EXTENDING REGULATORY TAKINGS THEORY BY APPLYING CONSTITUTIONAL DOCTRINE AND ELEVATING TAKINGS PRECEDENTS TO JUSTIFY HIGHER STANDARDS OF REVIEW IN *KOONTZ*[*]

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The Roberts Court decided a regulatory takings issue involving an impact fee or conditional demand that required real estate developers to pay a fee or spend money to make offsite improvements in order to receive a development permit.[1] Almost three decades ago, a similar issue that required the landowner to grant an interest in land had been at the center of the Rehnquist Court's efforts to give greater protection to the right to receive just compensation.[2] The Rehnquist Court gave more protection to private property rights by applying the unconstitutional conditions doctrine to justify heightened scrutiny of conditional demands.[3] In *Dolan v. City of Tigard*, the Rehnquist Court reviewed land dedication conditions that required a landowner to grant the government a right-of-way or use of the land to receive a land use permit, such as a building permit.[4] The Roberts Court faced a similar issue and followed the Rehnquist Court in *Koontz v. St. Johns River Water Management District*.[5] The Roberts Court used lesser precedents that dealt with financial obligations and economic regulations to establish a constitutional framework to limit conditional demands imposing financial obligations to spend money.[6] In *Koontz*, the government demanded a mitigation or impact fee that required the landowner to pay money or a fee to make offsite improvements.[7] The Roberts Court follows the path of the Rehnquist Court by giving greater protection to the right to receive just

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[1] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013).

[2] Dolan v. City of Tigard, 512 U.S. 374, 377 (1994).

[3] *Id.* at 385.

[4] *Id.* at 377.

[5] *Koontz*, 133 S. Ct. at 2586.

[6] *Id.* at 2599.

[7] *Id.* at 2593.

compensation through imposing heightened scrutiny on some conditional demands and per se test on others.[8]

I. INTRODUCTION

The Roberts Court has expanded the regulatory takings theory to broaden its interpretation of the Takings Clause of the Fifth Amendment. The Roberts Court applies constitutional doctrine and elevates lesser cited takings precedent to justify higher standards of review to scrutinize and categorize land use and other regulations restricting the exercise of private property rights.[9] Regulatory takings theory began with *Pennsylvania Coal Co. v. Mahon*,[10] and evolved in the Rehnquist Court to include common law background doctrine of *Lucas v. South Carolina Coastal Council*[11] and the unconstitutional conditions doctrine of *Nollan v. California Coastal Commission*[12] and *Dolan v. City of Tigard.*[13] *Nollan*, *Dolan,* and *Lucas* give greater protection to private property rights by giving greater protection to the right to receive just compensation.[14] These cases limit the exercise of police and other government powers to regulate land development, [15] environmental resources,[16] natural resources, [17] and access at the beach.[18] Some takings precedents that are not often cited in land use cases limit the imposition of financial obligations and economic and public service regulations on personal property and contractual relationships.[19] These precedents do not involve land or real estate but now support higher standards of review, namely heightened scrutiny and a per se test, which apply to land use regulation under the regulatory takings theory.[20] The Roberts Court gives

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[8] *Koontz*, 133 S. Ct. at 2599-2600.

[9] *See* Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, 238-39 (1897) (quoting Scott v. City of Toledo, 36 F. 385, 395-96 (C.C.N.D. Ohio W.D. 1888)). The Takings Clause of the Fifth Amendment applies to the states and its municipalities, counties and agencies through the Due Process Clause of the Fourteenth Amendment. *Id.*; s*ee* U.S. CONST. amend. V.

[10] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[11] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[12] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[13] *See* Dolan v. City of Tigard, 512 U.S. 374, 385-86 (1994).

[14] *See Nollan*, 483 U. S. at 837; *Dolan*, 512 U.S. at 385-86; *Lucas*, 505 U.S. at 1030.

[15] *See Dolan*, 512 U.S. at 379-80, 91, 94-95 (limiting the government's power to attach conditional demands on the request for a building permit to expand a small business).

[16] *See Lucas*, 505 U.S. at 1007-08, 1029 (limiting the government's power to restrict land use pursuant to regulations designed for the "preservation of open space").

[17] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (limiting the government's power to limit "values incident to property," such as the right to mine coal pursuant to existing property and contractual rights.)

[18] *See Nollan*, 483 U. S. at 827, 841 (limiting the government's power to condition a grant of permission to rebuild a house on the beach on the transfer by the landowner of an easement to allow the public access to the beach).

[19] *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 240 (2003); E. Enterprises v. Apfel, 524 U.S. 498, 538 (1998).

[20] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013).

two lesser-used precedents broader application by using these precedents to apply a categorical standard or per se test to land use regulation. These precedents are *Brown* v. *Legal Foundation of Washington*, which concerned a physical taking involving a financial obligation to transfer funds to a public service,[21] and *Eastern Enterprise v. Apfel*, concerning a regulatory taking involving a statutory obligation to pay funds to a private retirement plan.[22] Obviously, they are not takings precedents involving private property rights in land that are subject to traditional land use or environmental or natural resources regulation.[23] Notwithstanding, in *Koontz v. St. Johns River Water Management District*, *Brown* and *Apfel* demonstrate the Roberts Court's willingness to rely on takings precedents that do not involve a property interest in land to support heightened scrutiny and a per se test to review the regulation of land use, environmental quality, and natural resources.[24]

Although *Brown* is a physical takings precedent, the Roberts Court in *Koontz* uses *Brown* and *Apfel* to extend regulatory takings theory by supporting heightened scrutiny[25] and a per se test[26] to protect the right to receive just compensation from coercive conditional demands that include burdensome financial obligations.[27] *Koontz* also relies on the unconstitutional conditions doctrine to give greater protection to the right to receive just compensation by justifying higher standards of review to scrutinize and categorize monetary exactions and fees in lieu of land dedications.[28] *Koontz* decided whether monetary exactions that impose

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[21] *Brown*, 538 U. S. at 235.

[22] *Apfel,* 524 U. S. at 523.

[23] *Id.* at 522; *see also Brown*, 538 U.S. at 235 (applying a regulatory takings analysis to the mandatory transfer of client funds from IOLTA accounts for legitimate public use).

[24] *See Koontz,* 133 S. Ct. at 2599-2601.

[25] *Id.* at 2599-2601, 2603 (rejecting the argument that a financial obligation to spend money cannot amount to a taking under *Eastern Enterprises* and holding that "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*).

[26] *Id.* at 2600 (finding that "petitioner's claim rest[ed] on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* [takings] approach' is the proper mode of analysis under the Court's precedent") (citing *Brown*, 538 U. S. at 235).

[27] *Id.* at 2598-99 (explaining that the Court "began [its] analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking").

[28] *Id.* at 2595. The Court stated:

> The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine.

Id. (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (explaining that the government "*may not deny* a benefit to a person on a basis that infringes his constitutionally protected interests"); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974) (finding unconstitutional condition where government denied healthcare benefits)).

financial obligations on tracts or parcels of land could be so coercive that the application of the unconstitutional conditions doctrine would justify either coverage under *Dolan* or support a per se test under *Brown* and *Apfel*.[29] Thus, *Koontz* gives more insight into the Roberts Court's use of constitutional doctrine and takings precedents to establish takings principles and standards of review to extend the application of regulatory takings theory to land use and economic regulation.

This article consists of an introduction, five parts, and a conclusion and examines *Koontz* to explain how the Roberts Court uses the application of the unconstitutional conditions doctrine and lesser takings precedents to establish higher standards of review under the regulatory takings theory. These standards decide whether monetary exactions and fees in lieu of dedications are justified by the impact of development on the community or whether the burden of these exactions and fees on landowners amounts to regulatory takings.[30] Part II identifies the jurisprudential and constitutional concerns that are raised by the United States Supreme Court's expansion of regulatory takings theory. As stated above, this expansion relies on constitutional doctrine and not often cited precedents to justify heightened scrutiny to give more protection to the right to receive just compensation. Part III explains regulatory takings theory and the use of constitutional doctrine to establish takings principles and standards of review to protect the guarantee of the right to receive just compensation which, in turn, protects private property rights. Part IV examines *Koontz* to explain when environmental and land use regulations that impose financial obligations to spend funds to complete offsite mitigation measures justify the application of takings and doctrinal precedents to establish a higher standard of review. Part V examines the nature and application of the unconstitutional conditions doctrine in *Koontz* to determine whether monetary exactions should be subject to *Dolan's* heightened scrutiny in order to protect the right to receive just compensation. Part VI examines *Koontz* to ascertain whether the higher standard used to scrutinize land dedication conditions under *Dolan* should apply to monetary exactions and fees in lieu of dedications.

Koontz illustrates the Roberts Court's development of takings jurisprudence through observing the Rehnquist Court's efforts to use constitutional doctrine to elevate an enumerated right. Part VII examines the impact of *Koontz* on the Roberts Court's development of takings jurisprudence in light of the Rehnquist Court's doctrinal and right-centered (emphasis on the importance of right to receive just compensation) approach to protect private property rights. Finally, Part VIII concludes that *Koontz* demonstrates that the Roberts Court followed the Rehnquist Court by continuing to use constitutional doctrine to decide whether the right to receive just compensation should be given greater protection from conditional demands or monetary exactions that impose financial obligations on landowners to spend funds to improve public lands.

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[29] *Koontz,* 133 S. Ct. at 2594, 2599.
[30] *Id.* at 2599-2600.

II. REGULATORY TAKINGS THEORY, DOCTRINE, AND PRINCIPLES

Regulatory takings theory has relied on constitutional doctrines to determine standards of review to closely scrutinize and categorize land use regulation.[31] This theory states that a regulation can amount to a taking of private property for public use[32] and was used by the Court to fashion a takings doctrine at the winding up of the substantive due process era.[33] This takings doctrine of *Pennsylvania Coal* that applied an objective test justified the use of a deferential standard of review.[34] Several decades later, the Court began and continues to apply constitutional doctrines to justify heightened scrutiny[35] and other doctrines to justify a per se test to determine whether the relationship between a regulation and its public objectives amounts to a regulatory taking.[36] Nevertheless, few bright-line principles have been applied to determine whether a regulatory taking has occurred.[37]

A. Regulatory Takings Theory

Regulatory takings theory is applied by federal and state courts to determine when a regulation amounts to a taking of private property for public use and whether the government must pay just compensation to landowners.[38] Regulatory takings theory was developed in *Pennsylvania Coal Co.* at the beginning of the close of the substantive due process or *Lochner* era.[39] In *Pennsylvania Coal*, the State of Pennsylvania had required the Pennsylvania Coal Company to leave a pillar of coal under Mahon's house to prevent it from subsidizing.[40] Justice Holmes, writing for the majority, concluded that a regulation could *go too far* by taking private property for a public use, even though the government may have a legitimate need to protect the welfare of citizens.[41] Justice Holmes stated that "[w]hen

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[31] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[32] *Id.*

[33] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 146-47 (1938).

[34] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

[35] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) ("We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed . . . We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment.").

[36] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029-31 (1992).

[37] *Pa. Coal Co.*, 260 U.S. at 416 ("As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.").

[38] *Id.* at 415-16.

[39] *See id.* at 415.

[40] *Pa. Coal Co.*, 260 U.S. at 412-13. Later, the Court held that a physical taking occurs when government regulation permits another person or government agency to permanently occupy private property. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

[41] *Pa. Coal Co.*, 260 U.S. at 415-16. The Roberts Court sought to create a judicial takings theory to protect private property rights from state and federal judicial decisions changing common law property rights. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl.

this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[42] Yet, Justice Holmes was not willing to settle on a bright line test to decide whether a government regulation that furthers a public need might amount to taking of private property for public use.[43] Justice Holmes concluded that this taking by regulation "is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court."[44] The taking at issue in *Pennsylvania Coal* that was raised by a burdensome regulation on the exercise of property rights justified a new takings theory to protect the right to receive just compensation that, in turn, protects private property rights.[45]

B. Regulatory Takings Doctrine

The Court must decide the standard of review that should be applied to regulatory takings claims which challenge the exercise of police and other state powers. Justice Holmes refused to apply a general proposition or bright line test in *Pennsylvania Coal* and conceded that the Kohler Act[46] served a legitimate welfare interest,[47] but concluded that the public must pay for the property rights (pillars of coal) that were taken from the mine owners.[48] Justice Holmes relied on a deferential standard of review to determine the connection or relationship between government regulation and public

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Prot., 560 U.S. 702, 713-14 (2010) (finding no unconstitutional taking of property owners' rights without sufficient reference to the foundations of takings law). Several commentators, scholars, and practitioners have analyzed and commented on *Stop the Beach Renourishment*. *See, e.g.,* James E. Holloway & Donald C. Guy, *The Use of Theory Making and Doctrine Making of Regulatory Takings Theory to Examine the Needs, Reasons, and Arguments to Establish Judicial Takings Theory*, 14 FLA. COASTAL L. REV. 191, 212-13 (2013) (arguing that the Court did not use the better approach to attempt to establish a judicial taking); Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the IUS Naturale and* Stop the Beach Renourishment, 6 DUKE J. CONST. L. & PUB. POL'Y 37, 73-74 (2011) (arguing that a place may exist in our federalism for a judicial takings theory); Nestor M. Davidson*, Judicial Takings and State Action: Rereading* Shelley *After* Stop the Beach Renourishment, 6 DUKE J. CONST. L. & PUB. POL'Y 75, 77 (2011) (explaining the need for some to read *Stop the Beach Renourishment* in light of *Shelly v. Kramer* and its impact on private property rights); Ilya Somin, Stop the Beach Renourishment *And the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL'Y 91, 106 (2011) (arguing that a judicial takings does exist under the federal Takings Clause).

[42] *Pa. Coal Co*., 260 U.S at 415.

[43] *Id.* at 416.

[44] *Id.*

[45] *Id.* at 415-16.

[46] *Id.* at 416. At issue in this case was whether the Kohler Act, which prohibited the mining of anthracite coal in such a manner that would cause subsistence of a dwelling, limited the property rights of the mine owners to such an extent as to constitute a taking. *Id.* at 412-13.

[47] *Id.* at 413.

[48] *See Pa. Coal Co*., 260 U.S at 415-16.

objectives.[49] In *Penn Central Transp. Co. v. City of New York*,[50] the Court noted that *Pennsylvania Coal* was decided under the interference with investment-backed expectations principle.[51] The Court in *Penn Central* recognized that a standard of review had evolved since *Pennsylvania Coal* which determines whether a government regulation imposes an unreasonable burden on the right to receive just compensation.[52] The Court's precedents show much deference to state and municipal governments imposing zoning and other land use regulations.[53] Such deference raises the question of whether the right to receive just compensation is given enough protection to ensure that the Takings Clause protects private property rights from burdensome land use regulations. If the Roberts Court follows *Dolan* and *Lucas* from the Rehnquist Court, it would rely on constitutional and other doctrines to justify heightened scrutiny of and a per se test for government regulation under the Takings Clause.

Heightened scrutiny is more than a loose connection between a regulation and its impact on development, but it avoids allowing the government to rely on a deferential standard of review to deny the right to receive just compensation.[54] In *Dolan*, the Court recognizes that giving deference to a government regulation that imposes a burdensome conditional demand on landowners to grant the government a property interest would cause landowners to forfeit their right to receive just compensation.[55] The unconstitutional conditions doctrine was applied to establish greater protection to the right to receive just compensation when the government imposes coercive conditional demands that request landowners to grant an interest in land.[56] Earlier in *Lucas,* the Court went much further and recognized that a burdensome land use regulation that eliminates all beneficial economic use justified a per se test that overrides the public need for the government regulation.[57] This common law background doctrine was applied to give greater protection of the right to receive just compensation

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[49] *Pa. Coal Co*., 260 U.S at 413. Justice Holmes stated that "[t]he greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Id*. *See also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) ("*Pennsylvania Coal* . . . is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'").

[50] In *Penn Central*, the Court recognized that historic preservation, zoning, and other land use regulation is subject to the reasonably related test. *Penn Cent.,* 438 U.S. at 131 (1978).

[51] *Id.* at 127. The Court also states that it is "implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Id*. (citing Nectow v. Cambridge*,* 277 U.S. 183, 188 (1928); *cf.* Moore v. East Cleveland*,* 431 U.S. 494, 513-14 (1977) (Stevens, J., concurring)).

[52] *See id.* at 126-27.

[53] *See id.* at 125-27.

[54] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[55] *Id*. at 389.

[56] *Id*. at 391-96.

[57] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

when the government takes all economically viable use of the land.[58] Thus, constitutional and other doctrines were applied to justify the need to use higher standards of review to protect the right to receive just compensation where the government is denying the landowner the right to receive just compensation.[59]

C. Regulatory Takings Principles

The Court's willingness to give greater protection to the right to receive just compensation goes far beyond a deferential standard of review. The Court's precedents show much deference to state and municipal governments that have exercised police power to impose zoning and other land use regulations.[60] For example, *Pennsylvania Coal* recognizes that a bright line test or a general proposition was not appropriate to determine whether a state antisubsidence statute amounted to a taking of private property for public use, and settles on an objective test to determine whether this statute amounts to a taking, though still not settling on an entirely deferential standard.[61] Roughly five or so decades later, *Penn Central* recognized that a deferential standard of review was applied by the Court to decide whether a government regulation amounts to a taking of private property.[62] The Rehnquist Court did not always follow *Penn Central* and *Pennsylvania Coal*.[63] The Rehnquist Court gave greater protection to the right to receive just compensation where such protection limits deference to government policies and does not always rely on a reasonableness test to scrutinize means-ends relationships.[64]

Lucas and *Dolan* demonstrate the use of less deference in reviewing takings challenges by the Rehnquist Court. These precedents, though resting on a narrow set of facts, are underpinned by expandable constitutional doctrines that provide greater protection for fundamental constitutional rights and important common law property rights. Specifically, *Lucas* established a per se test for a category of government regulation that denies all economically viable use of private property that had been protected under the land title at common law.[65] The Court in *Lucas* established a categorical test in order to avoid deference to the government and as a result, gives more protection to common law uses by not permitting the state legislature to

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[58] *Lucas*, 505 U.S. at 1027, 1029.

[59] *See id.* at 1029.

[60] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

[61] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

[62] *Penn Cent.*, 438 U.S. at 127 (finding that "*Pennsylvania Coal Co. v. Mahon* is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'") (internal citations omitted).

[63] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); *Lucas*, 505 U.S. at 1022-23, 1029.

[64] *See Lucas*, 505 U.S. at 1027-29.

[65] *Id.* at 1028-29.

totally deny land development (or use) permitted at common law.[66] *Lucas* uses common law background doctrine to firmly justify the per se test.[67] *Lucas* established a higher standard of review to protect the right to receive just compensation when the government takes all economic use of private property, notwithstanding any recreational and other beneficial uses.[68] *Dolan* does not go as far as *Lucas* but still places a limitation on the use of police power to impose adjudicatory conditional demands, namely land dedication conditions.[69] *Dolan* establishes heightened scrutiny to examine the relationship between the means-ends of land dedication conditions.[70] These means are land dedication conditions that were imposed by a county or municipal adjudicatory process and a demand that a landowner forfeit the right to receive just compensation to receive a government permit to build on his or her land.[71] *Dolan* uses the unconstitutional conditions doctrine to justify the rough proportionality test.[72] *Dolan* establishes a standard of review to closely scrutinize adjudicatory decision-making that imposes a conditional demand requiring a landowner to transfer an interest in private property or forego development.[73] *Lucas* and *Dolan* are underpinned by constitutional and other doctrines that justify greater protection for the right to receive just compensation by not permitting government to severely restrict development.

Both *Lucas* and *Dolan* are narrow precedents resting firmly on a common law background and unconstitutional conditions doctrines that were applied to justify a higher standard of review.[74] These doctrines strengthen and extend regulatory takings theory by giving greater protection to the right to receive just compensation by requiring closer scrutiny of government decisions, such as land dedication conditions.[75] These precedents can be distinguished on new facts and circumstances, but lawyers and courts must

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[66] *See Lucas*, 505 U.S. at 1028-29.

[67] *See id*. at 1029.

[68] *Id.* at 1028-29.

[69] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[70] *Id.* at 391; *see also* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (requiring government regulation to substantially advance a legitimate state interest). *But see* Lingle v. Chevron U.S.A. Inc., 544 U.S. 538 (2005) (abrogating *Agins* by holding that whether government regulation of private property "substantially advances" a legitimate state interest is not the appropriate test for determining whether there is a taking under the Fifth Amendment).

[71] *Dolan*, 512 U.S. at 385 (recognizing that "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were . . . a requirement that she deed portions of the property to the city"). For the definition of impact exactions that are land use conditional demands, *see infra* note 273 and accompanying text.

[72] *See Dolan*, 512 U.S. at 385, 391.

[73] *Id.* at 391.

[74] *See id.* at 385; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[75] *See Dolan*, 512 U.S. at 385 (unconstitutional conditions doctrine); *Lucas*, 505 U.S. at 1030 (common law doctrine of background principles). *See supra* Part II Section B and accompanying notes (explaining the use of constitutional doctrine applied to establish regulatory takings principles).

not overlook weighing or considering the breadth of any constitutional and other doctrines underpinning these precedents. Courts and lawyers must consider the need for doctrinal arguments that support or restrict the limitations on environmental and land use regulation. These arguments address constitutional and other doctrines justifying or underlying precedents, such as *Dolan*, that originally extended regulatory takings theory.[76]

Koontz points out the Roberts Court's path to expanding takings jurisprudence. *Koontz* relies on the unconstitutional conditions doctrine, but integrates – after using *Nollan* and *Dolan* – two lesser precedents involving financial obligations that do not involved traditional property rights in land.[77] *Koontz* is the Roberts Court's application of constitutional doctrine that had been used to extend regulatory takings theory by creating precedents which give more protection to the right to receive just compensation in land transactions.[78] *Koontz* also shows the willingness of the Roberts Court to firmly protect the right to just compensation as a limitation that could protect any private property interest by relying on constitutional doctrine and takings precedents.[79]

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[76] *See* James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles,* 34 WM. & MARY ENVTL. L. & POL'Y REV. 315, 315, 326-27 (2010) (explaining how the Court-developed takings doctrine of Armstrong v. United States, 364 U.S. 40, 44–49 (1960), helped to fashion standards of review). Moreover, the unconstitutional conditions doctrine has generated much commentary on its use by the Court. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1413, 1415 (1989) (explaining the use of the unconstitutional conditions doctrine to grant more protection to constitutional rights); Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines,* 26 SAN DIEGO L. REV. 175, 175 (1989); Richard A. Epstein, *Unconstitutional Conditions and Bargaining Breakdown,* 26 SAN DIEGO L. REV. 189, 189, 205 (1989); William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses,* 26 SAN DIEGO L. REV. 243, 244 (1989); Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause,* 26 SAN DIEGO L. REV. 255, 255-56 (1989); Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions,* 26 SAN DIEGO L. REV. 289, 290, 324 (1989); Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty,* 26 SAN DIEGO L. REV. 327, 327-30 (1989); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?,* 26 SAN DIEGO L. REV. 337, 344-45 (1989).

[77] Koontz v. St. John's River Water Mgmt. Dist., 133 S. Ct. 2568, 2601 (2013).

[78] *See id.* at 2595. *See infra* Part IV Section A (examining the use of the unconstitutional conditions doctrine).

[79] *Koontz*, 133 S. Ct. at 2599-2600 (using *Brown* and *Apfel* to protect the right to receive just compensation by recognizing that financial obligations to spend money can amount to a takings of private property). *See infra* Part V Section A and Part V Section C and accompanying notes (explaining the application of *Nollan* and *Dolan* to monetary exactions and fees in lieu of dedications and *Brown* and *Apfel* to financial obligations that demand the relinquishment or spending of funds).

III. REGULATION, DEVELOPMENT, AND TAKINGS ISSUE OF *KOONTZ*

Koontz shows how the Roberts Court interprets constitutional doctrines to decide whether an environmental regulation that imposed a conditional demand creates the need to apply constitutional doctrine to justify a higher standard of review to protect the right to receive just compensation.[80] Earlier, *Dolan* had used the unconstitutional conditions doctrine to justify establishing the rough proportionality test, a higher standard of review, to review an adjudicated conditional demand, specifically, a land dedication condition.[81] *Koontz* determines whether heightened scrutiny should be applied to monetary exactions and fees in lieu of dedications.[82] Although the Roberts Court failed to expand takings jurisprudence by creating a judicial takings theory,[83] *Koontz* demonstrates how the Roberts Court expands regulatory takings theory.[84] *Koontz* returns to the unconstitutional conditions doctrine and uses takings precedents to justify the application of more rigorous scrutiny to adjudicated, and perhaps a few legislated, monetary exactions and fees in lieu of dedications.[85]

A. Regulation of the Development of Wetland Resources

States use conditional demands that include monetary exactions and land dedication conditions in wetlands, natural resources, land use, and environmental regulatory schemes to protect environment quality and preserve natural resources.[86] In 1972, the state of Florida enacted the Water Resources Act (the Act).[87] The Act divides the state into districts that are permitted to regulate construction that "connects to, draws water from, drains water into, or is placed in or across the waters in the state."[88] The Act obligates landowners who wanted to engage in construction to acquire from the district a Management and Storage of Surface Water (MSSW) permit.[89]

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[80] *See Koontz*, 133 S. Ct. at 2594. The Roberts Court might be "on a roll" (not continuing to follow but actually surpassing the Rehnquist Court) to expand, if not reshape, regulatory takings theory in a highly competitive global economy. *See infra* note 288 and accompanying text (listing takings issues that the Roberts Court has agreed to decide in the October 2014 Term).

[81] *See* Dolan v. City of Tigard, 512 U.S. 374, 385, 91 (1994).

[82] *Koontz*, 133 S. Ct. at 2601.

[83] *See* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 560 U.S. 703, 713-14 (2010) (finding no unconstitutional taking of property owners' rights without sufficient reference to the foundations of takings law). For an analysis of *Stop the Beach Renourishment* by the authors, see Holloway & Guy, *supra* note 41, at 212-14.

[84] *See Koontz*, 133 S. Ct. at 2599-2600**.**

[85] *Id.* at 2599.

[86] *See, e.g.*, FLA. STAT. § 373.403(5) (2010); FLA. STAT. § 373.413(1) (2010).

[87] *Koontz*, 133 S. Ct. at 2592 (citing FLA. STAT. § 373).

[88] *Id*. (quoting FLA. STAT. § 373.403(5)).

[89] *Id*. (citing FLA. STAT. § 373.413(1)).

The district may impose conditions on the permit to avoid harming the water resources of the district.[90]

In 1984, Florida imposed additional restrictions to protect wetlands. Specifically, the Florida legislature enacted the Warren S. Henderson Wetlands Protection Act[91] (Henderson Act) that prohibits persons from dredging or filling "in, on, or over surface waters without a Wetlands Resource Management (WRM) permit."[92] Persons who are issued a permit under the Henderson Act must "provide 'reasonable assurance' that proposed construction on wetlands is 'not contrary to the public interest,' as defined by an enumerated list of criteria."[93] The St. John River Water Management District (the District) has jurisdiction over Koontz's land and "requires that . . . applicants [who are seeking permit] wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere."[94] Thus, Florida's environmental regulation grants regional districts the authority to regulate wetlands and restrict land development by imposing conditional demands to preserve wetlands.[95]

B. Development Causing the Need for Conditional Demands

Koontz demonstrates how the government uses conditional demands and other requirements to further environmental objectives by imposing onsite and offsite financial and other obligations on land development.[96] In *Koontz*, Coy Koontz Sr., the petitioner, owned a tract of land that was subject to environmental regulations that included monetary exactions and other restrictions on the development of his tract of land.[97] This tract was a 14.9 acre site near Orlando, Florida, divided by a state highway, and considered wetlands.[98] The northern section was well drained with little standing water, while the southern section contained a creek, woodlands, and wetlands that would sometimes be submerged in water a foot deep.[99] In 1994, Koontz decided to develop the northern portion of his tract and applied to the district for MSSW and WRM permits.[100] Koontz proposed to change the topography by:

> elevat[ing] the northernmost section of his land to make it suitable for a building, grad[ing] the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and instal[ing] a dry-bed pond for retaining and gradually

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[90] *Koontz*, 133 S. Ct. at 2592 (citing FLA. STAT. § 373.413(1)).
[91] FLA. STAT. § 403.905(1) (2010).
[92] *Koontz*, 133 S. Ct. at 2592 (citing FLA. STAT. § 403.905(1)).
[93] *Id.* at 2592 (citing FLA. STAT. § 373.414(1) (2010) (internal citation omitted)).
[94] *Id*.
[95] *See id*.
[96] *See id.* at 2591-92.
[97] *Koontz*, 133 S. Ct. at 2591-92.
[98] *Id.*
[99] *Id.* at 2592.
[100] *Id*.

> releasing stormwater runoff from the building and its parking lot.[101]

In addition, Koontz also proposed to mitigate the environmental effects by "foreclose[ing] any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property."[102] Koontz proposed to develop only a portion of the tract and mitigate the impact of development by foreclosing use of the other portion of the land.[103]

The District rejected Koontz's proposal for development of the northern section and foreclosure of the use of the other portion, and would not issue the needed permits until Koontz complied with specific conditional demands to protect and preserve wetlands.[104] The District considered the eleven-acre conservation easement inadequate but would still approve construction under its restrictions and conditional demands if Koontz agreed to develop only one acre and granted the District a conservation easement on the other 13.9 acres.[105] The District's proposal also suggested that Koontz eliminate the proposed pond, but install a subsurface drainage system and retaining walls.[106]

Rather than waiting for Koontz to consider its proposal, the District offered an alternative that included a conditional demand of imposing an offsite financial obligation to improve public lands.[107] The District's proposal would permit Koontz develop 3.7 acres and deed a conservation easement to the District.[108] The District imposed another condition that demanded Koontz to "hire contractors to make improvements to District-owned land several miles away" and "pay to replace culverts on one parcel or fill ditches on another" site to enhance fifty acres offsite.[109] In the past, the District had asked permit applicants to make specific offsite mitigation work, but it had not requested permit applicants to fund any specific offsite project.[110] Here, it asked Koontz to fund a specific offsite project, though it would permit Koontz to make an equivalent mitigation project.[111] Koontz rejected both District proposals and believed the conditional "demand[] for mitigation to be excessive in light of the environmental effects."[112] Koontz, the petitioner, simply did not find that the impact of his land development project on wetlands would ever justify a public need for the District's

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[101] *Koontz*, 133 S. Ct. at 2592.
[102] *Id.* at 2592-93.
[103] *Id.* at 2593.
[104] *Id.*
[105] *Id*.
[106] *Id.*
[107] *Koontz*, 133 S. Ct. at 2593.
[108] *Id.*
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id.*

conditional demands for specific offsite mitigation or improvements on government-owned or public lands.[113]

C. Addressing the Takings Issue of Restrictions on Development

Koontz returns to the fundamental issue of whether a monetary exaction (public means) was justified by the impact of a land development project on wetland resources. Other courts had divided on the same or similar issues, so the Court decided to review an issue it left undecided in earlier cases.[114] Koontz did not agree with the restrictions and conditional demands and decided to sue the District for an unreasonable exercise of police power by imposing conditional demands for offsite mitigation in violation of the Takings Clause of Florida and the Federal Constitutions.[115] Koontz filed suit in the Florida Circuit Court claiming that "[a]mong other claims . . . he was entitled to relief under [Florida law] which allows owners to recover 'monetary damages' if a state agency's action is 'an unreasonable exercise of the state's police power constituting a taking without just compensation.'"[116] The Florida Circuit Court dismissed Koontz's claim for a failure to exhaust state administrative remedies.[117] The circuit court's decision was reversed and remanded by the Florida District Court of Appeal for the Fifth Circuit.[118] On remand, the Florida Circuit Court entered a decision for Koontz after finding that Koontz's northern section had been badly degraded and concluded that the District's request for payment for offsite mitigation did not provide an "[essential] nexus and rough proportionality to the environmental impact of the proposed construction."[119] On appeal of this decision by the state, the Florida District Court affirmed the circuit court's decision,[120] but the district court's decision was reversed by the State Supreme Court of Florida.[121]

The Supreme Court of Florida concluded that *Nollan* and *Dolan* did not apply to the facts of *Koontz*.[122] The supreme court did not find that the District imposed unlawful conditional demands on Koontz.[123] In fact, the District had only rejected the application for a permit to develop the land because Koontz refused to comply with the District's request for concessions and offsite mitigation.[124] On the constitutionality of the conditional demands, the supreme court also concluded that *Nollan* and *Dolan* did not apply to

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[113] *Koontz*, 133 S. Ct. at 2593.
[114] *Id.* at 2594.
[115] *Id.* at 2593.
[116] *Id.* (citing FLA. STAT. § 373.617(2)).
[117] *Id*.
[118] *Id.*
[119] *Koontz*, 133 S. Ct. at 2593.
[120] St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 12 (Fla. Dist. Ct. App. 2009).
[121] St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1223 (Fla. 2011).
[122] *Id.* at 1231.
[123] *Id.*
[124] *Id.*

monetary exactions.[125] The supreme court acknowledged that a division existed among courts over whether a demand for money can give rise to a claim under *Nollan* and *Dolan*.[126] The supreme court agreed with federal and state courts that had concluded that *Dolan* and *Nollan* did not apply to monetary exactions that could impose financial obligations that may be as burdensome as unconstitutional land dedication conditions.[127] Simply, the Supreme Court of Florida gave too little weight to the determinative nature of the connection between monetary exactions and the impact of development in *Nollan* and *Dolan*.[128] This oversight led it to not consider how the unconstitutional conditions doctrine had treated this connection to justify a closer means-ends relationship in *Dolan* to give greater protection to the right to receive just compensation.

The Supreme Court of Florida's constitutional approach to weighing the determinative nature of this connection and not considering constitutional doctrine justifying the connection was not shared by the United States Supreme Court.[129] The Court granted a writ of certiorari and reversed the Supreme Court of Florida.[130] Although lower courts were divided on the substantive issue of applying *Nollan* and *Dolan* to monetary exactions, the Court began its constitutional analysis with constitutional doctrine[131] that had justified, in *Dolan*, the closer means-ends connection to decide whether the heightened scrutiny of *Nollan* and *Dolan* apply to monetary exactions and fees in lieu of dedications.[132] Later in *Koontz*, the Court went much farther and signaled that if a specific tract of land is subject to a monetary exaction or conditional demand imposing a financial obligation to spend funds offsite, the per se or categorical test may be the appropriate standard of review to scrutinize this category of monetary exactions.[133] Thus, the Roberts Court was asked by the petitioner to extend the boundaries of regulatory takings theory to give even greater protection to the right to receive just compensation by subjecting more exercises of police power to heightened scrutiny and a categorical standard, thus forcing lower courts to rely even less on a deferential or reasonableness standard when challenging conditional demands, such as impact exactions.[134]

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[125] *St. Johns River Water Mgmt. Dist.*, 77 So. 3d at 1230.

[126] *Id.* at 1229–30. *Compare* McClung v. Sumner, 548 F.3d 1219, 1228 (9th Cir. 2008), *with* Ehrlich v. Culver City, 911 P.2d 429, 444 (Cal. 1996) *and* Flower Mound v. Stafford Estates Ltd., 135 S.W. 3d 620, 641–42 (Tex. 2004).

[127] *St. Johns River Water Mgmt. Dist*., 77 So. 3d at 1229–30.

[128] *See* Koontz v. St. Johns River Mgmt. Dist., 133 S. Ct. 2586, 2596 (2013).

[129] *Id.*

[130] *Koontz*, 133 S. Ct. at 2594.

[131] *Id.* at 2596; *see infra* Part IV and accompanying notes.

[132] *Id*. at 2599; *see infra* Part V Section A and accompanying notes.

[133] *Koontz*, 133 S. Ct. at 2600; *see infra* Part V Section B and accompanying notes.

[134] *See Koontz*, 133 S. Ct. at 2600.

IV. UNCONSTITUTIONAL CONDITIONS DOCTRINE

Koontz continues the Rehnquist Court's application of constitutional doctrine to justify and expand heightened scrutiny of coercive conditional demands or impact exactions that deny the right to receive just compensation.[135] The Court applied the unconstitutional conditions doctrine to decide whether the District's conditional demands denied the right to receive just compensation under the Takings Clause.[136] The unconstitutional conditions doctrine does not permit "the government . . . to deny a benefit to a person because he exercises a constitutional right."[137] This doctrine does not allow the government to coerce landowners and other persons to surrender or forfeit enumerated rights to receive a public or government benefit.[138] *Nollan* and *Dolan* apply the unconstitutional conditions doctrine to protect the right to receive just compensation that could be denied when the government demands an interest in property, such as an easement, for the landowner's receipt of a building or another permit.[139]

A. Applying the Unconstitutional Conditions Doctrine

Nollan and *Dolan* reflect two realities of land use policy-making using permits that included conditional demands to mitigate or offset the harm to the community or its resources. First, the landowner who is seeking a permit is subject to and vulnerable to coercive permitting processes and extortionate demands.[140] The unconstitutional conditions doctrine prohibits such coercive permitting processes that demand the owner to voluntarily surrender an interest in land that is less than the value of the permit to develop.[141] When the value of the building permit exceeds just compensation that could be received by the landowner, this owner is more likely to comply with the government's demand, though this demand may be unreasonable.[142] "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits

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[135] *Koontz*, 133 S. Ct. at 2595.

[136] *Id.* at 2594.

[137] *Id*. (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1983)). *See also* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 59–60 (2006); Rutan v. Republican Party of Ill., 497 U.S. 62, 78 (1990); Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 269 (1974) (concluding that a county impermissibly burdened the right to travel by extending healthcare benefits only to those indigent sick who had been residents of the county for at least one year); Perry v. Sindermann, 408 U.S. 593, 593, 596 (1972) (holding that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration).

[138] *Koontz*, 133 S. Ct. at 2594.

[139] *Id.* at 2594; *see also* Dolan v. City of Tigard, 512 U.S. 374, 385 (invoking "the well-settled doctrine of 'unconstitutional conditions'").

[140] *Koontz*, 133 S. Ct. at 2594.

[141] *Id.* at 2594.

[142] *Id.* at 2595.

them."[143] Second, the permitting process seeks to force landowners to offset the impact or cost of development imposed on communities.[144] *Nollan* recognized the coercive behavior of land use regulations by requiring more than a loose fit between a land use regulation and its public purpose.[145] *Dolan* went further by requiring a closer connection between a land development project and the impact of this development on the community.[146] The permitting process forces the landowner, who develops land, to internalize the cost for public services, such as public roads to accommodate traffic.[147] In *Koontz*, the District had argued that the mitigation project and concessions offset the harm that would be done to the environment by the land development project.[148] Governments that force land developers to internalize or pay the cost of negative externalities engage in legitimate land use policy-making that will normally survive constitutional attack.[149] *Nollan* and *Dolan* permit governments to impose land dedication conditions, but require an essential nexus and rough proportionality between a conditional demand and the social and other impacts of development on the community, such as destruction of wetland resources.[150]

The Court must determine when conditional demands that demand an interest in property or money impose too heavy a burden on landowners to internalize the cost of providing services and benefits that are created by the impact of residential, institutional and other developments. On one hand, landowners cannot externalize all costs (educational, medical, law enforcement, etc.) of development by passing them on to the government through an increase in public services.[151] On the other hand, the government cannot leverage its means, a "legitimate government interest in mitigation," to further government ends that "lack an essential nexus and rough proportionality to those impacts" of the development on communities.[152] *Nollan* and *Dolan* are the application of the unconstitutional conditions doctrine to protect the right to receive just compensation by not allowing the use of conditional demands to force landowners to internalize public costs that do not relate to the impact or negative externalities of a land development project on the community.

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[143] *Koontz*, 133 S. Ct. at 2595.
[144] *Id*.
[145] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831-32 (1987).
[146] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
[147] *Koontz*, 133 S. Ct. at 2595.
[148] *Id.*
[149] *Id*.
[150] *Id.*
[151] *See id*.
[152] *Id.*

B. Conditions Precedent or Conditions Subsequent for the Issuance of a Permit

The timing of the performance of the event that is required by the conditional demand appears to be a determinative factor in deciding whether the government even needs to decide the constitutional validity of conditional demands under the Takings Clause. However, the Court did not agree, and held that the essential nexus and rough proportionality of *Nollan* and *Dolan*, respectively, apply "whether the government *approves* a permit on the condition that the applicant turn[s] over property or *denies* a permit because the applicant refuses to do so."[153] The Court stated that the unconstitutional conditions doctrine makes the "denials of governmental benefits . . . impermissible . . ."[154] The Court "[has] recognized that regardless 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."[155] Deciding whether *Nollan* and *Dolan* apply based on the timing of the landowner's performance that government stated in the conditional demand undermines the unconstitutional conditions doctrine.[156]

Governments could avoid complying with the essential nexus and rough proportionality tests by phrasing the conditional demand as "conditions precedent to permit approval."[157] The Court rejected the approach of the Supreme Court of Florida and decided that *Nollan* and *Dolan* should apply to a government order stating that a permit is "*approved if*" the owner grants a property interest to the government that here imposes only the conditions precedent to effect a transfer.[158] *Nollan* and *Dolan* would also apply if the government order stating that a permit is "*denied until*" the owner grants property to the government that here imposes the condition subsequent to effect a transfer.[159] The conditions precedent and conditions subsequent have no significance under the unconstitutional conditions doctrine that focuses on the denial or forfeiture of enumerated rights to gain a public benefit.[160] Furthermore, a distinction between conditions precedent and conditions subsequent allows the government to nullify or avoid *Nollan* and *Dolan* by timing the performance of a coercive event in a nonconsensual relationship.[161] Simply, a conditional demand that is an *if* statement or an *until* statement has the same constitutional effect of denying an enumerated

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[153] *Koontz*, 133 S. Ct. at 2595.
[154] *Id.*
[155] *Id*.
[156] *Id.* at 2596.
[157] *Id*. at 2595.
[158] *Id*. at 2595-96.
[159] *Koontz*, 133 S. Ct. at 2596.
[160] *Id.*
[161] *Id*.

right for receipt of a public benefit under the unconstitutional conditions doctrine.

C. Preventing Extortionate Demands

Another concern is raised by the application of the Takings Clause to government actions that do not take land or a property interest. The issue is whether the Takings Clause can be violated by a conditional demand for property by a government action, though this government action takes no property.[162] The Court responds by placing both the constitutional doctrine and an enumerated right at the center of its analytical approach, stating that:

> the unconstitutional conditions doctrine provides a ready answer [by concluding that] [e]xtortionate 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.[163]

The right to receive just compensation is given greater protection by using the unconstitutional conditions doctrine and its precedents to reaffirm that a burden on the right to receive just compensation is a cognizable injury.[164] Thus, an impermissible denial of a government or public benefit is a constitutionally cognizable injury when someone is faced with a coercive government effort to deny a public benefit.[165]

The unconstitutional conditions doctrine protects the right to receive just compensation as a means to protect private property rights.[166] Simply put, the doctrine would still apply if the District could have banned the use of property and denied Koontz a permit to use the property.[167] Nearly all "unconstitutional conditions cases involve a gratuitous governmental benefit of some kind."[168] A total ban on the use of land "does not imply a lesser power to condition permit approval on [Koontz's] forfeiture of his constitutional rights."[169] Actually, taking it a step further, the government's conformance to *Lucas*[170] does not permit it to impose a burdensome conditional demand on the development of the land when its environmental or land use regulation does not deny all economically viable use.[171] The

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[162] *Koontz*, 133 S. Ct. at 2596.
[163] *Id.* at 2596.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 2594.
[167] *Id*. at 2596.
[168] *Koontz*, 133 S. Ct. at 2596.
[169] *Id.* at 2596.
[170] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); *see supra* Part II Section A and Part II Section B and accompanying notes (explaining the use of doctrine and protection of the right to receive just compensation).
[171] *See Koontz*, 133 S. Ct. at 2593 (leaving one acre in proposal and three and one-half acres in another).

government cannot burden an enumerated right by imposing a conditional demand for receipt of a government benefit.[172]

The takings and unconstitutional conditions claims of a denial of development and other permits are different. Under the doctrine, the denial of a permit does not necessarily result in the taking of land, which means the government is not required to take property for public use by a regulatory takings.[173] The unconstitutional conditions doctrine is violated by imposing a burden on an enumerated right, but the Takings Clause requires just compensation, a remedy, for a taking of private property.[174] "In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies."[175] The state remedy remains an open question not considered by the Court since Koontz brought a state claim for relief seeking a state remedy for his claim.[176]

Two proposals that contain different conditional demands which expose a landowner to the same risks of forfeiting an enumerated right will be treated the same under the unconstitutional conditions doctrine.[177] In *Koontz*, the District, the respondent, gave Koontz a second alternative, but the respondent wanted the Court to consider this option separately from the first option; the Court disagreed.[178] The District contended that the Court need not decide "whether its demand for offsite improvements satisfied *Nollan* and *Dolan* . . . ."[179] The District gave the Koontz a second option to obtain a permit by offering to "approve[] a revised permit application that reduced the footprint of [Koontz's] proposed construction site from 3.7 acres to 1 acre and placed a conservation easement on the remaining 13.9 acres of [Koontz's] land."[180] The District wanted the Court to consider each option separately, but the Court stated that both options offered by the District involved the same issue.[181] If the government offers the landowner one option that is lawful under *Nollan* and *Dolan*, this option is not subject to the unconstitutional conditions doctrine.[182] However, the District's second option allowed Koontz to develop one acre as an alternative to offsite mitigation whereas the first option would allow Koontz to develop three and seven tenths acres.[183] Actually, the second option denied Koontz the right to develop 2.7 acres unless Koontz gave money to improve public land offsite.[184] Thus, the

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[172] *See Koontz*, 133 S. Ct. at 2594.
[173] *Id.* at 2597.
[174] *Id.*
[175] *Id*.
[176] *Id*. at 2597-98.
[177] *Id.* at 2598.
[178] *Koontz*, 133 S. Ct. at 2598.
[179] *Id.*
[180] *Id.*
[181] *Id*.
[182] *See id*.
[183] *Id*.
[184] *Koontz*, 133 S. Ct. at 2598.

second option contained conditional demands that were still subject to *Nollan* and *Dolan* and exposed Koontz to the same risks that required application of the unconstitutional conditions doctrine.[185]

V. MONETARY EXACTIONS AS TAKINGS

The right to receive just compensation is given greater protection when federal courts perform closer scrutiny or establish a category of the government demands that would deny the right to receive just compensation.[186] Unlike *Dolan* and *Nollan*, *Koontz* sought to address the constitutionality of conditional demands that were monetary exactions, e.g., impact fees and fees in lieu of land dedications.[187] Koontz was asked to spend money, not grant an easement.[188] The unconstitutional conditions claim requires that the government not possess the power to order a landowner to do what it is demanding with a conditional demand.[189] In *Nollan* and *Dolan*, the government would have committed a physical or per se taking by seizing the easements it demanded from the landowners using its permitting process.[190] Thus, the issue is whether "[Koontz's] claim fails at this first step because the subject of the exaction at issue here was money, rather than a more tangible interest in real property."[191]

A. Financial Obligations as Categorical Takings

The question is whether monetary exactions that demand landowners to spend funds onsite or offsite should be subject to heightened scrutiny or even more protection under the limitation of the Takings Clause. According to the respondent in *Koontz*, *Eastern Enterprises* v. *Apfel* does not stand "for the proposition that an obligation to spend money can never provide the basis for a takings claim."[192] In *Eastern Enterprises*, "the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families."[193] Yet, a "plurality concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause."[194] Relying on the plurality opinion, the "respondent argues that a requirement that [Koontz] spend money improving public lands could not give rise to a taking."[195] The Court did not find the

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[185] *Koontz*, 133 S. Ct. at 2598.
[186] *See id.* at 2594.
[187] *Id.* at 2598.
[188] *Id*.
[189] *Id*.
[190] *Koontz*, 133 S. Ct. at 2598-99.
[191] *Id*. (citing St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1230 (Fla. 2011).
[192] *Id.* at 2599 (citing E. Enterprises v. Apfel, 524 U.S. 498 (1998) (Kagan, J., dissenting)).
[193] *Id.*
[194] *Id.* (citing *Apfel*, 524 U.S. at 529-37).
[195] *Id*.

argument persuasive by finding that in *Koontz*, "the demand for money . . . 'operate[s] upon . . . an identified property interest by directing the owner of a particular piece of property to make a monetary payment.'"[196]

Another set of takings precedents that require the government to pay just compensation for imposing a financial obligation involves a direct link between the government demand and an identifiable property interest.[197] Specifically, *Koontz* "bears resemblance to [*Armstrong v. United States* and other] cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property."[198] Among these decisions that involve a lien on private property, the pivotal point "is the direct link between the government's demand and a specific parcel of real property."[199] This direct link causes *Koontz* to:

> implicate[] the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property. [200]

Thus, the direct link between monetary exaction (conditions) and a property interest justifies the need for heightened scrutiny and perhaps even a per se test.[201]

The exclusion of monetary exactions and fees in lieu of dedications from the coverage of *Nollan* and *Dolan* would allow the government to demand these fees and exactions and avoid paying just compensation for takings.[202] Such exclusion would allow the government to "give the owner a choice of either surrendering an easement or making a payment equal to the easement's

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[196] *Koontz*, 133 S. Ct. at 2599 (*quoting Apfel,* 524 U.S. at 540 (Kennedy, J., concurring in part, dissenting in part)).

[197] Armstrong v. United States, 364 U.S. 40, 44–49 (1960).

[198] *Koontz*, 133 S. Ct. at 2599-2600.

[199] *Id.* at 2600. The Court states that:

> because the proposed offsite mitigation obligation in this case was tied to a particular parcel of land, this case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking. That is so even when the demand is considered '*outside* the permitting process.' The unconstitutional conditions analysis requires us to set aside petitioner's *permit application*, not his ownership of a particular parcel of real property.

Id. at 2600 n.2 (internal citation omitted).

[200] *Id.* at 2600.

[201] *See id.*

[202] *Id. at* 2599.

value."[203] The fees in lieu of dedication are common land use tools that are equivalent of other impact exactions of land use regulatory schemes.[204] Fees in lieu of dedications and impact fees that require the payment of funds "must satisfy the [essential] nexus and rough proportionality requirements of *Nollan* and *Dolan*" to determine if these exactions are too burdensome.[205] The Court reaffirms *Nollan* and *Dolan* by applying the essential nexus and rough proportionality to monetary exactions and fees in lieu of land dedication conditions.[206]

B. Establishing a Direct Link to Justify a Per Se Test

A category of monetary exactions that contains offsite financial obligations are subject to a much stricter standard of review to determine whether these exactions can ever be proportional to the social impact of development by imposing offsite costs on land developers.[207] These exactions require an analytical approach that categorizes exactions bearing a direct link between the monetary exaction and a specific parcel of real property.[208] In analyzing these exactions, the *Penn Central* inquiry or fundamental fairness approach need not be applied.[209] *Koontz* does not involve a regulatory takings claim regarding a mandated spending of private funds for a public need, and the *Penn Central* inquiry is an ad hoc, factual inquiry that contains much difficulty and uncertainty in its application to general land use and other regulation.[210] Koontz's "claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a *per se* [takings] approach is the proper mode of analysis under the Court's precedent."[211] Thus, the Court does not think the *Penn Central* inquiry is useful when a regulatory takings claim

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[203] *Koontz*, 133 S. Ct. at 2599. For definitions of land dedication conditions and impact fees, see *infra* note 273 and accompanying notes.

[204] *Koontz*, 133 S. Ct. at 2599.

[205] *Id*. The Court held that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Id.* at 2603. Yet, the Court did not reach the merits of the case by applying *Nollan* and *Dolan* and "principles set forth in this opinion." *Id.* The Court reversed the Florida Supreme Court's judgment, and remanded the case for further proceedings. *Id*.

[206] *Id.* at 2599.

[207] *See id.*

[208] *See id. Koontz's* direct link is quite similar to *Lochner*'s direct relation. *See* Lochner v. New York, 198 U.S. 45, 57-58 (1905). *Lochner* states that "[t]he act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." *Id.*

[209] *Koontz*, 133 S. Ct. at 2600.

[210] *Id*.

[211] *Id*. (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003)).

challenges an exaction as relinquishing or spending funds rather than regulation ordinarily mandating a land use obligation.

The Court concludes that other clauses of the federal constitution do not provide adequate analysis of regulatory takings claims that raise a challenge to an exaction demanding the spending of funds or imposing a burdensome cost to improve public lands under the Takings Clause.[212] Koontz's "claim does not implicate normative considerations about the wisdom of government decisions."[213] "[W]hether it would be arbitrary or unfair for respondent to order a landowner to make improvements to public lands" nearby is not an issue before the Court.[214] The Due Process Clause would not be considered to determine the constitutionality or reasonableness of a government decision.[215] By simple logical deduction, the categorical standard or per se test would apply to determine the constitutionality of financial obligations imposed by monetary exactions. The Takings Clause is implicated by a demand imposing a financial obligation to spend funds, but the reasonableness test (*Penn Central* inquiry) and intermediate scrutiny (rough proportionality) of the Takings Clause do not apply to an exaction demanding the spending of funds bearing a direct link to an identifiable, special parcel of property.[216] A government condition demanding a landowner to spend funds to make improvements to nearby public lands "would transfer an interest in property from the landowner to the government" and "amount to a *per se* taking similar to the taking of an easement or a lien."[217] Here, the transfer is not an interest in land but personal property that is a cost to the developer.[218] Therefore, a government regulation that imposes a conditional demand requiring landowners to spend money to make improvements on public land is subject to a categorical standard or a per se test.

C. Impact of Heightened Scrutiny on Taxes and Other Policies

Another issue raised by the application of *Nollan* and *Dolan* to monetary exactions is the likelihood of causing confusion between monetary exactions and property taxes. Simply, "[t]axes and user fees . . . are not takings."[219] *Koontz* also "does not affect the ability of governments to impose property

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[212] *See Koontz*, 133 S. Ct. at 2599. Justice Alito learns from Justice Scalia's theoretical failure in *Stop the Beach Renourishment*, and eliminates other constitutional analysis before declaring the need for higher standard of review. *See infra* Part VI Section B and accompanying notes.

[213] *Koontz*, 133 S. Ct. at 2600 (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in part, dissenting in part)).

[214] *Id.* (citing *Apfel*, 524 U.S. at 554 (Breyer, J., dissenting)).

[215] *See id.* at 2602.

[216] *See id.* at 2599-2600.

[217] *Id*.

[218] *Id.* at 2599.

[219] *Koontz*, 133 S. Ct. at 2600-01 (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 243 n.2 (2003) (Scalia, J., dissenting) ("We said as much in *County of Mobile* v. *Kimball*, 102 U.S. 691, 703 (1881), and our cases have been clear on that point ever since.").

taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[220] Notwithstanding *Brown*,[221] a taking can occur if government confiscates private property by imposing financial obligations.[222]

Koontz is not concerned with distinguishing between monetary exactions and taxes, and *Nollan* and *Dolan* apply only to monetary exactions and fees in lieu of dedications.[223] *Koontz* raises a "long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain."[224] On distinguishing exactions and taxes, the Court's "cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice . . . the respondents in *Brown* argued that extending the protections of the Takings Clause to a bank account would open a Pandora's Box of constitutional challenges to taxes."[225] In *Koontz*, "Florida law greatly circumscribes respondent's power to tax."[226] "If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of [Koontz's] permit was improper under Florida law."[227] Neither Florida law nor respondent's argument shows that the application of *Nollan* and *Dolan* to monetary exaction would undermine tax policy.

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[220] *Koontz*, 133 S. Ct. at 2601.

[221] *See Brown*, 538 U.S. at 240 (since there was no actual "pecuniary loss" to the owner, the Court found "no violation of the Just Compensation Clause of the Fifth Amendment").

[222] *Koontz*, 133 S. Ct. at 2601. The Court states:

> [a]t the same time, we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown*, we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. Our holding in *Brown* followed from *Phillips* v. *Washington Legal Foundation*, and *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, two earlier cases in which we treated confiscations of money as takings despite their functional similarity to a tax. Perhaps most closely analogous to the present case, we have repeatedly held that the government takes property when it seizes liens, and in so ruling we have never considered whether the government could have achieved an economically equivalent result through taxation.

Id. (internal citations omitted).

[223] *Id*.

[224] *Id*.

[225] *Id.* (citing Brief for Respondents Washington Legal Foundation at 32 & Brief for Respondent Justices of the Washington Supreme Court at 22, Brown v. Legal Found. of Wash., 536 U.S. 216 (2003)).

[226] *Id*.; s*ee also* FLA. STAT. §373.503 (authorizing respondent to impose ad valorem tax on properties within its jurisdiction); FLA. STAT. §373.109 (authorizing respondent to charge permit application fees but providing that such fees "shall not exceed the cost . . . for processing, monitoring, and inspecting for compliance with the permit").

[227] *Koontz*, 133 S. Ct. at 2602.

The Court decided not to consider at what point a land use regulation that imposes a tax would amount to taking of private property.[228] "[R]espondent has maintained throughout this litigation that it considered [Koontz's] money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land."[229] Moreover, the Court does not address "precisely what point a land-use permitting charge denominated by the government as a tax becomes so arbitrary . . . that it was not the exertion of taxation but a confiscation of property."[230] The Court had "long recognized that the power of taxation should not be confused with the power of eminent domain . . . ."[231] The Court acknowledges that it had distinguished between a tax and fee.[232] Therefore, the Court decided not to consider when a tax becomes so arbitrary that it amounts to a regulatory taking of private property for public use.

VI. THE ROBERTS COURT AND TAKINGS JURISPRUDENCE

Although the Roberts Court follows the lead of the Rehnquist Court, the Roberts Court's development of takings jurisprudence is robustly expanding constitutional doctrine and standards of review. The seminal decisions during the Rehnquist Court era were *Dolan*, which established heightened scrutiny of adjudicated land dedication conditions, and *Lucas*, which established a per se takings analysis for regulation denying all economically viable use.[233] *Dolan* and *Lucas* relied on the unconstitutional conditions doctrine and common law background principles, respectively, to justify a close connection between means and ends and establish a category of totally unlawful means.[234] The Roberts Court expands the application of *Dolan* and

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[228] *Koontz*, 133 S. Ct. at 2602.

[229] *Id.* The Court recognizes that state law is available to decide whether an excessive monetary exaction is a tax. *Id*. The Court states that:

> [c]iting cases in which state courts have treated similar governmental demands for money differently, the dissent predicts that courts will struggle to draw a coherent boundary between taxes and excessive demands for money that violate *Nollan* and *Dolan*. But the cases the dissent cites illustrate how the frequent need to decide whether a particular demand for money qualifies as a tax under state law, and the resulting state statutes and judicial precedents on point, greatly reduce the practical difficulty of resolving the same issue in federal constitutional cases like this one.

Id. at 2602 n.3 (internal citation omitted).

[230] *Id.* at 2602 (citing, *Brushaber* v. *Union Pacific R. Co.*, 240 U.S. 1, 24–25 (1916) (internal citation omitted)).

[231] *Id*.

[232] *Id*. For another take on the distinction between a fee and tax, *see* Justin R. Pidot, *Fees, Expenditures, and the Takings Clause***,** 41 ECOLOGY L.Q. 131, 135-36 (2014) (classifying monetary exactions as requiring a fee or expenditure to show their financial impact on the land developers).

[233] *See* Dolan v. City of Tigard, 512 U.S. 374, 391, 94-95 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028-29 (1992).

[234] *Dolan*, 512 U.S. at 385-86; *Lucas*, 505 U.S. at 1029.

expands the per se test in *Koontz*, showing again, its willingness to go beyond the Rehnquist Court.[235] Yet, the Roberts Court continues to follow in *Koontz* the Rehnquist Court's effort to establish stricter standards of review and leave much risk and uncertainty about the application of these standards to land use policy-making and regulation.[236]

A. Moving Beyond Regulatory Takings Theory

The Roberts Court moves beyond the Rehnquist Court by using the unconstitutional conditions doctrine to justify higher standards of review for regulatory takings claims involving financial obligations.[237] The Roberts Court uses constitutional doctrines to protect the right to receive just compensation, which, in turn, protects common law property rights.[238] The Roberts Court relies on the unconstitutional conditions doctrine[239] to limit the use of conditional demands.[240] *Koontz* follows *Dolan* by limiting the use of conditional demands, but these demands involve monetary exactions and fees in lieu of land dedications.[241] These demands are now subject to the essential nexus and rough proportionality test.[242] The Roberts Court goes farther when landowners believe conditional demands are too costly under adjudicatory

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[235] *See* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 560 U.S. 703, 714-15 (2010) (attempting to establish a judicial taking to prohibit state trial courts from ignoring or reinterpreting common law property rights to allow governments to make environmental regulation).

[236] *See* Michael Alan Wolf, *The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects*, 40 FORDHAM URB. L.J. 1835, 1857-1858 (2013) (anticipating an increase in regulatory takings and judicial takings claims to monetary exactions and other regulations). Other commentators conclude that the Court wrongly decided *Koontz*. *See* Elizabeth Tisher, *Land-Use Regulation After Koontz: Will We "Rue" the Court's Decision?*, 38 VT. L. REV. 743, 744 (2014) (finding that *Koontz* could "have serious ramifications for local governments in affecting flexible land-use planning decisions . . ."); Lee Anne Fennell & Eduardo M. Penalver, *Exactions Creep* 1, 61 (Univ. Of Chicago Pub. L. & Legal Theory Working Papers, Paper No. 448, 2013) (concluding that Court failed to establish a balanced approach to reviewing land use actions).

[237] *See Koontz*, 133 S. Ct. at 2597.

[238] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).

[239] *Dolan*, 512 U.S. at 385. In *Dolan*, the Court states that:

> [u]nder the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right— here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Id.

[240] *Id.* The Court states that "[s]econd, the [land dedication] conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." *Id*.

[241] *Koontz*, 133 S. Ct at 2599 ("[W]e . . . hold that so-called monetary exactions must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.").

[242] *Id.*

and perhaps legislative decision-making. *Koontz* follows *Lucas* and physical takings by applying a categorical or per se test to limit offsite financial obligations, but these demands and their obligations involve "the relinquishment of funds linked to a specific, identifiable property interest . . . ."[243] These demands are subject to a "*per se* [takings] approach."[244] Therefore, *Koontz* extends *Dolan*'s rough proportionality and *Lucas'* per se test to impose, respectively, closer scrutiny of and a categorical test on conditional demands based on their impact on the community and the developer's spending of funds on offsite improvements.[245]

Applying *Nollan* and *Dolan* to monetary exactions raises concerns regarding the impact of *Koontz* on local policy-making to impose money exactions and fees in lieu of dedications. It is not apparent how applying *Nollan* and *Dolan* to monetary exactions "will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees."[246] Some states have applied *Nollan* and *Dolan* to impact fees and exactions in lieu of dedications.[247] These applications of *Dolan* have not created any harm and the "dissent is correct that state law normally provides an independent check on excessive land use permitting fees."[248] "[T]he dissent's argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*" when "other constitutional doctrines leave no room for the [essential] nexus and rough proportionality requirements of *Nollan* and *Dolan*."[249] Although *Nollan* and *Dolan* apply to adjudicated monetary exactions and fees in lieu of dedications, the Court introduces confusion by establishing an entirely different standard of review to apply to

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[243] *Koontz*, 133 S. Ct. at 2600.

[244] *Id.*

[245] *See id.* at 2599.

[246] *Id*. at 2602. Some commentators have examined the impact of *Koontz* on local land use policy-making and regulation. *See* Michael Castle Miller, *The New Per Se Takings Rule:* Koontz's *Implicit Revolution of the Regulatory State*, 63 AM. U.L. REV. 919, 947 (2014) (finding that *Koontz* is consistent with purpose of the Takings Clause that does permit some persons to bear a public burden); Michael Farrell, *A Heightened Standard for Land Use Permits Redefines the Power Balance Between the Government and Landowners*, 3 U. BALT. J. LAND DEV. 71, 78 (2013) (concluding that "higher standard [of review permit] landowners . . . to fight excessive exactions while governments will try to continue to raise capital to fund increased infrastructure due to land development"); Israel Piedra, *Confusing Regulatory Takings with Regulatory Exactions: The Supreme Court Gets Lost in the Swamp of* Koontz, 41 B.C. ENVTL. AFF. L. REV. 555, 565 (2014) (concluding that it is "unclear what practical impact the decision will have"); Christopher Hammond, Koontz v. St. Johns*: Expanding Property Rights in Takings Jurisprudence*, 5 CALIF. L. REV. CIR. 240, 249 (2014) ("expand[ing] the Takings Clause protections afforded to property owners . . . under the Fifth Amendment"); Kristin N. Ward, *The Post*-Koontz *Landscape:* Koontz's *Shortcomings and How to Move Forward*, 61 EMORY L.J. 129, 167-68 (2014) ("creat[ing] uncertainty for local governments regarding their exposure to takings liability and, as a result, has negatively reduced regulatory flexibility").

[247] *Koontz*, 133 S. Ct. at 2602.

[248] *Id*.

[249] *Id.* at 2602-03.

financially burdensome and more costly monetary exactions and to regulations that could also include legislated exactions.[250] Therefore, *Koontz* should not apply to legislated land use regulations[251] but may eventually need to apply to legislated monetary exactions making excessive demands[252] that significantly diminish the value of, substantially reduce return on invested capital, or coercively compel an offsite investment in public infrastructure not adjacent to or near the land development project.

If *Koontz* does not apply to a few legislated monetary exactions, *Koontz* may have an extremely limited application to land use regulatory schemes due to the higher standard of the per se test that could be applied to adjudicated monetary exactions and fees in lieu of dedications. *Koontz* establishes a per se test that would apply to monetary exactions requiring landowners to relinquish funds to make improvements offsite to public lands.[253] These funds or costs provide public services and infrastructure and are burdensome financial obligations on or diminish the value[254] of a real

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[250] *Koontz*, 133 S. Ct. at 2601.

[251] *See* Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702-03 (1999). The application of *Koontz* to legislated monetary exactions would not be overly inconsistent with *Monterey* that recognized the use of the rough proportionality test to determine the validity of on excessive exactions. *Id*. at 703 (stating that "the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one").

[252] *Id. But see Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (stating that the Court was not clear on the application of the *Koontz* to legislative determination and states that "the majority's refusal to say more about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money").

[253] *Koontz,* 133 S. Ct. at 2600.

[254] *See id.* The Court recognizes that monetary exactions or financial obligations can diminish the value of the parcel. *Id*. The Court places the diminution in value in means-ends analysis by stating that:

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

Id. In *Penn Central*, the Court stated that the diminution could not alone amount to taking of private property for public use. Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 131 (1978). The Court stated that "the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Id*. (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394, 96 (1915) (87 1/2% diminution in value); *cf.* Eastlake v. Forest City Enterprises, 426 U.S. 668, 674 n.8 (1976)). The Court also states that "the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Penn Cent.*, 438 U.S. at 131 (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

estate development project.[255] These financial obligations must have a direct link to a specific identifiable property interest in a manner similar to the bank accounts in *Brown*.[256] An obvious link to an identifiable property interest may exist when municipal or county governments collect or request payment of monetary exactions imposed on identifiable land development projects. Land developers and landowners cannot pass these exactions on to buyers and must pay the fees or funds directly to local government.[257] The payment of these fees and funds is not as clear as a lien attaching to property. We do

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[255] *See* Jennifer Evans-Cowley, *Development Exactions: Process and Planning Issues* 3 (Lincoln Inst. of Land Pol'y, Working Paper WP06JEC1, 2006). Professor Evans-Crowley states that:

> The fees associated with exactions can vary widely. Again using impact fees as an example, in a 2005 survey on impact fees the average impact fee for a single family home was $7,669. If California is excluded, the average impact fee was $5,361. The lowest impact fee was $446 for DuPage County, Illinois, which charges a road impact fee, while the highest was $41,108 for Gilroy, California, which charges impact fees for roads, water, sewer, drainage, parks, libraries, fire, police, general government, and schools.

Id. at 2.

Exactions have been used to finance public services and infrastructure. *See* Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 518 (2012). Professor Mulvaney states that local governments have found the use of exactions an attractive option, especially when state and federal funds were reduced in the 1970s and 1980s. *Id.* (citing Evans-Cowley, *supra* note 255, at 3). He also states that "[o]ver the course of time, wastewater facilities, schools, public parks, precinct houses, fire stations, and even day care services became public welfare projects that developers might be expected to help provide in conjunction with the government's approval of their proposed land use intensification." *Id*. (citing Evans-Cowley, *supra* note 255, at 3-4; Vicki Been*, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 479 (1991); STATE AND LOCAL GOVERNMENT LAW SECTION, AMERICAN BAR ASSOCIATION, EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA, xxxiii-xxxiv (Robert H. Freilich & David W. Bushek eds. 1995)).

[256] *See Koontz*, 133 S. Ct. at 2600. ("[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property").

[257] *See generally* Evans-Cowley, *supra* note 255, at 19. The collection of the impact fees or exactions indicates that these fees are applied to an identifiable tract or parcel of land. *Id*. Professor Evans-Crowley states that:

> The time at which the impact fee is paid differs from state to state. One-third allow impact fees to be collected at any time during the development process. The remaining legislation limits the collection of the impact fees either to the time that the building permit is issued or to the time that the certificate of occupancy is issued.

Id.

The collection of impact fees may establish a link or connection between the exaction and identifiable property interest of a real estate development project. *See Koontz*, 133 S. Ct at 2600 (citing Brown v. Legal Found. of Wash., 538 U. S. 216, 235 (2003)) (stating that "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property . . . .").

not see land developers who create profitable land development projects voluntarily give funds to (or share of their profits with) governments to finance public services and infrastructure.

Koontz's per se test is not easily avoided by courts that must apply the highest standard mandated by the Takings Clause where such standard may be higher than *Nollan* and *Dolan's* standard of review.[258] In this instance, the higher standard of review would actually be the lowest standard permitted by the Takings Clause. In addition, the States cannot opt out of the highest standard mandated by the Takings Clause.[259] Therefore, *Koontz's* per se test leaves the heightened scrutiny of *Nollan* and *Dolan* applicable to mostly adjudicated monetary exactions and fees in lieu of dedications. The remaining exactions do not create a direct link to an identifiable property interest and could also include legislated exactions having only a general connection to the impact of development on a community's public services, such as education, public safety, and recreation.

B. Relying on Takings Doctrine and Other Doctrines

The Roberts Court continues earlier efforts by the Rehnquist Court to expand regulatory takings jurisprudence but has gone much farther in a shorter period of time. The Roberts Court starts by attempting to establish judicial takings theory in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[260] and implying that *Pennsylvania Coal* could go no farther.[261] *Koontz* returns to and extends the inherent limitation of regulatory takings theory. The Roberts Court recognizes the Rehnquist Court's doctrinal approach to expanding regulatory takings theory.[262] Foremost, the Roberts Court goes back to *Pennsylvania Coal* by using *Koontz* to expand the *Lochner* era's unconstitutional conditions doctrine to cover more government regulation by justifying higher standards

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[258] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); *See* Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVIRONS ENVTL. L. & POL'Y J. 189, 227 (2010). Prior to *Koontz*, Professor Mulvaney finds a similar effect when courts review conditions on land use permits and states that "[t]he U.S. Supreme Court's exaction takings jurisprudence has created an anomaly where lower courts must apply a more stringent level of scrutiny when reviewing land use permit conditions than they accord outright permit denials." *Id*. at 228.

[259] *See Dolan*, 512 U.S. at 391 (recognizing that the states can apply a standard higher than the federal standard, thus replacing lower state standards (rational basis test) with a rough proportionality test).

[260] *See* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 560 U.S. 703, 714-15 (2010).

[261] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The Court concludes that these considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

[262] *See Koontz*, 133 S. Ct. at 2600 (recognizing that *Dolan* and *Nollan* justify the heightened scrutiny of monetary exactions and that *Brown v. Legal Found. of Wash.* supports a per se taking).

of review.[263] Most significantly, its requirement of a direct link between some exactions and a property interest for economic reasons, namely development cost, is reminiscent of the *Lochner* era,[264] which required a direct relation between economic regulation and public needs to protect private property rights.[265] Of course, Justice Alito was explicit in stating that the normative considerations of the *Lochner* era did not need to be considered to decide that monetary exactions imposed a burdensome cost on land development when these exactions demand developers pay for offsite improvements to public lands.[266] The Court reaffirms the end of the use of substantive due process to protect private property rights. [267]

The categorical or per se test of *Lucas* and *Koontz* strongly underpins the need to protect the enumerated right to receive just compensation that is now given more protection by common law and *Lochner* era doctrines. Simply, the Roberts Court embraces a doctrinal approach that is right-centered (emphasis on the right to receive just compensation) to protect property rights and does not use property rights to bolster the right to receive just compensation.[268] The Takings Clause is the common thread running through takings theory, doctrine, and principles, such as standards of review. The Roberts Court can use more constitutional doctrine and create higher standards of review to expand regulatory takings theory or use less constitutional doctrine and create narrow standards of review to cause the need for more takings theory. The latter failed once[269] but the former continues for now.[270]

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[263] *Dolan*, 512 U.S. at 406-07 (Stevens, J., dissenting) (Justice Stevens notes that the unconstitutional conditions doctrine is an inadequate framework to analyze a land dedication condition challenged as a regulatory takings).

[264] *See* Lochner v. New York, 198 U.S. 45, 57-59 (1905) (refusing to sustain a state statute establishing a limit on the number of hours of work). Approximately three decades later, the United States Supreme Court permitted state and federal governments to regulate economic relationships of private property and eventually ended the *Lochner* era. *See* United States v. Carolene Products. Co., 304 U.S. 144, 154 (1938) (federal statute excluding filled milk from interstate commerce); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 386 (1937) (state statute establishing a minimum wage for women); Nebbia v. New York, 291 U.S. 502, 515 (1934) (state statute fixing the price of milk).

[265] *See Lochner*, 198 U.S. at 57-58. For an analysis of the relationship between takings and due process claims, see Mulvaney, *supra* note 258, at 543-50 (examining the relationship between the Due Process Clause and Takings Clause during the *Lochner* era).

[266] *Koontz*, 133 S. Ct. at 2600 (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998).

[267] *See Carolene Products. Co.*, 304 U.S. at 147, 154.

[268] *See, e.g., Koontz*, 133 S. Ct. at 2595.

[269] *See* Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 560 U.S. 702, 714-15 (attempting to establish a judicial takings theory).

[270] *See* Horne v. U.S. Dep't. of Agric., 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419, 2425-26 (2015) [hereinafter *Horne II*]. *See infra* note 288 and accompanying text (listing the issues that were presented by the petitioner in *Horne II* in his brief).

C. Imposing Heightened Scrutiny on Monetary Exactions

A two-level framework exists to determine whether landowners who are subject to burdensome monetary exactions are denied the right to receive just compensation.[271] This framework is driven by the need to give greater protection to the right to receive just compensation by requiring heightened scrutiny and a per se test on different kinds of impact exactions imposed on land development projects.[272] The various kinds of impact exactions and their imposition and obligations create the need for a two-level framework to apply *Koontz*.[273] In the first level, courts must determine whether the

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[271] *See Koontz*, 133 S. Ct. at 2599.

[272] *Id.* Commentators have analyzed the use of the unconstitutional conditions doctrine on the application of *Nollan* and *Dolan* to monetary exactions in *Koontz*. *See, e.g.,* Scott Woodward, *The Remedy for A* Nollan/Dolan *Unconstitutional Conditions Violation*, 38 VT. L. REV. 701, 702-03 (2014) ("suggest[ing] that the *Nollan/Dolan* standard is functionally no different from other applications of the unconstitutional conditions doctrine and as such is more properly viewed as a means to invalidate a permit condition"); 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, 456 (2014) ("showing how [doctrine] has evolved in the context of land use and come to be the logical underpinning of controversial Supreme Court decisions regarding exactions"); Mark Fenster, *Substantive Due Process by Another Name:* Koontz**,** *Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 404 (2014) ("rendering the exactions decisions in *Nollan*, *Dolan*, and now *Koontz***,** as conceptually and practically outside of the federal constitutional takings realm entirely, and existing in the astral realm, known as unconstitutional conditions.").

[273] *See* Evans-Cowley, *supra* note 255, at 4. There several kinds of impact exactions that provide revenues and land to municipal and county governments to provide public services and benefits. *See id.* These exactions are as follows:

> **Dedication**
> A dedication is a requirement for a developer to donate land and/or facilities for public use. For example, a developer might be required to dedicate land to be used as a park for use of the residents living in a development. . . .
>
> **Tap Fees**
> Utility connection fees, commonly known as tap fees, are exactions that are used to fund capital improvements. Connection fees are charged to allow cost-recovery of the cost to tie new development into the existing infrastructure network. . . .
>
> **Fee-in-lieu**
> A fee-in-lieu is an exaction that requires the developer to pay a fee instead of providing a public facility on-site. Parks and other forms of infrastructure are a type of public good, and it is possible for the private sector to provide these public facilities, but it is impractical for each developer to build parks, roads, and water and sewer lines when they could be shared. . . .
>
> **Linkage Fee**
> Linkage fees are an exaction that is used to pay for the secondary effects of development. They are used to collect money from large scale commercial, industrial, and multifamily development to provide for such things as affordable housing, job creation, and day care facilities. . . .

conditional demand is an adjudicated monetary exaction or fee in lieu of dedication that is subject to the rough proportionality test newly imposed by *Koontz*.[274] The courts must continue to examine the fee or exaction to determine if this exaction or fee on a specific parcel or tract requires landowners to make improvements to public lands and facilities.[275] In the second level, the courts must determine whether this fee or exaction, which imposes an offsite financial obligation to spend funds to improve public lands, is linked to an identifiable property interest where such obligation is subject to per se or categorical test by *Koontz*.[276] The two-level analytical approach requires judges and policy-makers to thoroughly consider the regulatory nature and transferable benefits of monetary exactions and fees in lieu of dedications in a land use regulatory scheme.[277]

The heightened scrutiny or rough proportionality of *Dolan* requires a closer connection between land dedication conditions and the impact of development on the community.[278] *Dolan's* rough proportionality test examines the government's need for a regulation by applying a means-ends analysis to an adjudicatory decision.[279] The rough proportionality test establishes the existence of a closer fit or relationship between a land dedication condition and the impact of land development on the community.[280] This relationship requires the impact of the land development project to create the need for the land dedication condition.[281] *Koontz* requires land development to create the need for the monetary exactions

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Impact Fee

Impact fees "are scheduled charges applied to new development to generate revenue for the construction or expansion of capital facilities located outside the boundaries of the new development (off-site) that benefit the contributing development." Impact fees are most commonly assessed for roads, water, sewer, and stormwater, but can be utilized for other types of facilities such as schools and fire stations.

Id. (internal citation omitted).

[274] *See* Evans-Cowley, *supra* note 255, at 4.

[275] *Id.* at 2.

[276] *See id.*, at 4.

[277] *See id.*

[278] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[279] Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978). The *Penn Central* inquiry includes the nature of the government action factor that examines land use, environmental, and other regulation to determine whether this regulation "substantially advance[s] a legitimate state interest." *Id.* (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). The Court also asks whether the regulation denies all economically viable use...to justify need for and use of [the] regulation." *Penn Cent.*, 438 U.S at 124, 138 n.36.

[280] *Dolan*, 512 U.S. at 391. For an analysis of the extension of *Nollan* and *Dolan in Koontz*, see Catherine Contino, *Monetary Exactions: Not Just Compensation? The Expansion of* Nollan *and* Dolan *in* Koontz v. St. Johns River Water Management District, 25 VILL. ENVTL. L.J. 465, 467 (2014) (analyzing "the Supreme Court's holding in *Koontz* that monetary exactions added as a condition to approval of a land use permit must satisfy the essential nexus and rough proportionality test and predicts the potential effects of expanding *Nollan* and *Dolan* on Takings Clause jurisprudence").

[281] *Dolan*, 512 U.S. at 391.

under *Nollan* and *Dolan*, but appears to apply only to monetary exactions and fees in lieu of dedications created by adjudicatory policy-making.[282] *Nollan* and *Dolan* applied to adjudicated land dedication conditions.[283] Therefore, *Koontz* extends *Nollan* and *Dolan* to cover adjudicated monetary exactions and fees in lieu of dedications. To address the extortionate behavior attributed to adjudicatory decisions, *Koontz* perhaps could apply to a few legislated monetary exactions. We suspect that these exactions would be narrowly tailored to make a demand of a specific, large residential, or other development with a conceivable impact on a badly deteriorated or nonexistent but critical public facility that is needed but cannot be afforded by the whole community.

Brown treats financial obligations as a physical or per se taking,[284] whereas *Lucas* does not permit the government to deny all economically viable use under a per se test.[285] *Brown* and *Lucas* do not permit the government to use regulation (means) to achieve some objectives (ends),[286] and *Koontz* follows *Brown* and *Lucas*.[287] If monetary exactions and fees in lieu of dedications demand the relinquishment of funds having a direct link to specific, identifiable parcels or tracts of land, *Koontz* establishes a per se test to examine burdensome financial and other obligations on a specific parcel of real property.[288] Monetary exactions and fees in lieu of dedications create financial obligations and can appear to be similar to taxes that are often legislative decisions.[289] As immediately stated above, *Koontz* conceivably may apply to a few legislated monetary exactions and fees in lieu of dedications that demand extortionate or burdensome financial obligations

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[282] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013).

[283] *See* Nollan v. Ca. Coastal Comm'n, 483 U.S. 825, 827 (1987); *Dolan*, 512 U.S. at 377.

[284] *See* Brown v. Legal Found. of Wash., 538 U. S. 216, 235-36 (2003).

[285] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[286] *See Brown*, 538 U. S. at 235, 240; *see also Lucas*, 505 U.S. at 1029.

[287] *Koontz*, 133 S. Ct. at 2600.

[288] *Id.* The Court addressed other takings issues involving the per se test in *Horne II*. *See* Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2425-26 (2015). The questions presented by the petitioner were:

> Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property . . . [w]hether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion . . . [and] [w]hether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

Id. at 2425, 2428, 2430. *Horne* seems poised to address some questions that were left unanswered by the Court in *Koontz* when the Court established a categorical or per se test to require a "direct link between the government's demand and a specific parcel of real property." *Koontz*, 133 S. Ct. at 2600.

[289] *See supra* Part V Section C and accompanying notes.

establishing a direct link to a specific parcel of real property and avoiding the right to receive just compensation.

Federal and state courts must consider the higher federal standard of review when this federal standard is higher than any state or federal standard of review. *Dolan* does not permit the application of the rational basis test when a rough proportionality is applicable to the land dedication condition.[290] Applying only the per se test to adjudicated monetary exactions and fees in lieu of dedications that demand landowners to spend funds offsite to improve public lands would eliminate these adjudicated monetary exactions and fees in lieu of dedications. This application of the per se test may cause municipalities to rely primarily on legislated exactions, taxes, and user fees. These legislative exactions and other regulations normally include financial obligations. Other circumstances may still require a categorical or per se test. For instance, a land dedication conditions demanding a landowner to suffer financial losses that are directly linked to the use of a dedication (land) to make an improvement on a public facility or infrastructure could conceivably trigger a categorical or per se test of *Koontz*.[291] These burdensome losses that reduce the profit from or market value of the remaining development signals a reverse transfer of funds from the landowner to the government through demanding transactions and events causing financial losses on the development.[292] This transfer of funds by demanding financial losses imposes a negative obligation, while a monetary exaction and fee in lieu of dedication impose a positive financial obligation that is connected to a specific parcel of real property and subject to a per se test.[293] Thus, some monetary exactions and fees in lieu of dedications amount to takings by their very nature when they impose offsite financial obligations that have a direct link to an identifiable parcel or tract of land.

VII. CONCLUSION

The Roberts Court follows the Rehnquist Court's expansion of regulatory takings theory by using a similar analytical approach. The Roberts Court relies on constitutional doctrine and lesser takings precedents to protect the right to receive just compensation. The Roberts Court applies the unconstitutional conditions doctrine to justify closer scrutiny of coercive land use permitting processes denying a landowner an enumerated right to receive just compensation.[294] *Koontz* shows how the Roberts Court continues the Rehnquist Court's doctrinal and right-centered approach to expand regulatory takings theory by using higher standards of review to scrutinize and categorize government actions. In following *Dolan*, *Koontz* requires

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[290] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

[291] *See Koontz*, 133 S. Ct. at 2600.

[292] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (using a per se test to prevent government regulation from denying all economically viable use).

[293] *See Koontz*, 133 S. Ct. at 2600.

[294] *Id.* at 2595.

heightened scrutiny of monetary exactions and fees in lieu of dedications to determine whether the impact of land development created the need for these exactions and fees.[295] In matching *Lucas* and following *Brown*, *Koontz* requires the application of a categorical standard or per se test to monetary exactions and fees in lieu of dedications that demand offsite financial obligations on public lands having a direct link to a specific parcel of real property.[296] The Roberts Court expands regulatory takings theory by using higher standards of review to give greater protection to the right to receive just compensation, which, in turn, gives greater protection to private property rights. Therefore, *Koontz* requires the government to design monetary exactions and fees in lieu of dedications that do not demand the transfer or relinquishment of funds to improve public lands and that do not demand funds disproportionate to social and other impacts of development on the community.[297]

[295] *See Koontz*, 133 S. Ct. at 2599-2600.
[296] *Id.* at 2600.
[297] *Id.* at 2586.