AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Property

Koontz v. St. Johns River Water Management District, ___ U.S. ___ (2013)

Coy Koontz Sr. owned 15 acres of undeveloped wetlands near a major highway in Orlando, Florida. In 1994, he sought to develop 3.7 acres of his property. Florida law required that developers obtain a Wetlands Resource Management (WRM) permit and that such permits be granted by the local agency only if the construction was "not contrary to the public interest." The St. Johns River Water Management District interpreted that requirement as enabling the agency to require persons who wished to develop wetlands to help finance projects that preserved other wetlands in the district. When Koontz refused to fund those projects, the St. Johns River Water Management District denied his application for a WRM permit. Koontz filed suit. He claimed that the refusal violated the takings clause of the Fifth Amendment as incorporated by the due process clause of the Fourteenth Amendment. The trial court ruled that a taking had taken place, that decision was sustained by an intermediate state appellate court, but reversed by the Supreme Court of Florida. Coy Koontz Jr. his father's heir, appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote reversed the Florida Supreme Court decision. Justice Alito's majority opinion held that states and localities had to demonstrate "rough proportionality" between the conditions for obtaining land-use permits and the social costs of the proposed land use, whether those conditions were attached to the permit or a reason for denying those permit. Alito's opinion also determined that monetary exactions for permits should be held to the same constitutional standard. All nine justices agreed that no constitutional difference existed between a condition attached to a permit (we give you this permit to build a swimming pool on the condition that you have a lifeguard) and a condition for granting a permit (we will give you a permit to build a swimming pool only if you agree to have a lifeguard). Does any good argument exist to the contrary? The justices disputed whether the same rule should apply when the permitting agency made a monetary demand. Why did Justice Alito think that the requirement that Koontz pay for other wetlands projects potentially subverted the constitutional requirement of rough proportionality? Why did Justice Kagan disagree? Who has the better argument? Suppose an agency simply charged a flat fee for permits and used the money for wetlands preservation. Would that be constitutional? Does your answer depend on how much the agency charged for the permit?

JUSTICE ALITO delivered the opinion of the Court.

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We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Nollan v. California Coastal Comm'n* (1987) and *Dolan v. City of Tigard* (1994) "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. . . . So long as the building permit is more valuable than any just compensation the owner could hope 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. A

second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. . . .

Nollan and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in "out-and-out . . . extortion" that would thwart the Fifth Amendment right to just compensation. Under *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 pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. . . . [R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them. A contrary rule would be especially untenable in this case because it 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. Under the Florida Supreme Court's approach, a government order stating that a permit is "approved if" the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. . . . Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. 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.

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We turn to the Florida Supreme Court's alternative holding that petitioner's claim fails because respondent asked him to spend money rather than give up an easement on his land. . . . We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

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It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'" This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.

At the same time, we have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. Most recently, in *Brown v. Legal Foundation of Washington* (2003), we were unanimous in concluding that a State Supreme Court's seizure of the interest on client funds held in escrow was a taking despite the unquestionable constitutional propriety of a tax that would have raised exactly the same revenue. . . . Two facts emerge from those cases. The first is that the need to distinguish taxes from takings is not a creature of our holding today that monetary exactions are subject to scrutiny under *Nollan* and *Dolan*. . . . Second, our

cases show that teasing out the difference between taxes and takings is more difficult in theory than in practice. Brown is illustrative. . . .

. . . . Florida law greatly circumscribes respondent's power to tax. If 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. Far from making that concession, respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land.

This case does not require us to say more. We need not decide at precisely what point a land-use permitting charge denominated by the government as a "tax" becomes "so arbitrary . . . that it was not the exertion of taxation but a confiscation of property." For present purposes, it suffices to say that despite having long recognized that "the power of taxation should not be confused with the power of eminent domain," we have had little trouble distinguishing between the two.

Finally, we disagree with the dissent's forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it. Yet the "significant practical harm" the dissent predicts has not come to pass.

. . . . [T]he dissent's argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*. After all, the Due Process Clause protected the Nollans from an unfair allocation of public burdens, and they too could have argued that the government's demand for property amounted to a taking under the Penn Central framework. We have repeatedly rejected the dissent's contention that other constitutional doctrines leave no room for the nexus and rough proportionality requirements of *Nollan* and *Dolan*. Mindful of the special vulnerability of land use permit applicants to extortionate demands for money, we do so again today.

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JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

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I think the Court gets the first question it addresses right. The *Nollan*–*Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (i.e., imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require. . . .

. . . . Claims that government regulations violate the Takings Clause by unduly restricting the use of property are generally "governed by the standards set forth in *Penn Central Transp. Co. v. New York City* (1978)." Under *Penn Central*, courts examine a regulation's "character" and "economic impact," asking whether the action goes beyond "adjusting the benefits and burdens of economic life to promote the common good" and whether it "interfere[s] with distinct investment-backed expectations." That multi-factor test balances the government's manifest need to pass laws and regulations "adversely affect[ing] . . . economic values" with our longstanding recognition that some regulation "goes too far." *Pennsylvania Coal Co. v. Mahon* (1922).

Our decisions in *Nollan* and *Dolan* are different: They provide an independent layer of protection in "the special context of land-use exactions." . . . *Nollan* and *Dolan* prevent the government from exploiting the landowner's permit application to evade the constitutional obligation to pay for the property. They do so, as the majority explains, by subjecting the government's demand to heightened scrutiny: The government may condition a land-use permit on the relinquishment of real property only if

it shows a "nexus" and "rough proportionality" between the demand made and "the impact of the proposed development." . . .

Accordingly, the *Nollan–Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for—or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking. . . .

Here, Koontz claims that the District demanded that he spend money to improve public wetlands, not that he hand over a real property interest. The key question then is: Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation? Only if the answer is yes does the *Nollan–Dolan* test apply.

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[A] requirement that a person pay money to repair public wetlands is not a taking. Such an order does not affect a "specific and identified propert[y] or property right[ ]"; it simply "imposes an obligation to perform an act" (the improvement of wetlands) that costs money. To be sure, when a person spends money on the government's behalf, or pays money directly to the government, it "will reduce [his] net worth"—but that "can be said of any law which has an adverse economic effect" on someone. Because the government is merely imposing a "general liability" to pay money—and therefore is "indifferent as to how the regulated entity elects to comply or the property it uses to do so"—the order to repair wetlands, viewed independent of the permitting process, does not constitute a taking. And that means the order does not trigger the *Nollan–Dolan* test, because it does not force Koontz to relinquish a constitutional right.

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When the government dissolves a lien, or appropriates a determinate income stream from a piece of property—or, for that matter, seizes a particular "bank account or [the] accrued interest" on it—the government indeed takes a "specific" and "identified property interest." But nothing like that occurred here. The District did not demand any particular lien, or bank account, or income stream from property. It just ordered Koontz to spend or pay money. Koontz's liability would have been the same whether his property produced income or not— e.g., even if all he wanted to build was a family home. And similarly, Koontz could meet that obligation from whatever source he chose—a checking account, shares of stock, a wealthy uncle; the District was "indifferent as to how [he] elect[ed] to [pay] or the property [he] use[d] to do so."

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The majority's approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. 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.

That problem becomes still worse because the majority's distinction between monetary "exactions" and taxes is so hard to apply. The majority acknowledges, as it must, that taxes are not takings. But once the majority decides that a simple demand to pay money—the sort of thing often viewed as a tax—can count as an impermissible "exaction," how is anyone to tell the two apart? . . . Nor does the majority's opinion provide any help with that issue: Perhaps its most striking feature is its refusal to say even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny.

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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 exaction 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. And if officials were to impose a fee as a contrivance to take an easement (or other real property right), then a court could indeed apply *Nollan* and *Dolan*. That situation does not call for a rule extending, as the majority's does, to all monetary exactions. Finally, a court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan*, that simply "go[ ] too far."

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