NOTE

THE DEATH OF *NOLLAN* AND *DOLAN*? CHALLENGING THE CONSTITUTIONALITY OF MONETARY EXACTIONS IN THE WAKE OF *LINGLE v. CHEVRON*

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INTRODUCTION

This term [property], in its particular application, means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster

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> *meaning, it embraces everything to which a man may attach a value and have a right, and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandise, or money, is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties, and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.*[1]

Facing the specter of re-emerging Lochnerism in its takings jurisprudence,[2] the Supreme Court was forced to backpedal on a twenty-five year old precedent in *Lingle v. Chevron*.[3] The 1980 case of *Agins v. City of Tiburon* had held that a government regulation "effects a taking if the [regulation] does not substantially advance legitimate state interests."[4] Before *Agins*, language of this sort had been reserved for due process inquiries.[5] *Lingle*, however, disavowed any merit to this inquiry within the takings context: a takings challenge, the Court stated, should presume the validity of state interests rather than second-guess them, as the typical due process inquiry does.[6] Removing the "substantially advances" test of *Agins* from the takings landscape did much to clarify the scope of regulatory takings law. But in combing through the

[1] James Madison, Property (Mar. 27, 1792), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 478, 478 (Philadelphia, J.B. Lippincott & Co. 1867) (emphasis omitted).

[2] "Lochnerism" is a term drawn from the case of *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court declared a New York maximum bakers' hours law a violation of the freedom of contract guaranteed in the Due Process Clause of the Fourteenth Amendment. *Id*. at 58. The term has widely come into repute as signifying judicial second-guessing of legislative judgments. *See, e.g.*, Howard Gillman, *De-Lochnerizing* Lochner, 85 B.U. L. REV. 859, 861 (2005) (stating that *Lochner* now serves as a "symbol of judges usurping legislative authority by basing decisions on policy preferences rather than law"). Justice Stevens openly expressed this fear of Lochnerism in his dissent to *Dolan v. City of Tigard*, 512 U.S. 374 (1994), warning that the Court's holding might "signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era." *Id.* at 409 (Stevens, J., dissenting).

[3] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[4] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[5] *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[6] *Lingle*, 544 U.S. at 543 ("[T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" (quoting First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 315 (1987) (emphasis added))).

thicket that *Agins* and its progeny created, the Supreme Court may have left a few new knots in its regulatory takings jurisprudence.

The regulatory takings doctrine derives from the Fifth Amendment's command that private property shall not "be taken for public use without just compensation."[7] The Takings Clause encompasses both per se takings (government appropriations or condemnations of physical property) and what have come to be called regulatory takings.[8] The doctrine of regulatory takings dates back to the 1922 case of *Pennsylvania Coal Co. v. Mahon*,[9] in which Justice Holmes announced that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[10] Since this pronouncement, the Supreme Court has found "regulatory takings" where government regulations, for example, forbade the mining of coal under certain conditions,[11] prevented the rebuilding of structures on floodplain property,[12] and barred an owner from erecting permanent, habitable structures on beachfront property.[13]

Eventually, litigants began to call on the courts to scrutinize the constitutionality of another government regulation using the regulatory takings framework: the development exaction. A development exaction occurs when a local governing body conditions the grant of a development permit on the developer agreeing to dedicate land, pay money, or provide materials or services.[14] The Supreme Court finally answered litigants in *Nollan v. California Coastal Commission*[15] and *Dolan v. City of Tigard*,[16] which require courts to apply a two-prong test to determine whether a development exaction violates the Takings Clause as an uncompensated taking. First, the court must determine whether an "essential nexus" exists between the legitimate state interest to be advanced by the restriction on development and the condition exacted by the government.[17] Second, the court must determine whether there is a "rough proportionality" between the condition exacted and the projected impact of the development.[18] *Nollan* and *Dolan*, to this day, set a heightened standard of judicial review for analyzing adjudicative, land dedication

[7] U.S. CONST. amend. V.

[8] *Lingle*, 544 U.S. at 537.

[9] 260 U.S. 393 (1922).

[10] *Id.* at 415.

[11] *Id.*

[12] First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 322 (1987).

[13] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

[14] *See* Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, *483 U.S. 825 (1987)*, 22 URB. LAW. 23, 23-24 (1990).

[15] 483 U.S. 825 (1987).

[16] 512 U.S. 374 (1994).

[17] *Id.* at 386; *Nollan*, 483 U.S. at 837.

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

exactions under the Takings Clause.[19] The Supreme Court, however, has failed to take any definitive stance on whether monetary exactions (i.e., a requirement imposed on developers to pay a fee or monetary assessment as a condition to the issuance of a development permit) are subject to *Nollan* and *Dolan* heightened scrutiny.[20]

Courts and commentators have split over whether the *Nollan* and *Dolan* heightened scrutiny standard applies to monetary exactions.[21] The *Lingle* decision, however, has reframed this debate. Realizing that abrogating the *Agins* "substantially advances" test placed its precedents at risk,[22] the Supreme Court revisited the doctrinal underpinnings of the *Nollan* and *Dolan* precedents in *Lingle*. To preserve *Nollan* and *Dolan*, the *Lingle* Court clarified the doctrine behind the two decisions:

> [T]hese cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[23]

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[19] *See infra* note 37 and accompanying text; *see also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005) ("[O]ur decision should not be read to disturb these precedents [*Nollan* and *Dolan*].").

[20] The Supreme Court has not decided on the merits any of the monetary exaction cases from the lower courts. The closest the Supreme Court has come to taking a stance on the issue was the remand of *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994), a case squarely presenting the question of whether monetary exactions are subject to the *Nollan* and *Dolan* standard. The Supreme Court granted certiorari on *Ehrlich* only days after the *Dolan* decision and remanded the case to the lower court "for further consideration in light of *Dolan*." *Id.* at 1231.

[21] *Compare, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (extending *Nollan* and *Dolan* to discretionary monetary exactions), *and* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1569-70 (2006) (arguing that monetary exactions pose the same risk of improper government leveraging as land exactions and that the *Nollan* and *Dolan* standard should therefore apply to monetary exactions), *with* San Remo Hotel L.P. v. S.F. City & County, 364 F.3d 1088, 1098 (9th Cir. 2004) (holding that the *Nollan* and *Dolan* standard does not apply to monetary exactions), *and* Robert H. Freilich & David W. Bushek, *Thou Shalt Not Take Title Without Adequate Planning: The Takings Equation After* Dolan v. City of Tigard, 27 URB. LAW. 187, 201 (1995) (arguing that *Dolan* should be limited to "exaction cases in which the property owner is required to dedicate land as a condition of permit approval").

[22] *See Lingle*, 544 U.S. at 546 ("It might be argued that [the *Agins*] formula played a role in our decisions in *Nollan v. California Coastal Comm'n* and *Dolan v. City of Tigard*." (citations omitted)).

[23] *Id.* at 547 (quoting *Dolan*, 512 U.S. at 385).

This confirmation of *Nollan* and *Dolan*'s doctrinal underpinnings within the doctrine of unconstitutional conditions potentially alters the debate over monetary exactions.

Lingle's recasting of *Nollan* and *Dolan* as based on the doctrine of unconstitutional conditions has led some commentators to herald the death of any principled extension of the *Nollan* and *Dolan* heightened scrutiny standard to the context of monetary exactions.[24] These commentators claim that in *Eastern Enterprises v. Apfel*,[25] a "second majority" of five Supreme Court Justices – Justices Stevens, Souter, Ginsburg, and Breyer, who dissented, and Justice Kennedy, who concurred – all indicated that they would refuse to apply a takings analysis to any ordinary obligation to pay money.[26] Applying the doctrine of unconstitutional conditions, these commentators argue that there must first be a Fifth Amendment right to compensation present, which the government seeks to bargain away by conferring a discretionary benefit – here, the granting of a permit. Under this analysis, these commentators conclude that a monetary exaction, as analyzed under the *Eastern Enterprises* second majority, can never constitute a compensable taking and thus can never be a bargained-away right to receive compensation that is worthy of heightened review under *Nollan* and *Dolan*.[27]

This Note seeks to challenge these academic premises by re-examining the *Eastern Enterprises* plurality decision, paying special attention to Justice Kennedy's concurring and dissenting opinion. This Note posits that upon examining the reasoning of Justice Kennedy's concurrence, it is clear that aligning him with the dissent to create a "second majority" is a hasty and ill-advised move. Ultimately, this Note concludes that *Eastern Enterprises* does not close the door on the monetary exactions debate; instead, Justice Kennedy's concurrence provides the critical arguments necessary to challenge monetary exactions under the *Nollan* and *Dolan* standard in the wake of *Lingle*.

Part I of this Note details the decisions in *Nollan* and *Dolan*, the seminal cases which established a heightened level of scrutiny for development exactions. Part II presents the debate on monetary exactions, outlining the evolution of conditional permitting through monetary exactions and the court split over the extension of *Nollan* and *Dolan*. Part III discusses the Supreme

[24] *See, e.g.*, John D. Echeverria, Lingle*, Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 ENVTL. L. REP. NEWS & ANALYSIS 10577, 10583 (2006); Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of* Lingle v. Chevron U.S.A., Inc. *on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 482 (2006); Daniel Pollak, *Regulatory Takings: The Supreme Court Tries To Prune* Agins *Without Stepping on* Nollan *and* Dolan, 33 ECOLOGY L.Q. 925, 931 (2006).

[25] 524 U.S. 498 (1998) (plurality opinion).

[26] *See infra* note 211 and accompanying text (discussing cases and commentaries that have recognized the "second majority" in *Eastern Enterprises*).

[27] *See* Echeverria, *supra* note 24, at 10583; Jacobs, *supra* note 24, at 482.

Court's recent decision in *Lingle*, which shifted popular understanding of the doctrinal underpinnings of *Nollan* and *Dolan*. Part III.C presents the argument made by commentators that the *Lingle* decision forecloses the application of *Nollan* and *Dolan* to monetary exactions. Part IV then responds to this claim, arguing that even in light of the unconstitutional conditions formulation of *Nollan* and *Dolan* set forth in *Lingle*, monetary exactions can constitute compensable takings within the scope of Justice Kennedy's *Eastern Enterprises* concurrence.

I. *NOLLAN* AND *DOLAN*: HEIGHTENED SCRUTINY FOR EXACTIONS

Prior to *Nollan* and *Dolan*, state courts formulated their own standards for evaluating the constitutionality of development exactions.[28] Following the lead of early zoning cases,[29] the courts evaluated the constitutionality of development exactions by inquiring whether the exaction was reasonably related to a legitimate government purpose.[30] In applying this standard, however, the states diverged and required different levels of "relation" between the conditions exacted and the impact of the development.[31] Some courts allowed the government to justify its exactions by proffering "very generalized statements as to the necessary connection between the required dedication and the proposed development."[32] Other courts applied an extremely exacting "specific and uniquely attributable" test, which required the local government to "demonstrate that its exaction is directly proportional to the specifically created need."[33] A number of other state courts took a middle ground between these opposing standards and applied a "reasonable relationship" test to the exaction at issue, asking the government to show that the exaction has "'some reasonable relationship to the needs created by the [development].'"[34] These

[28] *See* Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 528 (1988) ("The standard of reasonableness determines whether the exaction is unconstitutional . . . [and] [t]his standard . . . varies from state to state . . . ."); Noreen A. Murphy, Note, *The Viability of Impact Fees After* Nollan *and* Dolan, 31 NEW ENG. L. REV. 203, 216 (1996) ("Faced with Supreme Court silence on what constitutes a regulatory taking, state courts were left to develop their own standards and apply them to development exactions."); s*ee also Dolan*, 512 U.S. at 389-91 (recounting various state court approaches).

[29] *See* Murphy, *supra* note 28, at 210-11 (observing that state courts deciding exaction cases relied on the seminal zoning case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

[30] *See* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 11 (1987).

[31] *See Dolan*, 512 U.S. at 389-91; Murphy, *supra* note 28, at 216.

[32] *Dolan*, 512 U.S. at 389.

[33] *Id.* at 389-90.

[34] *Id.* at 391 (alteration in original) (quoting Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979)).

differing tests left developers little predictability as to how challenges to development exactions would turn out.

This landscape changed when the Supreme Court entered the development exactions debate in *Nollan* and *Dolan*. The *Nollan* and *Dolan* decisions crafted a two-part test for evaluating the constitutionality of a development exaction: first, the government must show that an "essential nexus" exists between the exaction and the legitimate state interest advanced;[35] and second, the government must demonstrate a "rough proportionality" between the exaction imposed and the impact of the development.[36] This two-part test has been characterized as a heightened scrutiny takings test.[37] These cases and the standards they created are addressed in turn.

A. Nollan*: The 'Essential Nexus' Requirement*

In 1987, the Supreme Court took its first step toward creating a uniform, national standard for evaluating the constitutionality of development exactions in *Nollan v. California Coastal Commission*.[38] The controversy in *Nollan* arose when the Nollans sought a permit from the California Coastal Commission to demolish their small beachfront home and build a new three-bedroom house.[39] The Commission approved the permit subject to a deed restriction granting a public easement to pass across a portion of the Nollans' property running along the beach.[40] After the Nollans' appeal to the Superior Court and a remand to the Commission, the Commission justified this easement by finding that the larger home would create and foster a psychological barrier to the beach by obstructing the view of the beach from the roadway.[41] The Commission also found that the larger home would increase private use of the beach, further burdening the public's ability to view and traverse the beach.[42] In response, the Nollans appealed again, this time alleging that the easement condition violated the Takings Clause.[43] After the Superior Court once again invalidated the Commission's decision and the California Court of Appeal reversed and reinstated the Commission's decision,[44] the Nollans' case finally reached the Supreme Court.

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

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

[37] *See, e.g.*, Murphy, *supra* note 28, at 205.

[38] 483 U.S. 825 (1987).

[39] *Id.* at 827-28.

[40] *Id.* at 828.

[41] *Id.* at 828-29.

[42] *Id.* at 829.

[43] *Id.*

[44] *Id.* at 829-30.

The Supreme Court, through Justice Scalia, declined to treat the exaction at issue in *Nollan* as a per se taking, though he noted the analogy at the outset.[45] Instead, the Court considered whether requiring the easement as a condition for issuing a land-use permit altered the Takings Clause violation that would result if the state had made an outright condemnation.[46] The Court began its analysis by quoting the *Agins* formula: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"[47] The Court then acknowledged that the power of the state to deny a permit in order to protect legitimate state interests necessarily includes the power to condition the permit upon some concession of property rights to serve that same end.[48] Here, the Court accepted as legitimate the Commission's proffered justifications for the permit condition: to protect the public's ability to see the beach and to prevent congestion on the beach.[49] The problem the Court recognized immediately, however, was that the condition imposed in place of the permit denial "utterly fail[ed] to further the end advanced as the justification for the prohibition."[50]

The Court reasoned that, for example, the Commission could exact from the Nollans a viewing spot on their property in order to protect the public interest in overcoming a psychological barrier to the beach.[51] But the lateral beach access easement exacted by the Commission in this instance had nothing to do with reducing any obstacle to viewing the beach.[52] When the condition substituted for the prohibition is unrelated to the purpose of the land-use regulation, the building restriction simply becomes "'an out-and-out plan of extortion.'"[53] According to the Court, the purpose here was, "quite simply, the obtaining of an easement to serve some valid governmental purpose, but

[45] *See id.* at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.").

[46] *Id.* at 834.

[47] *Id.* (alterations in original) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). The Court also cited *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . .").

[48] *Nollan*, 483 U.S. at 836 ("[A] permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.").

[49] *Id.* at 834-35.

[50] *Id.* at 837.

[51] *Id.* at 836.

[52] *Id.* at 838.

[53] *Id.* at 837 (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981)).

without payment of compensation."[54] This, according to the Court, violated the Takings Clause.[55] The Court thus required that an "essential nexus" exist between the permit condition and the legitimate state interest being advanced through the development ban in order for a real property exaction to pass constitutional muster.[56]

B. Dolan*: The 'Rough Proportionality' Requirement*

In 1994, the Supreme Court once again faced an exaction case when it decided *Dolan v. City of Tigard*.[57] In *Dolan*, the City of Tigard adopted a comprehensive community development plan for its Central Business District, which included an open space and landscaping requirement,[58] a pedestrian/bicycle pathway plan,[59] and a drainage plan.[60] Dolan owned a plumbing and electric supply store in the Central Business District abutting Fanno Creek.[61] Dolan's 1.67-acre parcel consisted of her 9700 square foot store and a gravel parking lot.[62] Dolan applied to the city for a permit to redevelop her site and submitted plans to increase the size of her store to 17,600 square feet, pave a 39-space parking lot, and build an additional structure.[63] The City Planning Commission approved Dolan's permit subject to the following conditions: that she dedicate the portion of her property lying within the 100-year Fanno Creek floodplain in accordance with the Master Drainage Plan, and that she dedicate an additional 15-foot strip of land adjacent to the floodplain to be used as a pedestrian/bicycle pathway.[64] The

[54] *Id.*

[55] *Id.* ("Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them.").

[56] *Id.* at 837; *see also* Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (characterizing *Nollan* as requiring courts to "first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city").

[57] 512 U.S. 374 (1994).

[58] Property owners in the Central Business District were made to comply with a 15% open space requirement, limiting total structure and paved parking coverage to 85% of the parcel. *Id.* at 377.

[59] New development in the Central Business District would facilitate the plan to alleviate traffic through requirements to dedicate land for pedestrian and bicycle pathways. *Id.* at 377-78.

[60] The Master Drainage Plan noted that the Fanno Creek area of the city suffered flooding problems, and suggested a series of improvements to the Fanno Creek Basin, including channel excavation in the area next to Dolan's land. *Id.* at 378.

[61] *Id.* at 379.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 379-80.

total dedication required under these conditions encompassed approximately 7000 square feet of Dolan's property, or roughly 10% of the parcel.[65]

Dolan sought variances from the conditions promulgated under the comprehensive plan, arguing that her proposed development was not in conflict with the policies of the city's zoning scheme for the Central Business District.[66] In response, the Commission made a series of findings: that it was reasonable to assume that Dolan's customers and employees would use the pedestrian/bicycle pathway, offsetting increased traffic congestion,[67] and that the floodplain dedication was reasonably related to Dolan's request to add a paved parking lot, which would increase the impervious surface area of her land and the runoff of storm water into Fanno Creek.[68] Dolan then appealed to the Land Use Board of Appeals, arguing that the dedication requirements were not related to the impact of the development and thus constituted an uncompensated taking.[69] The appeals board rejected Dolan's arguments, finding instead that the conditions bore a "reasonable relationship" to the proposed development impacts.[70]

On appeal, the Oregon Court of Appeals and the Oregon Supreme Court both rejected Dolan's contention that the *Nollan* decision had abrogated the state's "reasonable relationship" test in favor of a stricter "essential nexus" test.[71] The Supreme Court granted certiorari to determine this issue,[72] and also to "resolve a question left open by [*Nollan*] of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development."[73]

The Court, this time through Justice Rehnquist, began the analysis in the same way that Justice Scalia had in *Nollan*,[74] by pointing out that had the city simply required Dolan to dedicate portions of her land (instead of conditioning the grant of a permit on such a dedication), then a taking would have occurred.[75] While the government may regulate land in furtherance of legitimate state interests, the Court reminded us that

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[65] *Id.* at 380.

[66] *Id.* at 380-81.

[67] *Id.* at 381-82.

[68] *Id.* at 382.

[69] *Id.*

[70] *Id.* at 382-83.

[71] *Id.* at 383.

[72] *Id.* ("We granted certiorari because of an alleged conflict between the Oregon Supreme Court's decision and our decision in *Nollan.*" (citations omitted)).

[73] *Id.* at 377.

[74] *See supra* note 45 and accompanying text.

[75] *Dolan*, 512 U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.").

> [u]nder the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.[76]

The Court then set out a two-part test for evaluating the constitutionality of permit conditions. First, the Court must evaluate the question presented in *Nollan*: "whether [an] 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."[77] Next, if the Court finds that a nexus exists, the Court must decide whether the required degree of connection between the exaction and the development impact is met.[78] In *Nollan*, the Court emphasized, the Court was not called on to address the required degree of connection between the exactions and the development impact because the exactions in *Nollan* failed to meet the threshold "essential nexus" requirement.[79] Here, however, the City of Tigard had advanced the legitimate state interests of preventing flooding and reducing traffic congestion.[80] Furthermore, limiting development in the floodplain and providing a pedestrian/bicycle pathway each had the required nexus to the city's legitimate goals.[81]

The Court next moved to the second prong of the test to determine what relationship must exist between the permit conditions and the projected impact of the proposed development.[82] The Court reviewed the various approaches followed by the state courts for guidance on the standard required by the Fifth Amendment.[83] The Court rejected an approach which allowed authorities to make "very generalized statements as to the necessary connection" as too "lax."[84] The Court also rejected the "specifi[c] and uniquely attributable" test that a minority of courts followed as too "exacting."[85] Rather, the Court nodded to the majority of courts, which followed a "reasonable relationship"

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[76] *Id.* at 385.

[77] *Id.* at 386; *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (requiring a "nexus between the condition and the original purpose of the building restriction").

[78] *Dolan*, 512 U.S. at 386.

[79] *Id.*; *see also Nollan*, 483 U.S. at 838 ("We can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.").

[80] *See Dolan*, 512 U.S. at 387.

[81] *Id.* at 387-88.

[82] *See id.* at 388.

[83] *See id.* at 389-91.

[84] *Id.* at 389.

[85] *Id.* (alteration in original).

test.[86] The Court determined that such a test, which it termed a "rough proportionality" test (in order to avoid confusion with equal protection scrutiny), "best encapsulates what we hold to be the requirement of the Fifth Amendment."[87] The standard of rough proportionality defined by the Court requires an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[88]

Having determined that the city met the initial requirement of the *Nollan* essential nexus test, the Court next applied the "rough proportionality" test to the impact of the proposed development. As to the city's requirement that Dolan dedicate a floodplain, the Court agreed that the increase of impervious surfaces would increase storm water flow, but found no logical reason why the floodplain needed to be public.[89] The Court thus determined that the floodplain easement bore no reasonable relationship (i.e., was not roughly proportional) to the impact of Dolan's development.[90] As to the bicycle and pedestrian pathway easement, the Court found that the city made no quantifiable demonstration that the development would actually increase traffic demands.[91] As a result, both conditions exacted here did not meet the rough proportionality requirement and therefore violated the Takings Clause. The Court thus established a two-prong analysis, which sets a heightened scrutiny standard for development exactions: the government must demonstrate (1) an essential nexus between a legitimate state interest and the condition exacted; and (2) a rough proportionality between the condition exacted and the impact of the development.

II. MONETARY EXACTIONS: COURTS SPLIT ON EXTENDING *NOLLAN* AND *DOLAN*

Development exactions, like those challenged in *Nollan* and *Dolan*, are as old and common as the practice of zoning.[92] An exaction, loosely defined, is a requirement imposed by a local government on a builder, developer, or owner

[86] *Id.* at 391 ("We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed.").

[87] *Id.*

[88] *Id.*

[89] *Id.* at 393 ("The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").

[90] *Id.* at 394-95.

[91] *Id.* at 395-96 ("No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.").

[92] *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 203 (2006).

as a condition of land-use approval.[93] Exactions come in many forms and can require the individual to make on- or off-site improvements, dedicate land, or make a cash payment to the locality.[94] The cash payment form of an exaction is referred to as a "monetary exaction."

A. *The Rise of Monetary Exactions*

Monetary exactions first began to appear as "in lieu of" payments, that is, cash fees instead of dedications of land or other physical exactions when these traditional exactions were inconvenient, too small, or otherwise did not account for the perceived needs of the development.[95] Over time, monetary exactions have evolved and now typically take the form of fees imposed by a municipality as a condition to approval of a development permit or some other land-use action, such as rezoning.[96] An often-litigated species of monetary exaction is the impact fee: a one-time assessment imposed as a condition of development.[97] "Linkage," an emerging form of monetary exaction, is a fee imposed on a development to fund off-site social programs and policies.[98]

The use of development impact fees is rapidly expanding and is commonly employed by municipalities, thus lending itself as a relevant model for a general discussion of monetary exactions.[99] The impact fee is designed to impose a financial charge on a developer that offsets the municipality's capital expenditures on off-site infrastructure systems rendered necessary by the new development.[100] The impact fee is charged once, at the time of development approval, and is typically determined by a set schedule of administratively or legislatively adopted rates.[101] The schedule itself usually attempts to account for the expected impact of the new development, basing the rate charged on the

[93] *See id.* at 181-82; Taub, *supra* note 28, at 519 ("The exaction concept is very simple – the developer, in return for the 'privilege' of developing his land and thus realizing a profit from governmental approval, agrees to donate to government an amount of land or money needed to provide certain services necessitated by the influx of new residents or employees into the community which his development is said to attract.").

[94] Rosenberg, *supra* note 92, at 181.

[95] *Id.* at 201-02.

[96] *See* Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (discussing Culver City's requirement that a developer pay a $280,000 "mitigation fee" as a condition for approval of a rezoning permit).

[97] *See* Rosenberg, *supra* note 92, at 205-06, 213.

[98] *See* John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, LAW & CONTEMP. PROBS., Winter 1987, at 139, 140 (1987).

[99] *See* Rosenberg, *supra* note 92, at 207.

[100] *See id.* at 206; Taub, *supra* note 28, at 522.

[101] Rosenberg, *supra* note 92, at 205.

square footage of the development or its expected intensity of use (e.g., the number of bedrooms per unit).[102]

Municipalities have drastically increased imposition of monetary exactions generally and impact fees specifically over the last twenty years as the need to fund capital improvements and infrastructure has fallen more heavily on local governments.[103] The reasons for the growth in the use of monetary exactions and impact fees are numerous, including the reduction in state and federal subsidies to local governments and political pressures to resist widespread taxation measures.[104] Furthermore, following the Supreme Court's announcement of heightened scrutiny for traditional development exactions in *Nollan* and *Dolan*, municipalities may have resorted to monetary exactions in the hope of invoking a more deferential standard of review.[105]

As the use of monetary exactions increased over the last twenty years, so too did the rate of litigation challenging these exactions,[106] particularly in the wake of the heightened scrutiny standards set forth in *Nollan* and *Dolan*.[107] The *Nollan* and *Dolan* decisions left many questions open, not the least of which is, In what situations outside the particular facts of *Nollan* and *Dolan* will the heightened scrutiny standard apply?[108] Almost immediately litigants began to litigate in state courts whether the heightened scrutiny standard would apply to impact fees and other types of monetary exactions.

B. *Courts Extending Heightened Scrutiny to Monetary Exactions*

Only days after the *Dolan* decision, the Supreme Court first opened the discussion over whether monetary exactions would be subject to heightened scrutiny when it granted certiorari in *Ehrlich v. City of Culver City*.[109] The grant of certiorari vacated the California Court of Appeal decision and

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[102] Taub, *supra* note 28, at 522.

[103] *See* Rosenberg, *supra* note 92, at 208.

[104] *Id.*

[105] *See infra* Part II.C (discussing cases in which the court refused to extend *Nollan* and *Dolan* heightened scrutiny to monetary exactions).

[106] *See* Rosenberg, *supra* note 92, at 228-29.

[107] *See id.* at 255-59.

[108] Another important question left open after *Nollan* and *Dolan* is whether the heightened scrutiny standard applies only to adjudicative decision making or also when a legislative determination is made. *See, e.g.*, Ball & Reynolds, *supra* note 21, at 1561-62 (recounting the split among courts on this issue); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 391 (2002) (indicating that courts have been "deeply divided over the issue"). This important point remains open even after the *Lingle* decision, *see* Daniel J. Curtin, Jr. et al., *Exactions Update: The State of Development Exactions After* Lingle v. Chevron U.S.A., Inc., 38 URB. LAW. 641, 646-47 (2006) (observing that the *Lingle* Court limited its ruling to "adjudicative physical exactions"), but is immaterial to the analysis in this Note.

[109] 512 U.S. 1231 (1994).

remanded the case "for further consideration in light of *Dolan v. City of Tigard*."[110] Following the remand order, the Court of Appeal reaffirmed its ruling in favor of Culver City, causing the Supreme Court of California to grant review.[111]

In *Ehrlich*, a landowner-developer applied for a permit to build a condominium complex on a site where he once owned a recreational facility.[112] Concerned about the loss of the site as a recreational facility, the city granted the landowner-developer's application, but imposed a $280,000 fee to be used for additional public recreational facilities.[113] The landowner-developer challenged this monetary exaction as an unconstitutional taking.[114]

The California Supreme Court began its opinion by interpreting California's procedures for challenging exactions under the Mitigation Fee Act's "reasonable relationship" language as coextensive with the "rough proportionality" standard of *Dolan*.[115] The court then provided an expansive interpretation of the applicability of the standards set forth in *Nollan* and *Dolan*:

> In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address [leveraging] in land use "bargains" between property owners and regulatory bodies – those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context – where the individual property owner-developer seeks to negotiate approval of a planned development – that the combined *Nollan* and *Dolan* test quintessentially applies.[116]

Under this broad reading of *Nollan* and *Dolan*, the California Supreme Court concluded that the heightened scrutiny standard espoused in *Nollan* and *Dolan* applied to the monetary exaction at issue.[117]

The court next sought to justify its conclusion by carefully reviewing the *Nollan* and *Dolan* decisions.[118] The court determined that

> it matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction. In

[110] *Id.* at 1231.

[111] Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996).

[112] *Id.* at 434.

[113] *Id.* at 434-35. The city also required an additional "art in public places" fee, which was upheld by the Supreme Court of California on the ground that it was "not a development exaction of the kind subject to the *Nollan-Dolan* takings analysis." *Id.* at 450.

[114] *Id.* at 435.

[115] *See id.* at 437.

[116] *Id.* at 438.

[117] *Id.* at 439.

[118] *Id.* at 444-47.

> 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 in either case.[119]

Thus, for the California Supreme Court, the crux of the issue is not whether the exaction imposed is a monetary "dedication" versus a land dedication; rather, the *real* issue is whether the exaction was imposed through a generally applicable legislative program, which would deserve deference, or whether it was imposed adjudicatively as a special, discretionary permit condition for an individual.[120] The court held that when an exaction, whether possessory or monetary, is imposed pursuant to a discretionary, administrative determination, rather than pursuant to a generally applicable legislative program, the heightened scrutiny standard of *Nollan* and *Dolan* applies.[121]

Applying these standards to the monetary exaction at hand, the court concluded that the city met the *Nollan* "essential nexus" requirement because ensuring adequate public recreational resources is a legitimate interest which the recreational fee achieves.[122] On the limited record available, however, the court determined that there was not enough evidence to demonstrate that the city had met the *Dolan* "rough proportionality" standard.[123] The fee that could be constitutionally imposed, the court opined, "must take into account any relative benefit that plaintiff's project would contribute to the public interest for which the fee is imposed," in addition to being tied closely with the actual impact of the owner-developer's change in land use.[124] The court thus remanded the case to the lower court to determine what fee, if any, would be roughly proportional to the impact of the development.[125]

Other courts have followed California's lead in subjecting monetary exactions to the heightened scrutiny standards of *Nollan* and *Dolan*.[126] Illinois,

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[119] *Id.* at 444.

[120] *See id.* at 447.

[121] *Id.* According to the California Supreme Court, *Nollan* and *Dolan*'s heightened scrutiny standard acts "'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,'" *id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)), and applying the standard to all administrative, discretionary determinations, regardless of whether the exaction imposed is a dedication of land or a monetary imposition, better achieves this goal than restricting *Nollan* and *Dolan*'s application to possessory exactions. *See id.*

[122] *Id.* at 448.

[123] *Id.* at 449.

[124] *Id.*

[125] *Id.* at 449-50.

[126] *See* Daniel J. Curtin, Jr. & W. Andrew Gowder, Jr., *Exactions Update: When and How Do the* Dolan/Nollan *Rules Apply?*, 35 URB. LAW. 729, 733-38 (2003); Rosenberg, *supra* note 92, at 258-59. Some state courts have determined, contrary to the *Ehrlich* court, that the *Nollan* and *Dolan* heightened scrutiny standard applies equally to impact fees imposed either adjudicatively or legislatively. *See, e.g.*, Town of Flower Mound v. Stafford

Ohio, Oregon, Texas, and Washington are among the states that apply *Nollan* and *Dolan* heightened scrutiny to monetary exactions.[127]

C. *Courts Declining To Extend Heightened Scrutiny*

Other courts have ruled that the *Nollan* and *Dolan* heightened scrutiny standard does not apply to monetary exactions at all.[128] For example, the Ninth Circuit, which encompasses California, is one of the federal circuits that has embraced a narrower view of *Nolan* and *Dolan*.[129] Curiously, this has created two different rules within California: the liberal *Ehrlich* approach for California state courts, and a narrow Ninth Circuit approach that restricts *Nollan* and *Dolan* to the context of adjudicative, physical exactions for the federal courts right across the street.[130] In addition to the Ninth Circuit, the Tenth Circuit, Arizona, Colorado, Kansas, and Maryland have also ruled that the *Nollan* and *Dolan* heightened review standard does not apply to monetary exactions.[131]

Krupp v. Breckenridge Sanitation District, for example, squarely presented the question of whether an impact fee would be subject to the *Nollan* and *Dolan* analysis.[132] The Breckenridge Sanitation District, a special district providing wastewater services, assesses a one-time Plant Investment Fee (PIF) "designed to defray the cost of expanding the District's infrastructure as

Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004). The distinction between adjudicative and legislative programs imposing monetary exactions, however, is unimportant for the purposes of this Note, which only seeks to address the viability of applying *Nollan* and *Dolan* heightened scrutiny to monetary exactions *at all* after the *Lingle* decision.

[127] *See* N. Ill. Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384, 388-89 (Ill. 1995); Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000); Rogers Mach., Inc. v. Washington County, 45 P.3d 966, 979-80 (Or. Ct. App. 2002); *Town of Flower Mound*, 135 S.W.3d at 639-40; Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172, 175 (Wash. Ct. App. 2000).

[128] *See* Curtin & Gowder, *supra* note 126, at 734 & n.36; Rosenberg, *supra* note 92, at 256-57.

[129] *See* San Remo Hotel L.P. v. S.F. City & County, 364 F.3d 1088, 1098 (9th Cir. 2004); Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 874-75 (9th Cir. 1991) (holding that *Nollan* did not change the level of scrutiny to be applied to regulations that are not physical encroachments on land).

[130] *See* Matthew S. Watson, Note, *The Scope of the Supreme Court's Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions*, 20 WHITTIER L. REV. 181, 201 n.191 (1998).

[131] *See* Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578-79 (10th Cir. 1995); Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999-1000 (Ariz. 1997); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695-98 (Colo. 2001); McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995); Waters Landing Ltd. P'ship v. Montgomery County, 650 A.2d 712, 724 (Md. 1994).

[132] *See Krupp*, 19 P.3d at 689 n.1.

development increases demand for the District's services."[133] The PIF is assessed against all new development and must be paid before the Town of Breckenridge will issue a building permit or certificate of occupancy for a new building.[134] The assessment is calculated according to a conversion scale which varies depending on whether the development is for long-term residences (such as single family homes and duplexes) or short-term residences (such as apartments and condominiums).[135]

The Krupps sought to construct a townhouse complex within the District consisting of both duplexes and triplexes.[136] The District informed the Krupps that the duplexes would be assessed for a PIF at the lower long-term residence rate, but that the triplexes would be assessed at the higher short-term residence rate.[137] The Krupps appealed the assessment to the District's Board of Directors, arguing both that all units should receive the same assessment and that the PIF assessment was subject to a *Nollan* and *Dolan* takings analysis.[138] The Board of Directors approved the assessment and the Krupps paid it "under protest."[139]

After paying the assessment under protest, the Krupps then renewed their *Nollan* and *Dolan* takings argument in a series of appeals that ultimately led to a review by the Supreme Court of Colorado. In addressing the Krupps' argument, the court determined that the District acted in a legislative capacity in imposing the PIFs.[140] It characterized the PIF as a service fee subject only to the requirement that it be "reasonably related to the overall cost of the service."[141] Based on the record, the court determined that the difference in the rates set by the Board was rational and "reasonably related to the specific government service of providing wastewater collection and treatment to new developments within the District."[142]

Turning to the Krupps' *Nollan* and *Dolan* argument, the court delineated two opposing extremes of the takings spectrum:

> A taking unquestionably occurs when an entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property. There is no taking, however, where the government implements a land use regulation that "substantially

[133] *Id.* at 691.

[134] *Id.*

[135] *Id.* The conversion scale did not include a conversion category for triplexes, but authorized the District Manager to assign an appropriate calculation of the rate while keeping the legislative fee design in mind. *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 691-92.

[139] *Id.* at 692.

[140] *Id.* at 693.

[141] *Id.* at 693-94.

[142] *Id.* at 694.

> advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land."[143]

Between these two extremes, the court opined, fall development exactions which are subject to the heightened "essential nexus" and "rough proportionality" analysis enunciated in *Nollan* and *Dolan*.[144] The court, however, found *Nollan* and *Dolan* inapplicable to this case.[145]

The court first distinguished the PIF from the exactions at issue in *Nollan* and *Dolan* on the ground that the PIF was a legislative determination.[146] The court characterized *Dolan* as distinguishing between legislative land-use determinations, typically sustained against constitutional challenge, and adjudicative determinations to place conditions on an individual developer's permit, which are subject to heightened review.[147] The court also cited *Ehrlich* in support of this distinction.[148] Noting that adjudicative determinations pose a greater threat of "leveraging or extortion," the court surmised that under "a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions as a condition of development."[149] Thus, a legislatively imposed fee is "critical[ly] differen[t]" from a "specific, discretionary adjudicative determination" in that "the risk of leveraging or extortion on the part of the government is virtually nonexistent."[150] Since the fee schedule determining the PIF was legislatively enacted and the administration of that schedule by the District Board did not constitute an adjudicative activity, the court concluded that the "PIF assessment on the Krupps' development, then, is different from the exactions subject to *Nollan* and *Dolan*, both in its creation and in its reach."[151]

The court next distinguished *Krupp* from *Nollan* and *Dolan* on the ground that the PIF was "purely a monetary assessment rather than a dedication of real property for public use."[152] For guidance on whether *Nollan* and *Dolan* extend to monetary exactions, the court turned to the Supreme Court's pronouncements in *City of Monterey v. Del Monte Dunes*: "The Supreme Court rejected the applicability of *Nollan* and *Dolan* . . . noting that 'we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the

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[143] *Id.* at 695 (citation omitted) (alterations in original) (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987)).

[144] *Id.*

[145] *Id.*

[146] *Id.* at 696.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* at 697.

dedication of property to public use.'"[153] The court interpreted this language from *Del Monte Dunes* as suggesting that *Nollan* and *Dolan* are to be narrowly construed and only applied to forfeitures of private property for public use.[154] The court also cited the Supreme Courts of Arizona and Kansas in support of this view.[155] Since *Nollan* and *Dolan* only applied heightened scrutiny to real property exactions, the Supreme Court of Colorado concluded that the general development fee at issue would not be subject to heightened scrutiny.[156] Concluding that "the PIF is a legislatively created, generally applicable service fee," the court determined that "it does not fall into the relatively narrow category of development exactions addressed by *Nollan* and *Dolan*."[157]

The court split over *Nollan* and *Dolan*'s application to monetary exactions has not been definitively resolved by the Supreme Court.[158] The Supreme Court did, however, recently decide *Lingle v. Chevron*, which has recast the decisions rendered in *Nollan* and *Dolan*. While helping to clarify the general landscape of regulatory takings doctrine,[159] the doctrinal underpinning that *Lingle* prescribed for *Nollan* and *Dolan* has raised new and interesting questions in the debate over *Nollan* and *Dolan*'s application to monetary exactions.

[153] *Id.* (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999)). In *Del Monte Dunes*, the Supreme Court held the *Dolan* "rough proportionality" analysis inapposite to the *denial* of a development permit, stating that "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Del Monte Dunes*, 526 U.S. at 702. While courts like *Krupp* have read this language as the Supreme Court's way of signaling that it would restrict the holdings in *Nollan* and *Dolan* to the context of physical property dedication exactions, other courts and commentators have rejected this reading. *See, e.g.*, Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 636 (Tex. 2004) (rejecting the Town's argument that *Del Monte Dunes* precludes applying *Dolan* beyond the context of adjudicative property dedication exactions); Breemer, *supra* note 108, at 400 (arguing that *Del Monte Dunes* does not undermine the extension of *Dolan* to monetary exactions since the case merely stands for the "unremarkable principle that *Dolan*'s 'rough proportionality' test does not apply to outright permit denials" and did not address exactions at all).

[154] *Krupp*, 19 P.3d at 697.

[155] *Id.* (citing Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997), and McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995)).

[156] *Id.*

[157] *Id.* at 698.

[158] *See* Curtin et al., *supra* note 108, at 646.

[159] *See infra* notes 193-95 and accompanying text.

III. *LINGLE V. CHEVRON*: CLARIFYING THE BOUNDS OF TAKINGS JURISPRUDENCE

The Supreme Court's decision in *Lingle*, though it has not drawn as much public attention as *Kelo v. City of New London*,[160] is arguably the most important of the three takings cases decided in the 2005 term.[161] Following twenty-five years of academic criticism,[162] the Supreme Court finally untangled the conflation of its due process and takings analyses that had been present since *Agins*.[163] In the process, *Lingle* did a great deal to clarify the landscape of takings law, as a unanimous court finally endorsed four distinct categories of regulatory takings: "[1] a 'physical' taking, [2] a *Lucas*-type 'total regulatory taking,' [3] a *Penn Central* taking, or [4] a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."[164] But in the specific context of *Nollan* and *Dolan*, the Court further muddied the waters, prompting many commentators to declare the death of the *Nollan* and *Dolan* era of heightened scrutiny.[165]

A. *The Decision*

In *Lingle*, Chevron brought a facial challenge against Hawaii's Act 257, which sought "to protect independent dealers by imposing certain restrictions on the ownership and leasing of service stations by oil companies."[166] Chevron alleged that the provision restricting the amount of rent an oil company may charge lessee-dealers "effected a taking" of property.[167] The federal district court and the Ninth Circuit, relying on the Supreme Court's decision in *Agins*, determined that Act 257 effected an unconstitutional taking of Chevron's property because it did not "substantially advance" a legitimate state interest.[168]

The Supreme Court granted certiorari and announced that the *Agins* "substantially advances" formula "has no proper place in our takings jurisprudence."[169] Instead, the Court admonished that the *Agins* test

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[160] 545 U.S. 469 (2005).

[161] *See* Curtin et al., *supra* note 108, at 641.

[162] *See, e.g.*, Jacobs, *supra* note 24, at 463 (criticizing the *Agins* Court's "doctrinally incoherent merger of substantive due process analysis with takings analysis"). *See generally* Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the* Agins*' Tests*, 33 URB. LAW. 343 (2001).

[163] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005) ("We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.").

[164] *Id.* at 548.

[165] *See* sources cited *supra* note 24 and *infra* note 196.

[166] *Lingle*, 544 U.S. at 533.

[167] *Id.*

[168] *Id.* at 534-36.

[169] *Id.* at 540.

"prescribes an inquiry in the nature of a due process, not a takings, test."[170] The court traced the origins of the "substantially advances" language to two zoning regulation precedents sounding in due process.[171] Since *Agins* presented a takings challenge to a zoning regulation, the Court excused its reliance on the seminal zoning cases, *Nectow v. City of Cambridge*[172] and *Village of Euclid v. Ambler Realty Co.*,[173] as "understandable . . . [though] regrettably imprecise."[174]

Because the "substantially advances" due process formula creates a "means-ends" test, asking whether the regulation of private property effectively achieves a legitimate public purpose, the inquiry tells the Court "nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights," or the distribution of that burden.[175] In contrast, the regulatory takings tests pronounced in *Loretto*,[176] *Lucas*,[177] and *Penn Central*[178] answer those exact questions, and thus reveal to the Court which regulations are "functionally comparable to government appropriation or invasion of private property," and thus deserving of Takings Clause protection.[179] Because the "substantially advances" inquiry challenges the regulation's underlying validity – "an inquiry . . . logically prior to and distinct from the question whether a regulation effects a taking" – it should be considered under the Due Process Clause, not the Takings Clause, which "presupposes that the government has acted in pursuit of a valid public purpose."[180] Furthermore, because Chevron only argued the "substantially advances" formula as a takings claim, and sought invalidation of the Act rather than compensation for a taking, the Court held that Chevron's takings claim must fail.[181]

Though presented in simple, straightforward terms, the *Lingle* decision upset a twenty-five year old precedent – that a regulatory taking will be found where the government regulation fails to substantially advance legitimate state

[170] *Id.*

[171] *Id.* at 540-41.

[172] 277 U.S. 183 (1928).

[173] 272 U.S. 365 (1926).

[174] *Lingle*, 544 U.S. at 542.

[175] *Id.* The Supreme Court put it logically: "The owner of a property subject to regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not." *Id.* at 543.

[176] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

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

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

[179] *Lingle*, 544 U.S. at 542.

[180] *Id.* at 543.

[181] *Id.* at 544-45.

interests.[182] According to the Court, the *Agins* "substantially advances" test is an imprecise "commingling of due process and takings inquiries,"[183] and it no longer stands as a valid takings test.[184]

B. *Application to* Nollan *and* Dolan

Recognizing that eradicating the "substantially advances" *Agins* test from the takings context might cast doubt on the continuing validity of some precedents, the Supreme Court sought to preempt those concerns.[185] Specifically, the Court sought to preempt any argument that the *Lingle* decision would upset *Nollan* and *Dolan*.[186] The Court conceded that *Nollan* and *Dolan* drew on language from *Agins*, but admonished that they by no means *applied* a "substantially advances" test.[187] The Court emphasized that under the *Nollan* and *Dolan* "essential nexus" and "rough proportionality" inquiry, a court is not called upon to "question whether the exaction would substantially advance *some* legitimate state interest."[188] Instead, under *Nollan* and *Dolan*, a court should presume the validity of the state interests proffered to justify the denial of the permit, and ask "whether the exactions substantially advance[] the *same* interests."[189] Drawing on language from *Dolan*, the *Lingle* Court cast this inquiry as

> involv[ing] a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[190]

Ultimately, the Court confirmed that the *Lingle* decision "should not be read to disturb [the *Nollan* and *Dolan*] precedents."[191]

C. *The Post-*Lingle *Reaction*

While some property rights advocates lamented the specific holding of *Lingle*,[192] many commentators have hailed it as bringing much needed clarity

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[182] *Id.* at 548.

[183] *Id.* at 541.

[184] *Id.* at 548.

[185] *Id.* at 545. The Court emphasized that no precedents would be disturbed because "in no case have we found a compensable taking based on [a 'substantially advances'] inquiry." *Id.* at 546.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 547.

[189] *Id.*

[190] *Id.* (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

[191] *Id.* at 548.

to takings law.[193] The decision has been lauded for appropriately distinguishing the due process inquiry from takings law, where it had uncomfortably rested for twenty-five years.[194] Furthermore, the decision provided even greater clarity in the field of regulatory takings because the four regulatory takings tests identified in the decision had the support of a unanimous Court for the first time.[195]

The reaction of commentators to *Lingle*'s discussion of *Nollan* and *Dolan*, however, has been decidedly more pessimistic (or optimistic, depending on one's view). Many responding to the *Lingle* decision have predicted the end of the *Nollan* and *Dolan* era of heightened scrutiny,[196] and the foreclosure of any possibility that the *Nollan* and *Dolan* test might be legitimately extended

[192] *See, e.g.*, James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 51-52 ("*Lingle* must be seen as a setback for those interested in reviving constitutional protection for the rights of property owners."); *see also* 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, 355 (2005) ("*Lingle* dealt a blow to property rights advocates who had hoped to use the substantially advance test as a tool to attack government regulation of private property.").

[193] *See, e.g.*, Barros, *supra* note 192, at 349-56; *see also* R.S. Radford, *Just a Flesh Wound? The Impact of* Lingle v. Chevron *on Regulatory Takings Law*, 38 URB. LAW. 437, 438 (2006) (discussing the views of commentators who believe that *Lingle* brings added coherence and clarity to takings law).

[194] *See, e.g.*, Barros, *supra* note 192, at 356 ("*Lingle* has tremendous potential to clarify regulatory takings law through its doctrinal separation of substantive due process and regulatory takings."); Curtin et al., *supra* note 108, at 643 ("In *Lingle*, the Court finally recognized its error in commingling the due process and takings inquiries."). *See generally* Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371 (2006).

[195] *See supra* note 164 and accompanying text.

[196] *See, e.g.*, 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 4:8, at 4-29 (2006) ("The holdings in *Nollan* and *Dolan* survive *Lingle*, but it is now clear that they apply only as a version of the unconstitutional conditions doctrine and only in the context of exactions in the nature of dedications of public easements."); Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 820 (2006) ("Even the care that the *Lingle* Court took to make clear that it was not disturbing either *Nollan* or *Dolan* will likely have just the opposite effect."); Sarah B. Nelson, Case Comment, Lingle v. Chevron USA, Inc., 30 HARV. ENVTL. L. REV. 281, 292 (2006) ("But even without an explicit overruling, *Lingle* fatally undercuts *Nollan* and *Dolan*. . . . Now, lower courts concerned with precedent should hesitate to rely on it, and perhaps disregard *Nollan* and *Dolan* all together."). *But see* Curtin et al., *supra* note 108, at 645-46 ("The Court carefully distinguished the invalid *Agins* formulation from the language it used in *Nollan* and *Dolan*. . . . Courts should continue to apply such heightened scrutiny to determine whether a particular land use exaction effects a taking.").

beyond their limited facts.[197] This Note contends that these predictions are conclusory and premature. As explained below, challenging the constitutionality of monetary exactions under a *Nollan* and *Dolan*–style heightened scrutiny analysis, even as reformulated within the doctrine of unconstitutional conditions, is still viable post-*Lingle*.

IV. MONETARY EXACTIONS AND *NOLLAN* AND *DOLAN* UNCONSTITUTIONAL CONDITIONS

Those commentators who eschew any principled extension of *Nollan* and *Dolan* post-*Lingle* have done so relying on *Eastern Enterprises v. Apfel*.[198] Specifically, doubters argue that in light of the outcome in *Eastern Enterprises*, a requirement to pay a monetary obligation (such as a monetary exaction in the permitting context) could never form the basis of a takings claim, and therefore a monetary exaction could never be an unconstitutional condition under *Lingle*'s conception of *Nollan* and *Dolan*. To understand this argument, it is useful to review *Eastern Enterprises* and its unique disposition.

A. Eastern Enterprises *and the "Second Majority"*

Eastern Enterprises is an interesting precedent in a line of cases that analyze whether a regulation imposing monetary obligations can ever form the basis of a takings claim.[199] Eastern Enterprises, a coal operator no longer directly operating in the coal industry,[200] challenged the application of the Coal Industry Retiree Health Benefit Act (Coal Act) to the company both as a taking and as a violation of due process.[201] The Coal Act, in an attempt to alleviate the problem of inadequate retirement benefits for former coal workers, assigned liability for the retirement expenses of individual coal workers to coal operators based on a set formula.[202] Under the scheme established by the Coal Act, the Commissioner of Social Security assigned Eastern Enterprises over one thousand retired miners – a monetary obligation totaling over five million

[197] *See* sources cited *supra* note 24.

[198] 524 U.S. 498 (1998) (plurality opinion).

[199] *See* Brown v. Legal Found. of Wash., 538 U.S. 216 (2003); Phillips v. Wash. Legal Found., 524 U.S. 156 (1998); United States v. Sperry Corp., 493 U.S. 52 (1989); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

[200] Eastern Enterprises left the coal industry in 1965, transferring all of its coal mining liabilities to a subsidiary corporation. In 1987, Eastern Enterprises sold its interest in the subsidiary corporation to a holding company, expressly transferring responsibility for payments to certain benefit plans to that holding company. Though no longer involved in the coal industry, at the time of the Coal Act's enactment, Eastern Enterprises held Boston Gas Company and a barge operator and was thus still considered "in business" under the Coal Act. *See Eastern Enterprises*, 524 U.S. at 516.

[201] *Id.* at 517. Eastern Enterprises also challenged the Commissioner's interpretation of the Coal Act. *Id.*

[202] *Id.* at 514.

dollars for a twelve-month period.[203] Eastern Enterprises brought suit and the Supreme Court ultimately granted certiorari.[204]

The plurality decision issued by the Court held the Coal Act unconstitutional, but the Justices could not agree on a rationale. Four Justices – O'Connor, Rehnquist, Scalia, and Thomas – invalidated the Coal Act as a violation of the Takings Clause, determining that the Coal Act "'permanently deprived [Eastern Enterprises] of those assets necessary to satisfy its statutory obligation.'"[205] Justice Kennedy, concurring in the judgment and dissenting in part, found the Coal Act's extreme retroactive liability to be unconstitutional even "'under the deferential standard of review applied in substantive due process challenges to economic legislation.'"[206] The four remaining Justices – Stevens, Souter, Ginsburg, and Breyer – agreed with Justice Kennedy that the proper analysis rested in principles of substantive due process, but disagreed that the analysis called for invalidation of the Coal Act.[207]

The crux of the disagreement between the Justices concerned whether the statutory obligation to pay money created by the Coal Act could form the basis of a takings claim. Justice Kennedy, in accord to this extent with the dissent, found that it could not.[208] Like the dissent,[209] Justice Kennedy ultimately concluded that the regulatory takings doctrine is limited to when "specific and identified" property rights are at stake.[210] Courts and commentators have thus recognized that a "second majority" emerges from *Eastern Enterprises*: five Justices – Kennedy, Stevens, Souter, Ginsburg, and Breyer – do not think the Takings Clause is implicated by statutory or "ordinary" obligations to pay money that do not operate on specific or identifiable property interests.[211]

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[203] *Id.* at 517.

[204] *Id.* at 519.

[205] *Id.* at 523 (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 222 (1986)).

[206] *Id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part) (quoting Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 639 (1993)).

[207] *Id.* at 554 (Breyer, J. dissenting).

[208] *See id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

[209] *See id.* at 554-55 (Breyer, J., dissenting) (declaring that the Takings Clause is only implicated when the regulation operates on a "specific" or "separately identifiable" property interest or "fund of money").

[210] *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part).

[211] *See, e.g.*, Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001) ("[F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. . . . [W]e are obligated to follow the views of that majority."); Brian M. Hoffstadt, *Retaking the Field: The Constitutional Constraints on Federal Legislation That Displaces Consent Decrees*, 77 WASH. U. L.Q. 53, 95 (1999) ("Under the reasoning employed by Justice Kennedy and the dissenters, contracts not affecting rights in specific property would seem to fall outside the ambit of private property protected by the Takings Clause."); Thomas W. Merrill,

It is this second majority that commentators rely on in proclaiming the inevitable end of any extension of the *Nollan* and *Dolan* heightened scrutiny analysis to monetary exactions.[212] However, as dubious as it already is to rely on a concurrence and dissent from a plurality decision,[213] it is even more precarious to reflexively lump Justice Kennedy's concurrence in with the dissenting view in *Eastern Enterprises* without a more thorough analysis of his reasoning. This Note argues that a thorough explication of Justice Kennedy's concurrence reveals arguments that monetary exactions in the context of conditional permitting could qualify as obligations to pay money which *do* operate on specific or identifiable property interests. Based on Justice Kennedy's reasoning in his *Eastern Enterprises* concurrence, this Note crafts an argument that monetary exactions could form the basis of a takings claim and thus constitute an unconstitutional condition worthy of a *Nollan* and *Dolan*–style heightened scrutiny analysis.

B. *Justice Kennedy's Concurrence*

Justice Kennedy's concurrence to *Eastern Enterprises* ultimately concluded that the Coal Act was a violation of the Due Process Clause rather than the Takings Clause.[214] Characterizing the plurality's takings analysis as "imprecise" and "unwise,"[215] Justice Kennedy catalogued the reasons that he thought the takings analysis employed by the plurality was "incorrect and quite unnecessary" to invalidating the Coal Act.[216] Justice Kennedy's primary point of disagreement with the plurality's takings approach rested with the fact that the Coal Act was not a regulation affecting "specific and identified properties or property rights."[217] Specifically, Justice Kennedy quarreled, the Coal Act

Compensation and the Interconnectedness of Property, 25 ECOLOGY L.Q. 327, 349 n.87 (1998) ("[T]he Supreme Court, by a vote of five to four, agreed that the Takings Clause applies only to interferences with specific assets . . . .").

[212] *See, e.g.*, Echeverria, *supra* note 24, at 10583 & n.52; Jacobs, *supra* note 24, at 482.

[213] While not the subject of this Note, some courts have noted the dubious nature of attempting to rely on concurring and dissenting opinions in a plurality decision. *See, e.g.*, Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254-55 & n.5 (D.C. Cir. 1998). The standard governing the interpretation of plurality decisions was set forth in 1977 in *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the Supreme Court held that when a decision is issued in which "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Notably, the *Marks* decision declares nothing about the weight to be afforded to dissenting opinions upon future interpretations of a plurality decision.

[214] *Eastern Enterprises*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

[215] *Id.* at 540.

[216] *Id.* at 539.

[217] *Id.* at 541.

regulates Eastern Enterprises "without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest."[218]

Justice Kennedy balked at the plurality's approach to the Coal Act as a regulatory taking. He acknowledged that the case-by-case regulatory takings analysis leaves open space for determining when a regulation may become a taking, but warned that "one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake."[219] Justice Kennedy cited numerous cases, including both *Nollan* and *Dolan* (cases he characterized as regarding the "creation of an easement"), to illustrate his point that the takings analysis applies to cases involving "specific and identified properties or property rights."[220] To Justice Kennedy, then, the takings analysis could not properly apply to the Coal Act, which involved no more than "an obligation to perform an act, the payment of benefits."[221] The character of the government's action, a component of the traditional regulatory takings analysis,[222] Justice Kennedy posited, was simply "unlike the act of taking specific property."[223] Justice Kennedy determined that the "Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms," and thus concluded that the Coal Act did not work a taking on Eastern Enterprises.[224]

Because Justice Kennedy determined that the Takings Clause analysis employed by the plurality was "incorrect and quite unnecessary for decision of the case," he instead determined that the Coal Act's extreme retroactive liability violated principles of substantive due process.[225] While Justice Kennedy's rejection of a takings analysis for the Coal Act aligns him with the dissent as to the applicable doctrine for resolving the case at hand (thus the "second majority"), it is hasty to resolve all future possible applications of his opinion without applying his reasoning at face value.

The California Court of Appeal recently did exactly that when it considered Justice Kennedy's concurring opinion from *Eastern Enterprises* as a guide to

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[218] *Id.* at 540.

[219] *Id.* at 541. Furthermore, for Kennedy, the already amorphous nature of the regulatory takings doctrine counseled against extending the doctrine to cases not affecting specific property interests. *Id.* at 542.

[220] *Id.* at 541.

[221] *Id.* at 540.

[222] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (listing "the character of the governmental action" as one of the "factors that have particular significance" in determining whether a regulatory taking has occurred).

[223] *Eastern Enterprises*, 524 U.S. at 542 (Kennedy, J., concurring in the judgment and dissenting in part).

[224] *Id.* at 543.

[225] *Id.* at 539, 549-50.

the takings question in *Small Property Owners of San Francisco v. City and County of San Francisco*.[226] Though not a case addressing development exactions,[227] the Court of Appeal employed Justice Kennedy's analysis to address a challenge to a regulation which property owners claimed effected a taking of money.[228] The property owners, small residential landlords, challenged a local ordinance that required landlords to pay a five percent rate of interest on security deposits during a sixteen-month period when money market funds were paying less than five percent.[229] The court distilled the landlords' claim to whether "the City should have to compensate them for the amounts they had to pay tenants *from their own funds* in satisfying the requirement that tenants receive 5 percent interest on their security deposits."[230] But the Court of Appeal noted that Supreme Court decisions have cast doubt on whether a monetary obligation can constitute a compensable taking.[231] Discussing *Eastern Enterprises*, the court pointed out that some lower courts have followed the "second majority," holding that the Takings Clause does not apply to regulations requiring the payment of money, but also noted the limited precedential effect of the plurality decision.[232] Nonetheless, the court read *Eastern Enterprises* as "not expressly rul[ing] that this sort of regulation, although mandating only the payment of money, cannot be subject to a takings clause analysis."[233] The landlords urged, however, that "to the extent the view of the five justices in *Eastern Enterprises* has any precedential value, it is necessarily limited by the scope of Justice Kennedy's concurrence, whereby a monetary obligation is subject to the Takings Clause if the obligation operates upon, alters, or is measured by an identified property interest."[234] The court entertained this argument and posited that the payment required by the ordinance is arguably "measured" by the landlord's real

[226] 47 Cal. Rptr. 3d 121, 128-30 & n.7 (Ct. App. 2006) (analyzing Justice Kennedy's concurring opinion and opining that "[i]n order for the application of the Takings Clause to payments of money to make sense, we must remember Justice Kennedy's reservation in *Eastern Enterprises* that the payment must be in some way linked to real or personal property").

[227] *Id.* at 129 n.6 (noting that appellants cited Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), in support of their argument that the takings analysis applies to payment of a fee, but rejecting any analogy to the case since "[a]n exaction fee is not at issue here").

[228] *Id.* at 126.

[229] *Id.* at 122-23.

[230] *Id.* at 127.

[231] *Id.* at 128.

[232] *Id.* at 128 & n.5.

[233] *Id.* at 129. The court did also note that applying a Takings Clause analysis to regulations requiring the payment of money led to "odd results," i.e., the government may take money, but only if it pays it back. *Id.* at 129 n.6.

[234] *Id.* at 129.

property.[235] Since the trial court had engaged in a takings analysis, the Court of Appeal followed suit, assuming arguendo that the ordinance here could meet Justice Kennedy's limited basis for applying a takings analysis.[236]

Having determined that a fee could be the subject of a takings analysis, the court proceeded to apply the *Penn Central* factors to the case with emphasis on "how the payment affects the payor's real property interest," while keeping in mind "Justice Kennedy's reservation in *Eastern Enterprises* that the payment must be in some way linked to real or personal property."[237] Ultimately, the Court of Appeal concluded that the ordinance did not effect a regulatory taking under the *Penn Central* test because it did not compel the landlords to place the security deposits in an account earning below five percent interest, and thus did not have a compulsory adverse economic impact on appellants.[238] Furthermore, the court held that the ordinance did not undermine any investment-backed expectations of the landlords because the landlords possessed no initial expectation to keep the interest earned on security deposits.[239] Finally, the character of the government action was that of "a regulatory scheme adjusting the benefits and burdens of economic life between landlords and tenants" rather than a physical invasion of property.[240] The court thus concluded that the landlords had not proved a regulatory taking.

Though not addressing development exactions, and ultimately concluding that the ordinance at issue did not rise to the level of a taking under the *Penn Central* analysis, the Court of Appeal's use of Justice Kennedy's concurrence in *Eastern Enterprises* lends support to the argument that this Note advances. Like the California Court of Appeal, this Note concludes that Justice Kennedy's concurrence in *Eastern Enterprises* sets forth the appropriate standard for when a takings analysis is applicable to obligations to pay money. In the following sections, this Note will trace the application of Justice Kennedy's *Eastern Enterprises* concurrence to monetary exactions and set forth the results that follow from such an application.

C. *Justice Kennedy's Analysis Applied to Monetary Exactions*

Justice Kennedy's view of when a takings analysis should be employed focuses on whether "specific and identified properties or property rights" are at

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[235] *Id.* ("It could be argued that the payment required by the Ordinance is 'measured' by the landlord's real property: the payment is a percentage of the security deposit; the deposit is ordinarily gauged by the initial monthly rent and, indeed, may not exceed twice that figure; and the initial rent in turn depends upon the property's value in the rental market. We recognize as well that the Ordinance applies only to landlords, and in that sense bears some relation to appellants' use of their real property.").

[236] *Id.* at 129-30.

[237] *Id.* at 130 n.7.

[238] *Id.* at 131, 134, 136.

[239] *Id.* at 134.

[240] *Id.* at 135.

stake.[241] According to Justice Kennedy's concurrence in *Eastern Enterprises*, the Coal Act was not to be analyzed as a taking because it did not regulate the affected party with regard to its property.[242] In the context of monetary exactions imposed as a condition to approval of a development permit, however, the same cannot be said. A monetary exaction – a condition that a landowner pay a fee to the government in order to receive a development permit or other favorable land-use decision – *precisely* regulates a party with regard to its property. The condition to pay does not even enter the picture until the landowner seeks to develop his physical property. Unlike the Coal Act, which seeks to obligate mine operators to pay fees in regard to their employment practices, a monetary exaction seeks to obligate landowners to pay fees in regard to their property development practices.

Further drawing on Justice Kennedy's language, monetary exactions "operate upon or alter an identified property interest" and are *precisely* "applicable to or measured by a property interest."[243] While a monetary exaction does not seem to expressly "alter" an identified property interest, it certainly does "operate upon" one – the property for which the landowner seeks the development permit. Furthermore, when looking at the common practice with monetary exactions, the fee is also "applicable to" and "measured by" the property interest. The fee is applicable to the property because it would not be charged unless the landowner was seeking to develop his property. The fee itself, generally set by a predetermined schedule, is measured according to the size of the development or the expected intensity of its use.[244]

Justice Kennedy's analysis also places some emphasis on the fact that the Coal Act is "indifferent as to how the regulated entity elects to comply or the property it uses to do so."[245] This point is also true of monetary exactions which do not require that the landowner satisfy the fee from a particular fund or from the property itself. In fact, little restriction exists to keep a landowner or developer from passing the fee forward to buyers or backward to raw land or materials dealers.[246] Though monetary exactions do not require that the fee be paid from a particular, specific or identified fund of money, Justice Kennedy's analysis in no way implies that this single issue is dispositive.[247]

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[241] *See* Eastern Enterprises v. Apfel, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

[242] *See id.* at 540.

[243] *See id.*

[244] *See supra* note 28 and accompanying text.

[245] *Eastern Enterprises*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

[246] *See* Rosenberg, *supra* note 92, at 211-14.

[247] Justice Kennedy's concurrence considered multiple factors in determining whether a specific and identified property interest was at stake, thus invoking a takings analysis. *See* discussion *supra* Part III.B.

Considering the character of the government's action, Justice Kennedy was able to conclude that the "Coal Act neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms."[248] The same simply cannot be said for monetary exactions. A monetary exaction targets a specific property interest – the property for which the landowner seeks a permit. A monetary exaction also depends upon particular property for the operation of its statutory mechanisms, both because the fee may not be levied at all until the landowner seeks to develop the property and because the property itself (its size or intensity of use) will determine the exaction to be levied through the established schedule of fees. While a monetary exaction seems to "simply impose[] an obligation to perform an act"[249] – the payment of a fee – it does so with regard to "specific and identified properties or property rights."[250] Monetary exactions thus fall squarely within Justice Kennedy's contemplation of when a takings analysis should arise in a constitutional challenge to a regulation.[251]

D. *Forming an Unconstitutional Conditions Argument for Monetary Exactions*

When one looks to the reasoning of Justice Kennedy's concurrence in *Eastern Enterprises*, one can see that he did not reject the application of a takings analysis to any and all regulations related to money. Instead, he carefully crafted his approach to distinguish between regulations which "regard" property and those which do not. Concluding that a monetary exaction could not be a compensable taking according to the second majority of *Eastern Enterprises* is, as demonstrated, unwarranted. The further leap, that a monetary exaction could never form the basis of an unconstitutional conditions claim warranting *Nollan* and *Dolan* heightened scrutiny, is also hasty.

Instead, this Note argues that it is best to recognize that the debate remains open. The language of Justice Kennedy's concurrence in *Eastern Enterprises* provides the needed ammunition to those who would continue to challenge monetary exactions under the *Nollan* and *Dolan* framework as reformulated by *Lingle*. According to this reformulation, *Nollan* and *Dolan* are based in the doctrine of unconstitutional conditions, which proscribes the state from requiring a person to give up a constitutional right in exchange for a discretionary benefit. For a monetary exaction to fit within the doctrine of

[248] *Eastern Enterprises*, 524 U.S. at 543 (Kennedy, J., concurring in the judgment and dissenting in part).

[249] *Id.* at 540.

[250] *Id.* at 541.

[251] It is worth noting that because Justice Kennedy did not think the Coal Act merited a takings analysis, he did not perform one in *Eastern Enterprises*. Thus, it is not possible to draw from his concurrence alone how Justice Kennedy would in fact proceed to analyze a contemplated regulation that met the criteria set forth in his concurrence.

unconstitutional conditions, the monetary exaction *itself* must constitute a compensable taking. While many conclude that five Supreme Court Justices have held that an ordinary obligation to pay money cannot form the basis of a takings claim, this simplistic conclusion ignores the plain language of Justice Kennedy's *Eastern Enterprises* concurrence. The arguments set forth above show that whether or not a monetary exaction could form the basis of a takings claim depends on the language and reasoning set forth in Justice Kennedy's concurrence. As demonstrated, a monetary exaction fits within Justice Kennedy's limiting distinctions and could form the basis of a takings claim. Under this analysis, a monetary exaction could constitute a compensable taking and form the basis of an unconstitutional conditions argument deserving of the preserved *Nollan* and *Dolan* heightened scrutiny standard.

CONCLUSION

The debate over monetary exactions and *Nollan* and *Dolan* heightened scrutiny is far from resolved by the doctrinal shift recognized in *Lingle.* In grounding *Nollan* and *Dolan* in the doctrine of unconstitutional conditions, *Lingle* has opened the door to new arguments about monetary exactions and takings – a debate started in *Eastern Enterprises,* but never resolved by the divided plurality. Far from dead, *Lingle* breathes new life into the *Nollan* and *Dolan* precedents.

Commentators have leapt too quickly to conclude that *Lingle* ends the debate over the application of heightened scrutiny to monetary exactions. By lumping Justice Kennedy in with the dissenters in *Eastern Enterprises,* commentators have brushed aside the precision with which Justice Kennedy wrote in distinguishing the takings analysis from the due process analysis – the very approach embraced in *Lingle.* A thorough explication of Justice Kennedy's reasoning in his *Eastern Enterprises* concurrence shows the error in hastily forecasting the end of *Nollan* and *Dolan.* The conscientious, post-*Lingle* challenger will use Justice Kennedy's language from *Eastern Enterprises* to demonstrate how monetary exactions fit within the doctrine of unconstitutional conditions as compensable takings. Despite popular opinion, *Lingle* does not foretell the end of *Nollan* and *Dolan*; the debate over monetary exactions continues.