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Holistic Climate Change Governance: Towards Mitigation and Adaptation Synthesis

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VIEWING THE SUPREME COURT'S EXACTIONS CASES THROUGH THE PRISM OF ANTI-EVASION

MICHAEL B. KENT, JR.*

This Article considers the U.S. Supreme Court's 2013 decision in Koontz v. St. Johns River Water Management District, which extended the application of the Court's framework for evaluating the constitutionality of land use exactions (known as the Nollan/Dolan test). The majority of the Court relied heavily on the unconstitutional conditions doctrine, explaining that this doctrine formed the basis not only for the Nollan/Dolan framework but also for the extension of that framework to Koontz's new factual setting. Four members of the Court dissented. Although the dissenting justices seemingly agreed with several of the majority's propositions, they vigorously opposed the manner in which the majority applied those propositions.

Although Koontz might be viewed as just another in a long line of cases that make up the messy jurisprudence of regulatory takings and unconstitutional conditions, the primary thesis of this Article is that Koontz in fact provides a key to unlocking the Court's exactions framework. Relying on my prior work with Brannon Denning, this Article posits that both regulatory takings and the doctrine of unconstitutional conditions constitute anti-evasion doctrines by which the Court seeks to fill enforcement gaps left open by its prior constitutional decision rules. Inasmuch as land use exactions lie at the intersection of these two doctrinal areas, one would expect to find that anti-evasion notions play a large role in the Court's exactions decisions. And indeed, both the majority and the dissent in Koontz invoked the anti-evasion characteristics of the Nollan/Dolan test in support of their analytical positions in that case.

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Viewing Koontz (and its jurisprudential antecedents) through the prism of anti-evasion helps both to explain the majority's decision in that case and to bring the differences between the majority and dissent into sharper focus. Additionally, the anti-evasion concept suggests some guidelines for how future exactions issues might be resolved—both at the micro level (dealing with future decision rules that will have to be developed in light of Koontz) and at the macro level (addressing larger questions about the Court's takings jurisprudence and the place of the exactions cases within it).

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INTRODUCTION

Of the many difficult areas of constitutional law, few have reputations as infamous as the doctrines of regulatory takings and unconstitutional conditions. Takings doctrine, for example, has long been labeled a “muddle”¹ that is “incomprehensible,”² “confused,”³ and “famously incoherent.”⁴ In like manner, observers have described the doctrine of unconstitutional conditions as a “conundrum,”⁵ a “minefield,”⁶ a “quagmire,”⁷ and a “mess.”⁸ Although scholars have labored to explain both doctrines, questions persist for which clear answers do not readily present themselves, resulting in frequent consternation⁹ and occasional calls that the doctrines simply be

1. *E.g.*, Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

2. *E.g.*, Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 61 (1996).

3. *E.g.*, D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 343 (2005).

4. *E.g.*, Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 1 (2003).

5. *E.g.*, Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 479 (2012).

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

7. *E.g.*, Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 951 (2006).

8. *E.g.*, Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1047 (2014).

9. *See, e.g.*, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001) (“The persistent challenge . . . has been to articulate some coherent or at least intelligible principles or tests . . . to support the [unconstitutional conditions] doctrine.”); Blais, *supra* note 2, at 61 (“Scholars have been trying to make sense of the Court’s [regulatory takings] endeavor for decades, but most concede that they are unable to do so.”).

jettisoned.¹⁰ Nonetheless, the courts continue to apply the doctrines,¹¹ and the task remains to explain and evaluate the principles upon which they rest and the manner in which they are applied.

This Article contributes to that task by focusing on the issue where these two doctrines intersect—namely, the constitutionality of land use exactions. Specifically, I argue that the Supreme Court’s most recent exactions decision, *Koontz v. St. Johns River Water Management District*,¹² provides a key to understanding the Court’s exactions cases and the jurisprudential foundations upon which they rest. In short, the exactions cases are best understood as anti-evasion doctrines designed to minimize enforcement gaps left open by the Court’s other takings tests.

A land use exaction generally is defined as “a governmental requirement that a developer dedicate or reserve land for public use or improvements, or pay a fee in lieu of dedication, which is used to purchase land or construct public improvements.”¹³ Usually, the local government makes these requirements a condition to obtaining some type of development approval—for example, a rezoning, the approval of a subdivision plat, or the issuance of a building permit.¹⁴ Although local governments have long conditioned development approval on both physical and monetary exactions that help provide a variety of on-site and off-site improvements,¹⁵ their ability to do so has been constrained

10. See, e.g., Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594 (1990) (arguing that “the unconstitutional conditions doctrine should be abandoned”); Richard E. Levy, *Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 422 (1995) (stating that “the concept of regulatory takings should be abandoned altogether”).

11. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (applying both regulatory takings and unconstitutional conditions doctrine).

12. *Id.*

13. Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 L. & CONTEMP. PROBS. 51, 56 (1987).

14. See MICHAEL A. ZISKA ET AL., STATE AND LOCAL GOVERNMENT LAND USE LIABILITY § 18:2, Westlaw (database updated Dec. 2015) (“A typical exaction ordinance requires that developers, as a condition to receiving permit approval, dedicate land for public purposes, pay a fee to the municipality in lieu of land dedication, or both.”) (emphasis added).

15. See, e.g., EDWARD H. ZIEGLER, JR., 2 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 20:67 (4th ed. 2013) (discussing exactions in context of tree protection

somewhat by the rules established in *Nollan v. California Coastal Commission*¹⁶ and *Dolan v. City of Tigard*.¹⁷

Rooted in the Supreme Court's takings jurisprudence, the *Nollan/Dolan* standards apply a form of heightened scrutiny to evaluate whether a challenged exaction constitutes a taking of private property.¹⁸ At the same time, the Court has characterized *Nollan/Dolan* as "a special application" of the unconstitutional conditions doctrine.¹⁹ Thus, the problem of land use exactions concurrently triggers "two of the most difficult and intractable problems known to law."²⁰

In *Koontz*, the Supreme Court once again waded into these murky waters, addressing two questions about the applicability of the *Nollan/Dolan* test.²¹ First, the Court considered what type of government action is necessary to trigger that test.²² In both *Nollan* and *Dolan*, the government had approved a land use application subject to an exaction—specifically, that the applicant in each case grant a public easement across its land.²³ The question presented in *Koontz* was whether *Nollan/Dolan* was limited to this type of conditional approval or whether it might also apply to situations where the government denies an application. A majority of the Court held that *Nollan/Dolan*'s requirements apply equally irrespective of whether the government approves a permit subject to a condition or denies the permit until the applicant accedes to the condition.²⁴

Second, the Court addressed the type of exactions that are subject to *Nollan/Dolan*'s heightened scrutiny.²⁵ Is the test limited to the physical exactions at issue in those cases—that

regulations); see also Vicki Been, "Exit" as Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 479–83 (1991) (providing overview of different types of and purposes for exactions).

16. 483 U.S. 825 (1987).

17. 512 U.S. 374 (1994).

18. See *id.* at 386–96 (applying "essential nexus" and "rough proportionality" standards).

19. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005).

20. Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 85 (2000).

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

22. *Id.* at 2594–98.

23. See *Dolan*, 512 U.S. at 379–80; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

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

25. *Id.* at 2598–603.

is, conditions that force a property owner to dedicate some portion of her land to public use—or does it also apply to monetary exactions—conditions requiring an owner to pay money to the government? Over a vigorous dissent, the *Koontz* majority rejected the notion that *Nollan/Dolan* applies only to physical exactions and explicitly held that monetary exactions must also satisfy its nexus and proportionality requirements.²⁶

Not surprisingly, *Koontz* has received both praise and censure, and these reactions appear largely to depend on the particular commenter's view of the appropriate policy balance between private property rights and governmental regulatory authority.²⁷ Notwithstanding how one feels about the decision's policy ramifications, however, it seems clear that the Court's opinion raises a number of significant doctrinal difficulties.

To the extent that the *Nollan/Dolan* test is rooted in the unconstitutional conditions doctrine, for example, the Court's holding that monetary exactions are subject to that test does not necessarily follow.²⁸ As Justice Kagan wrote in dissent, *Nollan/Dolan* most obviously applies when "the property the government demands during the permitting process is the kind it otherwise would have to pay for."²⁹ A requirement that an owner physically dedicate land to the public fits that definition,³⁰ a requirement that the owner pay money to the

26. *Id.* at 2599.

27. Compare Brian T. Hodges, *Koontz v. St. Johns River Water Management District and Its Implications for Takings Law*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Oct. 2013, at 39, 39 (calling *Koontz* "one of the most significant and decisive victories for property owners in decades"), with John D. Echeverria, Opinion, *A Legal Blow to Sustainable Development*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html> [<https://perma.cc/3C8T-F5WC>] (describing *Koontz* as "revolutionary and destructive").

28. See, e.g., Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1853 (2010) (acknowledging that limitation of *Nollan/Dolan* to physical exactions "might more readily accord with [the] description of [those cases] as flowing from the doctrine of unconstitutional conditions"); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 588–601 (2009) (arguing that unconstitutional conditions doctrine necessarily limits *Nollan/Dolan* to physical exactions).

29. *Koontz*, 133 S. Ct. at 2605 (Kagan, J., dissenting).

30. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that permanent physical occupation of property is taking *per se*).

government does not.³¹ How then can *Nollan/Dolan* apply to monetary exactions and still fit within the doctrine of unconstitutional conditions?

A similar problem results from the Court's holding that *Nollan/Dolan* does not distinguish between conditions that accompany regulatory approvals and those that accompany denials.³² In the former circumstance—where the government grants a permit subject to the condition that the applicant turn something over to the government—it is much easier to see how the condition might implicate a taking. After all, the approval affirmatively requires the applicant to transfer to the government the thing demanded. This link is more attenuated, however, where the government denies the permit, even if it indicates a willingness to reverse course should the applicant make the transfer.³³ In this latter scenario, the applicant is under no obligation to give the government anything and, accordingly, cannot readily be said to suffer a taking of its property.³⁴ And if no property is taken, then the applicant is not entitled to just compensation, the remedy mandated by the Takings Clause.³⁵ How then can *Nollan/Dolan* apply to denials of land use applications and still fit within the context of the Court's takings jurisprudence?³⁶

When confronted with such questions, it often is tempting to take one or the other of two courses—first, to suggest a grand theory that attempts to comprehensively explain all of the nuances and inconsistencies in a particular doctrine or area of law; or second, to throw up one's hands in frustration and view any attempt to find consistency as hopeless because it simply does not exist. It is my aim here to avoid either extreme. As the opening paragraph of this Article makes clear, both the

31. See *Kent*, *supra* note 28, at 1853.

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

33. In *Nollan* itself, the Court assumed that an outright denial of a permit would not constitute a taking unless doing so would trigger one of the Court's other takings tests. See *Nollan*, 483 U.S. at 835–36.

34. Indeed, the *Koontz* majority admitted as much. See *Koontz*, 133 S. Ct. at 2597 (“Where the permit is denied and the condition is never imposed, nothing has been taken.”).

35. See *id.* (“[T]he Fifth Amendment mandates a particular *remedy*—just compensation—only for takings.”).

36. At least one scholar has argued that, after *Koontz*, *Nollan* and *Dolan* should be regarded as substantive due process cases rather than as takings cases. See Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 *TOURO L. REV.* 403, 415–17 (2014).

regulatory takings doctrine and the doctrine of unconstitutional conditions are recondite, at best, and no attempt to bring absolute clarity to either area is likely to prove very successful. At the same time, however, both areas seem to share at least some common principles and characteristics, suggesting there is perhaps more coherence in the Court's exactions jurisprudence than some of its critics have observed.

From a doctrinal standpoint, it appears that a primary task of both the takings and unconstitutional conditions doctrines is to prevent the government from elevating form over substance or doing indirectly what it cannot do directly. Both doctrines, thus, can be considered what Brannon Denning and I elsewhere term “anti-evasion doctrines”—that is, judicially-created decision rules designed to fill doctrinal gaps by preventing the government from complying with the form of earlier rules while simultaneously circumventing the constitutional values those rules were intended to implement.³⁷ We have argued that the Court typically chooses to employ these anti-evasion doctrines when it perceives there to be a lack or failure of political safeguards that otherwise might prevent governmental overreaching.³⁸

Although it does not answer every question raised by *Koontz*, this anti-evasion principle helps to explain the majority's decision in that case and to bring the differences between the majority and dissent into clearer focus. Additionally, viewing *Koontz* through the prism of anti-evasion suggests some guidelines for how future issues might be resolved—both at the micro level (dealing with future decision rules that will have to be developed in light of *Koontz*) and at the macro level (addressing larger questions about the Court's takings jurisprudence and the place of the exactions cases within it).

This Article proceeds as follows. Part I provides an overview of the Court's regulatory takings doctrine. Part II offers a similar synopsis of the unconstitutional conditions doctrine. Part III sketches Denning's and my theory of anti-evasion doctrines and situates both takings and

37. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1779.

38. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Anti-Evasion in Constitutional Law*, 41 FLA. ST. U. L. REV. 397, 423–24 (2014).

unconstitutional conditions within that paradigm.

Part IV then turns to *Koontz*, emphasizing the anti-evasion themes employed by both the majority and the dissent. Both sides of the Court agreed that *Nollan/Dolan* is designed as an anti-evasion doctrine, and because of this fact, both sides generally agreed that the applicability of nexus and proportionality do not depend on whether the government couches its condition in terms of “approval if” or “denial unless.”³⁹ But the justices parted ways on how far this anti-evasion principle should extend,⁴⁰ and I argue they did so in part because of different perceptions about the adequacy of political safeguards to police the boundary between permissible and impermissible regulatory conduct.

In light of the foregoing, Part V discusses the implications of *Koontz* for future litigation. Specifically, how might a *Nollan/Dolan* violation work in the context of a permit denial? What prerequisites exist in that context to trigger *Nollan/Dolan*, and what particular facts might an applicant allege to state a valid claim? If a claim is successfully brought in that context, what is the appropriate remedy? And what do the answers to these micro-level questions suggest about macro-level difficulties concerning the takings doctrine and *Nollan/Dolan*’s place within it?

I. OVERVIEW OF REGULATORY TAKINGS DOCTRINE

As suggested above, the Supreme Court’s takings jurisprudence is widely regarded as among the most unclear and confused doctrines in constitutional law, and it has been this way more or less from the beginning. In perhaps the earliest formulation of the doctrine,⁴¹ Justice Holmes famously

39. See *Koontz*, 133 S. Ct. at 2595–96; *id.* at 2603 (Kagan, J., dissenting).

40. Compare *id.* at 2603 (“We hold that the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* . . . even when its demand is for money.”), with *id.* at 2603–04 (Kagan, J., dissenting) (disagreeing with this portion of majority’s holding).

41. Perhaps fittingly, given the famous murkiness of the doctrine itself, the precise origins of the regulatory takings doctrine is also the matter of some debate. Compare, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 325 (2002) (“[I]t was Justice Holmes’ opinion in *Pennsylvania Coal Co. v. Mahon* that gave birth to our regulatory takings jurisprudence.”) (citation omitted), with James W. Ely, Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 50 (calling this proposition “historically dubious” and

wrote that “while property may be regulated to a certain extent,” such regulation will be recognized as a taking if it “goes too far.”⁴² Not surprisingly, the Court has struggled to explain precisely when that nebulous standard might be violated, articulating a variety of tests⁴³ that have frequently incorporated elements of substantive due process into the takings analysis.⁴⁴ In 2005, however, with its unanimous decision in *Lingle v. Chevron U.S.A. Inc.*,⁴⁵ the Court helped bring some clarity to this area of constitutional inquiry.

A. *The Lingle Framework*

Lingle helped to clarify the law of regulatory takings in three primary ways. First, the Court distinguished takings claims from those grounded in substantive due process. The latter challenge the purposes and legitimacy of government action, the Court explained, and a regulation that is sufficiently arbitrary or irrational under due process standards will thus be invalidated.⁴⁶ The Takings Clause, by contrast, presupposes the validity of the regulation at issue,⁴⁷ and thus focuses on the distinct problem of burden distribution—whether the regulation, even though serving a valid purpose, nonetheless “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁴⁸ For this reason, the remedy required by the Takings Clause is not invalidation of the government’s action but is compensation to the person whose property has been taken.⁴⁹

stating that “jurists and commentators had long discussed whether regulations might be so onerous as to have the practical effect of a physical taking”).

42. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

43. See Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVTL. L.J. 63, 68–77 (2008) (discussing Supreme Court’s takings cases).

44. See *id.* at 68–69; see also Barros, *supra* note 3, at 352 (noting that regulatory takings cases “have been infected with substantive due process analysis”); Robert G. Dreher, *Lingle’s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 373–87 (2006) (discussing influence of substantive due process doctrine on regulatory takings jurisprudence).

45. 544 U.S. 528 (2005).

46. *Id.* at 543; see also *id.* at 548–49 (Kennedy, J., concurring).

47. *Id.* at 543 (majority opinion).

48. *Id.* at 537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

49. *Id.*

Second, the Court sought to establish some intelligible criteria by which a compensable taking might be identified. “The paradigmatic taking,” the Court explained, “is a direct government appropriation or physical invasion of private property.”⁵⁰ Thus, where the government seizes or occupies private property, the Fifth Amendment requires that the owner of that property receive compensation.⁵¹ In like fashion, compensation is also required when the government acts in some other manner—for example, by regulating private property—that is “functionally equivalent” to an appropriation or ouster.⁵² The Court made clear that “functional equivalence” is characterized by “the severity of the burden that government imposes upon private property rights.”⁵³

Third, the *Lingle* Court authoritatively approved five of its prior regulatory takings decisions as especially conforming to the “functional equivalence” benchmark.⁵⁴ The decision in *Loretto v. Teleprompter Manhattan CATV Corp.* held that there is always a compensable taking when government regulation requires an owner to suffer a permanent physical invasion of her property.⁵⁵ In a similar manner, *Lucas v. South Carolina Coastal Council* held that the government must generally compensate for regulations that deprive an owner of all economically beneficial use.⁵⁶

Both of these tests, explained *Lingle*, accord with the “functional equivalence” concept by focusing on the burdensome effects of the regulations at issue.⁵⁷ There seems to be no meaningful difference, for example, between the type of regulation at issue in *Loretto* and a direct occupation by the government; either action “effectively destroys” the traditional rights of a property owner to possess, use, transfer, and exclude.⁵⁸ Likewise, a regulation that totally deprives an owner of all beneficial use is, “from the landowner’s point of view, the

50. *Id.*

51. *Id.* (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) and *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945)).

52. *Id.* at 539.

53. *Id.*

54. *See id.* at 538–39, 546–48.

55. 458 U.S. 419, 426 (1982).

56. 505 U.S. 1003, 1019, 1027–29 (1992).

57. *Lingle*, 544 U.S. at 539 (“[E]ach of these tests focuses directly upon the severity of the burden that government imposed upon private property rights.”).

58. *See Loretto*, 458 U.S. at 435–36.

equivalent of a physical appropriation,"⁵⁹ probably because it has the same effects on the owner's core rights.⁶⁰

And even the frustratingly amorphous balancing test established in *Penn Central Transportation Co. v. City of New York*⁶¹ "turns in large part . . . upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."⁶² Thus, whatever difficulties that inhere in these decisions or the tests they create, the unifying characteristic of all three is their focus on the burdens imposed on private property by government regulation.

B. Nollan/Dolan's Place in the Lingle Framework

The *Lingle* Court admitted, however, that the two other decisions it endorsed—*Nollan* and *Dolan*—proved more troublesome to defend on "functional equivalence" grounds.⁶³ For one thing, in both cases, the Court had drawn upon due process precedents to support its conclusions.⁶⁴ For another, the very questions asked by the analytical framework established in *Nollan* and *Dolan* seem to focus, at least partially, on due process concerns.

When the government conditions land use approval on an exaction, *Nollan/Dolan* evaluates the constitutionality of the exaction through the following inquiries: (1) Does the government possess a sufficient interest to deny the application outright? (2) If so, does the exaction bear an "essential nexus" to that interest? (3) If so, is the exaction "roughly proportional" to the impact that the proposed land use is expected to have on that interest?⁶⁵ Because these questions speak about the

59. *Lingle*, 544 U.S. at 439–40 (quoting *Lucas*, 505 U.S. at 1017).

60. See *Kent*, *supra* note 43, at 90–92 (discussing total taking's effect on core property rights).

61. 438 U.S. 104 (1978). Under *Penn Central*, whether a government regulation effects a taking depends on the court's assessment of three factors: (1) the regulation's economic impact on the claimant; (2) the extent to which the regulation interferes with the claimant's investment-backed expectations; and (3) the character of the governmental action at issue. *Id.* at 124.

62. *Lingle*, 544 U.S. at 540.

63. *Id.* at 546.

64. *Id.*

65. See *Kent*, *supra* note 43, at 102 (outlining parts of *Nollan/Dolan* analysis); see also *Dolan v. City of Tigard*, 512 U.S. 374, 386–96 (1994) (discussing "essential nexus" and "rough proportionality"); *Nollan v. Cal. Coastal Comm'n*,

sufficiency of the state's interest in imposing the challenged exaction, as well as the relationship between the exaction and the interest sought to be advanced, they more readily call to mind *Lingle's* description of due process analyses than the "functional equivalence" touchstone for a taking.⁶⁶

Nonetheless, the *Lingle* Court made clear that it viewed *Nollan* and *Dolan* as serving the same basic function as the other approved takings tests—namely, evaluating whether government regulation imposed burdens that, in their effects, were analogous to a physical appropriation of property.⁶⁷ The Court emphasized that both cases involved a government demand for a public easement, which normally "would have been a *per se* physical taking."⁶⁸ As such, the issue was not whether the government had imposed a burden that was tantamount to a direct appropriation—it unquestionably had—but whether doing so in connection with a permit application somehow made a difference.⁶⁹

In *Nollan*, the Court agreed that it might make a difference in the right circumstances.⁷⁰ If, under its police power, the government could exercise the greater authority of denying the application, then it also could exercise the lesser authority of conditioning its approval of the application, so long as the condition served the same police power purpose as would the denial.⁷¹ At the same time, however, *Nollan* recognized that the context in which such conditions might be imposed brought with it the temptation to leverage the police power simply to gain concessions without having to pay for them.⁷²

483 U.S. 825, 835–37 (1987) (discussing "essential nexus").

66. See, e.g., Timothy M. Mulvaney, *The Remnants of Exactions Takings*, 33 ENVIRONS ENVTL. L. & POL'Y J. 189, 212 (2010) ("It appeared that both *Nollan* and *Dolan* required application of the very analysis rejected [under the Takings Clause] in *Lingle* . . ."); Daniel Pollack, *Regulatory Takings: The Supreme Court Tries to Prune Agins Without Stepping on Nollan and Dolan*, 33 ECOLOGY L.Q. 925, 929–30 (2006) ("At first blush, it appears that the *Nollan* and *Dolan* rules subject government regulation to just the sort of means-ends inquiry now rejected by the *Lingle* ruling.").

67. *Lingle*, 544 U.S. at 546–48.

68. *Id.* at 546.

69. *Id.* at 546–47.

70. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987).

71. See *id.* at 836 ("[T]he Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner . . . that serves the same end.").

72. See *id.* at 837 ("[U]nless the permit condition serves the same

The *Nollan/Dolan* inquiries are designed to balance these concerns by allowing the government to exercise its police power while simultaneously preventing the government from skirting its constitutional obligation to compensate for property it takes. Thus, the analysis starts by asking about the governmental interests at stake.⁷³ Although *Nollan* and *Dolan* phrased the question in terms of legitimacy, *Lingle* made clear that neither decision actually evaluated the state's proffered interests on such grounds: "In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest."⁷⁴ Rather, in both cases, the Court assumed that the interests advanced by the government were valid.⁷⁵ Accordingly, the first question under *Nollan/Dolan* does not actually probe the reasons underlying the exaction; it merely seeks to have the government articulate those reasons and then accepts them as sufficient.⁷⁶

Nollan/Dolan's second question—nexus—likewise does not test the validity of the government's stated purposes but seeks to ensure that the exaction actually serves *those* purposes rather than other (more nefarious) ones.⁷⁷ The same can be said for *Dolan*'s rough proportionality requirement, which serves to limit the burdens imposed by the exaction—burdens that otherwise would qualify as a taking *per se*—to those necessary to advance the government's stated interest.⁷⁸

Thus, as explained by *Lingle*, the *Nollan/Dolan* framework remains focused on the burdens government places on property rights.⁷⁹ In the specific context of those cases, the burdens were sufficiently severe that, under different facts,

governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981)).

73. *Kent*, *supra* note 43, at 102.

74. *Lingle*, 544 U.S. at 547.

75. *See Dolan v. City of Tigard*, 512 U.S. 374, 386–87 (1994); *Nollan*, 438 U.S. at 834–35.

76. *See Kent*, *supra* note 28, at 1843 (describing this step as "an analytical placeholder [rather] than an actual inquiry").

77. *See Lingle*, 544 U.S. at 547 ("[T]he issue was whether the exactions substantially served the *same* interests that land-use authorities asserted would allow them to deny the permit altogether.").

78. *See Dolan*, 512 U.S. at 391 (requiring that exaction be related "both in nature and extent to the impact of the proposed development").

79. *Lingle*, 544 U.S. at 546–48; *see also Kent*, *supra* note 43, at 102–06 (explaining *Nollan/Dolan* in terms of "functional equivalence").

compensation would be required automatically.⁸⁰ Any discussion of governmental interests or purposes must be viewed in that context, which raised unique concerns about the government trading regulatory approvals in exchange for the waiver of a constitutional right. For this reason, *Lingle* highlighted *Nollan/Dolan*'s status as "a special application of the 'doctrine of unconstitutional conditions.'"⁸¹ That doctrine is explored in the next Part.

II. OVERVIEW OF UNCONSTITUTIONAL CONDITIONS DOCTRINE

As difficult as takings doctrine is to explain and apply, the unconstitutional conditions doctrine arguably is more difficult still. Unlike takings cases, which all involve the same constitutional provision and the same constitutional right, the unconstitutional conditions doctrine has been applied in a wide variety of contexts.⁸² The sheer range of its application thus presents an obstacle to studying and understanding it.

Compounding the problem is the *way* the Court has applied the doctrine, which has been plagued by a lack of coherence both within and among the various contexts in which the doctrine has surfaced.⁸³ This lack of coherence necessarily hinders attempts, both theoretical and practical, "to separate the constitutional from the unconstitutional."⁸⁴

Finally, whereas the unanimous opinion in *Lingle* sought to bring at least minimal order to the assorted strands of takings jurisprudence,⁸⁵ the Court has undertaken no similar attempt to unify its unconstitutional conditions cases. As such, the principles and concepts that the Court itself views to be most important about the doctrine remain somewhat obscure.⁸⁶

80. See *Lingle*, 544 U.S. at 546.

81. *Id.* at 547 (quoting *Dolan*, 512 U.S. at 385).

82. See, e.g., Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 807 (2003) (listing contexts in which doctrine has been applied); see also RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 9 (1993) (stating that the doctrine is not "anchored to any single clause of the Constitution," but "roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others").

83. See, e.g., Berman, *supra* note 9, at 3 (noting that the Court's "failure to provide coherent guidance on the subject is, alas, legendary"); Sullivan, *supra* note 6, at 1416 (stating that application of doctrine "is riven with inconsistencies").

84. Berman, *supra* note 9, at 8.

85. See *supra* Section I.A.

86. See Hamburger, *supra* note 5, at 487 ("The cases on unconstitutional

Despite these difficulties, however, a brief review of some of the cases in which the Court has employed the doctrine helps to identify a few important themes.⁸⁷ In particular, tracing the development of the doctrine from its early iterations yields the conclusion that the Court has most often emphasized problems arising from governmental coercion, as well as improper motives and effects.

A. *Early Unconstitutional Conditions Cases*

1. Governmental Coercion

Early applications of the unconstitutional conditions doctrine hinted that the problem might be one of consent—that is, whether the waiver of a constitutional right was made voluntarily or resulted instead from some type of coercion or duress. When a Wisconsin statute required out-of-state insurance companies to agree that they would not remove lawsuits from Wisconsin courts to federal courts, for example, the Court voided both the agreement and the statute as infringing the companies’ “absolute right” to removal.⁸⁸ The Court began with the dubious proposition that “[a] man may not barter away . . . his substantial rights,”⁸⁹ but it quickly suggested that the real problem was the nature and scope of the particular agreement before it.

Although the foreign corporation could consent to forego removal in a given case, the Court doubted that an *ex ante* agreement to “forfeit [its] rights at all times and on all occasions” could truly be considered consensual.⁹⁰ And this was doubly true, it seemed, where the agreement was required by

conditions are so poorly conceptualized that they cannot provide more than rough support for any theory of such conditions . . .”).

87. By focusing on cases that apply the doctrine to invalidate a law or regulation, I am admittedly providing only half the story and, thereby, avoiding some of the doctrine’s more troublesome features. Indeed, many of the difficulties with the doctrine lie not in the decisions that have applied it but, rather, in squaring those decisions with others where the Court has refused to do so. But my goal here is neither to provide a comprehensive appraisal of the doctrine nor to bring absolute clarity to the Court’s mercurial appeals to it. Instead, I aim merely to sketch its most basic aspects in the hope that some shared ideas common to those cases where it has been applied might be extracted.

88. *Home Ins. Co. v. Morse*, 87 U.S. 445, 458 (1874).

89. *Id.* at 451.

90. *Id.*

statute before the company could transact any business.⁹¹ The Court conceded that Wisconsin possessed the authority both to exclude foreign corporations altogether and to allow them within the state subject to reasonable conditions.⁹² But to make corporations affirmatively agree in advance not to exercise a right guaranteed to them went beyond the constitutional pale.⁹³

2. Improper Purpose and Effect

Perhaps mindful of the Court's imprecise distinction between agreements and conditions, other states decided to approach the issue not through *ex ante* stipulation but rather by making removal to federal court a basis for revoking a business license already issued. In these cases, while not renouncing its earlier notions of voluntariness, the Court emphasized the improper purposes that underlay such statutes.

In *Barron v. Burnside*, for example, the Court noted that "the entire purpose" of the offending statute was "to deprive the foreign corporation . . . of the right conferred upon it by the Constitution and laws of the United States . . ."⁹⁴ In *Terral v. Burke Construction Co.*, the Court similarly reprobated "state action . . . necessarily calculated to curtail the free exercise of" the corporation's constitutional rights.⁹⁵ Because the states could not directly strip foreign corporations of their right to remove or make those corporations agree in advance not to exercise that right, the Court seemed to be saying, they likewise could not impose conditions that reached the same results by a more circuitous route.⁹⁶

91. *See id.* at 454–55.

92. *Id.* at 455–56.

93. *Id.* at 458. *But see* *Doyle v. Cont'l Ins. Co.*, 94 U.S. 535, 542 (1876), *overruled by Terral v. Burke Constr. Co.*, 257 U.S. 529, 532–33 (1922) (refusing to enjoin revocation of license, under same Wisconsin statute, issued to foreign corporation that had removed case to federal court).

94. 121 U.S. 186, 197 (1887).

95. 257 U.S. at 532. *Terral* also noted that the Court had rendered conflicting decisions on the issue and explicitly overruled those that could not be reconciled with its holding. *See id.* at 532–33.

96. *See Barron*, 121 U.S. at 200 (implicitly comparing condition imposed on foreign corporation to statute directly depriving foreign citizens of removal rights).

B. *The Court's Decision in Frost*

What was intimated in these earlier cases the Court made clear in *Frost v. Railroad Commission*.⁹⁷ There, the Court considered the validity of a California statute regulating the use of the state's highways by certain transporters.⁹⁸ Under the statute as originally written, common carriers were required to obtain a certificate of public convenience as a condition of utilizing the public highways.⁹⁹ An amendment to the statute later extended these requirements to transporters that were not common carriers but, rather, conveyed persons or goods under private contracts.¹⁰⁰ When one private carrier was ordered to cease operations because it had not acquired the necessary certificate, the carrier challenged the statute as effectively converting it into a common carrier in violation of its constitutional rights.¹⁰¹ The Supreme Court agreed.¹⁰²

1. Governmental Coercion

Writing for the majority, Justice Sutherland began with the proposition, expressed in prior cases, that "a private carrier cannot be converted against his will into a common carrier by mere legislative command."¹⁰³ The question, then, was whether California could do by condition what it clearly could not do by edict.¹⁰⁴

In answering, the Court first called attention to the lack of meaningful choice afforded to the private carrier.¹⁰⁵ Although in *form* the statute looked like a conditional offer that the company could accept or reject as it chose, the majority viewed the *substance* of the situation to be quite different.¹⁰⁶ "In reality," Justice Sutherland explained, "the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood

97. 271 U.S. 583 (1926).

98. *Id.* at 589.

99. *Id.* at 589–90.

100. *Id.* at 590.

101. *Id.* at 590–91.

102. *Id.* at 599–600.

103. *Id.* at 592.

104. *Id.*

105. *Id.* at 593.

106. *Id.*

or submit to a requirement which may constitute an intolerable burden.”¹⁰⁷ Thus, to the extent that a private carrier submitted itself to the statutory requirements, such submission could not really be considered a voluntary waiver of its rights.

2. Improper Purpose and Effect

In addition, the Court was wary of the purposes that California sought to accomplish. Rejecting the notion that the state’s statute was a simple regulation of the public roads,¹⁰⁸ Justice Sutherland saw it instead as an attempt to skirt the constitutional limitations otherwise placed on the government:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished *under the guise of a surrender* of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . It is inconceivable that guaranties embedded in the Constitution of the United States may thus be *manipulated* out of existence.¹⁰⁹

Thus, irrespective of California’s authority otherwise to regulate its roadways or impose conditions on privileges it chose to grant, the purpose underlying this condition, as well as its potential effects, rendered it unconstitutional.¹¹⁰

C. *The Court’s Modern Decisions*

Although the Court’s application of the doctrine has been anything but clear, where it has been applied, the Court routinely returns to these themes of coercion, purpose, and effects. Thus, when California conditioned receipt of a tax exemption on an oath not to advocate the forceful overthrow of the government, the Court struck down the condition as unduly

107. *Id.*

108. *Id.* at 591.

109. *Id.* at 593–94 (emphases added).

110. *See also id.* at 599 (“Acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.”) (citing *W. Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910)).

coercing the waiver of free speech rights,¹¹¹ which the state could not have accomplished directly.¹¹² When Arkansas conditioned employment as a public school or college teacher on the annual disclosure of every organization to which the teacher belonged or contributed during the past five years, the Court found that the statute put undue pressure on teachers to waive their associational rights¹¹³ and raised implicit questions about the purposes served by the requirement.¹¹⁴ And when Congress conditioned the continued receipt of all Medicaid funds on the states agreeing to a vast expansion of the program, seven members of the Court found that the statute effectively strong-armed the states into waiving their sovereignty and serving as agents of the federal government.¹¹⁵

Whatever the exact boundaries of the unconstitutional conditions doctrine, the foregoing decisions reveal a general wariness about the government leveraging its discretion to grant or deny benefits when constitutional rights are at stake. At least in certain circumstances,¹¹⁶ this wariness can prove fatal, with the Court heavily scrutinizing, and even invalidating, conditions that the government attaches to the benefits it distributes. As a general proposition, then, the doctrine constrains the government from conditioning a benefit—even one it has no obligation to provide and could otherwise withhold altogether—if the condition is designed to or has the effect of coercing the waiver of a constitutional

111. See *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (“[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.”).

112. See *id.* at 526 (faulting the statute for “necessarily produc[ing] a result which the State could not command directly”).

113. See *Shelton v. Tucker*, 364 U.S. 479, 486–87 (1960) (“[T]he pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy.”).

114. See *id.* at 486 (noting that, because Arkansas had no tenure system for teachers, the “interference with personal freedom is conspicuously accented [because] the teacher serves at the absolute will of those to whom the disclosure must be made”); *id.* at 488 (stating that many of the relationships required to be disclosed “could have no possible bearing upon the teacher’s occupational competence or fitness”).

115. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J., Breyer & Kagan, JJ.) (describing the condition as “a gun to the head”); *id.* at 2662 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (“If the anticoercion rule does not apply in this case, then there is no such rule.”).

116. Again, determining precisely which cases are likely to receive this scrutiny—differentiating those that do from those that do not—proves to be one of the major sticking points with the doctrine.

right.¹¹⁷

D. *The Function of Unconstitutional Conditions Doctrine*

Although it remains the Court's principal explanation for the unconstitutional conditions doctrine, the coercion theory has been widely criticized by legal scholars.¹¹⁸ Whatever its strengths or shortcomings as an explanatory device, however, I think it reveals something very important about the *function* of the doctrine. As demonstrated above, in many of the doctrine's formative cases, the Court linked the problem of coercion to the problem of circumvention.¹¹⁹ Put differently, the lack of meaningful choice accompanying a waiver of rights was thought to expose the government's true motivation in imposing the condition, which was to sidestep a prohibition on direct action through indirect action that accomplished the same goal.¹²⁰

When understood in these terms, some of the Court's discussions of coercion make a bit more sense. In *Frost*, for example, California knew that it could not directly compel a transporter to assume the obligations of a common carrier, so instead it conditioned the use of its highways on the company's "agreement" to do so, thus jeopardizing the transporter's continued viability if it did not acquiesce.¹²¹ *NFIB v. Sebelius* can be viewed in similar terms: Unable to make the states enact federally-preferred legislation, Congress instead imposed burdensome conditions on the receipt of federal funding, thus

117. See EPSTEIN, *supra* note 82, at 5 (providing "canonical" definition of unconstitutional conditions doctrine along these lines); see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (stating that unconstitutional conditions cases "reflect an overarching principle . . . that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up").

118. See, e.g., EPSTEIN, *supra* note 82, at 12–15; Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 859–60 (1995); Sullivan, *supra* note 6, at 1428–56. *But see* Berman, *supra* note 9, at 12–47 (discussing conventional wisdom against coercion theories but arguing in favor of alternative understanding of coercion).

119. See *supra* Sections II.A.–II.C.

120. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 519, 526 (1958); *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 592–93 (1926). *Cf.* *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.* 547 U.S. 47, 59–60 (2006) (finding no unconstitutional conditions problem where direct congressional action would have been authorized).

121. See *Frost*, 271 U.S. at 593 ("In reality, the carrier is given no choice, except a choice between the rock and the whirlpool . . .").

endangering the states' reliance interests in programs already underway¹²² and exposing state taxpayers to politically unpalatable tax increases.¹²³ In these and similar scenarios, the Court seems to regard the coercive nature of the conditions as part and parcel of an overarching attempt to thwart constitutional limitations.

Accordingly, the primary role of the unconstitutional conditions doctrine is to prevent governmental attempts to evade constitutional requirements despite formal compliance with the Court's prior pronouncements. It is, in other words, what Brannon Denning and I call an "anti-evasion doctrine" (or "AED").¹²⁴ And in this regard, it serves the same basic function as the Court's regulatory takings tests, which we previously have described "as an elaborate body of AEDs."¹²⁵

III. TAKINGS, UNCONSTITUTIONAL CONDITIONS, AND ANTI-EVASION

In this Part, I provide a brief overview of anti-evasion doctrines and the reasons Denning and I have posited for their creation—specifically, the justices' perceptions that political safeguards are inadequate to enforce the constitutional principle at stake. I then demonstrate how both regulatory takings doctrine and the doctrine of unconstitutional conditions fit within the AED model.

A. *Anti-Evasion Doctrines and Political Safeguards*

In the past several years, a number of scholars have focused upon how the Supreme Court performs its role in

122. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604–05 (2013) (Roberts, C.J., Breyer & Kagan, JJ.) (noting that potential loss of all Medicaid funding would jeopardize "intricate statutory and administrative regimes [developed by the states] over the course of many decades to implement their objectives under existing Medicaid").

123. See *id.* at 2661–62 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (worrying that "States may, as a practical matter, be unable to refuse to participate in the federal program" because "withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States").

124. See Denning & Kent, *supra* note 37, at 1779 (defining "anti-evasion doctrine").

125. *Id.* at 1795.

deciding constitutional cases.¹²⁶ Whereas more conventional accounts depict that role as centering on the Court's interpretative function, this alternative school points out that interpretation is only the initial step in the Court's adjudicatory work.¹²⁷ After the Court performs that step—determining the “constitutional operative propositions”—it then performs a second step, in which it implements those propositions through the formation and application of “constitutional decision rules.”¹²⁸ Because constitutional principles are frequently “framed at a relatively high level of generality,” the decision rules operate akin to “intermediating regulations that get applied to particular situations to resolve actual cases.”¹²⁹

When one carefully examines how the Court applies these decision rules, a pattern emerges. In a number of different contexts, the Court initially implements a constitutional proposition through a decision rule that typically takes the form of an *ex ante* rule and often tends to track the proposition itself.¹³⁰ After this initial decision rule is established, those actors intended to be bound by it begin to develop ways to evade its limitations, and this characteristically occurs through efforts to *formally* comply with the rule while *substantively* violating the proposition it was designed to enforce.¹³¹ When these efforts are subsequently challenged, the Court then augments the initial decision rule with another decision rule—typically taking the form of an *ex post* standard—aimed at curbing the evasive conduct and protecting the constitutional proposition from it.¹³²

The Court tends to frame these AEDs as one of four types of constitutional “tests.” First, they frequently are packaged as “pretext tests,” which ask whether the government is, under

126. *See id.* at 1775 n.6 (citing examples).

127. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004); *see also* Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV L. REV. F. 220, 221 (2006) [hereinafter Berman, *Two-Output Thesis*].

128. Berman, *Two-Output Thesis*, *supra* note 127, at 9.

129. Brannon P. Denning & Michael B. Kent, Jr., *Judicial Doctrine as Risk Regulation*, 82 TENN. L. REV. 405, 409 (2015).

130. Denning & Kent, *supra* note 37, at 1793.

131. *Id.* at 1827.

132. *Id.* at 1793, 1827. As Denning and I explain, we think this is the usual pattern revealed in the Court's decisions, even though there are exceptions—which we deem largely immaterial—in certain doctrinal contexts. *See id.* at 1793.

the guise of achieving some purpose permitted by the Constitution, really attempting to do something that the Constitution disallows.¹³³ Second, they are structured as “proxy tests,” “which ferret out regulations that depend on a purportedly neutral characteristic, but in reality use that characteristic as a proxy for some other, prohibited characteristic.”¹³⁴ Third, AEDs take the form of “purpose tests,” asking whether government action is motivated by “constitutionally illegitimate reasons.”¹³⁵ Finally, they appear as “effects tests,” which give attention to the consequences of government action rather than its content.¹³⁶

Although these tests focus on slightly different criteria, they seek to address the same basic problem—evasion of constitutional principles—by performing the same basic function—preventing government actors from elevating form over constitutional substance. “Put differently, AEDs attempt to optimize constitutional enforcement by ensuring that governmental officials cannot easily evade or undermine constitutional commands by manipulating gaps left open in the decision rules developed to implement those commands.”¹³⁷

Given the role played by AEDs in optimizing constitutional enforcement, it is noteworthy that the Court does not employ them in all circumstances. As Denning and I have explained, there are times—such as its rejection of disparate treatment claims under the Equal Protection Clause¹³⁸—where the Court conspicuously refuses to apply an AED (a phenomenon that we term “anti-anti-evasion”).¹³⁹ In light of this phenomenon, the question becomes why the Court utilizes AEDs in some cases but not in others.

Although there may be a number of valid answers to that question,¹⁴⁰ part of the explanation seems to depend on how “risky,” in terms of endangering various constitutional principles, the justices perceive a given action to be.¹⁴¹ Where

133. *Id.* at 1780.

134. Denning & Kent, *supra* note 38, at 399.

135. Denning & Kent, *supra* note 37, at 1780 (quoting RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 79 (2001)).

136. *Id.*

137. Denning & Kent, *supra* note 38, at 399.

138. *Id.* at 411–14.

139. *Id.* at 399–400.

140. See, e.g., *id.* at 416–21 (cataloguing and discussing Court’s stated reasons).

141. See Denning & Kent, *supra* note 129, at 418–25 (arguing that doctrinal

the risks are relatively low, for example, the Court is more likely to develop and employ decision rules that defer to the political branches (classic rational basis scrutiny, for example).¹⁴² Where the Court perceives the challenged activity to pose greater risks, however, it is more apt to scrutinize the law or regulation at issue (such as in its employment of strict scrutiny).¹⁴³ Thus, the Court's decision rules "occupy points along a deference spectrum," with "[t]he transition from more to less deference reflect[ing] a corresponding rise in perceived level of risk to constitutional principle by official action."¹⁴⁴

In this telling, it is important to note that the perceived risk of governmental injury to the constitutional norm is connected to the amount and type of judicial intervention that the Court chooses to employ. Accordingly, when confronted with a potential constitutional violation, the selection of a decision rule appears to be influenced not only by the nature and effect of the conduct being challenged but also by the need for and consequences of judicial action itself. The Court must decide whether the conduct in question poses sufficient risk to warrant weighty judicial involvement, which comes with attendant risks of its own.

The decision whether or not to employ an AED can be viewed in similar terms. When the Court encounters official conduct that conforms to a prior decision rule but nonetheless is alleged to evade the constitutional principle underlying that rule, it essentially has two choices. Either it can defer to the government and uphold the action as constitutional under the initial decision rule (that is, not employ an AED), or it can create a supplementary decision rule that more closely scrutinizes the conduct in question (that is, employ an AED). The path the Court chooses appears to be influenced by how the justices assess the risks involved.¹⁴⁵

Of particular importance to this risk assessment, Denning and I argue, is the existence of political safeguards that can be

formation results, in part, from justices' perceptions of, and attempts to manage, risk to constitutional propositions posed by government action).

142. *Id.* at 419.

143. *Id.*

144. *Id.*

145. *See id.* at 409 (arguing that "selection of decision rules—either initially or subsequently (as in the case of AEDs)—should be understood as judicial efforts to regulate . . . the public risk [of] violation of constitutional principles by government officials").

expected to adequately prevent governmental overreaching, at least when compared to the prospect of judicial intervention.¹⁴⁶ When robust process protections are available to defend the boundary between permissible and impermissible conduct, the need for additional judicial protections is minimized. Indeed, it might be that additional judicial scrutiny would produce more harm than good, over-enforcing certain constitutional norms instead of optimizing them.¹⁴⁷ Thus, where “there are sturdy political safeguards that adequately monitor and enforce the relevant constitutional principle better than would a judicially crafted decision rule,”¹⁴⁸ the Court appears to be less eager to utilize an AED.

B. Regulatory Takings as Anti-Evasion Doctrine

The AED model, without reconciling every inconsistency or explaining away all confusion, helps to bring a more coherent shape to the doctrine of regulatory takings. As an initial matter, it is helpful to note that the Court’s takings jurisprudence largely follows the pattern described above. Early decisions basically tracked the rule-like text of the Takings Clause¹⁴⁹ by requiring the government to provide compensation whenever it takes private property.¹⁵⁰ Moreover, at least some decisions reinforced the rule-like nature of the restriction by applying it “only to a direct appropriation, and not to consequential injuries [to property] resulting from the exercise of [some other] lawful power.”¹⁵¹

The problem with such a rule, of course, is that it can easily be evaded. Rather than appropriate property outright, the government might accomplish the same objectives by regulating property in a manner that equally frustrates the rights of the owner. In this way, the government might avoid its obligation to pay compensation simply by taking an indirect,

146. Denning & Kent, *supra* note 38, at 424.

147. *Id.*; see also Denning & Kent, *supra* note 37, at 1814 (noting that maximal constitutional protections “might entail a . . . stifling of innovation that can make government run more efficiently, increase public safety, enhance national security, or provide sought-after public goods”).

148. Denning & Kent, *supra* note 38, at 432.

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

150. See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336–37 (1893).

151. See, e.g., *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871).

rather than a direct, course.

The Court seemed to recognize this reality in *Pennsylvania Coal Co. v. Mahon*, where it was confronted with a Pennsylvania statute that regulated coal-mining operations.¹⁵² Specifically, the statute forbade the mining of coal in such a manner as to cause the subsidence of structures or improvements on the surface.¹⁵³ The state justified the prohibition on grounds that it served a public interest—presumably safety¹⁵⁴—and the Court did not disagree that such was the case. Indeed, the majority assumed not only the existence of a public interest, but one that would have authorized the state to condemn the mineral rights under its power of eminent domain.¹⁵⁵

But that was precisely the problem. Because Pennsylvania had *not* directly appropriated the mineral estate, it was not required to compensate the owner under the Court's previous decision rules.¹⁵⁶ The statute, however, effectively accomplished the same thing as a direct appropriation—specifically, it abolished a private estate in land for the benefit of the public at large.¹⁵⁷ Admitting that the state possessed the authority to regulate property, the majority nonetheless held that such regulation could not go “too far” and had gone “too far” in this case.¹⁵⁸

Mahon, of course, offered no meaningful guidance for subsequent takings cases. A standard that prohibits a regulation from going “too far” does not lend itself to reliable application or predictable results. But *Mahon* suggests much about the concerns that underlie takings doctrine. The constitutional guarantee of just compensation is undermined, the Court seemed to say, if it depends entirely on formalistic distinctions between appropriation and regulation. A decision rule that cuts so precisely is too easily manipulated and leaves an enforcement gap that government officials can exploit to disregard the right at issue. In *Mahon*, the Court signaled that it would close that gap by treating regulation and appropriation the same way in cases where they produced the

152. 260 U.S. 393 (1922).

153. *Id.* at 412.

154. *See id.* at 420 (Brandeis, J., dissenting) (discussing safety rationale).

155. *Id.* at 416.

156. *Id.*

157. *Id.* at 414.

158. *Id.* at 415–16.

same effects. What's more, the Court's amorphous standard left open the possibility that any regulation might be found to go "too far," thus keeping government officials honest by making the consequences of their conduct less certain.¹⁵⁹

The Court's modern takings jurisprudence operates in similar fashion. As noted in Part I, the touchstone inquiry under current takings analysis is whether a regulation is "functionally equivalent" to a direct appropriation.¹⁶⁰ The tests that most readily conform to this standard—*Loretto*,¹⁶¹ *Lucas*,¹⁶² and *Penn Central*¹⁶³—operate as effects tests that evaluate the similarities between burdens imposed by the challenged regulation and those that would be occasioned by outright seizure.¹⁶⁴ The overarching point of this evaluation is the same as it was in *Mahon*—namely, to make sure the government provides compensation not only for the *direct* appropriation of private property but also for its *indirect* appropriation via regulation that produces the same results.

The same anti-evasion principle animates the *Nollan/Dolan* test as well, although it takes a slightly different form. Unlike the other tests, *Nollan/Dolan*'s nexus and proportionality requirements are not designed to evaluate the effects of the government's conduct, which are evident. Had the government in those cases simply demanded the easements at issue, rather than make them conditions for obtaining regulatory approval, compensation clearly would have been required.¹⁶⁵ The effects of the condition were tantamount to an outright seizure of an easement across the owner's land. The question, as explained above, was whether the unique regulatory context in which the conditions arose somehow made those effects defensible.¹⁶⁶ Because the conditions were

159. See Denning & Kent, *supra* note 37, at 1801–02 (noting that AEDs “blur the sharp edges of rules with the uncertainty and unpredictability of standards, thus raising costs to governmental actors that would use a rule’s clarity and precision to undermine the constitutional principle the rule was intended to enforce”).

160. See *supra* notes 50–52 and accompanying text.

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

162. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

163. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

164. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); see also Denning & Kent, *supra* note 37, at 1792 (identifying regulatory takings tests as effects tests).

165. See *supra* notes 68–69 and accompanying text.

166. See *supra* note 69 and accompanying text.

justified as mitigation measures for otherwise intolerable land use projects, the nexus and proportionality requirements resembled pretext or proxy tests that ensured the governments' stated reasons for the conditions were not simply attempts to obtain the easements without paying for them.¹⁶⁷

It remains true that the Court's takings tests are not in all respects cohesive,¹⁶⁸ and the Court itself has conceded that many "vexing subsidiary questions" exist.¹⁶⁹ All the same, anti-evasion serves as a predominant theme in the Court's decision rules and helps to explain what the doctrine fundamentally is about—"checking governmental efforts to evade the constitutional requirement to pay just compensation for the taking of private property."¹⁷⁰

At this point, of course, the question becomes why the Court is so concerned about these efforts. As previously mentioned, the Court refuses to utilize AEDs in some other constitutional areas, so what makes the Takings Clause different? The answer appears to be the inadequacy of political safeguards that might otherwise curb evasive conduct.¹⁷¹ Where it has declined to create AEDs, the Court hints that the political process can defend the constitutional principle better, or at least as passably, as can additional layers of judicial

167. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement . . . without payment of compensation."); see also *Denning & Kent*, *supra* note 37, at 1777 (suggesting that *Nollan/Dolan* might be a pretext test); *id.* at 1787 (describing *Nollan/Dolan* in terms of a proxy test).

168. See, e.g., *Lingle*, 544 U.S. at 539 (admitting that "our regulatory takings jurisprudence cannot be characterized as unified").

169. *Id.*

170. *Denning & Kent*, *supra* note 37, at 1824.

171. Several scholars have noted the connection between the Takings Clause and the Court's takings decisions, on the one hand, and political process failure, on the other. See, e.g., Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 306–07 (1992) (suggesting that Takings Clause operates as check on discriminatory actions against politically disfavored groups); *Kent*, *supra* note 28, at 1863–65 (discussing process failure in context of land use exactions); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 855 (1995) (positing that remedying process failure was original purpose of the Takings Clause); see also Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 699–702 (discussing political process theory but finding it inadequate to explain Court's takings decisions).

protection.¹⁷² For example, when the Court refused to treat tax credits the same as direct appropriations under the Establishment Clause, it grounded its decision, in part, on concerns about the proper judicial role.¹⁷³ When the Court declined to create an AED for funding conditions that allegedly undermined the right to an abortion recognized by *Roe v. Wade*,¹⁷⁴ it touted the role of the political branches, as well as the judiciary, in preserving constitutional guarantees.¹⁷⁵ These examples demonstrate not only that the Court believes it should sometimes stay its hand but also that there are acceptable means of guarding constitutional principles apart from judicial intervention.¹⁷⁶

In areas like regulatory takings, however, the Court's assessment is different. Here, the cases suggest that the Court does not trust whatever political safeguards may be in place.¹⁷⁷

172. See generally Denning & Kent, *supra* note 38, at 422–31 (discussing political safeguards hypothesis).

173. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145–46 (2011) (“Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.”).

174. 410 U.S. 113 (1973).

175. *Maher v. Roe*, 432 U.S. 464, 479–80 (1977) (“We should not forget that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”) (quoting *Mo., Kan., & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904)).

176. See Denning & Kent, *supra* note 38, at 424 (“By ceding the enforcement role to these other institutions . . . the Court signals its confidence that the protections provided by the political processes are sufficient to prevent grave abuses.”).

177. This distrust of the political process vis-à-vis regulatory takings may be misplaced given the legislative response to the Court's decision about the use of eminent domain in *Kelo v. City of New London*, 545 U.S. 469 (2005). In response to that decision's broad and deferential reading of the Fifth Amendment's “public use” language to allow the taking of private property for economic development, forty-two states enacted legislation or adopted amendments to their own constitutions to curb the practice. See James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half-Full or Half-Empty?*, 17 SUP. CT. ECON. REV. 127, 133 (2009). In light of this response, perhaps the Court should trust the political process more when it comes to takings issues. On the other hand, at least one study concluded that, despite all of this legislative activity, “the *Kelo* uprising has led to little substantive limitation on states' eminent domain authority,” Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L. Q. 703, 729 (2011), suggesting that the political process may not work that well after all to curb takings abuses. Whether the Court's judgment about process sufficiency in this area is sound presents an interesting question, but one that exceeds the scope of my purposes here.

Consider again the Court's opinion in *Mahon*.¹⁷⁸ Justice Holmes noted explicitly that the Constitution presupposes a public necessity or purpose for the property taken, but it nonetheless obligates the government to compensate the owner.¹⁷⁹ And this obligation to compensate exists, he pointed out, even when the need for the property is quite strong.¹⁸⁰ The mere invocation of a police power purpose does not in itself negate the compensation requirement because, were that the rule, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappears."¹⁸¹

This same notion is echoed in the Court's more recent explanations that the Takings Clause serves to prevent the government from compelling a particular individual or group to bear burdens that should be borne by society as a whole.¹⁸² Human nature being what it is, the Court seems to be saying that the defense of the compensation right cannot be left to the voters and taxpayers, most of whom are more than happy to shift whatever costs they can onto others.¹⁸³ Because the political process is unlikely to curb (and, indeed, may encourage) attempts to evade the takings protections, the Court's intervention is required.

C. *Unconstitutional Conditions as Anti-Evasion Doctrine*

As with takings, the perceived need to curtail evasion of constitutional principles serves as the leading characteristic of the Court's unconstitutional conditions cases. Having already

178. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

179. *Id.* at 415.

180. *See id.* at 416 (noting the existence of "exigency" that would warrant statute being challenged).

181. *Id.* at 415.

182. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005); *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

183. Some state tribunals applying the Court's takings decisions have utilized just this rationale. *See, e.g., Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996) ("In a context in which the constraints imposed by legislative and political processes are absent or substantially reduced, the risk of too elastic or diluted a takings standard—the vice of distributive injustice in the allocation of civic costs—is heightened . . ."); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004) ("[W]e think it entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.").

laid much of the groundwork for this argument in the preceding sections, I offer here a few observations to bring the argument to fruition.

First, the factual contexts in which unconstitutional conditions most characteristically arise offer an ideal setting for evasive behavior. As Philip Hamburger has explained, “the Constitution typically protects liberty by limiting government constraints, not government benefits.”¹⁸⁴ The Constitution, in other words, explicitly restrains the government from negating certain rights—“Congress shall make no law . . . abridging the freedom of speech,”¹⁸⁵ for example—but it provides only minimal direction about government largesse.¹⁸⁶ For this reason, conditions on benefits doled out by the government often escape the scrutiny that applies to more overt obstructions of rights. “By casting restrictions on liberty in terms of conditions rather than direct constraints,” Hamburger continues, “the government can escape not only its limited powers but also most of the limits on such powers, including most of the Bill of Rights.”¹⁸⁷

Second, as already discussed, evasion of constitutional norms is a frequent concern in the Court’s unconstitutional conditions cases. In *Speiser v. Randall*, for example, the Court advised that the problem with the offensive condition was that it “must necessarily produce a result which the State could not command directly.”¹⁸⁸ The Court repeated that concern in *Perry v. Sindermann*, where it utilized an effects test to evaluate the state’s nonrenewal of an outspoken college professor who had criticized the state board of regents.¹⁸⁹ “[I]f the government

184. Hamburger, *supra* note 5, at 491.

185. U.S. CONST. amend. I.

186. Professor Hamburger observes that the Establishment Clause does address government benefits by barring subsidies and other types of assistance to religion. See Hamburger, *supra* note 5, at 491. The Equal Protection Clause might provide another example; although the government may not be required to provide a particular benefit, if it chooses to do so, it must provide the benefit in a non-discriminatory manner. See, e.g., *Dawson v. Mayor & City Council of Balt. City*, 220 F.2d 386, 387 (4th Cir. 1955), *aff’d* 350 U.S. 877 (1955); cf. *Palmer v. Thompson*, 403 U.S. 217, 220 (1971) (acknowledging that the city had no affirmative duty to operate municipal swimming pools, but implying that Constitution would still be violated if “whites [were] permitted to use public facilities while blacks [were] denied access” or if the city maintained “different sets of facilities for blacks and whites”).

187. Hamburger, *supra* note 5, at 492.

188. 357 U.S. 513, 526 (1958).

189. 408 U.S. 593, 597–98 (1972).

could deny a benefit to a person because of his constitutionally protected speech or associations,” Justice Stewart wrote for the majority, “his exercise of those freedoms would in effect be penalized and inhibited.”¹⁹⁰

Anti-evasion principles also informed the Court’s decision to invalidate a requirement that recipients of federal funds, under a program to combat the spread of HIV/AIDS, agree that they were opposed to prostitution and sex trafficking.¹⁹¹ Noting that the requirement would “plainly violate the First Amendment” if “enacted as a direct regulation of speech,”¹⁹² the Court held that its unconstitutional effects were the same even though framed as a spending condition. “By demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern,” explained the Court, “the condition by its very nature affects ‘protected conduct outside the scope of the federally funded program.’”¹⁹³

Perhaps the clearest use of the anti-evasion rationale occurs in Justice Sutherland’s opinion in *Frost*.¹⁹⁴ Observing that the state could not directly convert a private transporter into a common carrier, Sutherland articulated the question as “whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege.”¹⁹⁵ For the majority of the Court, that question had to be answered negatively.¹⁹⁶ Otherwise, Justice Sutherland explained, “constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion.”¹⁹⁷ Allowing the state to evade constitutional norms in this way imperiled not only the rights of the individual carrier at issue, or even those of other private carriers similarly situated.¹⁹⁸ The risks involved were more systemic. “If the state may compel the

190. *Id.* at 597.

191. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321 (2013).

192. *Id.* at 2327.

193. *Id.* at 2330 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

194. *Frost v. R.R. Comm’n of Cal.*, 271 U.S. 583 (1926).

195. *Id.* at 592.

196. *Id.* at 593–94.

197. *Id.* at 593.

198. *See id.* at 594.

surrender of one constitutional right as a condition of its favor," Sutherland warned, "it may, in like manner compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."¹⁹⁹

As a third and final observation, many of the Court's unconstitutional conditions cases, like its takings cases, contain clues that it views the political process as inadequate to protect the right at issue. A recurring theme in the decisions that apply the doctrine is that the challenged condition, if allowed, might be used to harm persons or groups outside the political mainstream. The requirement in *Shelton v. Tucker* that public school teachers list their associations, for example, ran the risk of those associations being publicly exposed, "bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations"²⁰⁰

A similar concern appears to have been at work in *Sherbert v. Verner*, where the state denied unemployment benefits to a Seventh Day Adventist because she refused to accept work on Saturdays.²⁰¹ In reversing that denial, the Court specifically noted that the state's employment statutes contained exemptions for employees opposed to working on Sundays—presumably, the more mainstream view—thus "expressly sav[ing] the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty."²⁰² Implicit in these discussions is an apprehension that identifiable out-groups, whose members "might not be able to activate the normal safeguards that restrain simple majorities,"²⁰³ are particularly at risk.²⁰⁴

199. *Id.*

200. *Shelton v. Tucker*, 364 U.S. 479, 486–87 (1960).

201. 374 U.S. 398, 399–401 (1963).

202. *Id.* at 406.

203. Denning & Kent, *supra* note 129, at 438.

204. See *Sherbert*, 374 U.S. at 411 (Douglas, J., concurring) ("[M]any people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views.").

D. Summary

The function of AEDs is to optimize constitutional enforcement by preventing government officials from indirectly accomplishing a goal that would be constitutionally forbidden if accomplished directly. Both regulatory takings and the doctrine of unconstitutional conditions bear the traits of AEDs, and (as with other AEDs) the Court tends to utilize them when it believes that political safeguards do not adequately protect the constitutional values at stake in a given case.

For this reason, it should come as no surprise that anti-evasion concepts abound in the Court's exactions jurisprudence, where the doctrines of regulatory takings and unconstitutional conditions intersect. Indeed, anti-evasion and political safeguards feature prominently in both the majority and dissenting opinions in *Koontz*—the Court's most recent exactions case—as the next Part demonstrates.

IV. ANTI-EVASION IN *KOONTZ*

The foregoing discussion placed the *Nollan/Dolan* standard within the AED model, explaining that it was designed largely to prevent the government from evading the *per se* classification of permanent physical invasions as compensable takings. This Part takes the conversation a step further by demonstrating that the Court's extension of the *Nollan/Dolan* framework in *Koontz*, as well as the dissent's quarrel with that extension, can likewise be understood in terms of anti-evasion.

A. Background of the Litigation

Coy Koontz owned an approximately fifteen-acre parcel of Florida land, most of which was classified as wetlands under state law.²⁰⁵ As a result of this classification, the land could not be developed without first obtaining a Wetlands Resource Management permit, which required the applicant to provide the state with reasonable assurance that any proposed construction would not adversely affect the public interests

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

served by the wetlands.²⁰⁶ Koontz applied for a permit in conjunction with his plans to develop approximately four acres of the parcel.²⁰⁷ To meet his obligation of providing “reasonable assurance,” Koontz offered to deed to the local water management district a conservation easement for the remaining eleven acres.²⁰⁸

The district rejected the conservation easement as inadequate and informed Koontz that it would issue the permit only if he agreed to one of two alternative substitutes.²⁰⁹ First, he could limit development to only one acre and increase the district’s conservation easement to cover the remaining fourteen acres.²¹⁰ Alternatively, he could proceed with the development as originally proposed but, in addition to the eleven-acre easement, also agree to pay for improvements to enhance government-owned wetlands located several miles away.²¹¹ Koontz refused to acquiesce to either alternative and, after his permit application was denied, sued the district in state court under a Florida statute allowing the recovery of damages for a regulatory taking.²¹²

After several years of legal wrangling, the trial court agreed with Koontz.²¹³ Specifically, the trial court concluded that the district’s demand for off-site mitigation in addition to the eleven-acre conservation easement failed *Nollan/Dolan’s* nexus and proportionality requirements.²¹⁴ The district appealed this ruling on two grounds. First, it argued that there was no exaction, and thus no taking, because Koontz’s permit application had been denied.²¹⁵ Consequently, without a viable takings claim, Koontz’s suit was improperly brought under the Florida statute referenced above.²¹⁶ Second, even assuming a

206. *See id.* at 2592; *see also* FLA. STAT. § 373.414(1)(a) (2015) (identifying, *inter alia*, preserving public health, preserving property of others, wildlife conservation, and prohibiting erosion as examples of public interests potentially at stake).

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

208. *Id.* at 2592–93.

209. *Id.* at 2593.

210. *Id.*

211. *Id.*

212. *Id.* (citing FLA. STAT. § 373.617(2) (2015)).

213. *Id.*

214. *See* *St. Johns River Water Mgmt. Dist. v. Koontz* (*St. Johns River Water III*), 5 So. 3d 8, 10 (Fla. Dist. Ct. App. 2009).

215. *See id.* at 10–11.

216. *See id.*

viable takings claim, the district contended that *Nollan/Dolan* was inapplicable because the condition at issue involved a monetary expenditure rather than a physical dedication of land.²¹⁷

These arguments prevailed before the Florida Supreme Court, which held that *Nollan/Dolan* was limited to the “narrow circumstances” in which (1) “the regulatory agency actually issues the permit sought, thereby rendering the owner’s interest in the real property subject to the dedication imposed”; and (2) “the condition/exaction sought by the government involves a dedication of or over the owner’s interest in real property in exchange for permit approval.”²¹⁸ The U.S. Supreme Court granted certiorari²¹⁹ and ultimately reversed.²²⁰

B. Majority Opinion

Writing for the majority of the Court, Justice Alito began his analysis by clarifying the relationship between *Nollan/Dolan* and the unconstitutional conditions doctrine.²²¹ As a general rule, he noted, the unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”²²² The heightened scrutiny of *Nollan/Dolan* was designed to address just such an issue because “land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits.”²²³ Justice Alito elaborated:

By conditioning a building permit on the owner’s deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope

217. *See id.* at 12.

218. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011).

219. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 420 (2012).

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

221. *Id.* at 2594–95.

222. *Id.* at 2594.

223. *Id.*

to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.²²⁴

In this explanation, one already sees hints of the anti-evasion characteristics identified earlier in this Article. Although Justice Alito framed the *Nollan/Dolan* test (and along with it, the unconstitutional conditions doctrine) in terms of coercion, he appeared to use coercion as a sort of shorthand for something else—namely, governmental efforts to obtain property interests without having to pay for them.²²⁵ As with all regulatory takings and unconstitutional conditions problems, the object of judicial intervention in the *Nollan/Dolan* context is to prevent the government from circumventing constitutional requirements through form-over-substance behavior. *Nollan/Dolan's* nexus and proportionality requirements minimize the likelihood that such evasion will occur by ensuring that any conditions imposed by the government are tied to some public interest that the proposed development is said to endanger.²²⁶ In short, “[u]nder *Nollan* and *Dolan*, the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to” undermine the requirement that it pay just compensation for property it takes.²²⁷

Having laid that doctrinal foundation, Justice Alito turned his attention to the specific issues in the case. For starters, he explained, it mattered little whether the government approved an application subject to an exaction or denied an application until the applicant agreed to the exaction.²²⁸ In either situation, the government effectively demands something from the applicant in exchange for the permit, and for this reason, the principles involved are the same regardless of how the government chooses to package the demand.²²⁹

224. *Id.* at 2594–95 (citations omitted).

225. *See id.*

226. *See id.* at 2595 (“Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy . . .”).

227. *Id.*

228. *Id.*

229. *Id.* at 2595–96.

Again, Justice Alito's discussion reveals the anti-evasion concerns animating the majority's thinking. A bright-line rule distinguishing between a conditional approval, on the one hand, and a denial, on the other, "would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval."²³⁰ The vindication of constitutional rights, the majority suggested, cannot depend on so thin a distinction.

Even so, applying *Nollan/Dolan* to permit denials poses a theoretical problem. "Where the permit is denied and the condition is never imposed," Justice Alito admitted, "nothing has been taken."²³¹ How then could the district's refusal to issue Koontz a permit be viewed as violating the Takings Clause? Once more invoking the theme of anti-evasion, Justice Alito answered:

Extortionate demands for property in the land-use permitting context run afoul of the Taking Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.²³²

Thus, in the context of a permit denial, the problem addressed by *Nollan/Dolan* is not so much that the government *is taking* property without compensation but that its actions weaken the owner's *ability to resist* such a taking. This weakness, in turn, provides the government with smoother avenues to achieve its goals than the Constitution permits.²³³ The danger, quite simply, is that the government

230. *Id.* at 2595.

231. *Id.* at 2597.

232. *Id.* at 2596.

233. *Cf.* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (explaining that regulatory takings doctrine is designed to prevent government from achieving public purposes "by a shorter cut than the constitutional way of paying for the change"). In this regard, *Nollan/Dolan* operates akin to other applications of the unconstitutional conditions doctrine. Where the government conditions a tax exemption on a loyalty oath, for example, it is not directly violating free speech rights because the taxpayer may always refuse to make the oath and forego the exemption. But the condition, attached to valuable government benefits enjoyed

will employ conditions—whether attached to a permit approval or as an alternative to a permit denial—for the purpose of eluding the restrictions placed upon it by the Takings Clause.

Similar concerns prompted the majority also to reject the proposed distinction between physical and monetary exactions. “[I]f we accepted this argument,” Justice Alito pointed out, “it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*.”²³⁴ This was so because the effects of an exaction are the same regardless of the form the exaction takes. Whether the government is demanding a tangible interest in real property or the payment of money, in the context of land use approval, the demand is directly linked to a specific parcel and the owner’s rights in it.²³⁵

For this reason, exactions of either type run the risk of transferring the owner’s rights to the government.²³⁶ The “central concern” of *Nollan/Dolan* is, consequently, triggered by both scenarios:

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.²³⁷

Given that either form of exaction poses this risk, a decision rule that exempted monetary exactions from the *Nollan/Dolan* rule would simply encourage the government to

by those who take the oath, operates as a *de facto* penalty for taxpayers who insist upon their First Amendment freedoms. In this way, the condition inhibits taxpayers from resisting the government’s preferred message and undermines the principles embodied in the Free Speech Clause. See *supra* notes 111–12 and accompanying text. It is difficult to see the difference between this First Amendment scenario and the denial of a development permit to landowners who refuse to give up their right to be compensated for the taking of their property. Because landowners who resist will forego a benefit (in the form of the permit) that those who acquiesce will enjoy, the condition deters their willingness to insist upon their rights and undermines the principles embodied in the Takings Clause.

234. *Koontz*, 133 S. Ct. at 2599.

235. *Id.* at 2600.

236. *Id.*; see also Kent, *supra* note 28, at 1857 (noting that “[e]xactions of either stripe are directly tied to the government’s authority to regulate *land* use” and “what ultimately is at stake, whether the exaction is monetary or physical, is the owner’s ability to move forward with a proposed use of her real property”).

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

demand money rather than land so as to escape the heightened scrutiny that *Nollan/Dolan* requires.

C. Dissenting Opinion

The foregoing discussion shows the majority's reliance on anti-evasion concepts. Interestingly, anti-evasion principles played an important role in Justice Kagan's dissenting opinion as well.²³⁸ Indeed, to a significant extent, the dissent and the majority agreed on the overarching function of the *Nollan/Dolan* test. "*Nollan and Dolan*," Justice Kagan wrote, "prevent the government from exploiting the landowner's permit application to evade the constitutional obligation to pay for the property."²³⁹

For this reason, the dissenting justices also agreed that *Nollan/Dolan* applies regardless of whether the government approves a permit subject to an exaction or denies a permit until the owner acquiesces to the exaction.²⁴⁰ In either scenario, so long as the government has unequivocally demanded the exaction,²⁴¹ the owner is entitled to challenge the exaction on the grounds that it fails to meet the nexus and proportionality standards mandated by those cases.²⁴²

The dissent, however, parted company with the majority on the type of demand that qualifies as an exaction for purposes of applying those standards. Because *Nollan/Dolan* is designed to prevent evasion of the just compensation requirement, Justice Kagan explained, it can only apply to demands that, "outside the permitting process, would constitute a taking."²⁴³ Otherwise, the demand would not

238. *Id.* at 2604 (Kagan, J., dissenting).

239. *Id.*; see also *id.* at 2612 (stating that *Nollan/Dolan* is "designed to curb governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for").

240. *Id.* at 2603.

241. See *id.* at 2610 ("Before applying *Nollan and Dolan*, a court must find that the permit denial occurred because the government made a demand of the landowner" and "that demand must be unequivocal").

242. *Id.* at 2603. Like the majority, the dissent acknowledged that, in the case of a permit denial, "nothing has actually been taken." *Id.* For that reason, Justice Kagan explained, "[t]he owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property." *Id.*

243. *Id.* at 2605.

implicate the applicant's constitutional rights, and there would be no unconstitutional condition for which a remedy would be necessary.²⁴⁴ The question, then, was whether the demand made by the water management district—specifically, that Koontz spend money to repair off-site wetlands—would have triggered the right to just compensation had it been made apart from the permitting context.²⁴⁵

The dissent thought not, relying on *Eastern Enterprises v. Apfel*, where five members of the Court concluded that a generic demand for the payment of money did not trigger the Takings Clause.²⁴⁶ The demand made upon Koontz, Justice Kagan explained, was no different. It did not burden a particular piece of real property, nor did it mandate the use of a specific and identifiable fund.²⁴⁷ It simply required Koontz to perform an act that cost him money and was, in that regard, no different than any general liability that could be satisfied from whatever source Koontz chose.²⁴⁸ It was, in other words, akin to a tax.²⁴⁹ Inasmuch as the imposition of a tax ordinarily does not trigger the Takings Clause,²⁵⁰ the demand that Koontz repair the off-site wetlands would not constitute a taking if made outside the permitting process.²⁵¹

That conclusion, in turn, meant that there was no unconstitutional condition for the *Nollan/Dolan* test to cure.²⁵² Put differently, in the dissent's view, the Takings Clause would not have prevented the government from simply ordering Koontz to pay for the improvement of public wetlands.²⁵³ And

244. *Id.*

245. *Id.* Justice Kagan made it clear that, in her view, no such demand was ever made of Koontz and, therefore, his claim failed for that reason, as well. See *id.* at 2610–11.

246. See 524 U.S. 498, 539–47 (1998) (Kennedy, J., concurring); *id.* at 554–58 (Breyer, J., dissenting).

247. *Koontz*, 133 S. Ct. at 2606 (Kagan, J., dissenting).

248. *Id.*

249. *Cf. id.* at 2607 (suggesting similarities between monetary exactions and taxes).

250. See *id.* at 2600 (majority opinion) (“It is beyond dispute that ‘[t]axes and user fees . . . are not ‘takings.’”) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 243 n.2 (2003) (Scalia, J., dissenting) (alteration in original)).

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

252. *Id.* at 2605–06.

253. See *id.* at 2606 (“[T]he order to repair wetlands, viewed independent of the permitting process, does not constitute a taking.”). The dissent held open the possibility, however, that such an order might violate notions of due process. See *id.* at 2609 (“[A] court can use . . . the Due Process Clause . . . to protect against monetary demands . . .”).

what would not have been a taking if pursued directly is not transformed into a taking merely because it is pursued indirectly through a permit condition.²⁵⁴ In the dissent's view, the AED created in *Nollan/Dolan* did not need to be utilized because the government was not attempting to evade any restriction imposed by the Takings Clause.

D. *The Implicit Debate Over Political Safeguards*

One of the striking features of *Koontz* is that all nine justices so fundamentally agreed on the function of the *Nollan/Dolan* test while simultaneously disagreeing about how that test should be applied. As demonstrated, both the majority and the dissent described *Nollan/Dolan* as an AED that serves to prevent evasion of the constitutional just compensation requirement through use of the government's permitting authority.²⁵⁵ But the majority and the dissent could not agree on how far to take the anti-evasion notions at the heart of the *Nollan/Dolan* framework. A close reading of the opinions suggests that this disagreement can be explained by the political safeguards theory outlined above. Put succinctly, the opinions reveal an implicit debate over the adequacy of the political process to shelter landowners such as *Koontz* from overreaching demands that they pay money in exchange for development approval.

Consider again Justice Kagan's suggestion that the monetary payment demanded of *Koontz* was analogous to a tax.²⁵⁶ Although she accused the majority of unnecessarily conjoining taxes and takings, Justice Kagan left no doubt that she thought something bigger than mere doctrinal confusion was at stake. Her points concerning taxation occurred in the midst of a larger discussion about the ramifications of the majority's holding more generally.²⁵⁷ By extending *Nollan/Dolan* to monetary exactions, she insisted, the majority had interjected heightened scrutiny "into the very heart of local

254. *Id.* at 2606 (stating that connection to permitting process alone "is insufficient to trigger heightened scrutiny"); *cf.* *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 58–59 (2006) (holding that "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly").

255. *See supra* notes 221–27, 238–39 and accompanying text.

256. *Koontz*, 133 S. Ct. at 2607 (Kagan, J., dissenting).

257. *Id.*

land-use regulation and service delivery.”²⁵⁸ And the consequences of this interjection were severe: “The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.”²⁵⁹

This concern over judicial intrusion into local affairs carries with it the message that the types of issues raised by Justice Kagan—the provision of public utility services, the cost of business and alcohol permits, decisions about community identity, etc.²⁶⁰—are better addressed in the legislative than judicial arena. But inherent in that message is the further notion that the legislative process can adequately protect whatever constitutional concerns might be raised by these local issues. Although her dissent did not say so explicitly, Justice Kagan intimated that political recourse typically will be available to curb governmental overreaching:

At bottom, the majority’s analysis seems to grow out of a yen for a prophylactic rule: Unless *Nollan* and *Dolan* apply to monetary demands, the majority worries, “land-use permitting officials” could easily “evade the limitations” on exactions of real property interests that those decisions impose. But that is a prophylaxis in search of a problem. No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development’s costs.²⁶¹

Unspoken, yet suggested, in this passage is that the evidence almost certainly leads to a contrary result. One hears in Justice Kagan’s dissent echoes of the explanation that state courts have offered for declining to extend *Nollan/Dolan*: “A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 2608 (citations omitted).

election.”²⁶² In this view, the democratic political processes can handle these cases better than judicial intervention, which promises “to wreck land-use permitting throughout the country—to the detriment of both communities and property owners.”²⁶³

By contrast, Justice Alito’s opinion hints that the majority of the justices thought the political process insufficient to protect the constitutional norms at stake. When explaining the rationale underlying the *Nollan/Dolan* standards, Justice Alito noted that land use applicants remain “especially vulnerable” to “[e]xtortionate demands” from government officials.²⁶⁴ This is true because the government wields “substantial power and discretion” in the land use process,²⁶⁵ which sometimes crosses the constitutional line—even in the service of some public good or purpose—by forcing a subset of the population to carry burdens that should be borne by the public as a whole.²⁶⁶ As with regulatory takings more generally, there is a considerable danger that the taxpaying public will not only tolerate such redistribution of public burdens but will desire and celebrate it.²⁶⁷ If a substantial portion of the public is happy to shift the costs of public projects to others, and if land use applicants can effectively be pressured into paying those costs, then one would expect the political process to favor candidates and policies accomplishing those results.

This view was reinforced by the majority’s discussion of taxation. Answering the dissent’s argument that the majority had confused the power to tax and the power to take, Justice Alito indicated that any confusion was already inherent in the powers themselves. Although it was “beyond dispute” that taxes are not takings,²⁶⁸ he explained, “we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax.”²⁶⁹ The Court’s prior precedent, and not its

262. *San Remo Hotel L.P. v. City & Cty. of S.F.*, 41 P.3d 87, 105 (Cal. 2002).

263. *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting).

264. *Id.* at 2594–95 (majority opinion).

265. *Id.* at 2600.

266. *Cf. id.* (“Whatever the wisdom of [making a landowner improve nearby public lands], it would transfer an interest in property from the landowner to the government.”).

267. *See supra* note 183 and accompanying text.

268. *Koontz*, 133 S. Ct. at 2600–01.

269. *Id.* at 2601.

extension of *Nollan/Dolan* to monetary exactions, produced whatever confusion existed.²⁷⁰

At the same time, Justice Alito explained that the confusion was more theoretical than practical.²⁷¹ In most cases where the confiscation of money was held to be a taking, the government actually could not have achieved its result through taxation because of various state laws restricting the power to tax.²⁷² Implicit in this statement is the view that the taxing power is monitored and controlled by the political process in ways that other governmental powers are not. Indeed, evading the restraints on the government's ability to impose taxes seems to be the very catalyst for attempting to exact money by other means.²⁷³ Thus, in the majority's view, minimal judicial intervention is necessary to monitor the exercise of the taxing power because process protections generally exist to curb abuses of that power. Because similar process protections do not exist in the land use permitting context, the majority seemed to say, judicial involvement must be more vigorous.

E. Summary

Viewing *Koontz* through the prism of the anti-evasion and political safeguards theories helps to explain the majority's decision in that case, as well as to bring the differences between the majority and dissent into clearer focus. But it also suggests some guidelines for determining issues inherently raised, but not resolved, by *Koontz's* extension of the *Nollan/Dolan* framework. It is to those issues that the next Part turns.

V. IMPLICATIONS FOR FUTURE LITIGATION

Koontz's extension of the *Nollan/Dolan* framework has several implications for future litigation in the exactions arena. To begin with, additional decision rules will need to be

270. *Id.*

271. *Id.* at 2601–02.

272. *Id.*; *cf.* Kent, *supra* note 28, at 1868–75 (outlining legal differences between taxes and regulatory fees and discussing difficulty of labeling development impact fees as either device).

273. *See Koontz*, 133 S. Ct. at 2602 (“[B]ecause Florida law greatly circumscribes respondent’s power to tax . . . [i]f respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner’s permit was improper under Florida law.”).

developed so that claims brought under *Koontz* can properly be evaluated. In particular, courts will need to determine exactly when a permit denial triggers *Nollan/Dolan*, as well as the proper remedies to apply to a permit denial that violates *Nollan/Dolan*'s nexus and proportionality standards. Additionally, quite aside from these micro-level questions is the larger issue of *Koontz*'s effect on macro-level doctrinal development: What does *Koontz* suggest more generally about the protection of constitutional property rights and the relationship—so important to *Lingle*—between the Takings and Due Process Clauses?

A. *Micro-Level Questions*

1. When Does a Permit Denial Trigger *Nollan/Dolan*?

Justice Alito's majority opinion left open two significant questions concerning how a *Nollan/Dolan* violation will work in the context of a permit denial. First, there is the issue of how to distinguish cases where the denial results from the applicant's refusal to accede to an improper exaction and those where the permit is denied for other, valid regulatory purposes.

How to tell the difference between the two situations—and into which category the denial of *Koontz*'s permit fell—was yet another sticking point for Justice Kagan and her colleagues in dissent.²⁷⁴ In their view, the government had not actually demanded anything of *Koontz* at all. Rather, when faced with an application that did not meet the legal requirements for obtaining a permit, the reviewing agency simply suggested ways that *Koontz* might modify his application to meet those requirements.²⁷⁵ When *Koontz* refused to continue negotiating, the agency denied the permit application “consistent with its original view that [the application] failed to satisfy Florida law.”²⁷⁶ Thus, in Justice Kagan's telling, the denial was not based on *Koontz*'s resistance to a demanded exaction because no such demand was ever made.²⁷⁷ Instead, the government denied his permit application on the basis that granting the

274. *See id.* at 2610 (Kagan, J., dissenting).

275. *See id.*

276. *Id.* at 2611.

277. *Id.*

permit would injure wildlife associated with his wetlands in violation of Florida law.²⁷⁸ This type of denial, Justice Kagan suggested, should be reviewed under the *Penn Central* test rather than the heightened scrutiny of *Nollan/Dolan*.²⁷⁹

Although I am not convinced by Justice Kagan's analysis of *Koontz* itself,²⁸⁰ her larger point is well taken. How specific must a demand be before it can legitimately form the basis for a permit denial and, thus, trigger *Nollan/Dolan*? As explained above, those cases are designed to prevent the government from evading the constitutional requirement to compensate for property it takes.²⁸¹ Their function is not to prohibit regulation or thwart the negotiations that inevitably take place between local governments and applicants in the land use process. Unless the nexus and proportionality standards are to apply to every case in which an exaction might have been raised in any manner and at any point during the application review process, it will be necessary to distinguish permit denials governed by *Nollan/Dolan* from those that are not.

In this regard, Justice Kagan suggested that, to trigger

278. *Id.*

279. *Id.* at 2610.

280. Specifically, I do not believe the facts of the case were as unambiguous as Justice Kagan understood them to be. As the majority pointed out, the state courts clearly characterized the government's conduct as a demand, and the accuracy of that characterization was not within the scope of the Court's review. *See id.* at 2598 (majority opinion). Moreover, the decisions of the Florida Fifth District Court of Appeal, which had reviewed the case four times before it went to the United States Supreme Court, plainly indicate that the government did more than merely make suggestions to Koontz. Rather, in the words of that court, the government told Koontz "that it would approve the permits *only if* [he] agreed to satisfy certain conditions, one of which was the performance of 'off-site' mitigation involving property a considerable distance from [his] property." *St. Johns River Water III*, 5 So. 3d 8, 10 (Fla. Dist. Ct. App. 2009) (emphasis added). Finally, contrary to Justice Kagan's suggestion, Koontz's application did not on its face fail to satisfy Florida's legal requirements. Although the water management district determined that Koontz's development proposal would adversely affect fish and wildlife, *St. Johns River Water Mgmt. Dist. v. Koontz (St. John's River Water D)*, 861 So. 2d 1267, 1269–70 (Fla. Dist. Ct. App. 2003) (Pleus, J., concurring), the support for this conclusion was, at best, mixed. Three experts testified that additional mitigation was unnecessary, and the agency's own scientist admitted that there were no fish on Koontz's property and that she had not performed a wildlife survey. *See id.* at 1269–70. These facts strongly suggest that the denial of the permit was grounded in Koontz's refusal to perform the specific off-site mitigation requested by the agency, and not for any larger purpose relating to wildlife protection. At the very least, they create a sufficient question to defer, as the majority correctly did, to the state courts that had repeatedly evaluated the case over a series of several years.

281. *See supra* text accompanying note 255.

Nollan/Dolan, an applicant must demonstrate that it rejected an unequivocal demand from the government.²⁸² Only upon such a showing, she insisted, could a permit denial properly be subjected to the nexus and proportionality requirements.²⁸³ Otherwise, government agencies would run the risk of litigation under *Nollan/Dolan* anytime they attempted to communicate their concerns about a land use project and offer ways in which those concerns might be assuaged.²⁸⁴ That risk, in turn, ultimately would make it safer for the government to deny a troubling application than to negotiate mitigation measures.²⁸⁵

I have doubts that a more fluid standard will necessarily produce these results. First, as the majority pointed out, several state courts had already applied *Nollan/Dolan* to monetary exactions without the dire consequences predicted by the dissent.²⁸⁶ Second, similar arguments were made about the potential impact of *Nollan* and *Dolan* themselves,²⁸⁷ but the empirical evidence suggests that these dangers have not materialized.²⁸⁸ Indeed, one study found that the decisions “tend to favor a comprehensive, long-range approach to planning that avoids ad hoc decision-making,” and that they sometimes justify the imposition of more intense exactions than the government actually imposed.²⁸⁹ Third, in an era of shrinking revenues and tax revolts, it is difficult to believe that local governments will completely abandon their efforts to negotiate for exactions and thereby shift to land developers some of the costs for public projects.²⁹⁰

282. *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 2602 (majority opinion).

287. See Ann E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 105 (2001) (noting that *Nollan* and *Dolan* “initially engendered fears about their potentially chilling effects on land use practices”).

288. See *id.* at 142–43 (finding that large majority of California planners view *Nollan/Dolan* favorably and consider them to embody “good land use planning practice”).

289. *Id.* at 143.

290. Cf. Been, *supra* note 15, at 482 (characterizing cost shifting as “main reason” that local governments impose exactions); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 S.M.U. L. REV. 177, 191 (2006) (describing “unmistakable trend . . . towards a system of local government ‘non-financing’ through increased

Ultimately, however, I disagree with Justice Kagan's call for an "unequivocal demand" test²⁹¹ primarily on doctrinal grounds. The test is too reminiscent of an *ex ante* rule to serve its anti-evasion function adequately. Although there may be some room at the margins to debate what constitutes a "demand" and what qualifies as "unequivocal," the test raises the specter of bright-line categorization that encourages evasive conduct.²⁹² Enforcing *Nollan/Dolan*, itself an anti-evasion doctrine, with a test that promotes further evasion would be ironic at best and self-defeating at worst. For this reason, a standard—with its attendant unpredictability—seems preferable to a rule.

In place of the dissent's "unequivocal demand" test, therefore, I propose a modified version of the "substantial or motivating factor" test utilized in some unconstitutional conditions cases under the First Amendment. Established in *Mt. Healthy City School District Board of Education v. Doyle*, the test typically applies when a public employee or contractor claims to have suffered some adverse employment action in retaliation for exercising his free speech rights.²⁹³ Because employment decisions often result from multiple considerations, the Court "found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused."²⁹⁴

Thus, the *Mt. Healthy* test requires the plaintiff to show, first, that his conduct was in fact protected by the Constitution and, second, that his conduct was a substantial or motivating factor in the government's decision concerning his employment.²⁹⁵ If these two showings are made, the burden

reliance on cost-shifting to the developer").

291. *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting).

292. See Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 995 (1995) ("Because rules have clear edges, they allow people to 'evade' them by engaging in conduct that is technically exempted but that creates the same or analogous harms.").

293. 429 U.S. 274, 276, 285 (1977); see also *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (applying test to government contractors). The test has its origins in criminal law issues relating to tainted evidence and has been incorporated into a number of federal employment statutes, either by judicial decision rule or statutory codification. See generally Bryan S. Clarke, *A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine*, 65 RUTGERS L. REV. 723, 738–44 (2013) (discussing origins and subsequent history of *Mt. Healthy* test).

294. *Mt. Healthy*, 429 U.S. at 286.

295. *Id.* at 287. The Court seems to use the terms "substantial" and

then shifts to the government to demonstrate that it would have rendered the same decision even absent the protected conduct.²⁹⁶

A similar test seems appropriate to distinguish between land use denials resulting from a *Nollan/Dolan* violation and those resulting from some other cause. As with the employment cases in which the *Mt. Healthy* test is most routinely applied, a land use decision will often be the result of multiple considerations and, therefore, a test that accounts for the government's various motives seems particularly helpful. Moreover, inasmuch as the decision to grant or deny a given land use application typically remains within the government's discretion, there should be sufficient room for the government to demonstrate that it would have exercised its discretion just as it did even if the exaction had never been raised.

Nonetheless, to adapt the *Mt. Healthy* test to this context requires some slight modification. Because the *Nollan/Dolan* framework places the burden on the government to demonstrate that its conduct was constitutional,²⁹⁷ the plaintiff need only show that its refusal to acquiesce to a particular exaction was a motivating factor in the government's decision to deny approval for the land use project. While I do not believe that an "unequivocal demand" is required, the plaintiff must show more than a general suggestion by the government that measures to mitigate the impact of the project might be necessary. Instead, the plaintiff needs to point to some specific condition proposed by the government—like the off-site improvements in *Koontz*—the rejection of which, based on all the facts and circumstances, seemingly played a substantial role in the decision to deny the plaintiff's application.

Once the plaintiff makes this showing, the burden then shifts to the government to demonstrate, by a preponderance of the evidence, that it would have reached the same decision (denial of the project) regardless of the plaintiff's rejection of the exaction at issue. If the government can meet this burden, then *Nollan/Dolan* does not apply and, as Justice Kagan suggested, any takings claim arising from the denial of the

"motivating" interchangeably. *See id.*; accord *Umbehr*, 518 U.S. at 675.

296. *Mt. Healthy*, 429 U.S. at 287.

297. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (placing burden on city to "make some sort of individualized determination that the [exaction] is related both in nature and extent to the impact of the proposed development").

application is evaluated under another test (*Lucas* or *Penn Central*, for example).²⁹⁸ But if the government cannot satisfy its burden, then the denial of the application is presumptively based on the plaintiff's failure to accede to the exaction, and the government must prove that the exaction would have complied with *Nollan/Dolan*'s nexus and proportionality requirements.

2. How to Remedy a Permit Denial that Violates *Nollan/Dolan*?

A proposed exaction that lacks the requisite nexus and proportionality would raise the second question left open by *Koontz*: What is the appropriate remedy for a violation of *Nollan/Dolan* in the context of a permit denial? As explained above, the majority conceded that, in this context, "nothing has been taken," and therefore the constitutional remedy of just compensation does not apply.²⁹⁹ The dissent concurred completely with this proposition,³⁰⁰ meaning that the entire Court agreed that just compensation *is not* the remedy for an unconstitutional condition of this type. Moreover, the justices seemed to agree that money damages might or might not be available, depending on the particular state or federal cause of action the plaintiff utilized to advance the claim.³⁰¹

The dissent suggested, however, that the most appropriate remedy would be the invalidation of the offending condition.³⁰² Presumably, this remedy envisions a judicial order prohibiting the government not only from imposing the condition, but also from using the plaintiff's refusal of the condition as a basis for denying the application. This remedy comports with the result in most other unconstitutional conditions cases,³⁰³ and I agree that it is a particularly suitable remedy for this type of case as well. Because at this stage of the analysis, however, the

298. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2610–11 (2013) (Kagan, J., dissenting).

299. *Id.* at 2597 (majority opinion).

300. *Id.* at 2611 (Kagan, J., dissenting).

301. *Id.* at 2597 (majority opinion); *id.* at 2603 (Kagan, J., dissenting).

302. *Id.* at 2603 (Kagan, J., dissenting) ("The owner is entitled to have the improper condition removed . . ."); *id.* at 2611 (suggesting that plaintiff could sue "to invalidate the purported demand as an unconstitutional condition").

303. See, e.g., *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.* 133 S. Ct. 2321 (2013); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Speiser v. Randall*, 357 U.S. 513 (1958).

burden-shifting framework outlined above presumes that the plaintiff's refusal to accede to the exaction was the reason her application was denied, an order invalidating the condition would necessarily remove the only basis for the denial. As a result, such an order would also require that the plaintiff's application be granted.

Once this occurs, however, the plaintiff possibly could be entitled to just compensation upon proving that the initial denial of the permit worked a "temporary taking." Now that the permit must be granted because of the government's failure to adhere to *Nollan/Dolan*, the question becomes whether the government's refusal to grant it earlier took the plaintiff's property during the period in which the *Nollan/Dolan* claim was being litigated. That question must necessarily be evaluated according to the other takings tests—i.e., whether the improper denial of the permit deprived the owner of all economically beneficial use or otherwise failed the balancing test established by *Penn Central*³⁰⁴ prior to the court order requiring the permit to be granted. If so, then a taking occurred despite the fact that the permit is belatedly issued, and the plaintiff would be owed compensation for the period of time in which the taking existed.³⁰⁵

B. Macro-Level Questions

In addition to the foregoing micro-level questions, *Koontz* raises significant macro-level questions concerning the Court's regulatory takings jurisprudence and the proper place of the exactions cases within the larger constitutional protections for property rights. At the heart of these questions is *Koontz*'s compatibility with *Lingle* and that decision's distinction between takings and due process challenges to land use regulations.

As an initial matter, the majority's concession that no taking occurs if the permit is denied³⁰⁶ and its application of the *Nollan/Dolan* standards to monetary exactions³⁰⁷ raise

304. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

305. See *First English Evangelical Lutheran Church v. Cty. of L.A.*, 482 U.S. 304, 318–22 (1987) (concluding that government must compensate for "temporary takings").

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

307. *Id.* at 2598–99.

concerns about how closely *Koontz* fits with the “functional equivalence” touchstone established in *Lingle*.³⁰⁸ Additionally, as indicated by my proposed “substantial or motivating factor” test, an evaluation of the government’s motives in denying the permit lies at the heart of the constitutional inquiry in this context, suggesting the inquiry is closer to a due process analysis than a takings analysis. In light of these issues, it is appropriate to wonder whether *Koontz* (and perhaps *Nollan* and *Dolan*, as well) properly lie within the “takings realm” at all.³⁰⁹

At least one scholar has answered that question in the negative. Mark Fenster has opined that, after *Koontz*, the Court’s exactions decisions should be viewed as sounding not under the Takings Clause but, rather, as a species of substantive due process.³¹⁰ Although I agree with Professor Fenster’s ultimate conclusion, I am not persuaded that the Court’s exactions jurisprudence necessarily lies outside the ambit of the Takings Clause. After all, in both *Nollan* and *Dolan*, the permit condition imposed by the government clearly burdened the owner’s property rights by demanding a physical interest in the parcels.³¹¹ And in *Koontz* itself, even though the permit was denied, that denial resulted from the landowner’s refusal to accede to a governmental demand that was directly linked to the owner’s rights in his parcel.³¹²

As I have explained elsewhere, in every exaction case, “what ultimately is at stake . . . is the owner’s ability to move forward with a proposed use of her real property.”³¹³ Irrespective of whether the exaction at issue is physical or monetary, and regardless of whether the permit is conditionally granted or denied because the applicant refuses the condition, the applicant’s right to use its land depends on its willingness to give something to the government. Thus, exactions inherently involve burdens on property, and for this

308. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

309. *See Fenster, supra* note 36, at 404 (arguing that *Koontz* demonstrates that the Court’s exactions cases are “conceptually and practically outside of the federal constitutional takings realm entirely”).

310. *Id.* at 414–17.

311. *See supra* note 236 and accompanying text.

312. *See Koontz*, 133 S. Ct. at 2600 (“The fulcrum this case turns on is the direct link between the government’s demand and a specific parcel of real property.”).

313. *Kent, supra* note 28, at 1857.

reason, the Court's exactions cases (including *Koontz*) are not so fundamentally unrelated to *Lingle*'s understanding of the takings inquiry that they must be viewed as wholly independent of it.

Even so, fitting the exactions cases neatly into the *Lingle* framework has always proved a bit challenging, as *Lingle* itself acknowledged.³¹⁴ To say that land use exactions necessarily burden property is not to say that they are always *unconstitutionally* burdensome. Once a case moves beyond the specific fact set at issue in *Nollan* and *Dolan*, analytical problems undeniably arise. Unlike the easements requested in those two cases, monetary exactions do not clearly qualify as the functional equivalent of a direct appropriation.³¹⁵ And conceptualizing an exactions case as functionally equivalent to a direct appropriation becomes even more difficult where the government never actually imposes the condition and the landowner never hands anything over. Although land use exactions present dangers similar to those covered by the Takings Clause, cases like *Koontz* demonstrate that they also can introduce issues for which the takings paradigm offers no easy resolution.

The precise source of authority for the Court's exactions jurisprudence, at least as extended by *Koontz*, thus presents something of a conundrum. In a recent paper dealing with anti-evasion under the Confrontation Clause, however, David Noll has suggested a helpful framework for answering this type of question.³¹⁶ When implementing devices to curb evasive activity, Professor Noll acknowledges, courts must decide whether that implementation will occur "under the specific provision being evaded or a broader source of authority, such as the Due Process Clause."³¹⁷ The answer to this question, Noll posits, typically turns on two subordinate factors: "[t]he obviousness of the evasion, and the means-end fit between the primary constitutional provision and the regulatory response the court believes appropriate."³¹⁸

In a case like *Koontz*, both factors weigh heavily in favor of

314. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005).

315. See *Kent*, *supra* note 28, at 1857.

316. David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1968 (2015).

317. *Id.*

318. *Id.*

a due process remedy. To begin with, not all land use exactions are clearly designed to evade the Takings Clause. Although they undeniably create evasive opportunities, avoiding constitutional strictures is not the only reason for a government to utilize exactions in the land use context. Moreover, a straightforward application of the remedial scheme envisioned by the Takings Clause—requiring the government to provide compensation for property it takes—will not adequately curb evasion in every situation, as the facts of *Koontz* plainly show.³¹⁹ As discussed above, in some cases, a more appropriate remedy might be to proscribe the imposition of the exaction altogether or otherwise to limit the government's regulatory power.³²⁰ Remedies of this nature seem more naturally suited to the Due Process Clause than the Takings Clause, even though the latter provides the foundational principles that such remedies seek to protect.

At this point, then, I agree with Professor Fenster that the *Koontz* majority's invocation of the unconstitutional conditions doctrine is telling.³²¹ That doctrine, at least in its development, traditionally has been associated with substantive due process.³²² Moreover, since its inception, the doctrine has been at least partially concerned with the purposes that lay behind government-imposed conditions,³²³ an inquiry that *Lingle* unmistakably places within the primary jurisdiction of the Due Process Clause.³²⁴ The majority's appeal to the doctrine of unconstitutional conditions is a tacit admission that these concerns are at work in the Court's exactions jurisprudence.

Indeed, similar concerns have animated the Court since its first foray into the exactions debate. In *Nollan*, the Court grounded its scrutiny of land use exactions in the need to forestall improper leveraging—that is, the government exercising its monopoly power over land use regulation to demand concessions from property owners it would not

319. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591–94 (2013).

320. See *supra* notes 302–03 and accompanying text.

321. Fenster, *supra* note 36, at 415–17.

322. See, e.g., Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 91–92 (2006) (linking unconstitutional conditions doctrine to *Lochner*-era development of economic substantive due process); Sullivan, *supra* note 6, at 1416 (same).

323. See *supra* notes 94–96 and accompanying text.

324. *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 540–43 (2005).

otherwise be able to obtain.³²⁵ As the *Nollan* majority explained:

One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions.³²⁶

As this language makes clear, the purpose for which the condition was imposed formed a primary component of the Court's theoretical basis for *Nollan*'s "essential nexus" requirement. Commentators have explained the *Nollan/Dolan* test in comparable terms, frequently focusing on the rationality and legitimacy of the government's demand rather than the precise burden that it imposes on the applicant's property.³²⁷ Finally, *Koontz* itself echoes these means-ends characterizations, stating that the government "may not leverage its legitimate interest in mitigation *to pursue governmental ends*" that violate the nexus and proportionality standards.³²⁸ As Professor Fenster argues,³²⁹ these explanations sound very similar to the sort of due process notions that *Lingle* said "ha[ve] no proper place in our takings jurisprudence."³³⁰

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

326. *Id.* at 837 n.5.

327. See, e.g., Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 491 (2006) ("[T]he state can use its monopoly power over land use decision making to exact objectively unreasonable property demands . . ."); Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 350 (1999) ("An unrelated or disproportionate exaction reveals that the government's only purpose for applying a particular land-use restriction to a particular property is to obtain some property interest from the owner, rather than to harmonize public and private interests by mitigating the negative effects of the requested land use. Such a purpose is illegitimate.").

328. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (emphasis added); see also *id.* at 2597–98 (noting that *Koontz*'s claim was brought under Florida statute providing cause of action for "an *unreasonable exercise* of the state's police power constituting a taking without just compensation") (emphasis added).

329. Fenster, *supra* note 36, at 416.

330. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

Accordingly, the most accurate understanding of the Court's post-*Koontz* exactions jurisprudence is to view it as a due process-based remedy designed to restrain Takings Clause evasion. To some extent, this blending of substantive due process with the takings protections seems inevitable, *Lingle's* attempts at wholesale segregation notwithstanding.³³¹ As government actors continue to develop additional ways to circumvent the Takings Clause, the Court will presumably continue (as it did in *Koontz*) to create additional decision rules aimed at curbing that evasion. As these additional AEDs are layered on top of the prior body of doctrine, there is a tendency for them to move further and further from the Takings Clause's core proposition. At some point, to achieve optimal enforcement of that proposition, the rules will begin to police unenumerated limits beyond which the government simply is forbidden to cross. Insofar as that policing function is what is meant by "substantive due process," if the Court is serious about regulating evasive conduct, due process elements will unavoidably creep into the decision rules.

The Supreme Court, however, has been reluctant to admit this type of doctrinal commingling, at least in the context of constitutional property protections. This reluctance is most likely born from a fear that admitting such commingling would signal a return to the sort of economic due process the Court long ago rejected.³³² In fact, in a recent takings case, a plurality of the Court reiterated that "the 'liberties' protected by Substantive Due Process do not include economic liberties."³³³ This statement came in response to an argument by Justice Kennedy (joined by Justice Sotomayor) that so-called "judicial takings" are best understood not as uncompensated takings

331. Special thanks to Brannon Denning for the following insights.

332. See, e.g., *W. Coast Hotel Co. v. Parish*, 300 U.S. 379, 392 (1937) ("Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.") (quoting *Chi., Burlington, & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 565 (1911)); *Nebbia v. New York*, 291 U.S. 502, 532 (1934) ("The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property."); see also *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

333. *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env'tl. Prot.*, 560 U.S. 702, 721 (2010) (plurality).

but, rather, as deprivations of property without due process.³³⁴ Justice Scalia and three other justices rejected this argument as “propel[ling] us back to what is referred to (usually deprecatingly) as ‘the *Lochner* era.’”³³⁵ In view of these statements, an explicit judicial admission that the exactions cases incorporate due process components seems unlikely. The tacit admission of *Koontz*, through its invocation of the unconstitutional conditions doctrine, may be the best for which one can hope.

CONCLUSION

Regulatory takings and the doctrine of unconstitutional conditions, although often puzzling in both their theoretical bases and their various applications, can be understood as anti-evasion doctrines. At bottom, they operate to fill enforcement gaps left open by other constitutional decision rules. They perform this function by preventing government actors from elevating form over substance or accomplishing indirectly that which cannot be done directly. It should come as no surprise, then, that anti-evasion plays a significant role in the constitutional treatment of land use exactions, as both the majority and dissenting opinions in *Koontz* demonstrate.

Viewing the exactions rules of *Nollan* and *Dolan* through the prism of anti-evasion is useful on a number of fronts. First, it helps make sense of the Court’s extension of those rules in *Koontz*, as well as to focus the debate between the majority and the dissenting justices regarding the propriety of that extension. Second, it assists in answering the micro-level questions left open by *Koontz*—specifically, how to prove and remedy a violation when the exacted condition is not actually imposed but nonetheless features prominently in the government’s decision to deny the proposed land use. Finally, regarding the exactions rules as a form of anti-evasion doctrine contributes to a better understanding of their place in the larger constitutional landscape. Despite the Court’s delineations between takings and substantive due process—

334. *See id.* at 735 (Kennedy, J., concurring) (“If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.”).

335. *Id.* at 721 (plurality opinion).

delineations that are helpful, in the main—there remains a perhaps inevitable element of the latter in the Court's exactions jurisprudence.