The State of Exactions

Timothy M. Mulvaney

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THE STATE OF EXACTIONS

TIMOTHY M. MULVANEY*

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

* Professor of Law and Associate Dean for Faculty Research, Texas A&M University School of Law. Thank you to Vicki Been, John Burling, J. Peter Byrne, David Callies, John Echeverria, and Joseph Singer for insightful conversations on the Article’s theme. I benefitted from the opportunity to present various iterations and components of this project at Harvard Law School, the University of Michigan Law School, and William & Mary Law School. I am grateful for the fine research assistance of Ian Klein.
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. 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. 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. 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.

even as social, economic, and moral perspectives on the values that property serves evolve over time.\textsuperscript{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 \textit{Koontz} through July of 2018. In the course thereof, the Article offers two contentions. First, on doctrinal grounds, it contends that \textit{Koontz}’s footprint is thus far rather light.\textsuperscript{5} The decision has not prompted lower courts to extend the heightened scrutiny of \textit{Nollan} and \textit{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.\textsuperscript{6} Second, on normative grounds, this Article asserts that the restraint evident in the lower court opinions that have wrestled with \textit{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 \textit{Nollan} and \textit{Dolan}—on whether those allocative choices are fair and just absent compensation.\textsuperscript{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 \textit{Koontz}’s bearing on a number

\textsuperscript{4} See, e.g., John D. Echeverria, \textit{Koontz: The Very Worst Takings Decision Ever?}, 22 N.Y.U. ENVTL. L.J. 1, 49-50 (2014) (suggesting that the \textit{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. Peñaiver, \textit{Exactions Creep}, 2013 SUP. CT. REV. 287, 288 (“[T]he Court has left the domain of... heightened scrutiny wholly undefined. Indeed, the \textit{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, \textit{Strategies for Making Sea-Level Rise Adaptation Tools “Takings-Proof,”} 28 J. LAND USE & ENVTL. L. 157, 186-89 (2013) (“Before the \textit{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, \textit{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 \textit{Koontz} ... will most likely [lead to] dramatically expanded application[s] of \textit{Nollan} and \textit{Dolan}”).

\textsuperscript{5} See infra Part II.

\textsuperscript{6} See infra Part II.

\textsuperscript{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.”\(^\text{13}\) This limitation originally applied only to physical appropriations resulting from governmental conduct.\(^\text{14}\) 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.\(^\text{15}\) 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 \textit{Koontz v. St. Johns River Water Management District} involved one such “exaction taking” claim.\(^\text{16}\)

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 \textit{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 \textit{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 \textit{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. \textit{Const.}, amend. V.

\(^{14}\) See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (“Prior to Justice Holmes’s exposition in \textit{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, \textit{The Original Understanding of the Takings Clause and the Political Process}, 95 \textit{Colum. L. Rev.} 782 (1995).


\(^{16}\) 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. 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. Construction of the shopping center would require the destruction of 3.4 acres of protected wetlands and 0.3 acres of protected uplands.

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. The District found Koontz’s self-proposed mitigating condition inadequate, for Florida law is premised on avoiding net wetland loss. 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. Moreover, the District left the door open for Koontz to propose other conditions to offset the anticipated wetland loss. Koontz, however, refused the District’s

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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].


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. 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).
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

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.”).
32. See id.
The Florida Supreme Court rejected Koontz’s claim, but the U.S. Supreme Court reversed in a five-to-four opinion in 2013. 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. 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.”

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,” to “maneuver,” “coerc[e],” “evade[],” make “[e]xtortionate demands,” 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].” It echoed Richard Epstein’s view that the permitting process is a “holdup game” that is best understood as “a form of highway robbery.”

These claims of regular extortionate conduct by the state in the land use permitting context have not been substantiated by empirical evidence. 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.

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


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 the 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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{48} Yet citing Koontz for this purpose

\begin{itemize}
    \item \textsuperscript{46} Koontz, 570 U.S. at 604.
    \item \textsuperscript{47} Id. at 605.
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. 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. 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.

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. 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. 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. 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.” 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. 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.


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.


permit in the first place. 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. 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. 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. At best, then, Koontz supports what the Court described in dicta in an earlier case as a “special application” of the unconstitutional conditions doctrine 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; 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. 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,

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.
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 law64 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

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65. See supra Part I.B.
66. See infra Part II.A.
broadly applicable legislation;\textsuperscript{67} whether courts would interpret broadly the class of proposed conditions deemed “concrete and specific” enough to implicate \textit{Nollan} and \textit{Dolan};\textsuperscript{68} and whether courts would expand the remedies available in exaction takings cases.\textsuperscript{69} This Part takes up these four issues in turn, beginning with monetary impositions.

\textbf{A. Monetary Impositions}

\textit{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, \textit{Nollan} and \textit{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.\textsuperscript{70} A decade after \textit{Dolan}, the Court reiterated the \textit{Nollan} and \textit{Dolan} Courts’ reliance on this assumption.\textsuperscript{71} Remarking on \textit{Nollan} and \textit{Dolan} in an opinion for a unanimous Court in \textit{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 \textit{per se} physical taking.”\textsuperscript{72}

\textsuperscript{67} See infra Part II.B.
\textsuperscript{68} See infra Part II.C.
\textsuperscript{69} See infra Part II.D.
\textsuperscript{70} See \textit{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.”); \textit{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.”).
\textsuperscript{71} See generally \textit{Lingle v. Chevron U.S.A., Inc.}, 544 U.S. 528, 548 (2005) (taking care not “to disturb these precedents”).
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.” 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.) 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.

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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. Indeed, prior to Koontz, most monetary demands were not subject to any takings analysis at all. Only the state’s appropriation of a specific pool of money triggered takings review, and even in such exceptional cases, only under the far less demanding framework set out in Penn Central Transportation Co. v. New York City. 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).


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

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”).
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

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85. 424 P.3d 95 (Utah 2017).
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 Energía Eléctrica 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 Energía Eléctrica 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.
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. 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. However, the court refused to extend Koontz to consider, in the course of exaction takings analyses, whether and how impact fees ultimately are spent. Rather, the court concluded that the time to challenge a permit condition under Nollan and Dolan is upon its proposition.

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. 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. 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. 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.

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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. Such an approach would reflect a level of second-guessing state decisions that the *Alpine Homes* court did not deem prudent to take on.

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. 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. 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.” 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.”

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.” 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.

3. *Summary*

*Koontz* was not up to the challenge of delineating which permit conditions requiring applicants to pay, spend, or forgo opportunities...
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 underlies 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. Prior to Koontz, the Court denied fifteen petitions for certiorari raising the issue. 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) ("Some 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.\textsuperscript{110}
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.”

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; establish a buffer between all development and “critical areas,” including wetlands; pay school and transportation impact fees on a predetermined schedule; conduct traffic studies and ensure that the development will not exceed existing carrying capacity when completed; confirm that all new development connects to water reuse systems; and display art on the premises or contribute funds to city arts projects.


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) (“The 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.”).


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;\(^\text{118}\) and (2) the Supreme Court’s repeated reference to *Nollan* and *Dolan* scrutiny as applying to “adjudicative decisions”\(^\text{119}\) indicates that such scrutiny is not relevant in takings suits involving exactions that are part of a community-wide plan and broadly applicable.\(^\text{120}\) If more

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\(^\text{119}\) 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.”).

\(^\text{120}\) *Bldg. Indus. Ass’n*, 289 F. Supp. 3d at 1059; *Cal. Bldg. Indus. Ass’n*, 351 P.3d at 991; *Golf Course Ass’n*, 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. ENVT. L.J. 397, 405-07 (2009); Steven J. Eagle, *Del Monte Dunes, Good Faith, and Land Use Regulation*, 30 ENVT. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{123} Second, the generality of a legislative act helps ensure some measure of reciprocal advantage.\textsuperscript{124} Third, exposing legislative exactions to \textit{Nollan} and \textit{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-\textit{Koontz} decisions to reject the legislative-administrative distinction in the exactions context. In the first, \textit{Levin v. City \& County of San Francisco}, Judge Breyer offered two doctrinal reasons to subject to \textit{Nollan} and \textit{Dolan} scrutiny a San Francisco ordinance requiring all landlords who withdraw rent-controlled properties...
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)).


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.”).

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.

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.”).


131. See id.

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. 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.” However, the claim that a lower court conflict exists is, at best, remarkably overstated.

Consider, first, Town of Flower Mound. The case involved two local ordinances. The first required developers to assure that streets abutting residential subdivisions conform to minimum safety standards, which included, among others, the requirement that adjacent and connector streets be constructed with concrete. 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. The second ordinance authorized the Town to grant exceptions to its street standards in instances of developer hardship. The Town denied Stafford’s request for such an exception in this instance. Stafford objected to the condition throughout the permitting process and, after obtaining its plat approvals and completing

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.\footnote{The Town unsuccessfully argued that, on public policy grounds, Stafford should be precluded from suing after obtaining its development approval and rebuilding Simmons Road. \textit{Id.} at 25. \textit{Town of Flower Mound}, and an appellate decision based thereon, \textit{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 \textit{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).}

In dicta, the Texas Supreme Court asserted that while “an ad hoc decision is more likely to constitute a taking than general legislation,”\footnote{\textit{Id.} at 641.} 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.”\footnote{\textit{Id.} at 641. One year after \textit{Town of Flower Mound}, the Texas Legislature codified certain parts of the decision and modified or expanded others. \textit{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 \textit{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., Plating 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.weglaw.com/assets/docs/publications/Plating%20and%20Proportionality.pdf [https://perma.cc/K6KP-995R]).}

However, the court did not find it necessary to reach a decision on the legislative-administrative distinction.\footnote{\textit{Town of Flower Mound}, 135 S.W.3d at 642 (stating that “we need not and do not decide” the issue).} 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.\footnote{\textit{Id.} at 641-42; see also Hansen, supra note 128, at 272 (suggesting that \textit{Nollan} and \textit{Dolan} should apply where administrators exercise “substantial discretion” to “subjectively exempt[ ]” individual applicants from otherwise broadly applicable requirements).} For this reason, the court concluded that there was “no meaningful distinction between the conditions imposed on Stafford and the conditions
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.
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.”

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*. 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. 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. 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.

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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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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 afoot 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.” 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. 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.*” Justice Alito wrote that “the issue remains open on remand for the Florida Supreme Court to address.”

2. Movement Post-Koontz

The Florida Supreme Court ultimately remanded the matter to the state appellate court. Puzzlingly, the appellate court did not address whether the state had issued a concrete and specific demand. 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.” 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. 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.*
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. 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.’” 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. 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. 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. 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. 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. The county then denied the company’s subdivision permit application because the traffic issue was not definitively resolved.

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. 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.

In an opinion that an appellate panel later adopted in full, 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. 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. Second, burdening governmental entities with possible takings liability for assumed implications will place a chilling effect on regulator-landowner coordination.

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)).
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,\(^\text{186}\) 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.\(^\text{187}\)

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.\(^\text{188}\) In turn, the remedy mandated by the Fifth Amendment for takings (just compensation) did not apply.\(^\text{189}\) 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.”\(^\text{190}\) 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.\(^\text{191}\)

\(^{186}\) See supra notes 164-67 and accompanying text.

\(^{187}\) See supra notes 172-85 and accompanying text.


\(^{189}\) 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.”\textsuperscript{192} Florida takings law is quite similar to federal takings law,\textsuperscript{193} and the Supreme Court here decided that, under federal constitutional law, nothing had been taken from Koontz.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{197}

\textsuperscript{192} FLA. STAT. § 373.617(2) (2019) (emphasis added).
\textsuperscript{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.”).
\textsuperscript{194} See Koontz, 570 U.S. at 612.
\textsuperscript{195} Id. at 620 (Kagan, J., dissenting).
\textsuperscript{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.
2. Movement Post-Koontz

On remand, the Florida appellate court asserted that “[t]he underpinning of Koontz’s claim is clearly the Takings Clause.” 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. 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.

Beyond the puzzling Koontz remand, the claimant has prevailed in just two of the seven post-Koontz exaction takings cases decided on the “nexus” and “proportionality” merits. 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, they did not require compensation for the period in which those conditions were in force or order issuance of

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

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

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;\(^\text{206}\) applying Nollan and Dolan scrutiny to permit conditions imposed not only through individualized administrative decisions but also to those imposed via broadly applicable legislation;\(^\text{207}\) construing broadly the class of proposed conditions deemed “concrete and specific” enough to implicate Nollan and Dolan;\(^\text{208}\) and enhancing the remedies available in exaction takings cases.\(^\text{209}\) 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.”\(^\text{210}\) Another suggested that Koontz “could turn out to be the most important property rights victory in the Supreme Court in some time.”\(^\text{211}\) 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.
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.”

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. 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, assigning abatement costs to a landowner handling solid waste without prior authorization, and charging insurers a fee to support a state insurance exchange even if they did not sell policies on the exchange.

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:
[The 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. 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. 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.

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. 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.” 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. In just three years, more than seven thousand claims had been filed against municipal governments 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.
223. Id.
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. DEPT 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.
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

232. Id. at 124.
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. 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.

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.

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

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. 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. 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.

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. Koontz may well prompt a sea change


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))).