NONDELEGATION AND THE LEGISLATIVE VERSUS ADMINISTRATIVE EXACTIONS DIVIDE: WHY LEGISLATIVELY IMPOSED EXACTIONS DO NOT REQUIRE A MORE SEARCHING STANDARD OF REVIEW

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As the United States continues to grow and urbanize, local governments have tried to manage this growth to mitigate the external impacts that new developments can cause. One method by which state and local governments seek to control growth within their borders is by imposing conditions on the issuance of building permits—otherwise known as exactions. Exactions, however, face federal constitutional limits under the Takings Clause of the Fifth Amendment, which applies to state and local governments through the Fourteenth Amendment.

In Nollan v. California Coastal Commission *and* Dolan v. City of Tigard*, the U.S. Supreme Court restricted exactions in certain situations by requiring that, prior to imposing the exaction, the government make an individualized determination that the condition has an "essential nexus" and is "roughly proportionate" to the foreseen harm from the development. The* Nollan*/*Dolan *test is primarily grounded in a fear of government overreach and coercion of property owners. The courts agree that the* Nollan*/*Dolan *test applies when a government agency, such as a zoning board, imposes an exaction on a discretionary and ad hoc basis. The U.S. Supreme Court, however, has not yet determined whether exactions that are generally imposed on property owners through a legislative action, such as an ordinance, must comply with the* Nollan*/*Dolan *test. On the one hand, a legislatively imposed exaction is like a typical land use regulation, to which the Court has granted broad deference. But on the other hand, such exactions still carry the risk of government overreach by unfairly targeting a small, politically unpopular group: developers.*

This Note evaluates the debate over whether the Nollan*/*Dolan *test should apply to legislatively imposed exactions and ultimately concludes that it*

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should not. Legislatively imposed exactions are fundamentally different from administrative exactions because of their greater democratic legitimacy. Indeed, courts already recognize and are hardening this line between legislative and administrative actions, as evidenced by the nondelegation doctrine. Thus, the Nollan/Dolan *test should not apply to legislatively imposed exactions.*

INTRODUCTION

Nashville has rapidly grown in recent years, with an increase in both residents and tourists.[1] The city, like many other Sunbelt cities, originally developed around automobile transportation.[2] Accordingly, as of 2017, only 19 percent of the streets in the city had sidewalks.[3] City residents have some of the worst commutes in the country, with an average commute time of thirty minutes—on par with both Los Angeles and Houston.[4] Moreover, the city often receives poor ratings for its walkability and public transit.[5]

1. *See* Ana Durrani, *The Hardest Commutes in the U.S., Ranked*, FORBES (Oct. 12, 2023, 4:44 PM), https://www.forbes.com/home-improvement/moving-services/hardest-commutes-in-us/ [https://perma.cc/XPF9-564G].

2. *See* Dustin Shane, *Nashville an Unlikely Leader in Parking Reform*, STRONG TOWNS (Feb. 8, 2023), https://www.strongtowns.org/journal/2023/2/8/nashville-unlikely-leader-parking-reform [https://perma.cc/6W9J-NSXE].

3. *See Nashville Sidewalk Bill Passes!*, WALK BIKE NASHVILLE (Apr. 19, 2017), https://www.walkbikenashville.org/nashville_sidewalk_bill_passes [https://perma.cc/79HT-96PH].

4. *See* Durrani, *supra* note 1.

5. *See, e.g.*, *id.*

In 2016, Nashville councilwoman Angie Henderson introduced a bill to expand the city's sidewalk network.[6] The ordinance conditioned development or redevelopment of properties within a designated urban area on either the construction of a new sidewalk or payment of an in-lieu fee (i.e., a fee to bypass the sidewalk construction requirement) based on the city's average cost of sidewalk construction.[7] The conditions required for a building permit are collectively called exactions.[8]

The bill aimed to tackle several issues, ranging from management of stormwater flow, to reducing dependency on the automobile, to the more efficient provisioning of sidewalks in the city.[9] The bill easily passed the city council with thirty-seven of the forty members joining as cosponsors.[10] The ordinance was subsequently amended in 2019 to loosen the requirements by formalizing a waiver process and capping the maximum exaction.[11]

In 2018, Nashville resident James Knight demolished his existing home and sought to rebuild a home on the same lot that was triple the size of his previous home.[12] Prior to issuing the permit, the city informed him that, under this sidewalk ordinance, he would have to either construct a sidewalk on his land[13] or pay a fee of $7,600.[14] After failing to obtain a waiver, he filed suit in federal court attacking the ordinance's exaction requirement as an unconstitutional taking in violation of the Fifth Amendment because it required him to surrender his property rights in exchange for a building permit.[15]

James Knight's case illustrates the challenges exactions pose. On the one hand, they can provide valuable public benefits by forcing property owners to internalize the negative effects of their development.[16] On the other hand, they can unduly burden property owners—especially those who inherited, rather than created, the original problems.[17] This latter issue implicates the

6. BL 2016-493 (codified as amended at DAVIDSON CNTY., TENN., METRO. CODE § 17.20.120 (2024)); *see Developing More Sidewalks: Council Bill 2016-493*, WALK BIKE NASHVILLE (Nov. 29, 2016), https://www.walkbikenashville.org/sidewalkbill493?locale=en [https://perma.cc/U99H-9646].

7. *See* BL 2016-493.

8. *Exactions*, BLACK'S LAW DICTIONARY (11th ed. 2019).

9. *See* Knight v. Metro. Gov't of Nashville, 572 F. Supp. 3d 428, 432–33 (M.D. Tenn. 2021), *rev'd*, 67 F.4th 816 (6th Cir. 2023).

10. *See* Kea Wilson, *Two Nashville Residents Ask: Should Landowners Fund Sidewalks?*, STREETSBLOG USA (Nov. 9, 2020, 12:01 AM), https://usa.streetsblog.org/2020/11/09/nashville-asks-should-property-owners-pay-for-sidewalks [https://perma.cc/T5HU-ECQ2].

11. *See* BL 2019-1659 (codified as amended at DAVIDSON CNTY., TENN., METRO. CODE § 17.20.120 (2024)); *BL 2019-1659 Overview and Thoughts*, WALK BIKE NASHVILLE (June 25, 2019), https://www.walkbikenashville.org/2019sidewalkbill_update?locale=en [https://perma.cc/8N5F-KWUK].

12. *See Knight*, 572 F. Supp. 3d at 433.

13. This requirement to give the government land in exchange for a building permit is called a dedication. *See Dedication*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The donation of land or creation of an easement for public use.").

14. *See Knight*, 572 F. Supp. 3d at 433.

15. *See id.* at 435.

16. *See infra* Part I.B.

17. *See infra* Part II.B.

Takings Clause of the Fifth Amendment due to its restrictions on property use.[18]

The trial court in Knight's case ruled in favor of the government by reasoning that it was entitled to significant deference because this exaction was imposed by a legislative body.[19] The U.S. Court of Appeals for the Sixth Circuit, however, reversed and held that legislative exactions must be treated like administrative exactions,[20] which the U.S. Supreme Court has held require a more searching standard of review.[21]

Whether legislative exactions are fundamentally different from administrative exactions—and thus whether legislative exactions should receive more deference under the Takings Clause—is still an open question.[22] In *Nollan v. California Coastal Commission*[23] and *Dolan v. City of Tigard*,[24] the Supreme Court held that for an administrative exaction to be constitutional, a government must show that it has an "essential nexus" to the burdens created by the development and is "roughly proportionate" to the harm created (the "*Nollan*/*Dolan* test").[25]

Although the *Nollan*/*Dolan* test definitely applies to administrative exactions, the Court has not yet decided whether it applies to legislative exactions.[26] This lack of clarity has led to a messy split among the state and federal courts on how to evaluate Takings Clause challenges to legislative exactions.[27] After avoiding this question for years,[28] the Court, in 2023, granted a writ of certiorari in *Sheetz v. El Dorado County*,[29] a case that directly raises the issue. Indeed, the petitioner asked the Court to decide whether the *Nollan*/*Dolan* test applies to legislative exactions.[30]

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18. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see infra* Part I.B.

19. *See Knight*, 572 F. Supp. 3d at 439. This Note refers to generally applicable, nondiscretionary exactions imposed pursuant to a statute passed by a legislative body as "legislative exactions."

20. *See* Knight v. Metro. Gov't of Nashville, 67 F.4th 816, 829 (6th Cir. 2023). Exactions imposed by an administrative body, like a zoning board, are sometimes also referred to as "adjudicative exactions" because they are often determined on an ad hoc basis after individually evaluating a permit application. *See Knight*, 572 F. Supp. 3d at 440, 442. For convenience, this Note will refer to them as "administrative exactions."

21. *See Knight*, 67 F.4th at 829.

22. *See infra* Part II.

23. 483 U.S. 825 (1987).

24. 512 U.S. 374 (1994).

25. *See Knight*, 67 F.4th at 825; *Nollan*, 483 U.S. at 837 (providing the essential nexus language).

26. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 628 (2013) (Kagan, J., dissenting).

27. *See Knight*, 67 F.4th at 829 (collecting cases); *see also infra* Part II.

28. *See* Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting); *see also* Cal. Bldg. Indus. Ass'n v. City of San Jose, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring).

29. 300 Cal. Rptr. 3d 308 (Ct. App. 2022), *argued*, No. 22-1074 (U.S. Jan. 9, 2024).

30. Petition for Writ of Certiorari at *i, Sheetz v. County of El Dorado, No. 22-1074 (U.S. May 2, 2023).

This Note will argue that the Court should impose a distinction[31] between administrative and legislative exactions because of fundamental differences in their respective sources of legitimacy. The Note will discuss how the greater democratic legitimacy of legislatively imposed exactions warrants maintaining this distinction and will rely on a commonly recognized fundamental difference between legislative and administrative decisions—the nondelegation doctrine—to demonstrate that the courts already understand the differences between legislative and administrative actions in other contexts.[32]

This Note will proceed in three parts. Part I will provide the legal background for addressing the constitutionality of exactions. Part I.A will explain exactions generally, the distinction between administrative and legislative exactions, and other limits on exactions outside the *Nollan*/*Dolan* test. Part I.B will explain the Supreme Court's trilogy of exactions cases: *Nollan*, *Dolan*, and *Koontz v. St. Johns River Water Management District*.[33] Part I.C will briefly describe *Sheetz*. Finally, Part I.D will discuss the nondelegation doctrine at the federal and state levels and document how some courts are increasingly finding fundamental democratic differences between legislative and administrative actions.

Part II will then lay out the conflict. Part II.A will discuss the arguments for recognizing a distinction between administrative and legislative exactions, and Part II.B will consider the arguments against the distinction.

Then, Part III will argue that the Court should recognize this legislative versus administrative exactions distinction because courts already recognize the inherent and fundamental differences between legislative and administrative decisions in other contexts, as evidenced by the nondelegation doctrine.

I. THE TAKINGS CLAUSE, THE SUPREME COURT'S EXACTIONS JURISPRUDENCE, AND THE NONDELEGATION DOCTRINE

This part will provide the legal background necessary to understand the Court's exactions jurisprudence. Part I.A will discuss the intersection of the Fifth Amendment's Takings Clause with land use regulation outside the *Nollan*/*Dolan* context. Part I.B will lay out the Supreme Court's trilogy of exactions cases, specifically the cases in which the Court developed its

31. Many have advocated for a wholesale reworking of the Court's exactions jurisprudence. *See, e.g.*, D.S. Pensley, Note, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 CORNELL L. REV. 699, 704 (2006) (proposing an alternative test taken from corporate law); Glen Hansen, *Let's Be Reasonable: Why Neither* Nollan/Dolan *Nor* Penn Central *Should Govern Generally-Applicable Legislative Exactions After* Koontz, 34 PACE ENV'T. L. REV. 237, 242 (2017) (arguing that a "reasonable relationship" test should apply instead). This Note, however, will accept this *Nollan*/*Dolan* framework as given, particularly because of *Sheetz*.

32. *See, e.g.*, Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1214 (2022).

33. 570 U.S. 595 (2013).

current exactions doctrine. Part I.C will briefly describe *Sheetz*. Lastly, Part I.D will discuss the nondelegation doctrine at the federal and state levels.

A. The Takings Clause and Its General Deference to Land Use Regulations

State and local governments across the United States have wielded their legislative authority to regulate land use for over a century.[34] As the country continues to urbanize,[35] land use planning has only increased in importance.[36] States, by virtue of the plenary power granted to them by the Tenth Amendment of the U.S. Constitution,[37] can regulate land through their police power.[38] Localities, as subunits of the state, may also regulate land.[39] Although states have broad leeway to exercise (or limit) their police power, they are nevertheless subject to the limitations that the Constitution imposes on governments.[40] Of particular relevance here, the Takings Clause of the Fifth Amendment,[41] which applies to the states (and therefore localities) via the Fourteenth Amendment,[42] prevents governments from taking property without just compensation.[43] In addition to preventing uncompensated physical takings, the Takings Clause also limits states' regulation of land use if those regulations become so burdensome that it approximates a direct physical taking.[44] Such an onerous regulation is known as a regulatory taking.[45]

The Supreme Court first addressed the constitutionality of land use regulations in 1926. In *Village of Euclid v. Ambler Realty Co.*,[46] the Court

34. *See, e.g.*, Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1399 (2012) (discussing how local authorities have retained primary land regulation authority despite the expansion of federal regulation in other areas); William Reckley, *Land Use 101: The History of Land Use Regulation*, NAT'L CTR. FOR MOBILITY MGMT. (Sept. 17, 2020), https://nationalcenterformobilitymanagement.org/blog/land-use-blog-series-part-1/ [https://perma.cc/9PHM-C9PX] ("The first true land use regulations can be traced to Los Angeles in 1906.").

35. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 177–79 (2006) (discussing how most of this country's growth is happening in the suburbs rather than rural areas).

36. *See, e.g.*, Ben Fritz & Zusha Elinson, *California Limits Single-Family Home Zoning*, WALL ST. J. (Sept. 16, 2021, 8:55 PM), https://www.wsj.com/articles/california-limits-single-family-home-zoning-11631840086 [perma.cc/GS2K-6P8K].

37. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

38. *See generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

39. *See id.* at 379 (discussing how the village adopted a plan to regulate and restrict property uses); *see also supra* note 34 and accompanying text.

40. *See* U.S. CONST. amend. X; *see also supra* note 37.

41. The Takings Clause reads, "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

42. *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 238–39 (1897) (enforcing the Fifth Amendment against the states through the Fourteenth Amendment).

43. *See* U.S. CONST. amend. V.

44. *See* Dolan v. City of Tigard, 512 U.S. 374, 383–85 (1994).

45. *See Taking*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A taking of property under the Fifth Amendment by way of regulation that seriously restricts a property owner's rights.").

46. 272 U.S. 365 (1926).

upheld a town's zoning ordinance that prohibited industrial development in certain areas of the city.[47] Although the challenge was based on substantive due process, rather than the Takings Clause, the Court held that zoning was a legitimate use of the locality's police power so long as it benefited the public welfare, which, as a legislative action, it presumptively did.[48]

Although *Euclid* first considered the constitutionality of general land use regulations, in *Penn Central Transportation Co. v. City of New York*,[49] a Takings Clause challenge over fifty years after *Euclid*, the Court confirmed their validity as applied on a more individualized basis.[50] There, in the wake of backlash to the demolition of Penn Station,[51] New York City passed legislation protecting certain historical landmarks.[52] The ordinance empowered a new city agency, the Landmarks Preservation Commission, to take action to preserve landmarks it designated as having historical importance.[53] The plaintiffs sought a permit from the commission to build a tower on top of the landmarked Grand Central Terminal.[54] The agency denied the permit, and the Supreme Court upheld the denial.[55]

Like in *Euclid*, the Court used a similarly deferential standard of review by crafting a three-prong balancing test that evaluated whether a regulation became so burdensome that it constituted a taking.[56] It applied this test and held that no regulatory taking occurred.[57] The test considered the regulation's economic impact, potential interference with the "owner's 'investment-backed expectations,'" and the reason for the government regulation.[58] Although this historical landmark law only applied to select parcels, the Court found that it was not discriminatory because it was part of a broad, comprehensive zoning plan.[59] In the decades since, the *Penn Central* test has become the default test for challenges to regulations under

47. *Id.* at 395–407.
48. *Id.*
49. 438 U.S. 104 (1978).
50. *Id.* at 138.
51. *See* Michael Kimmelman, *When the Old Penn Station Was Demolished, New York Lost Its Faith*, N.Y. TIMES (April 24, 2019), https://www.nytimes.com/2019/04/24/nyregion/old-penn-station-pictures-new-york.html/ [https://perma.cc/DFL3-Q7QN].
52. David W. Dunlap, *Longing for the Old Penn Station?: In the End, It Wasn't So Great*, N.Y. TIMES (Dec. 30, 2015), https://www.nytimes.com/2015/12/31/nyregion/longing-for-the-old-penn-station-in-the-end-it-wasnt-so-great.html [https://perma.cc/SM68-6MWR] (noting that the demolition of the old Pennsylvania Station in the mid-twentieth century "gave rise to the Landmarks Preservation Commission").
53. *Penn Cent.*, 438 U.S. at 108–10.
54. *Id.* at 115–16.
55. *Id.* at 138.
56. *See id.* at 136–38.
57. *See id.*
58. *See* Knight v. Metro. Gov't of Nashville, 67 F.4th 816, 823 (6th Cir. 2023) (quoting *Penn Cent.*, 438 U.S. at 124–25).
59. *Penn Cent.*, 438 U.S. at 132.

the Takings Clause[60] and is favored by governments given its deferential posture.[61]

In addition to zoning, governments exercise their land use powers through granting permits, as most land developments require some form of government approval.[62] Since the early to middle part of the twentieth century, governments have imposed conditions on the granting of permits.[63] These conditions, collectively called "exactions," include land dedications[64] and fees.[65] Exactions are typically justified as a mechanism to force the developers to internalize the negative externalities that their development causes.[66] Property owners, however, decry them as a form of government extortion,[67] and exactions are commonly criticized for serving as a politically popular mechanism to fund local governments in lieu of taxes.[68] Nevertheless, governments routinely use exactions, and some commentators have proposed expanding them to a variety of contexts, including water rights,[69] energy,[70] climate change mitigation,[71] and green buildings.[72]

Exactions are not just subject to federal constitutional limits.[73] They are subject to political limits as well.[74] Localities may choose not to exercise the

60. *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 611 (2004) (discussing the Court's bifurcated approach to takings).

61. *See, e.g.*, Knight, 67 F.4th at 818; Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 BYU L. REV. 809, 828 (2022) (arguing that progressives want *Penn Central*'s ad hoc balancing test to apply to all physical and regulatory takings challenges).

62. *See, e.g.*, Knight, 67 F.4th at 819.

63. *See* Daniel P. Selmi, *Takings and Extortion*, 68 FLA. L. REV. 323, 327 (2016) (discussing how localities began imposing conditions on development projects in the 1960s); Rebecca L. Matlock, Note, *Constitutional Law—Fifth Amendment and Takings—Courts and the Judicial Process Will Impede Orderly Development by Limiting Local Governments' Use of Exactions in Development Planning*, 37 U. ARK. LITTLE ROCK L. REV. 519, 523 (2015).

64. Land dedication is like an easement and involves ceding part of the property to the government. *See Dedication*, *supra* note 13.

65. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013).

66. *See, e.g.*, Christina M. Martin, Nollan *and* Dolan *and* Koontz*–Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, but No More*, 51 WILLAMETTE L. REV. 39, 42–43 (2014).

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

68. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1517–18 (2006) (discussing how exactions are a method to circumvent taxation restrictions and raise funds for localities). Some people claim that exactions are extortive because the government alone has approval authority for land use permitting. *Id.* at 1518.

69. *See generally* Karrigan Börk, *Water Rights Exactions*, 47 HARV. ENV'T L. REV. 63 (2023).

70. *See generally* Jim Rossi & Christopher Serkin, *Energy Exactions*, 104 CORNELL L. REV. 643 (2019).

71. *See generally* J. Peter Byrne & Kathryn Zyla, *Climate Exactions*, 75 MD. L. REV. 758 (2016).

72. *See generally* Benjamin S. Kingsley, Note, *Making It Easy to Be Green: Using Impact Fees to Encourage Green Building*, 83 N.Y.U. L. REV. 532 (2008).

73. Part I.B will discuss the federal constitutional limits to exactions.

74. *Cf.* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Context of Exactions*, 58 HASTINGS L.J. 729, 764, 767 (2007) (discussing how ordinances that

full extent of their authority,[75] or voters may limit the locality's exactions powers because localities often have relatively robust systems of direct democracy.[76] In addition, localities may need explicit authorization from the state to impose exactions and, in any case, may be subject to state statutory preemption.[77] Lastly, exactions are subject to state constitutional limits.[78] Indeed, before the Supreme Court intervened,[79] state courts struck down exactions based on many of the limitations described above rather than by relying on the Constitution.[80]

B. Federal Exactions Doctrine

The Fifth Amendment provides, in relevant part, that no "private property [shall] be taken for public use, without just compensation."[81] Among the Justices of the Supreme Court, how this command applies to exactions is still up for debate. This part will discuss the Supreme Court's approach to exactions by describing its trilogy of exactions cases: *Nollan v. California Coastal Commission*, *Dolan v. City of Tigard*, and *Koontz v. St. John's River Water Management District*.

1. *Nollan v. California Coastal Commission* and the "Essential Nexus" Prong

The landowners in *Nollan* sought to rebuild their beachfront home, which was in disrepair.[82] However, they first needed a coastal development permit from the California Coastal Commission.[83] The commission approved their permit on the condition that the Nollans grant the public an easement—a permanent right to use part of the land[84]—to access the beach.[85] The commission reasoned that this easement was necessary because the rebuilt home, combined with the other new developments in the area, would block the public's view of the ocean, and it suggested that the public would not have access to the beach absent the easement.[86] After unsuccessfully challenging the commission's demand in administrative hearings, the

impose substantive and procedural limitations show how localities do not use the full extent of their authority to impose exactions).

75. *See id.*

76. *See, e.g.*, CAL. GOV'T CODE § 65867.5 (West 2024) (showing the state's general referendum provision to repeal exactions).

77. *See* Frona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DEPAUL L. REV. 635, 646, 653 (1990) ("[T]he city must still demonstrate some basis for the power to enact local exaction or impact fee ordinances.").

78. *See, e.g.*, N.Y. CONST. art. I, § 7; Fenster, *supra* note 74, at 759.

79. *See infra* Part I.B.

80. *See* Fenster, *supra* note 74, at 736.

81. U.S. CONST. amend. V.

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

83. *Id.* at 828.

84. *See Easement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

86. *Id.* at 828–29.

Nollans filed a lawsuit in state court challenging the condition as a taking in violation of the Takings Clause.[87]

Although the trial court ruled in favor of the Nollans, the court did so on statutory grounds, reasoning that the commission's condition did not comply with state law.[88] The state appellate court, however, disagreed with the trial court's statutory interpretation and found that the condition satisfied the statute.[89] The court further held that the condition did not violate the Takings Clause.[90] With respect to the Takings Clause, the appellate court simply looked for (and found) a sufficient relation, even indirect, between the burdens created by the project and the condition.[91] The court also upheld the condition because "it did not deprive [the landowners] of all reasonable use of their property."[92] Shortly thereafter, the Nollans appealed to the Supreme Court.[93]

The Court reversed the California appellate court.[94] In a five to four opinion authored by Justice Antonin Scalia, the Court focused on how the commission's demand for an easement would unquestionably be considered a taking outside of the permitting context.[95] According to the Court, the easement was akin to a physical taking—even though the Nollans remained in possession of the land.[96]

In general, land use regulations are not takings.[97] The *Nollan* Court, however, decided that an exaction could amount to a taking *if* the connection (the "nexus," in Justice Scalia's words) between the required condition and the proffered public purpose is too attenuated.[98] If the condition is insufficiently connected with the original purpose of the regulatory scheme, then the condition is an improper taking that violates the Fifth Amendment by granting the public an easement without just compensation to the landowner.[99] Absent a sufficient nexus, the Court said, the condition is "an out-and-out plan of extortion."[100] Moreover, the Court rejected the commission's argument that the access requirement was needed because the rebuilt home would block the public's view of the beach and thus "interfere

87. *Id.*
88. *Id.* at 829.
89. *Id.* at 830.
90. *Id.*
91. *Id.* The Nollans' project "contributed to the need for public access." *Id.*
92. *Id.*; *see also* note 58 and accompanying text (discussing the *Penn Central* test for regulatory takings).
93. *Nollan*, 483 U.S. at 830–31.
94. *Id.* at 841–42.
95. *Id.* at 831.
96. *Id.* at 832.
97. *Id.* at 834; *see also supra* Part I.A.
98. *Nollan*, 483 U.S. at 837.
99. *Id.*; *see also* Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 349, 360 (1999) (arguing that *Nollan* should have reasoned that an unrelated condition alters the purpose of the regulation, which destroys its legitimate public character).
100. *Nollan*, 483 U.S. at 837 (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

with the desire of people who drive past the Nollans' house to use the beach."[101] This connection was too tenuous for the Court; thus, the permit condition was not a valid use of police power, but rather an attempt at using eminent domain without compensating the landowner.[102]

2. *Dolan v. City of Tigard* and the "Rough Proportionality" Prong

Seven years after *Nollan*, the Court again weighed in on a Takings Clause issue involving exactions. In a five to four majority written by Chief Justice William Rehnquist, the Court added a second prong to *Nollan*'s exactions test in *Dolan v. City of Tigard*.[103] Florence Dolan sought to nearly double the size of her store and create a new parking lot.[104] She applied for a permit, which the Tigard Planning Commission, following guidelines established by the city's comprehensive development plan, approved.[105] As a condition for its approval, however, the commission required that she (1) "dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system" and (2) dedicate a stretch of land to serve as a public greenway.[106]

The commission found that the floodplain dedication was necessary to counteract the increase in impervious surfaces associated with Dolan's proposed land use intensification.[107] Similarly, the commission justified the greenway condition based on the assumption that the larger store would increase traffic.[108] In the commission's view, some of store's customers would come by bike or foot, and, to the extent that they drove, the greenway dedication would help offset the increased traffic on the road by providing an alternative travel path.[109] The Oregon Land Use Board of Appeals denied Dolan's challenge,[110] and the Oregon Court of Appeals affirmed the dismissal by reading *Nollan* to simply require that (1) the exaction be reasonably related to projected impact and (2) the public purpose of the exaction be the same purpose that would have otherwise led to denial.[111]

The U.S. Supreme Court, however, reversed.[112] Although the Court determined that the "'essential nexus' . . . between the 'legitimate state interest' and the permit condition exacted by the city" existed,[113] the Court

101. *Id.* at 838.
102. *See id.* at 839. The Court agreed, however, that a condition requiring the Nollans to give the public a "viewing spot" would be constitutional. *Id.* at 836.
103. 512 U.S. 374, 391 (1994).
104. *Id.* at 379.
105. *Id.* at 379–80.
106. *Id.* at 380.
107. *Id.* at 382.
108. *Id.* at 381–82.
109. *Id.*
110. *Id.* at 382.
111. *Id.* at 383.
112. *Id.* at 396.
113. *Id.* at 386–88 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)). The nexus here was "between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain." *Id.* at 387.

also required a sufficient connection between the exaction and the development's impact,[114] a requirement now known as "rough proportionality."[115] The Court surveyed state court decisions and considered what degree of connection to require between the exaction and the development.[116] The Court ultimately settled on the "intermediate position"[117] that was "adopted by a majority of the state courts" as its standard.[118] This standard requires an "individualized determination that the . . . dedication is related both in nature and extent to the impact of the proposed development."[119] This determination requires more than conclusory statements; rather, the government "must make some effort to quantify" or otherwise support its findings.[120]

After adopting this rough proportionality standard, the Court held that the exaction failed to satisfy the standard's requirements.[121] Although the Court found the requirement to leave the land in the floodplain undeveloped constitutional,[122] it questioned the requirement to build a public rather than private greenway.[123] In the Court's view, the public nature of the greenway did nothing to mitigate the flood hazards, and the agency did not sufficiently determine that a public greenway would offset increased traffic.[124] Thus, the Court held that the exaction was unconstitutional.[125]

The Court also suggested that its decision to limit the government's authority to impose exactions is based on the unconstitutional conditions

114. *Id.* at 386. The Court did not address this rough proportionality requirement in *Nollan* because that exaction failed at the first step, the nexus requirement. *See id.*

115. *Id.* at 391.

116. *See id.* at 389–91. Prior to 2019, when the Supreme Court held that property owners could bring Fifth Amendment challenges against local governments in federal court irrespective of whether they sought review in state court, property owners generally had to initiate takings claims in state courts. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2167 (2019).

117. Some commentators question whether the Court truly took an intermediate position. *See, e.g.*, Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 249–50, 250 n.39 (2000).

118. *Dolan*, 512 U.S. at 390–91. Although the states used the term "reasonable relationship," the Court decided against that nomenclature because of potential confusion with the Equal Protection Clause's rational basis review. *See id.* at 391.

119. *Id.* The Court's analysis as to why the Constitution required this test was cursory. *See id.* at 392 ("We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

120. *Id.* at 395–96.

121. *See id.* at 394–95.

122. *Id.* at 392 ("It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm water flow from petitioner's property.").

123. *See id.* at 393.

124. *See id.* at 393, 395–96.

125. *See id.* at 396.

doctrine.[126] This "well-settled" doctrine[127] prohibits the government from forcing a person to cede a constitutional right for a discretionary government benefit if that benefit is insufficiently related to the right.[128] Here, Dolan claimed that she was neither receiving any benefits from the government nor imposing any burdens sufficient to justify the demanded exaction.[129]

The Court in *Dolan* also shifted the presumption of validity such that the government bears the burden of proving an exaction's constitutionality.[130] The Court distinguished this burden shifting from zoning regulations, which are presumptively constitutional, because this exaction was determined on an ad hoc basis through an individualized analysis.[131]

3. *Koontz v. St. Johns River Water Management District* and Extending the *Nollan*/*Dolan* Test to Monetary Exactions

In *Koontz v. St. Johns River Water Management District*, with Justice Alito writing for a five to four majority, the Court extended the *Nollan*/*Dolan* test to denials of permits and to monetary exactions.[132]

The petitioner, Coy Koontz, sought to develop part of his undeveloped property on a state-designated wetland and applied for a permit from the St. Johns River Water Management District (the "District") as required by Florida's statute.[133] In exchange for approval, he proposed to leave the rest of the land undeveloped and deed it to the District as a conservation easement.[134] The District, having found this proposal to be an inadequate environmental mitigation effort, countered by requesting that he either further reduce his development size and dedicate the rest of the property to the public or pay to construct improvements to some other District-owned land.[135]

Koontz challenged the proposed conditions, and the state trial court agreed that the District's actions violated the *Nollan*/*Dolan* test.[136] It found that

126. *See id.* at 385. The Court later more explicitly clarified in *Lingle v. Chevron U.S.A. Inc.* that its exactions doctrine is a special application of the unconstitutional conditions doctrine. 544 U.S. 528, 547–48 (2005).

127. One of the few things that takings scholars agree on is that the unconstitutional conditions doctrine is not well-settled. *See, e.g.*, Michael B. Kent, Jr., *Viewing the Supreme Court's Exactions Cases Through the Prism of Anti-evasion*, 87 U. COLO. L. REV. 827, 831 (2016); *see also* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 608 (1990) (proposing that courts instead should evaluate if there was a government coercion or penalty in connection with the interest affected by the government).

128. *See Dolan*, 512 U.S. at 385.

129. *Id.* at 385–86.

130. *See id.* at 391 n.8.

131. *See id.*; *see also supra* notes 60–61 and accompanying text.

132. 570 U.S. 595, 599 (2013).

133. *Id.* at 599–601.

134. *Id.* at 601. A conservation easement is an easement that is intended to mitigate adverse environmental effects from a development. *See id.*

135. *Id.* at 601–02.

136. *Id.* at 603.

Koontz's original proposal was adequate and the District's suggested offsite improvements failed both the nexus and proportionality prongs of the test.[137]

Although the appellate court affirmed, the Florida Supreme Court reversed the decision and concluded that the *Nollan*/*Dolan* test did not apply to a denial of a permit for refusal to accept the exaction.[138] The court also distinguished the case from the exactions in *Nollan* and *Dolan* because the demand was for money rather than property.[139] Noting the lack of consensus as to whether the *Nollan*/*Dolan* test applied to monetary exactions, the court held that it did not.[140]

The Supreme Court reversed and held that the *Nollan*/*Dolan* test applied to monetary exactions.[141] This time around, the Court explicitly focused on the *Nollan*/*Dolan* test serving as a "special application" of the unconstitutional conditions doctrine.[142] The Court was primarily concerned with the vulnerability of property owners given the government's broad discretion to deny the permit request.[143] In the Court's view, applicants could be coerced into accepting any condition so long as it was less valuable than the building permit.[144] As such, it saw no difference between approving a permit with conditions and denying one for refusal to accede to the conditions.[145] The Court noted that to hold otherwise would create a loophole that would allow the government to circumvent the *Nollan*/*Dolan* test by placing the same burden on property owners using monetary exactions while avoiding the judicial scrutiny of nonmonetary exactions.[146]

The Court agreed with the District that the *Nollan*/*Dolan* test was satisfied so long as the government provided at least one alternative condition that satisfied the test.[147] It held, however, that the monetary exaction that the District proffered failed the test.[148] According to the Court, considering such a fee to be a valid alternative condition would allow governments to circumvent *Nollan*/*Dolan*'s protections and abusively regulate land use.[149] Although these fees could seemingly be confused with a tax, which does not implicate the Takings Clause,[150] the Court was not concerned with its ability to distinguish taxes from takings in the context of monetary exactions.[151] Here, the Court found that the challenged exaction was clearly not a tax

137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 604.
142. *Id.* (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005)); *see also supra* note 126.
143. *Koontz*, 570 U.S. at 604–05.
144. *Id.* at 605.
145. *See id.* at 606. The unconstitutional conditions doctrine similarly recognizes no difference. *Id.*
146. *See id.*
147. *Id.* at 611.
148. *Id.* at 612.
149. *Id.* at 613–14.
150. *See id.* at 615.
151. *See id.* at 616.

because Florida state law, like in many other states, greatly restricts the ability of a locality to tax.[152] Accordingly, the District did not attempt to argue that this exaction was a tax.[153]

C. The Live Question in Sheetz v. County of El Dorado*: Does the* Nollan*/*Dolan *Test Apply to Legislative Exactions?*

Despite having avoided answering the legislative versus administrative question for decades, the Supreme Court is poised to finally resolve this debate in a case this term. In September 2023, the Court granted certiorari in *Sheetz v. County of El Dorado*.[154] In *Sheetz*, the petitioner George Sheetz challenged his payment of a traffic impact mitigation fee that a county ordinance required prior to issuance of a building permit for construction of a single-family home.[155] This fee, which the parties agreed is an exaction rather than a permit application fee because it is intended to offset the new development's impact, was established in 2006 in a county general planning ordinance.[156] The county makes no individualized determination as to the fee because it is set out in a public schedule based on the development's location and type of construction.[157] In 2016, George Sheetz paid the county $23,420 for approval to build a 1,854-square foot single-family home on his property.[158] Thereafter, he sent numerous letters to the county to protest the fee and seek a refund.[159]

In 2017, after receiving no response to his letters, Sheetz challenged the fee in state court by alleging that the fee violated the state exactions enabling statute and the federal Takings Clause.[160] The trial court held, under a deferential standard of review, that the fee and ordinance did not violate the enabling statute, and the appellate court affirmed.[161] Moreover, both courts agreed that the *Nollan*/*Dolan* test does not apply to legislatively imposed exactions like the county's.[162] The appellate court distinguished Sheetz's exaction from those exactions at issue in *Nollan* and *Dolan* because of its general application and formulaic calculation.[163] Thus, the exaction was valid under California statutory law and the Fifth Amendment.[164]

152. *See id.* at 617.
153. *See id.*
154. No. 22-1074, 2023 WL 6319652 (U.S. Sept. 29, 2023), *argued*, No. 22-1074 (U.S. Jan. 9, 2024).
155. Sheetz v. County of El Dorado, 300 Cal. Rptr. 3d 308 (Ct. App. 2022), *argued*, No. 22-1074 (U.S. Jan. 9, 2024).
156. *See id.* at 311–12.
157. *See id.* at 312.
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.* at 323.
162. *See id.* at 321.
163. *See id.* at 319.
164. *See id.* at 325.

After the Supreme Court of California denied review,[165] Sheetz petitioned the Supreme Court on the Takings Clause issue.[166] Specifically, he and numerous amici curiae[167] urged the Court to hold that the *Nollan*/*Dolan* test applies to legislatively imposed exactions.[168] And in September 2023, the Court granted certiorari on the question of "whether a permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation."[169] Oral arguments in the case occurred in January 2024.[170]

D. The Nondelegation Doctrine in the Federal and State Courts

Although the Supreme Court has yet to weigh in on the difference between administrative and legislative exactions under the *Nollan*/*Dolan* test, the Court and many states recognize a fundamental difference between these two types of government actions. According to this perspective, there are differences in democratic legitimacy between legislative and administrative decisions which have led to the application of the nondelegation doctrine.[171]

The nondelegation doctrine is the principle that only the legislative branch can exercise legislative power.[172] Accordingly, executive agencies can only implement policies that the legislature defines and may not *independently* form policy.[173] In other words, under the nondelegation doctrine, agencies can only fill in statutory gaps.[174] The nondelegation doctrine primarily exists because of concerns regarding the separation of powers and a fear that agencies lack accountability and, therefore, their decisions lack democratic legitimacy.[175] The nondelegation doctrine is an important limiting principle on governmental power at both the federal and state levels, as it limits who may exercise power in addition to the ordinary restraints on what power may be exercised.

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165. Petition for Writ of Certiorari, *supra* note 30, at 9–10.

166. *Id.* at 4.

167. No. 22-1074 (U.S. filed May 2, 2023) (docket includes fourteen amici briefs in favor of the petitioner); *see, e.g.*, Brief of the Chamber of Com. of the U.S. of Am. as Amicus Curiae in Support of Petitioner, Sheetz v. County of El Dorado, No. 22-10174 (U.S. Nov. 20, 2023); Brief of the Cato Inst. as Amicus Curiae in Support of Petitioner at 17, *Sheetz*, No. 22-10174 (U.S. Nov. 20, 2023).

168. Petition for Writ of Certiorari, *supra* note 30, at 27–28.

169. *Id.* at i.

170. No. 22-1074 (U.S. argued Jan. 9, 2024); *see also Sheetz v. County of El Dorado, California*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/sheetz-v-county-of-el-dorado-california/ [https://perma.cc/6VFU-JTAR] (last visited Mar. 3, 2024).

171. This Note makes no normative judgment about the propriety of the nondelegation doctrine—a doctrine with both strong support and vehement disapproval. *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380 (2017).

172. *See* Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

173. *See id.* at 2136.

174. *See id.*

175. *See id.* at 2135.

1. The Potential Revival of the Federal Nondelegation Doctrine

At the federal level, the nondelegation doctrine, in its traditional form, is nearly nonexistent today.[176] One of the last times that the Supreme Court invalidated an agency decision specifically on the grounds of nondelegation was in 1935 in *A.L.A Schechter Poultry Corp. v. United States*.[177] Since then, most delegations have been upheld.[178] In *Yakus v. United States*,[179] the Court, rather than invalidating an agency action on nondelegation grounds, simply inquired whether Congress provided sufficient guidelines for the agency to implement the congressionally determined policies.[180] The Court still has not fully revived the nondelegation doctrine at the federal level, although some Justices have explicitly called for its return.[181]

Despite the moribund status of the federal nondelegation doctrine, a growing number of Justices recognize a modern variant of it called the major questions doctrine, through which the Court has similarly hardened the line between legislative and administrative action.[182] The Court's major questions doctrine assumes that, absent *specific* language to the contrary, Congress did not intend to delegate to executive agencies the power to implement "major" regulatory policies.[183] In contrast to the traditional nondelegation doctrine, which could invalidate the legislation that establishes the agency (i.e., the enabling statute), the major questions doctrine invalidates agency action in a specific area.[184] Instead of primarily limiting economic regulations like the federal nondelegation doctrine did, the major questions doctrine has thus far been applied to a wider range of subject

176. *See id.* at 2130–31 (Alito, J., concurring) (noting that "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards").

177. 295 U.S. 495 (1935).

178. *See Gundy*, 139 S. Ct. at 2137–38 (Gorsuch, J., dissenting).

179. 321 U.S. 414 (1944).

180. *See id.* at 426.

181. *See, e.g.*, *Gundy*, 139 S. Ct. at 2140–42 (Gorsuch, J., dissenting) (criticizing the "intelligible principle" test that replaced the nondelegation doctrine); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints."); *see also* Jarkesy v. Sec. Exch. Comm'n, 34 F.4th 446, 459 (5th Cir. 2022) (finding that the delegation of legislative power from Congress to the SEC was unconstitutional "by failing to provide [the SEC] with an intelligible principle to guide its use of the delegated power"), *argued*, No. 22-859 (U.S. Nov. 29, 2023).

182. *See Gundy*, 139 S. Ct. at 2141–42; *see also* Adam Liptak, *The Curious Rise of a Supreme Court Doctrine that Threatens Biden's Agenda*, N.Y. TIMES (Mar. 6, 2023), https://www.nytimes.com/2023/03/06/us/politics/supreme-court-major-questions-doctrine.html [https://perma.cc/U9NP-UCMU] (noting that the phrase "major questions doctrine" was only mentioned five times in federal decisions before 2020).

183. *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000) (invalidating the FDA's regulation of tobacco); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1013 (2023).

184. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2608 (2022).

areas, from coal emissions regulation,[185] to an eviction moratorium,[186] to vaccine or mask-plus-test mandates in the workplace.[187] The Justices are still determining the extent of the major questions doctrine,[188] but they have increasingly used the doctrine in recent years.[189]

Although the Court has thus far applied the major questions doctrine as a statutory interpretation canon by reading enabling statutes as not actually authorizing such actions,[190] some Justices view it as a variant of nondelegation.[191] In their view, separation of powers principles prevent anyone but the legislative branch from making certain important decisions.[192] Just as with nondelegation, the major questions doctrine is motivated by the fear that a small group of unaccountable government officials will implement wide-ranging, politically significant regulatory policies.[193] Instead, according to the doctrine's proponents, the "wisdom of the masses" should determine policy.[194] Thus, these proponents would find the agency actions unconstitutional rather than merely ultra vires and beyond the scope of their statutorily delegated power.[195] In fact, Justices Gorsuch and Alito have explicitly tied the modern major questions doctrine to the traditional nondelegation doctrine.[196]

2. The Persistence of the State Nondelegation Doctrine

In contrast to the federal level, the nondelegation doctrine has remained robust in many, although not all, state courts. One argument for why the

185. *See id.* at 2607. The major questions doctrine assumes that Congress did not intend to delegate such authority to the agency. *See id.* at 2609 ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (quoting U.S. Telecomm. Ass'n. v. Fed. Commc'ns Comm'n, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting))).

186. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam).

187. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 117–18 (2022) (per curiam).

188. *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) ("Doubtless, what qualifies as an important subject, and what constitutes a detail may be debated.").

189. Ian Millhiser, *How the Supreme Court Put Itself in Charge of the Executive Branch: The Major Questions Doctrine, Explained*, VOX (July 17, 2023, 6:30 AM), https://www.vox.com/scotus/23791610/supreme-court-major-questions-doctrine-nebraska-biden-student-loans-gorsuch-barrett [https://perma.cc/BNG9-LZ79].

190. *See Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117.

191. *See id.* at 124 (Gorsuch, J., concurring). Justices Thomas and Alito joined Justice Gorsuch's concurrence. *Id.*

192. *See id.* The Court also views the major questions doctrine as a textual canon to discern the true meaning of the statutory text by providing further context. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring).

193. *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

194. *See id.*; *see also Nebraska*, 143 S. Ct. at 2372 ("The question here is not whether something should be done; it is who has the authority to do it.").

195. *See Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 126 ("[I]f the statutory subsection the agency cites really *did* endow OSHA [the Occupational Safety and Health Administration] with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.").

196. *See West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

nondelegation doctrine is especially active at the state level is the minimal political accountability of state administrative agencies.[197] In particular, there is less control over the agencies by the elected branches, which leads to a fear of capture.[198] Moreover, local agencies, in particular, are often insulated from electoral accountability despite the breadth of their discretion "in daily contact with local residents."[199] Although states differ to the extent that their constitutions explicitly incorporate separation of powers principles, a constitutionalized separation of powers provision generally leads to a stronger manifestation of the nondelegation doctrine.[200]

Proponents of the nondelegation doctrine similarly argue that the more minimal oversight of state agencies supports applying the nondelegation doctrine.[201] The review mechanism for agency actions is less robust at the state and especially local levels than at the federal level, which has the Administrative Procedure Act[202] formally providing for judicial review of agency action.[203] The state nondelegation doctrine reflects a "judicial anxiety about authority being given to local residents."[204] After all, one common concern of legitimacy in administrative law is agencies' unelected and constitutionally ambiguous position, which leaves them susceptible to capture.[205] Accordingly, some states like Florida have sought to bring agencies under more legislative control through procedural reforms and by recognizing a strong nondelegation doctrine.[206]

One example of the nondelegation doctrine at play in the states is *Boreali v. Axelrod*.[207] In *Boreali*, the New York Court of Appeals reviewed the state's Public Health Council's regulation of tobacco smoking in public spaces.[208] The agency, following its broad enabling statute, promulgated regulations that prohibited smoking in certain publicly accessible indoor spaces.[209] The Public Health Law,[210] which established the agency, gave it

197. *See* Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527, 534 (2016).

198. *See id.*

199. Nestor Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 606, 623 (2017).

200. *See* Rachel Scholz-Bright, Note, *Walking the Tightrope: Finding Balance Between Strict Nondelegation and the Administrative State Through an Examination of State Experience*, 20 GEO. J.L. & PUB. POL'Y 427, 437 (2022).

201. *See, e.g.*, Shaw, *supra* note 197, at 537.

202. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

203. *See* Shaw, *supra* note 197, at 537; *cf.* Casey Adams, Note, *Home Rules: The Case for Local Administrative Procedure*, 87 FORDHAM L. REV. 629, 669 (2018) (advocating for a local administrative procedure act like the federal Administrative Procedure Act).

204. Davidson, *supra* note 199, at 623.

205. *See* Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 447 (2014).

206. *See* Scholz-Bright, *supra* note 200, at 442.

207. 517 N.E.2d 1350 (N.Y. 1987).

208. *See id.* at 1351.

209. *See id.* at 1352.

210. N.Y. PUB. HEALTH LAW § 225 (McKinney 2024).

authority to "deal with any matters affecting the public health."[211] Despite this seemingly broad grant of authority, the court read in the principle that the legislative branch may not give an administrative agency its "policy-making responsibility."[212] This prohibition on sharing legislative authority, according to the court, derived from separation of powers concerns in the state constitution.[213] Thus, the court held that the state constitution prohibits agencies from "engaging in inherently legislative activities."[214] Instead, the court said that agencies may only "fill up the details" of a general statutory provision.[215]

Here, the court expressed concerns that the agency exercised broad, open-ended means to achieve its ends, which is something only the legislative branch may constitutionally do.[216] The court found that the agency engaged in the sort of balancing of various interests that the legislature typically does.[217] Furthermore, the Public Health Council made certain categorical carveouts from its regulations, as well as instituting an ad hoc waiver process if a regulated party faces financial hardship from compliance.[218] For the court, such balancing of interests and creation of ad hoc exemptions that are not primarily grounded in public health concerns belonged to the legislative branch, not an administrative agency.[219] Instead, in the court's view, the agency should have simply implemented policy by filling in the details rather than creating an entire regulatory scheme from scratch.[220]

The court similarly found the regulations to be improper because the agency had acted in an area in which the legislature had already tried and failed to legislate.[221] The court viewed this agency action as a way of circumventing the democratic process.[222] The legislature was unable to determine the proper goals and methods to regulate smoking; therefore, the court found that the agency usurped this task.[223] Lastly, the anti-smoking

211. *See Boreali*, 517 N.E.2d at 1351 (quoting N.Y. PUB. HEALTH LAW § 225(5)(a) (McKinney 1987)).
212. *See id.* at 1353.
213. *See id.* The court relied on the New York State Constitution, which says, "[t]he legislative power of this State shall be vested in the Senate and the Assembly." N.Y. CONST. art. III, § 1.
214. *See Boreali*, 517 N.E.2d at 1353.
215. *See id.* (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).
216. *See id.* at 1355.
217. *See id.*
218. *See id.*
219. *See id.*
220. *See id.* at 1356.
221. *See id.*
222. *See id.* ("Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.").
223. *See id.*

regulations required no technical expertise that the agency could have provided.[224] Thus, the court held that the rules were invalid.[225]

The state nondelegation doctrine, however, does not just apply to purported delegations from the legislative branch to an agency.[226] Rather, as Professor Benjamin Silver argues, it applies to all delegations made outside of a branch.[227] For instance, the Supreme Court of Kentucky invalidated a statute that gave the courts the de facto power to draw electoral districts.[228] The primary doctrinal basis for this broad view of nondelegation is that states' separation of powers constitutional provisions implicitly restrict any form of delegation regardless of who is delegating the power and who is receiving it.[229] In fact, Professor Silver argues that the nondelegation doctrine has been applied to invalidate all permutations of interbranch delegations, with the sole exception of delegations from the judicial branch to the legislative branch (which have "evaded judicial opinion").[230]

In addition to compliance with separation of powers principles, this strong nondelegation doctrine in the states serves to promote accountability.[231] By limiting who may take certain actions, the populace is able to determine who is responsible for a decision.[232] Professor Silver names this nondelegation justification the "sovereignty theory."[233] Under this view, only the "correct government" officials may exercise certain powers.[234] As such, the state nondelegation doctrine seeks to ensure that "government power is . . . exercised by the relevant politically accountable government."[235] Moreover, proponents of the state nondelegation doctrine argue that limiting who exercises governmental power prevents the "arbitrary exercise of unnecessary and uncontrolled discretionary power."[236] For instance, Iowa prevents delegation of decisions that require judgement or discretion.[237] In

224. *See id.* ("[T]he [Public Health Council] drafted a simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups.").

225. *See id.* at 1355. The court technically held that the legislature constitutionally delegated regulatory authority to the agency, but it more narrowly construed the open-ended grant of authority to avoid the separation of powers concerns. *See id.* The dissent, however, argued that the true separation of powers concern was judicial branch overreach and interference with agency power. *See id.* at 1360 (Bellacosa, J., dissenting) ("The case represents, simply, a substitution of judicial preference for the expert authorized action of an agency . . . .").

226. *See* Silver, *supra* note 32, at 1216.

227. *See id.* at 1230.

228. *See id.* at 1217.

229. *See id.* at 1229–30.

230. *See id.* at 1234.

231. *See id.* at 1242.

232. *See id.*

233. *See id.*

234. *See id.*

235. *See id.* at 1248.

236. *See id.* at 1242 (quoting Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 833 (Pa. 2017)).

237. *See id.* at 1220.

summary, the state nondelegation doctrine constrains who has the decision-making power rather than the decision itself.[238]

II. COMPETING VIEWS ABOUT HOW THE TAKINGS CLAUSE APPLIES TO LEGISLATIVE EXACTIONS

After *Koontz*, courts agree that the *Nollan*/*Dolan* test applies to all ad hoc administrative exactions, regardless of whether the permit was approved with a condition or denied for failure to accept a condition.[239] The Court, however, has not decided whether the *Nollan*/*Dolan* test applies to generally applicable legislative exactions.[240] Part II will lay out the debate on that question. Part II.A catalogues arguments in favor of the distinction, and Part II.B discuses arguments against the distinction.

A. Arguments in Favor of Recognizing the Distinction Between Legislative and Administrative Exactions

Those in favor of maintaining a distinction between legislative and administrative exactions primarily focus on the greater political accountability inherent in legislative exactions, as such accountability reduces the risk of governmental coercion that the exactions doctrine is intended to mitigate.[241] The lack of governmental discretion in legislative exactions, proponents believe, minimizes the risk of extortion.[242] They also argue that legislatively imposed exactions increase predictability and transparency for landowners by encouraging the government to act comprehensively.[243] Some supporters of the distinction have also focused on how the Supreme Court's exactions trilogy involved individual judgements;[244] thus, they argue that precedent precludes an expansion of the *Nollan*/*Dolan* test.[245] Lastly, proponents of this distinction also believe that market forces prevent government overreach in the exactions context.[246]

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238. *See id.* at 1257.

239. *See supra* Part I.

240. *See* Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting); *see also* Cal. Bldg. Indus. Ass'n v. City of San Jose, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring).

241. *See supra* Part I.B; *see also infra* Part II.B.1.

242. *See, e.g.*, Bldg. Indus. Ass'n–Bay Area v. City of Oakland, 289 F. Supp. 3d 1056, 1058–59 (N.D. Cal. 2018) ("The exactions doctrine, in other words, has historically been understood as a means to protect against abuse of discretion by land-use officials with respect to an individual parcel[] of land . . . ."), *aff'd*, 775 F. App'x 348, 350 (9th Cir. 2022).

243. *See* Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 530 (2012).

244. *See supra* Part I.B.

245. *See* Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 197 (2019).

246. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 475–76 (1991).

1. The Argument that the Democratic Process Sufficiently Minimizes the Extortion Risk with Legislative Exactions

The primary argument for maintaining this distinction is that the political process provides a check on the risk of coercion, which sufficiently distinguishes legislative exactions from administrative exactions. Critics of a *Nollan*/*Dolan* expansion decry that it will allow the judiciary to second-guess the legislature's policy judgments.[247] Rather, they assert that democracy and the political process will prevent legislatures from extorting developers.[248] Moreover, because there are multiple political avenues, such as state and local legislation regulating exactions that can protect property owners, they argue that the *Nollan*/*Dolan* test should not apply to legislative exactions.[249]

Proponents of the distinction similarly dispute the argument that the political process primarily favors local homeowners, who do not generally need permits and are thus unlikely to face the effects of an exaction.[250] On the contrary, proponents suggest that developers and other landowners are often well-represented in local government.[251] In fact, they believe that developers may have sufficient political control in local governments such that they, not the residents, benefit more from local legislation.[252] Therefore, in their view, maintaining this distinction would not harm developers.[253]

San Remo Hotel L.P. v. City of San Francisco[254] exemplifies the perspective that the checks that the political process provides sufficiently

247. *See generally* Rosenberg, *supra* note 35; *see also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005) ("The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.").

248. *See* San Remo Hotel L.P. v. City of San Francisco, 41 P.3d 87, 105 (Cal. 2002) ("A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls."); *see also* Town of Flower Mound v. Stafford Ests. Ltd. P'ship, 135 S.W.3d 620, 640 (Tex. 2004) (conceding that the legislative body would probably be pushed out for imposing overly extortionate exactions).

249. *See, e.g.*, Fenster, *supra* note 74, at 759 (arguing that state and local legislation can sufficiently limit the authority of the government to impose exactions).

250. *See, e.g.*, Kent, Jr., *supra* note 127 at 856 n.177, 871.

251. *See* Selmi, *supra* note 63, at 368–69; *see also* Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENV'T L. & POL'Y 1, 37 (2004) (arguing that most local legislators are homeowners and that developers and other repeat players have significant influence over the political process).

252. *Cf.* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 851 (1993) (discussing how one concern that some courts have is that the city council is corrupt and gives the developer a good deal); *see also* Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 955 (discussing the risk that zoning boards are biased in favor of developers who are often repeat players).

253. *Cf.* Fenster, *supra* note 60, at 680 (arguing that scrapping the *Nollan*/*Dolan* test will not lead to adverse extortionate effects on developers).

254. 41 P.3d 87 (Cal. 2002).

distinguish legislative from administrative exactions.[255] There, the hotel-owner plaintiffs challenged a local ordinance that required a permit before eliminating a residential hotel unit or converting it into a short-term rental unit.[256] The city conditioned the permit on either replacing the lost residential units with comparable new units or otherwise paying a fee to offset the loss.[257] The plaintiffs challenged the condition as a violation of the Takings Clause and argued that the *Nollan*/*Dolan* test should apply.[258]

The Supreme Court of California denied this request for a more searching standard of review for legislatively imposed exactions.[259] The court focused on the lack of "meaningful government discretion" involved in imposing this condition.[260] Moreover, the fee applied to all residential hotel owners who sought to convert their property rather than just singling out the plaintiff.[261] The court rejected the notion that general applicability requires that an ordinance apply to every single property rather than just a subset because "almost no rationally drawn land use regulation" would meet that requirement.[262] Thus, for the Supreme Court of California, the lack of government discretion involved in legislative exactions rendered the *Nollan*/*Dolan* test inapplicable.[263]

Moreover, for the *San Remo Hotel* court, the political process provided sufficient recourse from an allegedly extortionate exaction.[264] The court viewed the risk of improper leveraging as low given the "ordinary restraints of the democratic political process."[265] According to the *San Remo Hotel* court, a legislative body who demands an extortionate exaction takes the risk of strong opposition at the polls when running for reelection.[266] It distinguished these legislative exactions from administrative ones because the fewer people impacted, the more likely that such an exaction would evade political oversight.[267] Similarly, the court described how exactions nevertheless face statutory and constitutional limitations that prevent a local government from arbitrarily imposing exactions.[268] Thus, according to the court, the judiciary should be wary of interfering with the *legislature's* regulations.[269]

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255. *See id.* at 105.
256. *Id.* at 92.
257. *See id.*
258. *See id.* at 95.
259. *See id.* at 104.
260. *See id.*
261. *See id.*
262. *See id.*
263. *See id.* at 105.
264. *See id.*
265. *See id.*
266. *See id.*
267. *See id.*
268. *See id.* at 105–06; *see also* Fenster, *supra* note 74, at 759 (discussing how developers have helped pass state statutes that explicitly authorize exactions).
269. *See San Remo Hotel*, 41 P.3d at 106; *see also* Selmi, *supra* note 63, at 370 (arguing that the minimal state regulation of exactions shows that states do not perceive this "extortion" to be a problem, so judicial intervention would be antidemocratic).

2. The Argument that Market Forces Prevent Extortionate Exactions

Lastly, although not all property owners may be able to vote out the officials in the locality,[270] they can challenge an allegedly extortionate exaction by leaving the jurisdiction.[271] Professor Vicki L. Been argues that these quasi-market forces prevent the government from overreaching in the exactions context.[272] She compares exactions to other areas of state law, such as banking regulations and corporate charters, in which competition between local governments and states inherently limits any given legislature's regulations.[273] Thus, she argues that such competitive mechanisms similarly prevent governments from coercing property owners who seek building permits.[274] They can simply leave the locality for a more competitive jurisdiction.[275]

B. Arguments Against Recognizing a Distinction Between Legislative and Administrative Exactions

Despite the arguments outlined above, the primary argument for extending the *Nollan*/*Dolan* test to legislative exactions is that there is no practical difference from administratively imposed ones. Proponents of this view argue that the extortion risk remains regardless of who imposes the exaction and how much discretion they have.[276] Moreover, they argue that it is difficult to distinguish legislative from administrative actions at the local level, particularly with land-use decisions, so it is difficult to draw the line.[277] Additionally, proponents of this position argue that the Fifth Amendment's text applies to *all* takings, including those executed via generally applicable legislation.[278] Lastly, supporters believe that the distinction between legislative and administrative exactions encourages unrestrained exactions and leads to suboptimal planning outcomes.[279]

1. The Extortion Risk Remains with Legislative Exactions

Proponents of extending the *Nollan*/*Dolan* test to legislative exactions believe that the extortion risks inherent in administrative exactions still exist with legislative ones, particularly at the local level. Land use permits, they

270. *Cf.* Wit v. Berman, 306 F.3d 1256, 1258 (2d Cir. 2002) (upholding the state's exclusion of nonresidents from voting in local elections).

271. *See* Selmi, *supra* note 63, at 339 (arguing that overreach of conditions generally does not occur because developers are a powerful group and are able to exit the jurisdiction).

272. Been, *supra* note 246.

273. *Id.* at 506.

274. *Id.* at 478.

275. *See id.* at 509–10. Professor Been argues that empirical evidence supports her view that there is, in fact, competition between neighboring jurisdictions. *Id.* at 528.

276. *See infra* II.B.1; *cf.* Rosenberg, *supra* note 35, at 238 (discussing how *Nollan* shows a skepticism of state and local government land use regulations and potential for misuse of state police power).

277. *See infra* Part II.B.2.

278. *See infra* Part II.B.3.

279. *See infra* Part II.B.4.

claim, are especially suspectable to coercion.[280] This skepticism of local governments dates back to the founding, particularly James Madison's fear of factional control at the local level (i.e., a tyranny of the majority).[281] The founders, like Madison, were concerned that the small population size of local governments increases the risk that one group will dominate the government to the detriment of others.[282] The pool of potential representatives, Madison argued, is too small to adequately protect everyone.[283] Thus, proponents of extending the *Nollan*/*Dolan* test believe that the local legislative process may be insufficient to protect certain groups—like developers, who are often outsiders[284]—from extortionate exactions,[285] which are a politically popular mechanism to regulate land and raise revenue.[286] After all, the Fifth Amendment and takings jurisprudence serve to protect minorities from the majority.[287]

Land use is the area of local government with the most public participation[288] because citizens are less apathetic about land use than other issues.[289] Supporters of applying the *Nollan*/*Dolan* test to legislative exactions, however, believe that such participation leads to decisions that often disproportionately burden unfavored groups.[290] Public participation, they assert, favors existing residents while harming everyone else.[291] Thus,

280. *See* Anderson Creek Partners, L.P. v. County of Harnett, 876 S.E.2d 476, 486 (N.C. 2022); *see also* Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 491 (2006) (arguing that the government has a monopoly power over land use decisions).

281. *See* Rose, *supra* note 252, at 856 (discussing how some academics follow Madison's federalist perspective and treat all local decisions with skepticism and as not being truly legislative).

282. *See* THE FEDERALIST NO. 10 (James Madison); *see also* KYLE SCOTT, THE FEDERALIST PAPERS: A READER'S GUIDE 71–73 (2013); Knight v. Metro. Gov't of Nashville, 67 F.4th 816, 836 (6th Cir. 2023) (citing the problem with factions as a reason to expand the *Nollan*/*Dolan* test). *But see* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 75–76 (Francis Bowen ed., Henry Reeve trans., Univ. Press 1862) (1850) (arguing that local institutions are the best way to protect individuals' interests); Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 1007 (1989) (questioning the assumption that most local governments have small homogenous factions).

283. *See* THE FEDERALIST NO. 10, *supra* note 282.

284. *See* Reznik, *supra* note 117, at 271 (expressing concern that outsiders, such as developers, have no voice because they cannot vote).

285. *See, e.g.*, *Anderson Creek Partners*, 876 S.E.2d at 502 (debating if the legislative process is sufficient to protect developers and other politically unpopular groups).

286. *See* Kent, *supra* note 127, at 871 (viewing the *Koontz* majority opinion as reflecting a concern that the public would appreciate disproportionate exactions).

287. *See* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 309, 312 (1990) (describing the Fifth Amendment as "protecting minority interests that are not represented in political bargains").

288. *See, e.g.*, Fenster, *supra* note 74, at 729, 735 (discussing how land development is an important issue for local governments).

289. *See* Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENV'T. L. & POL'Y 293, 301–02 (2002). This intense citizen interest also politicizes land use decisions. *See id.* at 302.

290. *See* Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1087 (2021).

291. *See id.* at 1130.

proponents of expanding the *Nollan*/*Dolan* test argue that this targeting risk is present no matter which body is imposing the exaction.[292] Constitutional protections, in their view, serve to constrain the political process when it is insufficient by placing certain decisions beyond political reach.[293]

Courts that apply the *Nollan*/*Dolan* test to legislative exactions focus on this political dynamic. For instance, the Supreme Court of Texas in *Town of Flower Mound v. Stafford Estates Ltd. Partnership* found that a legislative exception to the *Nollan*/*Dolan* test would cause politically unpopular groups to suffer.[294] The *Flower Mound* court rejected the contention made by other courts that the democratic process would safeguard against extortionate exactions by voting out legislators who support such exactions.[295] Instead, the court feared that the legislative body's constituents would "applaud" such disproportionate exactions so long as the burden lies on someone else.[296] Thus, the court believed that the government is incentivized to "'gang up' on particular groups."[297]

According to this view, homeowners dominate local politics and seek to maximize their home values.[298] Many localities are small homogenous suburbs with a majority homeowner population that dilutes the influence of developers.[299] Homeowners often oppose new development[300] and can pass seemingly generally applicable laws that nevertheless target individuals given their hold on the political process.[301]

Some courts, like the Sixth Circuit in *Knight*, have also argued that applying a law to only those people seeking a building permit unfairly singles out that group.[302] They distinguish an exaction from a typical land use regulation on the grounds that it only affects property owners who are trying to obtain a permit as opposed to all land owners.[303] In these courts' view, the less constitutionally suspect option is to generally impose the requirement on all similarly situated property owners rather than only those owners

292. *Cf.* Anderson Creek Partners, L.P. v. County of Harnett, 876 S.E.2d 476, 499–500 (N.C. 2022) (discussing how the unconstitutional conditions doctrine focuses on the government rather than a particular body).

293. *See* Ilya Somin, *Supreme Court Will Hear Case on Whether There Is a "Legislative" Exception to the Takings Clause*, VOLOKH CONSPIRACY (Sept. 30, 2023, 1:31 AM), https://reason.com/volokh/2023/09/30/supreme-court-will-hear-case-on-whether-there-is-a-legislative-exception-to-the-takings-clause/ [https://perma.cc/88EE-HKVY].

294. Town of Flower Mound v. Stafford Ests. Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004).

295. *See id.* at 640.

296. *Id.* at 641.

297. *Id.*

298. *See* Stahl, *supra* note 252, at 980.

299. *See id.* at 981, 989.

300. *See id.* at 1002.

301. *See* Garrett Messerly, Note, *A Half-Baked Law: How the Supreme Court's Decision in* Koontz v. St. Johns River Water Management District *Misses a Key Ingredient to Fifth Amendment Protection*, 2015 BYU L. REV. 549, 567–68, 571 (suggesting that there is no presumption that legislatively enacted exactions are generally applicable).

302. *See* Knight v. Metro. Gov't of Nashville, 67 F.4th 816, 827 (6th Cir. 2023).

303. *See id.* at 827.

seeking to develop their property.[304] Thus, these courts have found such legislative exactions to not truly be generally applicable because they do not apply to all property owners.[305]

2. Courts Cannot Properly Draw the Line Between Legislative and Administrative Actions, and Legislative Exactions Implicate Separation of Powers Concerns

Proponents of extending the *Nollan*/*Dolan* test to all exactions also maintain that there are significant challenges in determining if an action is truly legislative.[306] Unlike at the state level, many local governments do not have such a clear separation of powers between executive and legislative bodies.[307] For example, the local legislative body may appoint rather than elect their chief executive.[308] Thus, proponents of expanding the *Nollan*/*Dolan* test believe that the line between a legislative and administrative local action is too blurry to have any constitutional significance.[309]

Some courts that extend the *Nollan*/*Dolan* test to all exactions cite this line-drawing difficulty in distinguishing legislative from administrative exactions.[310] Specifically, they argue that administrative agencies are simply acting on behalf of the legislative branch through delegated legislative power.[311] Indeed, some scholars believe that the risk of extortion in administratively imposed exactions already comes from the legislature that established the agency.[312] Thus, these courts and scholars believe that the risk of extortion is still present in any exaction.

The *Flower Mound* court, for instance, was concerned about the lack of a "workable distinction . . . between actions denominated adjudicative and

304. *See id.* at 836; *see also* Highlands-in-the-Woods, L.L.C. v. Polk County, 217 So.3d 1175, 1178 n.3 (Fla. Dist. Ct. App. 2017) (arguing that the exaction was adjudicatory, not legislative, because it was in response to a permit application). One issue with these exactions is that developers are faced with compensating not just their marginal costs, but also all the past costs of other developments. *See* Erin Ryan, Note, *Zoning, Takings, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflict*, 7 HARV. NEGOT. L. REV. 337, 374 (2002).

305. *See Knight*, 67 F.4th at 836.

306. *See, e.g.*, Haskins, *supra* note 280, at 490 (discussing the line-drawing problems with maintaining a legislative versus administrative distinction).

307. *See* Davidson, *supra* note 199, at 600–01 (asserting that the "[p]revailing view" is that there is no separation of power at the local level).

308. *See id.* at 602.

309. *See* Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. 105, 128 (highlighting the difficulties in distinguishing legislative from administrative actions because of the relative lack of separation of powers). *But see* Haskins, *supra* note 280, at 518 (discussing how some courts have created tests to determine if an action is legislative or adjudicative).

310. *See* Mulvaney, *supra* note 243, at 537; *see also* Ball & Reynolds, *supra* note 68, at 1515 (arguing that the legislative versus adjudicative distinction does not make sense because of the lack of separation of powers).

311. *See* Haskins, *supra* note 280, at 510.

312. *See id.*

legislative."[313] The court was unsure how to accurately determine whether a given exaction is legislative or administrative.[314] The court pointed out how the government imposed the condition in *Dolan* pursuant to the city's zoning code (i.e., a piece of legislation).[315] Similarly, it noted that the California Coastal Commission in *Nollan* had imposed the same condition on all the beachfront properties in the Nollans' neighborhood.[316] Although these agencies considered individual circumstances in determining the exaction, the exactions were, nevertheless, based on "general authority."[317] Moreover, the plaintiff in *Flower Mound* had sought an exception from the legislative exaction, but the town denied this specific request despite having previously granted similar exemptions.[318] Thus, in the court's view, this seemingly general exaction still entailed a meaningful amount of discretion, which the court argued minimized the distinction between legislative and administrative exactions.[319]

3. The Takings Clause's Text Does Not Distinguish Between Legislative and Administrative Actions

Supporters of extending the *Nollan*/*Dolan* test to all exactions point out that the Constitution does not distinguish between governmental bodies engaging in takings. The Sixth Circuit in *Knight* argued that the passive voice of the Takings Clause shows that all governmental bodies are restrained by the clause.[320] Moreover, the *Knight* court held that the Fourteenth Amendment's focus on the state affirms that the Takings Clause covers any branch exercising state power.[321] Thus, according to this perspective, the text of the Constitution does not support any distinction.[322]

Some courts also focus on how the Supreme Court has not treated legislative versus administrative conditions differently within the broader context of the unconstitutional conditions doctrine.[323] The *Knight* court discussed how the unconstitutional conditions doctrine actually arose from a generally applicable legislative condition.[324] In fact, the court believed that the Supreme Court has consistently applied the same test to both legislative and administrative conditions.[325] Similarly, the *Knight* court asserted that

313. Town of Flower Mound v. Stafford Ests. Ltd., 135 S.W.3d 620, 641 (Tex. 2004).
314. *See id.*
315. *See id.*
316. *See id.*
317. *See id.*
318. *See id.*
319. *See id.*
320. *See* Knight v. Metro. Gov't of Nashville, 67 F.4th 816, 829–30 (6th Cir. 2023); U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
321. *See Knight*, 67 F.4th at 830; *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").
322. *Knight*, 67 F.4th at 829–30.
323. *See, e.g.*, *id.* at 833.
324. *See id.* at 832.
325. *Id.* at 833.

the Court's other regulatory takings precedents do not depend on the branch of government engaging in the purported taking.[326] The *Knight* court did not want to "draw indiscernible lines," particularly given that "[m]ost zoning schemes involve a mix of legislative and administrative choices."[327] The discretion, in the eyes of the *Knight* court, still existed because of the power to grant waivers or variances from a generally applicable exaction.[328] Partially on this basis, the *Knight* court held that the *Nollan*/*Dolan* test should apply to legislative exactions.[329]

4. The Distinction Between Legislative and Administrative Exactions Would Lead to Suboptimal Land Use Regulation

Lastly, proponents of the more searching standard of review for legislative exactions argue that the distinction provides perverse incentives for state and local governments. For example, they believe that keeping this distinction may encourage local governments to "increase the scope of their takings" because the more property owners affected, the less likely a court is to apply a searching review to the legislative exaction.[330] As the U.S. Chamber of Commerce argued in its amicus curiae brief before the Supreme Court in *Sheetz*, legislative exactions are politically popular to lawmakers because the median voter has personal incentives (e.g., lower taxes) to favor exactions.[331] Moreover, the Chamber of Commerce argued that developers are often minimally concerned with exactions because they can simply pass the cost onto the ultimate buyer.[332] Thus, proponents of expanding the *Nollan*/*Dolan* test fear further government overreach.[333]

Similarly, according to this view, the uniformity of legislative exactions can lead to arbitrary results as opposed to the individualized assessment inherent in an administrative exaction.[334] Accordingly, some supporters of expanding the *Nollan*/*Dolan* test argue that the government, seeking to avoid legal challenges, will instead refuse to negotiate with property owners in

326. *See id.* The court relied on *Cedar Point Nursery v. Hassid* as reaffirming that the takings inquiry does not depend on if the government action was through a regulation or through a statute or ordinance. *Id.* (citing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021)).

327. *Knight*, 67 F.4th at 834.

328. *See id.* at 835.

329. *See id.* at 836 (holding that *Nollan* applies to Nashville's ordinance).

330. *See* Haskins, *supra* note 280, at 515; *see also* Brief on the Merits for Amici Curiae Cal. Bldg. Indus. Ass'n & Nat'l Ass'n of Home Builders in Support of Petitioner at 2, Sheetz v. County of El Dorado, No. 22-10174 (U.S. Sept. 29, 2023) (arguing that the distinction encourages unrestrained exactions).

331. *See* Brief of the Chamber of Com. of the U.S. of Am. as Amicus Curiae in Support of Petitioner at 5, 21, *Sheetz*, No. 22-10174 (U.S. Nov. 20, 2023).

332. *See id.* at 26.

333. *See* Brief of the Cato Inst. as Amicus Curiae in Support of Petitioner at 17, *Sheetz*, No. 22-10174 (U.S. Nov. 20, 2023).

334. *See* Sam Sturgis, Note, *An Appeal to Heaven—the Timeless Plea for* Nollan/Dolan *Extension to the Sphere of Legislative Exactions*, 40 MISS. COLL. L. REV. 251, 273 (2022).

order to keep the presumption of constitutionality of a legislative exaction.[335] Thus, some believe that maintaining this distinction leads to suboptimal land-use planning outcomes.[336]

III. LEGISLATIVE EXACTIONS DESERVE MORE TAKINGS CLAUSE DEFERENCE THAN ADMINISTRATIVE EXACTIONS AND SHOULD NOT BE SUBJECT TO THE *NOLLAN*/*DOLAN* TEST

Part III will conclude by arguing that the Supreme Court should explicitly recognize that legislative exactions are fundamentally distinct from administrative exactions; thus, the Court should not apply the *Nollan*/*Dolan* test to generally applicable legislative exactions. Specifically, this part argues that generally applicable legislative exactions are fundamentally different from administrative exactions because legislative exactions carry greater democratic legitimacy.

Part III.A will discuss how the federal and state courts' recognition of the nondelegation doctrine[337] underscores this distinction between legislative and administrative actions. Moreover, Part III.A will argue that this distinction is consistent with the Supreme Court's major questions doctrine, which acts as a modern variant on the traditional nondelegation doctrine.[338] Part III.B will additionally demonstrate that legislative exactions have sufficient extraconstitutional protections,[339] so courts need not apply a more searching standard of review to them. Because (1) courts already recognize this distinction between legislative and administrative decisions in other contexts and (2) legislative exactions have sufficient avenues of recourse besides the Takings Clause that administrative exactions lack, this Note ultimately concludes that the Court should recognize this legislative versus administrative distinction.

A. The Major Questions and Nondelegation Doctrines Support Recognizing a Fundamental Distinction Between Legislative and Administrative Exactions

Because the Supreme Court is already hardening the line between legislative and administrative actions through its expansion of the major questions doctrine,[340] it should similarly recognize that these same fundamental differences are applicable in the exactions context. Thus, the

335. *See* Sean Nolon, *Bargaining for Development Post*-Koontz*: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 192, 202, 205–06 (2015) (arguing that because negotiation is an efficient planning method, scrapping the legislative distinction will increase the difficulties for land use planners). Professor Nolon is concerned that *Koontz*'s extension of the *Nollan*/*Dolan* test to permit denials will have a "chilling effect" because of the uncertainty of when a proposed condition becomes a demand subject to the *Nollan*/*Dolan* test. *See id.* at 175, 205.

336. *See* Selmi, *supra* note 63, at 354–55.

337. *See supra* Part I.D.

338. *See supra* Part I.D.1.

339. *See supra* Part I.A.

340. *See supra* Part I.D.1.

Court in *Sheetz* should affirm the lower court's holding that the *Nollan*/*Dolan* test does not apply to legislative exactions.

One implicit motivation of the major questions doctrine is a fear of overreach by unelected officials.[341] The major questions doctrine is based on the assumption that Congress did not intend to allow agencies to unilaterally make particularly impactful, wide-reaching decisions.[342] Thus, this quasi–clear statement rule has so far been used to strike down agency actions that purportedly involve broad delegations of power.[343] The problem is not the action itself; rather, it is *who* is directing it.[344] A measure that is unacceptable if catalyzed by an administrative agency could nonetheless be acceptable if the legislative branch explicitly calls for it.[345] At the heart of the major questions doctrine, then, is the idea that the people, through their democratically elected representatives in the legislative branch, should make certain decisions—an agency, however, should not.[346]

The exactions doctrine is similarly based on a fear of government officials abusing their discretion pursuant to a broad mandate.[347] Legislative exactions, however, do not suffer this same abuse of discretion problem as administrative exactions.[348] Accordingly, the Court should afford them more deference. Indeed, the Court already recognizes these fundamental differences between legislative and administrative actions.[349]

Legislative exactions, firstly, do not suffer the same lack of predictability concerns as administrative exactions because of their strong connection to the legislative process.[350] The major questions doctrine, in one regard, seeks to prevent this problem of surprises in agency actions.[351] After all, "Congress . . . does not . . . hide elephants in mouseholes."[352] The major questions doctrine is concerned with administrative overreach beyond that which the legislature contemplated.[353] Even assuming, for the sake of argument, that the legislative body (e.g., a city council) clearly delegated power to an agency (e.g., a zoning board) with sufficient guidelines, a

341. *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000); *see also supra* Part I.D.1.

342. *See Brown & Williamson*, 529 U.S. at 159.

343. *See, e.g.*, *id.* at 161 (invaliding a health agency's regulation of tobacco); *see also* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607 (2022) (striking down an environmental agency's regulation of coal emissions); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 117–18 (2022) (per curiam) (holding that OSHA does not have the statutory authority to mandate vaccinations or a masking and test requirement in the workplace).

344. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023) ("The question here is not whether something should be done; it is who has the authority to do it.").

345. *See id.*

346. *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

347. *See supra* Part II.B.1.

348. *See supra* Part II.A.

349. *See supra* Part I.D.A.

350. *See supra* Part II.A; *see also* Byrne & Zyla, supra note 71, at 766.

351. *See supra* Part I.D.1.

352. Whitman v. Am. Trucking Ass'n., 531 U.S. 457, 468 (2001).

353. *See id.*

legislative exaction is nevertheless more predictable and transparent because it must go through the democratic process.[354]

State courts also similarly recognize these fundamental differences between legislative and administrative actions as reflected by their relatively strong adherence to the traditional nondelegation doctrine.[355] The nondelegation doctrine, rather than serving as a quasi–statutory interpretation canon like the major questions doctrine,[356] directly prevents administrative agencies from making policy decisions.[357] Although courts constitutionally justify the nondelegation doctrine with separation of powers concerns,[358] the primary concern with delegations outside of the legislative branch is the agency's lack of accountability, which decreases the democratic legitimacy[359] of such decisions.[360] Agencies, as proponents of the nondelegation doctrine argue, should only be filling in the gaps that the legislature left open rather than exercising independent judgment.[361] The state nondelegation doctrine worries more about who makes a decision rather than what they decide.[362]

Ad hoc exactions imposed by an administrative agency, like a zoning board, are precisely the type of agency decisions with which the nondelegation doctrine is concerned. One major concern with both exactions and agency actions is abuse of discretion by unelected officials.[363] Local zoning boards, which are the entities often involved in imposing administrative exactions, raise these democratic legitimacy concerns because, generally speaking, local agencies are relatively informal and zoning boards may only be staffed by part-time volunteers.[364] Moreover, the composition of zoning boards often does not represent the ordinary population, which leads to inherent biases not found in legislative exactions.[365]

In contrast, legislatively imposed exactions that leave no room for discretion by unelected officials are no different than a typical legislative action. Put simply, there are no gaps to be filled in applying an exaction. For example, in *Sheetz*, the county simply looked to the public fee schedule to

354. *See supra* Part II.A.

355. *See supra* Part I.D.2.

356. *See supra* Part I.D.1; *see also supra* notes 184–85 and accompanying text.

357. *See supra* Part I.D.2; *see also* Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

358. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

359. What exactly constitutes legitimacy is debated, but it seems to be motivated by a fear of capture and unelected officials exercising significant power. *See, e.g.*, Seifter, *supra* note 205, at 447.

360. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

361. *See* Boreali v. Axelrod, 517 N.E.2d 1350, 1353 (N.Y. 1987); *see also supra* Part I.D.

362. *See* Silver, *supra* note 32, at 1242.

363. *Compare supra* Part I.D, *with supra* Part II.B.1. *See also* Silver, *supra* note 32, at 1242.

364. *See* Davidson, *supra* note 199, at 623.

365. *See* Jerry Anderson, Aaron Brees & Emily Reninger, *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689, 691 (2008).

determine the fee.[366] As a default rule, most legislative actions, particularly those by state legislatures (which, unlike Congress, have plenary power[367]) are presumed valid.[368] Moreover, the Court has expressed its respect for and deference to legislative judgement, especially when it concerns land use,[369] and traditionally defers to localities' evaluations and approvals of land use plans.[370]

The Supreme Court has often considered state courts' views on property law in reaching its own constitutional holdings. For instance, in *Dolan*, the Court looked to the states for guidance in determining the appropriate test that fits the "federal constitutional norm."[371] The *Dolan* court cited a case from the Supreme Court of Nebraska,[372] in which the court construed the state constitution's own takings clause analogue, as exemplifying its new rough proportionality test.[373] Similarly, the Court often expresses a level of appreciation for state conceptions of property rights because the Constitution does not define property (despite the property protections it provides).[374] Rather, state law is an "important source" for federal constitutional property law.[375]

The Court also considers its own precedent, "'traditional property law principles,' plus historical practice" in defining the scope of property rights.[376] So, in the exactions context, the Court should similarly look at state practice, such as their perspective on legislative versus administrative actions, as that is similarly grounded in constitutional considerations.[377]

366. Sheetz v. County of El Dorado, 300 Cal. Rptr. 3d 308, 312–13 (Ct. App. 2022), *argued*, No. 22-1074 (U.S. Jan. 9, 2024); *see also* Brief of the Am. Plan. Ass'n as Amicus Curiae in Support of Neither Party at 10–11, *Sheetz*, No. 22-10174 (U.S. Nov. 20, 2023) (arguing that developers rely on such exactions because they provide a more predictable timeline for approval).

367. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907) ("In all these respects the State is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.").

368. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926).

369. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 480 (2005).

370. *See id.* at 483–84 ("Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan.").

371. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); *see also supra* notes 116–19 and accompanying text.

372. *See Dolan*, 512 U.S. at 391 (citing Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980)); *see also Simpson*, 292 N.W.2d at 300 ("The property of no person shall be taken or damaged for public use without just compensation therefor." (quoting NEB. CONST. art. 1, § 21)).

373. *See supra* note 118 and accompanying text.

374. *See* Tyler v. Hennepin County, 598 U.S. 631, 638 (2023) ("The Takings Clause does not itself define property." (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998))); *see also* Murr v. Wisconsin, 582 U.S. 383, 406–07 (2017) (Roberts, C.J., dissenting) ("Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.").

375. *Tyler*, 598 U.S. at 638.

376. *Id.* (quoting *Phillips*, 524 U.S. at 165–68).

377. *See supra* Part I.D.2.

Moreover, the nondelegation doctrine has existed for years in both federal and state courts,[378] and both systems recognize this principle based on similar considerations.[379]

In addition to property law, the Court has also historically considered state interpretations of their own constitutions in other contexts, dating back to the creation of federal judicial review in 1803 with *Marbury v. Madison*[380] (a principle that was already active in state constitutional law).[381] The Court especially borrows state constitutional law in a few areas, such as the Fourth, Fifth, Sixth, and Eighth Amendments, in which state constitutional law is well-developed.[382] The persuasive value of state constitutional law arises because the state judiciary branch is theoretically a coequal sovereign to the federal government in the American federalist system.[383] The Court has engaged in a dialogue with the states and has considered their practices—legislative and constitutional—when shaping its own federal constitutional law.[384] The Court should similarly consider state constitutional law, including its view on the legislative versus administrative divide, in the exactions context because this area of state law is similarly well-developed.[385]

Because courts recognize inherent differences between legislative and administrative decisions in other contexts, this recognition should extend to exactions. *Who* decides matters just as much as *what* is decided. Therefore, the *Nollan*/*Dolan* test should not apply to legislative exactions.

B. Legislative Exactions Have Sufficient Political and Institutional Protections that Administrative Exactions Lack

Because the political process provides sufficient avenues for protection against any extortionate exactions that the legislature may impose, such exactions do not require the same searching standard of review applicable to administrative exactions. Land use is perhaps the area of local government with the most public participation and interest.[386] States themselves impose

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378. *See supra* Part I.D.

379. *See supra* Part I.D.

380. 5 U.S. (1 Cranch) 137 (1803).

381. The *Marbury* court, however, did not explicitly reference or cite the existing state practice. *See id.* at 25–27; *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 334 (2011) (citing A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 72 VA. L. REV. 873, 877 (1976)). Professor Joseph Blocher argues that the Court should more often consider state constitutional doctrine, especially when the federal and state courts are considering similar issues. *See id.* at 327–28, 341.

382. *See* Blocher, *supra* note 381, at 328, 343.

383. *See id.* at 385.

384. *See id.* at 372, 379–80.

385. *Cf. id.* at 386 (arguing that the Court should look more often to state law in areas in which it is well-developed); *see also supra* note 372 and accompanying text (describing how the *Nollan*/*Dolan* test developed from state law).

386. *See* Lemar, *supra* note 290, at 1087.

limitations, both constitutional and statutory, on exactions.[387] Given this high salience and visibility, the political process adequately distinguishes legislative from administrative exactions.

The prototypical answer for how property owners can counter unfair legislatively imposed exactions is to simply vote out the elected officials who authorized the exaction.[388] In addition to elections, direct democracy provides another check on exactions.[389] Compared to the federal government, states offer more forms of direct democracy and other mechanisms for government accountability.[390] In fact, well-funded interest groups often utilize these mechanisms to defeat popular local initiatives.[391]

Local elections, however, are not the only option for recourse. For instance, as the *Kelo v. City of New London*[392] Court pointed out in the context of eminent domain, the state can impose stricter requirements on localities' imposition of exactions.[393] Thus far, this assumption has shown to be correct.[394] In fact, developers, the group commonly believed to be most vulnerable to extortionate exactions due to their outsider status,[395] have helped pass statutes at the state level granting localities the power to impose exactions—albeit with certain guideposts.[396] Professor Daniel P. Selmi argues that the lack of state legislation substantially restricting legislative exactions shows that states do not view exactions as requiring more protection.[397] Accordingly, judicial intervention in this process would be undemocratic.[398] Thus, outsiders who may not have access to the local

387. *See* Fenster, *supra* note 74, at 736. State courts have often invalidated exactions for either being an ultra vires action by the locality or for violating the state constitution rather than for violating the federal constitution. *See id.*

388. *See supra* Part II.A; *see also* Stahl, *supra* note 252, at 1004 (discussing how elections serve as a check on the legislature's decisions).

389. *See supra* Part II.A.

390. *See* Jonathan Marshfield, *Popular Regulation?: State Constitutional Amendment and the Administrative State*, 8 BELMONT L. REV. 342, 344–45 (2021).

391. *See, e.g.*, Kellen Browning, *California Court Mostly Upholds Prop. 22 in Win for Uber and Other Gig Companies*, N.Y. TIMES (Mar. 13, 2023), https://www.nytimes.com/2023/03/13/business/prop-22-upheld-california.html [https://perma.cc/5URJ-7EJ9] (noting that California's Proposition Twenty Two limited "the State Legislature's ability to oversee workers' compensation for gig drivers").

392. 545 U.S. 469 (2005).

393. *Cf. id.* at 489 (discussing how state constitutional or statutory law can impose public use requirements that are "stricter than the federal baseline").

394. *See* Kent, *supra* note 127, at 856 n.177 (documenting the expediency with which state legislatures acted following *Kelo*'s controversial public use holding).

395. *See* Town of Flower Mound v. Stafford Ests. Ltd. P'Ship, 135 S.W.3d 620, 641 (Tex. 2004). There is also a concern that many localities are antidevelopment to preserve home values for the existing residents. *See* Stahl, *supra* note 252, at 1003.

396. *See* Fenster, *supra* note 74, at 759; *see also* Deboard Rhoads, Note, *Developer Exactions and Public Decision Making in the United States and England*, 11 ARIZ. J. INT'L & COMPAR. L. 469, 478 (1994) (discussing how most enabling laws "have been initiated by builders' associations advocating limitations on local impact fees"). A state enabling statute can minimize any questions of whether the locality has the power to impose an exaction. *See* Powell, *supra* note 77, at 667.

397. *See* Selmi, *supra* note 63, at 370.

398. *See id.*

democratic process[399] may nevertheless protect themselves against potentially unfair exactions.

Another powerful mechanism is the process of amending state constitutions.[400] State constitutions are generally easier to amend than the federal Constitution and are more durable than statutes.[401] Moreover, state constitutional limitations on exactions can definitively preempt local governments, whereas preemption of local government actions by state statutes is more complicated.[402] Thus, a more searching standard of review under the Takings Clause for legislatively imposed exactions is unnecessary.

CONCLUSION

The *Nollan*/*Dolan* test should not apply to legislatively imposed exactions because of their inherent and fundamental differences from administrative exactions. It matters which entity decides just as much as what the decision itself is. Legislative exactions, like other legislative actions, are more democratically legitimate than administrative actions, as the courts recognize in other contexts. Courts are once again hardening the line between legislative and administrative actions, as evidenced by the major questions doctrine (a modern variant of the nondelegation doctrine) and the continuous presence of a nondelegation doctrine in the states. The legislative versus administrative question in the context of exactions reflects the concerns that underlie the nondelegation doctrine and its variants. Moreover, the political process is sufficient to protect property owners from potential government overreach, so the *Nollan*/*Dolan* test does not need to apply to legislatively imposed exactions. Therefore, the Supreme Court in *Sheetz v. County of El Dorado* should affirm the lower court's judgement and clarify that the *Nollan*/*Dolan* test does not apply to legislatively imposed exactions. State and local governments can sufficiently regulate such exactions rather than constitutionalizing this issue at the federal level.

399. *See, e.g.*, Wit v. Berman, 306 F.3d 1256, 1263 (2d Cir. 2002) (upholding New York's exclusion of nonresidents from local voting).

400. *See* Marshfield, *supra* note 390, at 345–46.

401. *See id.* at 344. States typically allow for constitutional amendments through legislative initiation followed by popular vote. *See id.* at 356.

402. *Cf.* Powell, *supra* note 77, at 646 (discussing how the threshold question in evaluating local exactions is whether it is authorized by state statute or constitution).