings might be that the idea over-generalizes the parties who are subject to extortionate behavior by local governments. The argument would be that individual landowners often bear the brunt of extortionate exactions, and they do not have the same political power to voice their interests at the state level as larger development interest groups. But the interests of individual landowners are unlikely to differ fundamentally from those of larger development interest groups who are subject to the same laws and who, unquestionably, do have the political clout to make themselves heard.

If the Court's assumption of helplessness on the part of development interest groups is not accurate, then the question becomes why state legislatures are not adopting legislation that would prevent the type of behavior that the Court sees as extortionate. A strong possibility is simply that legislatures do not perceive the behavior of local governments to be as unfair and coercive as the Court does. If so, then the Court's insistence on prophylactic protection for landowners against "extorted" conditions takes on antidemocratic overtones, with the Court substituting its own subjective view of the appropriate scope of regulatory authority for those of elected officials.<sup>295</sup>

At the same time, the Court has become less interested in how the state courts are applying takings law. While interpretation of the Fifth Amendment is, of course, a question of federal constitutional law, the Takings Clause particularly affects state and local governments because they are primarily in charge of land use regulation. Additionally, local

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292. 545 U.S. 469 (2005).

293. *Id.* at 485–86.

294. See, e.g., Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 *ECOLOGY L.Q.* 703, 708 (2011) ("The property rights movement gained significant traction after *Kelo*, leading some states to tighten their eminent domain laws to eliminate economic development as a viable 'public use' and to limit 'blight' condemnations under state takings clauses."). But see Shaun Hoting, *The Kelo Revolution*, 86 *U. DET. MERCY L. REV.* 65, 128 (2009) ("[M]any of these statutes have either failed to close loopholes or opened new loopholes that will allow continued abuses of eminent domain powers.").

295. Others have noted the anti-democratic tendencies of recent takings decisions. See Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 *UCLA J. ENVTL. L. & POL'Y* 1, 15 (2003/2004).

authority to regulate largely derives from state legislation.<sup>296</sup>

As a result, state courts have longstanding and extensive experience adjudicating takings challenges. During the first three quarters of the twentieth century, the U.S. Supreme Court issued few opinions interpreting the Fifth Amendment, leaving most of that work to the state courts.<sup>297</sup> Indeed, the idea of land use “extortion” through conditions originated in a state decision. In *Nollan*, when the Court first held that a permit condition lacking a nexus to a project’s impact would constitute “an out-and-out plan of extortion,”<sup>298</sup> it principally cited a New Hampshire Supreme Court decision, *J.E.D. Associates, Inc. v. Atkinson*.<sup>299</sup> In that case, a town had adopted a regulation requiring all developers to dedicate “land of a character suitable for playgrounds or other town use” that equaled approximately seven-and-one-half percent of a subdivision’s total acreage.<sup>300</sup>

The New Hampshire Supreme Court concluded that the dedication requirement “appears to us to be an out-and-out plan of extortion” requiring developers to pay for the privilege of using their land.<sup>301</sup> The town had not even attempted to connect the dedication requirement to any specific impacts of the project.<sup>302</sup> In *Koontz*, however, the Court cited no

296. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 23 PACE ENVTL. L. REV. 705, 719 (2006) (“In most states, it is understood that municipalities have no inherent powers, but can exercise only that authority expressly granted or necessarily implied from, or incident to, the powers expressly granted by the state.”).

297. See *supra* Section I.A.

298. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 839, 825 (1987) (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

299. 432 A.2d 12, 14–15 (1981). The Supreme Court also used “see” citations directing readers to the Brief of the United States as amicus curiae and the Court’s decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which rebutted a Teleprompter argument about how a landlord could avoid the requirements of the New York City law, neither of which sheds light on the extortion idea. *Nollan*, 483 U.S. at 837.

300. *J.E.D. Assocs.*, 432 A.2d at 13.

301. *Id.* at 14. The Court later stated that municipal officials “may not attempt to extort from a citizen a surrender of his right to just compensation for any part of his property that is taken from him for public use as a price for permission to exercise his right to put his property to whatever legitimate use he desires subject only to reasonable regulation.” *Id.* at 15.

302. See *id.* The New Hampshire Supreme Court distinguished one of its earlier opinions in which it had upheld a condition requiring that part of a subdivision be left as unimproved open space. *Patenaude v. Town of Meredith*, 392 A.2d 582, 586 (N.H. 1978). In that situation, the court said that the requirement “was based on a specific need related to the nature of that development and unlike the regulation now before us, was not an arbitrary blanket requirement.” *J.E.D. Assocs.*, 432 A.2d at 15. The *Dolan* decision, too, relied on various state court decisions about the appropriate test to establish the relationship between a condition and an impact. The rough proportionality test purported to be a middle ground between state tests that were more stringent or weaker. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). But see Matthew J. Cholewa & Helen L. Edmonds, *Federalism and Land Use After Dolan: Has the Supreme Court Taken*

state decisions in support of its holding; instead, the Court relied on its assumptions about extortion as the primary basis for the holding.<sup>303</sup> Moreover, some members of the Court have suggested that state courts are not following its decisions in this area.<sup>304</sup>

The point here is not that the Court must rely on state court decisions to bolster the reasoning in its opinions. Rather, what is striking is that as the Court proceeded to develop its exaction jurisprudence, it began by relying on and closely considering state law decisions and then departed in *Koontz* from that practice. At the same time, the Court adopted the extortion narrative with its overt hostility to and distrust of local decision makers and its implied dismissal of state legislators as the primary correctors of local overreaching.

To sum up, the extortion narrative at its core assumes a power imbalance between municipal governments and development interests, and in response posits the need for the Court to shape prophylactic rules as a corrective device.<sup>305</sup> State legislation might correct the imbalance, but the Court has taken no notice either of such legislation or its absence—situations that might lead a court to question the correctness of its assumption underlying the extortion narrative. In short, the Court has blazed its own path in forging the extortion narrative and, in doing so, has abandoned its traditional respect for the institutional sphere of state and local government.

#### D. Textual Failure and Structural Inconsistency

In the end, the Court's development of exactions law must comport with the actual language of the Takings Clause. At the same time, exactions law must relate structurally to those other constitutional provisions, particularly the Due Process Clause, that are available to constrain local land use discretion exercised in an extortionate manner. In adopting the extortion narrative, the Court has failed here as well.

A fundamental problem arises from the focus of the Takings Clause on compensation. The clause establishes a dividing line that, when crossed by the government to secure property for a public use, requires

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*Takings from the States?*, 28 URB. LAW. 401, 415–16 (1996) (arguing that *Dolan* misread many state court decisions).

303. See *supra* Section I.C.

304. See Ronald H. Rosenberg, *The Non-impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL L.J. 523, 555–56 (1995).

305. See Mulvaney, *Remnants of Exaction Takings*, *supra* note 108, at 196–97 (stating that “[f]or the majorities in *Nollan* and *Dolan*, the regulatory takings doctrine became a corrective device to balance against incentives for abuse of state permitting power”).

payment of “just compensation.”<sup>306</sup> The clause does not, as the Court has emphasized, impose substantive limitations on land use regulation other than the “public use” requirement.<sup>307</sup>

By contrast, the extortion narrative, as implemented through the unconstitutional conditions doctrine, serves a different purpose: ensuring that individuals are not coerced into surrendering rights.<sup>308</sup> That purpose does not align well with the actual language and function of the Takings Clause. The Court’s awkward linguistic attempt to fuse extortion with takings—prohibiting governments from “impermissibly burden[ing] the right not to have property taken without just compensation”<sup>309</sup>—only serves to illustrate the mismatch. Not surprisingly, this language lacks the expository power that could explain and justify such an important judicial restraint on local government power.

Thus, as explicated in *Koontz*, the extortion doctrine focuses on “impermissibly burden[ing]” rights<sup>310</sup> and strays quite a distance from the actual language of the Fifth Amendment. The Court was forced to recognize as much by concluding that no actual taking occurred in that case.<sup>311</sup> Instead, to avoid a potential unconstitutional condition, *Koontz* now authorizes courts to police negotiations that precede any actual regulatory action by local governments.<sup>312</sup> Moreover, no obvious stopping point for that oversight exists from the standpoint of the extortion narrative. One can now conceive of charges that the very breadth of the negotiations was extortionate, even if the local government did not actually demand that the developer acquiesce to any conditions. The question is not what was taken; it is what *could* have been taken.

Further, the Court now has fully linked its exactions jurisprudence to the unconstitutional conditions doctrine. But that doctrine also is nowhere reflected in the text of the Constitution. In implementing the extortion narrative, then, the Court has likewise distanced itself from the actual language of the Fifth Amendment.

The Court’s departure from the constitutional text also renders suspect its discussion in *Koontz* of the remedy for a violation of the unconstitutional conditions doctrine. First, it found that extortionate

306. U.S. CONST. amend. V.

307. *Id.* (“[N]or shall private property be taken for public use, without just compensation.”).

308. *See supra* Section III.B.

309. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013); *see also* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1986) (drawing the distinction between interference and just compensation for takings).

310. 133 S. Ct. at 2596 (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”).

311. *Id.* at 2597.

312. *See supra* Section I.C.

demands can “run afoul” of the Takings Clause<sup>313</sup> but later concluded that no taking occurred.<sup>314</sup> The Court ended up citing the Takings Clause as the source of a potential prophylactic measure to prevent takings, yet that clause cannot supply the measure of any remedy because no taking actually occurred.<sup>315</sup>

The remedy, therefore, must originate elsewhere, but here the Court scurried to distance itself from the problem. It first explained that “[i]n cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law.”<sup>316</sup> Rather, it depends on the cause of action, whether state or federal, on which the landowner relies.<sup>317</sup> The *Koontz* Court then opted out of the issue, concluding that because the petitioner brought his claim pursuant to state law, the Court “ha[d] no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.”<sup>318</sup> And the Court later reinforced the point, finding that it did not need to “decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause.”<sup>319</sup>

This reasoning is puzzling. The Court refused to address the remedy because it is a state law issue, leaving one to wonder why the Court would address a constitutional claim that might have *no* remedy under state law. Indeed, Justice Elena Kagan’s dissent strongly suggests that no such remedy existed under Florida law absent an actual taking.<sup>320</sup>

That leaves a potential federal remedy for the unconstitutional conditions violation. The remedy might be to strike the unconstitutional condition that burdened the benefit.<sup>321</sup> How that would work in a case such as *Koontz* is unclear because the local government never actually

313. *Koontz*, 133 S. Ct. at 2596.

314. *Id.* at 2597.

315. *Id.* at 2603.

316. *Id.* at 2597.

317. *Id.*

318. *Id.*

319. *Id.*

320. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2612 (Kagan, J., dissenting) (“Certainly, none of the Florida courts in this case suggested that the majority’s hypothesized remedy actually exists.”). The Supreme Court had been down a similar road before. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 306–07 (1987) (holding that the remedy for a taking was damages, even though it was not clear that any taking had occurred). On remand, the California appeals court found that no taking had occurred in the case. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 893 (Ct. App. 1989).

321. See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (finding unconstitutional a statute that established a durational residence requirement for eligibility for nonemergency free medical care).

imposed any conditions but instead disapproved the project.<sup>322</sup> Perhaps the Court could find that the local government was somehow obligated to approve the project without the objectionable condition, a form of injunctive relief. Mandatory injunctive relief of this type would seem rare, not to mention difficult to formulate. Also the remedy would put federal courts deep in the thicket of local land use law.

In short, the Takings Clause on its face is a remedial measure designed to compensate for a taking. Turning the clause into a prospective protective measure against extortionate demands immediately leads to uncertainty about both the availability and source of a remedy for a violation.

In terms of constitutional structure, the principal difficulty is that, at its core, the extortion narrative centers on abuse of discretion. The concern is that land use agencies will act in a rent-seeking manner by imposing excessive burdens on landowners. But determining whether a land use agency has abused its discretion by acting arbitrarily in this fashion is traditionally a function of the Due Process Clause, not the Takings Clause.<sup>323</sup> The Court's use of the extortion narrative thus skews the relationship between the Takings and Due Process Clauses. That result is particularly ironic because the Court as recently as 2005 in *Lingle* took pains to set forth the appropriate relationship between those clauses.<sup>324</sup>

In sum, as fully explicated in *Koontz*, the extortion narrative departs entirely from the actual language of the Takings Clause and distorts that clause's relationship with the Due Process Clause. Nothing, of course, prevents a five-member majority of the Court from continuing to redefine takings law in this fashion. But such further expansion will lack both textual justification in the Fifth Amendment and legitimacy in constitutional structure.

## CONCLUSION

The Supreme Court's recent cases on exaction takings, particularly the 2013 *Koontz* decision, have shown that the Court's language

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322. See *supra* Section III.B.

323. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (noting that a means-end test "has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause"); see also Siegel, *supra* note 253, at 586 (stating, in discussing *Lingle*, that a "regulation's validity" is a due process question "as opposed to the pivotal regulatory takings question: whether a regulation is 'functionally comparable to government appropriation or invasion of private property'" (citation omitted) (quoting *Lingle*, 544 U.S. at 542)).

324. *Lingle*, 544 U.S. at 542 (explaining that the "means-ends test" for substantive due process "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment").

regarding extortion amounts to far more than just hyperbole. A majority of the Court has endorsed the extortion narrative, and it increasingly animates the Court's holdings. The Court's references to "extortion" cannot be dismissed as vivid surplusage; instead, they demand scrutiny. The extortion theme has, for example, caused the Court to veer unpredictably in explaining the structure of takings law. Thus, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,<sup>325</sup> the Court declared that *Dolan's* test for dedications "was not designed to address" the situation of a denial of development.<sup>326</sup> But with the ascendancy of the extortion narrative in *Koontz*, the Court reversed course.

When one examines the extortion narrative and its implementation in the Court's cases, the flaws in the narrative become apparent. If the Court continues to rely upon it, exactions takings law will rest on an unconvincing and unsustainable foundation.

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325. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

326. *Id.* at 703.