Substantive Due Process Through the Just Compensation Clause: Understanding *Koontz*'s "Special Application" of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine's History

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Koontz v. St. Johns River Water Management District[1] recently resolved, at least to some extent, a question hounding judges, land use lawyers, developers, and commentators since the Supreme Court decided *Nollan v. California Coastal Commission*[2] and *Dolan v. City of Tigard*[3] in 1987 and 1994 respectively.[4] In *Koontz*, a five-justice majority held that in addition to real property, money exacted from a property owner during the land use permitting process must satisfy *Nollan*'s essential nexus test, as well as *Dolan*'s rough proportionality test.[5] The Court based its decision on the doctrine of "unconstitutional conditions,"[6] a doctrinal dinosaur that has staved off extinction since its judicial invention in the 1800s through a protean evolution in different contexts and areas of the law.[7] Understanding the Court's trilogy of decisions in *Nollan*, *Dolan*,

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1. 133 S. Ct. 2586 (2013).
2. 483 U.S. 825 (1987).
3. 512 U.S. 374 (1994).
4. *Cf.* Lauren Reznick, *The Death of* Nollan *and* Dolan*: Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. Rev. 725, 738 (2007) (describing the state-level litigation and disagreement over whether *Nollan* and *Dolan* apply to monetary exactions immediately after the Court's decisions).
5. *See Koontz*, 133 S. Ct. at 2603.
6. *See generally id.* at 2594-603 (explaining the doctrine and how it applies to permit denials and monetary exactions).
7. *See* Cass R. Sunstein, *The Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. Rev. 593, 620 (1990) (calling the doctrine an "anachronism[,]" crude, general, and incompatible with

and *Koontz* requires understanding the doctrine of unconstitutional conditions, which in turn requires tracing its development.

In its basic formulation—although the Court has applied the doctrine in a remarkably inconsistent fashion over the years, when it has applied it at all[8]—the doctrine says that "the government may not deny a benefit to a person because [that person] exercises a constitutional right."[9] The doctrine may be used to stop the government from punishing one who exercises a constitutional right or pressuring someone to waive a constitutional right.[10] In other words, the doctrine prohibits the government from doing indirectly what it cannot do directly,[11] so that even if the government may withhold a benefit altogether, it generally cannot condition the benefit on the beneficiary's relinquishment of a constitutional right.[12] Benefits protected by the doctrine include things like business licenses,[13] tax exemptions,[14] employment contracts,[15] medical care,[16] unemployment benefits,[17] food stamps,[18] pre-trial release from jail,[19] and building permits.[20]

Since the mid-1800s the Court has applied the doctrine in different contexts and with different rationales to laws alleged to burden constitutional rights.[21] The Court's application of the doctrine in different settings varies—like a "quilt" of individual segments within a

making sense of our modern government); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415-17 (1989) (describing the doctrine and its development through the major "divisions and shifts of temperament of the Court").

8. *See* Sullivan, *supra* note 7, at 1416.

9. *Koontz*, 133 S. Ct. at 2594 (quoting Regan v. Taxation With Representation, 461 U.S. 540 (1983)).

10. Sullivan, *supra* note 7, at 1416-17.

11. Lynn A. Baker, *The Price of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1193-94 (1990); Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 (1988).

12. Sullivan, *supra* note 7, at 1415; Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 321 (1935).

13. *E.g.*, Doyle v. Continental Ins. Co., 94 U.S. 535, 537 (1876).

14. *E.g.*, Speiser v. Randall, 357 U.S. 513, 514-15 (1958).

15. *E.g.*, Perry v. Sindermann, 408 U.S. 593, 597-98 (1972).

16. *E.g.*, Memorial Hosp. v. Maricopa Cnty., 415 U.S. 250, 252 (1974).

17. *E.g.*, Sherbert v. Verner, 374 U.S. 398, 410 (1963).

18. *E.g.*, Lyng v. Castillo, 477 U.S. 635, 635-36 (1986).

19. *E.g.*, U.S. v. Scott, 450 F.3d 863 (9th Cir. 2005).

20. *E.g.*, *Koontz*, 133 S. Ct. at 2592.

21. *See* Baker, *supra*, note 11, at 1186 n.4; Sullivan, *supra* note 7, at 1415-17. Perhaps the first case in which the Court applied the doctrine's rationale is *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1855) (concluding that the State of Ohio could place conditions on the right of foreign corporations to engage in business in the state so long as they were constitutional). Baker, *supra* note 11, at 1186 n.4.

broader doctrinal border.[22] Scholars describe the doctrine as "riven with inconsistencies[,]" "a minefield to be traversed gingerly[,]" and say that it "confound[s] courts" and suffers from an "unfortunate lack of clarity . . . ."[23]

In Parts I through III, this paper discusses the Court's evolution in formulating the doctrine by focusing on the absolute-power versus germaneness themes, especially in the early corporate rights cases, some law enforcement cases, and federalism cases. Part IV looks at the doctrine applied to the Free Speech and Free Exercise Clauses, focusing on the Court's framing of conditions as coercive or as penalties, versus non-subsidies. Part V addresses the Court's application of the doctrine to certain un-enumerated rights. Part VI takes a step back and tries to make sense of the doctrine based on the cases discussed in Parts I through V. Then, Part VII focuses on land use exactions, explaining what they are, and how the doctrine applies to them through the Just Compensation Clause; that discussion focuses on the Court's trilogy of decisions in *Nollan*, *Dolan*, and *Koontz*. In Part VIII, this paper contends that the Court's application of the doctrine to land use exactions is a new form of substantive due process through the guise of a takings analysis in which the Court pulls land use planning decisions that traditionally received more judicial deference into a stricter, substantive review, expanding the Just Compensation Clause's protection of property rights. Part IX discusses the doctrine's current formulation to land use exactions after *Koontz* and potential agency responses to *Koontz*, and Part X briefly concludes.

I. Absolute Power Versus Germaneness

Whether a condition is germane often decides unconstitutional conditions cases.[24] However, what exactly that means is not always clear.[25] Commentators describe germaneness as a "heuristic device" to weed out conditions meant to pressure constitutional rights that deserve heightened scrutiny.[26] Generally, the less germane a condition, the

22. Baker, *supra* note 11, at 1196.

23. *Id.* at 1186; Sullivan, *supra* note 7, at 1416; Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs, 692 F.3d 343, 349 (5th Cir. 2012).

24. Brooks R. Fudenberg, *Unconstitutional Condition and Greater Powers: a Separability Approach*, 43 UCLA L. REV. 371, 413 (1995).

25. *Id.*

26. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 92 (2001); Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051, 1084-85 (1995).

more strictly the Court will review the condition.[27] Some, like Justice Scalia, contend a condition is germane when the government's justification for imposing the condition is the same justification that the government could rely on to withhold the benefit.[28] That is a narrow idea of germaneness relative to that in the Court's decision in *South Dakota v. Dole*, authored by Justice Rehnquist, in which the Court formulated germaneness as a rational relationship between the condition and a broadly defined legitimate government interest.[29] This debate is an important theme in unconstitutional conditions cases.

Criticism of germaneness is that its application can be manipulated and it is unclear whether the degree of connection should receive heightened judicial review, or whether a general rational relationship between the two is sufficient.[30] What level of review to use in different situations is the primary battle fought in unconstitutional conditions cases.[31] It seems a fair assertion that no judicial officer is immune from the attack that the doctrine is often used to advocate for heightened judicial review in some areas (and not others) based on personal policy preferences.[32]

A. *Early Cases*

The Court invented the doctrine of unconstitutional conditions during the *Lochner* era[33]—although it did not always state the doctrine by that name—and first used it as a means to invalidate states' regulation of corporations.[34] The Court's early decisions were inconsistent in that

27. Sullivan, *supra* note 7, at 1458.
28. *Id.* at 1457; *see Nollan*, 483 U.S. at 836-37.
29. Fudenberg, *supra* note 24, at 414 (citing South Dakota v. Dole, 483 U.S. 203 (1987)). Although Justice Rehnquist supported a broader interpretation in that case, which addressed the Spending Clause, he supported a narrower interpretation in the context of property rights and the Just Compensation Clause in *Dolan*.
30. Fudenberg, *supra* note 24, at 414.
31. *See id.* at 394.
32. *Id.* at 379 & n.46 (providing examples of that and commenting that "[v]irtually every justice" who has been involved in unconstitutional conditions cases is inconsistent regarding the greater-lesser rationale, arguing for a more absolute view of it when in service of policy choices they approve of and a narrower view when they want to more critically review legislation).
33. The term "the *Lochner* era" refers to the period roughly between 1880 and 1940 in which the Court used the Fourteenth Amendment Due Process Clause to evaluate the substance of economic regulation, much of which it invalidated under the theory that it violated individual's constitutional right to be free from excessive government interference. Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 379-80, 442 (1988). The name comes from the famous case characteristic of that approach, *Lochner v. New York*, 198 U.S. 45, 62-64 (1905), in which the Court ruled that New York's law that established maximum hours that bakers could work in a week interfered with their freedom of contract and, therefore, violated the Due Process Clause. *Id.*
34. *See* Sullivan, *supra* note 7, at 1505; Baker, *supra* note 11, at 1186 n.4.

the Court first rejected any kind of germaneness requirement, and then reversed track.[35] The first view the Court adopted was the "absolute power" formulation of the greater-lesser rationale, in which no condition is unconstitutional.[36] *Doyle v. Continental Insurance Co.*[37] is characteristic of that view.

In *Doyle*, the plaintiff corporation challenged Wisconsin's law that a foreign corporation wanting to do business in the state had to give up its right to remove lawsuits from state to federal court.[38] The benefit to the corporation was the business license.[39] The right to be relinquished was the corporation's right under the Judiciary Act to remove lawsuits from state to federal court, which is a constitutional right.[40] In *Doyle*, the Court reasoned that the state's greater inherent power to give permission to particular businesses to operate within its borders necessarily included the lesser power to give that permission conditioned on the corporation's waiver of its right to remove lawsuits from state to federal court.[41] According to the Court, the corporation had the option of whether to accept the state's offer, so even if it voluntarily relinquished the right, the corporation was not being unconstitutionally compelled to do so.[42] The Court upheld the condition.[43]

However, that absolute view of the greater-lesser rationale was heavily criticized and the opposite principle ultimately became the favored approach—that the greater power does not necessarily include the lesser power to attach unconnected conditions to the receipt of a benefit.[44] *Terral v. Burke Construction Co.*,[45] which has similar facts to *Doyle*, shows the Court's reversal. In *Terral*, the plaintiff challenged Arkansas' statute that, likewise, required foreign corporations

35. Sullivan, *supra* note 7, at 1458.
36. *Id.*
37. Doyle v. Cont'l Ins. Co., 94 U.S. 535 (1876).
38. Fudenberg, *supra* note 24, at 433. For an example, see *Doyle*, 94 U.S. at 537-41.
39. *See Doyle*, 94 U.S. at 540 (describing the corporation's complaint detailing how the state could revoke its license).
40. *Id.* at 538. The Judiciary Act guarantees foreign defendants a right to remove lawsuits to federal court, which courts have interpreted as based in Article III of the United States Constitution because it was necessary to implement the Constitution's concept of federal diversity jurisdiction. Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U.L. REV. 609, 613-14, 618 (2004).
41. *Id.* at 540-42 ("If the [s]tate has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.").
42. *Id.* at 542; Sullivan, *supra* note 7, at 1429.
43. *Doyle*, 94 U.S. at 542.
44. *Cf.* Frost & Frost Trucking Co., v. R. R. Comm'n, 271 U.S. 583 (1926); W. Union Tel. Co. v. Kansas, 216 U.S. 1 (1910).
45. Terral v. Burke Constr. Co., 257 U.S. 529 (1922).

doing in-state business to relinquish their right to remove lawsuits to federal court.[46] In striking down the statute, the Court rejected its earlier greater-lesser reasoning and stated the following:

> [t]he principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not.[47]

The Court restated and elaborated on the doctrine in *Frost & Frost Trucking Co., v. Railroad Commission of the State of California*[48] when it said:

> [i]t is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[49]

In *Frost*, the State of California conditioned a foreign corporation's use of the state highways on requiring the foreign corporation to purchase common-carrier liability insurance even though its business was unrelated to that of a common carrier.[50] The California Supreme Court approved, reasoning the state could impose whatever conditions it saw fit because it had the greater power to deny access to the highways.[51] Like the Court's conclusion in *Terral*—that the condition exacted a waiver from the corporation—in *Frost*, the Court concluded that the corporation had no meaningful choice other than to purchase the insurance and become a common carrier so as to gain the state's business; the corporation would rather take a small profit than none at all.[52] According to the Court, the condition was un-germane to regulating the use of the highways and, instead, was a way to control the competitive conditions in the common-carrier market.[53] Because of that suspicion, the Court

46. *Id.* at 530-33.
47. *Id.* at 532.
48. 271 U.S. 583 (1926).
49. *Id.* at 593-94.
50. *Id.* at 589-90.
51. *Id.* at 593.
52. *See id.* at 593 (noting that doing in-state business might be necessary for the corporation's survival).
53. *See id.* at 591 ("It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the businesses of those who are engaged in using them.").

reviewed the condition more strictly and ultimately concluded that the coercive condition violated the corporation's due process rights.[54]

Generally speaking, the absolute power formulation of the greater-lesser rationale was abandoned in favor of a more nuanced germaneness theory. However, the Court has described its application of the doctrine since the *Lochner* era in terms of the greater-lesser rationale, so that logic is still relevant.[55]

B. *The Greater-Lesser Rationale Returns in* Posadas

In *Posadas de Puerto Rico Associates v. Tourism Co.*,[56] Puerto Rico banned certain casino advertising to Puerto Rican residents but allowed such advertising in publications directed at tourists.[57] Plaintiffs argued that the law effectively conditioned the right to operate a casino on the operator's surrender of its Free Speech Clause rights.[58] Writing for a majority of the Court, Justice Rehnquist reasoned that because "the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether . . . the greater power to completely ban casino gambling necessarily included the lesser power to ban advertising of casino gaming . . . ."[59]

Although the Court seemed to rely on an absolute power formulation of the greater-lesser rationale, perhaps the Court could have upheld the ban using germaneness because the advertising prohibition arguably served the same purpose that a total ban on gambling would serve,[60] which was a desire to reduce gambling by Puerto Ricans.[61] In dissent Justice Brennan wanted to apply strict scrutiny to the commercial speech regulation and argued that even if the restrictions were supported by a substantial government interest, the state failed to show its regulation directly advanced that interest and that it was the narrowest means of doing so.[62] Even when the Court does not use a broad formulation of the greater-lesser rationale, in other contexts the rationale's reasoning is still relevant

54. *Id.* at 596-600.
55. *Cf.* Posadas de P. R. Assoc. v. Tourism Co. 478 U.S. 328, 345-46 (1986) (concluding that the State of Puerto Rico's greater power to prohibit gambling advertising included the lesser power to regulate certain gambling advertising).
56. *Id.*
57. *Id.* at 330-32.
58. *Id.* at 337-38.
59. *Id.* at 345-46.
60. Sullivan, *supra* note 7, at 1464.
61. *Posadas,* 478 U.S. at 341.
62. *Id.* at 351, 355-56 (Brennan, J., dissenting). The balancing test the Court used—which is the Court's rationale for regulating commercial speech—is embodied in Central Hudson Gas & Elect. Corp. v. Pub. Serv. of N. Y., 447 U.S. 2343 (2005).

II. Law Enforcement Monopoly Power

The Ninth Circuit Court of Appeals discussed and rejected the greater-lesser rationale in *United States. v. Scott*,[63] a more recent Fourth Amendment search and seizure case. The court cited *Doyle* to note the temptation of the broad greater-lesser rationale's logic.[64] In *Scott*, as a condition of a prisoner's pre-trial release from jail following his arrest on a drug charge, the prisoner waived his Fourth Amendment right to be free from unreasonable searches and seizures by consenting to warrantless drug testing and warrantless searches of his home for drugs.[65] Because the government could have kept him in jail until trial, the court noted it naturally seemed fair to allow him to trade his Fourth Amendment rights to be otherwise free until then.[66] However, focusing on the government's monopoly power in the law enforcement context, the court reasoned that "[g]iving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections."[67] Accordingly, the Court ignored his waiver of rights and went on to analyze the reasonableness of the search, concluding it was unreasonable and, therefore, violated the Fourth Amendment.[68]

In another Fourth Amendment case, the First Circuit Court of Appeals concluded that a prison unconstitutionally conditioned all visits to prisoners on the guests' submission to strip searches.[69] Focusing on the unreasonableness of the search and rejecting the state's argument that the visitors were free to choose whether to submit to the search, the court reasoned "it is *the very choice to which [the plaintiff-guest] was put* that is constitutionally intolerable . . . ."[70] Invalidating the plaintiff-guest's consent, the Court concluded the search violated the Fourth Amendment.[71]

The doctrine is also used to protect the Fifth Amendment right against self-incrimination in various contexts.[72] In *Lefkowitz v. Cunningham*[73] the Court invalidated the State of New York's law conditioning political party officers' employment on waiving their right against self-incrimination after the state fired an officer for asserting his right against self-incrimination and he refused to testify. The Court stated, "[W]hen a [s]tate compels testimony by threatening to inflict potential sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the defendant in a criminal prosecution."[74] Likewise, in *Garrity v. New Jersey*,[75] the Court concluded that the state violated several police officers' rights against self-incrimination when the state told the officers they would be fired if they refused to testify. The Court compared the state's coercion of the officers to the coercion states used to impermissibly induce corporations to waive their right to remove lawsuits to federal court or engage in interstate commerce, which were unconstitutional conditions.[76] Because the officers waived their privilege at the time and only objected to use of their testimony later, the Court held that their statements could not be used.[77] Implicit in that holding is the fact that if the officers had objected to the condition and been fired, the state, like in *Lefkowitz*, would have directly violated their Fifth Amendment rights against self-incrimination.

Unconstitutional conditions claims in contexts involving allegations of coercion related to states' law enforcement power are unsurprising because of the vast and monopolist nature of law enforcement power and have, in some circumstances, proven successful. Attempts to use the coercion argument in the context of the state-nation relationship have, however, for the most part, failed.[78]

III. The Broad View of Germaneness in Federalism Cases

The Tenth Amendment provides: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the State

63. 450 F.3d 863 (9th Cir. 2005).
64. *Id.* at 866 (citing *Doyle*, 94 U.S. at 542).
65. *Id.* at 865.
66. *Id.* at 866.
67. *Id.* at 889.
68. *Id.* at 866-75.
69. Blackburn v. Snow, 771 F.2d 556, 559, 568 (1985).
70. *Id.* at 568 (emphasis in original).
71. *Id.*
72. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); Garrity v. New Jersey, 385 U.S. 493, 497 (1967).
73. *Lefkowitz*, 431 U.S. at 801, 802-03.
74. *Id.* at 805.
75. *Garrity*, 385 U.S. at 493, 494.
76. *Id.* at 498, 500.
77. *Id.*
78. *Cf.* South Dakota v. Dole, 483 U.S. 203, 205 (1987) (rejecting the state's argument that the condition placed by Congress on a state's receipt of federal funds infringed on the state's ability to regulate the drinking age).