William & Mary Law Review

Volume 61 | Issue 1 Article 4

10-2019

The State of Exactions

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THE STATE OF EXACTIONS

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ABSTRACT

In Koontz v. St. Johns River Water Management District*, the Supreme Court slightly expanded the range of land use permitting situations in which heightened judicial scrutiny is appropriate in a constitutional "exaction" takings case. In crafting a vision of regulators as strategic extortionists of private property interests, though,* Koontz *prompted many takings observers to predict that the case would provide momentum for a more significant expansion of such scrutiny in takings cases involving land use permit conditions moving forward, and perhaps even an extension into other regulatory contexts, as well.*

Five years on, this Article evaluates the extent to which those predictions have come to pass via a review of the approximately 130 lower court cases to have cited Koontz *to date. Based on this review, the Article offers two claims. First, on doctrinal grounds, it contends that* Koontz*'s footprint thus far is rather light, in the sense that the decision has not prompted lower courts to extend the application of heightened scrutiny to a broad class of regulatory measures and, in those select instances where such scrutiny does apply, has not led lower courts to craft a far-reaching array of remedies. Second, on normative grounds, it asserts that the restraint evident in the lower court opinions that have wrestled with* Koontz *is appealing in the sense that this course acknowledges that property necessarily*

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involves context-driven allocative choices by the state, and focuses—as best these courts can, given the constraints explicit in prior doctrine—on whether those allocative choices are fair and just absent compensation.

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INTRODUCTION

In the conveniently rhyming cases of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* more than two decades ago, the Supreme Court declared that in order to avoid having to pay takings compensation, the state, as the defendant, shoulders the burden of proving that certain conditions, or "exactions," attached to land use permits are qualitatively and quantitatively commensurate with the proposed development's impacts.[1] In its 2013 decision in *Koontz v. St. Johns River Water Management District*, the Court slightly expanded the range of circumstances to which this demanding standard applies.[2] Of potentially far more significance than this minor, affirmative doctrinal step, though, was the rhetoric on the state's role in allocating property interests that accompanied it.

In crafting a vision of regulators as strategic extortionists of private property interests, *Koontz* prompted many takings observers to predict that the case would provide momentum for a more significant expansion of such scrutiny in takings cases involving land use permit conditions moving forward, and perhaps even an extension into other regulatory contexts, as well. Some observers exalted at this possibility on the view that it would reflect long overdue protection of individuals' freedom to use their land without fear of the state extracting concessions or changing the rules mid-game.[3] Others, though, expressed deep concern that *Koontz* would set off a chain reaction of takings cases that routinely put a stringent burden on the state to defend adjustments to existing property allocations,

1. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) ("rough proportionality"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) ("essential nexus").

2. 570 U.S. 595, 599 (2013).

3. *See, e.g.*, Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulation*, 20 GEO. MASON L. REV. 725, 767 (2013); Steven J. Eagle, Koontz *in the Mansion and the Gatehouse*, 46 URB. LAW. 1, 30-31 (2014) [hereinafter Eagle, Koontz *in the Mansion*]; Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law:* Koontz*,* Arkansas Game & Fish*, and the Future of the Takings Clause*, 2012-2013 CATO SUP. CT. REV. 215, 216; Sophia M. Stadnyk, *A Fistful of Dollars—Exactions and Extortion*, 65 PLAN. & ENVTL. L. 4, 5 (2013); Luke A. Wake & Jarod M. Bona, *Legislative Exactions After* Koontz v. St. Johns River Management District, 27 GEO. INT'L ENVTL. L. REV. 539, 581-83 (2015).

even as social, economic, and moral perspectives on the values that property serves evolve over time.[4]

To get a status-check on these prospects five years on, this Article reflects the author's review of each of the nearly 130 cases to have cited *Koontz* through July of 2018. In the course thereof, the Article offers two contentions. First, on doctrinal grounds, it contends that *Koontz*'s footprint is thus far rather light.[5] The decision has not prompted lower courts to extend the heightened scrutiny of *Nollan* and *Dolan* to a broad class of regulatory measures and, in those select instances where such scrutiny does apply, the lower courts have not crafted expansive remedies.[6] Second, on normative grounds, this Article asserts that the restraint evident in the lower court opinions that have wrestled with *Koontz* thus far is appealing in the sense that it acknowledges that property necessarily involves context-driven allocative choices by the state, and focuses—as best these courts can, given the constraints explicit in *Nollan* and *Dolan*—on whether those allocative choices are fair and just absent compensation.[7]

Part I outlines the problematic foundations of exaction takings law in an effort to delineate the confines within which the lower courts must operate in interpreting *Koontz*'s bearing on a number

4. *See, e.g.*, John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 49-50 (2014) (suggesting that the *Koontz* majority may believe that its holding "will logically fit" within a more stringent version of takings doctrine that has "yet to be developed"); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 288 ("[T]he Court has left the domain of ... heightened scrutiny wholly undefined. Indeed, the *Koontz* majority eschewed any boundary principle that would hive off its exactions jurisprudence from its land use jurisprudence more generally.... [T]he Court has left land use regulation vulnerable to the creeping expansion of heightened scrutiny under the auspices of its exactions jurisprudence."); Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools "Takings-Proof,"* 28 J. LAND USE & ENVTL. L. 157, 186-89 (2013) ("Before the *Koontz* decision, the imposition of coastal impact fees for all permitted development located in the [path of sea-level rise] would have been situated comfortably at the moderate risk level. However, if state and lower federal courts ambitiously apply the Supreme Court's ruling[,] such fees could prove problematic for coastal regulators."); Michael Allan Wolf, *The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects*, 40 FORDHAM URB. L.J. 1835, 1857-58 (2013) (contending that the "property-rights friendly decision in *Koontz* ... will most likely [lead to] dramatically expanded application[s] of *Nollan* and *Dolan*").

5. *See infra* Part II.

6. *See infra* Part II.

7. *See infra* Part III.

of critical takings issues that are the central focus of the Parts that follow.

Part II unpacks the lower courts' choices on four specific issues to evaluate whether the projections made on these issues in *Koontz*'s immediate wake have come to pass. These issues include whether courts would interpret broadly the class of monetary impositions that are subject to *Nollan* and *Dolan* scrutiny;[8] whether courts would extend *Nollan* and *Dolan* to permit conditions imposed not only through individualized administrative decisions but also to those imposed via broadly applicable legislation;[9] whether courts would interpret broadly the class of proposed conditions deemed "concrete and specific" enough to implicate *Nollan* and *Dolan*;[10] and whether courts would expand the remedies available to successful exaction takings claimants.[11]

Part III addresses the lower courts' course relating to a more ambitious projection that select scholars offered on a fifth issue in *Koontz*'s immediate wake, namely that courts would extend *Nollan* and *Dolan* scrutiny *outside* the permit conditions context altogether and into government contracts and other more traditional realms of regulatory takings law.

Part IV concludes that the lower courts in most instances have not seen *Koontz* as a launching pad to curtail the state's broad authority to regulate land uses absent compensation.[12] Fortunately, the cases that have cited *Koontz* to date do little to interfere with the state's flexibility to draw on its suite of regulatory tools to ensure that property rights are not exercised in ways that harm either the legitimate property and personal rights of others, or the economic and social infrastructure that facilitates wide dispersal of the advantages of the property system.

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8. *See infra* Part II.A.
9. *See infra* Part II.B.
10. *See infra* Part II.C.
11. *See infra* Part II.D.
12. The leading case recognizing such regulatory flexibility is *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

I. FOUNDATIONS: *KOONTZ* AND UNCONSTITUTIONAL CONDITIONS

The Fifth Amendment's Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."[13] This limitation originally applied only to physical appropriations resulting from governmental conduct.[14] More recently, however, courts also have interpreted the Takings Clause to require that the state pay compensation when a regulatory decision reallocates property interests in a manner that is markedly unfair and unjust to an individual property owner absent such payment.[15] Among these cases are those in which claimants allege that conditions attached to land use development permits amount to unconstitutional exactions absent the payment of just compensation. The 2013 Supreme Court matter of *Koontz v. St. Johns River Water Management District* involved one such "exaction taking" claim.[16]

Over the course of two Sections, this Part lays the groundwork for the doctrinal and normative claims that follow in the remainder of the Article. The first of these Sections provides an outline of the dispute in *Koontz*, as well as a synopsis of the Court's resolution thereof. The second Section offers a summary critique of exaction takings law and, specifically, the *Koontz* Court's situating this body of law within the unconstitutional conditions doctrine. The problematic foundations of exaction takings law described in this Part set the contours within which the lower courts must operate in interpreting *Koontz*'s bearing on the outstanding takings issues—involving monetary impositions, exactions and other regulatory measures devised through legislation, the requisite concreteness

13. U.S. CONST. amend. V.

14. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, ... it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, ... or the functional equivalent of a 'practical ouster of [the owner's] possession.'" (first citing Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922); then quoting Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870); and then quoting Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879))). For an exhaustive study on the original meaning of the Takings Clause, see generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

15. *See Penn Cent. Transp. Co.*, 438 U.S. at 123-24; Armstrong v. United States, 364 U.S. 40, 48-49 (1960); *Pa. Coal Co.*, 260 U.S. at 413.

16. 570 U.S. 595, 601-02 (2013).

and specificity of demands, and the available remedies—that are the central focus of the Article's remaining Parts.

A. A Precis on Koontz

In the early 1990s, Coy Koontz decided that he wanted to construct a commercial shopping center on an undeveloped 14.2-acre lot that he had purchased two decades prior.[17] Koontz needed to secure a discretionary permit from the regional Water Management District given that nearly all of his tract lay within a hydrologic basin protected under Florida environmental law.[18] Construction of the shopping center would require the destruction of 3.4 acres of protected wetlands and 0.3 acres of protected uplands.[19]

In his application, Koontz offered to "mitigate" the wetland loss by preserving the remaining undeveloped portion of his property in its natural state through a conservation easement.[20] The District found Koontz's self-proposed mitigating condition inadequate, for Florida law is premised on avoiding net wetland loss.[21] While the District could have exercised its authority to deny Koontz's application outright at that point, it instead identified several possible conditions—including reducing the size of his development or funding offsite wetland improvements—that, if accepted by Koontz, could allow for the development to proceed.[22] Moreover, the District left the door open for Koontz to propose other conditions to offset the anticipated wetland loss.[23] Koontz, however, refused the District's

17. *Id.* at 599-601. The description of the *Koontz* case set out in the next several paragraphs draws from a blog post the author penned soon after the Supreme Court issued its decision in June of 2013. *See* Tim Mulvaney, Koontz: *5-4 Supreme Court Sides with Landowner in Takings Case*, ENVTL. L. PROF. BLOG (June 25, 2013), https://lawprofessors.typepad.com/environmental_law/2013/06/koontz-5-4-supreme-court-sides-with-landowner-in-takings-case.html [https://perma.cc/DJH8-WSYN].

18. *Koontz*, 570 U.S. at 599-601.

19. BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 1:11 (2018 ed.) (citing St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1224 (Fla. 2011)).

20. *Koontz*, 570 U.S. at 601.

21. *Id.* at 600-01; *see* 1984 Fla. Laws 204.

22. *Koontz*, 570 U.S. at 601-02, 607. According to Koontz, the offsite wetland improvements would have cost him $90,000-$150,000. *See* Petition for Writ of Certiorari at 4, *Koontz*, 570 U.S. 595 (No. 11-1447).

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

proposals and chose not to offer any of his own.[24] The District, therefore, ultimately denied Koontz's development application.[25]

Since the dawn of exactions in the 1930s on through the mid-1980s, many state courts had policed the imposition of these permit conditions via some iteration of a "reasonable relationship" test that accounted for both the burdens and benefits of the imposed exaction.[26] Even in those states employing an arguably more stringent "specifically and uniquely attributable" test, the courts regularly placed the burden of proof on the permit applicant.[27] However, to protect landowners from what it perceived as extortionist behavior by permitting entities to unfairly shift infrastructure and related costs onto individual landowners, the Supreme Court curtailed the exercise of this power starting with its 1987 decision in *Nollan v. California Coastal Commission* and buttressed by its 1994 decision in *Dolan v. City of Tigard*.[28] Under this new constitutional takings framework unique to exaction disputes, it is the government—as the defendant—who has the burden of proving that a challenged exaction, which would amount to a taking outside the permitting process, bears both an "essential nexus" to and "rough

24. *Id.* at 599.

25. *Id.*

26. *See, e.g.*, Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976); Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex. 1984).

27. Of the five state cases the *Dolan* Court cited as the foundation of its "rough proportionality" test, all placed the burden of proof on the plaintiff to prove that the exaction bore no semblance of reason. *See* Dolan v. City of Tigard, 512 U.S. 374, 390-91 (1994); *Collis*, 246 N.W.2d at 28; *Simpson*, 292 N.W.2d at 301; *Turtle Rock Corp.*, 680 S.W.2d at 807; Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 447-48 (Wis. 1965). *Dolan* cited five state cases as employing the "specifically and uniquely attributable" test that it deemed too demanding for federal constitutional purposes. *See* 512 U.S. at 389-90 (citations omitted). However, at least four of these cases also placed the burden of proof on the plaintiff. *See* Pioneer Tr. & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 801 (Ill. 1961); J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 13-14 (N.H. 1981); Divan Builders, Inc. v. Planning Bd. of Twp. of Wayne, 334 A.2d 30, 37 (N.J. 1975); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971). The lone possible exception is *Frank Asuini, Inc. v. City of Cranston*, which arguably required the state to prove that a developer's "donation" of 7 percent of the land (to be subdivided for recreational purposes) was a legitimate condition of final plan approval. 264 A.2d 910, 913 (R.I. 1970).

28. *See Dolan*, 512 U.S. at 385, 396; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837, 841-42 (1987).

proportionality" with the development's impacts to avoid having to pay compensation.[29]

The *Nollan* and *Dolan* decisions have been described as establishing a form of heightened scrutiny.[30] However, leading up to *Koontz*, there was general agreement only that *Nollan*'s nexus and *Dolan*'s proportionality standards apply when the state issues a land use permit administratively conditioned on an applicant providing strangers permanent access to her land.[31] Debate raged on whether the heightened scrutiny of *Nollan* and *Dolan* applied to any other permit conditions.[32] In this contested space, Koontz alleged that the District's proposed conditions were unconstitutional in light of *Nollan* and *Dolan*, even though those conditions were never actually imposed upon him and, in any event, did not require third-party access to his land, as was the case in both *Nollan* and *Dolan*.[33]

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

30. *See* Otto J. Hetzel & Kimberly A. Gough, *Assessing the Impact of* Dolan v. City of Tigard *on Local Governments' Land-Use Powers*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 219, 219, 232 (David L. Callies ed., 1996) (stating that *Nollan* and *Dolan* "clearly signaled the Court's determination to provide greater protection for private property rights" through the application of intermediate judicial scrutiny); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 622 (2004) ("*Nollan*'s and *Dolan*'s 'essential nexus' and 'rough proportionality' tests require courts to apply heightened scrutiny to challenged land use regulations."); Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post*-Lochner *Era*, 102 DICK. L. REV. 327, 346 (1998) (stating that the Court's proportionality test "represents the application of heightened scrutiny"); Charles M. Haar & Michael Allan Wolf, Commentary, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2184-87 (2002) (suggesting that, in *Nollan* and *Dolan*, the Court "lowered the bar ... for private property owners challenging government regulation of land" by calling for a more significant level of scrutiny than had previously been required in land use cases and placing the burden of proof on the defendant government); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1651 (1988) (describing *Nollan* as calling for a "closeness of fit between regulatory means and ends" and making sure that "the burden of the regulation is properly placed on *this* landowner"); Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 868 (1995) (suggesting that *Dolan*'s rough proportionality test "appears to incorporate elements of both less restrictive means analysis and cost-benefit analysis"); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607-08 (1988) ("[T]he Court expressly endorsed a form of semi-strict or heightened judicial scrutiny of regulatory means-ends relationships in the course of invalidating, as a taking, the Commission's conditional regulatory imposition on the Nollans.").

31. *See* Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 143-49 (2016).

32. *See id.*

33. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 599, 602-03 (2013).

The Florida Supreme Court rejected Koontz's claim, but the U.S. Supreme Court reversed in a five-to-four opinion in 2013.[34] The Court's reversal explicitly expanded the application of the *Nollan* and *Dolan* standards in two small ways. First, those standards now apply to some situations in which the state conditions a development permit on the payment of money.[35] Second, those standards now apply not only when the state actually imposes subject conditions through an issued permit, but also when, in the midst of conversations with an applicant, the state *proposes* such conditions, so long as the proposal constitutes a "concrete and specific ... demand."[36]

B. Exaction Takings Law in View

Nollan and *Dolan* diverge from the core principles of regulatory takings jurisprudence in three specific ways: they shift the burden of proof away from the claimant and toward the defendant government entity; authorize a probing review of the relationship between an exaction's design and the public goals in imposing that exaction; and allow for takings liability findings in instances in which the economic impact of the exaction is quite modest. While this divergence appeared motivated by the *Nollan* and *Dolan* Courts' supposition that state offices regularly are populated by individuals seeking to take undo advantage of vulnerable property owners, *Koontz* was more direct in this regard. The *Koontz* Court referred to the prospect of permitting officials attempting to "circumvent[ ] *Nollan* and *Dolan*,"[37] to "maneuver,"[38] "coerc[e],"[39] "evade[ ],"[40] make "[e]xtortionate demands,"[41] and "leverage [the state's] legitimate

34. *Id.* at 603-04.

35. *See id.* at 612; *see also* Dabbs v. Anne Arundel County, 182 A.3d 798, 808 (Md. 2018), *cert. denied*, 139 S. Ct. 230 (2018) (explaining that, in *Koontz*, the "*Nollan* and *Dolan* line of cases was expanded ... to apply to a narrow set of monetary exactions, i.e., a condition of the payment of money for favorable governmental action on a required permit application for a specific parcel of land" (citing *Koontz*, 570 U.S. at 599)).

36. *Koontz*, 570 U.S. at 610.

37. *Id.* at 599.

38. *Id.*

39. *Id.* at 604.

40. *Id.* at 599.

41. *Id.* at 605.

interest[s]."[42] It echoed Richard Epstein's view that the permitting process is a "holdup game" that is best understood as "a form of highway robbery."[43]

These claims of regular extortionate conduct by the state in the land use permitting context have not been substantiated by empirical evidence.[44] Indeed, the limited empirical evidence that is available suggests just the opposite: after following the *Dolan* Court's command to make "individualized determinations" of development impacts, local governments realized that they had been demanding far *less* mitigation than that sufficient to offset those impacts.[45]

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42. *Id.* at 606; *see also* Echeverria, *supra* note 4, at 51 ("*Koontz* reflects fierce suspicion about the motivations of local government officials.").

43. Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 TOURO L. REV. 265, 292 (2014).

44. *See, e.g.*, *Koontz*, 570 U.S. at 628-29 (Kagan, J., dissenting) (deeming *Koontz*'s extension of *Nollan* and *Dolan* scrutiny to monetary exactions "a prophylaxis in search of a problem").

45. *See, e.g.*, DANIEL SELMI ET AL., LAND USE REGULATION 169 (3d ed. 2008) ("A survey of local California governments concluded that developers have been grossly undercharged for the supporting infrastructure necessary to mitigate or accommodate the impacts of projects." (citing Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103 (2001))). Recent work advocating that the state devise exactions aimed at the impacts of new development on climate change and energy consumption buttress the view that favoritism toward development interests—implicit or otherwise—may be more problematic in the exactions context than the corruption about which *Koontz* roundly expressed concern. *See generally* J. Peter Byrne & Kathryn A. Zyla, *Climate Exactions*, 75 MD. L. REV. 758 (2016); Jim Rossi & Christopher Serkin, *Energy Exactions*, 104 CORNELL L. REV. 643 (2019). Yet third parties who bear the brunt of the externalities that permit conditions do not sufficiently offset have not yet had considerable success in transposing *Nollan* and *Dolan* scrutiny to their advantage. However, it is possible to consider the recent California state court decision in *McAllister v. California Coastal Commission* as demonstrating consideration for third parties harmed by exactions that are excessively lenient on developers. In this case, at the urging of neighbors opposed to an approved development, a state appellate court overturned the state coastal commission's granting of that approval for fear that denial might prompt a takings claim when the record did not support the commission's fears. *See* McAllister v. Cal. Coastal Comm'n, 87 Cal. Rptr. 3d 365, 386 (Ct. App. 2008) ("[O]ne would expect the record to reflect some discussion of both the restriction and the taking issue."). The author of this Article discussed the possibility of transposing exaction takings law some time ago. *See* Timothy Mulvaney, Where the Wild Things Aren't: Transposing Exaction Takings, Address at Gonzaga University School of Law, Faculty Seminar (Sept. 30, 2010). In a recent work, Gregory Stein explored this possibility, albeit from a slightly different angle and in far greater depth. *See generally* Gregory M. Stein, *Reverse Exactions*, 26 WM. & MARY BILL RTS. J. 1 (2017) (raising the prospect of the permittee paying compensation to a neighbor where the government's granting a development permit with no or inadequate conditions "takes" that neighbor's

In the *Koontz* Court's unsubstantiated vision of the state, though, there is a surface appeal to grounding *Nollan*'s "nexus" and *Dolan*'s "proportionality" standards in what is known as the unconstitutional conditions doctrine. As Justice Alito wrote for the majority in *Koontz*, the unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[46] He continued, "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.... Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."[47]

Dozens of lower court decisions that have cited to *Koontz* have done so for the purpose of pointing to this description of the unconstitutional conditions doctrine.[48] Yet citing *Koontz* for this purpose

property).

46. *Koontz*, 570 U.S. at 604.

47. *Id.* at 605.

48. *See* Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1377 n.4 (2018); Planned Parenthood of Greater Ohio v. Himes, 888 F.3d 224, 231-32 (6th Cir. 2018), *rev'd en banc*, 917 F.3d 908 (6th Cir. 2019); Edwards v. City of Delray Beach, No. 16-15693, 2017 WL 2813838 (11th Cir. June 29, 2007); Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245, 1258 (10th Cir. 2016); Petrella v. Brownback, 787 F.3d 1242, 1265 (10th Cir. 2015); Solida v. United States, 778 F.3d 1351, 1360 (Fed. Cir. 2015); Lebron v. Sec'y of Fla. Dep't of Children & Families, 772 F.3d 1352, 1376 (11th Cir. 2014); Benjamin v. Stemple, No. 18-CV-10849, 2018 WL 3069286, at *3-4 (E.D. Mich. June 21, 2018); Thompson v. City of Oakwood, 307 F. Supp. 3d 761, 778 (S.D. Ohio 2018); Werkheiser v. Pocono Township, No. 16-CV-0015, 2018 WL 509814, at *4 (M.D. Pa. Jan. 23, 2018); June Med. Servs. v. Gee, 280 F. Supp. 3d 849, 862 (M.D. La. 2017), *motion to certify appeal denied*, No. CV 16-00444-BAJ-RLB, 2018 WL 1041301 (M.D. La. Feb. 23, 2018); Country Mill Farms, LLC v. City of East Lansing, 280 F. Supp. 3d 1029, 1052 (W.D. Mich. 2017); Jamgotchian v. State Horse Racing Comm'n, 269 F. Supp. 3d 604, 616 (M.D. Pa. 2017); Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 410 (E.D. Pa. 2017), *aff'd*, 890 F.3d 1124 (3d Cir. 2018), and *aff'd*, 897 F.3d 518 (3d Cir. 2018); Banks v. County of San Mateo, No. 16-CV-04455-YGR, 2017 WL 3434113, at *14 (N.D. Cal. Aug. 10, 2017); Mamakos v. Town of Huntington, No. 16-CV-5775(SJF)(GRB), 2017 WL 2861719, at *14 (E.D.N.Y. July 5, 2017), *aff'd*, No. 17-2318, 2018 WL 1377125 (2d Cir. Mar. 19, 2018); Landon v. City of Flint, No. 16-11061, 2017 WL 2798414, at *3 (E.D. Mich. June 27, 2017); Montagno v. City of Burlington, No. 2:16-CV-232, 2017 WL 2399456, at *7-8 (D. Vt. June 1, 2017); Wagda v. Town of Danville, No. 16-CV-00488-MMC, 2017 WL 2311294, at *6 (N.D. Cal. May 26, 2017); Lea Family P'ship Ltd. v. City of Temple Terrace, No. 8:16-CV-3463-T-30AAS, 2017 WL 1165583, at *5 (M.D. Fla. Mar. 29, 2017); Safelite Grp. v. Rothman, 229 F. Supp. 3d 859, 873 (D. Minn. 2017); Gutierrez v. City of East Chicago, No.

is peculiar, for, upon closer inspection, the link between takings and unconstitutional conditions jurisprudence is not altogether apparent.

Traditionally, the unconstitutional conditions doctrine is implicated where two assumptions hold: (1) a person possesses an individual constitutional right that she capably could waive, and (2) the state has discretion to confer a benefit.[49] In these situations, the right is subject to coercion in exchange for the benefit, and it is against such coercion that the unconstitutional conditions doctrine aims to protect.[50] For instance, individuals hold a First Amendment right to free speech and the state has discretion to confer unemployment benefits; in turn, then, the state's conditioning an award of unemployment benefits on the waiver of free speech rights has been deemed violative of the doctrine.[51]

2:16-CV-111-JVB-PRC, 2016 WL 5819818, at *8 (N.D. Ind. Sept. 6, 2016), *report and recommendation adopted*, No. 2:16-CV-111 JVB, 2016 WL 5816804 (N.D. Ind. Oct. 5, 2016); Boston Correll v. Herring, 212 F. Supp. 3d 584, 605 (E.D. Va. 2016); Planned Parenthood of Greater Ohio v. Hodges, 188 F. Supp. 3d 684, 692 (S.D. Ohio 2016); Wayside Church v. County of Van Buren, No. 1:14-CV-1274, 2015 WL 13308900, at *6 (W.D. Mich. Nov. 9, 2015), *vacated sub nom*., Wayside Church v. Van Buren County, 847 F.3d 812 (6th Cir. 2017); O'Hare v. Town of Gulf Stream, No. 13-CV-81053, 2015 WL 12977393, at *7 (S.D. Fla. June 22, 2015); Sourovelis v. City of Philadelphia, 103 F. Supp. 3d 694, 707 (E.D. Pa. 2015); Muhammad *ex rel*. J.S. v. Abington Twp. Police Dep't, 37 F. Supp. 3d 746, 761 (E.D. Pa. 2014); Coppi v. City of Dana Point, No. SACV111813 JGB (RNBx) 2014 WL 12589639 (C.D. Cal. 2014); State v. Gray, 372 P.3d 999, 1007 (Ariz. 2016); San Diego Cty. Water Auth. v. Metro. Water Dist. of S. Cal., 220 Cal. Rptr. 3d 346, 375 (Ct. App. 2017); Genuine Parts Co. v. Cepec, 137 A.3d 123, 147 (Del. 2016); Weaver v. Myers, 229 So. 3d 1118, 1139 (Fla. 2017); Williams v. State, 167 So. 3d 483, 486 (Fla. Dist. Ct. App. 2015), *vacated*, No. SC15-1417, 2016 WL 6637817 (Fla. Nov. 9, 2016); State v. Yong Shik Won, 372 P.3d 1065, 1086 n.39 (Haw. 2015), *as corrected* (Dec. 9, 2015); Nava-Mendoza v. Luna, 2015 Ill. App. (1st) 151553-U (2015); Commonwealth v. Johnson, 75 N.E.3d 51, 71 (Mass. App. Ct. 2017); Commonwealth v. Dew, 33 Mass L. Rep. 78, 80 (Super. Ct. 2015); AFT Mich. v. State, 866 N.W.2d 782 (Mich. 2015); State *ex rel*. Norfolk S. Ry. Co. v. Dolan, 512 S.W.3d 41, 51 n.9 (Mo. 2017); Moongate Water Co. v. City of Las Cruces, 329 P.3d 727, 733 (N.M. Ct. App. 2014); Town of Verona v. Cuomo, 997 N.Y.S.2d 670 (Sup. Ct. 2014); Torres v. Seaboard Foods, LLC, 373 P.3d 1057, 1071 (Okla. 2016), *as corrected* (Mar. 4, 2016); Marchese v. Commonwealth Dep't of Transp., 169 A.3d 733 (Pa. Commw. Ct. 2017); Yucha v. Commonwealth Dep't of Transp., No. 1917 C.D. 2016, 2017 WL 4542374 (Pa. Commw. Ct. Oct. 12, 2017); Hutto v. S.C. Ret. Sys., No. 2016-MO-026, 2016 WL 4208093 (S.C. Aug. 10, 2016).

49. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

50. *See Koontz*, 570 U.S. at 604.

51. *See* Sherbert v. Verner, 374 U.S. 398, 404-05 (1963). The Supreme Court originally set out the unconstitutional conditions doctrine in striking down a state statute conferring the right of commercial carriers to utilize state highways on the condition that they assume the burdens and duties of common carriers. *See* Frost v. R.R. Comm'n, 271 U.S. 583, 593-94

The Takings Clause, however, does not confer an individual right not to have property taken; instead, it requires only that the state pay just compensation when it chooses to take property.[52] And, importantly, takings law long has recognized that just compensation need not come in the form of money but instead can be presented in-kind.[53] If an applicant chooses to accept a discretionary development permit conditioned on the conferral of an easement, for example, the applicant is asserting that the in-kind compensation—the development authorized by the permit—is more valuable than the monetary compensation for the right-of-way that the Constitution presumptively requires.[54] *Koontz* itself stated that "[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."[55] The Court recently made this point even clearer by rejecting a claim that "condition[ing] the benefit of a patent on accepting the possibility of inter partes review" is unconstitutional because, the Court concluded, inter partes review "is something Congress can 'command directly'" under its Article I authority.[56] Query: Could the government, consistent with the Takings Clause, appropriate an interest in real property by ordering the owner to accept in-kind compensation of more market value than the amount of money that Supreme Court precedent has deemed "just compensation"? Of course it could.

Koontz's preventing the state from offering a landowner such a choice, therefore, is logical only in those instances in which the state does not actually have the discretion to deny the development

(1926). For a very recent, traditional application of the doctrine, see U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. 205 (2013) (declaring that a requirement that prospective recipients declare their opposition to prostitution amounted to an unconstitutional condition of state-funded financial aid).

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

53. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195-215 (1985); *see also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1218 (1967).

54. As one scholar colorfully explained, "Justice Alito has implicitly adopted the novel, indeed bizarre position that the unconstitutional conditions doctrine should apply even in the absence of government action that violates the Constitution." Echeverria, *supra* note 4, at 27.

55. *Koontz*, 570 U.S. at 612 (citing Rumsfeld v. Forum for Acad. & Institutional Rts., 547 U.S. 47, 59-60 (2006)).

56. Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1377 n.4 (2018).

permit in the first place.[57] If the Water Management District did not have such discretion in *Koontz*, imposing the permit conditions at issue effectively would have appropriated the easement without following the payment procedures of formal condemnation.[58] Yet the Court did not provide any basis for the proposition that the Water Management District did not have discretion to deny the permit Mr. Koontz requested.[59] Moreover, if there were such a basis, it would negate one of the two aforementioned assumptions on which the theory of unconstitutional conditions traditionally has rested: the state must have discretion to confer a benefit.[60] At best, then, *Koontz* supports what the Court described in dicta in an earlier case as a "special application" of the unconstitutional conditions doctrine[61] that, at least as explained thus far, lacks a theoretical foundation.

C. Summary

The property owner's claim in *Koontz* came to the Court under the guise of a body of exaction takings law that rests on questionable foundations. *Nollan* and *Dolan* had called on the judiciary to examine government decisions on social and economic policy with such a probing eye that the cases drew comparisons to *Lochner* itself;[62] moreover, *Nollan* and *Dolan* made the rare move of shifting the burden of proof to the government entity against whom a property owner levels a charge of unconstitutional conduct.[63] *Koontz* further destabilized the case for *Nollan* and *Dolan* scrutiny by unjustifiably, if steadfastly, situating exactions takings law within the unconstitutional conditions doctrine.

These problematic foundations set the bounds within which the lower courts were tasked with interpreting *Koontz*'s bearing on the outstanding takings issues—involving monetary impositions,

57. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 546-47 (2005).
58. *See id.*
59. *See Koontz*, 570 U.S. at 607-08.
60. *See Lingle*, 544 U.S. at 547 (citing Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).
61. *See id.*
62. *See, e.g.*, Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605 (1996).
63. *See* Haar & Wolf, *supra* note 30, at 2184-87.

exactions and other regulatory measures devised through legislation, the requisite concreteness and specificity of demands, and the available remedies—that are the central focus of this Article's remaining Parts. If the lower courts were to define broadly those monetary and proposed actions to which *Koontz* declares *Nollan* and *Dolan* scrutiny applies and extend such scrutiny to those actions implemented through legislation—all with the support of an expansive suite of remedies—observers could look back on *Koontz* as initiating a revolutionary change across the takings landscape.

II. IN THE WAKE OF *KOONTZ*: POTENTIAL EXTENSIONS INSIDE THE EXACTIONS CONTEXT

Koontz has been cited in nearly 130 lower court opinions through July of 2018. About 90 of the courts in these cases did so for very general purposes, including *Koontz*'s summary of takings law[64] and, as noted above, *Koontz*'s ill-considered but, outside the takings space, largely harmless explanation of the basic parameters of the "unconstitutional conditions" doctrine.[65] Though the cataloguing thereafter admittedly posed some challenges given the intricacies of individual disputes, the bulk of the remaining cases can be interpreted as touching on the following issues on which *Koontz* did not explicitly opine: whether courts would interpret broadly the class of monetary impositions that *Koontz* instructs are subject to *Nollan* and *Dolan* scrutiny;[66] whether courts would extend *Nollan* and *Dolan* to permit conditions imposed not only through individualized administrative decisions but also to those imposed via

64. *See, e.g.*, Caquelin v. United States, No. 2016-1663, 2017 WL 2684180 (Fed. Cir. June 21, 2017); Cenergy-Glenmore Wind Farm No.1, LLC v. Town of Glenmore, 769 F.3d 485 (7th Cir. 2014); Edmonson v. Fremgen, No. 14-1925, 2014 WL 5422851 (7th Cir. Oct. 27, 2014); Cedar Point Nursery v. Gould, No. 1:16-cv-00185-LJO-BAM, 2016 WL 3549408 (E.D. Ca. June 29, 2016); Home Builders Ass'n of Greater Chicago v. City of Chicago, 213 F. Supp. 3d 1019 (E.D. Ill. 2016); City of Perris v. Stamper, 376 P.3d 1221 (Cal. 2016); Surfrider Found. v. Martins Beach 1, LLC, 221 Cal. Rptr. 3d 382 (Ct. App. 2017); Scheinberg v. County of Samona, No. A135286, 2014 WL 5305857 (Cal. Ct. App. Oct. 17, 2014); Town of Ponce Inlet v. Pacetta, LLC, 226 So. 3d 303 (Fla. Dist. Ct. App. 2017); State v. Eighth Jud. Dist. Ct., 351 P.3d 736 (Nev. 2015); Delchester Developers, L.P. v. Zoning Hearing Board of Twp. of London Grove, 161 A.3d 1081 (Pa. Commw. Ct. 2017).

65. *See supra* Part I.B.

66. *See infra* Part II.A.

broadly applicable legislation;[67] whether courts would interpret broadly the class of proposed conditions deemed "concrete and specific" enough to implicate *Nollan* and *Dolan*;[68] and whether courts would expand the remedies available in exaction takings cases.[69] This Part takes up these four issues in turn, beginning with monetary impositions.

A. Monetary Impositions

1. Issue

The theoretical case for applying the unconstitutional conditions doctrine in the exactions context is especially challenging when the permit condition does not involve the conferral of an easement authorizing third-party access, but instead requires the applicant to pay, spend, or forego money. As intimated at the outset of this Article, *Nollan* and *Dolan* operated on the assumption that the state's demand in the form of a permit condition, if imposed in isolation outside the permitting process, automatically would have triggered takings law's compensation requirement.[70] A decade after *Dolan,* the Court reiterated the *Nollan* and *Dolan* Courts' reliance on this assumption.[71] Remarking on *Nollan* and *Dolan* in an opinion for a unanimous Court in *Lingle v. Chevron*, Justice O'Connor wrote that "[i]n each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking."[72]

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67. *See infra* Part II.B.

68. *See infra* Part II.C.

69. *See infra* Part II.D.

70. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach ... we have no doubt there would have been a taking.").

71. *See generally* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005) (taking care not "to disturb these precedents").

72. *See id.* at 546. The author has explored the relationship between *Lingle* and exaction takings law in prior work. *See* Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 548-54 (2012); Timothy M. Mulvaney, *On Bargaining for Development*, 67 FLA. L.

The *Lingle* Court rested this statement on the Court's 1982 assertion in *Loretto v. Teleprompter Manhattan CATV Corp*. that "permanent occupations of land ... are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land."[73] While I contend below that *Loretto*'s categorical nature is overstated, the point can be set aside for the moment to note that the state, of course, can condition discretionary development permits on a wide range of demands that do not require the occupation of land.

Indeed, the state routinely conditions development permits on requirements that the applicant pay for, spend money on, or forgo potential earnings in the pursuit of measures to mitigate development impacts on third parties. Consider, for instance, requirements to pay into a wetlands mitigation fund, create culverts to increase wetland functionality, or record a conservation restriction to preserve wetlands. To suggest that every state request that an applicant pay, spend, or forgo money should be considered on its own as amounting to a compensable taking outside the permitting process is effectively to suggest that the state is constitutionally prohibited from collecting or requiring any financial outlays or forbearances relating to land at all, absent a clear and sufficient nonmonetary offset transferred by the state to the applicant. (A monetary offset is impracticable given that the amount of compensation necessarily would equal what the applicant just paid, spent, or forwent.[74]) If an applicant chooses to accept a discretionary development permit to which such a condition is attached, she is asserting that the in-kind compensation/offset—the development authorized by the permit—is more valuable than the monetary compensation/offset she would receive for the taking or the money she was asked to pay, spend, or forgo.

REV. F. 66, 69 (2015); Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVTL. L. & POL'Y J. 189, 212-27 (2010).

73. 458 U.S. 419, 430 (1982); *see Lingle*, 544 U.S. at 539.

74. *See* Fennell & Peñalver, *supra* note 4, at 335-36. Two commentators raise the possibility that, exclusively for administrability purposes, it might be most prudent to subject permit condition requirements to pay or spend money to *Nollan* and *Dolan* scrutiny, while leaving conditions that require the applicant to forgo potential earnings immune from such heightened scrutiny. *See* Wake & Bona, *supra* note 3, at 562 n.139.

For these reasons, among others, a majority of the lower court opinions that addressed this issue leading up to *Koontz* did not subject those permits conditioned on such monetary outlays or forbearances to *Nollan* and *Dolan* scrutiny.[75] Indeed, prior to *Koontz*, most monetary demands were not subject to *any* takings analysis at all.[76] Only the state's appropriation of a specific pool of money triggered takings review,[77] and even in such exceptional cases, only under the far less demanding framework set out in *Penn Central Transportation Co. v. New York City*.[78] *Koontz*, though, rejected the general distinction between monetary and in-kind conditions that

75. *See* Norman v. United States, 429 F.3d 1081, 1089-90 (Fed. Cir. 2005) (holding that *Nollan* and *Dolan* only apply to permit conditions that require a physical invasion of property); Kitt v. United States, 277 F.3d 1330, 1336 (Fed. Cir. 2002) ("The mere imposition of an obligation to pay money ... does not give rise to a claim under the Takings Clause of the Fifth Amendment." (quoting Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1340 (Fed. Cir. 2001))); Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998) (expressing "considerable doubt" about the applicability of *Dolan*'s rough proportionality standard to "fee exactions, as opposed to physical exactions"); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) (declaring that *Dolan*'s heightened scrutiny is inapplicable to fees imposed as a condition of a landowner's exercise of her property rights to hunt on her own land because no physical occupation occurred); Atlas Corp. v. United States, 895 F.2d 745, 757-58 (Fed. Cir. 1990) (conditioning approval on expenditures is not a taking); Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (finding a water resource development fee not subject to *Dolan*'s heightened scrutiny); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695 (Colo. 2001) (holding that *Dolan* analysis does not apply to sanitation fee); McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (declining to apply *Dolan* beyond property dedications to impact fees); City of Olympia v. Drebick, 126 P.3d 802, 808 (Wash. 2006) (holding that the tests applied in *Nollan* and *Dolan* should not be extended to impact fees imposed to mitigate the direct effects of new development or general growth impact fees imposed pursuant to statutorily authorized ordinances). *But see* Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (applying *Dolan* to recreation fees); N. Ill. Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384, 390-91 (Ill. 1995) (applying *Dolan* to transportation impact fees); J.C. Reeves Corp. v. Clackamas County., 887 P.2d 360, 365-66 (Or. Ct. App. 1994) (applying *Dolan* to transportation impact fees); Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* to park fees); Benchmark Land Co. v. City of Battle Ground, 972 P.2d 944, 950 (Wash. Ct. App. 1999) (concluding that *Nollan* and *Dolan* apply "where the City requires the developer as a condition of approval to incur substantial costs improving an adjoining street").

76. *Brown v. Legal Foundation of Washington* represents the rare exception. *See* 538 U.S. 216, 234-35 (2003) (setting out an exception to the general rule that financial impositions are not subject to a takings analysis for situations in which the state unilaterally targets a specific pool of money, such as, here, interest earned on a specific trust account).

77. *See* E. Enters. v. Apfel, 524 U.S. 498, 522-23 (1998).

78. *Brown*, 538 U.S. at 217-18 (applying Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)).

had been recognized by many lower courts.[79] According to the *Koontz* Court, some monetary demands that do *not* target a specific pool, but instead are attached in some way to a specific piece of land, not only are subject to takings review but "amount to a *per se* taking similar to the taking of an easement or lien."[80]

Koontz clearly did not intend to subject to heightened scrutiny *all* monetary conditions with any connection to land, for Justice Alito explicitly noted for the majority that "[t]his case ... does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[81] The Court deemed of little "practical difficulty" distinguishing between (a) the class of financial burdens that sufficiently resembles property taxes and user fees, and (b) the class that does not.[82] However, in support of this position, the Court merely cited to select cases in which lower courts have evaluated whether local governments are authorized under specific state statutes to assess certain taxes.[83] These cases are hardly the type of precedents useful for courts tasked with determining whether a financial obligation imposed by the state on an individual property owner more closely resembles a property tax, a user fee, or something else, for constitutional takings purposes. The citation to this line of cases, however, does provide an indication from the Court that, unlike the allegedly acontextual approach of *Loretto* and its progeny in physical appropriation cases, context matters in

79. Koontz v. St. Johns River Water Mgmt. Dist., 510 U.S. 595, 614-16 (2013).

80. *Id.* at 615; *see also id.* at 614 (asserting that the "fulcrum" of the holding was "the direct link between the government's demand and a specific parcel of real property").

81. *Id.* at 615. A number of lower courts generally cited *Koontz* for this point. *See* Temple-Inland, Inc. v. Cook, 192 F. Supp. 3d 527 (D. Del. 2016); Page v. City of Wyandotte, No. 15-CV-10575, 2015 WL 6164004 (E.D. Mich. Oct. 20, 2015); United States v. King Mountain Tobacco Co., 131 F. Supp. 3d 1088 (E.D. Wash. 2015); Russo v. Township of Plumsted, No. CIV.A. 13-5082 PGS T, 2014 WL 3459066 (D.N.J. July 11, 2014); Hotze v. Sibelius, 991 F. Supp. 2d 864 (S.D. Tex. 2014); McClain v. Sav-On Drugs, 215 Cal. Rptr. 3d 416 (Ct. App. 2017), *as modified on denial of reh'g* (Apr. 10, 2017); Merscorp Holdings, Inc. v. Malloy, No. X04HHDCV136043132S, 2014 WL 486952 (Conn. Super. Ct. Jan. 10, 2014); Trantham v. State Disbursement Unit, 882 N.W.2d 170, 173 (Mich. Ct. App. 2015), *vacated in part, appeal denied in part sub nom.* Trantham v. State Disbursement Unit, 885 N.W.2d 307 (Mich. 2016); *see also* Wayside Church v. County of Van Buren, No. 1:14-CV-1274, 2015 WL 13308900, at *1 (W.D. Mich. Nov. 9, 2015), *vacated sub nom.* Wayside Church v. Van Buren County, 847 F.3d 812 (6th Cir. 2017).

82. *Koontz*, 510 U.S. at 615.

83. *Id.* at 618.

determining whether no takings review, *Penn Central* review, or *Nollan* and *Dolan* review applies to financial impositions attached to development permits. Just how it matters in a post-*Koontz* world, though, remains an open book.

*2. Movement Post-*Koontz

Amidst *Koontz*'s cloudiness on this point, the lower courts citing to *Koontz* have construed the class of financial burdens subject to *Nollan* and *Dolan* scrutiny very narrowly. Consider the matters of *Malone Investments, LLC v. Somerset County Sanitary District, Inc.*,[84] *Alpine Homes, Inc. v. City of West Jordan*,[85] and *Willie Pearl Burrell Trust v. City of Kankakee*.[86]

Malone Investments involved a fee imposed upon new developers to fund a sewer service project, while prior developers of neighboring lots who would benefit from the project did not have to pay such fees.[87] A Maryland appellate court held that the development company did not have a vested interest in complimentary sewer service such that any takings analysis—let alone the "strict scrutiny" of *Koontz*—was inapposite.[88] Instead, the court explained, the company's claim of unfairness fit more squarely within the realm of equal protection review, and its attendant rational basis standard.[89]

84. No. 0476, 2016 WL 3185229, at *1 (Md. Ct. Spec. App. June 8, 2016).

85. 424 P.3d 95 (Utah 2017).

86. 56 N.E.3d 1067 (Ill. App. Ct. 2016).

87. *Malone Invs.*, 2016 WL 3185229, at *1.

88. *Id.* at *2; *see id.* at *4 ("[T]he Takings Clause protects property owners against certain types of government action that *reduce* the value of property. However, the Takings Clause does not impose an affirmative obligation upon government to *enhance* property values [by providing free sewer service]."); *see also* Santiago-Ramos v. Autoridad de Energia Electrica de P.R., No. CIV. 11-1987 JAG/SCC, 2015 WL 846750, at *2 (D.P.R. Feb. 26, 2015), *report and recommendation adopted sub nom.* Ramos v. Autoridad de Energia Electrica de P.R., No. CIV. 11-1987 JAG, 2015 WL 1416745 (D.P.R. Mar. 27, 2015), *aff'd sub nom.* Santiago-Ramos v. Autoridad de Energía Eléctrica de Puerto Rico, AEE, 834 F.3d 103 (1st Cir. 2016) ("Plaintiffs are not complaining about their service being terminated; to the contrary, they are paying their bills and complaining about the uses to which those payments are put. I therefore see no basis for holding that AEE customers have a property interest in electric services as such."). A federal appellate court affirmed this decision on the grounds that, because the customers do not have a property interest in electric services, they lacked standing. *See Santiago-Ramos*, 834 F.3d 103.

89. *Malone Invs.*, 2016 WL 3185229, at *4.

In *Alpine Homes*, a developer claimed that the state's failure to spend impact fees it had collected made their initial collection an unconstitutional taking and thus necessitated their return.[90] Utah's Supreme Court explained that a pre-*Koontz* state statute requires its state courts to review impact fees under the heightened scrutiny of *Nollan* and *Dolan*.[91] However, the court refused to extend *Koontz* to consider, in the course of exaction takings analyses, whether and how impact fees ultimately are spent.[92] Rather, the court concluded that the time to challenge a permit condition under *Nollan* and *Dolan* is upon its proposition.[93]

Interestingly, the *Alpine Homes* court noted that the people hurt by any unspent fees are not the developers who pay those fees, but instead are those third parties who bear the brunt of the impacts those fees were supposed to be used to offset.[94] In doing so, the court seemingly left open the possibility of transposing the exaction takings standard to encompass not only applicants' claims that permit conditions are too stringent, but also neighbors' claims that permit conditions imposed on others are too lenient.[95] Its holding, though, shows no interest in extending heightened review to the continuous monitoring of the state's expending impact fees or to the actual development impacts as they arise after a permit is issued.[96] In its view, tasking courts with deciding under takings law whether and when impact fees should be returned—because the state, however reasonably, over-estimated the impact of new development—also would suggest that the state is authorized to demand additional fees from developers when it turns out that the impact fees originally imposed on those developers are insufficient

90. *Alpine Homes*, 424 P.3d at 100-01.

91. *Id.* at 103.

92. *Id.* at 100, 105.

93. *Id.* at 105 ("The demand for property is either permissible or forbidden under the takings clause at the time the demand is made based upon an evaluation of the 'projected impact of [the] proposed development.'" (quoting Dolan v. City of Tigard, 512 U.S. 374, 388 (1994))). In this regard, consider John Nolon's recent writing on the advantages of "contingency bargaining." *See generally* John R. Nolon, *Land Use and Climate Change: Lawyers Negotiating Above Regulation*, 78 BROOK. L. REV. 521 (2013).

94. *Alpine Homes*, 424 P.3d at 107-08.

95. For a brief discussion of transposing exaction takings claims, see *supra* note 45 and accompanying text.

96. *See Alpine Homes*, 424 P.3d at 105.

to offset the impacts of that development.[97] Such an approach would reflect a level of second-guessing state decisions that the *Alpine Homes* court did not deem prudent to take on.[98]

Finally, *Willie Pearl Burrell Trust v. City of Kankakee* involved a requirement that applicants pay all outstanding debts to the city before receiving any land use approvals.[99] In this instance, the city refused an applicant's request to renew licenses to rent properties for residential purposes when the applicant owed the city over $40,000 for a collection of tickets issued for code violations.[100] The applicant maintained that, because the debt it owed to the city "did not stem from any of the properties for which it sought rental licenses, there did not exist a sufficient nexus [under *Nollan*] between defendant's demand and the licenses requested."[101] The applicant relied on *Koontz* in asserting that the payment requirement amounted to a taking on its own, and that conditioning the renewal license on this payment constituted "an infringement upon its right to be free of a taking without just compensation."[102]

An Illinois appellate panel rejected this claim. It interpreted *Koontz* to extend *Nollan* and *Dolan* scrutiny only to monetary obligations that are "inextricably tied" to a "specific parcel of land."[103] Here, it found the city's demand for money did not meet this threshold, for it stemmed from a generally applicable ordinance that not only barred the applicant from receiving rental licenses—which necessarily are related to properties the applicant owns throughout the city—but any type of license at all.[104]

3. Summary

Koontz was not up to the challenge of delineating which permit conditions requiring applicants to pay, spend, or forgo opportunities

97. *See id.*
98. *See id.*
99. *See* 56 N.E.3d 1067, 1070 (Ill. App. Ct. 2016).
100. *Id.*
101. *Id.* at 1077.
102. *Id.* at 1078.
103. *Id.* at 1079 (quoting the pre-*Koontz* Illinois Supreme Court decision in Empress Casino Joliet Corp. v. Giannovlias, 896 N.E.2d 277, 292 (Ill. 2008), interpreting the U.S. Supreme Court's splintered holding in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)).
104. *See id.*

to accumulate money are appropriately subject to the exacting review set out in *Nollan* and *Dolan*. Prominent takings scholars, working within *Koontz*'s confines, have proposed limiting principles—such as distinguishing between "fees" and "expenditures"[105] or concentrating on the extent to which a monetary obligation is "designed to replace a physical exaction"[106]—though each proposal to date is wrought with challenges.[107] If not collectively resting on

105. *See* Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 14 ECOLOGY L. Q. 131, 131-32 (2014). Pidot contends that conditions requiring permit applicants to directly transfer money to the government (fees) should be subject to *Nollan* and *Dolan* scrutiny, while conditions requiring permit applicants to spend money in undertaking mitigation measures (expenditures) should not. *See id.* at 131. Somewhat peculiarly, he likens this fee-expenditure distinction to the distinction between direct appropriation and regulation that underlines the conventional view of takings law, despite critiquing this conventional view. *See id.* at 154-55 (writing that distinguishing between physical and regulatory takings "fails to account for the multiplicity of regulatory regimes that impose positive obligations on landowners").

106. *See* Shelley Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. 105 (2016). According to Saxer, only those individually accessed monetary obligations that are "designed to *replace* a physical exaction" or "evade ... an occupation" of the sort at issue in *Loretto* should be subject to the heightened scrutiny of *Nollan* and *Dolan*. *Id.* at 110-11. Saxer's claim, therefore, is grounded in the normative view that regulatory decisions that result in the forced, permanent physical invasion by third-party strangers *are* of special concern (a view that Pidot accepts as a doctrinal reality but questions on normative grounds). Her conclusion, though, asserting that *Koontz* involved such an exaction is debatable. *See id.* at 111. Neither of the exactions allegedly proposed to the applicant—reducing the size of his development or funding wetland improvements on nearby District-owned land—involved a forced, permanent physical invasion by a third-party stranger to which *Loretto* applies; moreover, the District, unlike the City of New York in *Loretto*, gave the applicant the opportunity to propose alternative conditions that would fulfill the government's end of mitigating the development's impacts. *See generally* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).

107. Pidot's thesis is difficult to square doctrinally, for it rests on the erroneous assumption that takings law is centered on the formal, direct-appropriation/regulation dichotomy on which his proposed fee/expenditure distinction is based. *See, e.g.*, Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. REV. 145, 153-54 (2018). Pidot offers two more pragmatic justifications for the fee-expenditure distinction, though they too are not free from challenge. He asserts that failing to recognize the fee-expenditure distinction would cripple local governments given their "ubiquitous" use of conditions requiring expenditures. Pidot, *supra* note 105, at 137. However, takings claimants might well counter that the ubiquity of what they see as unconnected and exorbitant expenditure requirements imposed through the permitting process does not dictate that those impositions should be immunized from takings liability; otherwise, unconnected and exorbitant fees would be immunized if they, too, were ubiquitous. Pidot also seeks to justify the application of *Nollan* and *Dolan* to fees as protecting permit applicants from efforts by regulators "to leverage permitting authority to pad government coffers" or "aggrandize[ ] ... property for itself." *Id.* at 139, 159. Yet, beyond the generic assertion that subjecting expenditures to *Nollan* and *Dolan* scrutiny would "substantially increase the cost to government of regulating," *id.* at 160, the normative principle underpinning the claim that the state could be seen as illegitimately leveraging its authority in demanding the

a consistent, generalizable theory, the lower courts who have faced *Koontz*-driven claims to date have been reluctant to construe the class of financial burdens subject to *Nollan* and *Dolan* scrutiny in even moderately broad terms.

B. Legislative Exactions

1. Issue

One of the most pressing questions across the entire realm of takings law involves whether the heightened scrutiny of *Nollan* and *Dolan* applicable to certain types of exactions imposed via case-by-case administration also is applicable when those types of exactions are imposed via broadly applicable legislative formulas or directives.[108] Prior to *Koontz*, the Court denied fifteen petitions for certiorari raising the issue.[109] To some observers, though, the *Koontz*

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payment of a fee for mitigation and not in demanding that the applicant pay to complete that mitigation herself is not altogether evident. *See* SELMI ET AL., *supra* note 45, at 169. Meanwhile, Saxer's approach also poses the evidentiary difficulty of a plaintiff mounting a case that a monetary exaction actually is "designed to replace a physical exaction"—or, more appropriately following the burden-of-proof allocation underpinning *Nollan* and *Dolan*, a state defendant proving the negative. Saxer, *supra* note 106, at 111.

108. It admittedly is not always evident whether a specific exaction should be deemed administrative or legislative. For a prominent example, compare Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 468 (7th Cir. 1988) (concluding that a city council's rejection of a site plan application over the recommendation of the city's planning commission was legislative), with Richard A. Epstein, Coniston Corp. v. Village of Hoffman Hills: *How to Make Procedural Due Process Disappear*, 74 U. CHI. L. REV. 1689, 1697-98 (2007) (asserting that Judge Posner's classification of the governmental decision in *Coniston Corp.* as legislative was "astonishing" and "wholly unconvincing," and "takes the common deferential stance in land use to new heights"). *See also* B.A.M. Dev. v. Salt Lake County, 87 P.3d 710, 728 n.23 (Utah Ct. App. 2006) ("[S]ome exactions are somewhere in the middle of adjudicative and legislative because the legislature [may give] some guidelines, [while] the administrative body retains considerable discretion as well." (alterations in original) (internal quotations omitted) (quoting Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 266 (2000))). The discussion in the text does not address precisely where to draw the line between administrative and legislative exactions, but instead operates on the assumption that at least some government acts fall into each category. On the difficulty of line drawing in this space, see, for example, Fennell & Peñalver, *supra* note 4, at 314-17, 342-46; *see also* Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist., 388 P.3d 753, 758 (Utah 2016) ("The threshold question of whether the District's impact fee regime was *legislatively* adopted is a difficult one.").

109. These petitions include Alto Eldorado P'ship v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011), *cert. denied*, 565 U.S. 880 (2011); Mead v. City of Cotati, No. 09-15005, 2010

Court established momentum toward rejecting the legislative-administrative distinction down the line.[110]

WL 2931431 (9th Cir. July 22, 2010), *cert. denied*, 563 U.S. 1007 (2011); McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009); Nat'l Ass'n of Home Builders of the United States v. Chesterfield County, 92 F.3d 1180 (4th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997); Ehrlich v. City Of Culver City, 911 P.2d 429 (Cal. 1994), *cert. denied*, 519 U.S. 929 (1996); Action Apartment Ass'n v. City of Santa Monica, 166 Cal. Rptr. 3d 722 (Ct. App. 2008), *cert. denied*, 556 U.S. 1237 (2009); Agencia La Esperanza Corp. v. Orange Cnty. Bd. of Supervisors, No. G027288, 2002 WL 681798 (Cal. Ct. App. May 22, 2002), *cert. denied*, 538 U.S. 916 (2003); Schaumburg v. Amoco Oil Co., 661 N.E.2d 380 (Ill. App. Ct. 1996), *cert. denied*, 519 U.S. 976 (1996); New York v. Manocherian, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); Long Clove, LLC v. Town of Woodbury, 795 N.Y.S.2d 458 (App. Div. 2005), *cert. denied*, 546 U.S. 1215 (2006); Rogers Mach. Co. v. Washington County, 45 P.3d 966 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003); Drebick v. City of Olympia, 126 P.3d 803 (Wash. 2006), *cert. denied*, 549 U.S. 988 (2006). The petition in San Remo Hotel, L.P. v. City & County of San Francisco sought review on several questions, including whether legislatively imposed exactions should be scrutinized under the *Nollan* and *Dolan* standards. 364 F.3d 1088 (9th Cir. 2004), *cert. granted*, 543 U.S. 1032 (2005). While the Court granted that petition, it did so only to address a question surrounding issue preclusion in federal court when a state court previously ruled on a takings claim under state constitutional law. *See id.* The Court has denied two such petitions since *Koontz*. *See* Cal Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016); 616 Croft Ave., LLC, v. City of West Hollywood, 207 Cal. Rptr. 3d 729 (Ct. App. 2016), *cert. denied*, 138 S. Ct. 377 (2017).

110. *See* Marc J. Herman, *The Continuing Struggle Against Government Extortion, and Why the Time Is Now Right to Employ Heightened Scrutiny to All Exactions*, 46 URB. LAW. 655, 673 (2014) ("[I]n its most recent takings decision, *Koontz v. St. Johns River Water Management District*, the Supreme Court has implicitly signaled that both legislative and adjudicative exactions are deserving of heightened scrutiny."); Elizabeth Tisher, *Land-Use Regulation After* Koontz*: Will We "Rue" the Court's Decision?*, 38 VT. L. REV. 743, 767 (2014) ("[T]he [*Koontz*] Court impliedly extended *Nollan* and *Dolan* analysis to legislative exactions by abrogating *McClung* and by not qualifying its holding that monetary exactions are subject to heightened scrutiny."). There is a subliminal, if far-fetched, interpretive argument to support this position. At issue in the oft-discussed California case of *Ehrlich v. City of Culver City* was Culver City's conditioning the approval of a re-zoning request on a recreation mitigation fee imposed ad hoc and an "in-lieu" fee imposed pursuant to the city's "art in public places" ordinance. 911 P.2d 429, 435 (Cal. 1996). The California Supreme Court found *Nollan* and *Dolan* applicable to the former, but not the latter. *Id.* at 439, 450. One could contend that *Koontz* was signaling its disapproval of *Ehrlich's* legislative-administrative distinction by citing *Ehrlich* as a case holding that *Nollan* and *Dolan* can apply to fees (in addition to dedications of land), *see* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 603 (2013), but, later in the opinion, only citing cases applying *Nollan* and *Dolan* to legislative exactions—and thus declining to include *Erhlich*—when asserting that state courts in the most populous states have applied *Nollan* and *Dolan* to fees without the "significant practical harm" forecasted by the dissent. *Id.* at 618.

*2. Movement Post-*Koontz

Eight of the ten courts to address the issue since *Koontz* have affirmatively declined to extend *Nollan* and *Dolan* to permit conditions imposed via generally applicable legislation. In the above-referenced case of *Willie Pearl*, an Illinois appellate panel explained that a city ordinance requiring the payment of all municipal debts prior to receipt of any land use approval "is ... not the sort of *ad hoc* demand contemplated in *Koontz*, but simple compliance with a straightforward ordinance."[111] Seven other courts have said the same of generally applicable ordinances, including those requiring developers to assure that a set percentage of units in residential complexes are affordable for low-income families;[112] establish a buffer between all development and "critical areas," including wetlands;[113] pay school and transportation impact fees on a predetermined schedule;[114] conduct traffic studies and ensure that the development will not exceed existing carrying capacity when completed;[115] confirm that all new development connects to water reuse systems;[116] and display art on the premises or contribute funds to city arts projects.[117]

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111. Willie Pearl Burrell v. City of Kankee, 56 N.E.3d 1067, 1079 (Ill. App. Ct. 2016). *But see* David L. Callies & Christopher T. Goodin, *The Status of* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard *After* Lingle v. Chevron U.S.A., Inc., 40 J. MARSHALL L. REV. 539, 599 n.196 (2007) (suggesting that Illinois rejects the legislative-administrative distinction).

112. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 991 (Cal. 2014); 2910 Georgia Ave. LLC v. D.C., 234 F. Supp. 3d 281, 305 (D.D.C. 2017).

113. Common Sense All. v. Growth Mgmt. Hearings Bd., Nos. 7-2235-2-I, 7-2236-1-I, 2015 WL 4730204, at *7 (Wash. Ct. App. Aug. 10, 2015).

114. Dabbs v. Anne Arundel County, 182 A.3d 798, 813 (Md. 2018), *cert. denied*, No. 18-54, 2018 WL 3377873 (Oct. 1, 2018) ("Impact fees imposed by legislation applicable on an area-wide basis are not subject to *Nollan* and *Dolan* scrutiny.").

115. Golf Course Assoc., LLC v. New Castle County, No. 15A-02-007JAP, 2016 WL 1425367, at *2, *18 (Del. Super. Ct. Mar. 28, 2016) ("[T]he unconstitutional exactions doctrine should not be applied here.... [T]he exaction must come in the form of a demand arising from an administrative requirement particular to the requested land use permit.... In this case there is a statutory scheme applicable to all property owners in the county.").

116. Highlands-in-the-Woods, LLC v. Polk County, 217 So. 3d 1175, 1180 (Fla. Dist. Ct. App. 2017).

117. Bldg. Indus. Ass'n v. City of Oakland, 289 F. Supp. 3d 1056, 1059 (N.D. Cal. 2018). Powell v. County of Humboldt, 166 Cal. Rptr. 3d 747, 749-50 (Ct. App. 2014) involved an ordinance requiring all owners within a one-mile radius of an airport to grant airspace easements to receive a building permit. The trial court had rejected application of *Nollan* and

Each of these opinions rested its holding on some iteration of the following two-part doctrinal argument: (1) the takings disputes in *Nollan, Dolan*, and *Koontz* involved individual judgments about the applicability of those policies to particular parcels;[118] and (2) the Supreme Court's repeated reference to *Nollan* and *Dolan* scrutiny as applying to "adjudicative decisions"[119] indicates that such scrutiny is not relevant in takings suits involving exactions that are part of a community-wide plan and broadly applicable.[120] If more

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Dolan to legislative exactions. *Id.* at 752. This court, though, rejected the landowner's claim because the demand fell outside the permitting context and did not meet the threshold requirement that the condition would amount to a taking. *Id.* at 757-58. Therefore, the court did not reach the legislative-administrative question. *Id.* at 763 n.14. ("We do not reach the trial court's additional ground for ruling in favor of the County—that the *Nollan* and *Dolan* analysis applies only to discretionary, adjudicatory impositions of exaction conditions, not to exactions applied to all similarly situated property owners on an identical, nondiscretionary basis by legislative enactment.").

118. *See Bldg. Indus. Ass'n*, 289 F. Supp. 3d at 1056; Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 974 (Cal. 2015); *Golf Course Assoc.*, 2016 WL 1425367, at *1; *Highlands-in-the-Woods*, 217 So. 3d at 1175; Willie Pearl Burrell v. City of Kankakee, 56 N.E.3d 1067, 1067 (Ill. App. Ct. 2016); *Dabbs*, 182 A.3d at 801-02; *Common Sense All.*, 2015 WL 4730204, at *1. The City of San Jose and a group of interveners recently set out this position in opposing a developer's petition for a writ of certiorari in *California Building Industry Association*. *See* City of San Jose's Answer Brief on the Merits at 46-48, *Cal. Bldg. Indus. Ass'n*, 351 P.3d 974 (Cal. 2015) (No. 5212072); Defendant-Appellant Intervener's Answer Brief on the Merits at 38, *Cal. Bldg. Indus. Ass'n*, 351 P.3d 974 (Cal. 2015) (No. S212072).

119. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 546 (2005) ("Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit."); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) ("[H]ere the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."); *see also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) (Kennedy, J., plurality) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.").

120. *Bldg. Indus. Ass'n*, 289 F. Supp. 3d at 1059; *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 991; *Golf Course Assoc.*, 2016 WL 1425367, at *18; *Highlands-in-the-Woods*, 217 So. 3d at 1180; *Willie Pearl*, 56 N.E.3d at 1079; *Dabbs*, 182 A.3d at 813; *Common Sense All.*, 2015 WL 473032 at *7. Some scholars have offered the counter view that the Court's references to "adjudicative decisions" distinguishes not between different types of exactions but only between large-scale regulatory mechanisms, such as zoning, and smaller-scale regulatory mechanisms, such as exactions. *See* James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 405-07 (2009); Steven J. Eagle, Del Monte Dunes*, Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100, 10103-05 (2000); Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1861 (2010); *see also* J. David Breemer, *The Evolution of the "Essential Nexus": How State and*

implicit, the decisions also leaned on the normative view that the state is significantly less likely to take inappropriate advantage of the leverage provided by a development application in the legislative context than in the adjudicative one.[121] Several reasons underlie this assessment. First, legislative decisions usually are devised by the most high-ranking government officials through a more transparent process with more political checks and balances than those reached administratively.[122] Suspicions can arise where discussions surrounding the parameters of individual permits are conducted behind closed doors and anchored by relatively lower-level permitting officials.[123] Second, the generality of a legislative act helps ensure some measure of reciprocal advantage.[124] Third, exposing legislative exactions to *Nollan* and *Dolan* scrutiny could put the judiciary in the position of regularly micromanaging local governments' fiscal decisions and thereby stifle municipalities' abilities to make responsible roadway, utility, and other plans for the future.

Federal District Court Judge Charles Breyer authored the only two post-*Koontz* decisions to reject the legislative-administrative distinction in the exactions context. In the first, *Levin v. City & County of San Francisco*, Judge Breyer offered two doctrinal reasons to subject to *Nollan* and *Dolan* scrutiny a San Francisco ordinance requiring all landlords who withdraw rent-controlled properties

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Federal Courts Have Applied Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 401-02 (2002); Callies & Goodin, *supra* note 111, at 563-64; Christopher T. Goodin, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference,"* 28 U. HAW. L. REV. 139, 158-67 (2005).

121. This paragraph draws in part from Mulvaney, *supra* note 31, at 149-51.

122. *See, e.g.*, Echeverria, *supra* note 4, at 55.

123. *See* Karl Manheim, *Rent Control in the New* Lochner *Era*, 23 UCLA J. ENVTL. L. & POL'Y 211, 255 (2005); David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 NOTRE DAME L. REV. 717, 761 (1999).

124. *See* Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 39 (2004) (suggesting that applicants tasked by administrators with abiding by certain permit conditions "are without power to 'protect themselves through the political process [by] engaging in logrolling to ensure that they do not receive an unfair share of the public's burden'").

from the rental market to pay their displaced tenants money that those tenants presumably would put toward relocation.[125]

First, he contended that *Koontz* instructed as much. *Koontz*, Judge Breyer explained, found it meaningful that the Water Management District's demand for money "'operated[d] upon ... an identified property interest by directing the owner of a particular piece of property to make a monetary payment."[126] Judge Breyer interpreted this statement from *Koontz* to mean that *Nollan* and *Dolan* apply in *every* case in which a property owner "wishing to make a different use of a property ... must apply to the City for a permit to do so."[127]

To assert that *Koontz* decided the issue cuts against the near universal assessment by takings scholars in *Koontz*'s immediate wake that the Court—through its repeated references to Koontz's "specific" parcel and the Water Management District's "discretion"—did no such thing.[128] Moreover, that the Court left the

125. 71 F. Supp. 3d 1072, 1072 (N.D. Cal. 2014) (arguing that *Koontz* overrules *McClung* (rejecting the application of *Nollan* and *Dolan* to legislative exactions) and *Garneau* (rejecting facial *Nollan* and *Dolan* challenges)).

126. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 613 (2013).

127. *Levin*, 71 F. Supp. 3d at 1082-83 ("[H]ere the Ordinance's requirement of a monetary payment is directly linked to a property owner's desire to change the use of a specific, identifiable unit of property.").

128. *See* David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 48-51 (2014); Glen Hansen, *Let's Be Reasonable: Why Neither* Nollan/Dolan *nor* Penn Central *Should Govern Generally-Applied Legislative Exactions After* Koontz, 34 PACE ENVTL. L. REV. 237, 239-40 (2017). Prior to *Koontz,* some scholars contended that the Court had effectively already deemed the legislative-administrative distinction irrelevant given that the exactions at issue in *Nollan* and *Dolan* are themselves most appropriately classified as legislative exactions. *See* J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. ENVTL. L. & POL'Y 247, 265 (2004) (discussing *Dolan* and *Nollan*); Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 513, 539-40 (1995) (discussing *Dolan*); Kent, *supra* note 120, at 1861 (discussing *Dolan*); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1040-41 (1997) (discussing *Dolan*); Deborah M. Rosenthal, Commentary, Nollan, Dolan *and the Legislative Exception*, 66 PLAN. & ENVTL. L. 4, 4-5 (discussing *Dolan*, *Nollan*, and *Koontz*). For a particularly thorough discussion on the *Dolan* Court classifying the exaction before it as "adjudicative," see Stephen M. Johnson, *Avoid, Minimize, Mitigate: The Continuing Constitutionality of Wetlands Mitigation After* Dolan v. City of Tigard, 6 FORDHAM ENVTL. L.J. 689, 720 n.172 (1995) (explaining that while city policy required only that developers provide "sufficient open space"—a legislatively stated aim that officials met by determining in individual cases the amount and location of the land to be dedicated—the Supreme Court found constitutionally

question undecided in *Koontz* has since been confirmed doctrinally by five Justices who participated in the case. The four-Justice dissent in *Koontz*—authored by Justice Kagan and joined by Justices Breyer, Ginsburg, and Sotomayor—claimed that the majority had left open whether *Nollan* and *Dolan* scrutiny applied to legislative exactions,[129] and Justice Thomas—who joined the *Koontz* majority—later corroborated this claim. In a statement concurring in the denial of certiorari in *California Building Industry Ass'n*, Justice Thomas wrote: "Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively."[130]

Second, in *Levin*, Judge Breyer justified applying *Nollan* and *Dolan* by pointing to the Ninth Circuit's decision in *Horne v. U.S. Dep't of Agriculture*, which had applied *Nollan* and *Dolan* to a marketing order that required raisin growers to deliver to the state a certain percentage of their crop so that the state could keep the market afloat.[131] However, *Horne* did not discuss *Koontz* or raise the legislative-administrative distinction in any capacity. More threatening to this doctrinal analogy, though, the Supreme Court reversed the Ninth Circuit's *Horne* decision after Judge Breyer decided *Levin* in 2014, concluding—for better or for worse—that the case involved not a traditional regulatory takings or exaction takings claim, but a physical takings claim.[132]

Given the doctrinal developments since *Levin*, one might expect that Judge Breyer would have reacted accordingly moving forward.

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infirm not the amount or location of the dedication required of Dolan, but the legislative requirement that Dolan and other applicants dedicate any land at all (quoting Dolan v. City of Tigard, 114 S. Ct. 2309, 2314 (1994))).

129. *See Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) ("Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish.... 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 .... Maybe today's majority opinion accepts that distinction; or then again, maybe not.").

130. 136 S. Ct. 928, 928-29 (2016) (Thomas, J., concurring in the denial of certiorari).

131. *See* 135 S. Ct. 2419, 2433-36 (2015).

132. *See id.* For an especially insightful critique of *Horne*'s conclusion that the regulation at issue should be subjected to a physical takings analysis, see Lynda L. Butler, *The* Horne *Dilemma: Protecting Property's Richness and Frontiers*, 75 MD. L. REV. 787 (2016).

Surprisingly, though, he continued on the course he charted in *Levin* in a separate case *after* Justice Thomas issued his concurrence in the denial of certiorari in *California Building Industry Ass'n* and the Supreme Court decided *Horne*. In his November 2016 decision in *Ophca, LLC v. City of Berkeley*, Judge Breyer, without explanation, subjected to a facial *Nollan* and *Dolan* challenge a generally applicable ordinance requiring payment of an impact fee to offset the loss of affordable housing from the demolition of residential buildings.[133]

The City of San Francisco ultimately repealed and redrafted the ordinance at issue in *Levin* and therefore voluntarily agreed with the plaintiffs to dismiss its appeal. Though Judge Breyer denied the city's motion to vacate the district court's judgment in light of this settlement, it appears that the doctrinal arguments on which *Levin* and *Ophca* rested are no longer in play.

Several pre-*Koontz* lower court cases—most often the Texas Supreme Court's decision in *Town of Flower Mound v. Stafford Estates*[134] and the Ohio Supreme Court's decision in *Homebuilders Ass'n of Dayton and Miami Valley v. City of Beavercreek*[135]—regularly are attributed by jurists and scholars alike with having rejected the legislative-administrative distinction in a matter akin

133. No. 16-CV-3046CRB, 2016 WL 6679560, at *1 (N.D. Cal. Nov. 14, 2016). Judge Breyer rejected this facial claim on the merits, on the ground that there were conceivable applications of the ordinance that would comply with *Nollan* and *Dolan*, unlike, in his view, any applications of the ordinance at issue in *Levin* (which he had deemed facially unconstitutional). *Id.* at *4. He found the *Ophca* claimants' applied challenge as unripe, since city officials had not yet calculated the fee for their respective development projects. *Id.* Three courts did not discuss the threshold issue of whether to distinguish legislative from administrative exactions and moved directly to the question of whether *Nollan* and *Dolan* scrutiny is applicable to facial, as well as as-applied, challenges. Two of these three courts declined to apply *Nollan* and *Dolan* to facial challenges of legislative exactions. *See* Koontz Coal. v. City of Seattle, No. C14-0218JLR, 2014 WL 5384434 (W.D. Wash. Oct. 20, 2014) (involving an ordinance requiring the payment of "in lieu" fees where development will exceed footprint authorized in zoning code); Olympic Stewardship Found. v. State, 399 P.3d 562 (Wash. Ct. App. 2017) (involving an ordinance requiring coastal development to respect a 150 foot shoreline buffer and provide public access easements). The other case involved an as-applied challenge that the court denied on the merits. *See* Webster Assocs., LLC v. Cromwell Planning and Zoning Comm'n, No. CV146055771, 2015 WL 10353111 (Conn. Sup. Ct. Dec. 18, 2018) (involving an ordinance conditioning subdivision permits to reduce lot sizes on preservation of a percentage of each subdivided parcel for open space).

134. 71 S.W.3d 18 (Tex. App. 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004).

135. 729 N.E.2d 349 (Ohio 2000).

to Judge Breyer's opinions in *Levin* and *Ophca*.[136] In dissenting from the denial of certiorari in *California Building Industry Ass'n v. City of San Jose* in 2016, Justice Thomas pointed to *Homebuilders Ass'n of Dayton* as evidence of a lower court conflict that "shows no signs of abating."[137] However, the claim that a lower court conflict exists is, at best, remarkably overstated.

Consider, first, *Town of Flower Mound*.[138] The case involved two local ordinances.[139] The first required developers to assure that streets abutting residential subdivisions conform to minimum safety standards,[140] which included, among others, the requirement that adjacent and connector streets be constructed with concrete.[141] The Town approved a 247-unit site plan submitted by a development company, Stafford Estates, on the condition that the company fund the replacement of the asphalt on an adjacent street with concrete.[142] The second ordinance authorized the Town to grant exceptions to its street standards in instances of developer hardship.[143] The Town denied Stafford's request for such an exception in this instance.[144] Stafford objected to the condition throughout the permitting process and, after obtaining its plat approvals and completing

136. *See* Wake & Bona, *supra* note 3, at 556-57 n.102; Benjamin S. Kingsley, Note, *Making It Easy to Be Green: Using Impact Fees to Encourage Green Building*, 83 N.Y.U. L. Rev. 532, 560 (2008); Lauren Reznick, Note, *The Death of* Nollan *and* Dolan*? Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron*,* 87 B.U. L. Rev. 725, 740-41 n.126 (2007).

137. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in the denial of certiorari).

138. 71 S.W.3d 18 (2002).

139. *Id.* at 24.

140. *Id.* at 24-25 n.1 ("Section 4.04(o) [sic] provides as follows ... Where a subdivision or industrial area abuts a street that does not meet the minimum design standards of this section, the following shall apply. (1) Local and collector streets. Abutting substandard local and collector streets shall be constructed or reconstructed as necessary by the developer to bring them up to minimum standards, and all right-of-way from the centerline of such roadway necessary to meet minimum right-of-way requirements dedicated to the Town, with no cost participation from the Town. The Federal Government, the State of Texas, and political subdivisions of the State of Texas may be exempt from the provisions of this requirement.").

141. *Id.* at 24 (citing section 4.04(b)).

142. *Id.* at 25.

143. *Id.* at 25 n.2 ("The Town Council may grant an exception to the street design standards as contained in this section, provided that the Council finds and determines that such standards work a hardship on the basis of utility relocation costs, right-of-way acquisition costs, and other related factors." (quoting section 4.04(a))).

144. *Id.* at 25.

the asphalt-to-concrete improvements, filed an exaction takings claim against the Town.[145]

In dicta, the Texas Supreme Court asserted that while "an ad hoc decision is more likely to constitute a taking than general legislation,"[146] a government entity conceivably "could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others."[147] However, the court did not find it necessary to reach a decision on the legislative-administrative distinction.[148] Instead, it found that the second ordinance operated to make the Town's implementation of the first ordinance administrative in nature, in that it required the Town to take into account the development company's individual circumstances in considering the company's request for an exception.[149] For this reason, the court concluded that there was "no meaningful distinction between the conditions imposed on Stafford and the conditions

145. The Town unsuccessfully argued that, on public policy grounds, Stafford should be precluded from suing after obtaining its development approval and rebuilding Simmons Road. *Id.* at 25. *Town of Flower Mound,* and an appellate decision based thereon, *Sefzik v. City of McKinney*, 198 S.W.3d 884, 894 (Tex. App. 2006) (holding that landowner signing a "Facilities Agreement" with the government did not bar a later takings claim), apparently are distinguishable from *Rischon Development Corp. v. City of Keller*, where the court dismissed a takings suit in which the claimant did not raise objections until after the government granted the requested approval and he signed a developer agreement with the government. 242 S.W.3d 161, 168 (Tex. App. 2007).

146. Town of Flower Mound v. Stafford Estates P'ship, 135 S.W.3d 620, 640-41 (Tex. 2004).

147. *Id.* at 641. One year after *Town of Flower Mound*, the Texas Legislature codified certain parts of the decision and modified or expanded others. *See* TEX. LOC. GOV'T CODE ANN. § 212.904 (West 2005) (legislative history available at www.capitol.state.tx.us under House Bill 1835 (79th Leg.-2005)). While the statute alters certain aspects of *Flower Mound*, namely the timing of a "rough proportionality" analysis and the recoverability of attorney's fees upon certain successful exaction takings claims, it does not shed any light on the legislative-administrative distinction. *See* Susan Alleman et al., Platting and Proportionality: A Practical Look at Tex. Loc. Gov't Code Sec. 212.904, Address at 2010 Land Use Conference (Mar. 25-26, 2010) (transcript available at https://www.wcglaw.com/assets/docs/publications/Platting% 20and%20Proportionality.pdf [https://perma.cc/K6KP-995R]).

148. *Town of Flower Mound*, 135 S.W.3d at 642 (stating that "we need not and do not decide" the issue).

149. *Id.* at 641-42; *see also* Hansen, *supra* note 128, at 272 (suggesting that *Nollan* and *Dolan* should apply where administrators exercise "substantial discretion" to "subjectively exempt[]" individual applicants from otherwise broadly applicable requirements).

imposed on Dolan and the Nollans," such that the heightened scrutiny of *Nollan* and *Dolan* applied.[150]

Homebuilders Ass'n of Dayton involved a generally applicable roadway impact fee ordinance.[151] The court confusingly asserted that the "dual rational nexus test ... based on the *Nollan* and *Dolan* cases" applied.[152] It required that the state demonstrate a "rational nexus"—or, as the court would later describe it, a "reasonable relationship"—between both (a) "the city's interest in constructing new roadways and the increase in traffic generated by new developments," and (b) "the impact fee imposed by [the city] and the benefits accruing to the developer from the construction of new roadways."[153] This course diverts from that charted in *Nollan* and *Dolan* in two important ways. First, *Nollan* and *Dolan* are concerned not with the benefits that might incur from the exaction to the applicant's benefit, but instead with whether the exaction is connected to, and does no more than offset, the harms the approved development will impose.[154] Second, the "rational nexus"/"reasonable relationship" standard employed by the Ohio court is one *Dolan* explicitly rejected as too lenient.[155] Indeed, in applying this test, the Ohio court specifically relieved the city from having to conduct the individualized determination that *Dolan* commands.[156] As the

150. *See Town of Flower Mound*, 135 S.W.3d at 641. At least one Texas appellate court has incorrectly interpreted *Flower Mound* as rejecting the legislative-administrative distinction wholesale. *See* Mira Mar Dev. Corp. v. City of Coppell, 364 S.W.3d 366, 374 (Tex. App. 2012), *aff'd in part, rev'd in part*, 412 S.W.3d 74 (Tex. App. 2013). At issue in *Mira Mar* was a City of Coppell ordinance that (i) compelled the dedication of one acre of land per 100 developed dwelling units for use as a public park, *or* (ii) required a set fee per dwelling unit in lieu thereof (to be earmarked for the purchase of park property nearby) when development will result in fewer than 100 residential units. *Id.* at 386. An appellate court subjected Coppell's in lieu fee to a *Dolan* analysis; ironically, the City had significantly *reduced* the in lieu fee for this particular claimant. *Id.* at 386-87. The court also subjected to *Nollan* and *Dolan* scrutiny the City's application of a similar tree preservation ordinance and a water-bacteria testing ordinance. *Id.* at 387-88 ("The City did not show that the removal of trees in the development would harm the air quality, increase noise and glare, remove ecosystems, bring down property values, or reduce the other benefits of trees described in the ordinance."); *id.* at 390.

151. 729 N.E.2d 349, 353 (Ohio 2000).

152. *Id.* at 356.

153. *Id.*

154. *See* Dolan v. City of Tigard, 512 U.S. 374, 394 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837-39 (1986).

155. *Dolan*, 512 U.S. at 391.

156. *Id.* ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and

Oregon Supreme Court would later remark on *Homebuilders Ass'n of Dayton*, the Ohio Supreme Court "did not seem to adhere to [the *Nollan* and *Dolan*] test in its analysis," for it "made no individualized assessment of proportionality at all but instead reviewed the legislation from a facial perspective as it applied to developers generally."[157]

3. Summary

There are some pragmatic considerations that suggest caution in recognizing the legislative-administrative distinction in the exactions context. For one, doing so could trigger a marked shift in land use policy toward inflexible legislative measures to avoid the heightened scrutiny of *Nollan* and *Dolan*.[158] This shift could have serious social implications, for administrative acts are more amenable to addressing the heterogeneous impacts of a given development project and affording important attention to the affected parties' personal, social, political, and economic identities.[159] For another, while current condemnation and regulatory takings jurisprudence afford broad deference to both legislative and administrative acts, conceiving of administrative acts in the exactions context as constitutionally suspect could have "spillover effects" in the myriad condemnation and regulatory takings contexts involving administrative acts unrelated to exactions.[160] On the whole, though, the foregoing analysis suggests that it is rather unsurprising that most every jurisdiction to have addressed the issue in the exactions context recognizes the legislative-administrative distinction in at least some regard.[161]

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extent to the impact of the proposed development.").

157. Rogers Mach., Inc. v. Washington County, 45 P.3d 966, 978 n.13 (Or. Ct. App. 2012).

158. Mulvaney, *supra* note 31, at 142.

159. *Id.*; *see also* Nolon, *supra* note 93, at 570 (praising "contingency bargaining" for its ability to "accommodate uncertainty in ways that regulation cannot").

160. Mulvaney, *supra* note 31, at 141.

161. At least three circuit courts (the Fifth, Ninth, and Tenth) and state courts in ten states (Alabama, Arizona, California, Colorado, Delaware, Georgia, Kansas, Minnesota, Washington, and Wisconsin) have recognized the distinction. *See* Alto Eldorado v. County of Santa Fe, 634 F.3d 1170, 1179 (10th Cir. 2011); McClung v. City of Sumner, 548 F.3d 1219, 1227-28 (9th Cir. 2008); Tex. Manufactured Hous. Ass'n v. City of Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996); Harris v. Wichita, 862 F. Supp. 287, 294 (D. Kan. 1994); Home Builders Ass'n of Cent.

Select cases beyond *Town of Flower Mound* and *Homebuilders Ass'n of Dayton* arguably could be interpreted as supporting the legislative-administrative distinction.[162] However, the insinuation that there was a fairly even split across the lower courts pre-*Koontz* is unsupportable, and *Koontz*, to date, has not prompted lower courts to alter course.

C. "Concrete and Specific" Demands

1. Issue

The majority and dissent in *Koontz* agreed that the *Nollan* and *Dolan* standards apply not only when the state actually imposes subject conditions through an issued permit, but also when the state denies a permit application after proposing such conditions to which the applicant refuses to accede.[163] However, *Koontz* explained that proposed exactions only trigger *Nollan* and *Dolan* review where they

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Ariz. v. City of Scottsdale, 930 P.2d 993, 999-1000 (Ariz. 1997); Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 65-66 (Ct. App. 2001); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001); Wolf Ranch, LLC v. City of Colorado Springs, 207 P.3d 875, 880-81 (Colo. App. 2008), *aff'd*, 220 P.3d 559 (Colo. 2009); Greater Atlanta Homebuilders Ass'n v. DeKalb County, 588 S.E.2d 694, 697 (Ga. 2003); Parking Ass'n of Ga. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994); Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 285-86 (Minn. Ct. App. 1996); W. Linn Corp. Park v. City of West Linn, 240 P.3d 29, 45 (Or. 2010); Dudek v. Umatilla County, 69 P.3d 751, 756 (Or. Ct. App. 2003); Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Recreation Dist., 62 P.3d 404, 408-10 (Or. Ct. App. 2003); City of Olympia v. Drebick, 126 P.3d 802, 808 (Wash. 2006); Wis. Builders Ass'n v. Wis. Dep't of Transp., 702 N.W.2d 433, 446-48 (Wis. Ct. App. 2005); *see also* Curtis v. Town of South Thomaston, 708 A.2d 657, 660 (Me. 1998) (asserting that the legislative nature of an exaction is just one factor in determining whether the *Nollan* and *Dolan* tests apply).

162. *See* Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 483 (N.Y. 1994); B.A.M. Dev., LLC v. Salt Lake County, 87 P.3d 710, 714-15 (Utah Ct. App. 2004); Trimen Dev. Co. v. King County, 877 P.2d 187, 194-95 (Wash. 1994).

163. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 607 (2013) ("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."); *see id.* at 619-20 (Kagan, J., dissenting) ("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).").

reflect a sufficiently "concrete and specific ... demand."[164] Justice Alito's majority opinion noted that the Florida Supreme Court had not reached this question of "whether respondent issued a demand of sufficient concreteness to trigger" *Nollan* and *Dolan* review.[165] He explained that, therefore, the Court had "no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*."[166] Justice Alito wrote that "the issue remains open on remand for the Florida Supreme Court to address."[167]

2. Movement Post-Koontz

The Florida Supreme Court ultimately remanded the matter to the state appellate court.[168] Puzzlingly, the appellate court did not address whether the state had issued a concrete and specific demand.[169] Instead, it simply "reaffirm[ed]" its original decision that Koontz is entitled to just compensation for an unconstitutional taking on the grounds that "[t]he constitutional issues decided by the United States Supreme Court were fully briefed here, and that Court's holding does not set forth a new legal construct with which we must re-analyze these issues."[170] The threshold problem with the appellate court's conclusion—that all nine Justices on the Supreme Court agreed that no compensable taking had occurred here—will be addressed in the discussion on remedies below.[171] The more specific problem, on which this Section concentrates, is that, in *Koontz*, the Supreme Court for the first time deemed *Nollan* and *Dolan* applicable to the subset of proposed demands that are sufficiently concrete and specific. Whether one terms this a "new legal construct"

164. *Id.* at 610 (majority opinion); *see also id.* at 619 (Kagan, J., dissenting) (questioning "whether the government here imposed any condition at all"); *id.* at 621 ("St. Johns River Water Management District ... never demanded *anything* (including money) in exchange for a permit.").

165. *See also id.* at 610 (majority opinion) (finding it unnecessary to address the State's claim that "its demands for property were too indefinite to give rise to liability under *Nollan* and *Dolan*").

166. *Id.*

167. *Id.*

168. *See* St. Johns River Water Mgmt. Dist. v. Koontz, 183 So. 3d 396, 398 (Fla. Dist. Ct. App. 2014).

169. *Id.*

170. *Id.*

171. *See infra* Part II.D.

or not, the concrete and specificity question seems one on which every court addressing a proposed exaction claim must opine moving forward absent a state concession on the point.

Contrary to the Floridian appellate court's decision on remand in *Koontz*, a Delaware court recently attended to the issue of the concreteness and specificity of a state demand in *Golf Course Associates v. New Castle County*.[172] The *Golf Course Associates* court asserted that *Koontz* "can only be read as acknowledging the necessity of a demand; otherwise there would be no need to remand for a determination of whether it was of 'sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*.'"[173] In this case, a development company realized that its subdivision would create a traffic problem, so it offered to fund a $1.1 million improvement project.[174] Under the county's development code, the county could not approve a "Record Plan" of development without assuring that infrastructure necessary to support the proposed development already existed or would exist by the time the development project is completed.[175] In this regard, the code required an applicant to submit a traffic impact study, on which the state's Department of Transportation would provide comments to the county.[176] Here, the Department of Transportation concluded that the proposed development would not meet the county's development code "level of service" standards without a $3.5 million improvement project.[177] It consented, though, to accept the applicant's offered $1.1 million contribution toward that $3.5 million project *if and when* the state ever undertook it.[178] The county then denied the company's subdivision permit application because the traffic issue was not definitively resolved.[179]

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172. No. 15A-02-007JAP, 2016 WL 1425367, at *16-17 (Del. Super. Ct. Mar. 28, 2016).

173. *Id.* at *16 (quoting Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 610 (2013)). The court continued, "The proposition that there must be a 'demand' is reinforced by the *Koontz* majority's repeated references to the extortionate nature of the government's demand.... These repeated references to extortion are pertinent here because they demonstrate that a demand is essential to an unconstitutional exactions claim." *Id.* at *16-17.

174. *Id.* at *4.

175. *Id.* at *1-2.

176. *Id.* at *3-4.

177. *Id.* at *4.

178. *Id.*

179. *Id.* at *5.

The company alleged that the state agency's preference for the more expensive maybe-we-will-construct-it improvement, though not requiring additional monies from the company, constituted an exaction taking.[180] While the company did not frame it in these terms, its claim seemingly rested on the following logic: (1) the state asserted that it would only charge the applicant $1.1 million of the anticipated $3.5 million in development impacts, though only if the state decided in the future that it would allow the development and mitigate this harm, and (2) the state thereby implied that, if the company wanted the permit now, it must pay $3.5 million.[181]

In an opinion that an appellate panel later adopted in full,[182] a trial court judge held that the county had not made a "concrete and specific" demand that could be subjected to a *Nollan* and *Dolan* analysis.[183] There are at least two justifications for the Delaware court declining to deem the state as having issued a concrete and specific demand in this scenario. First, judicial speculation on what state conversations with applicants imply poses a wholly unmanageable system that could require courts to review countless cases that do not present actual controversies.[184] Second, burdening governmental entities with possible takings liability for assumed implications will place a chilling effect on regulator-landowner coordination.[185]

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180. *Id.* at *6.

181. *See generally id.*

182. Golf Course Assocs. v. New Castle County, 152 A.3d 581, 581 (Del. 2016) ("[I]t appears to the Court that the judgment of the Superior Court should be affirmed on the basis of and for the reasons assigned in its decision." (referring to *Golf Course Assocs.*, 2016 WL 1425367)).

183. *Golf Course Assocs.*, 2016 WL 1425367, at *16-18.

184. For a fuller recitation of this rationale, see Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277, 304-05 (2011).

185. *See id.* at 308-12. In the only other lower court case to broach the issue since *Koontz, Koontz*'s holding on the concreteness and specificity of a proposed exaction actually came back to haunt a property owner-applicant. Talismanic Props., LLC v. Tipp City, 309 F. Supp. 3d 501, 509-10 (S.D. Ohio 2017), *aff'd*, No. 18-3036, 2018 U.S. App. LEXIS 21129 (6th Cir. July 31, 2018). After negotiating with city officials, the developer agreed to pay the city more than $140,000 for an electrical extension to its proposed subdivision, and these officials agreed on behalf of the city to approve the developer's "final plan" application. *Id.* at 505-06. In the first of two lawsuits, the developer sought reversal of the city's decision to reject an ordinance that would have finalized that agreement. *Id.* at 506. In settling that lawsuit, the city reversed course and approved the ordinance. *Id.* After receiving permission for its final plan via the settlement, the developer sought to challenge that permission's condition—the $140,000 electrical extension fee—as an exaction taking in a second lawsuit. *Id.* at 506-07. The court

3. Summary

While it is possible that the lower courts will follow the Florida appellate court's peculiar course of papering over *Koontz*'s requiring a "concrete and specific" demand to trigger exaction takings review,[186] for the reasons discussed in this Section, it seems probable that, like the Delaware appellate court in the *Golf Course Associates* case, the lower courts will explore whether the requirement is met in a given context.[187]

D. Remedies

1. Issue

The Supreme Court explained in *Koontz* that, because the District never granted the permit with what the Court deemed an unconstitutional condition, nothing had been taken from the claimant.[188] In turn, the remedy mandated by the Fifth Amendment for takings (just compensation) did not apply.[189] The Court asserted, instead, that "[i]n 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."[190] It thus declared that it had "no occasion" to discuss what remedy might be available to Koontz, given that he brought his claim pursuant to a state statutory cause of action.[191]

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held that this claim was barred because the developer should have raised it when she filed the first lawsuit, for by that time the concrete and specific demand already had been proposed in a written and binding form. *Id.* at 509-10 ("Because the City's demand predated Plaintiffs' execution of the electrical extension agreement on August 30, 2013, and Plaintiffs' first lawsuit was commenced approximately one year later in August 2014, the undersigned concludes that Plaintiffs could have, in the first lawsuit, sought just compensation for a taking arising from the City's allegedly excessive fee demand.").

186. *See supra* notes 164-67 and accompanying text.

187. *See supra* notes 172-85 and accompanying text.

188. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 608-09 (2013).

189. *Id.*

190. *Id.*

191. *Id.*

This declaration is difficult to square with Koontz's complaint. The statute on which Koontz relied allows property owners to seek "damages" where a state entity acts in a manner that reflects "an unreasonable exercise of the state's police power *constituting a taking without just compensation*."[192] Florida takings law is quite similar to federal takings law,[193] and the Supreme Court here decided that, under federal constitutional law, nothing had been taken from Koontz.[194] Therefore, it seemingly follows that because no exercise of the state's police power here constituted a taking without just compensation, a damages remedy necessarily is unavailable to Koontz under his state law cause of action.

Interestingly, the *Koontz* dissenters asserted that they agreed with the majority that a condition violative of *Nollan* and *Dolan* should be enjoined, even though the majority reached no such explicit conclusion.[195] No Justice said any more about remedies. In this space, proponents of strong takings protections expressed optimism that *Koontz* could kick-start an expansion of the remedies available in exaction takings cases. For instance, Steven Eagle wrote that "[w]hen providing remedies for its new *Koontz* doctrine of imposing unreasonable burdens on Takings Clause rights, the Court has the opportunity for a new beginning. It could provide for injunctive relief against demands for unreasonable exactions ... with damages for the time the burden was in force."[196] Richard Epstein echoed Eagle's view in noting that "[a]t the very least, a landowner ... should recover damages for economic losses attributable to what is [a] temporary taking of land given that no development could take place."[197]

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192. FLA. STAT. § 373.617(2) (2019) (emphasis added).

193. *See* Chmielewski v. City of St. Pete Beach, 890 F.3d 942, 949 (11th Cir. 2018) ("Because Florida follows federal takings law, we can look to cases brought under the Fifth Amendment to inform our analysis.").

194. *See Koontz*, 570 U.S. at 612.

195. *Id.* at 620 (Kagan, J., dissenting).

196. Eagle, Koontz *in the Mansion*, *supra* note 3, at 31. In *Koontz* itself, the state actually relented on requiring any permit condition at all well before the matter reached the Supreme Court. *See* Petitioner's Reply Brief at 5, Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (No. 11-1447). The landowner's claim before the Supreme Court, therefore, effectively concentrated on the delay in receiving that unconditioned permit.

197. *See* Richard Epstein, Koontz v. St. Johns River Water Management District: *Of Issues Resolved—and Shoved Under the Table*, POINTOFLAW.COM (June 26, 2013, 1:07 PM), http://www.pointoflaw.com/archives/2013/06/koontz-v-st-johns-river-water-management-district-of-

*2. Movement Post-*Koontz

On remand, the Florida appellate court asserted that "[t]he underpinning of Koontz's claim is clearly the Takings Clause."[198] Yet it declined to reopen the briefing and reinstated its earlier holding that "the District had effected a taking" for which it owed just compensation even though the Supreme Court decided in *Koontz* that nothing had been taken.[199] The appellate court reached this holding despite the fact that the violation the Supreme Court had found—an unconstitutional condition that did not amount to a taking—is not one for which Florida's statute awards damages.[200]

Beyond the puzzling *Koontz* remand,[201] the claimant has prevailed in just two of the seven post-*Koontz* exaction takings cases decided on the "nexus" and "proportionality" merits.[202] In these two instances, neither federal district court judge followed the course for which the likes of Eagle and Epstein had called. Rather, while these judges enjoined the imposition of what they deemed unconstitutional conditions,[203] they did not require compensation for the period in which those conditions were in force or order issuance of

issues-resolved--and-shoved-under-the-table.php [https://perma.cc/GWL2-7CMJ]; *see also* Thomas Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630, 1662 (2015) (suggesting that proposed exaction takings cases akin to *Koontz* should be resolved "through an anticipatory declaration of rights").

198. St. Johns River Water Mgmt. Dist. v. Koontz, 183 So. 3d 396, 398 n.2 (Fla. Dist. Ct. App. 2014) (citing *Koontz*, 570 U.S. at 607).

199. St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 10 (Fla. Dist. Ct. App. 2009), *decision quashed*, 77 So. 3d 1220 (Fla. 2011), *rev'd*, 570 U.S. 595.

200. *See Koontz*, 183 So. 3d at 396, 398 n.2.

201. *Id.*

202. *See* Cheatham v. City of Hartselle, No. CV-14-J-397-NE, 2015 WL 897583, at *4-5 (N.D. Ala. Mar. 3, 2015) (holding that a city conditioning a subdivision permit on addressing traffic concerns of a proposed development met the essential nexus test because of a likely increase in traffic, but failed on rough proportionality because the court could only consider the impacts of a small single-home carve out—which was the only part of the proposed development requiring approval—and not the subdivision as a whole); Levin v. City & County of San Francisco, 71 F. Supp. 3d 1072, 1088-89 (N.D. Cal. 2014) (striking down an ordinance requiring all landlords who withdraw rent-controlled properties from the rental market to pay their displaced tenants two years' worth of the difference between rent-controlled and market rents—which they presumably would but need not put towards relocation costs—but leaving open the possibility of conditioning withdrawal of rent-controlled properties on more specific relocation costs clearly caused by the withdrawal).

203. *Cheatham*, 2015 WL 897583, at *6; *Levin*, 71 F. Supp. 3d at 1089.

unconditional permits.[204] Instead, they left it to the state to determine whether to issue a new conditional permit that survived *Nollan* and *Dolan*.[205]

3. Summary

The remedies available to a claimant who prevails in an unconstitutional conditions suit predicated on a failure to meet the exaction takings standards of *Nollan* and *Dolan* is not entirely clear. However, the limited number of post-*Koontz* cases to have reached the remedies issue thus far have rebuffed any expansion-minded efforts.

E. Summary: Potential Extensions Inside the Exaction Takings Context

This Part has suggested that, contrary to the predictions set out by many takings observers in *Koontz*'s immediate wake, the case's footprint on exaction takings doctrine in the lower courts has been quite light to date. By and large, the lower courts citing *Koontz* have narrowly interpreted the class of monetary impositions and "concrete and specific" demands that are subject to *Nollan* and *Dolan* scrutiny; refused to extend *Nollan* and *Dolan* scrutiny to permit conditions stemming from broadly applicable legislation; and, in

204. *Cheatham*, 2015 WL 897583, at *6; *Levin*, 71 F. Supp. 3d at 1088-89.

205. The five cases to have cited *Koontz* in which courts found no exaction taking on the merits include Ophca, LLC v. City of Berkeley, No. 16-cv-3046 CRB, 2016 WL 6679560, at *5 (N.D. Cal. Nov. 14, 2016); White Oak Realty v. Army Corps of Eng'rs, No. A16-1937, 2016 WL 4799101, at *7-8 (E.D. La. Sept. 14, 2016) *aff'd*, No. 17-30438, 2018 WL 340991 (5th Cir. July 11, 2018); Pointe SDMU LP v. County of San Diego, No. DO66888, 2016 WL 3960075, at *5 (Cal. Ct. App. July 21, 2016); Powell v. County of Humboldt, 166 Cal. Rptr. 3d 747, 762 (Ct. App. 2014); Webster Assocs. v. Cromwell Planning and Zoning Comm'n, No. CV146055771, 2015 WL 10353111, at *6-7 (Conn. Super. Ct. Dec. 18, 2015). In *Harstad v. City of Woodbury*, the applicant argued that the city could not condition her permit on a certain fee because the State had not delegated that power to the city. 902 N.W.2d 64, 72 (Minn. Ct. App. 2017), *aff'd*, 916 N.W.2d 540 (Minn. 2018). She alleged a temporary taking for the period in which that condition was in force, relying on *Koontz* for the idea that *Nollan* and *Dolan* apply to proposed conditions even if those conditions are never imposed and thus nothing is actually taken. *Id.* at 69. The court deemed the conclusion that the city had no authority to impose the condition as mooting a temporary takings claim. *Id.* at 75-76. The case, therefore, does not decide but does suggest that temporary takings compensation is not owed where a permit condition is enjoined for violating *Nollan* and *Dolan*. *See id.*

those narrow instances in which *Nollan* and *Dolan* scrutiny is applicable, limited the remedies available to successful claimants.

III. IN THE WAKE OF *KOONTZ*: POTENTIAL EXTENSIONS OUTSIDE THE EXACTIONS CONTEXT

The prior Part explored several incremental extensions that takings scholars projected *Koontz* might initiate in the exactions context, including interpreting broadly the class of monetary impositions that are subject to *Nollan* and *Dolan* scrutiny;[206] applying *Nollan* and *Dolan* scrutiny to permit conditions imposed not only through individualized administrative decisions but also to those imposed via broadly applicable legislation;[207] construing broadly the class of proposed conditions deemed "concrete and specific" enough to implicate *Nollan* and *Dolan*;[208] and enhancing the remedies available in exaction takings cases.[209] This Part takes on a more ambitious projection offered by select scholars in *Koontz*'s immediate wake, namely that courts would extend *Nollan* and *Dolan* scrutiny outside the permit condition context altogether and into government contracts and other more traditional realms of regulatory takings law.

A. Issue

One analyst described *Koontz* as "represent[ing] a positive development in the trend towards [making] landowner challenges to land use restrictions more amenable to judicial review."[210] Another suggested that *Koontz* "could turn out to be the most important property rights victory in the Supreme Court in some time."[211] A third went so far as to contend that *Koontz* is "likely to have as much impact within the sphere of local government law and takings jurisprudence" as prominent recent rulings on affirmative action in university admissions, the validity of preclearance provisions

206. *See supra* Part II.A.
207. *See supra* Part II.B.
208. *See supra* Part II.C.
209. *See supra* Part II.D.
210. *See* Eagle, Koontz *in the Mansion*, *supra* note 3, at 30.
211. *See* Somin, *supra* note 3, at 216.

of the Voting Rights Act of 1965, and same-gender marriage will in the "civil rights arena."[212]

*B. Movement Post-*Koontz

Four post-*Koontz* cases in the lower courts have addressed directly the issue of extending *Nollan* and *Dolan* scrutiny outside the permit condition context. Of the four, one declined to apply *Nollan* and *Dolan* to conditions set out in a government contract.[213] The other three declined to extend *Nollan* and *Dolan* to other non-permitting contexts, including state decisions denying a request to remove a floodway designation,[214] assigning abatement costs to a landowner handling solid waste without prior authorization,[215] and charging insurers a fee to support a state insurance exchange even if they did not sell policies on the exchange.[216]

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212. *See* Stadnyk, *supra* note 3, at 4.

213. White Oak Realty v. U.S. Army Corps of Eng'rs, No. A16-1937, 2016 WL 4799101, at *1 (E.D. La. Sept. 14, 2016). The government contracted with landowners who were willing to provide fill materials for post-Hurricane Katrina levee enforcement, but required mitigation when removing the fill materials would harm forests or wetlands. *Id.* at *1, *7 ("The issue is whether the *per se* takings analysis used in *Dolan*, *Nollan*, and *Koontz* should be extended to apply to conditions set forth by contract, rather than in land use permits. Plaintiffs have not provided this Court with any case using a *per se* takings analysis when the condition at issue was contractual. Accordingly, this Court declines to extend the *per se* takings analysis to this matter.").

214. *See* Columbia Venture, LLC v. Richland County, 776 S.E.2d 900, 902 (S.C. 2015). The plaintiff bought a large lot and then challenged the state's failure to remove a floodway designation so that he could develop the tract. *Id.* at 902-03; *see id.* at 912 n.19 ("This case in no manner falls within the exactions line of cases, as Richland County has not required Columbia Venture to grant an easement or dedicate a portion of its property for public use.").

215. *See* ABC Holdings, Inc. v. Kittitas County, 348 P.3d 1222 (Wash. Ct. App. 2015). The city imposed a fine and abatement costs on a chemical company for handling solid waste without a permit. *Id.* at 1225. The appellate court asserted:

> [T]he *Koontz* holding applies solely in the context of the land use permit process where a government approval was conditioned on coercively compelling a landowner to give up property. Our case is distinguished from *Koontz* because it concerns regulatory permit enforcement and does not compel a landowner to give up property.

Id. at 1129 (internal citation omitted).

216. Am. Council of Life Insurers v. D.C. Health Benefit Exch. Auth., 73 F. Supp. 3d 65, 72-73, 96-99 (D.D.C. 2014) (holding *Nollan* and *Dolan* inapplicable to a fee that insurers were required to pay to support a state insurance exchange even if they did not sell policies on the exchange).

These courts' hesitancy is well founded. Extending *Nollan* and *Dolan* outside the permitting context would subject the state to a flood of challenges to even the most common land use controls, including zoning and building code regulations, which a large majority of owners and nonowners alike support.[217] Even if the bulk of these controls were to survive such challenges, the very existence of a legal platform to assert them would impose inordinate costs, especially on the smallest of government entities, such that a massive reduction in such controls seems the only fiscally possible result.[218] While such a course might well come with the benefit of eliminating those land use controls that ingrain prejudices and breed exclusivity, it would work as a hammer to serve this interest at the expense of many others when a scalpel would more prudently do.[219]

Oregon's experience with the infamous Measure 37 bears this out. In passing this ballot initiative in 2004, the State's voters openly encouraged the nonenforcement of land use restrictions.[220] The law asserted, in relevant part: "If a public entity ... enforces [most any] land use regulation ... that restricts the use of private real property ... and has the effect of reducing the fair market value of the property ... the owner ... shall be paid just compensation."[221] The law operated to modify the substance of all land use restrictions subject to it by directing municipalities not to enforce those restrictions if it did not plan to pay compensation for the economic diminution in property values resulting from their enforcement.[222] In just three years, more than seven thousand claims had been filed against municipal governments[223] seeking a total of seventeen billion dollars

217. *See* Fennell & Peñalver, *supra* note 4, at 288, 299-300, 331, 351-52.

218. *Id.* at 351.

219. *Id.* at 352.

220. OR. DEP'T OF LAND CONSERVATION & DEV., BALLOT MEASURES 37 (2004) AND 49 (2007) OUTCOME AND EFFECTS 34 (2011), https://www.oregon.gov/lcd/Measure49/Documents/M49_BallotMeasures37_and_49_OutcomesEffects_2011.pdf.pdf [https://perma.cc/E8UB-8HJC].

221. Or. Rev. Stat. § 197.352(1) (2005) (emphasis added) (current version at OR. REV. STAT. § 195.305(1) (2015)).

222. See Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 AM. U. L. REV. 1, 34 (2016).

223. *Id.*

in compensation.[224] These local governments found no viable fiscal option but to forego enforcement of regulations on zoning, subdivision, farming and forestry practices, transportation, and the like that allegedly diminished property values.[225]

Interest in passing an initiative such as Measure 37—much like interest in extending *Nollan* and *Dolan* outside of the permitting context—seems grounded in a particular conception of liberty intent on siphoning out as much state engagement in land use as possible. Yet land use regulations are not exclusively pro-liberty or anti-liberty.[226] Rather, they secure certain individuals' liberties against new, undesirable uses of property that would infringe on those liberties, though necessarily at the hefty expense of the liberty of use of others.[227]

C. Summary

Similar to what occurred in the Measure 37 context, the massive reduction in land use regulation that would result from extending *Nollan* and *Dolan* outside the permitting context would thwart the expectations of the very landowners whom the nexus and proportionality standards were designed to protect.[228] In such a world, the Nollans' neighbors could at any point poison the pristine oceanic waters and vista on which the value of the Nollans' land depends, while neighbors of Florence Dolan's hardware store and the strip mall Coy Koontz planned to construct could engage in similarly undesirable uses that make these business ventures far riskier propositions than they were under the extant regime. That Oregon property owners substantially reduced the impact of Measure 37 by supporting another ballot initiative in 2007 serves as a cautious tale for those optimistic about subjecting all or most land use regulations to heightened judicial scrutiny.[229] The post-*Koontz* cases to have

224. *See* OR. DEP'T OF LAND CONSERVATION & DEV., *supra* note 220, at 5.

225. *Id.* The claimants were using the market value that had been established, in part, by a system of land use rules as the baseline from which they alleged any enforcement of that system was causing their market value to decline. *Id.* at 34.

226. Timothy M. Mulvaney, *Property-as-Society*, 2018 WIS. L. REV. 911, 927-28.

227. *Id.*

228. *See* Fennell & Peñalver, *supra* note 4, at 351-52.

229. *See id.*

faced requests to extend *Nollan* and *Dolan* outside the permit conditions context have recognized as much.

CONCLUSION: THE STATE OF EXACTIONS

Modern regulatory takings law is best understood not as protecting against value diminutions resulting from regulation but rather "as a bulwark against unfairness."[230] In its well-known 1978 decision in *Penn Central*, the Supreme Court offered a nonexclusive list of considerations that courts should take into account in attempting to determine in an individual case whether an imposition stemming from a new regulatory safeguard or obligation, as opposed to one "concentrated on a few persons," is fair and just absent compensation.[231] These considerations include (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with [the claimant's] distinct investment-backed expectations," and (3) the "character of the governmental action."[232]

While the goal of fairness and the considerations that *Penn Central* suggested to advance this goal are of limited content in the abstract, hundreds of Supreme Court and lower court takings cases have given these goals and considerations meaning.[233] This expansive body of takings precedents has instructed that claimants generally are not entitled to takings compensation for adhering to generally applicable obligations that advance the public interest,[234] safeguards that prevent owners from using their land in ways harmful to others,[235] or baseline standards for market and social

230. *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 57 (1964).

231. 438 U.S. 104, 124, 128 (1978) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

232. *Id.* at 124.

233. *See, e.g.*, Mulvaney, *supra* note 226, at 953-56; Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 631-54 (2015).

234. *See* Gorieb v. Fox, 274 U.S. 603, 609-10 (1927) (holding that a setback requirement did not constitute a taking); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 379-80, 395-97 (1926) (holding that a zoning scheme did not constitute a taking); Welch v. Swasey, 214 U.S. 91, 103, 107-08 (1909) (holding that a statutory building height limit did not constitute a taking).

235. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474-77, 500-02 (1987) (upholding a Pennsylvania regulation that limited how much subsurface coal could be mined in order to protect surface structures); Goldblatt v. Town of Hempstead, 369 U.S. 590,

interactions.[236] In turn, these precedents suggest that takings compensation is more likely in those rare situations in which the state unjustifiably applies such obligations, safeguards, or relational standards retroactively to existing, unharmful uses or isolates individuals among similarly situated persons to shoulder their wholly disproportionate weight.[237]

This Article's analysis suggests that the lower courts in most instances have not seen *Koontz* as a launching pad to curtail this broad authority on the state's part to regulate land uses absent compensation. The cases that have cited *Koontz* to date do little to interfere with the state's flexibility to draw on its suite of regulatory tools to ensure that property rights are not exercised in ways that harm either the legitimate property and personal rights of others, or the economic and social infrastructure that facilitates wide dispersal of the advantages of the property system.[238]

The analysis herein of the 130 lower court cases that have cited *Koontz* to date indicates that application of *Nollan*'s and *Dolan*'s "nexus" and "proportionality" standards generally has been confined to a narrowly construed set of "concrete and specific," ad hoc demands that include a small subset of monetary impositions and requirements to provide strangers permanent access to the permit

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591-92, 595-96 (1962) (upholding a town regulation that prohibited excavation below the water table, which in turn rendered petitioner's quarry effectively useless); Walls v. Midland Carbon Co., 254 U.S. 300, 309-10, 324-25 (1920) (upholding a statute conditioning the burning of natural gas); Hadacheck v. Sebastian, 239 U.S. 394, 404-05, 409-11 (1915) (upholding a regulation that banned the operation of brick factories within Los Angeles' city limits); Reinman v. City of Little Rock, 237 U.S. 171, 176-77 (1915) (upholding a regulation banning livery stables from certain areas in the community); Mugler v. Kansas, 123 U.S. 623, 653, 675 (1887) (upholding a regulation that banned the production of alcohol for recreational purposes); Powell v. Commonwealth, 7 A. 913, 914-16 (Pa. 1887) (upholding a law that outlawed the production of oleomargarine).

236. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 415-18, 445-48 (1934) (upholding the constitutionality of a state mortgage moratorium law, which allowed courts to extend the period of redemption for foreclosure sales); Block v. Hirsh, 256 U.S. 135, 153-58 (1921) (holding that a rent control law, which regulated rent prices and allowed tenants to stay in their apartments so long as they paid on time and satisfied any other conditions of the lease, was not a taking).

237. *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 37-40 (2012) (holding that the temporary nature of government-caused floods did not automatically preclude such floods from constituting a taking); Pumpelly v. Green Bay Co., 80 U.S. 166, 166, 177-82 (1871).

238. Recognizing the value of the suite of regulatory tools as a whole, John Nolon explains that "contingency bargaining" can facilitate "deals that accommodate uncertainty in ways that [traditional] regulation cannot." Nolon, *supra* note 93, at 570.

applicant's land.[239] Moreover, it interprets this case law as designing a narrow set of remedies for the rare successful claimant that preserves the state's continued flexibility to regulate land uses in service of the public.[240] The goal of the cases interpreting and applying *Koontz*, like regulatory takings jurisprudence more generally, is identifying only those most isolating and unjust of impositions.[241]

These lower court cases respect the state's unavoidable role in allocating property interests in the face of competing claims. Consider, for instance, a building company's claim, on the one hand, to the benefits of a retaining wall to facilitate development on a given parcel to which it holds title, and a neighbor's claim, on the other hand, to be secure against the harm that could ensue from that retaining wall's channeling water next door. The post-*Koontz* case law recognizes that whether the state extends to the building company the unfettered ability to construct that retaining wall, imposes a permit condition that requires mitigation of the wall's external impacts, or prohibits construction of such a wall altogether, the state cannot extract itself from having made an allocative choice as to whether the affected neighbor's property interest includes security against the substantial harms that can result from nearby alterations in water flow.[242] *Koontz* may well prompt a sea change

239. *See supra* Parts II.A.-C. There is very little information—empirical or otherwise—on the disposition of permit applications that do not reach the judicial system. *See* Eagle, Koontz *in the Mansion, supra* note 3, at 24; Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995). Indeed, only a small collection of legal scholars have begun to venture into this space. *See* Carlson & Pollak, *supra* note 45; Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 Harv. J.L. & Pub. Pol'y 233 (1999); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. Rev. 177 (2006); Kristen P. Sosnosky, Note, Dolan v. City of Tigard*: A Sequel to* Nollan*'s Essential Nexus Test for Regulatory Takings*, 73 N.C. L. Rev. 1677 (1995). An in-depth future project in this regard would be a welcome contribution to exaction takings law scholarship.

240. *See supra* Part II.D.

241. *See supra* Part II.E.

242. *See* Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 487-88 (2018) ("Either an owner has the right to eject a homeless person from his property or the homeless person has a right to enter the property to save his life. The state cannot fail to act in cases like this; it must allocate the entitlement to someone and deny it to others; *there is simply no space within which the state can be said to not be acting*."). In this sense, the lower courts that have cited *Koontz* necessarily

in takings law that exerts constitutional pressure on some of the allocative choices that are available to the state. But, at least per an evaluation of the lower court decisions to date, signs of such a revolutionary move fortunately are few and far between.

have had to disregard the *Koontz* Court's claim that it was not making a normative judgment. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 614-15 (2013) ("[I]t bears emphasis that petitioner's claim does not implicate 'normative considerations about the wisdom of government decisions.'" (quoting E. Enters. v. Apfel, 524 U.S. 498, 545 (1998))).