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**SEMANTIC HYGIENE FOR THE LAW OF
REGULATORY TAKINGS, DUE PROCESS,
AND UNCONSTITUTIONAL CONDITIONS
—MAKING USE OF A MUDDY SUPREME
COURT EXACTIONS CASE**

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An unfortunate amount of semantic confusion currently burdens the constitutional process of balancing private property rights and governmental public welfare protections. The Fifth Amendment contains both a general requirement of “due process,” and a corollary protection against unconstitutional “taking” of property. These are two separate protections, not just one. More than a century after the Takings Clause was drafted, an enigmatic decision, Pennsylvania Coal, expanded the clause to say that government regulations could cause such a diminution of private property value that they could unconstitutionally

* Professor, Boston College Law School. Like hundreds of others, I owe a great debt to Joe Sax for shaping my life in the law and its theme of concern for land and environment—see Zygmunt Plater, *Joseph Sax, A Human Kaleidoscope*, 4 MICH. J. ENVTL. & ADMIN. L. 157 (2014)—as well as this Article. Looking back at Joe’s death in 2014, I decided to revisit the conundrums involved in drawing lines between private property and public civic rights. Sadly, while this Article was in process, our dear colleague Marc Poirier died after a long, brave struggle with cancer. In his last year, he wrote a memo on *Koontz* that helped shape the arguments of this Article, and we dedicate our efforts here, for whatever they may be worth, to the memory of Marc and his years of work. For this Article, we also owe thanks to Joseph Belza, Sonja Marrett, and Nelson Nedlin, of the Boston College Law School’s Class of 2017, and the remarkably deft and gracious staff of the *University of Colorado Law Review*.

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take that property, even with no physical appropriation (which is how the Framers had understood the clause). Having launched the concept of regulatory takings, the Court barely revisited it for another fifty years, while extensively developing general due process doctrine. Then, starting in the 1970s, the Justices began to expand the application of regulatory takings doctrine. But they did little to clarify the distinction between takings and general due process scrutiny. Nor did they clarify the essentially subjective line drawing of the takings inquiry, instead freighting it with new complexities, political agendas, and internal contradictions.

*One particularly inapt result has emerged in the realm of land use regulatory exaction conditions, where a due process inquiry has been maladroitly commingled with takings test language. The Court began to distinguish the two in 2005, but left the resolution half-baked. *Koontz v. St. Johns River Management District*, in 2013, demonstrated the current semantic jumble, taking a basic due process exaction question and discussing it as a takings question. The semantics have resulted in unfortunate consequences. Building upon a factual and conceptual autopsy of the *Koontz* litigation, and noting a strategic semicolon from 1789 in the Fifth Amendment, this Article proposes a number of semantic hygiene clarifications for reviews of exactions and other “unconstitutional conditions”—(1) that judicial review of a permit exaction’s validity typically first must address a takings question—could the permit have been simply denied without excessively diminishing private property value?—if not, no added conditions are justified, but if so, then the further question of the exaction conditions’ constitutionality presents a further, distinct, targeted test based in due process—the Nollan-Dolan test; (2) that further review under Nollan-Dolan, based in substantive due process, applies whenever a landowner challenges the logic of any government-required exaction, whether monetary or not; and (3) recognizing Nollan-Dolan review of exaction conditions as a matter of substantive due process, rather than regulatory takings, fundamentally narrows the remedy options, as well as very usefully clarifies other enduring mysteries of the constitutional balance between public and*

private rights in property, a core issue of modern democratic governance. To serve these goals, this Article includes a suggested Semantic Lexicon of public/private property rights jurisprudence.

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INTRODUCTION

Every so often, the muddled logic and semantics of long-accreted legal concepts cause such puzzlement or dysfunction that courts are jarred into making necessary, fundamental clarifications; at other times, the call for fundamental review necessarily comes from the academy. This Article addresses such a situation where fundamental clarification is necessary. A notable confusion currently haunts a particular area of property rights law—when property owners challenge regulatory *exactions* as unconstitutional conditions, as in the U.S. Supreme Court’s 2013 case *Koontz v. St. Johns River Water Management District*.¹ Exactions jurisprudence presents yet another dimension to a fundamental question in democratic governance—to attempt to define the line between private property rights and regulatory protections of public welfare in a democracy is to explore the fragile balance between individual freedoms and a society’s collective imperatives.

Exactions are conditions routinely attached to government permits when applicants seek permission to take actions that are a privilege rather than due-as-of-right—commonly a property owner’s request to amend, diminish, avoid, or expand existing regulatory specifications. Consider two standard examples: Under some zoning ordinances, a small professional commercial office may be allowed by special permit in a single-family residential zone *only if* extra parking spaces are provided for the adjacent public. Or, under subdivision regulations, a developer may be permitted to record a subdivision deed or subdivision plat map *only if* an array of conditional requirements are certified, often including exactions for required sewerage and utilities, dedication of open space for the public, funding for necessitated public services like school or fire-response facilities, etc.²

In such situations, courts and scholars alike often tend to confuse the semantics of the exactions inquiry, which has its

1. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013); see also Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 *TOURO L. REV.* 403, 416 (2014) (describing regulatory takings doctrine as a mess and *Koontz* as adding to the complexity of the doctrine).

2. See *infra* note 145 and accompanying text. Other similar exactions include development fees, conditional requirements for developers to get the benefit of local tax incentives, etc.

logical base in a due process rational basis review, with the very different concept of a *regulatory takings* excessive-burden review.³ Takings tests, at their canonic base, ask whether a regulated property owner has suffered an unconstitutionally excessive loss of property value. Review of government-exacted conditions, however, asks whether they make reasonable sense, a substantive due process inquiry—asking, in other words, whether there is a logical basis for the particular exaction condition in the particular circumstances being weighed.

Unconstitutional regulatory takings and unconstitutional conditions thus are fundamentally different. When a court has weighed the validity of a regulatory requirement's attached exaction conditions, analytically speaking it has applied two distinct judicial tests—not just one. First, the takings question asking whether the regulation's impact on property value is an unconstitutionally excessive *taking*; and then, second, a specifically targeted substantive due process inquiry asking whether the exactions required for the conditional grant of permission are themselves constitutionally rational.⁴ Over the years, however, judicial opinions have often spliced these two quite different inquiries into an inapt hybrid—with questions of due process rationality being called *takings* inquiries—a merger that serves neither concept well and produces ambiguity, confusion, and dysfunctions in constitutional jurisprudence. The muddled vocabulary that pervades every level of the judiciary remains a core problem that we suggest the academy must at some point try to rectify if the courts cannot do so on their own. This is especially so given the contemporary context of virulent political “deconstruction” assaults against governmental regulations generally, which in

3. Note the language of the Fifth Amendment: “No person shall be . . . deprived of life, liberty, or property, without due process of law; [and, in addition,] *nor shall private property be taken* for public use, without just compensation.” U.S. CONST. amend. V (emphasis added) (and note the significant semicolon, which appears in the original 1789 text of the Bill of Rights, Figure 3 *infra* after note 79). These are two distinct mandates, although the latter, while separate and more specific, analytically sits within the preceding general due process requirements. The Fourteenth Amendment does not contain a Takings Clause. U.S. CONST. amend. XIV. Only incorporation of the Fifth Amendment's Takings Clause through the Fourteenth's Due Process Clause makes it applicable to the states—just one more element contributing to the conflation of the different lines drawn between private property rights and the needs of the public. *Id.* amends. V, XIV.

4. See discussion *infra* Section III.A.

many cases use elaborations of private property rights concepts to attack environmental protection and other public-interest regulatory systems, international and domestic.⁵

The *Koontz* case amply serves to demonstrate this need for “semantic hygiene” clarification.⁶ The extensively scrutinized Supreme Court opinions in *Koontz*, and the cascade of lower court opinions in the case before and after the U.S. Supreme Court decision, provide a prime example of the semantic and functional confusion plaguing the intersection of private property rights and public governance.

Koontz was a 2013 Supreme Court land use decision coming from Florida that scrutinized the common practice of attaching mitigating offsets, exactions, or other forms of specific or general conditions to the permitting processes through which government agencies negotiate and approve or deny private development requests.⁷ Back in 1994 Mr. Koontz

5. Private property resistance to government regulation using the “invalid regulatory takings” rubric has grown in the politics and jurisprudence of the U.S. over past decades. Internationally, too: the regulatory takings debate has relatively recently intruded into the international sphere through previously unprecedented use of “expropriation” provisions in international trade agreements to require nation signatories to pay compensation to corporations that face profit-reducing regulations. In a famous arbitral case under NAFTA, for example, Mexico was forced to pay compensation to a U.S. corporation for preventing it from constructing a facility that posed toxic chemical contamination risks, under a novel expansion of international physical “expropriation” law to extend its compensation principle to “indirect expropriations.” *Metalclad Corp. v. Mexico*, Case No. ARB(AF)/97/1 (NAFTA Aug. 30, 2000); see also Gerard Greenfield, *Metalclad v. Mexico, Toxic Waste and NAFTA*, 90 AGAINST THE CURRENT (Solidarity), Jan.–Apr. 2001, <https://www.solidarity-us.org/node/977> [<https://perma.cc/H8KQ-9TY4>]:

[T]he NAFTA Tribunal for the case of *Metalclad Corp vs. Mexico* ruled in favor of Metalclad, ordering the Mexican government to pay US \$16.7 million in compensation In 1997 the U.S. chemicals giant, Ethyl Corp, used NAFTA’s Chapter 11 to sue the Canadian government for a ban imposed on MMT, a gasoline additive produced by Ethyl which is toxic and hazardous to public health. Ethyl claimed that the ban “expropriated” its assets in Canada Ethyl sued the Canadian government for US\$250 million. A year later, in June 1998, the Canadian government withdrew environmental legislation banning MMT, and paid Ethyl Corp US\$13 million to settle the case. Three more suits are outstanding against the Canadian government, three against the Mexican government and two against the U.S. government

6. We believe the legal profession has long needed an explicit phrase for the conceptual and terminological clarification process so necessary in many areas of muddled jurisprudential terms, and we are only too pleased to provide it: “semantic hygiene.” Let there be light

7. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013).

had applied for a permit to fill and develop wetlands on his property.⁸ Instead of simply denying the request, the state environmental agency suggested that it would approve the permit if Mr. Koontz would grant, or pay for, any of a number of offsetting exactions to mitigate the loss of wetland acreage.⁹ Mr. Koontz, however, refused to consider any of the suggested offsets, so the agency denied the permit and Mr. Koontz sued, alleging a violation of his constitutional property rights.¹⁰ The ensuing judicial treatment lingering over almost two decades fundamentally muddled what that alleged exactions violation should have been called, how it should have been tested, and what remedies were properly available.¹¹

In *Koontz*, the lower state courts had consistently addressed the matter in light of the then-recent decision in *Dolan v. Tigard*, along with the exaction review criteria introduced several years earlier in *Nollan v. California Coastal Commission*.¹² The *Nollan-Dolan* framework has become the standard test of exaction conditions. It directs courts to ask whether required conditions (1) have an “essential nexus,” a causative rational nexus, with the permitting programs’ objectives, and (2) are “roughly proportional” to the potential impact of the proposed projects.¹³

Unfortunately, the *Nollan* and *Dolan* opinions also incorporated incidental language from a prior case, *Agins v. Tiburon*,¹⁴ that spliced due process rational nexus language into its regulatory takings discussion. The *Koontz* trial court accordingly labeled its exactions analysis as a takings test, and found that the conditions proffered to Mr. Koontz effected an invalid “taking.”¹⁵ Subsequent appellate review centered on whether this exaction situation did or did not call for

8. *Id.* at 2592.

9. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1224 (Fla. 2011), *rev'd*, 570 U.S. 595 (2013).

10. *Koontz v. St. Johns River Water Mgmt. Dist.*, No. CI 94-5773, 1997 WL 34854535, at *8 (Fla. Cir. Ct. Oct. 29, 1997) (order granting motion to dismiss).

11. See discussion *infra* Part I.

12. *Dolan v. Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Koontz v. St. Johns River Water Mgmt. Dist.*, No. CI-94-5673, 2002 WL 34724740, at *4–8 (Fla. Cir. Ct., Oct. 30, 2002).

13. *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837.

14. *Agins v. Tiburon*, 447 U.S. 255, 262–63 (1980), with dicta subsequently rejected in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), *infra* notes 17, 111–116, and accompanying text.

15. *Koontz*, 2002 WL 34724740, at *8.

application of the *Nollan-Dolan* test. It glossed over the far more fundamental question, however, of whether the rational nexus test for exactions actually is separate from regulatory takings inquiries (that traditionally turn upon the extent of diminution of property value, now usually assessed under the framework outlined in *Penn Central Transportation Co. v. City of New York*¹⁶).

Midway through the parade of *Koontz* appellate appearances, however, in 2005, another Supreme Court case, *Lingle v. Chevron U.S.A. Inc.*, made a fundamental distinction between due process tests and regulatory takings. *Lingle* expressly rejected the *Agins* decision's mix-up of due process rational nexus language with takings language, a mix-up that the *Nollan* and *Dolan* decisions had incorporated.¹⁷ When deciding *Koontz*, however, both the majority and the dissenters in the Supreme Court failed to maintain that prior course of semantic hygiene in *Lingle*, continuing to conflate the two dissimilar judicial tests when they discussed the application of *Nollan-Dolan* to exactions.

In *Koontz*, Justice Alito issued a deceptively simple holding: "We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money."¹⁸

That summation does not strike us as surprising or inappropriate (although one eminent commentator has attacked the *Koontz* majority's decision to apply the *Nollan-Dolan* test to land-use exactions as "The Very Worst Land Use Decision Ever!").¹⁹ The far greater confusion emerging from the

16. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011); along with *Pennsylvania Coal*, the three-part rubric of the *Penn Central* decision has become the equally canonic regulatory takings citation, emphasizing diminution: *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

17. *Lingle*, 544 U.S. at 540, 542 (rejecting the *Agins* dictum that a takings test also included a test of whether the tested regulation "substantially advances" the public purpose).

18. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013).

19. John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 1 (2014); see also John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573, 574 (2015). As we see it, the application of a *Nollan-Dolan* rational nexus element to monetary as well as physical or title exactions is neither novel nor oppressive upon normal land use regulatory practices. Development fees are a familiar and frequent municipal requirement; subdivision regulation

various judicial opinions in *Koontz*, in the Supreme Court and in the Florida courts before and after, arises in the text beyond the simple words of the Court's majority holding—in the promiscuous manner in which the *Koontz* courts systematically conflated the *Nollan-Dolan* rational nexus inquiry with the rubric of regulatory *taking*.

In the private vs. public rights realm, the *Koontz* case offers a rich lode of fact and confusion for scholars, judges, and practitioners to mine. This Article ultimately uses the landscape and legal process of the case to help resolve the muddied jurisprudential waters, by analyzing the mismatched regulatory takings/unconstitutional conditions inquiries. Part I of this Article presents the facts, administrative, and judicial history of *Koontz* in more detail.²⁰ Part II proposes a course of semantic hygiene emerging from a scrutiny of pertinent case law, including a clarified lexicon of property rights judicial review terminology.²¹ Part III, finally, offers three propositions regarding judicial review of regulatory exactions that subsequently emerge from this analysis, including a fundamental clarification of remedy issues.²² Hopefully, these propositions may clear the jurisprudential fog shrouding exactions, takings, and due process, and help resolve the private rights-public welfare puzzles it harbored.

I. THE FACTS, AND THE ADMINISTRATIVE AND JUDICIAL HISTORY, OF *KOONTZ*

A. *Facts and Administrative History*

Mr. Coy Koontz owned a parcel of land of approximately 14.2 acres adjoining a state highway service road east of Orlando, Florida,²³ the majority of which had been classified as

exactions often involve monetary fees to counter-balance burdens placed upon local government services, etc.; and judicial review of such conditions, though rarely explicitly *Nollan-Dolan* review, is not regarded as unusual or as strict scrutiny.

20. See discussion *infra* Part I.

21. See discussion *infra* Part II, and Lexicon beginning at page 782.

22. See discussion *infra* Part III.

23. See *infra* Figure 1 (depicting Latitude 28°33'52.28" North / Longitude 81°11'16.37" West). Viewed at an aerial image "eye altitude" of 15 miles, the parcel's location East of Orlando appears juxtaposed with extensive suburban development, the adjacent highway interchange, and the various forested wetland

statutory wetlands.²⁴ The case focused on the developable 3.7-acre northern portion of the property situated between the road and a high-tension powerline easement.²⁵ Mr. Koontz wanted to fill in this portion of his property to make it more marketable or to build a strip mall himself.²⁶

Because most of the Koontz property, including 3.4 acres of the northern property, was classified as statutory wetlands, he needed regulatory approval from the St. Johns River Water Management District (“the agency”).²⁷ Mr. Koontz applied for a

extensions of the St. Johns River watershed. The parcel is tributary to the Econlockhatchee River, which in turn flows northward into the St. Johns River. When Mr. Koontz purchased the property in 1972, it comprised a bit less than 15 acres, but in 1987 the state highway department, to build a frontage service road, took under a half acre from the northern section, which left the 3.7 acres proposed for development with excellent road-frontage and highway access (the dead-end of the service road is now home to a large auto dealership complex). The 3.7-acre section can be clearly seen online at an “eye altitude” of 800 feet. *See infra* Figure 1 (noting the area sought to be developed with a smaller, upper, rectangular box).

24. *Koontz v. St. Johns River Water Mgmt. Dist.*, No. CI-94-5673, 2002 WL 34724740, at *2–3 (Fla. Cir. Ct., Oct. 30, 2002). Figure 1 designates the approximate non-wetland areas with diagonal lines. Approximately 1.4 acres in the entire property were non-wetland uplands, mostly in the southerly, undevelopable area. A 0.3-acre segment of this was located along the service road within the 3.7 acre proposed project area. The dimensions of the parcel and portions were described inconsistently through the litigation. The trial court opinion presents the most accurate description of the dimensions so those are used in this Article. *Koontz*, 2002 WL 34724740, at *2–3. A significant recalculation of the wetlands designation—based on the effects of prior canalization—raised questions about classification of the land as wetland but was not part of the Supreme Court proceedings. *See discussion infra* Section I.B.

25. *Koontz*, 2002 WL 34724740, at *2–3; *see* Figure 1 (noting the 3.7-acre area sought to be developed).

26. *Koontz*, 2002 WL 34724740, at *2–3.

27. *Id.* The Florida Water Resources Act of 1972, FLA. STAT. ANN. §§ 373.013–373.813 (West 2018), created a variety of Florida water management districts, including the St. Johns River Water Management District, § 373.069(1)(c), and authorized it to “require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration . . . will not be harmful to the water resources of the district.” FLA. STAT. ANN. §§ 373.069, 373.413. Initially, a project like Koontz’s would require two permits: a Management and Storage of Surface Waters permit (MSSW) for “filling in, excavating in, or drainage of a wetland” pursuant to FLA. ADMIN. CODE ANN. r. 40C-4.04(1), 2(b) 10 (1994), and a Wetland Resource Management permit (WRP) for “dredging and filling conducted in, on, or over . . . surface waters of the state.” (FLA. ADMIN. CODE ANN. r. 17.312.030(1) (1994)). State law changed in 1993 to allow a single Environmental Resource Permit to stand in place of these two permits, but the corresponding regulations did not take effect until 1995. FLA. STAT. ANN. § 373.4131 (West 2018); FLA. ADMIN. CODE ANN. r. 62-330.010 (2013); Respondent’s Brief at 7 n.4, *Koontz v. St. John’s River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (No. 11-1447). Consequently, when Koontz sought permission to fill his lands in

permit to fill the northern 3.4-acre wetland area and offered to give a conservation easement permanently restricting development on the remaining roughly eleven acres of wetlands in the southern interior of the property beyond the powerlines.²⁸



Figure 1. The Koontz Site (solid rectangle lines), with designated upland area (lower dotted line), one-acre fill + existing upland developable area (upper dotted line, schematic), small westerly drainage ditch (dashed vertical), and a high-tension power-line easement (the horizontal double-line).

Complementing its aims of conserving water resources, the agency had a policy of trying to promote appropriately feasible agricultural, industrial, and residential development through its permitting program.²⁹ The agency's staff therefore entered into informal negotiations with Mr. Koontz, suggesting a

1994, he still needed two permits. Respondent's Brief, *supra* at 7 n.4. Due to the similarity between the permits and permitting process, however, the state agency treated them as a single permit application throughout litigation for simplicity's sake. *Id.* This Article will continue as such.

28. *Koontz*, 2002 WL 34724740, at *3.

29. Policy and Purpose, FLA. ADMIN. CODE ANN. r. 40C-4.011 (3) (1983) (repealed 2012).

variety of alternatives that would accommodate an ecologically acceptable measure of development for the property while maintaining the watershed protection objectives of the state wetlands act.³⁰

Given the large proportion of wetlands within the subject parcel, the staff indicated that the district would not approve a permit to fill 3.4 acres of statutory wetlands with only an eleven-acre offset.³¹ Their standard rule of thumb for ecological mitigation of wetland losses called for a conservation easement of roughly ten acres for every one acre filled.³²

In the course of permit discussions, the water district staff suggested *five* acceptable development options, two of which involved potential on-site offsetting mitigation, one open-invitation option, and two options for off-site offsetting mitigation. Mr. Koontz's legal attacks exclusively criticized the two off-site suggestions, ultimately making them the focus of each of the semantically confused judicial opinions that followed in the case, all of which uniformly ignored the potential relevance of the other suggested options.³³

Option 1 (on-site): Mr. Koontz did not need a permit at all if he chose to develop the non-wetland 13,000 square feet of his parcel that lay along the highway spur, a part of his property that had never been designated as statutory wetlands.³⁴ This unregulated stretch of highway frontage potentially had a setting sufficient to generate substantial economic return for his property—in constitutional takings parlance a “reasonable remaining economic use” in spite of the wetlands regulation.³⁵

30. *Koontz*, 2002 WL 34724740, at *3.

31. *Id.*

32. Petitioner's Brief at 2, *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011) (No. SC09-713).

33. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 602–03 (2013).

34. *See* Figure 1 (referencing the line at top right of the parcel).

35. The baseline denominator in a judicial takings review of this option would be the parcel-as-a-whole, the more than fourteen acres that Mr. Koontz purchased (in 1972, for less than \$100,000—*see* Proposed Final Judgment for the Defendant at 39-39, No. CI-94-5673 (Fla. Cir. Ct., Oct. 30, 2002)) upon which he based his investment-backed expectations. *See* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). He received in excess of \$400,000 in the 1980s for condemnation of less than an acre of this land (*see* Proposed Final Judgment for the Defendant, *supra*). In the 1990s he sought to develop more of this property, sparking the at-issue litigation. The only estimation of property value that appears in the litigation record comes from the intermediate Florida appellate court's 2006 calculation of damages—\$477,000 for the entire 3.7-acre

Option 2 (on-site): As a second option, the district would grant a permit for development of one acre of property along the highway if Mr. Koontz set aside the remaining acres of his land as an offsetting conservation easement.³⁶ This acre—43,500-plus square feet of commercially developable highway frontage land—arguably would have given Mr. Koontz an even greater, and constitutionally sufficient, economic return on the private investment, validating the regulatory action.³⁷

Analytically, the existence of these two on-site options could clarify the fundamental distinction between the constitutional inquiries for takings and for exactions.³⁸

area, as valued with all regulations removed. *Koontz v. St. Johns River Water Mgmt. Dist.*, 2006 WL 6912444, at *1–2 (Fla. Cir. Ct. 2006). A current real estate appraisal for one developable acre in that location (one-acre development being one of the options suggested by the regulatory agency) is approximately \$170,660. Telephone interview with Rick Singh, CFA, Orange County Florida Real Estate Appraiser, Office of Rick Singh CFA (Dec. 4, 2017). Taken together, these figures suggest that Mr. Koontz would still have had a substantial overall profit available had he accepted the proffered one-acre development option, particularly in light of his modest initial investment. A less-accessible neighboring site on the same service road has also been beneficially developed with extensive commercial use for a large auto dealership. See Figure 1. The family ultimately sold the entire property in 2007 for \$1.2 million. Personal Representative Deed, Coy Koontz, Jr. to Floridel LLC, June 14, 2007; Property Summary, 12800 E Colonial Drive, Orange County Property Appraiser, <http://www.ocpafl.org/PRC/312223000000046.pdf> [<https://perma.cc/QXN5-T9Y5>]; see, e.g., *Rick Singh CFA Orange County Property Appraiser Florida*, Map Search-12800 E Colonial Dr, <https://maps.ocpafl.org/webmapjs/#> [<https://perma.cc/NK8J-ECQR>].

36. See *Koontz*, 570 U.S. at 602. This one-acre option apparently would have been made up by adding additional fill alongside the 0.3-acre of non-wetland highway frontage. The Court noted that this option would have required draining and leveling portions of the land. (The majority opinion said that the resulting conservation easement offset would incorporate 13.9 acres; for what it's worth—not much—the residuum would more precisely have been 13.2 acres minus 1.14 acre of powerline easement—12 acres—slightly more than the agency's preferred 10:01 ratio offset preference.)

37. In *Palazzolo*, the existence of one buildable lot out of the desired seventy-four was enough to avoid the Lucas “categorical” rule, and the qualities of the wetlands potentially affected supported a finding of no taking. *Palazzolo v. State*, No. WM 88-0297, 2005 R.I. Super LEXIS 108, at *58 (R.I. Super. Ct. July 5, 2005); Patrick A. Parenteau, *Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow's Ear*, 30 B.C. ENVTL. AFF. L. REV. 101 (2002).

38. A court might have fully resolved the case if it found that either of those proposed resolutions would have satisfied the constitutional requirements under the terms of the property value diminution test from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). If the diminution were found to be non-excessive in the relative context, and hence constitutional, the conservation easement in this option would probably have been found to be valid under the *Nollan-Dolan* due process terms.

Presuming that plain enforcement of the permitting regulations would not effect a taking, the proposed on-site exaction would have been a separate, hardly controversial, unconstitutional conditions inquiry.

Option 3 (open-invitation): Third, the water district staff invited Mr. Koontz to suggest a mitigation action proposal of his own choosing, building upon any suggestions from his hydrology expert that would proportionately offset the loss of wetland hydrological and ecological storage on the subject parcel.³⁹ Mr. Koontz apparently took no steps to address this option.



Figure 2. Satellite graphic showing the Koontz site (double ring), the sinuous Econlockhatchee watershed, and the alternative A & B offsite mitigation proposals. “A” represents the proposed drainage ditch corrections at the Little Big Econlockhatchee State Forest. “B” represents the proposed culvert repair at the Hal Scott Regional Preserve.

And finally, the agency proffered two potential *off-site*

39. See *Koontz*, 570 U.S. at 602.

alternatives—and it was these that were virtually the exclusive focus of every judicial analysis in the case.⁴⁰ If Mr. Koontz chose either one of the off-site options, the agency said, he could fill the entire 3.7-acre portion of his land between the powerline and the highway, as he had wished and requested.⁴¹

Option 4 (off-site): One of the proffered *off-site* mitigation options asked that, in addition to the offered eleven-acre conservation easement, he pay for the repair of some crushed culverts at the Hal Scott Preserve, four-and-a-half miles away from the Koontz property in the Econlockhatchee drainage.⁴²

Option 5 (off-site): An alternative suggested off-site mitigation option was that, in addition to the offered eleven-acre conservation, he could fill in some drainage ditches to restore natural wetland storage function at the Little Big Econlockhatchee State Forest, approximately seven miles away in the Econlockhatchee drainage.⁴³

Although the cases do not note the hydrological connection, an aerial view of the *Koontz* parcel's geographic location and the two proposed off-site mitigation options clearly shows their tributary relationship within the unitary Econlockhatchee watershed.⁴⁴

Each of the off-site improvements would have restored natural wetland water flows for marshy terrain estimated at approximately fifty acres.⁴⁵ The acreage benefited by either of the two off-site options, plus the conservation easement, would total sixty-one acres, safely in excess of the ten-to-one rule of thumb ratio for offsetting 3.4 acres of wetlands fill. The agency staff presented evidence, on the other hand, that cleaning out the clogged ditches or repairing the subject culverts would cost as little as \$10,000, in contrast to the substantially increased value of the filled acreage.⁴⁶

40. *See id.*

41. *See id.*; *supra* Figure 2 at A.

42. *Koontz*, 570 U.S. at 602; *supra* Figure 2 at B.

43. *Koontz*, 570 U.S. at 602; *supra* Figure 2 at A.

44. *See supra* Figure 2.

45. *Koontz*, 570 U.S. at 602.

46. *Koontz v. St. Johns River Water Mgmt. Dist.*, No. CI-94-5673, 2002 WL 34724740, at *4 (Fla. Cir. Ct. 2002). This raises the fascinating question of what *Nollan-Dolan* "proportionality" means; as a matter of due process fairness, does it consider the constitutional balancing fairness in terms of proportionality of acreage, or parity of economic burden, or some other quantum comparison? If causality is the basis of the proportionality analysis, then acreage would seem to be the most appropriate consideration. Ironically, if the regulatory takings rubric

The way we read the *Koontz* facts, therefore, is that under the Florida agency's permit process Mr. Koontz received a five-way choice. If he had chosen any of the four agency-proposed options, or had proposed an acceptable invited alternative, he apparently could have proceeded on those terms. But, Mr. Koontz chose not to adopt any of the five. As a result, the permit application did not meet a necessary standard for an exception to the wetlands rules, and the agency voted to deny the permit.⁴⁷

Irritated with the regulatory process's imposition on his plans, Mr. Koontz hired an attorney known for property rights opposition to government regulation, and he challenged its constitutionality.⁴⁸ He later found support from the powerfully financed and backed Pacific Legal Foundation, one of the industry-sponsored "public interest law firms" that in the past several decades have mounted private property challenges to a wide range of government regulations.⁴⁹

B. *Anomalies*

Three less-than-obvious factual complexities potentially cloud the legal analysis of the *Koontz* case as precedent. First, the litigation centered on the constitutional validity of the suggested off-site exactions—reviewing whether they were unconstitutional conditions—but the agency had never required any specific exaction, and as noted, one or more of the options may well have been constitutionally valid.⁵⁰ Arguably,

were applied to the exaction inquiry, the focus would more appropriately be upon the comparative individual burdens to the property owners.

47. *Id.*

48. Telephone Interview with St. Johns River Water Mgmt. Dist., Office of Gen. Counsel (Aug. 26, 2016) [hereinafter Aug. 26 Telephone Interview].

49. See Brief for Pacific Legal Foundation as Amici Curiae Supporting Respondent, *Koontz*, 570 U.S. 595 (2013) (Pacific Legal Foundation filing on behalf of petitioner); Brief for Pacific Legal Foundation as Amici Curiae Supporting Respondent, *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1221 (Fla. 2011) (No. SC09-713). There has long been a consistent, powerfully organized resistance to governmental constraints upon private—especially corporate—property, and the fossil fuel and other extractive industries, following the lead of the 1972 Powell Memorandum, created a series of well-resourced resistance to government regulation. See Oliver A. Houck, *With Charity for All*, 93 YALE L. J. 1415, 1419 (1984); Lewis Powell, Confidential Memorandum—Attack on American Free Enterprise System, U.S. Chamber of Commerce (1972).

50. See *supra* notes 33–46 and accompanying text. Whatever the broader scope of the concept of "unconstitutional conditions" might be, it seems clear that

finding the permitting process unconstitutional should have required a judicial holding that no agency-proffered option was constitutional—i.e., that all five suggested options were constitutionally invalid.

A second anomaly: Mr. Koontz applied for his permit—and the Supreme Court decided the case—on the premise that all but 0.3 acres of the project area were statutory wetlands under the state’s Clean Water Act authority and under the state’s watershed management laws.⁵¹ Koontz, however, had introduced a consultant’s study as evidence in the 2002 trial that argued that a ditch dug in the 1980s along the parcel’s border had artificially lowered the adjoining water table, making much of the parcel no longer definable as wetland.⁵² Ultimately, following a subsequent trial court judgment, the agency accepted the updated hydrology data and closed the file in 2006, giving Koontz a permit to develop his parcel as he had wished and requiring only the 11-acre conservation easement originally offered.⁵³ In effect, all the litigation that thereafter persisted—contesting whether *Nollan-Dolan* was the appropriate test for such off-site monetary exactions—ignored the mistaken data issue (which would have raised the fundamental due process question of whether a regulation is rational when it is based on fundamentally false evidence) and instead focused on determining whether the permitting process had effected a temporary *taking*—presuming that exactions were a *takings* issue.⁵⁴

This raises the third anomaly: throughout the *Koontz* litigation, it was never clear for what harm he sought compensation. No court found that he had suffered a diminution in property value, and he ultimately received a

judicial testing of the constitutional validity of conditional exactions under the *Nollan-Dolan* rule seeks a determination whether they are, or are not, “unconstitutional conditions.”

51. See *Koontz*, 570 U.S. at 600–01; Petitioner’s Brief, *supra* note 32, at 5 n.4. The Court also stated that he owned 14.9 acres. 13.9 acres of which it said were wetlands. *Koontz*, 570 U.S. at 601–02. Actually, at the time of the permit application, Koontz only owned 14.2 acres, 12.8 acres of which the parties believed to be wetlands. *Koontz*, 2002 WL 34724740, at *3.

52. Petitioner’s Brief, *supra* note 32, at 5. See Figure 1, vertical dashed line.

53. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 2003 WL 6072846, at *2 (Fla. Cir. Ct. 2004) (ordering grant of the permit); Affidavit of William C. Fogle, *Koontz v. St. Johns River Water Mgmt. Dist.*, 2006 WL 6931531 (Fla. Cir. Ct. 2006) (saying the permit was finally granted in December of 2005).

54. *Koontz*, 77 So. 3d at 1225.

permit to develop as he wished. The Florida courts assigning compensation apparently did so based on a ten-year “temporary takings” loss of property value that the mistaken hydrology had effected through the protracted permitting process, plus interest for the delay.⁵⁵ But the judicial opinions considering the constitutionality of the permitting process did not discuss the factual hydrological mistake. They only discussed the permitting negotiations that took place. It seems that the courts ordered compensation because they determined that the agency’s suggested off-site conditions failed the *Nollan-Dolan* due process test, but assessed compensation based on a deprivation not actually caused by the proffering of those conditions—but rather caused by the temporary deprivation of property use stemming from the mistaken hydrology facts and Mr. Koontz’s refusal to consider any of the five development options. Although Mr. Koontz possibly could have framed a suit for damages under § 1983 of the Civil Rights Act against the individual responsible for the mistake who thus caused the deprivation, he never pursued that course.⁵⁶

These three anomalies mean that the majority and dissenting Supreme Court opinions in *Koontz* both proceeded upon an understanding of the case’s facts that was in reality quite flawed. Taking the Court’s opinions in *Koontz* and analyzing them on the facts *as the Justices thought them to be*, however, nevertheless allows an analysis of the opinions’ legal logic and implications that is usefully revealing and instructive for the future.

C. *The Koontz Case in the Courts*

From the beginning, the *Koontz* litigation quickly moved

55. *Koontz v. St. Johns River Water Mgmt. Dist.*, 2006 WL 6912444, at *1–2 (Fla. Cir. Ct. 2006).

56. 42 U.S.C. § 1983 (2012). Section 1983 allows parties to sue state officials in their individual capacity for damages for constitutional violations. Section 1983 itself does not require any particular mental state, but bringing a due process clause § 1983 claim generally requires showing more than mere negligence. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). The required showings—that the person acted in their individual capacity under color of state law, caused a deprivation, and with liability greater than mere negligence—would have limited Mr. Koontz’s ability to succeed on such a suit. *See* remedies discussion *infra* notes 213–236 and accompanying text.

beyond the facts to arguments about the appropriate analysis for reviewing the type of exactions at play. Mr. Koontz, focusing on the options that would allow him to fill 3.4 acres, objected to both of the off-site mitigation options and filed suit claiming that the proposed conditions effected a taking.⁵⁷

In his original complaint to the circuit court in 1997, in fact, Koontz's counsel challenged the water district's permit denial process on two separate claims: that it was an unconstitutional regulatory taking and also an unconstitutional violation of his client's due process private property rights.⁵⁸ But at trial and thereafter, the parties only litigated the case as a "regulatory takings" claim.⁵⁹ On the facts, the trial court in 2002 held—in a single sentence—that there had been an unconstitutional regulatory "taking" because the off-site exactions lacked a sufficient *Nollan-Dolan* causative nexus and proportionality showing.⁶⁰ It was while awaiting appeal of that takings determination that the agency reviewed and accepted the corrected hydrology data, developed a new permit proposal based on those new facts, and, pursuant to subsequent court order, issued a permit. A later trial court in 2006 awarded \$376,154 in damages to Koontz, calling it a temporary "taking."⁶¹

But the 1998 trial court that held the agency actions to be an invalid "taking" had not based its determination on a finding of *excessive economic burden or diminution of property value*, the classic regulatory takings inquiry.⁶² Instead, the judge based his finding of unconstitutionality upon on a failure of *Nollan-Dolan* nexus-proportionality in the proposed off-site mitigation conditions.⁶³ The judicial rubric was regulatory

57. *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 561 (Fla. Dist. Ct. App. 1998).

58. Aug. 26 Telephone Interview, *supra* note 48.

59. *See Koontz*, 720 So. 2d at 561.

60. *Koontz v. St. Johns River Water Mgmt. Dist.*, 2002 WL 34724740, at *8 (Fla. Cir. Ct. 2002).

61. *Koontz v. St. Johns River Water Mgmt. Dist.*, 2006 WL 6912444, at *1–2 (Fla. Cir. Ct. 2006). A Florida statute requires an award of damages, attorney's fees, and costs for any takings judgment. FLA. STAT. § 373.617 (2017).

62. *Koontz*, 2002 WL 34724740, at *8.

63. *Id.* at *9–10.

There was neither a showing of a nexus between the required off-site mitigation and the requested development of the tract, nor was there a showing of rough proportionality to the impact of site development. Under this legal approval, the St. Johns District's required conditions of

takings, but the finding of the exactions' unconstitutionality was actually based upon due process nexus rationality.

On appeal of the takings issue in 2009, the Florida District Court of Appeals affirmed the trial court judgment, applying the same semantics—"under the exactions theory of takings jurisprudence, it may not attach arbitrary conditions to issuance of a permit."⁶⁴

When the case came to the Florida Supreme Court, the state high court just attempted to side-step scrutiny of the exactions, holding that the *Nollan-Dolan* test was inapplicable to the off-site conditions because they were monetary (a dubious distinction).⁶⁵ That court too, however, continued to refer to the exactions question as a "takings" issue.⁶⁶

Note the timing: When the trial court's basic findings were made in 1998, applying the exactions test from *Nollan* and *Dolan* that conflated regulatory takings and due process, the U.S. Supreme Court had not yet asserted that the two concepts were separate. That didn't happen until 2005 in the *Lingle* case. Ignoring *Lingle*, however, the 2006, 2009, and 2012 Florida court cases continued to interpret the *Nollan-Dolan* test as a "takings" test.

The conflation continued in the U.S. Supreme Court. Justice Alito wrote the opinion for a five-Justice majority, reversing the Florida Supreme Court's decision regarding the applicability of *Nollan-Dolan*, and holding that the test applies to monetary exactions as it does to physical exactions.⁶⁷ The majority clearly did not like the sound of the agency's proposed off-site conditional permit options and remanded the case to the state courts for a rather unclearly defined "further proceedings not inconsistent with this opinion."⁶⁸ In effect, the majority opinion said "there might be a constitutional violation; we'll let the remand see, applying *Nollan-Dolan* to the

an unspecified but substantial off-site mitigation resulted in a regulatory taking.

Id.

64. St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 9 (Fla. Dist. Ct. App. 2009).

65. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1231 (Fla. 2011); see *infra* text accompanying note 74.

66. *Koontz*, 77 So. 3d at 1222–23, 1230.

67. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013).

68. *Id.*

proposed exactions.”⁶⁹ Throughout the opinion, however, focusing on the proposed off-site exaction options under *Nollan-Dolan*, Justice Alito repeatedly referred to this unconstitutional conditions inquiry as a “takings” issue.⁷⁰

Both the majority and the dissent continued to confound the distinction between takings and exactions. Justice Kagan’s opinion for the usual four dissenters remarkably agreed with some of the Alito premises but thought *Nollan-Dolan* inapplicable on these particular facts.⁷¹ Justice Kagan echoed the Alito majority opinion that *Nollan-Dolan* was a “takings” inquiry but disagreed that the test applied to *monetary* exactions.⁷² In her view, only exactions that would lead to the appropriation of real or private property invoked *Nollan-Dolan*.⁷³

Throughout their focus on the applicability of *Nollan-Dolan* to monetary exactions, moreover, neither the majority nor the dissenters gave any thought to the question of the appropriate remedy.⁷⁴ On remand, the Florida Supreme Court opted to return the case to the district court, which simply reaffirmed its prior holding of an unconstitutional “taking,” upholding the original 1998 trial court decision and a temporary takings remedy under a state takings remedy statute.⁷⁵

The *Koontz* majority decision and dissent have inspired mixed emotions by commentators, some responding with mild satisfaction and others with dismay and aversion.⁷⁶ But virtually all find themselves enmeshed in the basic semantic

69. *See id.*

70. *Id.* at 607–10, 614–15.

71. *Id.* at 619–20 (Kagan, J., dissenting).

72. *Id.* at 619–21.

73. *See id.* at 621–22. While Justice Kagan’s view of the Takings Clause seems to accord better with its original meaning, understanding *Nollan-Dolan* as a form of rationality due process review rather than a takings issue puts her rejection of *Nollan-Dolan*’s relevance to monetary exactions out of step with long-established land use law. Monetary impact fees, which municipalities routinely use, regularly survive rationality review analogous to *Nollan-Dolan* analysis in modern land use practice. *See infra* text accompanying note 202.

74. *See id.* at 614, 619; *id.* at 621 (Kagan, J., dissenting).

75. *St. Johns River Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 398 (Fla. Dist. Ct. App. 2014) (reasserting the judgment the Florida Supreme Court had earlier overturned, affirming the trial court’s choice to use *Nollan-Dolan* inquiry, accepting its application thereof as a “taking,” and applying FLA. STAT. ANN. § 373.617(3) (West 2016)); *see infra* text accompanying note 226.

76. *See, e.g.*, Echeverria articles discussed *supra* note 19.

tangles of the Justices' reasoning. Analytically viewed, we would characterize the *Koontz* case as presenting two separate constitutional property rights issues. First, it presents a regulatory takings issue scrutinizing whether the state agency's permit denial "went too far" as an excessive diminution of Mr. Koontz's property value; and second, whether any of the agency's rejected offset-exaction suggestions sufficiently related in nexus or proportionality to the potential harms of development to satisfy due process. The fundamental mistake that sorely requires corrective clarification, we assert, is to treat these two very different Fifth and Fourteenth Amendment inquiries as the same.

II. SOME SEMANTIC BACKGROUND FOR TAKINGS DOCTRINE

Some background on the evolution of takings review and the advent of unconstitutional conditions exaction cases is useful given the turgid vocabulary and doctrinal overlaps that often occur in property rights litigation. To address that vocabulary specifically, a compilation of proposed clarifications, presented as a "semantic lexicon" of relevant terms and concepts, follows below.⁷⁷

A. *Fifth and Fourteenth Amendments*

The Fifth Amendment demonstrates the shifting mindsets of those leading the nation in the decade following the Revolution and their increased concern for individual liberties, property rights, and mistrust of legislatures.⁷⁸ The two clauses operative in the land use realm—the Due Process Clause, in both its procedural and substantive forms, and the Takings Clause—serve this end by providing individuals a means to protect themselves against the caprice or despotism of government. But as we argue, the takings clause's particular protection is a separate consideration from the rest of the general due process protections, and the distinction dictates the analysis applicable in any particular case.

77. See discussion *infra* Section II.D.

78. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 704–05 (1985).

Note that James Madison, the author of the Fifth Amendment, separated the two clauses with a *semicolon*, not just a comma, reflecting a practical distinction between the specific and the general:

No person shall . . . be deprived of life, liberty, or property, without due process of law**;** nor shall private property be taken for public use, without just compensation.⁷⁹

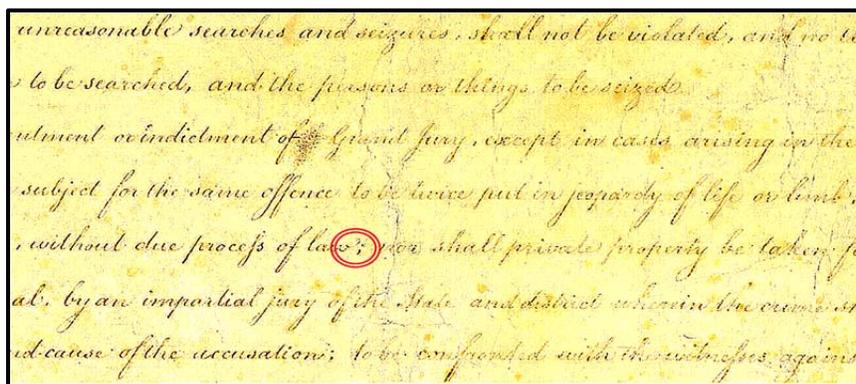


Figure 3. Excerpt from original parchment copy of the 1789 Bill of Rights, of what became the Fifth Amendment, highlighting the strategic semicolon between the general Due Process Clause and the Takings Clause.⁸⁰

79. U.S. CONST. amend. V.

80. *America's Founding Documents, High Resolution Downloads*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/downloads> (last visited Jan. 31, 2018) [<https://perma.cc/6KP9-XQFR>]. The National Archive's transcription of the original copy of the Fifth Amendment of the Bill of Rights reads as follows:

Article the seventh . . . No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

America's Founding Documents, The Bill of Rights: A Transcription, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript> (last visited Jan. 31, 2018) [<https://perma.cc/8LR9-64QX>].

Note that the original numbering of the amendment was as the "Seventh" because the first two original amendments—on allocation and compensation of members of the House of Representatives—were not concerned with citizens'

To Madison, property rights were a creation of positive law rather than natural law, but their role in conflicts between men, and in facilitating tyranny, meant that they needed protection.⁸¹ Nevertheless, Madison saw the protections of the takings clause as narrow, applying only to the federal government and only to physical appropriations.⁸² His contemporaries viewed the takings clause the same way, and the state constitutions that had inspired it had conveyed the same concrete but limited protections.⁸³ All other protections applied more generally, under due process.

Since the early nineteenth century, the Due Process Clause has not only provided procedural protections, limiting how the government can proceed, but also substantive protections, limiting what the government can do.⁸⁴ The track

rights, and thus were removed from initial placement in the Bill of Rights.

81. Treanor, *supra* note 78, at 710; see FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, *THE TAKINGS ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973). For more than seven centuries, from the Magna Carta to 1922, the Anglo-American legal system had understood a “taking” to require compensation only when the government physically took the land. Mere regulation was never a compensable taking; in 1922, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes invented an ahistorical, unprecedented interpretation of the word “take” never dreamed of by the Framers of the Constitution. See *infra* note 98. Justice Scalia (and Justice Thomas) have been longtime asserters of whatever they consider to have been the Framers’ original intent, seeking to delimit constitutional doctrines to their eighteenth century terms. But it is quite clear that the Framers had no thought that regulations could ever be unconstitutional takings. See the history in MELTZ, BOSSELMAN, MERRIAM & FRANK, *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* (1995 ed.). But, situationally inconsistent with principle, both Scalia and Thomas have expressed devotion to the application of the Takings prohibition of the Fifth and Fourteenth Amendments against governmental regulations, irrespective of the Framers’ intent. Professor Jeremy Firestone has noted Justice Scalia’s unapologetic political pragmatism on this point of originalist principle:

. . . I once had occasion to ask former Justice Scalia how he squared his regulatory taking jurisprudence with originalism, and his response was that regulatory takings jurisprudence had been with us for a long time and so he took it from there.

Posting of Jeremy Firestone, jf@udel.edu, to Env'tl. Law Professor Listserv, envlawprofessors@lists.uoregon.edu (June 23, 2017) (on file with author).

82. Treanor, *supra* note 78, at 708.

83. *Id.* at 711; see, e.g., MASS. CONST. of 1780, part I, art. X.

84. See James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 326–27 (1999). In its first interpretation of the Due Process Clause, the Supreme Court affirmed that it carried the same meaning as the phrase “law of the land” used centuries earlier in the Magna Carta, which embodies both procedural and substantive restraints on government. *Murray’s Lessee v. Hoboken Land & Improvement Co.*,

from constitutional text guaranteeing process to substantive protections relies on convoluted, rather anachronistic logic, but years of judicial decisions have cemented it within American jurisprudence.⁸⁵ These include late eighteenth-century state court cases considering the precursors to due process through *Allgeyer v. Louisiana* in 1897, *Euclid v. Ambler* in 1926, *Rowe v. Wade* in 1973, and *Obergefell v. Hodges* in 2015.⁸⁶ Despite oscillations in the Court's willingness to invalidate legislation in its name, through the years substantive due process has come to offer several discrete categorical protections.⁸⁷ Specifically, these include protection against ultra vires actions, actions for an improper public purpose, irrational "arbitrary and capricious" actions, and actions that impose an excessive burden on individuals.⁸⁸

Courts performing substantive due process analysis might not say so explicitly, but review of case history supports the persistence of the above categories.⁸⁹ For example, the Court's

59 U.S. 272, 276 (1855).

85. See Ely, *supra* note 84, at 316–19. Justice Scalia has voiced his opinion on the doctrine generally: "If I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation." *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring).

86. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–99 (2015); *Roe v. Wade*, 410 U.S. 113, 167 (1973); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 397 (1926); *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897); Ely, *supra* note 84, at 327–28.

87. See Zygmunt J.B. Plater, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 707–11 (1989); see also Stephen Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 4 (1991) (presenting the controversial *Lochner* era Court as a transitional period rather than an aberration). Though an opponent to substantive due process, Justice Brandeis's description of the doctrine in *New State Ice Co. v. Lieberman* towards the end of the *Lochner* era foretells its current status. See 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). He said,

We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Id.

88. See Plater, *supra* note 87, at 707–11.

89. Retreating from the liberal seizures of authority in the name of due process by the *Lochner* era Court, some subsequent Courts have avoided the words. Some scholars, likewise, argued that *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and the later case, *Ferguson v. Skrupa*, 372 U.S. 726 (1963),

manner of reviewing congressional authority under the Commerce Clause suggests that review of ultra vires legislation or regulatory action fits within substantive due process.⁹⁰ Personal liberty cases show that regulation can cause such undue or excessive “burdens” that it amounts to a violation of due process. In such cases, the Court tries to determine if the regulation so restricts the ability of certain individuals to exercise a fundamental right that it deprives them of due process.⁹¹ Similarly, land-use regulation cases throughout the twentieth and early twenty-first centuries have expressly described review of proper public purpose as a matter of substantive due process.⁹² The shape of rationality review changed with *West Coast Hotel* and the unofficial end of the *Lochner* era, but it also remained a central component of due process.⁹³ Just a year after *West Coast Hotel*, in *United States v. Carolene Products Co.*, the Court expressed what continues to be the rationality benchmark for economic, non-fundamental regulations, requiring that they be neither arbitrary nor irrational.⁹⁴

ended not just economic substantive due process, but substantive due process entirely. See Richard Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 557, 561 (1988); Daniel Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 218–19 (1987). But it persists, if restrained, “[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended.” *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). *West Coast Hotel* itself contains language indicating the persistence of substantive due process. 300 U.S. at 391, 399 (“[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide.”).

90. See *United States v. Lopez*, 514 U.S. 549, 601 n.9 (1995) (Thomas, J., concurring) (“Nor can the majority’s opinion [that the Act is not constitutionally justified by the Commerce Clause] fairly be compared to *Lochner v. New York* Unlike *Lochner* and our more recent ‘substantive due process’ cases, today’s decision enforces only the Constitution and not ‘judicial policy judgments.’”).

91. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992); *Bellotti v. Baird*, 443 U.S. 622, 647 (1979); *Shapiro v. Thompson*, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting).

92. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 185, 188 (1928); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542–43 (2005).

93. See *West Coast Hotel*, 300 U.S. at 399–400.

94. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). For other examples, see *U.S. v. Comstock*, 560 U.S. 126, 151 (2010) (Kennedy, J., concurring); *Lingle*, 544 U.S. at 548; *Washington v. Glucksberg*, 521 U.S. 702, 728

Rationality review and proper purpose review relate, with the former tending to follow the latter. In considering regulation of non-fundamental rights, courts will accept any conceivable proper public purpose and then require the challenger to prove the irrationality of the means chosen to serve that end. This presumption of constitutionality makes it a relatively deferential standard.⁹⁵ When regulation threatens more constitutionally valued rights, though, courts shift that burden.⁹⁶ In such cases, courts apply intermediate or strict scrutiny and require the government, first, to forward the purpose justifying the intrusion into private rights and, second, to demonstrate the rationality of the means chosen. Depending on the private interest at stake, such heightened scrutiny can amount either to a relatively neutral standard between the parties or even to a presumption of invalidity.

Though only a quick review, this demonstrates the breadth of the Due Process Clause, both in the variety of protections it offers and the diverse circumstances in which they can arise, particularly in comparison to the limited scope of the Takings Clause as originally understood by the Framers. Setting aside the practical challenges inherent in performing substantive due process analysis, this landscape of Fifth Amendment protections leaves a relatively clear distinction between those offered by the Due Process Clause—protecting against arbitrary government action—and the Takings Clause—protecting against uncompensated confiscation of property. The choice of analysis for any particular case should proceed logically from this distinction.

B. Evolution of Takings Doctrine

“A crazy-quilt pattern of Supreme Court doctrine” tracing the line between private property rights and public controls began to take form—one string, one knot, one case at a time, starting in 1922.⁹⁷ In that year, an activist Supreme Court

(1997); *Richardson v. Belcher*, 404 U.S. 78, 84 (1971). *See also Carolene Prods.*, 304 U.S. at 152 n.4 (differentiating between rational basis due process review and strict scrutiny, especially where government actions reflect prejudice against “discrete and insular minorities”).

95. *Carolene Prods.*, 304 U.S. at 152.

96. *Id.* at 152 n.4.

97. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (quoting Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years*

gave birth to regulatory takings doctrine when, for the first time, it struck down a regulatory limitation on the ground that it amounted to an excessive “taking” of property rights without payment of just compensation.⁹⁸ In that case, *Pennsylvania Coal v. Mahon*, Justice Holmes found that a statute limiting mining so intruded on or excessively burdened property rights that it had the same qualitative effect as a physical taking under eminent domain.⁹⁹ By finding that a regulation’s effect could in some cases be so oppressive as to be the equivalent of an eminent domain condemnation, Justice Holmes vastly expanded the umbrella of protections theretofore provided by the constitutional “taking” concept.¹⁰⁰

Justice Holmes’s analysis for such regulatory takings focused on “diminution”—the amount by which the challenged regulation diminishes the value of the property as compared to

of *Supreme Court Expropriation Law*, 1962 S. CT. REV. 63, 63 (1962)).

98. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (applying Fifth Amendment jurisprudence via the Fourteenth Amendment to a state regulation preventing the mining removal of underground coal pillars that were critical in supporting homes, streets, and streams on the land’s surface).

99. *Id.* at 415–16.

100. *See id.* at 415. In finding that a regulation could be so excessive as to amount to a taking in *Pennsylvania Coal*, Holmes said “[w]hen [diminution of value] reaches a certain magnitude, in most if not in all cases there must be an exercise of *eminent domain* and compensation to sustain the act.” *Id.* at 413 (emphasis added). Some jurists thus use the term “eminent domain” to mean the same thing as a constitutionally excessive invalid taking. But as we interpret the grammar and logic of *Pennsylvania Coal*, Holmes was using “eminent domain” in the regulatory setting as denoting the remedy—compensation—not as the cause of action. When a governmental entity files a complaint in a physical or title eminent domain condemnation suit, the government entity is the plaintiff, the property is the defendant *in rem*, eminent domain is the cause of action, and the remedy is issuance of title to the government with the order that the government pay the amount of compensation judicially assessed. In physical/title eminent domain actions, as opposed to cases of constitutionally excessive regulatory takings, the triggering measure of the compensation requirement is completely different in the two settings. In eminent domain, the taking of even one square inch requires compensation (for the actual value of the inch, plus the value of all consequential damages attributable to the governmental take). In regulatory taking cases, on the other hand, courts undertake a subjective diminution-balancing process to determine whether a taking of property value has gone “too far”; substantial amounts of loss of property use and value are possible without any compensation so long as they aren’t found to have gone too far. The options for remedy are also different. In eminent domain cases, just compensation is the automatically granted remedy; when a regulation has been determined to be excessive as applied, however, the government has the option to rescind the regulation, to amend the regulation as applied, or to pay compensation.

if it remained unregulated.¹⁰¹ If regulatory diminution of property value “goes too far,” he cryptically declared, the regulation is invalid.¹⁰² He mentioned no other criterion for takings judgments.¹⁰³ Diminution of property value, weighed against that sphinx-like “too far” criterion, accordingly became the canonic takings test, cited verbatim by decades of courts in a cacophony of erratic decisions as they reviewed the validity of regulatory inhibition of property rights in a wide swathe of cases.¹⁰⁴

Diminution clearly seems a valid and relevant focus for the constitutional test, with a ring of appropriate fairness in tracing the line between private and public rights. Invalid regulatory “takings,” simply put, impose a constitutionally excessive impact on private property interests—meaning it “*goes too far*” in diminishing the private property value, requiring the private property owner individually to bear a burden that should be laid upon the public as a whole. That basic understanding, however, does nothing to define an objective standard for determining what qualifies as “too far.”

Despite the place of *Pennsylvania Coal*’s constitutional takings analysis as the progenitor test of regulatory takings, the internal confusions and significant unacknowledged public

101. See *id.* at 413.

102. *Id.* at 415.

103. See *id.*

104. See *id.* (“When [diminution of property value] reaches a certain magnitude, in most if not in all cases . . . [when it] goes too far it will be recognized as a taking.”) (emphasis added). Note the pioneering semantics of the word “taking” as meaning “unconstitutionally excessive and hence invalid.” Brandeis in dissent said that diminution should be balanced against potential public harm, and that the baseline for diminution should be the whole coalfield, now defined by investment-backed expectations. See *id.* at 417, 419 (Brandeis, J., dissenting). *Pennsylvania Coal*, despite its mystifyingly vague defining line for takings validity, was so long the only game in town for constitutional authority on the point that one of us once wrote a footnote saying that it was so frequently cited that it took up eleven single-spaced pages in the Shepard’s Citation book (an archaic compendium of state and federal citations). That article’s editors declined the opportunity to publish such a footnote; perhaps the current editors will do so as a nod to an archaism. More than one thousand five hundred state and federal cases cite to *Pennsylvania Coal*. See LEXISNEXIS, <https://advance.lexis.com/search/?pdmfid=1000516&crd=b807d7f3-2954-4732-bf57-9c98815b66b5&pdsearchterms=%2C+260+U.S.+393&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqtype=and&pdpsf=&ecomp=qtbd9kk&earg=pdpsf&prid=3891c4fc-38d4-4e1b-ab16-c17d03bf5532> (last visited Nov. 20, 2017) [<https://perma.cc/7QAC-9RLV>] (view “Citing Decisions” on the right-hand side of the page).

and private concerns within that case have continued to haunt, with some measure of relief particularly coming from three subsequent cases—*Penn Central Transportation Co. v. New York City*, *Keystone Bituminous Coal Association v. DeBenedictis*, and *Palazzolo v. Rhode Island*.¹⁰⁵

The canonic 1978 *Penn Central* case best characterizes the primary current constitutional inquiry for regulatory takings.¹⁰⁶ In *Penn Central*, the Court provided guidance for identifying regulations that intrude too far into property rights by adding the *Penn Central* “triad” to *Pennsylvania Coal*.¹⁰⁷ This *Penn Central* triad directs a reviewing court to scrutinize (1) the extent of diminution, meaning the amount of private property loss caused, (2) the degree to which the regulation frustrates “investment backed expectations” as a subset of diminution, and (3) the “character of the government action.”¹⁰⁸ Following a clarification coming from *Palazzolo*, the latter phrase—the “third prong” of *Penn Central*—logically weighs the public protections and harm avoidance that motivated the regulation in the first place into the balance of private property loss.¹⁰⁹ Through this analysis, property owners need to show

105. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633–34 (2001) (O’Connor, J., concurring); *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978). For many years, the Court disingenuously avoided such cases, with the only exception being *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594 (1962). Plater is reminded of what Justice Douglas said on a visit to his class in Tennessee many years ago when he was asked why the Court had largely avoided regulatory takings cases over the decades since *Pennsylvania Coal*. Justice Douglas said, as roughly remembered, “What do you expect? We have no idea how to draw those lines. How would you draw them?” Subsequently, the ascendancy of the privateering Right—generally anti-environmental, anti-regulatory at every level—has spawned a parade of heavily contested up and down regulatory takings cases, and the scholarship in the field has increased dramatically in volume and sagacity, in which no current scholar figures more prominently than our colleague John Echeverria.

106. *Penn Central*, 438 U.S. at 124.

107. *Id.* Similar to *Pennsylvania Coal*, in addition to its regulatory takings analysis, the *Penn Central* Court acknowledged that the disputed government action satisfied other substantive due process requirements, namely the proper public purpose and rationality requirements. *Id.* at 132–33; *Pa. Coal Co.*, 260 U.S. at 415.

108. *Penn Central*, 438 U.S. at 124. As delivered by Justice Brennan, this second consideration is analytically an element of the first. The *Penn Central* “triad” has become clearer over time, but it certainly was not when argued and decided.

109. *Palazzolo*, 533 U.S. at 633–34 (O’Connor, J., concurring) (noting that the third prong of *Penn Central* balances the public “purpose,” i.e., the harms targeted

that the diminution of property value has gone “too far,” and, in general, if the court finds that the regulation leaves the property owner with reasonable remaining property value, or that the potential public harm from the regulated individual action counterbalances the property value diminution, then whatever inhibition of property rights the regulation caused is constitutionally valid without compensation.¹¹⁰

While *Penn Central* seems a logical refining of the regulatory takings notion as left by *Pennsylvania Coal*, just two years later, the Court in 1980 decided *Agins v. City of Tiburon*, which, while upholding the challenged regulation, seemingly added a new test to judge the constitutionality of land use restrictions.¹¹¹ Tiburon had initiated a land use planning process to encourage density control in different areas of the city.¹¹² The Aginses owned a piece of property zoned to allow construction of five separate homes overlooking San Francisco Bay, but they wanted a larger number of saleable units and challenged the restriction.¹¹³

Building on dicta in the *Penn Central* majority opinion,¹¹⁴

by the regulation). A late nineteenth-century ratemaking case described a similar analysis explicitly in the name of due process:

When a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law.

Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 597 (1896).

110. Governing bodies, in defense of their burdensome actions against takings claims, will often point to matters of substantive due process, such as the legitimate public purpose served, their authority to address such purposes under the police power, or the rational manner in which the action addresses the harm, as justification. Beyond per se regulatory takings cases, courts generally give such arguments great credence, supporting the idea that the conceptual origins of regulatory takings lie within substantive due process.

111. *Agins v. City of Tiburon*, 447 U.S. 255, 260–61 (1980).

112. *Id.* at 257.

113. *Id.* Gideon Kanner, a California attorney who has achieved eminence in a career opposing government land use regulations as violations of private property rights, represented Mr. and Mrs. Donald Agins, in challenging zone restrictions limiting development to five (subsequently splendid) single-family residences.

114. In *Penn Central*, the Brennan majority opinion said in passing that “a use restriction may constitute a ‘taking’ if not reasonably necessary to the effectuation

their attorney argued that limiting the number of units effected a regulatory taking because, in combination with alleged bad faith motives by the town, it in effect rendered the property valueless and useless.¹¹⁵ Accepting this position would have forced the Court to go against established zoning precedent.¹¹⁶ The Supreme Court, thus, saw this as an easy case and decided unanimously against the Aginses, finding that they had not suffered an unconstitutional regulatory taking because they had not suffered an excessive loss in property value.¹¹⁷ The Court's decision, however—seemingly as a throw-away—also added further words in support of the ordinance's validity: that the ordinance as applied was not a taking *because it "substantially advance[d]" the legislative purposes*.¹¹⁸

Asking whether a regulation "substantially advances" the regulatory purpose focuses upon the internal logic and rationality of the governmental action—an inquiry that sounds

of a substantial government purpose." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

115. *Agins*, 447 U.S. at 258; see Transcript of Oral Argument at 21–22, *Agins*, 447 U.S. at 258.

116. Transcript of Oral Argument, *supra* note 115, at 55; see *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Euclid v. Ambler*, 272 U.S. 365, 397 (1926).

117. *Agins*, 447 U.S. at 262–63; see also Meeting Notes on *Agins v. City of Tiburon* from Harry Blackmun, Associate Supreme Court Justice (Apr. 18, 1980) (available through the Manuscript Division of the Library of Congress in the Harry A. Blackmun Papers, Box 314).

118. *Agins*, 447 U.S. at 261 (emphasis added). Interestingly, in internal Court discussions over *Agins*, Justice Rehnquist expressed concern about the "substantially advances" language:

[M]y concerns along this line could be completely allayed if you could see fit to put in somewhere in the opinion the following quotation from what you describe as the 'seminal' case of *Euclid v. Ambler*, 272 U.S. 365, 395 (1926):

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

This may just be a difference of nuance, but it seems to me that it allows the states more latitude . . .

Memorandum from William Rehnquist, Associate Supreme Court Justice, to Lewis F. Powell, Associate Supreme Court Justice, on *Agins v. Tiburon* (May 29, 1980) (available through the Manuscript Division of the Library of Congress in the Harry A. Blackmun Papers, Box 314).

in due process. It is not an inquiry into the impact upon the individual property owner, which presumably is the focus of the constitutional question whether private property rights have been “taken.” This language in *Agins* thus for the first time implicitly encumbered the classic takings test embodied in *Pennsylvania Coal* and *Penn Central* with an added element of rational-basis review in addition to the regulatory takings rubric. As discussed later, the Court subsequently overruled the *Agins* “substantially advanced” test, but for a time it hitched even more due process language into the concept of regulatory takings.¹¹⁹

Again, two years later, the Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*, where it addressed a regulation that required installation of a cable box on a private building and held that regulations causing permanent physical occupations of private property per se effect a taking.¹²⁰ Although a regulatory requirement stood at issue in *Loretto*, the direct effect of the regulation was so clearly physical that it conceptually converged with an eminent domain analysis, the original understanding of the Takings Clause prohibiting physical or title takings without compensation. The Court accepted several substantive due process points—that the state had authority to promulgate the challenged regulation, that the regulation satisfied a proper public purpose, and even that the intrusion was small—but it still found that it effected a taking because the government action authorized a *physical* occupation of private property.¹²¹ Based on this understanding, it was the protection of the Takings Clause—and not the protections of substantive due process against ultra vires, improper public purpose, irrationality, or excessive burden—that made *Loretto*-style regulatory takings unconstitutional.

In 1987, in *Keystone Bituminous*, the Court fundamentally reconfigured the diminution analysis of *Pennsylvania Coal*. Without overtly overruling the 1922 case, Justice Stevens took virtually the same facts and law, coming from the same state, the same coal industry, and the same type of coal pillars, and declared that there was no excessive taking because diminution analysis should be based on “the parcel as a whole,” as

119. See discussion *infra* notes 158–166.

120. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

121. *Id.* at 425–26.

Brandeis had argued in dissent in 1922, not just on the regulated portion of the corporate property as Holmes had done and as Rehnquist and Scalia bitterly urged in *Keystone*.¹²²

Five years later, in *Lucas v. South Carolina Coastal Council*, an opinion by Justice Scalia launched another form of per se regulatory taking.¹²³ It held that unless there was a saving basis in pre-existing common law tort or property doctrine, regulations that created a *complete* diminution of property value effected constitutionally invalid regulatory takings.¹²⁴

Thus by 1992, four distinct, coexistent lines of analysis fell under the blanket term of regulatory taking: (1) excessive diminution analysis balanced under the *Penn Central* triad; (2) per se complete diminutions under *Lucas*; (3) per se physical

122. *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470, 497 (1987); *id.* at 517 (Rehnquist, J., dissenting); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting).

123. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Justice Scalia's definition of when his "categorical rule" was triggered was variously stated as a complete loss of value, and elsewhere an implication that a loss of "all economically viable [i.e. profitable] use" of property would likewise be categorically void. For a time, this forceful antiregulatory declamation pushed courts to declare a series of regulations unconstitutional. *E.g.*, *Arill v. Maiz*, 992 F. Supp. 112, 120 (D.P.R. 1998); *Philip Morris v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002). No longer:

Advocates for expanded property rights heralded the Supreme Court's 1992 decision in *Lucas* as the dawn of a new era in which landowners would obtain increased constitutional compensation for the burdens of regulation, and which would in turn discourage regulatory initiatives. The post-*Lucas* era has been a considerable disappointment to property rights advocates, however. Ensuing decisions have confined the categorical takings rule to regulations that result in complete economic wipeouts, a rare phenomenon. On the other hand, courts have expansively interpreted the decision's exemption from compensation for regulations that merely forbid uses prohibited by "background principles" of property and nuisance law. . . . *Lucas's* principal legacy lies in affording government defendants numerous effective categorical defenses with which to defeat takings claims.

Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 321 (2005).

124. *Lucas*, 505 U.S. at 1026 ("A *fortiori* the legislature's recitation of a noxious-use justification [a rationally based execution of a proper public purpose] cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed."). Scalia characterized his new rule as "categorical," but his inclusion of tort and property law balancings make that characterization semantically incorrect.

appropriations under *Loretto*; and (4) regulations that fail to substantially advance legitimate public interests under *Agins*.¹²⁵ Although the first two seem to address the protections imagined of regulatory takings by the *Pennsylvania Coal* Court, and the third addresses the protections guaranteed by the Framers, the fourth skewed the line of takings inquiries in a manner that affected the subsequent exaction condition cases.¹²⁶

C. *Exactions Laden with a Maladaptation of Takings Jurisprudence*

In the 1987 *Nollan* case, the Supreme Court extended the semantic conflation of due process and regulatory takings to exactions.¹²⁷ In that case, the California Coastal Commission granted a homeowner a permit to convert a small seasonal beachfront cottage into a large three-story year-round home on the condition that he dedicate a pedestrian right-of-passage along the beach.¹²⁸ With this right of passage, the Commission intended to facilitate connection between the public beaches to the far right and far left of the property.¹²⁹ The homeowners challenged this condition as a regulatory taking.¹³⁰

Justice Scalia's majority opinion confirmed the legitimacy of exaction conditions but struck down the particular easement exaction in the case.¹³¹ His opinion, citing the "substantially advances" part of the *Agins* holding, said that an exaction attached to a permit will be constitutionally valid if: (1) the

125. See discussion *infra* Section III.B.

126. See discussion *infra* Section III.B.

127. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987).

128. *Id.* at 827–28. Graphically, the agency attorneys poorly presented and argued the logic of the exaction, but it apparently was a tiny piece of a hoped-for easement that would visually present a passage for surfers carrying their boards. They also could have raised a Public Trust Doctrine justification for the passageway, but this raised Scalian hackles leading to a dramatic compromise between him and the dissenters. See Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10637, 10654 (2005).

129. *Nollan*, 483 U.S. at 828.

130. *Id.* at 829.

131. *Id.* at 834–35. Some privateering property rights interests undoubtedly hoped that the Supreme Court through *Nollan* would outlaw the concept of exactions, especially so when they heard that the newest member of the Court, Justice Antonin Scalia, would deliver the Court's decision. Boy, were they surprised.

government agency could have denied the entire permit outright without creating the excessive loss of an invalid taking, and (2) the permit condition had an “essential nexus” with the regulatory purposes being weighed in the permit decision.¹³²

This “nexus test” in *Nollan* required a logical causative nexus between the potential impact of development and the exaction required by the permitting authority. The nexus concept seems completely logical: individually negotiated and applied exactions pose a risk of coercion not present in generally applicable zoning regulations, so protecting private rights in the exaction context requires a somewhat higher standard of rationality scrutiny than in the zoning context.¹³³

Unfortunately, Justice Scalia did not use the phrases “unconstitutional condition” or “substantive due process,” but repeatedly used the word “taking” in orienting his “nexus” requirement.¹³⁴ At that time, the Court still considered *Agins* a good statement of takings law, which probably explained his failure to make the distinction. If the condition lacked an essential nexus with the purpose for the permitting program, it would not advance the permitting program’s legitimate purposes, and thus it would fail the *Agins* test, which had been characterized as a takings test.

In the *Nollan* setting, Justice Scalia could not see how the expansive reconstruction of a house would cause the need for pedestrian passage along the beach parallel to the water’s edge.¹³⁵ The Court struck down the beach easement condition,

132. *Id.* at 834, 835.

133. Amici representing the home construction industry advocated for the rationality-nexus approach to judicial review of exactions that the Court ultimately adopted. Justice Scalia in his majority opinion even cites some of the state cases raised by the amici to support the stricture he requires of the nexus. See Brief of the National Association of Home Builders and California Building Industry Association as Amici Curiae in Support of Appellants, *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (No. 86–133), U.S. S. Ct. Briefs LEXIS 1384. In *South Dakota v. Dole*, the Court employed a similar analysis to uphold a conditional grant of federal funding to the state as a valid exercise of the spending power. 483 U.S. 203, 211–12 (1987). There, the Court approved conditioning interstate highway funding on the state raising its drinking age to twenty-one because it was reasonable in scope, rather than coercive, and related to the federal interests served by the highway program. *Id.* at 207–09. This case arose from a controversy between governments rather than between government and person, correspondingly the analysis did not invoke due process. See *id.* at 205.

134. See *Nollan*, 483 U.S. at 831, 834.

135. *Id.* Although he, surprisingly, said it *would* be constitutional—there

and Mr. Nollan, who had already gone ahead and built his new house, got to keep it without any public easement dedication.¹³⁶ Although this holding was not surprising, it freighted exactions law with the takings label from *Agins*, and inaccurately made *Nollan* a highly derived descendant of *Pennsylvania Coal*.

The 1994 *Dolan* decision added to the *Nollan* nexus concept but likewise failed to separate its inquiry from the regulatory takings rubric.¹³⁷ The owner of a hardware store chain decided to expand her store and redevelop the one-acre parking lot to include a collection of boutiques and other commercial spaces.¹³⁸ The existing store was profitable, but the new plan would be substantially more so. The city planning agency agreed to allow this expansion but required dedications by the owner according to negotiation guidelines set out in the Community Development Code.¹³⁹ Specifically, the city asked for a public strip of protective land along a nearby stream that the new building would severely encroach upon, in order to alleviate flood risk.¹⁴⁰ As a second exaction, the agency required that the property owner provide a bike path so that people coming from a subdivision to the south of the new development would not have to drive there by car, thereby mitigating an increase in traffic flow attributable to the new complex.¹⁴¹

Justice Rehnquist, writing for the majority, struck down the exactions.¹⁴² His opinion did not argue that denying the expansion would have excessively diminished the value of the property—the classic takings question—nor did he deny that the newly expanded development posed a rationally and

would be a sufficient rational nexus—if the agency required Nollan to give public access to a viewing spot upon his land if the house expansion perpendicularly blocked the ocean view of passing tourists! *Id.* at 836.

136. *Id.* at 839–40. Note how this raises an interesting severability issue. *See infra* notes 231–236 and accompanying text.

137. *See Dolan v. City of Tigard*, 512 U.S. 374, 383–91 (1994).

138. *Id.* at 379.

139. *Id.* at 379–80 (citing Cmty. Dev. Code § 18.120.180.A.8: “Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.”).

140. *Id.* at 380.

141. *Id.* at 381.

142. *Id.* at 395–96.

causally related “nexus” to the need for floodwater passage and traffic mitigation. Instead he initiated an additional test of “rough proportionality” beyond the *Nollan* nexus requirement, mandating that exactions relate “both in nature and extent” to the proposed development’s impact.¹⁴³ The city, he argued, had not provided proof that the floodway and bike path exactions were roughly proportional to the need created by the proposed new commercial development (unsurprisingly, because no one had ever before mentioned such a test).¹⁴⁴ Rehnquist, moreover, said that the procedural burden was upon the city to prove this novel proportionality requirement whenever an exaction was “adjudicative” (i.e., based on flexible negotiation), rather than “legislated” (i.e., specifically set out in the text of the ordinance).¹⁴⁵ Other formulations of heightened due process rationality review call for such burden-shifting, and, in some settings, this makes sense as a matter of due process.¹⁴⁶ But *Nollan* did not reach this issue, and such burden shifting neither aligns with the logic of modern land use decision-making, where win-win negotiation is a usual shared goal,¹⁴⁷ nor takes place in regulatory takings analysis.¹⁴⁸ The city, as a

143. *Id.* at 391.

144. *Id.* at 395–96.

145. *Id.* at 391 n.8.

146. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

147. In a wide array of modern land use law settings—planned unit developments, and most other non-Euclidean zoning, as well as in most subdivision regulations—private and public actors flexibly negotiate exaction conditions to achieve win-win optimal arrangements, balancing private and public necessities. Basic land use ordinances generally do not spell out specifically the particular requirements for each individual master permit. Thus if Rehnquist’s burden-shifting standard for “adjudicated” conditions is applied, most land use planning processes would bear the burden of showing constitutionality—i.e., a presumption of unconstitutionality or heightened burden of scrutiny that would have to be overcome in rebuttal. His judicial review distinction between “legislated” conditions and “adjudicated” conditions in *Dolan*, however, does not seem to be generally followed. It may have been based on an Oregon case which made that distinction, *Fasano v. Board of County Commissioner of Washington County*, 507 P.2d 23, 27 (Or. 1973), but that case has subsequently been substantially modified by the Oregon Supreme Court. See *Valley & Siletz R.R. v. Laudahl*, 681 P.2d 109 (Or. 1984) (noting that “quasi-judicial” negotiations are commonplace and fall short of required shifting of the burden of proof of constitutionality); *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980). To assert that the presumption of governmental validity that usually applies during rational basis review did not apply, Rehnquist only cited *Nollan*, which does not actually discuss burden-shifting. *Dolan*, 512 U.S. at 391 n.8; *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 (1987).

148. Rehnquist dealt with Justice Stevens’s dissenting argument that this was

result, had not prepared the previously unrequired analysis, so the Court summarily struck down the conditions.¹⁴⁹

The analysis formed jointly by *Nollan* and *Dolan* has since become the dominant judicial test for deciding if the government has attached “unconstitutional conditions” to a permitting process. Because the Court decided *Nollan* and *Dolan* while the *Agins* “substantially advance[d]” language was still considered a component of regulatory takings analysis, for a time *Nollan-Dolan* also migrated into regulatory takings analysis. Two subsequent Supreme Court cases should have trashed that idea.

Eastern Enterprises in 1998 involved a statute requiring companies to pay into a compensation fund retroactively for employee miners that contracted black lung disease.¹⁵⁰ The Eastern Enterprises corporation challenged the law, arguing that it should not have to contribute for the former employees of a corporate predecessor in interest.¹⁵¹ Subsequently, in a split vote with no majority opinion, the Supreme Court decided in favor of Eastern Enterprises.¹⁵² A plurality opinion said that it was an invalid regulatory taking.¹⁵³ Four dissenters, and Justice Kennedy in concurrence, maintained that it was not a takings case—the substantive due process test applied instead—only differing in whether they saw the facts as showing the necessary nexus relationship between the corporation and the former coal miners to justify forcing retroactive payment.¹⁵⁴

In *Eastern Enterprises*, then, the majority of Supreme

a due process issue by asserting the irrelevant and uncontroverted fact that the Fourteenth Amendment applied the Fifth Amendment’s taking provision to the states. *Dolan*, 512 U.S. at 383 n.5.

149. *Id.* at 395–96.

150. *E. Enters. v. Apfel*, 524 U.S. 498, 504 (1998).

151. *Id.* at 517. Here is the interesting twist: In 1997, one of the authors received a request from an attorney in the Boston law firm that was then representing Eastern Enterprises, asking whether he could informally give advice on “a *regulatory takings* case which we now have in the Supreme Court.” They assumed that any challenge to a regulation affecting their client’s money was a “takings” challenge. When the attorney described the situation, the author demurred. “You don’t have a regulatory takings case. You have a substantive due process case: You’re dealing with the *propriety of a retroactive monetary assessment*, and that’s substantive due process.” So the firm made that argument in the Supreme Court, in addition to a “takings” argument.

152. *Id.* at 538.

153. *Id.* at 504.

154. *Id.* at 539 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting).

Court Justices recognized that the monetary funding issue did not speak to regulatory takings. Justice Kennedy's concurrence baldly stated that:

In my view, . . . the relevant portions of the Coal Industry Retiree Health Benefit Act . . . must be invalidated as contrary to essential *due process* principles, without regard to the Takings Clause of the Fifth Amendment. I concur in the judgment holding the Coal Act unconstitutional but disagree with the plurality's Takings Clause analysis, which, it is submitted, is incorrect and quite unnecessary for decision of the case.¹⁵⁵

The dissenters, too, argued that due process was indeed the issue, not takings law, and that a sufficient nexus relationship did exist to support a retroactive funding requirement. Justice Breyer wrote for the four dissenters, saying, "there is no need to torture the Takings Clause to fit this case The Due Process Clause . . . safeguards citizens from arbitrary or irrational legislation."¹⁵⁶

So by actual count, five of the nine Justices in *Eastern Enterprises* based their opinions on a tightened definition of what was properly a due process question, refusing to define it as a taking issue.¹⁵⁷ Carefully parsed, the five votes in the split Kennedy-Breyer concurring and dissenting opinions constitute a majority of the Court limiting the Takings Clause to the canonic *Pennsylvania Coal* and *Penn Central* formulations, with a distinctly different role for the rationality and causation requirements of due process.

Seven years later, in *Lingle v. Chevron U.S.A.*, the Court

155. *Id.* at 539 (Kennedy, J., concurring) (emphasis added). He also stated, [T]he Takings Clause . . . has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."

See id. (quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 314-15 (1987) (emphasis and internal citations omitted)).

156. *Id.* at 556 (Breyer, J., dissenting).

157. *Id.* at 539 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting).

again came close to a decisive separation of the mistaken conflation of takings and due process concepts.¹⁵⁸ In that case, the energy company challenged a Hawaii law limiting the company's right to charge excessive rents to its dealers who leased company-owned service stations.¹⁵⁹ Chevron argued that the statute was "an unconstitutional regulatory taking" of its property rights, not because the company alleged an excessive diminution of its property value, but because it "did not substantially advance proper state interests," using the *Agins* language.¹⁶⁰ Chevron did not allege a separate due process violation, just a claim of invalid regulatory taking under the *Agins* formulation.¹⁶¹

The *Lingle* Court, in a unanimous opinion written by Justice O'Connor, held that this was not an invalid regulatory taking because Chevron had not alleged or proved an excessive diminution of its property value.¹⁶² Most significantly, the *Lingle* Court declared that the *Agins* "substantially advanced" factor was not a valid takings test.¹⁶³ Instead, the Court specified that takings were to be judged by the excessive-loss test of *Pennsylvania Coal* as channeled by *Penn Central*, which the regulated corporation had not pleaded.¹⁶⁴ Since Chevron

158. 544 U.S. 528, 540, 542 (2005).

159. *Id.* at 533.

160. *Id.* at 544.

161. *Id.*

162. *Id.* at 548.

163. *Id.* at 542. ("The 'substantially-advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. [T]he Due Process Clause is intended, in part, to protect the individual against the exercise of power without any reasonable justification in the service of a legitimate governmental objective. But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998))). Interestingly, Justice Scalia, whose inopportune use of the "substantially advances" language in *Nollan* initiated much of the subsequent confusion, may have laid the foundation for this change in *Lingle* with his opinion in *Lucas*. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023–26 (1992) (internal citations omitted) ("Harmful or noxious use' analysis was, in other words, simply the progenitor of our more contemporary statements that "'land-use regulation does not effect a taking if it 'substantially advances legitimate state interests' . . . it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation.").

164. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005).

had offered neither a proper takings argument nor a proper due process argument, the Court dismissed its claims on summary judgment.¹⁶⁵

The *Lingle* case, properly understood, should have broadly clarified the semantic confusion reflected in the *Nollan* and *Dolan* decisions as instigated by the *Agins* conflation. But it did not. Subsequent courts should have discerned from *Lingle* that only those tests identifying and weighing property value diminution are regulatory takings inquiries. Invalid regulatory takings occur when regulations fail the tests epitomized by *Penn Central* and *Palazzolo*, or by *Lucas* if zero property value remains. Rational-basis due process inquiries, using rubrics like “substantially advanced,” are not regulatory takings tests. After *Lingle*, it should have been clear that if challengers wish to advance due process claims, they necessarily have to plead and prove them as such. The *Lingle* Court, however, understandably did not think to go off on a side note retroactively removing the takings label from *Nollan-Dolan* exaction reviews; *Lingle* was not an exactions case. Subsequent exaction cases thus have failed to note the sharp distinction between due process and regulatory takings that the *Lingle* decision had made,¹⁶⁶ and courts and practitioners alike continue to speak of the “unconstitutional conditions” doctrine framed in *Nollan* and *Dolan* as a “takings” issue rather than a due process inquiry.

D. A Semantic Lexicon of Public Authority/Private Property Rights

Given the continuing jumble of rhetoric in this area, the following “semantic lexicon” aspires to clarify some stable definitions and explanations for major relevant terms in contemporary constitutional property rights controversies, addressing one of the most complicated challenges of modern democratic governance, the balance between public and private rights—between governmental power in the service of a collective public interest, juxtaposed against private individual rights.

165. *Id.*

166. *Id.* at 546.

1. “Takings” Semantics

Taking: The concept of governmental “taking” has two very different applications, physical, and regulatory. But note at the outset that the word “taking” has rather ambiguous meanings. In both the physical and regulatory setting, governmental action takes away the private property rights of corporate or individual owners. In the *physical* setting, virtually every case requires compensation. In the *regulatory* setting, on the other hand, in many or most cases the taking is not unconstitutionally excessive, so no compensation has to be paid, despite some decline in private property market value.

Physical Taking: is the use of governmental authority to condemn and seize the possession, use, and/or title of private property, most commonly occurring through overt, governmentally acknowledged exercises of eminent domain, with compensation required in virtually all cases.¹⁶⁷ In rare cases, as in *Loretto*, if a regulatory act causes a de facto physical-like appropriation of property rights, it too can effect an invalid physical taking, requiring rescission or just compensation.¹⁶⁸ In the more recent case of *Horne v. Department of Agriculture* too, when government action leads to permanent occupation or possession of real or personal property, it falls squarely within the protection of the Takings Clause as understood by the Framers.¹⁶⁹

Regulatory Taking: Under the canonic *Pennsylvania Coal* case,¹⁷⁰ an act of government effects an invalid *regulatory* taking when a regulation goes “too far,” burdening property to the effect that it excessively diminishes the value of the property, so that in a particular context the public must pay for the benefit of the regulation or waive the regulation’s application to the property owner. A court would identify unconstitutional excessiveness by weighing the impact of the

167. Note Holmes’s examples of uncompensated physical takings in *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413–15 (1922).

168. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

169. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2426 (2015); *Loretto*, 458 U.S. at 426.

170. *Pa. Coal*, 260 U.S. at 415–16.

regulation in light of the *Penn Central* triad (see below).¹⁷¹ Alternatively, in the improbable event that the government action completely destroys all economic value, with no tort or property offsets, Justice Scalia's now-diminished *Lucas* opinion would define it as a per se categorically invalid regulatory taking.¹⁷²

The *Penn Central* Triad: The currently dominant regulatory taking test comes to us in three-pronged triad form from the 1922 *Pennsylvania Coal* decision, via the 1978 *Penn Central* case. Justice Holmes, in *Pennsylvania Coal*, fingered diminution—the loss of market value due to a regulation—as the bellwether of unconstitutionality. He rather unhelpfully defined “the general rule” that a regulation was unconstitutional if diminution “goes too far.” Brandeis in dissent accepted diminution’s relevance, but using the example of mining releases of poisonous gases he asserted that the degree of public risk or harm was also relevant.

In *Penn Central* Justice Brennan tried to clarify *Pennsylvania Coal*, saying that courts needed to weigh at least three factors to determine a regulation’s constitutional fairness: (1) the amount of diminution, (2) the owner’s investment-backed expectations (IBEs), and (3) the “character” of the governmental action, whatever that meant.

In *Palazzolo*, Justice O’Connor gave the third prong a major clarification: channeling Brandeis’s focus on public harm, she said that *Penn Central*’s third prong called for counterbalancing the first two prongs against “the purposes served, as well as the effects produced, by [the] regulation.”¹⁷³

171. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

172. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Although many people say that a regulation is a “taking” meaning that it is unconstitutional, in actuality most “takes” of private property are not unconstitutional. Virtually every regulation takes away some of the market value that a property would have if unregulated, but most such regulatory takings are not constitutionally invalid excessive expropriations of property values—they don’t “go too far.” Thus, semantic hygiene would appropriately be best served if the word “taking” was always coupled with a distinguishing adjective: e.g., a “valid” or “invalid” regulatory taking, or an “excessive” or “expropriatively unconstitutional” taking. Given human frailty and the instinctive tendency to abbreviate, however, many people will undoubtedly continue to use the labeling of a rule as “a taking” to mean that, via due process or excessive loss of value, it is in some way unconstitutional.

173. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633–34 (O’Connor, J., concurring)

Logically, it is naïve to judge the constitutionality of a regulation without explicitly weighing the public reasons that initially spurred it. No private property owner has a constitutional right to be paid for not imposing greater harms upon the public, so the degree of public harm that a regulation avoids weighs against the private owner's diminution of value.

Investment-backed expectations: IBE refers to the economic value and available uses of a property anticipated by the owner at the time of acquisition. Professor Frank Michelman invented the IBE concept in a 1967 article surveying the field of regulatory takings law.¹⁷⁴ IBEs have potential utility for both attackers and defenders of regulations. For attackers, the recentness of an acquisition investment increases the severity of the diminution. For defenders of regulations, the expectations that the property buyer had when acquiring the property should color the fairness or unfairness of the degree of diminution. If the expectation was that a large property parcel would generate substantial profits, the fact that a small, regulated part of it cannot be so developed does not substantially reduce the overall profit expectation. If a great deal of anticipated profit was made before a regulation blocked further profits, the revenue gained in accordance with expectations weighs in favor of the regulation's validity (as discussed in "Baseline denominators"). If one party purchased several adjacent parcels of land at roughly the same time, IBEs mean that the court can weigh profits and diminution across all the parcels in the entire investment, not just on the separately viewed regulated parcels.¹⁷⁵

If buyers purchase *with notice* of a pre-existing regulatory

(emphasis added) (commenting on *Penn Cent.*, 438 U.S. at 127).

174. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1213, 1233 (1967). The IBE concept was not originally intended as a constitutional test, although it became so.

175. See *K & K Constr., Inc. v. Dep't of Nat. Res.*, 575 N.W.2d 531 (Mich. 1998); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017). This echoes a tussle between Justices Scalia and O'Connor in *Palazzolo*. O'Connor argued the majority position that under investment-backed expectation logic, the prior-notice gamble diminishes a takings plaintiff's fairness claim because most landowners in forming fair expectations about their property would objectively consider reasonable, pre-existing restrictions. *Palazzollo*, 533 U.S. at 634–35 (O'Connor, J., concurring).

constraint on the property and then turn around and try to attack the diminution as unconstitutionally excessive, IBEs weigh against them. The buyers were gambling that the regulation would be stricken and that they would receive a windfall—which is not a right. As the Court said in *Murr v. Wisconsin*, “The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use . . . of the property.”¹⁷⁶

Baseline denominators: Although most agree with Holmes that diminution is pertinent to determining regulatory constitutionality, what physical property should provide the baseline for this assessment? Should it be the property as a whole, as Brandeis argued in *Pennsylvania Coal*, or just the regulated portion of the property, a divide-and-conquer definition urged by Justice Rehnquist that dramatically increases the prospects for invalidity? After *Keystone Bituminous*, the law now generally adopts Brandeis’s dissenting view of the conceptual baseline: you weigh the diminution against the scope of the entire investment. This incorporates the logic of “investment-backed expectations.”¹⁷⁷

Eminent domain: Eminent domain takings constitute an intrinsic, universal, and clearly necessary power of government to appropriate private property involuntarily for the public use via a condemnation action in court, with the requirement that just compensation be paid. A court transfers title to the government entity upon a showing that the condemning agency has proper delegated condemnation power, a proper public purpose (and no poison purpose), a design for the condemnation that rationally serves the official purpose, and proper procedures followed, with fair compensation determined by the

176. *Murr*, 137 S. Ct. at 1945.

177. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987). Note that there also can be a *time baseline*: In *Pennsylvania Coal*, for instance, the major coal field had been purchased circa 1903 and had generated what today would be millions of dollars in profits before the 1921 state statute was passed preventing further removal of coal. The baseline for diminution of value can extend back in time via IBEs. In the setting of *Pennsylvania Coal*, the original investment had paid off handsomely prior to the 1921 regulation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). We would argue that there is no *a priori* right to generate a *further* profit after the date of the regulation if a constitutionally fair profit has been made prior to the regulation.

trier of fact. Courts usually defer broadly to the government's defined choice of condemnation, focusing primarily on quantifying just compensation. Analytically, however, condemnations are subject to judicial scrutiny under the applicable federal or state Administrative Procedure Act as well as substantive due process criteria.

Some commentators apply the term "eminent domain" to cases where a *regulation* is found to be an unconstitutionally excessive invalid taking—probably because compensation must be paid unless the agency waives the regulation's application to the successful claimant.¹⁷⁸ Properly used, however, the phrase eminent domain only applies to physical taking of land or title. Applying this term to the regulatory setting is inartful and misleading.

Inverse condemnation: Physical eminent domain is usually an overt court action asking for transfer of title and possession (in fee, or less) brought by a government agency as plaintiff against a defined parcel of land as defendant, with payment of assessed just compensation. In some cases, however, where government is in effect taking a possessory use of land without acknowledging it—the classic example: low-level airplane flight paths at state-run airports, taking easements of noise, particle pollution, and physical passage from affected properties. Where agency conduct is de facto taking property rights from individual property owners—and sovereign immunity makes tort liability unlikely—the individuals can bring a constitutional action in inverse condemnation. The term "inverse" stems from the switch in complainant compared to eminent domain proceedings: the defendant landowner sues the potential plaintiff government agency, asking the court to force the public agency to bring an eminent domain condemnation action, with compensation damages, against the plaintiffs themselves. It's sort of "Property owner *ex rel.* Gov't Agency v. The Same Property owner."

Some privateering plaintiffs bring so-called inverse condemnation actions against *regulations*, but analytically these are a different beast, measured by regulatory takings

178. See, e.g., 1-1 NICHOLS ON EMINENT DOMAIN § 1.42 (2017) ("[R]egulative legislation . . . [can] come[] within the purview of the law of eminent domain.").

doctrine, not physical takings doctrine. Because they specifically seek monetary damages, they are often strategically advanced as threats meant to deter regulation at the start.

2. “Due Process” Semantics:

Procedural Due Process: Everyone knows procedural due process, right? You are entitled to get all procedures required by positive law, plus those identified as constitutionally necessary under a *Mathews v. Eldridge* procedural balance.¹⁷⁹

Substantive Due Process: With the terms *takings* and *regulatory takings* accounting for physical invasions and excessive regulatory burdens on property, substantive due process generally refers to the remaining protections guaranteed by the Fifth Amendment, namely protection from ultra vires government action, action without proper public purpose, irrational “arbitrary and capricious” government action, and the like. Thus challenges of government authority, zoning-type reviews of proper public purpose, and rational-basis proportionality and logical nexus analyses, all speak of substantive due process, not a takings inquiry.

Exactions: The term “exactions” refers to conditions and requirements placed by land-use agencies upon grants of permit meant to mitigate or offset the public harms that the development project will likely cause or exacerbate—in standard subdivision regulations or otherwise. As a matter of threshold context, the developer is asking for the requested permit as a privilege, not for a permit as-of-right. Accordingly, the agency could have denied the permit without creating an invalid regulatory taking but decides to issue the permit so long as the permittee grants the mitigating, offsetting exaction to the public—in monetary terms or in kind. Due to the obvious

179. This balance directs courts to determine the amount of procedure constitutionally required before a deprivation of life, liberty, or property occurs by considering the specific private interest at stake, the risk of erroneous deprivations under the current procedures, and any government interests limiting the alternate or additional procedures practically available. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

risk of extortionate demands, courts test exactions in terms of *Nollan-Dolan* due process: a challenged exaction must have a rational causal nexus to the public burdens caused by the permitted action, and the relationship between the exaction and the offset burden must be roughly proportional.¹⁸⁰

Essential Nexus and Rough Proportionality are due process tests, not “regulatory takings” tests: Note that exactions must satisfy criteria that are essentially substantive due process, most relevantly the general prohibition against irrational government actions. The judicial review of exactions is sometimes mislabeled as “regulatory takings” review, as in *Koontz v. St. Johns River Water Management District*. For purposes of jurisprudential and functional clarity, however, it is important to distinguish the difference. Regulatory takings scrutiny focuses on tests of excessive property value diminution, as in *Pennsylvania Coal* and *Penn Central*. Questions of authority, proper purpose, and rationality of government action sound in general due process.

3. Remedy Semantics:

Remedies for regulatory excess for failure of general due process element(s): What remedies are in order when a government action is judicially determined to be unconstitutional? It significantly depends upon what kind of constitutional criterion was violated. If the court finds that the government action violated one or more of the general substantive due process criteria of the Fifth or Fourteenth Amendments—i.e., it is ultra vires, has an improper public purpose, is irrational in its design, etc.—then the action is void on its own terms. And, further, monetary damages may be awarded under the Civil Rights Act’s § 1983 if the action took place with intent or some form of gross negligence.¹⁸¹

180. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987). One could also view unconstitutional exactions, if done for a proper public purpose, as asking the applicant landowner to assume an undue measure of a public burden, seemingly excessive because of its irrationality. Though the substantive due process analysis necessarily differs from that of regulatory takings, it has a similar effect from the landowner’s perspective.

181. See 1 SHELDON NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* §3:45 (4th ed. 2017).

Remedies for regulatory excess for invalid takings: If, on the other hand, the government action was found to be a constitutionally invalid, excessive *regulatory taking* as applied to the claimant's property, typically the government agency has a choice. It can pay compensation for the particular diminution of value, waive the regulation as applied to the claimant, or accept an injunction against application of the regulation to the successful claimant's property. In some cases, the courts can also award damages for a "temporary invalid taking," compensating for the value of property loss during the time of unconstitutional constraint on the use and development of the regulated property.¹⁸²

E. Some Semantic Hygiene for the Koontz Case

Applying semantic clarifications to the *Koontz* case demonstrates the simple and logical distinction between regulatory takings and due process exaction reviews, and it reveals some of the incongruities of the case.

The Court majority in *Koontz* regarded the proposed off-site monetary exactions as requiring *Nollan-Dolan* review.¹⁸³ In remanding the case, however, the Court failed to distinguish between due process and takings clause protections.

Justice Alito came frustratingly close to recognizing the difference between takings and due process:

Even if [the agency] would have been entirely within its rights in denying the permit . . . , that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights. See *Nollan*, 483 U.S., at 836–837 (explaining that "[t]he evident constitutional propriety" of prohibiting a land use "disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the

182. See discussion *infra* Section III.C.

183. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013). We base this analysis on the facts as the Supreme Court treated them, that is, from the stance that the validity of the off-site exactions were potentially determinative and that the at-issue parcel indeed was statutory wetlands, thus presenting normal wetland legal considerations.

justification for the prohibition”).¹⁸⁴

Justice Alito realized that if, as an initial step, the agency could have constitutionally denied the permit without violating the takings test, the further question was whether the condition satisfied the *rationality* requirement, and he cited the *Nollan-Dolan* test to make that determination.¹⁸⁵ Further, Justice Alito still almost made the critical distinction:

That is not to say, however, that there is *no* relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings.¹⁸⁶

Justice Alito here clearly said “nothing has been taken,” and that takings compensation is ordered “only for takings.” But having cited *Nollan*—which conflated “takings” with “substantially advanced” due process based on the *Agins* dictum rejected in *Lingle* eight years before *Koontz*—Alito then failed to say that “this thus is not a takings case.” Instead, he simply remanded, leaving it up to the Florida courts to determine whether “takings” jurisprudence (a concept conceived in federal rather than state jurisprudence) applied in this case:

Florida law allows property owners to sue for “damages” whenever a state agency’s action is “an unreasonable exercise of the state’s police power constituting a *taking* without just compensation.” Fla. Stat. Ann. §373.617. Whether that provision covers an unconstitutional conditions claim like the one at issue here is a question of state law. . . .¹⁸⁷

184. *Id.* at 608.

185. *Id.* at 608–09.

186. *Id.*

187. *Id.* at 610 (emphasis added). The dissent, contrarily, saw this subsequent

On remand, the Florida courts never asked whether this was a taking or due process unconstitutional conditions issue, nor did they consider any of the ramifications of that distinction. Thus, since the Florida Fifth District appellate court had already affirmed the trial court's application of *Nollan-Dolan* in an earlier judgment, it simply restated its prior holding, which had affirmed an earlier circuit court decision finding that the conditions failed *Nollan-Dolan* and effected a "taking."¹⁸⁸ Unfortunately, without considering Alito's distinction or *Lingle*, the Florida state courts thus unthinkingly assumed that an exaction invalidated through *Nollan-Dolan* analysis automatically and categorically constituted an invalid "taking," rather than making the distinction between Due Process and Takings Clause protections. This misunderstanding ultimately led to a judicial remedy order that was inconsistent with violations of either Due Process or the Takings Clause respectively.

Justice Kagan penned a strong dissent to the U.S. Supreme Court's judgment, but the two opinions, the majority by Justice Alito and the dissent by Justice Kagan, actually appear to have more in common than they do in opposition.¹⁸⁹ First, both agreed that a straight-out denial of Mr. Koontz's request to fill his three-and-a-half acres would not have involved *Nollan-Dolan*, but rather would merely present a straight takings question under the *Penn Central* takings test.¹⁹⁰ Second, although both used the "takings" rubric, both agreed that *Koontz* presented a test of unconstitutional conditions and not a case where excessive regulatory

analysis as only applicable if the exaction would, when viewed outside the permitting context, effect a taking under the physical appropriation taking test. Since, following *Eastern Enterprises*, they could not justify the monetary exactions as effecting this type of per se taking, the dissenters did not see applying *Nollan-Dolan* as necessary or appropriate. *Id.* at 620–21 (Kagan, J., dissenting).

188. *St. Johns River Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 398 (Fla. App. 5th Dist. 2014).

189. The analysis here draws in part from analysis of a commentary from our recently departed colleague Marc Poirier of Seton Hall Law School in a response message contributed to a listserv debate on *Koontz* between Professor John Echeverria, the eminent takings scholar at Vermont Law School, and me. Posting of Marc Poirier, Professor of Law and Martha Traylor Research Scholar, Seton Hall Univ. School of Law, poirierma@shu.edu, to Envtl. Law Professors Listserv, envlawprofessors@lists.uoregon.edu (June 27, 2013) (on file with author).

190. *Koontz*, 570 U.S. at 607–08; *id.* at 632 (Kagan, J., dissenting).

diminution of private property value was claimed or proven.¹⁹¹

Third, they both—and this is a critical semantic and analytical flaw—mixed the concept of *unconstitutional conditions* into the rubric of *takings*, either by mistake or by simply missing an opportunity for greater clarity, and thereby bollixed their reasoning. The Alito opinion, as previously noted, did state that the *Koontz* facts were not exactly a taking, but he then went on to say that the unconstitutional conditions doctrine made the case a constitutional matter, leaving open the question of what kind of constitutional test applies.¹⁹² Justice Kagan’s dissent makes the *Eastern Enterprises* distinction, but in her opposition to any review of monetary exactions ultimately says that “by applying *Nollan* and *Dolan* to permit conditions requiring monetary payments . . . the majority extends the *Takings Clause*, with its notoriously ‘difficult’ and ‘perplexing’ standards, into the very heart of local land-use regulation.”¹⁹³ She neither states nor implies that unconstitutional conditions are a completely separate question from takings validity.

And finally, both opinions also agreed—and this too raises problematic issues—that the unconstitutional conditions test should apply equally to permit denials where an applicant has refused proposed conditions as it does to scrutiny of permits that have actually been issued with attached conditions. Both opinions label, and equate, these as “conditions precedent and conditions subsequent.”¹⁹⁴ In a case like *Koontz*, however, where the agency ultimately denies the property owner’s original request after a failure to agree on the terms for altering the existing rules, it is not at all clear how a court should weigh the unsuccessful proposed conditions. The proposals were inchoate, and a clear governmental *demand* was never applied.¹⁹⁵

191. *Id.* at 604 (majority opinion); *id.* at 624–25 (Kagan, J., dissenting).

192. *Id.* at 608–09 (majority opinion).

193. *Id.* at 626 (Kagan, J., dissenting) (emphasis added).

194. *Id.* at 607; *id.* at 620 (Kagan, J., dissenting).

195. The essence of the “demand” distinction lies in the realities of negotiation. In virtually all negotiating sessions, the parties try out a variety, sometimes dozens, of alternative terms and options. Absent some sort of interlocutory request for a judicial declaratory judgment, we would argue that it is only when a governmental party defines a condition as a *sine qua non* mandatory requirement of permit issuance that there is sufficient ripeness, finality, and clarity of demand to support a judicial inquiry for unconstitutionality. If, as in *Koontz*, there is no

So in the aftermath of *Koontz*, there are several focal points of useful contested analysis, including the issues of:

(1) Whether the *Nollan-Dolan* unconstitutional conditions inquiry appropriately applies to monetary exactions—we think the answer is yes;

(2) Whether the *Nollan-Dolan* unconstitutional conditions inquiry appropriately applies to offsets, exactions, and other development conditions generally—we think the answer is yes;

(3) If negotiating parties do not reach an agreement, and the various inchoate proposed offsetting conditions never become concrete enough to constitute a sufficient governmental “demand” to merit testing under *Nollan-Dolan*, then we think that the appropriateness of applying that test is quite doubtful; and

(4) What remedy makes sense (a) if an issued permit required a condition that was later found to violate *Nollan-Dolan* or (b) if a permit denial follows applicant rejection of demanded conditions? In the former, we think the exaction is struck and a severability analysis determines whether the remaining substance of the permit survives or fails. In the latter, we think *Nollan-Dolan* applies, and, if the required exaction fails, then it is inapplicable, and the permitting agency is free to do nothing, or to consider granting the permit with or without an alternative valid condition.

Within each of these situations there lies the semantic challenge whether to utilize the terms of *Nollan-Dolan* analysis as a due process rationality review or to commingle it with the very different doctrinal twists and remedy consequences of takings law. We suggest that courts necessarily should choose the former, wiser avenue of judicial review.

III. THREE USEFUL CLARIFYING PROPOSITIONS

With a semantically cleansed understanding of the takings doctrine described above in mind, analysis of the *Koontz* decision prompts three propositions that should clarify these contested points of analysis and simplify judicial review of

such finality, no single option required (plus an unrequited open invitation for the applicant to offer further suggestions, and no judicial consideration of the possible constitutionality of one or more of the agency’s proposed five options) we think the negotiation has not produced a reviewable governmental demand sufficient to justify the rigors of *Nollan-Dolan* scrutiny.

exaction challenges moving forward. First, exaction challenges involve two logically distinct tests for the constitutionality of the government action; second, the *Nollan-Dolan* formula of review is plenary and applies to all conditional government regulations; and third, the distinction between Due Process and Takings Clause protections guides remedy formulation for constitutionally invalid government actions.

A. *Regulatory Exaction Challenges Involve Two Logically Distinct Tests of the Constitutional Validity of the Governmental Actions . . . and the Distinction Is Not Rocket Science*

Assuming that the delegation of authority to an agency and the public purpose behind the permitting program it oversees do not themselves raise due process concerns, analytically, there are *two* separate targeted constitutional inquiries or two cognitive steps involved in cases like *Koontz* that involve scrutiny of land-use permit restrictions with exactions.

In terms of logical staging in an exactions case, the first targeted inquiry goes to pure regulatory takings validity: could the permitting agency *have denied the application outright*? This addresses the fundamental question of whether the property-owner would suffer a diminution of property value that “goes too far,” i.e., is constitutionally excessive and constitutes an invalid expropriation, if denied the desired permit.¹⁹⁶ If an agency must grant a permit as of right, then any required conditions or exactions placed on that permission would go too far and effect a regulatory taking. In *Koontz*, neither the Supreme Court majority nor the dissenters noted any evidence showing that the permit denial caused excessive property value diminution so as to effect an invalid regulatory taking as understood in *Pennsylvania Coal* or *Penn Central*.¹⁹⁷ Accordingly, the *Koontz* Court was not making or assuming any finding of excessive diminution, so it should have moved to the second inquiry.

If then, as in *Koontz*, a government agency could constitutionally deny a permit but instead declares that it will

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

197. *Koontz*, 570 U.S. at 621–22 (Kagan, J., dissenting).

grant it with exaction conditions attached, then the quite-different second targeted inquiry arises. The question here is not whether an exaction is an excessive diminution of property value, but rather whether the exaction rationally and proportionally addresses the potential harm it offsets.¹⁹⁸ This is the *Nollan-Dolan* exactions inquiry—an “unconstitutional conditions” question grounded in general principles of substantive due process rationality review. The framework of that review depends on the character of the government action, i.e. the exaction. If, as in *Nollan* and *Dolan*, the government agency could not validly demand the exaction standing alone without compensation—meaning the demand would be a taking if not conditional—then the proportional nexus framework of review outlined in those cases, as opposed to an alternate standard of rationality review, applies.¹⁹⁹

B. After Koontz, We Conclude, the Nollan-Dolan Test Is Plenary for All Conditional Governmental Requirements, Including Monetary Exactions but—Properly Understood—That Does Not Portend Chaos in Municipal Land Use Management

The *Koontz* majority lumps unreasonable monetary exactions together with the questioned access easements from

198. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

199. See discussion *infra* Section III.B. In *Koontz*, both the majority and the dissenting opinions focused upon the character of the exactions, the second targeted inquiry. Both Court opinions seemed to support applying the two-step *Nollan-Dolan* inquiry—that sounds in due process—to review the constitutionality of required conditions, regardless of whether the permit was denied or granted. Neither opinion balked at the inchoate “merely proposed alternatives” nature of the conditions at play. Justice Kagan in dissent, however, argued that no specific exaction had ever been required, that an exaction requirement for funds rather than property accommodations could not effect a taking, and, accordingly, that the *Koontz* facts did not trigger rationality review under the *Nollan-Dolan* proportional nexus framework. *Koontz*, 570 U.S. at 620 (Kagan, J., dissenting). The majority, contrarily, found that monetary demands could constitute a taking, so monetary exactions would invoke *Nollan-Dolan*’s proportional nexus framework of scrutiny, and further found that the existence of such monetary exactions—in *Koontz* for off-site proposals—even if never actually required, necessitated *Nollan-Dolan* review. *Id.* at 615 (majority opinion). Neither Justice Alito nor Justice Kagan use the term rationality review. We phrase it as such here to continue along our course of semantic hygiene. Justice Kagan, however, does refer to the *Nollan-Dolan* framework as a standard of constitutional scrutiny. *Id.* at 620 (Kagan, J., dissenting).

Nollan and *Dolan*.²⁰⁰ It applied such a broad (property-protective) understanding of the phrase “takings” that *Nollan-Dolan* proportional-nexus review would apply to most exactions—a seemingly radical concept. But understanding the *Nollan-Dolan* test as a formulation of substantive due process rationality review dulls these dire forecasts and actually makes it a rather inert statement. If *Nollan-Dolan* is a form of rationality review and if the due process clause requires rationality of all government action, then this merely sharpens the frame of an already necessary inquiry. If the action challenged is an exaction, then the terms “essential nexus” and “rough proportionality” frame the inevitable rationality review rather than the more ubiquitous general phrase “arbitrary and capricious.”²⁰¹

Local governments have required development fees to cover anticipated burdens on the community for decades, so monetary exactions are neither a new nor an exotic concept. In reviewing such development fees, a court would scrutinize whether the required monetary fees rationally relate to the real potential costs of the project, a due process analysis virtually identical to that of *Nollan-Dolan* review.²⁰²

Applying this analysis more broadly will not bring governmental land use planning and implementation to its knees. Our colleague and an eminent takings scholar John

200. *Koontz*, 570 U.S. at 619 (majority opinion).

201. *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837. It is a simple matter of semantics. Some argue that this framing requires a tighter connection between the means and ends, but even assuming that as true, only the level of scrutiny changes, not the basis of the analysis, which mitigates what chaos the decision could portend. See Daniel Williams Russo, *Protecting Property Rights with Strict Scrutiny: An Argument for the “Specifically and Uniquely Attributable” Standard*, 25 *FORDHAM URB. L. J.* 575, 590–92 (1998).

202. As the eminent land-use professor J.B. Ruhl noted:

[O]ne could look to the experience of states that already apply the state equivalent of *Nollan-Dolan* to impact fees. Decades ago, for example, the Florida Supreme Court ruled as a matter of state constitutional law that impact fees (and land exactions of course) must withstand a “dual rational nexus test” that is in all respects the same as *Nollan-Dolan*. Indeed, the land use authority must even show that the impact fees provide proportional benefits on a subdivision level basis . . . I did not see any evidence that Florida’s rule led to increased permit denials . . . or that the burden on land use authorities was significant.

Posting of J.B. Ruhl, Professor of Law, Vanderbilt Univ., jb.ruhl@law.vanderbilt.edu, to Env’tl. Law Professors Listserv, envlawprofessors@lists.uoregon.edu (June 27, 2013) (on file with author).

Echeverria has expressed the conclusion that *Koontz* is the worst land use decision ever, threatening great ruin.²⁰³ But, the application of *Nollan-Dolan* is not an issue of strict scrutiny. If there is any increase in scrutiny from rational basis, it just requires competent land use planning and analysis to allow the agency to make the necessary minimal showing of rationality.²⁰⁴ With such planning, the challenger would still bear most of the burden of proof.

Consider the five alternate conditions proposed in *Koontz*. If a reviewing court had subjected all of them to constitutional analysis, pretty clearly at least one would satisfy *Nollan-Dolan*.²⁰⁵ *Nollan-Dolan* primarily addresses extortionate exactions, circumstances in which the governing agency withholds the permit-carrot to get something it wants in return. But a horse does not care about a dangled carrot if it has another readily available.²⁰⁶ Likewise, a permitting authority only needs to offer one viable option to satisfy due process.²⁰⁷ As the proceedings in Florida and the aerial satellite image of the region in Figure 2 indicate, the two off-site mitigation proposals were hydrologically connected to the Koontz parcel as part of the wetlands flowage of the

203. See Echeverria articles discussed *supra* note 19.

204. Viewing the levels of constitutional review as a spectrum and accounting for the burden shift called for in *Dolan*, the *Nollan-Dolan* nexus-rough proportionality requirement falls at the low end. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (disagreeing with a categorical approach to equal protection review, favoring a spectrum based on the social importance of the at-stake interests and the invidiousness of the governmental basis). It seems to fit somewhere between rational basis and intermediate scrutiny's substantial relation requirement but far short of strict scrutiny's necessary and least restrictive means requirements. This understanding places the scrutiny applied to exactions above that applied to economic regulations but below that applied to First Amendment review of facially neutral regulations and equal protection review of quasi-suspect classes. Justice Harry Blackmun's notes from *Nollan* reveal that despite Justice Scalia's use of the phrase "essential nexus" in the opinion, a majority of the justices were only looking for a "reasonable relationship." Harry Blackmun, Associate Supreme Court Justice, Meeting Notes on *Nollan v. Cal. Coastal Comm'n* (Apr. 1, 1987) (available through the Manuscript Division of the Library of Congress in the Harry A. Blackmun Papers, Box 481). This suggests that *Nollan-Dolan* actually falls closer to rational basis than to intermediate scrutiny.

205. *Koontz v. St. Johns River Water Mgmt. Dist.*, No. CI-94-5673, 2002 WL 34724740, at *8 (Cir. Ct. Fla. Oct. 20, 2002) (applying only *Nollan-Dolan* to the off-site mitigation proposals without disclosing details of the analysis).

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

207. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 611 (2013).

Econlockhatchee watershed.²⁰⁸ Viewing the satellite imagery, the theory of the agency quite clearly is that the filling of wetlands and wetland recharge areas in the Econlockhatchee Watershed would cut down substantially on the natural watershed conditions and aquifer recharge, and repairing its tributaries would mitigate that.²⁰⁹ The *Nollan* relational nexus is obvious.²¹⁰ The *Dolan* proportionality factor would require more specificity, but it seems demonstrable.²¹¹ Even if due process would invalidate both of these options, the agency presented Koontz with three other options.

If permitting authorities develop their exaction proposals rationally and with a mind for the harm that they wish to offset, making *Nollan-Dolan* applicable to all exactions would only give property owners a slightly stronger hand during negotiations, meaning that agencies might need to increase their preparations to justify conditions that may seem excessive. This falls far short of strict scrutiny's onerous burden.²¹²

Three further points push against the argument that the *Nollan-Dolan* framework will hinder normal land-use negotiations. First, a permittee must actually sue and risk the costs of litigation to make a full *Nollan-Dolan* showing immediately applicable. Second, any highly creative, disconnected conditions barred by *Nollan-Dolan* would not have survived substantive due process review under an alternative formulation had the permittee chosen to challenge it. Finally, if the *Nollan-Dolan* formulation did call for a somewhat higher level of scrutiny, while the knowledge thereof would inhibit permitting flexibility, it would also increase permitting predictability, increasing administrative efficiency in the majority of non-litigation proceedings and preserving resources for those proceedings in which the agency would have to litigate. The same reasons also urge against accepting the notion that making *Nollan-Dolan* plenary for exactions will dramatically increase the number of permit conditions

208. See discussion *supra* Section I.A, pp. 749–52.

209. See Figure 2.

210. See *Nollan*, 483 U.S. at 837.

211. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). It remains unclear whether the required proportionality is in terms of private burden and harm caused or ecological proportionality, i.e. wetland fill v. wetland mitigation.

212. See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

contested in court.

A bigger issue that could significantly shift the balance at the negotiation table arises, though, in the realm of choice of remedy, if reviewing courts award damages for conditions that fail *Nollan-Dolan* rather than simply invalidating them.

*C. The Distinction Between Takings and Due Process
Issues Guides Remedy Formulations for
Unconstitutional Government Regulations*

The Supreme Court did not reach the issue of remedy in *Koontz*, and the remand to the Florida courts affirmed the 2002 trial court decision—which had found a “taking”—so they invalidated the conditions, ordered payment of the Florida statute’s “takings” damages, and ordered grant of the permit.²¹³ Ordering grant of the permit corresponded with an updated understanding of the area’s hydrology that had emerged during the proceedings.²¹⁴ Ordering damages for the exaction, however, stemmed from the fundamental conflation of substantive due process and takings.

Due to the “takings” wording in the Supreme Court’s majority decision, the state court takings finding stayed in place, and its invocation of chapter 373, section 617(5) of the Florida Statutes, which requires compensation for any taking, remained valid.²¹⁵ Applying that statute, the agency had to pay compensation to the property owner. Because *Koontz* received his permit, thus punctuating the “taking,” the trial court calculated damages via temporary takings.²¹⁶

Temporary takings compensation approximates lost rental value or implied revenue value for the time that a constitutionally invalid regulation causes an excessive property value diminution.²¹⁷ But the off-site conditions in *Koontz* found

213. *St. Johns River Mgmt. Dist. v. Koontz*, 183 So.3d 396, 398 (Fla. App. 5th Dist. 2014); *Koontz v. St. Johns River Water Mgmt. Dist.*, 2002 WL 3472470, at *8 (Fla. Cir. Ct. 2002).

214. See discussion *supra* Section I.B, p. 757.

215. See *Koontz v. St. Johns River Water Mgmt. Dist.*, No. CI-94-5673, 2006 WL 6912444, at *1–2 (Cir. Ct. Fla. Feb. 21, 2006); *Koontz v. St. Johns River Water Mgmt. Dist.*, No. CI-94-5673, 2004 WL 6072846, at *2 (Cir. Ct. Fla. May 26, 2004).

216. See *Koontz*, 2006 WL 6912444, at *1–2; *Koontz*, 2004 WL 6072846, at *2.

217. See *First English Evangelical Lutheran Church v. Los Angeles Cty.*, 482 U.S. 304, 321 (1987).

to violate *Nollan-Dolan* did not cause a diminution in property value. Instead, the trial court calculating damages attributed the delay caused by the mistake in hydrology to the off-site conditions and determined compensation based on that property and time period.²¹⁸

Rather than follow this incoherent route to assign takings compensation, the courts should have considered an invalid exaction as a matter of due process. The remedy for due process failings in a regulation are quite different from remedies for invalid takings—under either federal constitutional law or Florida state law.²¹⁹

When a regulatory action is determined to be unconstitutional for some basic substantive due process failures—*ultra vires* lack of sufficient delegated authority, lack of a proper public purpose, or lack of rationality—the usual remedy is nullification of the regulation on its face, not damages.²²⁰ When a facially constitutional regulatory action violates the constitution as applied, the usual remedy is nullification of the regulation as applied to the particular protesting party, again, not damages.²²¹

In contrast, when a court has determined that a regulation creates an unconstitutionally excessive burden as applied to a particular property, government usually has a choice—to pay compensation for the regulation’s continuance or nullify the

218. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 600 (2013); *Koontz v. St. Johns River Water Mgmt. Dist.*, 77 So. 3d 1220, 1225 (Fla. 2012); *Koontz*, 2006 WL 6912444, at *1–2; *Koontz*, 2003 WL 6072846, at *2; Petitioner’s Brief, *supra* note 32, at 5; Affidavit of William Fogle, *supra* note 53 and accompanying text. Basing a restriction on data that is later discovered to be inaccurate seems to raise another due process issue: governmental correction of the misapprehended regulatory action is required because of the *ultra vires* lack of pertinent authority. Where there is no allegation of intent or malice, though, there is a question of what remedy is appropriate for such due process violations. Would mere rescission be sufficient, or would this qualify as sufficient gross negligence to allow damages under § 1983 of the Civil Rights Act? The latter seems unlikely.

219. Fenster, *supra* note 1, at 416 (noting that the substantive due process spin of *Koontz* may have future remedy implications).

220. See John F. Pries, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 3 (2013) (saying that while courts generally will not award damages without congressionally created causes of action, it will award injunctive relief).

221. See Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 327 (2016) (advocating for a particular means of judicial restraint in awarding constitutional remedies).

regulation as applied to the property.²²² In the latter case, there may also be temporary takings damages awarded for losses experienced before the regulation's nullification.²²³ In *Koontz*, however, the fundamental finding of an unconstitutionally excessive takings burden was never involved.

Considering the element of choice in takings remedies reveals the incongruity of viewing unconstitutional conditions as takings. Incorporating conditions into the adjudicative permitting process adds a transactional element, trading the condition for the permit. Focusing on the condition and giving the agency the choice to pay compensation or rescind their request would ignore the other half of the transaction. A due process decision to invalidate an extortionate measure as unconstitutional makes it a nullity. If the permit on its remaining terms is then deemed not to be severable, the permit is likewise nullified and the public-private parties can choose to go forward to negotiate a new arrangement, or not. Understanding a *Nollan-Dolan* invalidation as a violation of substantive due process thus clarifies the correct approach to defining a remedy in these exaction cases because it keeps a focus on the transactional nature of permitting with exactions.

In *Nollan* and *Dolan*, given their judgment of the exactions' irrationality in each case (and so hinted in *Koontz*), the respective courts each ordered an appropriate remedy—invalidation of the condition—but they did so under the wrong title. Each court invalidated the condition as remedy for a taking rather than remedy for a violation of substantive due process.²²⁴ In *Nollan* and *Dolan*, this contributed to the ongoing confusion regarding constitutional review of exactions but had no direct impact on the involved parties.²²⁵ In *Koontz*, however, the circuit court deciding that the monetary exactions failed *Nollan-Dolan* had to derive some way to calculate damages because of the Florida statute meant to discourage uncompensated takings.²²⁶

222. See *First English*, 482 U.S. at 317–18.

223. See *id.* at 321.

224. *Dolan v. City of Tigard*, 512 U.S. 374, 383, 94–96 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 839, 841 (1987).

225. The Court in *Nollan* addressed just compensation indirectly by stating that the agency could acquire the conditioned property interests through separate eminent domain proceedings if it wishes. 483 U.S. at 841–42.

226. FLA. STAT. ANN. § 373.617(3) (West 2016).

The same statute also stipulates that the agency “shall agree to issue the permit.”²²⁷ Had one of the multiple reviewing courts identified *Nollan-Dolan* as a matter of substantive due process rather than takings, the judgment would not have invoked this statute. Nullification of the conditions alone would have proceeded as the logical remedy, and the matter would have returned to the agency to decide in its discretion whether to issue the permit or not.

Federal law—§ 1983 of the Civil Rights Act of 1871, also known as the “Ku Klux Klan Act”—makes damages available when certain official actors violate a person’s constitutional rights.²²⁸ For liability under § 1983, though, there must be a finding that the officials committed gross negligence in their actions or, even more strictly, acted toward the complainant in a manner that “grossly shocks the conscience.”²²⁹ In the *Koontz* case, it is extremely unlikely that the facts could meet such a standard of due process damages liability, particularly because Mr. Koontz himself had also assumed the mistaken “statutory wetlands” facts in his original permit application,²³⁰ so simple invalidation of the exaction would have been the appropriate remedy.

The larger point is that the remedy determinations for exactions highlight a very significant difference between constitutional determinations of invalidity of regulatory takings and the due process invalidity of regulatory actions. The conflation muddle between takings and due process inquiries has critical consequences on this determination.

Subsequent to identifying invalidation as the appropriate remedy for unconstitutional conditions, courts should also consider how that invalidation affects the remainder of the permit process. Thus far, however, courts have failed to consider this “severability” issue—whether the permit granted upon an exaction condition found to be unconstitutional would remain effective after invalidation of the condition, i.e., whether it is severable; or whether removal of the mandated but now-invalid condition voids the permit and either returns the parties to negotiations or ends the permitting process, i.e., it is not severable.

227. *Id.* § 373.617(3)(a).

228. 42 U.S.C. § 1983 (2012).

229. See NAHMOD, *supra* note 181.

230. See Petitioner’s Brief, *supra* note 32, at 5 n.4.

In *Nollan*, the Commission had granted the permit, loosening its rules, because the homeowner initially agreed to transfer the access easement that the agency requested as a condition.²³¹ The Supreme Court, while invalidating the condition, presumed severability without any reasoning and treated the permit as if it would nevertheless be fully valid without the quid pro quo.²³² Similarly, in *Dolan*, the City had approved the landowner's permit application only with exaction conditions based on the City's community development code, denying the landowner's application for a variance waiver of the code conditions.²³³ The Court reversed this decision but presumed the persistence of the permit approval without any severability discussion, and Ms. Dolan proceeded to build her mall without conditions.²³⁴

Severability analysis by a court is normally supposed to turn upon a determination of the original intent of the promulgating agency,²³⁵ and in both *Nollan* and *Dolan*, the agency may well have considered the conditions as material to grant of the permit: with the exactions as quid pro quo, the agencies would grant the permits; without the exactions, they would not. However, both Justices Scalia and Rehnquist respectively, ignored the severability doctrine and presumed that the permits were fully valid despite the nullification of the agencies' antecedent conditions. The Court allowed the developers to proceed with no conditions.²³⁶ Under normal severability doctrine, when the intent of the agency was not clear, the question of a remnant permit's surviving terms should have been remanded.

In a *Koontz*-type scenario, where the landowner refuses

231. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

232. *Id.* at 841–42. The Nollans had already completed their larger house at this point, so concerns for economic waste may have counseled against considering severability and allowing the Commission to revoke the permit. *See id.* at 830.

233. *Dolan v. City of Tigard*, 512 U.S. 374, 380–82 (1994).

234. *Id.* at 394–96.

235. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685–86 (1987) (noting that the absence of a severability clause raises no presumption for or against severability, with the relevant judicial inquiry instead being the intent of the drafters).

236. *Dolan*, 512 U.S. at 394–96; *Nollan*, 483 U.S. at 841–42. Note that if an agency presciently words its permit decision—“NO approval UNLESS these conditions are supplied,” instead of “YES, IF these conditions are supplied . . .”—then the text makes the government's non-severability intent clear, and no override of the existing rules should occur.

proposed conditions, and then challenges the resultant permit denial, the reviewing court should review the proposed conditions, striking any condition determined to violate *Nollan-Dolan* as a matter of substantive due process, and then remand the matter to the agency.

CONCLUSION

This article's protracted analysis has been triggered by a frustrating semantic confusion deeply lurking within one of the most confusing areas of constitutional adjudication and democratic governance: how to draw the line between private property rights and collective public welfare protections. It took 133 years for the Court, in a mystifyingly enigmatic decision, to say that private property could be unconstitutionally *taken* by regulations without, as the Framers had been thinking, being physically taken.²³⁷ Then, for another half century, the Court largely avoided trying to refine regulatory takings limits,²³⁸ leaving lower courts to try erratically to assess property value diminution and find the line that marks "too far." Due process, on the other hand, enjoyed substantial development in the Court during these years. Then, beginning in the 1970s, the law of regulatory takings re-emerged in Supreme Court case law, somewhat clarified, but also further confused.²³⁹ A major anti-regulatory movement swelling in national politics²⁴⁰ and a misconceived phrasing in a short-lived California case²⁴¹ brought on a volley of anti-regulatory judicial initiatives²⁴² and

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

238. A rare exception, *Goldblatt v. Town of Hempstead*, only stood for the narrow proposition that wherever the line of invalidity might be located, regulations of stone quarries fall short of it. 369 U.S. 590, 596 (1962).

239. *See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633–34 (2001) (O'Connor, J., concurring); *Keystone Bituminous Coal Co. Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

240. For a note on the post-Goldwater, neo-Con, business-based movement against regulatory government, see Zygmunt J. B. Plater, *Dealing with Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. & LITIG. 9, 21–38 (2006).

241. *Agins v. City of Tiburon*, 447 U.S. 255, 260–61 (1980) (launching the substantially-advances test later rejected in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005)).

242. The short-lived *Lucas v. South Carolina Coastal Council* decision most forcefully demonstrates this. 505 U.S. 1003, 1030 (1992).

a semantic bastardization of judicial tests of regulatory validity that conflated the rationality review of permit conditions in the canonic *Nollan-Dolan* test with the excessive-diminution review of regulatory takings. A 2005 case²⁴³ should have put an end to this conflation, but it did not, and judicial understanding of the public-private duality continued in a semantic jumble.

The 2013 *Koontz* case was as messy on its facts as it was legally in both its majority and dissenting opinions in the U.S. Supreme Court and in each of its Florida state court iterations. The case was actually solely concerned with the due process rationality of suggested supplementary conditions, but it was adjudicated in semantic terms as if it was an excessive-diminution takings challenge.

The muddle of concepts in *Koontz* serves in excellent fashion to illustrate the semantic dysfunctions of current judicial review of conditions applied contextually in government regulation of private actions. Building upon our autopsy of the judicial opinions in *Koontz* and the conclusions we draw therefrom, we propose a number of semantic hygiene clarifications—identifying what judicial tests are appropriate, distinguishing takings inquiries from due process rationality inquiries, and noting the different consequences that follow as to burden of proof, degree of scrutiny, and perhaps most significantly, distinguishing the very different remedies that should apply.

If logic and words are applied carefully, it becomes clear that judicial reviews of regulatory exactions involve several separate stages. First, since exactions are raised in the context of an agency's grant or denial of a permit, as with all government actions there's an initial assessment confirming that the government actor possessed proper authority, a valid public purpose, and a rational basis for its permitting action. Then there's the takings question, whether the agency action could validly deny the permit without excessively diminishing private property rights; if the permit could not validly be denied, no requirement of exaction conditions can be justified. Then finally, if an agency agrees to approve a permit—if particular exaction conditions are included—a permit that it could validly deny, then there's the very different question whether the proposed conditions pass the *Nollan-Dolan* test.

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

This last stage inquiry is not strict scrutiny but rather a very specific due process rationality nexus test: “Is the required condition causally and proportionately related to a need created by the permitted action?” This last stage is a targeted due process unconstitutional conditions inquiry, far different from the logic of takings jurisprudence despite the muddling imprecisions that too often entangle the semantics and logic of these cases.

Judicial reviews of the constitutionality of government actions that affect individual and corporate property—addressing the fragile balance between individual freedoms and a society’s collective imperatives, a core question of modern democratic governance—will be far simpler, clearer, predictable, satisfactory, and wiser, we submit, if they evolve, along the lines that we and our proposed lexicon here suggest, to integrate a far more careful definitional logic, and semantic hygiene.