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CASES, MATERIALS AND PROBLEMS IN PROPERTY
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CHAPTER 1

Page 61: Insert the following new Note (3) and renumber the existing Note (3) as Note (4).

(3) *Fiduciary Obligations Revisited:* United States v. Jicarilla Apache Nation. In United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011), the Supreme Court was confronted with the nature of the fiduciary obligation owed by the United States to an Indian Nation in an unusual setting. Despite the oddity of the case, Justice Alito used it to undermine any notion that the United States owes standard fiduciary obligations to the tribes whose property it governs. Here is how Justice Alito described the problem and resolved the issue:

> The attorney-client privilege ranks among the oldest and most established evidentiary privileges known to our law. The common law, however, has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties. In such cases, courts have held, the trustee cannot withhold attorney-client communications from the beneficiary of the trust.
>
> In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes. We hold that it does not. Although the Government's responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law. The reasons for the fiduciary exception—that the trustee has no independent interest in trust administration, and that the trustee is subject to a general common-law duty of disclosure—do not apply in this context.

Justice Alito's comment that fiduciary obligations arise from "statutory duties" is unusual and potentially quite far reaching. It appears to reject the notions inherent in *McIntosh* and the *Cherokee Cases* that the relationship between the federal government and the various tribes is part of a judge made set of rules and government obligations emerging from the Discovery Principle and that these rules and obligations may, at least in part, be based on Constitutional principles arising from the Indian Commerce Clause. Justice Sotomayor in dissent warns that the relegation of the fiduciary rules to statutory questions risks undermining a significant run of cases creating obligations in the United States to appropriately care for Indian assets it manages.

Addition to Note (4) [Renumbered Note (3)] at p. 62:

Another custody dispute involving an Indian child was decided by the United States Supreme Court in 2013. Adoptive Couple v. Baby Girl, 570 U.S. ___, 133 S.Ct. 2552 (2013). The Court described the facts and holding in the following way:

> This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of the federal Indian Child Welfare Act of 1978 required her to be taken, at the age of 27 months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child. The provisions of the federal statute at issue here do not demand this result.

> Contrary to the State Supreme Court's ruling, we hold that 25 U.S.C. § 1912(f)—which bars involuntary termination of a parent's rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child—does not apply when, as here, the relevant parent never had custody of the child. We further hold that § 1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the "breakup of the Indian family"—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child. Finally, we clarify that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child.

The case was somewhat different from Santa Clara Pueblo. The non-Indian Latina biological mother agreed to give up the child for adoption. Dusten Brown,[1] the Indian biological father made a similar declaration but changed his mind four months after the child was born when he discovered that his ex-fiancé had placed the girl for adoption and that she was living with Matt and Melanie Capobianco. The child was with the adoptive family for over two years before being returned to his biological father by the South Carolina Supreme Court. There was no dispute that both families provided loving, good-quality homes. In a potentially odd twist, the Court did not order that the child be returned to the Capobiancos. It simply remanded for further proceedings. The natural father and the Cherokee Nation intervened in the remand proceedings seeking to bar finalization of the adoption. But, despite the passage of time between the order to return the child to its natural father and the remand to the state courts, the South Carolina Supreme Court affirmed an order finalizing the adoption. Adoptive Couple v. Baby Girl, 404 S.C. 490 (2013).

For more on custody disputes involving Native American children, see BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN (2010).

New Note (3) at p. 98:

(3) *Tribal Marijuana Hotels*: The Department of Justice announced in 2014 that it would permit tribes to grow and sell marijuana under terms similar to those adopted in some states.[2] The Santee Sioux Tribe of South Dakota opened the nation's first marijuana hotel just under a year later.[3] Does the history of relationships between tribes and the federal government explain this step. Are federal drug laws applicable to lands still held under Indian title? What about to other lands on reservations? The tribe actually burned its marijuana crop in late 2015 when they were told there might be a federal raid.[4]

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1. His name and other information about the case is available in Dan Frosch & Timothy Williams, *Justice Say Law Doesn't Require Child to Be Returned to Her Indian Father*, THE NEW YORK TIMES (June 25, 2013).
2. The Memorandum to United States Attorneys was issued on October 14, 2014 and is available online at http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf.
3. Regina Garcia Cano, *South Dakota Tribe to Open Nation's 1st Marijuana Resort,* (Associated Press Sep. 29, 2015), online at http://bigstory.ap.org/article/b759278274a94be89e6e4f3793b8c009/south-dakota-tribe-open-nations-1st-marijuana-resort (Visited Oct. 20, 2015).
4. *S.D. Tribe With Big Marijuana Ambitions Torches Crop,* http://www.cbsnews.com/news/south-dakota-sioux-tribe-marijuana-resort-torches-crop/ (Visited Aug. 8, 2016)

Add the following to the end of Note (4) at p. 118:

It often is difficult for one co-owner to prove that an ouster has occurred. As a result, as noted just above, informal passing of property from generation to generation tend to create "stacked up" tenancies in common. After a while it can get unwieldy. Some owners can't be found. Buying and selling the property becomes difficult. While judicial efforts to ease the ouster rule are sometimes helpful in these cases, easing the rigors of partition rules might also help. Every owner of a tenancy in common or a joint tenancy with right of survivorship has the right to seek partition—to ask a court to force either a splitting up of the asset in kind or a sale to an outside party. In lay terms, it is a property divorce. But the typical result of a partition action is an auction sale that is not likely to bring the best price. And locating all the owners can be a challenge. Efforts to make the process easier have been suggested by the Uniform Commissioners on State Laws in its Uniform Partition of Heirs Property Act. The act allows those not seeking partition to buy out those seeking to split the asset. It also streamlines provisions for dealing with a large number of owners, requires the use of open rather than auction sales in order to increase sales prices, and places some limitations on the allocation of sale costs and attorney fees upon those not seeking a partition. So far it has been adopted in seven states—Montana, Nevada, Arkansas, Alabama, Georgia, South Carolina, Connecticut—and introduced in two others—Mississippi and Nevada.[5]

New Note (9) at p. 132:

(9) *Adverse Possession and Foreclosure*: Because of the spate of residential foreclosure actions after 2008, thousands of dwelling across the nation were left empty. In an intriguing turnabout, one man in Florida—Mark Guerette—moved poor families into empty houses and charged them rent, hoping to gain ownership when the seven year statute of limitation expired. He notified the owners of record and foreclosing lenders of his plans for nineteen houses, fixed them up to make them habitable when he got no response from those he notified, and moved renters into the houses. The response from the State of Florida was to charge him with fraud for renting houses he did not own. Catherine Skipp & Damien Cave, *At Legal Fringe, Empty Houses Go to the Needy*, THE NEW YORK TIMES (Nov. 8, 2010). Guerette pled guilty to fraud and was sentenced to two years on probation. He claimed he took the plea bargain to avoid jail, deal with a foreclosure action pending on his own house, and insure that his children would not lose a parent for a period of time. Stefan Kamph, *Fraud Case Ends With Probation for Rogue Foreclosure Landlord Mark Guerette,* BROWARD PALM BEACH NEW TIMES (Dec. 3, 2010), http://blogs.browardpalmbeach.com/pulp/2010/12/mark_guerette_fraud_case_ends_in_probation.php (Visited June 20, 2013). Did Guerette do anything wrong? Perhaps he was guilty of trespass, but did he behave fraudulently? Does it make a difference if he didn't explain to his tenants that he was trying to obtain ownership by adverse possession and that he did not own the houses when the tenants moved in?

Addition to Note (6) at p. 147:

In 2014 and 2015, the results of further studies of the Kennewick Man were released. The Smithsonian Institution published a 670 page book about the skeletal remains, but could not confirm its lineage. Eventually a DNA sample was sent to scholars at the University of Copenhagen in Denmark who are world renowned for their ability to trace a person's historical

5. http://www.uniformlaws.org/Act.aspx?title=Partition%20of%20Heirs%20Property%20Act (Visited Aug. 8, 2016).

lineage. They concluded that the skeleton definitely was Native American in origin. As of this writing, tribal members still are hoping to rebury the skeleton now in the custody of the Army Corp of Engineers in accordance with long standing custom.[6]

A similar dispute arose in the San Diego area when members of archeology class digging on land owned by the University of California discovered some skeletal remains. They were claimed by the Kumeyaay Cultural Repatriation Committee, which filed litigation in 2006. They finally prevailed in January, 2016. The six tribes involved in the Rapatriation Committee have not ruled out further scientific investigation of the remains. But spokesman Steven Banegas said, "These things we need to discuss," adding pointedly, "We want to be the ones who tell our own story."[7]

6. Carl Zimmer, *New Study Links Kennewick Man to Native Americans,* THE NEW YORK TIMES A14 (June 19, 2015).

7. Carl Zimmer, *Tribes' Win in Fight for La Jolla Bones Clouds Hopes for DNA Studies,* THE NEW YORK TIMES (Jan. 29, 2016), http://www.nytimes.com/2016/02/02/science/tribes-win-in-fight-for-la-jolla-bones-clouds-hopes-for-dna-studies.html (Visited Aug. 8, 2016.

CHAPTER 2

New § 2.02a at p. 189 [This material also could be read at the end of Chapter 1 at p. 148.]:

§ 2.02a Shared Ownership

[1] Introduction to Popov v. Hayashi

In a widely publicized dispute, Alex Popov and Patrick Hayashi each claimed ownership of a baseball hit into the stands by Barry Bonds. Everyone knew the ball was valuable. It was the record 73rd home run launched by Bonds during the 2002 season. Though Bonds himself was later tainted by the steroid scandal, his record still stands. As expected a melee erupted shortly after the ball was hit as fans positioned themselves to obtain possession. The ball initially landed in Popov's glove, but fell out as he was set upon by the mob. Eventually the ball popped out and was picked up and pocketed by Hayashi. Videos of the event were widely distributed. Popov and Hayashi could not agree about what to do with the ball. Popov sued. In a fascinating unreported opinion, Judge McCarthy concluded that both men had an undivided interest in the ball. Popov, he opined, held a pre-possessory claim—the idea that if he had been allowed to try to complete the catch instead of being unlawfully assaulted by a mob, he might have gained complete possession. On the other hand, Hayashi was an innocent bystander who did not participate in any illegal activity. Both, therefore, held legitimate claims to the ball. The court created a tenancy in common in the ball, which was eventually sold for $450,000.[8] What is intriguing for our purposes is the willingness of the court not just to impose sharing obligations on Popov and Hayashi, but also to impose community behavior norms on spectators to respect the potential property interests of fellow fans. While not exactly like the fiduciary obligations among co-owners, the result still calls upon basic notions of human decency in disposing of property claims.

[2] The Court Opinion

ALEX POPOV V. PATRICK HAYASHI

Superior Court, San Francisco County, California.

2002 WL 31833731 (Cal.Superior 2002)

MCCARTHY, J.

FACTS

In 1927, Babe Ruth hit sixty home runs. That record stood for thirty four years until Roger Maris broke it in 1961 with sixty one home runs. Mark McGwire hit seventy in 1998. On October 7, 2001, at PacBell Park in San Francisco, Barry Bonds hit number seventy three. That accomplishment set a record which, in all probability, will remain unbroken for years into the future.

The event was widely anticipated and received a great deal of attention.

The ball that found itself at the receiving end of Mr. Bond's bat garnered some of that attention. Baseball fans in general, and especially people at the game, understood the importance

8. Ira Berkow, *Baseball; 73rd Home Run Ball Sells for $450,000*, THE NEW YORK TIMES (June 26, 2003). After legal and other fees it is unlikely that either claimant ended up with a substantial sum of money.

of the ball. It was worth a great deal of money[1] and whoever caught it would bask, for a brief period of time, in the reflected fame of Mr. Bonds.

With that in mind, many people who attended the game came prepared for the possibility that a record setting ball would be hit in their direction. Among this group were plaintiff Alex Popov and defendant Patrick Hayashi. They were unacquainted at the time. Both men brought baseball gloves, which they anticipated using if the ball came within their reach.

They, along with a number of others, positioned themselves in the arcade section of the ballpark. This is a standing room only area located near right field. It is in this general area that Barry Bonds hits the greatest number of home runs. The area was crowded with people on October 7, 2001 and access was restricted to those who held tickets for that section.

Barry Bonds came to bat in the first inning. With nobody on base and a full count, Bonds swung at a slow knuckleball. He connected. The ball sailed over the right-field fence and into the arcade.

Josh Keppel, a cameraman who was positioned in the arcade, captured the event on videotape. Keppel filmed much of what occurred from the time Bonds hit the ball until the commotion in the arcade had subsided. He was standing very near the spot where the ball landed and he recorded a significant amount of information critical to the disposition of this case.

In addition to the Keppel tape, seventeen percipient witnesses testified as to what they saw after the ball came into the stands. The testimony of these witnesses varied on many important points. Some of the witnesses had a good vantage point and some did not. Some appeared disinterested in the outcome of the litigation and others had a clear bias. Some remembered the events well and others did not. Some were encumbered by prior inconsistent statements which diminished their credibility.

The factual findings in this case are the result of an analysis of the testimony of all the witnesses as well as a detailed review of the Keppel tape. Those findings are as follows:

When the seventy-third home run ball went into the arcade, it landed in the upper portion of the webbing of a softball glove worn by Alex Popov. While the glove stopped the trajectory of the ball, it is not at all clear that the ball was secure. Popov had to reach for the ball and in doing so, may have lost his balance.

Even as the ball was going into his glove, a crowd of people began to engulf Mr. Popov. He was tackled and thrown to the ground while still in the process of attempting to complete the catch. Some people intentionally descended on him for the purpose of taking the ball away, while others were involuntarily forced to the ground by the momentum of the crowd.

Eventually, Mr. Popov was buried face down on the ground under several layers of people. At one point he had trouble breathing. Mr. Popov was grabbed, hit and kicked. People reached underneath him in the area of his glove. Neither the tape nor the testimony is sufficient to establish which individual members of the crowd were responsible for the assaults on Mr. Popov.

The videotape clearly establishes that this was an out of control mob, engaged in violent, illegal behavior. Although some witnesses testified in a manner inconsistent with this finding,

1. It has been suggested that the ball might sell for something in excess of $1,000,000. [As noted in the note before the case, the ball eventually sold for $450,000. Ed.]

their testimony is specifically rejected as being false on a material point.

Mr. Popov intended at all times to establish and maintain possession of the ball. At some point the ball left his glove and ended up on the ground. It is impossible to establish the exact point in time that this occurred or what caused it to occur.

Mr. Hayashi was standing near Mr. Popov when the ball came into the stands. He, like Mr. Popov, was involuntarily forced to the ground. He committed no wrongful act.[5] While on the ground he saw the loose ball. He picked it up, rose to his feet and put it in his pocket.

Although the crowd was still on top of Mr. Popov, security guards had begun the process of physically pulling people off. Some people resisted those efforts. One person argued with an official and another had to be pulled off by his hair.

Mr. Hayashi kept the ball hidden. He asked Mr. Keppel to point the camera at him. At first, Mr. Keppel did not comply and Mr. Hayashi continued to hide the ball. Finally after someone else in the crowd asked Mr. Keppel to point the camera at Mr. Hayashi, Mr. Keppel complied. It was only at that point that Mr. Hayashi held the ball in the air for others to see. Someone made a motion for the ball and Mr. Hayashi put it back in his glove. It is clear that Mr. Hayashi was concerned that someone would take the ball away from him and that he was unwilling to show it until he was on videotape. Although he testified to the contrary, that portion of his testimony is unconvincing.

Mr. Popov eventually got up from the ground. He made several statements while he was on the ground and shortly after he got up which are consistent with his claim that he had achieved some level of control over the ball and that he intended to keep it. Those statements can be heard on the audio portion of the tape. When he saw that Mr. Hayashi had the ball he expressed relief and grabbed for it. Mr. Hayashi pulled the ball away. Security guards then took Mr. Hayashi to a secure area of the stadium.

It is important to point out what the evidence did not and could not show. Neither the camera nor the percipient witnesses were able to establish whether Mr. Popov retained control of the ball as he descended into the crowd. Mr. Popov's testimony on this question is inconsistent on several important points, ambiguous on others and, on the whole, unconvincing. We do not know when or how Mr. Popov lost the ball.

Perhaps the most critical factual finding of all is one that cannot be made. We will never know if Mr. Popov would have been able to retain control of the ball had the crowd not interfered with his efforts to do so. Resolution of that question is the work of a psychic, not a judge.

LEGAL ANALYSIS

Plaintiff has pled causes of actions for conversion, trespass to chattel, injunctive relief and constructive trust.

Conversion is the wrongful exercise of dominion over the personal property of another. There must be actual interference with the plaintiff's dominion. Wrongful withholding of property can constitute actual interference even where the defendant lawfully acquired the

5. Plaintiff argues that the Keppel tape shows Mr. Hayashi biting the leg of Brian Shepard. The tape does not support such a conclusion. The testimony which suggests that a bite occurred is equally unconvincing. In addition, there is insufficient evidence that Mr. Hayashi assaulted or attempted to take the ball away from Mr. Popov.

property. If a person entitled to possession of personal property demands its return, the unjustified refusal to give the property back is conversion.

The act constituting conversion must be intentionally done. There is no requirement, however, that the defendant know that the property belongs to another or that the defendant intends to dispossess the true owner of its use and enjoyment. Wrongful purpose is not a component of conversion

The injured party may elect to seek either specific recovery of the property or monetary damages.

Trespass to chattel, in contrast, exists where personal property has been damaged or where the defendant has interfered with the plaintiff's use of the property. Actual dispossession is not an element of the tort of trespass to chattel.

In the case at bar, Mr. Popov is not claiming that Mr. Hayashi damaged the ball or that he interfered with Mr. Popov's use and enjoyment of the ball. He claims instead that Mr. Hayashi intentionally took it from him and refused to give it back. There is no trespass to chattel. If there was a wrong at all, it is conversion.

Conversion does not exist, however, unless the baseball rightfully belongs to Mr. Popov. One who has neither title nor possession, nor any right to possession, cannot sue for conversion. The deciding question in this case then, is whether Mr. Popov achieved possession or the right to possession as he attempted to catch and hold on to the ball.

The parties have agreed to a starting point for the legal analysis. Prior to the time the ball was hit, it was possessed and owned by Major League Baseball. At the time it was hit it became intentionally abandoned property.[15] The first person who came in possession of the ball became its new owner.[16]

The parties fundamentally disagree about the definition of possession. In order to assist the court in resolving this disagreement, four distinguished law professors participated in a forum to discuss the legal definition of possession.[17] The professors also disagreed.

The disagreement is understandable. Although the term possession appears repeatedly throughout the law, its definition varies depending on the context in which it is used. Various courts have condemned the term as vague and meaningless.

This level of criticism is probably unwarranted.

While there is a degree of ambiguity built into the term possession, that ambiguity exists for

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15. See generally, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?;* Cardozo Law Review, May 2002, Paul Finkelman, (Chapman Distinguished Professor of Law).

16. See generally, *Past and Future: The Temporal Dimension in the Law of Property,* (1986) 64:667;. Washington U.L. Quarterly, Professor Richard A. Epstein (James Parker Hall Professor of Law, University of Chicago; *Irwin v. Phillips* (1855) 5 Cal. 140; *Potter v. Knowles* (1855) 5 Cal. 87.

17. They are Professor Brian E. Gray, University of California, Hastings College of the Law; Professor Roger Bernhardt, Golden Gate University School of Law; Professor Paul Finkelman, The Chapman Distinguished Professor of Law, The University of Tulsa School of Law; and Professor Jan Stiglitz, California Western School of Law.

The discussion was held during an official session of the court convened at The University of California, Hastings College of the Law. The session was attended by a number of students and professors including one first year property law class which used this case as vehicle to understand the law of possession.

a purpose. Courts are often called upon to resolve conflicting claims of possession in the context of commercial disputes. A stable economic environment requires rules of conduct which are understandable and consistent with the fundamental customs and practices of the industry they regulate. Without that, rules will be difficult to enforce and economic instability will result. Because each industry has different customs and practices, a single definition of possession cannot be applied to different industries without creating havoc.

This does not mean that there are no central principles governing the law of possession. It is possible to identify certain fundamental concepts that are common to every definition of possession.

Professor Roger Bernhardt has recognized that "[p]ossession requires both physical control over the item and an intent to control it or exclude others from it. But these generalizations function more as guidelines than as direct determinants of possession issues. Possession is a blurred question of law and fact."

Professor Brown argues that "[t]he orthodox view of possession regards it as a union of the two elements of the physical relation of the possessor to the thing, and of intent. This physical relation is the actual power over the thing in question, the ability to hold and make use of it. But a mere physical relation of the possessor to the thing in question is not enough. There must also be manifested an intent to control it."

The task of this court is to use these principles as a starting point to craft a definition of possession that applies to the unique circumstances of this case.

We start with the observation that possession is a process which culminates in an event. The event is the moment in time that possession is achieved. The process includes the acts and thoughts of the would be possessor which lead up to the moment of possession.

The focus of the analysis in this case is not on the thoughts or intent of the actor. Mr. Popov has clearly evidenced an intent to possess the baseball and has communicated that intent to the world.[23] The question is whether he did enough to reduce the reduce the ball to his exclusive dominion and control. Were his acts sufficient to create a legally cognizable interest in the ball?

Mr. Hayashi argues that possession does not occur until the fan has complete control of the ball. Professor Brian Gray, suggests the following definition: "A person who catches a baseball that enters the stands is its owner. A ball is caught if the person has achieved complete control of the ball at the point in time that the momentum of the ball and the momentum of the fan while attempting to catch the ball ceases. A baseball, which is dislodged by incidental contact with an inanimate object or another person, before momentum has ceased, is not possessed. Incidental contact with another person is contact that is not intended by the other person. The first person to pick up a loose ball and secure it becomes its possessor."[24]

Mr. Popov argues that this definition requires that a person seeking to establish possession must show unequivocal dominion and control, a standard rejected by several leading cases.[25]

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23. Literally.

24. This definition is hereinafter referred to as Gray's Rule.

25. *Pierson v. Post* 3 Caines R. (N.Y.1805); *Young v. Hitchens* 6 Q.B. 606 (1844); *State v. Shaw* (1902) 67 Ohio St. 157, 65 N.E. 875.

Instead, he offers the perspectives of Professor Bernhardt and Professor Paul Finkelman[26] who suggest that possession occurs when an individual intends to take control of a ball and manifests that intent by stopping the forward momentum of the ball whether or not complete control is achieved.

Professors Finkelman and Bernhardt have correctly pointed out that some cases recognize possession even before absolute dominion and control is achieved. Those cases require the actor to be actively and ably engaged in efforts to establish complete control.[27] Moreover, such efforts must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future.

This rule is applied in cases involving the hunting or fishing of wild animals or the salvage of sunken vessels. The hunting and fishing cases recognize that a mortally wounded animal may run for a distance before falling. The hunter acquires possession upon the act of wounding the animal not the eventual capture. Similarly, whalers acquire possession by landing a harpoon, not by subduing the animal.

In the salvage cases, an individual may take possession of a wreck by exerting as much control "as its nature and situation permit". Inadequate efforts, however, will not support a claim of possession. Thus, a "sailor cannot assert a claim merely by boarding a vessel and publishing a notice, unless such acts are coupled with a then present intention of conducting salvage operations, and he immediately thereafter proceeds with activity in the form of constructive steps to aid the distressed party."

These rules are contextual in nature. The are crafted in response to the unique nature of the conduct they seek to regulate. Moreover, they are influenced by the custom and practice of each industry. The reason that absolute dominion and control is not required to establish possession in the cases cited by Mr. Popov is that such a rule would be unworkable and unreasonable. The "nature and situation" of the property at issue does not immediately lend itself to unequivocal dominion and control. It is impossible to wrap ones arms around a whale, a fleeing fox or a sunken ship.

The opposite is true of a baseball hit into the stands of a stadium. Not only is it physically possible for a person to acquire unequivocal dominion and control of an abandoned baseball, but fans generally expect a claimant to have accomplished as much. The custom and practice of the stands creates a reasonable expectation that a person will achieve full control of a ball before claiming possession. There is no reason for the legal rule to be inconsistent with that expectation. Therefore Gray's Rule is adopted as the definition of possession in this case.

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26. Professor Finkelman is the author of the definitive law review article on the central issue in this case, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?;* Cardozo Law Review, May 2002, Paul Finkelman, (Chapman Distinguished Professor of Law).

27. The degree of control necessary to establish possession varies from circumstance to circumstance. "The law . . . does not always require that one who discovers lost or abandoned property must actually have it in hand before he is vested with a legally protected interest. The law protects not only the title acquired by one who finds lost or abandoned property but also the right of the person who discovers such property, and is actively and ably engaged in reducing it to possession, to complete this process without interference from another. The courts have recognized that in order to acquire a legally cognizable interest in lost or abandoned property a finder need not always have manual possession of the thing. Rather, a finder may be protected by taking such constructive possession of the property as its nature and situation permit." *Treasure Salvors Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel* (1981)640 F.2d 560, 571. (emphasis added)

The central tenant of Gray's Rule is that the actor must retain control of the ball after incidental contact with people and things. Mr. Popov has not established by a preponderance of the evidence that he would have retained control of the ball after all momentum ceased and after any incidental contact with people or objects. Consequently, he did not achieve full possession.

That finding, however, does not resolve the case. The reason we do not know whether Mr. Popov would have retained control of the ball is not because of incidental contact. It is because he was attacked. His efforts to establish possession were interrupted by the collective assault of a band of wrongdoers.[34]

A decision which ignored that fact would endorse the actions of the crowd by not repudiating them. Judicial rulings, particularly in cases that receive media attention, affect the way people conduct themselves. This case demands vindication of an important principle. We are a nation governed by law, not by brute force.

As a matter of fundamental fairness, Mr. Popov should have had the opportunity to try to complete his catch unimpeded by unlawful activity. To hold otherwise would be to allow the result in this case to be dictated by violence. That will not happen.

For these reasons, the analysis cannot stop with the valid observation that Mr. Popov has not proved full possession.[36]

The legal question presented at this point is whether an action for conversion can proceed where the plaintiff has failed to establish possession or title. It can. An action for conversion may be brought where the plaintiff has title, possession or the right to possession.

Here Mr. Popov seeks, in effect, a declaratory judgment that he has either possession or the right to possession. In addition he seeks the remedies of injunctive relief and a constructive trust. These are all actions in equity. A court sitting in equity has the authority to fashion rules and remedies designed to achieve fundamental fairness.

Consistent with this principle, the court adopts the following rule. Where an actor undertakes significant but incomplete steps to achieve possession of a piece of abandoned personal property and the effort is interrupted by the unlawful acts of others, the actor has a legally cognizable pre-possessory interest in the property. That pre-possessory interest constitutes a qualified right to possession which can support a cause of action for conversion.

Possession can be likened to a journey down a path. Mr. Popov began his journey unimpeded. He was fast approaching a fork in the road. A turn in one direction would lead to possession of the ball [if] he would complete the catch. A turn in the other direction would result in a failure to achieve possession [if] he would drop the ball. Our problem is that before Mr. Popov got to the point where the road forked, he was set upon by a gang of bandits, who dislodged the ball from his grasp.

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34. Professor Gray has suggested that the way to deal with this problem is to demand that Mr. Popov sue the people who assaulted him. This suggestion is unworkable for a number of reasons. First, it was an attack by a large group of people. It is impossible to separate out the people who were acting unlawfully from the people who were involuntarily pulled into the mix. Second, in order to prove damages related to the loss of the ball, Mr. Popov would have to prove that but for the actions of the crowd he would have achieved possession of the ball. As noted earlier, this is impossible.

36. The court is indebted to Professor Jan Stiglitz of California Western School of Law for his valuable insights and suggestions on this issue.

Recognition of a legally protected pre-possessory interest, vests Mr. Popov with a qualified right to possession and enables him to advance a legitimate claim to the baseball based on a conversion theory. Moreover it addresses the harm done by the unlawful actions of the crowd.

It does not, however, address the interests of Mr. Hayashi. The court is required to balance the interests of all parties.

Mr. Hayashi was not a wrongdoer. He was a victim of the same bandits that attacked Mr. Popov. The difference is that he was able to extract himself from their assault and move to the side of the road. It was there that he discovered the loose ball. When he picked [it] up and put it in his pocket he attained unequivocal dominion and control.

If Mr. Popov had achieved complete possession before Mr. Hayashi got the ball, those actions would not have divested Mr. Popov of any rights, nor would they have created any rights to which Mr. Hayashi could lay claim. Mr. Popov, however, was able to establish only a qualified pre-possessory interest in the ball. That interest does not establish a full right to possession that is protected from a subsequent legitimate claim.

On the other hand, while Mr. Hayashi appears on the surface to have done everything necessary to claim full possession of the ball, the ball itself is encumbered by the qualified pre-possessory interest of Mr. Popov. At the time Mr. Hayashi came into possession of the ball, it had, in effect, a cloud on its title.

An award of the ball to Mr. Popov would be unfair to Mr. Hayashi. It would be premised on the assumption that Mr. Popov would have caught the ball. That assumption is not supported by the facts. An award of the ball to Mr. Hayashi would unfairly penalize Mr. Popov. It would be based on the assumption that Mr. Popov would have dropped the ball. That conclusion is also unsupported by the facts.

Both men have a superior claim to the ball as against all the world. Each man has a claim of equal dignity as to the other. We are, therefore, left with something of a dilemma.

Thankfully, there is a middle ground.

The concept of equitable division was fully explored in a law review article authored by Professor R.H. Helmholz in the December 1983 edition of the Fordham Law Review.[38] Professor Helmholz addressed the problems associated with rules governing finders of lost and mislaid property. For a variety of reasons not directly relevant to the issues raised in this case, Helmholz suggested employing the equitable remedy of division to resolve competing claims between finders of lost or mislaid property and the owners of land on which the property was found.

There is no reason, however, that the same remedy cannot be applied in a case such as this, where issues of property, tort and equity intersect.

The concept of equitable division has its roots in ancient Roman law. As Helmholz points out, it is useful in that it "provides an equitable way to resolve competing claims which are equally strong." Moreover, "[i]t comports with what one instinctively feels to be fair".

38. *Equitable Division and the Law of Finders,* (1983) Fordham Law Review, Professor R.H. Helmholz, University of Chicago School of Law. This article built on a student comment published in 1939. *Lost, Mislaid and Abandoned Property* (1939) 8 Fordham Law Review 222.

Although there is no California case directly on point, *Arnold v. Producers Fruit Company* (1900) 128 Cal. 637, 61 P. 283 provides some insight. There, a number of different prune growers contracted with Producer's Fruit Company to dry and market their product. Producers did a bad job. They mixed fruit from many different growers together in a single bin and much of the fruit rotted because it was improperly treated.

When one of the plaintiffs offered proof that the fruit in general was rotten, Producers objected on the theory that the plaintiff could not prove that the prunes he contributed to the mix were the same prunes that rotted. The court concluded that it did not matter. After the mixing was done, each grower had an undivided interest in the whole, in proportion to the amount of fruit each had originally contributed.

The principle at work here is that where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim.

Application of the principle of equitable division is illustrated in the case of *Keron v. Cashman* (1896) 33 A. 1055. In that case, five boys were walking home along a railroad track in the city of Elizabeth New Jersey. The youngest of the boys came upon an old sock that was tied shut and contained something heavy. He picked it up and swung it. The oldest boy took it away from him and beat the others with it. The sock passes from boy to boy. Each controlled it for a short time. At some point in the course of play, the sock broke open and out spilled $775 as well as some rags, cloths and ribbons.

The court noted that possession requires both physical control and the intent to reduce the property to one's possession. Control and intent must be concurrent. None of the boys intended to take possession until it became apparent that the sock contained money. Each boy had physical control of the sock at some point before that discovery was made.

Because none could present a superior claim of concurrent control and intent, the court held that each boy was entitled to an equal share of the money. Their legal claims to the property were of equal quality, therefore their entitlement to the property was also equal.

Here, the issue is not intent, or concurrence. Both men intended to possess the ball at the time they were in physical contact with it. The issue, instead, is the legal quality of the claim. With respect to that, neither can present a superior argument as against the other.

Mr. Hayashi's claim is compromised by Mr. Popov's pre-possessory interest. Mr. Popov cannot demonstrate full control. Albeit for different reasons, they stand before the court in exactly the same legal position as did the five boys. Their legal claims are of equal quality and they are equally entitled to the ball.

The court therefore declares that both plaintiff and defendant have an equal and undivided interest in the ball. Plaintiff's cause of action for conversion is sustained only as to his equal and undivided interest. In order to effectuate this ruling, the ball must be sold and the proceeds divided equally between the parties.

The parties are ordered to meet and confer forthwith before Judge Richard Kramer to come to an agreement as to how to implement this decision. If no decision is made by December 30, 2002, the parties are directed to appear before this court on that date at 9:00 am.

The court retains jurisdiction to issue orders consistent with this decision. The ball is to

remain in the custody of the court until further order.

[3] Notes

(1) *Abandonment of Property*: If property is abandoned, others may simply take it in most cases. The long standing custom in Major League Baseball ballparks is to allow spectators to keep any baseball that leaves the field of play and enters the seating area. Similarly, those outside of stadiums may retain any balls that entirely leave the facility. Though the teams could change the practice and require that balls be returned, none do. That meant that when Bonds hit his home run, the Giants did not claim any interest in the ball. A similar result would arise if a person simply abandons a $10 bill and leaves it on the street. The baseball custom, of course, inevitably leads to scrums among fans seeking to obtain a "souvenir" to take home. And when the ball happens to be quite important, the scrums can be quite fierce and sometimes violent. That is basically what happened in San Francisco. In other sports, of course, the custom is quite different. Footballs leaving stadia are routinely returned to the field of play. So are basketballs and soccer (really footballs outside of the United States) balls.

(2) *Lost Property*: Typically it is difficult to tell the difference between abandoned and lost property. The mere location of something in a place it normally is not found doesn't tell us whether it has been thrown out or merely misplaced. In general, the finder is deemed the rightful possessor against everyone but the true owner. It is from this general rule that the adage "possession is nine-tenths of the law" arises. That rule operates much like a trespasser in settings where adverse possession statutes of limitation run. But because of the difficulties in distinguishing between abandoned and lost property, states have adopted statutes requiring that seemingly misplaced property of value be turned over to public authorities. In cases involving valuable assets an effort is supposed to be made to find the true owner. If no one turns up to claim the property within a certain time, it is deemed abandoned and returned to the finder. In New York, for example, found property worth more than $20 must be turned in at a police station.[9] The Bonds baseball, of course, was not "lost" or even "misplaced." It was abandoned.

(3) *Possession*: If property is abandoned, getting to it first obviously makes a big difference. For possession of the first taker, as noted above, is given preference over everyone other than the true owner. That is why determining whose possession was lawful, continuous, and sustained was so important to the result in *Popov*. Since, the court concluded, no one had such possession of the ball, ownership was split. Would you decide the case the same way? Why not use something like a jump ball in basketball? Throw the ball in the air between the two contestants and let them have a tussle until one of them takes clear possession of the orb. Isn't that what baseball teams encourage every time a ball goes into the seats? Or maybe we should give the ball back to Bonds. Since neither Popov nor Hayashi had meaningful possession, why not give it back to the last person with a rightful claim? Oops, maybe Bonds didn't have possession either. He just slugged it out of the park using a bat and his hands never touched it. The pitcher was the last person to truly hold it. But his job requires him to abandon possession, at least until the catcher throws it back to him or the ball leaves the playing field. And the team has abandoned a claim in the ball once it leaves the ballpark. Aha! Give the ball to a local charity on the theory that no one had a right to it. Does that work? And perhaps the charity should be an organization devoted to ridding sports of performance enhancing drugs since the Bonds ball might not have been hit out of the park without their use. Isn't law wonderful?

9. N.Y. PEP. Law § 252.

Replace Section [5] at pp. 312-323 with the following new Section [5]:

[5] Same Sex Marriage

In 1996 Congress enacted the Defense of Marriage Act (DOMA). The act was adopted during the Clinton administration a bit over two years after the Hawaii Supreme Court decided Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993). The *Baehr* court declared that a compelling justification had to be demonstrated to deny same-sex couples the same right to marry enjoyed by heterosexual partners. The case generated a storm of protest, in Hawaii and elsewhere, by those opposed to same sex marriage.[10] The *Baehr* result, which was remanded for trial on the compelling justification issue, was mooted in 1998 when Hawaii's constitution was amended to allow the state's legislature to bar same-sex marriage and the legislature quickly responded by doing so. Congress reacted to the public furor by passing DOMA with overwhelming majorities in both houses. The legislation clearly was designed to bar the application to same-sex couples of any federal statute dealing with marriage and to give each state the power to refuse recognition to any marital benefits bestowed on same-sex couples by other jurisdictions.[11]

DOMA contained two main provisions. The first was in Title 1 of the United States Code, part of a section on rules of construction designed to tell courts how to define various terms used in federal statutes. The other, in Title 28, was a Congressional effort to give meaning to the Constitutional provisions requiring states to give full faith and credit to the judicial and legislative actions of other states.

1 U.S.C. §7. Definition of "marriage" and "spouse"

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

28 U.S.C. §1738C. Certain acts, records, and proceedings and the effect thereof

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

The federal statute placed same-sex couples married in states recognizing their relationships in a very peculiar position. If, for example, they moved to another jurisdiction, their relationship

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10. See, e.g., David W. Dunlap, *Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door*, THE NEW YORK TIMES (Mar. 6, 1996).

11. Article IV, Section 1 of the United States Constitution provides that:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

In construing this provision, the federal courts have allowed both state courts and Congress to deny full faith and credit to acts of states that conflict with strongly held public policies of a state hearing a legal dispute. Though the language of the second sentence of the section appears to deal with procedural matters, it has not been so limited. The Defense of Marriage Act, therefore, probably is valid unless it violates either the Equal Protection or Due Process Clause.

may not have been recognized as valid. So, in an odd twist, if one partner of a male duo originally married in Vermont moved to Texas and sought to file a divorce, it might fail on the ground that as far as Texas was concerned he was never married. The oddities of such a result led some states not allowing same-sex partners to marry, such as New York, to give full faith and credit to such marriages entered into in other states. In addition, though same-sex married couples retained all the state-level benefits and burdens of marriage if they lived in a state recognizing their relationships, their federal status was that of two single people. So they had to file a joint income tax return in their state of residence but two single person federal tax returns. A myriad of federal benefits available to married people under the tax code, social security system, family and medical leave legislation, and immigration law, among many others, were not bestowed on married same-sex couples.[12] No other form of relationship has ever been treated in this way in the history of the country.[13]

The validity of Section 3 of the Defense of Marriage Act barring the United States from treating state-recognized same-sex marriages as marriages under federal law came before the United States Supreme Court in 2013. United States v. Edith Schlain Windsor, Executor of the Estate of Thea Clara Spyer, 570 U.S. ___, 133 S.Ct. 2675 (2013). In a 5-4 ruling, the Court invalidated the section, concluding that its adoption by Congress in 1996 violated the Fifth Amendment of the Constitution.[14] And, of course, the Constitutionality of state bans of same-sex marriage came before the court in 2015. In another 5-4 result, the Court declared that states must allow such couples to marry. Obergefell v. Hodges, 576 U.S. ___, 135 S.Ct. 2584 (2015).

These recent results by no means guarantee that property disputes with problems applicable only to same-sex couples will cease to arise. For starters, it is important to note that *Windsor* dealt only with Section 3 of DOMA, leaving Section 2 (28 U.S.C. §1738C) untouched. That provision, reproduced above, allows but does not compel states to recognize the lawfulness of same-sex marriages entered into in other jurisdictions. It is the only provision in the United States Code explicitly establishing a category of cases in which states are free to ignore the laws and judicial proceedings of sister jurisdictions.[15] While *Obergefell* presumably will require all states to recognize same-sex marriages for all purposes, that does not mean that some courts will not continue to resist that obligation or that decisions will not surface creating different results

12. Human Rights Campaign has compiled a huge list of relevant federal programs. For a summary and link to the full list go to http://www.hrc.org/issues/5585.htm (Visited Apr. 17, 2009).

13. Though states have been allowed to deny legality of any polygamous relationship legalized by another jurisdiction, polygamy was never allowed by a significant number of states and barred by federal law. It has routinely been disfavored by virtually all states throughout our history.

14. The same day *Windsor* was announced the Court dismissed the appeal in Hollingsworth v. Perry, 570 U.S. ___, 133 S.Ct. 2652 (2013), concluding that those seeking review of the case lacked standing to do so. That left intact the result reached by the United States District Court for the Northern District of California invalidating the bar to same-sex marriage contained in Proposition 8 approved by the state's voters in 2008. See *Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D.Cal.2010). As a result, the Court declined to reach the question of whether the Constitution invalidates all state laws barring same-sex marriage.

15. Section 2 of DOMA is codified at 28 U.S.C. § 1738(C). 28 U.S.C. § 1738 codifies the basic provision requiring recognition of state law by other states. 28 U.S.C. §§ 1738A and 1738B do the opposite of § 1738C—requiring states to enforce the child custody and child support rulings of sister jurisdictions. During the decades before the arrival of no-fault divorce in the 1970s, the Supreme Court did permit states to decline to enforce certain aspects of "quickie" divorce decrees obtained in Nevada or foreign courts if the results conflicted with deeply rooted public policies of a state. See, e.g., Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). Presumably these cases will resurface if and when Section 2 of DOMA comes before the Supreme Court.

for same-sex and different-sex marital partners.

Here is just one example. Suppose a couple accumulates assets while they lived together but before they married. Like many such couples, they lived their lives together in an intensely sharing environment. If they split up while not married, *Marvin*-like rules would govern the separation of their assets. But if they did not split up until after they married, a problem emerges. Should the pre-marital period be treated the same as the post-marital period. Some courts have concluded that the fact of their marriage serves as an excellent basis for implying a contract that the couple wished to use marital or community property rules to govern their property lives before marriage. See, e.g., Collins v. Wassell, 133 Hawai'i. In such a case, all the shared assets of the couple would be subject to equitable division if they were purchased with funds that would have been treated as marital or community property had they been married during their entire relationship. What will happen if a state applies such a rule to a different-sex married couple when they divorce, but declines to do so for a same-sex married couple? Can you think of other issues that will continue to surface?

CHAPTER 4

Addition to Note (3) at pp. 520-521:

The litigation mentioned in this note was dismissed. The plaintiffs don't clearly have any ownership interest in the dam. The town of Wyckoff has offered to co-sign a note to borrow money to repair the dam, but it is highly unlikely that enough residents of Allison Acres would agree to take on such a large financial obligation. Meanwhile fears that the dam was in serious danger of failing have been alleviated. The New Jersey Department of Environmental Protection, while noting that the facility needs repairs, has declared that it is not in danger of collapsing anytime soon. The Department, however, has left open the option of breaching the dam if the town and residents do not come up with a plan to maintain and repair it. As of this writing, nothing further has happened. *DEP Finds Wyckoff's Rambaut Lake Dam Stable* at www.northjersey.com/news/135948068_DEP_finds_Wyckoff_s_Rambaut_Lake_dam_stable.html?page=all (Visited June 20, 2013). Allison Acres still is in limbo. There is no immediate prospect of a solution to the problems created by the *Petersen* court decision rendered more than forty years ago.

Addition to Note (3) at pp. 553-557:

Shortly after the article excerpted in the text was published, Paula Franzese undertook an interesting project—surveying residents of common interest communities to discover their concerns and seek their proposals for change. The most prominent problems involved lack of transparency in governance and financial affairs, selective enforcement of rules, autocratic leadership styles and ineffective communication. Given these issues, the recommended solutions were not surprising—training programs for board members, ethics audits as well as financial ones, web-based information sharing, greater accessibility and use of non-board advisory committees formed from among the community's residents. Paula Franzese, *New Jersey Common Interest Communities: Predictors of Distress and an Agenda for Reform*, 63 RUTGERS L. REV. 941 (2011).

Addition to Note (3) at pp. 611-612:

Some additional light was shed on the continuing vitality of disparate impact theory in housing discrimination cases in 2015. In Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc., 576 U.S. ___, 135 S.Ct. 2507 (2015), the United States Supreme Court decided clearly that such cases could be brought under the federal Fair Housing Act. The dispute arrived at the Court in a fairly unusual setting. The Inclusive Housing Communities Project claimed that Texas authorities unlawfully enhanced segregated housing patterns by guiding subsidized housing projects into black communities rather than dispersing them more broadly. The trial court, using statistics about the location patterns for housing projects, concluded that a prima facie case of discrimination was demonstrated and placed the burden on the state to demonstrate that there were no less discriminatory alternatives to its location pattern. On appeal, the Fifth Circuit Court of Appeals agreed that disparate impact cases could be pursued under the Fair Housing Act, but remanded for further hearings on whether a prima facie case was proved by the plaintiff. Rather than accepting the remand, Texas filed a write of certiorari solely on the question of whether disparate impact cases could be pursued under the Fair Housing Act. When the case arrived at the Supreme Court, therefore, the issue

was solely related to the availability of disparate impact theory. The requirements for proving a prima facie case were not before the Court. Justice Kennedy, writing for a 5-4 majority, held that disparate impact theory was available under the Federal Housing Act. Whether a prima facie case like that proven in the *Huntington* case will suffice in the future is left for a future decision. In the Texas case, the trial court after remand declared that it would apply the disparate impact theory by requiring the plaintiff to "prove a facie case of discrimination by showing that a challenged practice causes a discriminatory effect. * * * If the plaintiff makes a prima facie case, the defendant must then prove 'that the challenged practice is necessary to acieve one or more substantial, legitimate, nondiscriminatory interests * * *.' If the defendant meets it burden, the plaintiff must then show that the defendant's interests 'could be served by another practice that has less discriminatory effect."[16]

Add New Notes (4)-(5) at p. 623:

(4) *Urban Inclusionary Zoning*. Inclusionary zoning practices are becoming standard practice in many American cities. In New York City, recent changes are significantly altering the ways apartment buildings are developed. As areas of the city are replanned and sometimes upzoned, requirements are imposed forcing developers to build up to 20% of the new units as below-market facilities in order to take full advantage of any increasing zoning densities.[17]

(5) *Another Huntington-Style Dispute?:* Garden City on Long Island has gone through a litigation saga very similar to Huntington. Though it has not dragged on nearly as long, the land slated for use for below market rate housing is no longer available. Lisa W. Foderaro, *Housing Bias Outlasts Ruling in a Long Island Village,* THE NEW YORK TIMES (April 23, 2016) http://www.nytimes.com/2016/04/24/nyregion/housing-bias-outlasts-ruling-in-a-long-island-village.html (Visited Aug. 8, 2016).

16. The Inclusive Communities Projet, Inc. v. The Texas Department of Housing and Community Affairs, 2015 WL 5916220 (N.D. Tex. 2015).

17. Editorial, *Mayor de Blasio's Plan for Affordable Housing*, THE NEW YORK TIMES (Aug. 11, 2015), http://www.nytimes.com/2015/08/11/opinion/mayor-de-blasios-plan-for-affordable-housing.html (Visited Aug. 8, 2016).

CHAPTER 5

Add a new Note Subpart (g) at the end of Note (1) at the bottom of p. 680:

(g) In March 2016 John Boggs filed a suit in a Kentucky federal district court against his neighbor William Merideth claiming that Merideth intentionally and unlawfully shot down Boggs' drone with a shotgun while Boggs was flying it with a remote control 200 feet above Merideth's land. Boggs argued that only the Federal Aviation Administration has the right to control use of airspace, and sought declaratory and monetary relief.[18]

After the controversy arose Merideth began selling T-shirts to help defray the costs of the litigation.

Add a new Note (5) at p. 711:

(5) *Income Disparities*: The issue of wide income disparities in the United States has become a widely discussed problem in recent years. According to a study commissioned by the Pew Research Center, the gaps between both lower-income and upper-income, and middle-income and upper-income families in 2013 was the largest in thirty years by a wide margin.[19] Does this report and many others with similar conclusions suggest a need to reevaluate the refusal to consider wealth as a basis for searching Equal Protection analysis?

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18. Complaint, John David Boggs v. William H. Merideth, Case No. 3:16-cv-6-DJH (Jan. 4, 2016), https://assets.documentcloud.org/documents/2674191/001-Complaint-for-Declaratory-Judgment-and.pdf (Visited Aug. 8, 2016). See also Nick Bilton, *When Your Neighbor's Drone Pays and Unwelcome Visit,* THE NEW YORK TIMES (Jan. 27, 2016), http://www.nytimes.com/2016/01/28/style/neighbors-drones-invade-privacy.html (Visited Aug. 8, 2016); Debra Cassens Weiss, *Does Property Owner Have the Right to Shoot Down Hobbyist's Hovering Drone?* ABA JOURNAL (Jan 14, 2016), http://www.abajournal.com/mobile/article/does_property_owner_have_the_right_to_shoot_down_hobbyists_hovering_drone/ (Visited Aug. 8, 2016). The image in the text may be found in this article.

19. Richard Fry & Rakesh Kochhar, *American's Wealth Gap Between Middle-Income and Upper-Income Familes is Widest on Record*, Pew Research Center (2014).

CHAPTER 6

Addition to Note [6] at pp. 828-831:

Literature on the limited impact of the implied warranty of habitability continues to appear. In the most recent addition, David A. Super took the position that limiting enforcement of the warranty only to cases where the tenant deliberately withholds rent rather than allowing its use when tenants lack the money to make their monthly payments renders it virtually useless in most urban settings. When combined with the lack of public investment in below-market rate housing, the weak regulatory structures enforcing housing codes, the lack of counsel for tenants in eviction cases and reliance on courts lacking resources to effectively enforce health and safety laws, there is little hope that standard judicial proceedings will have much of an impact on housing quality for the poor. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389 (2011).

In an older study, however, the lack of attorneys representing tenants appeared to account for a great deal of the low impact of the implied warranty. Widespread use of tenant counsel significantly increased the rate at which tenants showed up to content their evictions, improved the contours of settlement agreements, and dramatically reduced the number of trial results favoring landlords. Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment,* 35 LAW & SOC'Y REV. 419 (2001). The outcome of this study has been confirmed in New York City where over $46,000,000 has been added to the budget for attorneys in housing court. Evictions have declined dramatically and case results favoring tenants have risen.[20] The importance of lawyers also is emphasized by the widespread presence of illegal clauses in many written leases.[21]

20. Mireya Navarro, *Evictions Are Down by 18%; New York City Cites Increased Legal Services*, THE NEW YORK TIMES (Feb. 29, 2016). http://www.nytimes.com/2016/03/01/nyregion/evictions-are-down-by-18-new-york-city-cites-increased-legal-services.html (Visited Aug. 8, 2016).

21. See Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms,* 70 OHIO ST. L.J. 1127 (2009).

CHAPTER 7

Add a New Note (8) at p. 991:

(8). *Renewed Controversey Over Land Sale Contract Transactions*. During 2016 the New York Times ran a series of stories on the investments tactics of major firms relying on land sale contracts. The paper took the position that the transactions often were abusive and suggested that the Consumer Financial Protection Bureau should take steps to limit the use or impact of such deals.[22] Given cases like *Skendzel*, the most important change would be to bar the forfeitures of built up equity allowed in standard land sale contracts.

22. Matthew Goldstein and Alexandra Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers,* THE NEW YORK TIMES (Feb. 20, 2016), http://www.nytimes.com/2016/02/21/business/dealbook/market-for-fixer-uppers-traps-low-income-buyers.html (Visited Aug. 8, 2016); Alexandra Stevenson and Matthew Goldstein, *Wall Street Veterans Bet on Low-Income Home Buyers,* THE NEW YORK TIMES (April 17, 2016), http://www.nytimes.com/2016/04/18/business/dealbook/wall-street-veterans-bet-on-low-income-homebuyers.html (Visited Aug. 8, 2016); Matthew Goldstein & Alexandra Stevenson, *'Contract for Deed' Lending Gets Federal Scrutiny*, THE NEW YORK TIMES (May 10, 2016), http://www.nytimes.com/2016/05/11/business/dealbook/contract-for-deed-lending-gets-federal-scrutiny.html (Visited Aug. 8, 2016); Matthew Goldstein and Alexandra Stevenson, *New York Lenders Subpoenaed Over Seller-Financed Mortgage Alternatives,* THE NEW YORK TIMES (May 13, 2016), http://www.nytimes.com/2016/05/14/business/dealbook/new-york-lenders-subpoenaed-over-seller-financed-mortgage-alternatives.html (Visited Aug. 8, 2016); Alexandra Stevenson and Matthew Goldstein, *Law Center Calls Seller-Financed Home Sales 'Toxic Transactions',* THE NEW YORK TIMES (July 14, 2016), http://www.nytimes.com/2016/07/14/business/dealbook/law-center-calls-seller-financed-home-sales-toxic-transactions.html (Visited Aug. 8, 2016).

CHAPTER 9

Addition to Note [c] at pp. 1226-1227:

The centennial of Grand Central Terminal was celebrated in February, 2013. Video reports on the event were created by all the major TV networks, as well as many other organizations. Though I am not a big fan of Fox News, it did one of the better reports on the event. You can find it at: http://video.foxnews.com/v/2134690473001/grand-central-station-celebrates-100th-birthday/ (Visited Dec. 1, 2015). In observance of the centennial, The New York Times published a tribute to the facility with a superb picture of the terminal's central concourse. See Sam Roberts, *100 Years of Grandeur*, THE NEW YORK TIMES (January 20, 2013); http://www.nytimes.com/imagepages/2013/01/20/nyregion/20GRAND1.html (Visited June 20, 2013).

After the centennial celebrations, legal disputes emerged with renewed vigor. Major rezoning proposals for areas around Grand Central began to surface during the last years of Michael Bloomberg's term as mayor of New York City.[23] Though the overall plan was withdrawn and reconfigured with somewhat lower densities when Bill DeBlasio became mayor in 2014, an area near the terminal was rezoned as a separate proposal in early 2015. That plan was part of a deal that allowed construction of a massive, 1,500 foot tall building at 1 Vanderbilt Place on a site just to the west of Grand Central Station. Andrew Penson purchased the Grand Central air rights in 2006 hoping to recoup his investment by selling them to the owners of neighboring sites under the terms of the historic preservation provisions of city law. But when the 1 Vanderbilt proposal was approved, without the use of any of his air rights, Penson sued the city for $1.1 billion claiming that the upzoning of the area made his investment worthless and was therefore a taking. The case, filed in September, 2015, is pending.[24]

New Note (8) at p. 1236:

(8) *Expanding Use of Transferred Development Rights*: Use of transferred development rights has expanded for beyond the realm of historic preservation, especially in New York City. It now is used in a variety of programs designed to encourage certain forms of development. The programs are a central feature of recent projects in West Chelsea and Hudson Yards, areas now being transformed from old industrial areas to residential, arts and commercial zones. For a summary and evaluation of the recent developments see Vicki Been & John Infranca, *Transferable Development Rights Programs as "Post" Zoning,* 78 BROOKLYN L. REV. 435 (2013).

New Note (8) at the bottom of p. 1291:

(8) *Beach Access by the Public:* Controversy over access to the beaches in California continues to arise. Particularly in wealthy areas of the coastline, beachfront owners frequently take steps to prevent strangers from getting to the beach, even over public rights of way. In an effort to inform the public about the locations of public access points in the Malibu area, Jenny Price developed a smartphone app with maps, descriptions of privately installed signs that wrongfully tell citizens access is barred and full instructions on how to get to the beach from a variety of spots. Adam Nagourney, *An App Shows the Gaps in Malibu's Beachfront Wall*, THE

23. Charles V. Bagli, *Bloomberg Pushes a Plan to Let Midtown Soar,* THE NEW YORK TIMES A1 (Oct. 7, 2012).
24. Chalres v. Bagli, *Owner of Grand Central Sues Developer and City for $1.1 Billion Over Air Rights,* THE NEW YORK TIMES A22 (Sep. 29, 2015).

NEW YORK TIMES A14 (June 13, 2013). For a description of the IPhone version, go to https://itunes.apple.com/us/app/our-malibu-beaches/id565636167?mt=8 (Visited Dec. 1, 2015). The Los Angeles Urban Rangers also has published an online access guide, available at http://laurbanrangers.org/site/malibu (Visited Dec. 1, 2015). Here is part of that guide.

Addition to Note (1) at p. 1362:

Nollan and *Dolan* became the focus of another case before the Supreme Court in 2013—Koontz v. St. Johns River Water Management District, 568 U.S. ___, 133 S.Ct. 2586 (2013). The dispute was about Koontz' request for a permit to develop an area with wetlands that were protected by Florida law. The five judge majority, in an opinion written by Justice Alito, assumed that a demand for money to compensate for damage to wetlands was made and concluded, therefore, that *Nollan* and *Dolan* compelled an analysis of the nexus between the harm caused by the proposed development and the amount of money demanded. Since the state courts had declined to make that analysis the case was remanded for further consideration. The four dissenters, in an opinion by Justice Kagan, told the factual story very differently. They construed the record as displaying a tale where Koontz's permit could have been denied outright for violating Florida wetlands law, but rather than taking that step the local authorities suggested various ways the problems could have been resolved. When Koontz declined to agree to any ameliorative actions, Justice Kagan opined, the permit was denied. That story, she argued, simply didn't invoke a need to look at the *Nollan* line of cases. And even if a money demand was actually made, Justice Kagan argued that does not invoke *Nollan* either. Since such a demand would not itself be a taking except in the most unusual circumstances, the predicate of *Nollan*—that an action equal to a taking was demanded in exchange for a permit—didn't exist. She complained at some length that the willingness of the majority to invoke takings analysis in a case like this created a strong incentive for local authorities to simply decline to bargain or work out solutions in land use permit situations. In addition, she predicted, the Florida Supreme Court which previously had declined to apply *Nollan* would simply do so again because of the factual situation. In essence she concluded that the case itself was a peppercorn, but the language of the majority opinion was mischievous. On remand, the Florida courts found the monetary exaction to be a taking. St. Johns River Water Management District v. Koontz, 2014 WL 1703942 (District Ct. App. Fla., 5th District).

If you wish to read the Supreme Court opinions, they are reproduced below.

COY A. KOONTZ, JR. V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Supreme Court of the United States

568 U.S. ___, 133 S.Ct. 2586 (2013)

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

Paul J. Beard, II, Sacramento, CA, for Petitioner.

Paul R.Q. Wolfson, for Respondent.

Edwin S. Kneedler, for the United States as amicus curiae, by special leave of the Court, supporting the respondent.

Brian T. Hodges, Pacific Legal Foundation, Bellevue, WA, Michael D. Jones, Michael D.

Jones and Associates, P.A., Oviedo, FL, Paul J. Beard II, Counsel of Record, Pacific Legal Foundation, Sacramento, CA, Christopher V. Carlyle, The Carlyle Appellate Law Firm, The Villages, FL, for Petitioner.

William H. Congdon, Jr., Rachel D. Gray, St. Johns River Water Management District, Palatka, FL, Paul R.Q. Wolfson, Counsel of Record, Catherine M.A. Carroll, Steven P. Lehotsky, Albinas Prizgintas, Daniel Winik, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, for Respondent.

Justice ALITO delivered the opinion of the Court.

Our decisions in *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), provide important protection against the misuse of the power of land-use regulation. In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use. In this case, the St. Johns River Water Management District (District) believes that it circumvented *Nollan* and *Dolan* because of the way in which it structured its handling of a permit application submitted by Coy Koontz, Sr., whose estate is represented in this Court by Coy Koontz, Jr. The District did not approve his application on the condition that he surrender an interest in his land. Instead, the District, after suggesting that he could obtain approval by signing over such an interest, denied his application because he refused to yield. The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and *Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.

I

A

In 1972, petitioner purchased an undeveloped 14.9-acre tract of land on the south side of Florida State Road 50, a divided four-lane highway east of Orlando. The property is located less than 1,000 feet from that road's intersection with Florida State Road 408, a tolled expressway that is one of Orlando's major thoroughfares.

A drainage ditch runs along the property's western edge, and high-voltage power lines bisect it into northern and southern sections. The combined effect of the ditch, a 100-foot wide area kept clear for the power lines, the highways, and other construction on nearby parcels is to isolate the northern section of petitioner's property from any other undeveloped land. Although largely classified as wetlands by the State, the northern section drains well; the most significant standing water forms in ruts in an unpaved road used to access the power lines. The natural topography of the property's southern section is somewhat more diverse, with a small creek, forested uplands, and wetlands that sometimes have water as much as a foot deep. A wildlife survey found evidence of animals that often frequent developed areas: raccoons, rabbits, several species of bird, and a turtle. The record also indicates that the land may be a suitable habitat for opossums.

The same year that petitioner purchased his property, Florida enacted the Water Resources Act, which divided the State into five water management districts and authorized each district to regulate "construction that connects to, draws water from, drains water into, or is placed in or

across the waters in the state." 1972 Fla. Laws ch. 72-299, pt. IV, § 1(5), pp. 1115, 1116 (codified as amended at Fla. Stat. § 373.403(5) (2010)). Under the Act, a landowner wishing to undertake such construction must obtain from the relevant district a Management and Storage of Surface Water (MSSW) permit, which may impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district." 1972 Fla. Laws § 4(1), at 1118 (codified as amended at Fla. Stat. § 373.413(1)).

In 1984, in an effort to protect the State's rapidly diminishing wetlands, the Florida Legislature passed the Warren S. Henderson Wetlands Protection Act, which made it illegal for anyone to "dredge or fill in, on, or over surface waters" without a Wetlands Resource Management (WRM) permit. 1984 Fla. Laws ch. 84-79, pt. VIII, § 403.905(1), pp. 204-205. Under the Henderson Act, permit applicants are required to provide "reasonable assurance" that proposed construction on wetlands is "not contrary to the public interest," as defined by an enumerated list of criteria. See Fla. Stat. § 373.414(1). Consistent with the Henderson Act, the St. Johns River Water Management District, the district with jurisdiction over petitioner's land, requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.

Petitioner decided to develop the 3.7-acre northern section of his property, and in 1994 he applied to the District for MSSW and WRM permits. Under his proposal, petitioner would have raised the elevation of the northernmost section of his land to make it suitable for a building, graded the land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and installed a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot. To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property.

The District considered the 11-acre conservation easement to be inadequate, and it informed petitioner that it would approve construction only if he agreed to one of two concessions. First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent." App. 75.

Believing the District's demands for mitigation to be excessive in light of the environmental

effects that his building proposal would have caused, petitioner filed suit in state court. Among other claims, he argued that he was entitled to relief under Fla. Stat. § 373.617(2), which allows owners to recover "monetary damages" if a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation."

B

The Florida Circuit Court granted the District's motion to dismiss on the ground that petitioner had not adequately exhausted his state-administrative remedies, but the Florida District Court of Appeal for the Fifth Circuit reversed. On remand, the State Circuit Court held a 2-day bench trial. After considering testimony from several experts who examined petitioner's property, the trial court found that the property's northern section had already been "seriously degraded" by extensive construction on the surrounding parcels. App. to Pet. for Cert. D-3. In light of this finding and petitioner's offer to dedicate nearly three-quarters of his land to the District, the trial court concluded that any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction. It accordingly held the District's actions unlawful under our decisions in *Nollan* and *Dolan*.

The Florida * * * Supreme Court reversed, 77 So.3d 1220 (2011). A majority of that court distinguished *Nollan* and *Dolan* on two grounds. First, the majority thought it significant that in this case, unlike *Nollan* or *Dolan,* the District did not approve petitioner's application on the condition that he accede to the District's demands; instead, the District denied his application because he refused to make concessions. Second, the majority drew a distinction between a demand for an interest in real property (what happened in *Nollan* and *Dolan*) and a demand for money. The majority acknowledged a division of authority over whether a demand for money can give rise to a claim under *Nollan* and *Dolan,* and sided with those courts that have said it cannot. Two justices concurred in the result, arguing that petitioner had failed to exhaust his administrative remedies as required by state law before bringing an inverse condemnation suit that challenges the propriety of an agency action.

* * *[W]e granted the petition for a writ of certiorari and now reverse.

II

A

We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Wash.,* 461 U.S. 540 (1983). * * * In *Perry v. Sindermann,* 408 U.S. 593 (1972), for example, we held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration. * * * Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.

Nollan and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528 (2005) * * *. Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions

doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: petitioner's proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack. See *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

Nollan and *Dolan* accommodate both realities by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a "nexus" and "rough proportionality" between the property that the government demands and the social costs of the applicant's proposal. Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in "out-and-out . . . extortion" that would thwart the Fifth Amendment right to just compensation. Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

B

The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. * * * In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.

A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court's approach, a government order stating that a permit is "approved if" the owner turns over property would be subject to *Nollan* and *Dolan,* but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the

distinction between conditions precedent and conditions subsequent. * * * To do so here would effectively render *Nollan* and *Dolan* a dead letter.

The Florida Supreme Court puzzled over how the government's demand for property can violate the Takings Clause even though "no property of any kind was ever taken," but the unconstitutional conditions doctrine provides a ready answer. Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Nor does it make a difference, as respondent suggests, that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands. See *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978). Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind. Yet we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights. * * *

That is not to say, however, that there is *no* relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan*/*Dolan* unconstitutional conditions violation either here or in other cases.

C

At oral argument, respondent conceded that the denial of a permit could give rise to a valid claim under *Nollan* and *Dolan,* but it urged that we should not review the particular denial at issue here because petitioner sued in the wrong court, for the wrong remedy, and at the wrong time. Most of respondent's objections to the posture of this case raise questions of Florida procedure that are not ours to decide. But to the extent that respondent suggests that the posture of this case creates some federal obstacle to adjudicating petitioner's unconstitutional conditions claim, we remand for the Florida courts to consider that argument in the first instance.

Respondent argues that we should affirm because, rather than suing for damages in the Florida trial court as authorized by Fla. Stat. § 373.617, petitioner should have first sought judicial review of the denial of his permit in the Florida appellate court under the State's Administrative Procedure Act, see §§ 120.68(1), (2) (2010). The Florida Supreme Court has said that the appellate court is the "proper forum to resolve" a "claim that an agency has *applied* a . . . statute or rule in such a way that the aggrieved party's constitutional rights have been violated," and respondent has argued throughout this litigation that petitioner brought his unconstitutional conditions claim in the wrong forum. Two members of the Florida Supreme Court credited respondent's argument, but four others refused to address it. We decline respondent's invitation to

second-guess a State Supreme Court's treatment of its own procedural law.

Respondent also contends that we should affirm because petitioner sued for damages but is at most entitled to an injunction ordering that his permit issue without any conditions. But we need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state* law. Florida law allows property owners to sue for "damages" whenever a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla. Stat. Ann. § 373.617. Whether that provision covers an unconstitutional conditions claim like the one at issue here is a question of state law that the Florida Supreme Court did not address and on which we will not opine.

For similar reasons, we decline to reach respondent's argument that its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan.* The Florida Supreme Court did not reach the question whether respondent issued a demand of sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*. It relied instead on the Florida District Court of Appeals' characterization of respondent's behavior as a demand for *Nollan*/*Dolan* purposes. Whether that characterization is correct is beyond the scope of the questions the Court agreed to take up for review. If preserved, the issue remains open on remand for the Florida Supreme Court to address. This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*.

Finally, respondent argues that we need not decide whether its demand for offsite improvements satisfied *Nollan* and *Dolan* because it gave petitioner another avenue for obtaining permit approval. Specifically, respondent said that it would have approved a revised permit application that reduced the footprint of petitioner's proposed construction site from 3.7 acres to 1 acre and placed a conservation easement on the remaining 13.9 acres of petitioner's land. Respondent argues that regardless of whether its demands for offsite mitigation satisfied *Nollan* and *Dolan,* we must separately consider each of petitioner's options, one of which did not require any of the offsite work the trial court found objectionable.

Respondent's argument is flawed because the option to which it points—developing only 1 acre of the site and granting a conservation easement on the rest—involves the same issue as the option to build on 3.7 acres and perform offsite mitigation. We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan,* the landowner has not been subjected to an unconstitutional condition. But respondent's suggestion that we should treat its offer to let petitioner build on 1 acre as an alternative to offsite mitigation misapprehends the governmental benefit that petitioner was denied. Petitioner sought to develop 3.7 acres, but respondent in effect told petitioner that it would not allow him to build on 2.7 of those acres unless he agreed to spend money improving public lands. Petitioner claims that he was wrongfully denied a permit to build on those 2.7 acres. For that reason, respondent's offer to approve a less ambitious building project does not obviate the need to determine whether the demand for offsite mitigation satisfied *Nollan* and *Dolan*.

III

We turn to the Florida Supreme Court's alternative holding that petitioner's claim fails because respondent asked him to spend money rather than give up an easement on his land. A predicate for any unconstitutional conditions claim is that the government could not have

constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. For that reason, we began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking. The Florida Supreme Court held that petitioner's claim fails at this first step because the subject of the exaction at issue here was money rather than a more tangible interest in real property. Respondent and the dissent take the same position * * *.

We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace, Rosenberg, The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees, 59 S.M.U. L.Rev. 177, 202-203 (2006), and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

* * * *

The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. [FN2] Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan* : the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

In this case, moreover, petitioner does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central* 's "essentially ad hoc, factual inquir[y]," at all, much less extend that "already difficult and uncertain rule" to the "vast category of cases" in which someone believes that a regulation is too costly. Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "*per se* [takings] approach" is the proper mode of analysis under the Court's precedent.

* * * *

* * * *

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

The dissent criticizes the notion that the Federal Constitution places any meaningful limits on

"whether one town is overcharging for sewage, or another is setting the price to sell liquor too high." But only two pages later, it identifies three constraints on land use permitting fees that it says the Federal Constitution imposes and suggests that the additional protections of *Nollan* and *Dolan* are not needed. In any event, the dissent's argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*. After all, the Due Process Clause protected the Nollans from an unfair allocation of public burdens, and they too could have argued that the government's demand for property amounted to a taking under the *Penn Central* framework. We have repeatedly rejected the dissent's contention that other constitutional doctrines leave no room for the nexus and rough proportionality requirements of *Nollan* and *Dolan*. Mindful of the special vulnerability of land use permit applicants to extortionate demands for money, we do so again today.

We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money. The Court expresses no view on the merits of petitioner's claim that respondent's actions here failed to comply with the principles set forth in this opinion and those two cases. The Florida Supreme Court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

In the paradigmatic case triggering review under *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the government approves a building permit on the condition that the landowner relinquish an interest in real property, like an easement. The significant legal questions that the Court resolves today are whether *Nollan* and *Dolan* also apply when that case is varied in two ways. First, what if the government does not approve the permit, but instead demands that the condition be fulfilled before it will do so? Second, what if the condition entails not transferring real property, but simply paying money? This case also raises other, more fact-specific issues I will address: whether the government here imposed any condition at all, and whether petitioner Coy Koontz suffered any compensable injury.

I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (*i.e.,* imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.,* imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require. Still, the condition-subsequent and condition-precedent situations differ in an important way. When the government grants a permit subject to the relinquishment of real property, and that condition does not satisfy *Nollan* and *Dolan,* then the government has taken the property and must pay just compensation under the Fifth Amendment. But when the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking

of property. So far, we all agree.

Our core disagreement concerns the second question the Court addresses. The majority extends *Nollan* and *Dolan* to cases in which the government conditions a permit not on the transfer of real property, but instead on the payment or expenditure of money. That runs roughshod over * * * [the notion] that the government may impose ordinary financial obligations without triggering the Takings Clause's protections. The boundaries of the majority's new rule are uncertain. But it threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny. I would not embark on so unwise an adventure, and would affirm the Florida Supreme Court's decision.

I also would affirm for two independent reasons establishing that Koontz cannot get the money damages he seeks. First, respondent St. Johns River Water Management District (District) never demanded *anything* (including money) in exchange for a permit; the *Nollan-Dolan* standard therefore does not come into play (even assuming that test applies to demands for money). Second, no taking occurred in this case because Koontz never acceded to a demand (even had there been one), and so no property changed hands; as just noted, Koontz therefore cannot claim just compensation under the Fifth Amendment. The majority does not take issue with my first conclusion, and affirmatively agrees with my second. But the majority thinks Koontz might still be entitled to money damages, and remands to the Florida Supreme Court on that question. I do not see how, and expect that court will so rule.

I

Claims that government regulations violate the Takings Clause by unduly restricting the use of property are generally "governed by the standards set forth in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978)." *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528 (2005). Under *Penn Central,* courts examine a regulation's "character" and "economic impact," asking whether the action goes beyond "adjusting the benefits and burdens of economic life to promote the common good" and whether it "interfere[s] with distinct investment-backed expectations." That multi-factor test balances the government's manifest need to pass laws and regulations "adversely affect[ing] . . . economic values," with our longstanding recognition that some regulation "goes too far," *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

Our decisions in *Nollan* and *Dolan* are different: They provide an independent layer of protection in "the special context of land-use exactions." *Lingle,* 544 U.S., at 538. In that situation, the "government demands that a landowner dedicate an easement" or surrender a piece of real property "as a condition of obtaining a development permit." If the government appropriated such a property interest outside the permitting process, its action would constitute a taking, necessitating just compensation. *Nollan* and *Dolan* prevent the government from exploiting the landowner's permit application to evade the constitutional obligation to pay for the property. They do so, as the majority explains, by subjecting the government's demand to heightened scrutiny: The government may condition a land-use permit on the relinquishment of real property only if it shows a "nexus" and "rough proportionality" between the demand made and "the impact of the proposed development." *Nollan* and *Dolan* thus serve not to address excessive regulatory burdens on land use (the function of *Penn Central*), but instead to stop the government from imposing an "unconstitutional condition"—a requirement that a person give up his constitutional right to receive just compensation "in exchange for a discretionary benefit" having "little or no relationship" to the property taken.

Accordingly, the *Nollan-Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for—or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking. That is why *Nollan* began by stating that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public . . ., rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking" requiring just compensation. And it is why *Dolan* started by maintaining that "had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to [d]evelop her property on such a dedication, a taking would have occurred." Even the majority acknowledges this basic point about *Nollan* and *Dolan*: It too notes that those cases rest on the premise that "if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." Only if that is true could the government's demand for the property force a landowner to relinquish his constitutional right to just compensation.

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

But we have already answered that question no. *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998). * * *

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

* * * *

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

The majority thus falls back on the sole way the District's alleged demand related to a

property interest: The demand arose out of the permitting process for Koontz's land. But under the analytic framework that *Nollan* and *Dolan* established, that connection alone is insufficient to trigger heightened scrutiny. As I have described, the heightened standard of *Nollan* and *Dolan* is not a freestanding protection for land-use permit applicants; rather, it is "a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken"—in exchange for a land-use permit. As such, *Nollan* and *Dolan* apply only if the demand at issue would have violated the Constitution independent of that proposed exchange. Or put otherwise, those cases apply only if the demand would have constituted a taking when executed *outside* the permitting process. And here * * * it would not.

The majority's approach, on top of its analytic flaws, threatens significant practical harm. By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.

That problem becomes still worse * * *. How to separate orders to pay money from . . . well, orders to pay money, so that a locality knows what it can (and cannot) do. State courts sometimes must confront the same question, as they enforce restrictions on localities' taxing power. * * * Because "[t]here is no set rule" by which to determine "in which category a particular" action belongs, courts often reach opposite conclusions about classifying nearly identical fees. * * * Nor does the majority's opinion provide any help with that issue: Perhaps its most striking feature is its refusal to say even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny.

Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish; the Court claims, after all, that its opinion is intended to have only limited impact on localities' land-use authority. The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. *Dolan* itself suggested that limitation by underscoring that there "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination[ ] classifying entire areas of the city." Maybe today's majority accepts that distinction; or then again, maybe not. At the least, the majority's refusal "to say more" about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.

At bottom, the majority's analysis seems to grow out of a yen for a prophylactic rule: Unless *Nollan* and *Dolan* apply to monetary demands, the majority worries, "land-use permitting officials" could easily "evade the limitations" on exaction of real property interests that those

decisions impose. But that is a prophylaxis in search of a problem. No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs. And if officials were to impose a fee as a contrivance to take an easement (or other real property right), then a court could indeed apply *Nollan* and *Dolan*. * * * That situation does not call for a rule extending, as the majority's does, to *all* monetary exactions. Finally, a court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan,* that simply "go[ ] too far."

In sum, *Nollan* and *Dolan* restrain governments from using the permitting process to do what the Takings Clause would otherwise prevent—*i.e.,* take a specific property interest without just compensation. Those cases have no application when governments impose a general financial obligation as part of the permitting process * * *. By extending *Nollan* and *Dolan* 's heightened scrutiny to a simple payment demand, the majority threatens the heartland of local land-use regulation and service delivery, at a bare minimum depriving state and local governments of "necessary predictability." That decision is unwarranted—and deeply unwise. I would keep *Nollan* and *Dolan* in their intended sphere and affirm the Florida Supreme Court.

II

I also would affirm the judgment below for two independent reasons, even assuming that a demand for money can trigger *Nollan* and *Dolan*. First, the District never demanded that Koontz give up anything (including money) as a condition for granting him a permit. And second, because (as everyone agrees) no actual taking occurred, Koontz cannot claim just compensation even had the District made a demand. The majority nonetheless remands this case on the theory that Koontz might still be entitled to money damages. I cannot see how, and so would spare the Florida courts.

A

Nollan and *Dolan* apply only when the government makes a "demand[ ]" that a landowner turn over property in exchange for a permit. I understand the majority to agree with that proposition: After all, the entire unconstitutional conditions doctrine, as the majority notes, rests on the fear that the government may use its control over benefits (like permits) to "coerc[e]" a person into giving up a constitutional right. A *Nollan-Dolan* claim therefore depends on a showing of government coercion, not relevant in an ordinary challenge to a permit denial. * * * Before applying *Nollan* and *Dolan,* a court must find that the permit denial occurred because the government made a demand of the landowner, which he rebuffed.

And unless *Nollan* and *Dolan* are to wreck land-use permitting throughout the country—to the detriment of both communities and property owners—that demand must be unequivocal. If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants. That hazard is to some extent baked into *Nollan* and *Dolan*; observers have wondered whether those decisions have inclined some local governments to deny permit applications outright, rather than negotiate agreements that could work to both sides' advantage. See W. Fischel, Regulatory Takings 346 (1995). But that danger would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan-Dolan* scrutiny. At that point,

no local government official with a decent lawyer would have a conversation with a developer. Hence the need to reserve *Nollan* and *Dolan,* as we always have, for reviewing only what an official demands, not all he says in negotiations.

With that as backdrop, consider how this case arose. To arrest the loss of the State's rapidly diminishing wetlands, Florida law prevents landowners from filling or draining any such property without two permits. Koontz's property qualifies as a wetland, and he therefore needed the permits to embark on development. His applications, however, failed the District's preliminary review: The District found that they did not preserve wetlands or protect fish and wildlife to the extent Florida law required. At that point, the District could simply have denied the applications; had it done so, the *Penn Central* test—not *Nollan* and *Dolan*—would have governed any takings claim Koontz might have brought.

Rather than reject the applications, however, the District suggested to Koontz ways he could modify them to meet legal requirements. The District proposed reducing the development's size or modifying its design to lessen the impact on wetlands. Alternatively, the District raised several options for "off-site mitigation" that Koontz could undertake in a nearby nature preserve, thus compensating for the loss of wetlands his project would cause. The District never made any particular demand respecting an off-site project (or anything else); as Koontz testified at trial, that possibility was presented only in broad strokes, "[n]ot in any great detail." And the District made clear that it welcomed additional proposals from Koontz to mitigate his project's damage to wetlands. Even at the final hearing on his applications, the District asked Koontz if he would "be willing to go back with the staff over the next month and renegotiate this thing and try to come up with" a solution. But Koontz refused, saying (through his lawyer) that the proposal he submitted was "as good as it can get." The District therefore denied the applications, consistent with its original view that they failed to satisfy Florida law.

In short, the District never made a demand or set a condition—not to cede an identifiable property interest, not to undertake a particular mitigation project, not even to write a check to the government. Instead, the District suggested to Koontz several non-exclusive ways to make his applications conform to state law. The District's only hard-and-fast requirement was that Koontz do something—anything—to satisfy the relevant permitting criteria. Koontz's failure to obtain the permits therefore did not result from his refusal to accede to an allegedly extortionate demand or condition; rather, it arose from the legal deficiencies of his applications, combined with his unwillingness to correct them *by any means. Nollan* and *Dolan* were never meant to address such a run-of-the-mill denial of a land-use permit. As applications of the unconstitutional conditions doctrine, those decisions require a condition; and here, there was none.

Indeed, this case well illustrates the danger of extending *Nollan* and *Dolan* beyond their proper compass. Consider the matter from the standpoint of the District's lawyer. The District, she learns, has found that Koontz's permit applications do not satisfy legal requirements. It can deny the permits on that basis; or it can suggest ways for Koontz to bring his applications into compliance. If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan,* the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice—even if he asks for guidance. As the Florida Supreme Court observed of this case: Were *Nollan* and *Dolan* to apply, the District would "opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation"; and property owners like Koontz then would "have no opportunity to amend their applications or discuss mitigation options." Nothing in the Takings Clause requires that folly. I would therefore hold that the

District did not impose an unconstitutional condition—because it did not impose a condition at all.

B

And finally, a third difficulty: Even if (1) money counted as "specific and identified propert[y]" * * * (though it doesn't), and (2) the District made a demand for it (though it didn't), (3) Koontz never paid a cent, so the District took nothing from him. As I have explained, that third point does not prevent Koontz from suing to invalidate the purported demand as an unconstitutional condition. But it does mean, as the majority agrees, that Koontz is not entitled to just compensation under the Takings Clause. He may obtain monetary relief under the Florida statute he invoked only if it authorizes damages *beyond* just compensation for a taking.

The majority remands that question to the Florida Supreme Court, and given how it disposes of the other issues here, I can understand why. As the majority indicates, a State could decide to create a damages remedy not only for a taking, but also for an unconstitutional conditions claim predicated on the Takings Clause. And that question is one of state law, which we usually do well to leave to state courts.

But as I look to the Florida statute here, I cannot help but see yet another reason why the Florida Supreme Court got this case right. That statute authorizes damages only for "an unreasonable exercise of the state's police power constituting a taking without just compensation." In what legal universe could a law authorizing damages only for a "taking" also provide damages when (as all agree) no taking has occurred? I doubt that inside-out, upside-down universe is the State of Florida. Certainly, none of the Florida courts in this case suggested that the majority's hypothesized remedy actually exists; rather, the trial and appellate courts imposed a damages remedy on the mistaken theory that there *had* been a taking (although of exactly what neither was clear). So I would, once more, affirm the Florida Supreme Court, not make it say again what it has already said—that Koontz is not entitled to money damages.

III

Nollan and *Dolan* are important decisions, designed to curb governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for. But for no fewer than three independent reasons, this case does not present that problem. First and foremost, the government commits a taking only when it appropriates a specific property interest, not when it requires a person to pay or spend money. Here, the District never took or threatened such an interest; it tried to extract from Koontz solely a commitment to spend money to repair public wetlands. Second, *Nollan* and *Dolan* can operate only when the government makes a demand of the permit applicant; the decisions' prerequisite, in other words, is a condition. Here, the District never made such a demand: It informed Koontz that his applications did not meet legal requirements; it offered suggestions for bringing those applications into compliance; and it solicited further proposals from Koontz to achieve the same end. That is not the stuff of which an unconstitutional condition is made. And third, the Florida statute at issue here does not, in any event, offer a damages remedy for imposing such a condition. It provides relief only for a consummated taking, which did not occur here.

The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and

economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision. I respectfully dissent.

Addition to Note (4) at p. 1363:

Stop the Beach Restoration turned out to be interesting for reasons other than those mentioned in the text of Note (4). Rather than investigating the grey area between exactions and regulation, the Justices debated at some length the importance of judicial changes in preexisting common law norms. Only eight Justices sat on the case; Justice Stevens recused himself. Justice Scalia, with Justices Roberts, Thomas and Alito concurring, concluded that judicial actions altering common law property norms could serve as a basis for Takings claims. When reviewing the particular claims at issue in the case, however, he found that the decision of the Florida Supreme Court did not contravene any preexisting common law rule and that, therefore, no Taking occurred. The other participating Justices—Kennedy, Ginsburg, Breyer and Sotomayor—agreed that there was no Taking but refused to concur with Scalia's conclusion that judicial decisions can give rise to Takings claims, either because the issue was not ripe for decision or because the appropriate tool was provided by Substantive Due Process analysis. The difference is important. Damages—Just Compensation in Takings cases—would not be appropriate in Due Process cases. Injunctions are simple reversals of lower court results that suffice according to the more liberal wing of the Court.

It is not at all clear why Justice Scalia tried to grapple with "common law" Takings in this case. The dispute was generated, not by the courts, but by the decision of the State of Florida to replenish some beaches damaged by hurricanes located near the western end of the state's panhandle. People owning property just north of the project area sued claiming that certain property rights of beach front owners would be lost if the project was completed. The Court described the legal situation like this:

> Littoral owners [those holding land up to the high tide line] have, in addition to the rights of the public [in the wet sand area], certain "special rights" with regard to the water and the foreshore, rights which Florida considers to be property, generally akin to easements. These include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property. This is generally in accord with well-established common law, although the precise property rights vary among jurisdictions.
>
> At the center of this case is the right to accretions and relictions. Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes. (For simplicity's sake, we shall refer to accretions and relictions collectively as accretions, and the process whereby they occur as accretion.) In order for an addition to dry land to qualify as an accretion, it must have occurred gradually and imperceptibly—that is, so slowly that one could not see the change occurring, though over time the difference became apparent. When, on the other hand, there is a "sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream," the change is called an avulsion.
>
> In Florida, as at common law, the littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry

> land by avulsion continues to belong to the owner of the seabed (usually the State). Thus, regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change; it remains (ordinarily) what was the mean high-water line before the event. It follows from this that, when a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions. Those accretions no longer add to *his* property, since the property abutting the water belongs not to him but to the State.

Over the years, Florida law treated actions of the state that altered beaches as instances of avulsion, not accretion. At some level that makes sense. Though such actions do not operate as quickly as hurricanes, they occur much more rapidly than the gradual erosion of or addition to beaches occurring as a result of normal tidal actions. As a result, when the replenishment project was complete, the land added to the beach would be owned by the State of Florida, not the littoral owners. That led the littoral owners to claim that two of their rights—the right to receive accretions and the right to have their land maintain contact with the water—were taken by the replenishment project.

Justice Scalia structured his analysis around the question of whether these impacts on the littoral owners resulted from changes in common law rules. In some ways that question is reminiscent of his approach in *Lucas* where he limited regulatory actions to those that did not disturb preexisting property norms arising from nuisance law. But given the conclusion that the Florida courts made no changes in pre-existing rules and the regulatory activity involved in replenishing the beaches was therefore well within the authority of the state, such an inquiry seems pointless. He must have had another agenda—perhaps trying to narrow the ability of state courts to alter property rules to reflect shifts in social and economic currents. If that was his goal, it would explain why the more liberal Justices on the Court were unwilling to sign on to his opinion. For Justices Kennedy, Ginsburg, Breyer and Sotomayor, therefore, the case was fairly simple. There simply was no reason under any prior precedent to restrain the actions of the State of Florida.

CHAPTER 10

Addition to Note (4) at pp. 1416-1417:

One of the major concerns about deploying the label "property" on a living human body is that it is hard for us to envision its transfer and sale. This is so despite our willingness to countenance sales of some aspects of our physical selves—reproductive cells, blood, surrogacy (at least in most states) or the placement of tattoo ads on the skin. And it also is so despite the fact that other attributes of life are thought of as property or property-like even though they generally cannot be sold. Think of trade secrets, the inability to destroy the façade of a house in an historic district, the contents of a trust held for charitable purposes or the land in Yellowstone National Park. So why not deploy the label property with appropriate limitations on its use? At least one recent author thinks that would a splendid way to think about the issues. See Meredith Render, *The Law of the Body*, 62 EMORY L. J. 549 (2013).

New Note (6) at p. 1524 and Renumber Existing Note (6) as Note 7:

(6) *Second Life Litigation*: Litigation over rights within the Second Life virtual world continue to arise. In Amaretto Ranch Breedables v. Ozimals Inc., 907 F.Supp. 2d 1080 (N.D. Ca. 2012), a dispute arose between two software companies that created breedable animals for purchase by those using Second Life. Ozimals developed a virtual bunny; Amaretto a virtual horse. The bunny was deployed first. When Amaretto's horse went virtual, Ozimal claimed Amaretto violated the copyright in the software used to operate the bunny. While the case was dismissed for somewhat technical reasons, it is another of a growing number of disputes over virtual property. See, e.g., Evans v. Linden Research, 2014 WL 1724891 (N.D. Ca.)—a class action filed in 2012 in which the plaintiffs claimed Linden promised "ownership" of land and other virtual assets in Second Life and wrongly took them without appropriate warnings or compensation. The unreported opinion approved a settlement for 284 claimants calling for payments of significant amounts of money to class members. See also Thai Phi Le, *Virtual Reality Meets Real-Life*, 27 WASHINGTON LAWYER 28 (2013); Hannah Yee Fen Lim, *Virtual World, Virtual Land But Real Property*, 2010 SINGAPORE J. LEG. STUDIES 304.