

LEE ANNE FENNELL AND  
EDUARDO M. PEÑALVER

EXACTIONS CREEP

Imagine you are a Supreme Court Justice who cares deeply about property rights. You worry that landowners are too easily exploited by governmental entities, and you believe that the Constitution must protect their prerogatives as owners. You recognize, however, that a panoply of zoning restrictions, building codes, and other laws and ordinances often preserve and enhance the value and security of landownership. The idea that property must be both protected *from* state power and *with* state power resonates with you, but it presents a doctrinal challenge. How can the Constitution protect landowners from the government without disabling the machinery that protects ownership itself? The Supreme Court's exactions jurisprudence can be understood as an attempt to confront this chal-

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Lee Anne Fennell is Max Pam Professor of Law and Herbert and Marjorie Fried Research Scholar, University of Chicago Law School. Eduardo M. Peñalver is John P. Wilson Professor of Law, University of Chicago Law School.

AUTHORS' NOTE: During Lee Anne Fennell's tenure as associate counsel at the State and Local Legal Center, she worked on an amicus brief filed in *Dolan v City of Tigard* on behalf of the National Association of Counties et al. Her academic work on the topic of exactions began several years later and has always reflected only her own views. She is grateful to the Stuart C. and JoAnn Nathan Faculty Fund for financial support. Eduardo M. Peñalver is grateful to the Roger Levin Faculty Fund for its support of this research. Both authors appreciate the helpful comments on earlier drafts provided by Hanoch Dagan, John Echeverria, Mark Fenster, Paul Gowder, Alexander Reinert, Stewert Sterk, Lior Strahilevitz, and David Strauss, and by participants in the Colloquium on the Public Purpose Requirement in Expropriation, hosted by the University of Groningen in the Netherlands, and in faculty workshops at Cardozo School of Law and the University of Iowa. They also thank Kristin Czubkowski and Monica Ghosh for excellent research assistance.

lenge.<sup>1</sup> The Court has sought to subject some local land use actions to heightened scrutiny as a matter of federal constitutional law<sup>2</sup> while leaving the superstructure of zoning, permitting, and taxation in place.<sup>3</sup> The difficulties with this approach became apparent in *Koontz v St. Johns River Water Management District*.<sup>4</sup> That the Supreme Court has failed in this difficult balancing act is no surprise. How it has failed, and why it may continue to fail, is an interesting question and the impetus for this article.

The Court's exactions jurisprudence, set forth in *Nollan v California Coastal Commission*,<sup>5</sup> *Dolan v City of Tigard*,<sup>6</sup> and now *Koontz*, requires the government to satisfy demanding criteria for certain bargains—or proposed bargains—implicating the use of land. But the Court has left the domain of this heightened scrutiny wholly undefined. Indeed, the *Koontz* majority eschewed any boundary principle that would hive off its exactions jurisprudence from its land use jurisprudence more generally. By beating back one form of exactions creep—the possibility that local governments will circumvent a too narrowly drawn circle of heightened scrutiny—the Court has left land use regulation vulnerable to the creeping expansion of heightened scrutiny under the auspices of its exactions jurisprudence.

At first blush, the fact that exactions always involve actual or proposed land use “bargains” might seem to mark out a clear and well-defined arena for heightened scrutiny. But in fact, virtually

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<sup>1</sup> We do not mean to suggest that all or even any of the Justices would frame the enterprise in quite this way, only that the pattern of decided cases reflects a struggle prompted by these competing goals.

<sup>2</sup> The Court has grounded this selectively intensified scrutiny in the unconstitutional conditions doctrine—a foundation that is notoriously unstable. See notes 33–35 and accompanying text.

<sup>3</sup> Even if most of the garden-variety land use regulations and taxes falling into this latter category could ultimately survive heightened scrutiny, the exercise of applying such scrutiny would be undesirably costly for both courts and local governments.

<sup>4</sup> 133 S Ct 2586 (2013). In the short time since the decision, *Koontz* has generated numerous and varied academic responses, some of which we engage in more detail below. Papers forthcoming or under development include, for example, Steven J. Eagle, *Koontz in the Mansion and the Gatehouse*, 61 *Urban Lawyer* (forthcoming 2014), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2354617](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354617); John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?* (Vermont Law School Research Paper No 28-13, Dec 2013), online at <http://ssrn.com/abstract=2316406>; Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, *Touro L Rev* (forthcoming 2014) (on file with authors).

<sup>5</sup> 483 US 825 (1987).

<sup>6</sup> 512 US 374 (1994).

every restriction, fee, or tax associated with the ownership or use of land can be cast as a bargain.<sup>7</sup> To retain its commitment to heightened scrutiny for a subset (and only a subset) of land use controls, the Court must construct some stopping point. Ideally, a boundary principle would be relatively easy to apply and would track relevant normative considerations reasonably well. In the exactions context, however, markers that can even minimally approximate these criteria are in short supply—and the Court thinned its options further in *Koontz*.

The difficulty the Court has experienced and will continue to experience in constructing a logically coherent, administrable, and normatively appealing way to bound heightened scrutiny should, we suggest, lead it to rethink its exactions jurisprudence, and especially its grounding in the Takings Clause, rather than in the Due Process Clause. Choosing an approach going forward requires examining not only the impact of heightened scrutiny on land use bargains but also the collateral damage that the rule in question may do to takings law and other constitutional doctrines, including the broader doctrine of unconstitutional conditions.

This article proceeds in six parts. Part I lays out the doctrinal terrain and shows where the *Koontz* case fits in. Part II demonstrates the potential boundlessness of the domain to which heightened scrutiny applies under the Court's recently revamped exactions jurisprudence. To maintain land use law as we know it, limits must be somehow derived or constructed. Part III approaches this question by asking what normative principles might underlie the sort of skepticism about bargaining reflected in exactions jurisprudence. After considering several possibilities, we suggest that the most plausible answer is found in rule-of-law concerns implicated by land use deal making. Part IV tries to divine the limits that the *Koontz* majority might have had in mind, given the way that its holdings intersect with prior doctrine. This sets the stage for Part V, which considers a series of alternatives that would attempt to reconcile the Court's twin interests in restraining governmental power over property owners and in keeping the gears of ordinary land use

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<sup>7</sup> The point is not limited to land use law. Virtually all governmental restrictions and impositions, head taxes aside, can be cast in conditional terms, as they are premised upon choosing to sell, earn, employ, and so on. See Richard A. Epstein, *Bargaining with the State* 11 (Princeton, 1993).

regulation running in ways that protect the property interests of those owners. Part VI concludes our analysis.

## I. TAKINGS, DUE PROCESS, AND EXACTIONS

*Koontz* arose out of a conflict between Coy Koontz, a Florida landowner, and the St. Johns River Water Management District (“District”), a regional water authority. Koontz had purchased a 14.9-acre tract of land near Orlando in 1972. The land was mostly wetlands, though it also contained some forested uplands. Florida law required Koontz to obtain permission from the District before filling any wetlands. In 1994, Koontz applied for a permit from the District to develop the northern 3.7 acres of his parcel, virtually all of which were wetlands.<sup>8</sup> He offered to dedicate a conservation easement covering the remaining 11 acres. In the past, the District had required owners seeking permission to fill wetlands to preserve 10 acres of wetland for every acre they filled.<sup>9</sup> In keeping with this general practice, the District proposed that Koontz either reduce the size of his development to a single acre (dedicating a conservation easement for the remainder of the property) or, alternatively, that he develop the 3.7 acres as he proposed, but pay to improve the drainage on additional, District-owned land.<sup>10</sup> The District also indicated that it was willing to entertain “equivalent” alternative proposals from Koontz.<sup>11</sup>

Koontz rejected the District’s proposal, and the District denied the permit. Rather than go back to the bargaining table, Koontz filed a lawsuit in state court. He claimed that the conditions for permit approval contained in the District’s proposal violated the Takings Clause.<sup>12</sup> Among other things, Koontz challenged the District’s suggested swap of development approval for wetlands protection or mitigation as an unlawful “exaction.” This exactions claim is different from a claim that the permit denial itself took Koontz’s

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<sup>8</sup> *St. Johns River Water Management District v Koontz*, 77 S3d 1220, 1224 (Fla 2011).

<sup>9</sup> See Echeverria, *Koontz: The Very Worst* at \*4 (cited in note 4) (citing Brief for Respondent, *Koontz v St. Johns Water Management District*, No 11-1447, \*12 (filed Dec 21, 2012) (available on Westlaw at 2012 WL 6694053)).

<sup>10</sup> *Koontz*, 133 S Ct at 2593.

<sup>11</sup> *Id.*

<sup>12</sup> Koontz sued under Fla Stat § 373.617(2), which provides a cause of action for damages if a state action is “an unreasonable exercise of the state’s police power constituting a taking without just compensation.”

property. Instead of challenging the regulatory burden that a denial would impose, Koontz's exaction theory contested the legality of the bargain the District was trying to strike. In order to understand how the mere attempt to bargain with a property owner—without any property changing hands—might violate the Takings Clause, we must briefly explore the contours of the Supreme Court's regulatory takings jurisprudence.

#### A. TAKINGS AND DUE PROCESS

In considering whether a regulation of land constitutes a taking of property requiring just compensation, the Supreme Court usually adheres to the analysis laid out in *Penn Central Transportation Co. v New York City*.<sup>13</sup> The *Penn Central* factors include the “economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the governmental action.”<sup>14</sup> The focus of this default regulatory takings inquiry, as the Court made clear in *Lingle v Chevron USA, Inc.*,<sup>15</sup> is the severity of the burden the regulation imposes on the property owner.<sup>16</sup> The unanimous Court in *Lingle* contrasted this burden-focused inquiry with a means-ends style inquiry into the rationality of government regulation. The latter, the Court said, falls within the province of the Due Process Clause and, in undertaking it, courts should be highly deferential to the elected branches.<sup>17</sup>

The Court has carved out from its default *Penn Central* takings analysis two per se rules governing discrete categories of regulation. First, in *Loretto v Teleprompter Manhattan CATV Corp.*, the Court held that a permanent physical invasion of property authorized by the government necessarily constitutes a taking.<sup>18</sup> In

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<sup>13</sup> 438 US 104 (1978).

<sup>14</sup> *Id.* at 124.

<sup>15</sup> 544 US 528 (2005).

<sup>16</sup> As the *Lingle* Court explains, “severity of the burden” represents a common thread running through all of its regulatory takings jurisprudence, one that can be used to test how closely a given governmental act approximates a physical appropriation, and to assess the distributive fairness of the imposition. *Id.* at 539; see *id.* at 539–40, 542–43.

<sup>17</sup> *Id.* at 543–45. The inquiries serve different purposes as well. A violation of the Due Process Clause leads to the invalidation of the enactment, whereas a Takings Clause violation represents an otherwise legitimate governmental act that can be fully validated by the payment of just compensation. *Id.* at 543.

<sup>18</sup> 458 US 419, 441 (1982).

subsequent cases, the Court has characterized the state appropriation of discrete pools of money, such as the interest from a specific account, as *Loretto*-type takings.<sup>19</sup>

The Court created a second per se regulatory takings rule in *Lucas v South Carolina Coastal Council*.<sup>20</sup> In that case, the Court held that a regulation is a per se taking (and not subject to the *Penn Central* analysis) when it permanently deprives an owner of all economically viable use of her property—unless the rule does no more than codify limitations on owners’ rights already built into “background principles” of state property law, such as nuisance.<sup>21</sup> The *Loretto* and *Lucas* exceptions to *Penn Central* are consistent with the Court’s characterization of the takings inquiry in *Lingle*: Their focus is on the burden a government action imposes on owners.

The Court’s takings framework is not a model of clarity or coherence. It can be (and has been) assailed on normative, logical, and administrability grounds. We will not delve into those criticisms here, but will instead accept these principles as given for purposes of addressing one particularly problematic corner of the doctrinal picture: exactions.

## B. ENTER EXACTIONS

Sitting uncomfortably with *Lingle*’s takings/due-process typology is the Court’s treatment of claims that the government has conditioned development approval on exactions of constitutionally protected property rights from the landowner. In *Nollan v California Coastal Commission*,<sup>22</sup> the plaintiffs owned a small beachfront home in California. They wanted to demolish the existing home and build a new, larger home on their lot. California law required them to obtain permission from the Coastal Commission before they could undertake their project. The Commission refused to grant the Nollans permission to build unless they would give the state a lateral easement allowing the public to cross over the por-

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<sup>19</sup> See, for example, *Brown v Legal Foundation of Washington*, 538 US 216, 235 (2003). Cases finding the appropriation of interest from specific accounts to be takings predate *Loretto*. See, for example, *Webb’s Fabulous Pharmacies, Inc. v Beckwith*, 449 US 155, 159, 164 (1980) (applying this principle and citing cases).

<sup>20</sup> 505 US 1003 (1992).

<sup>21</sup> *Id.* at 1027–31.

<sup>22</sup> 483 US 825 (1987).

tion of their property adjacent to the mean high tide line.<sup>23</sup> The Supreme Court concluded that the exaction was unconstitutional.<sup>24</sup> It held that the demanded easement did not share an “essential nexus” with the goal the Commission would have (legitimately) advanced by simply denying the requested permission to expand the house.

In *Dolan v City of Tigard*,<sup>25</sup> the Court added to *Nollan*’s “essential nexus” inquiry the requirement that the burden of the condition imposed upon development permission be roughly proportional to the harm that would be caused by permitting the development to go forward.<sup>26</sup> The plaintiff in *Dolan* owned a small hardware store. When she applied for a permit to expand the store and pave her parking lot, the city conditioned approval of her application on her dedication of a piece of her property to the city for use as a flood plain (subject to a recreational easement) and bicycle path.<sup>27</sup> The Court conceded the existence of a nexus between the city’s demands and the impacts of the plaintiff’s expanded use of her property on storm-water runoff and traffic. But it nonetheless held that the city had violated the Takings Clause because it had failed to establish that its exaction was sufficiently proportional to the impacts the plaintiff’s proposed expansion would cause.<sup>28</sup>

The “essential nexus” and “rough proportionality” tests established in *Nollan* and *Dolan* together produced an inquiry, ostensibly operating under the Takings Clause, that is noteworthy in two respects. First, it scrutinizes the fit between means (the condition imposed by the government) and ends (mitigation of the harm caused by the proposed development). Importantly, it does not evaluate the burden imposed on the landowner by the underlying regulatory regime from which she is seeking relief. This would appear to place the test in the domain that the Court identified

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<sup>23</sup> Id at 827–29.

<sup>24</sup> See id at 837–42.

<sup>25</sup> 512 US 374 (1994).

<sup>26</sup> Id at 391.

<sup>27</sup> See id at 379–81, 393–94.

<sup>28</sup> See id at 388, 394–95. The Court left ambiguous whether it is the harm eliminated by the exaction that must be proportional to the harm the development causes or whether it is the burden of the exaction (to the landowner) that must be proportional to those harms.

in *Lingle* with the Due Process Clause, not the Takings Clause.<sup>29</sup> Second, the exactions inquiry involves a level of scrutiny of the proffered ends and chosen means that would be highly unusual in the due process context.<sup>30</sup> The court in *Dolan* specifically opted for the “rough proportionality” language in order to make clear that the inquiry was to be more searching than the usual “rational basis” review.<sup>31</sup> Moreover, it placed the burden of establishing compliance with the exactions test squarely on the government’s shoulders, thereby inverting the traditional presumption of constitutionality of properly enacted regulations.<sup>32</sup>

The Court has characterized its exactions jurisprudence as an application of the unconstitutional conditions doctrine.<sup>33</sup> That

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<sup>29</sup> See *Lingle*, 544 US at 542–43. This is not to say that the determination that an owner has been singled out to bear an unfair burden—an inquiry that that Court in *Lingle* identified with the Takings Clause—does not involve any questions of fit. After all, to determine that a given burden is unfairly placed on a landowner, we need to know something about the reasons why the government has imposed it. A landowner whose use constitutes the equivalent of a nuisance, for example, might fairly be required to bear burdens that would not be appropriate for another landowner—a point the Court made explicit in *Lucas v South Carolina Coastal Council*:

The “total taking” inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, the social value of the claimant’s activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.

505 US 1003, 1030–31 (1992) (citations omitted). Similarly, some of the *Penn Central* factors arguably reach considerations that relate to matters of fit or that otherwise seem to sound in due process. See, for example, Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan Envtl L J 525, 529 (2009); Lee Anne Fennell, *Picturing Takings*, 88 Notre Dame L Rev 57, 85 & n 87, 88 (2012). Nonetheless, *Lingle* marks out a basic division of labor between the clauses based on the dominant inquiry involved in a given cause of action. The fact that exactions analysis involves no examination of the magnitude of the initial regulatory burden from which the landowner seeks relief, but rather begins the inquiry by examining the terms of a proposed exchange involving that burden, would seem to locate it in the realm of due process by the Court’s own account.

<sup>30</sup> Governmental acts directed at social and economic goals receive rational basis review unless they implicate fundamental rights or involve suspect classifications. Such review requires only that the act be rationally related to a legitimate governmental purpose (see, for example, *Schweiker v Wilson*, 450 US 221, 230 (1981)). While a governmental act that “fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause,” *Lingle*, 544 US at 542, the test is a deferential one that does not put the government to its proof in establishing how well, or even if, the legislation serves particular goals.

<sup>31</sup> 512 US at 391.

<sup>32</sup> See id at 394–96; id at 405–11 (Stevens, J, dissenting); id at 413–14 (Souter, J, dissenting).

<sup>33</sup> *Dolan*, 512 US at 385; *Koontz*, 133 S Ct at 2594–95; *Lingle*, 544 US at 547.

doctrine limits the ability of the government to condition its grant of a discretionary benefit to a claimant on the claimant's waiver of some constitutional right that the government would not be entitled simply to override.<sup>34</sup> For example, the government cannot condition its grant of employment—something it is entitled under normal circumstances to withhold—on an applicant's waiver of his First Amendment right to choose his own religion. In the exactions context, the constitutional right at issue has been located in the Takings Clause. As the Court put it in *Koontz*, by conditioning development approval on the landowner's conveyance of some property interest to the government, “the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.”<sup>35</sup>

### C. THE SCOPE OF SCRUTINY

*Nollan* and *Dolan* sparked two axes of disagreement among the lower courts about the reach of the exactions doctrine.<sup>36</sup> First, courts split over whether *Nollan/Dolan* heightened scrutiny applied to exactions in which the government demands a cash payment rather than a dedication of an interest in land in exchange for development permission.<sup>37</sup> Second, they divided over whether the

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<sup>34</sup> The unconstitutional conditions doctrine has spawned considerable scholarly output. Influential treatments include, for example, Richard A. Epstein, *Bargaining with the State* (1993); Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum L Rev 473 (1991); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413 (1989); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U Pa L Rev 1293 (1984). Despite the *Dolan* Court's characterization of the doctrine as “well-settled,” 512 US at 385, it has so thoroughly eluded attempts to reduce it to a workable formula that some scholars have urged abandonment of it altogether. See generally Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 Denver U L Rev 989 (1995); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism with Particular Reference to Religion, Speech and Abortion*, 70 BU L Rev 593 (1990). Theoretical work on the doctrine continues, nonetheless. Notable recent works include, for example, Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 Va L Rev 479 (2012); Mitchell N. Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Georgetown L J 1 (2001).

<sup>35</sup> *Koontz*, 133 S Ct at 2594.

<sup>36</sup> Another unresolved issue, addressed in *Koontz*, was the status of “failed exactions”—exactions proposed to a landowner but not accepted or implemented. See generally Mark Fenster, *Failed Exactions*, 36 Vt L Rev 623 (2012); Timothy M. Mulvaney, *Proposed Exactions*, 26 J Land Use & Envir L 277 (2011).

<sup>37</sup> See Ann E. Carlson and Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 UC Davis L Rev 103, 137–38 (2001) (suggesting that *Nollan* and *Dolan* may encourage use of impact fees and discourage physical land exactions); David A. Dana, *Land Use Regulation in an Age of Heightened*

exactions doctrine applies only to so-called “ad hoc” or “adjudicated” exactions, that is, exactions whose terms are worked out on a case-by-case basis in negotiations with landowners. Courts and commentators usually contrast adjudicative exactions with exactions that are more “legislative” in character.<sup>38</sup> A legislative exaction is one in which the state’s conditions on development are spelled out in advance in a generally applicable formula or schedule.

Before *Koontz*, the Supreme Court had not intervened to decisively resolve either debate. On at least two occasions, however, it had used dicta to describe its exactions cases as having involved ad hoc state demands that owners turn over tangible interests in land. In *City of Monterey v Del Monte Dunes at Monterey Ltd.*,<sup>39</sup> the Court defined “exactions” as “land-use decisions conditioning approval of development on the dedication of property to public use.”<sup>40</sup> Later, in *Lingle*, the Court suggested that the reach of *Nollan/Dolan* scrutiny was limited to “adjudicative land-use exactions,” in which the state demands—in exchange for development permission—that the property owner hand over an interest in land that, if imposed directly, “would have been a *per se* physical taking.”<sup>41</sup> This dicta in *Lingle* appeared to put the Court in the camp

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*Scrutiny*, 75 NC L Rev 1243, 1259–60 (1997) (considering the varying interpretations of *Dolan*’s application to monetary exactions); see also *Dudek v Umatilla County*, 69 P3d 751, 757–58 (Or Ct App 2003) (discussing the split among courts over the question of whether *Dolan* applies to monetary exactions). Cases holding that *Nollan* and *Dolan* do not apply to monetary exactions include *McClung v City of Sumner*, 548 F3d 1219, 1228 (9th Cir 2008); *Smith v Town of Mendon*, 4 NY3d 1, 12 (2004); *Home Builders Association v City of Scottsdale*, 930 P2d 993, 999–1000 (Ariz 1997); *West Linn Corporate Park, L.L.C. v City of West Linn*, 240 P3d 29, 45–46 (Or 2010); *City of Olympia v Drebeck*, 126 P3d 802, 808 (Wash 2006). Cases holding that monetary exactions are subject to *Nollan/Dolan* scrutiny include *Town of Flower Mound v Stafford Estates Ltd Partnership*, 135 SW3d 620, 635–40 (Tex 2004); *Home Builders Association of Dayton and the Miami Valley v City of Beavercreek*, 89 Ohio St 3d 121, 128 (2000); *Ebrlich v City of Culver City*, 911 P2d 429, 433 (Cal 1996); *Northern Illinois Home Builders Association v County of DuPage*, 165 Ill 2d 25, 32–35 (1995).

<sup>38</sup> Cases holding that *Nollan* and *Dolan* do not apply to “legislative” exactions include *McClung v City of Sumner*, 548 F3d 1219, 1227–28 (9th Cir 2008); *St. Clair County Home Builders Association v City of Pell City*, 61 S3d 992, 1007 (Ala 2010); *Greater Atlanta Homebuilders Association v DeKalb County*, 588 SE2d 694, 697 (Ga 2003); *San Remo Hotel v City and County of San Francisco*, 27 Cal 4th 643, 671–72 (2002); *Krupp v Breckenridge Sanitation District*, 19 P3d 687, 695–96 (Colo 2001); *Curtis v Town of South Tomastown*, 708 A2d 657, 659–60 (Me 1998); *Parking Association of Ga., Inc. v City of Atlanta*, 450 SE2d 200, 203 n 3 (Ga 1994). In *Town of Flower Mound*, 135 SW3d at 640–42, in contrast, the Texas Supreme Court applied *Nollan* and *Dolan* to a legislative exaction.

<sup>39</sup> 526 US 687 (1999).

<sup>40</sup> *Id* at 702.

<sup>41</sup> 544 US at 546.

of the lower courts that had declined to apply *Nollan* and *Dolan* to so-called “legislative” exactions (exactions that operate according to a predetermined formula or schedule) and on the side of those lower courts that had declined to apply *Nollan* and *Dolan* to exactions of money.<sup>42</sup>

#### D. THE KOONTZ DECISION

In *Koontz*, the Supreme Court definitively rejected the notion—hinted at in *Del Monte Dunes* and *Lingle*—that the *Nollan/Dolan* test applies only to exactions of physical interests in land. *Koontz* had prevailed in the state trial court and intermediate appellate court on an exactions theory, but the Florida Supreme Court had reversed, finding *Nollan* and *Dolan* inapplicable based on its interpretation of the scope of the Supreme Court’s exactions doctrine. Relying on the limiting language in *Del Monte Dunes* and *Lingle*, the Florida Supreme Court concluded that *Nollan* and *Dolan* do not apply to exactions of money and, in addition, do not apply when an agency denies the requested permit (as opposed to granting the permit subject to certain conditions).<sup>43</sup>

The U.S. Supreme Court rejected both of these limits on *Nollan* and *Dolan*. All of the Justices agreed that, contrary to the Florida Supreme Court’s holding, permit denials as well as conditional permit grants are subject to exactions scrutiny. In the majority’s words,

[a] contrary rule would be especially untenable . . . because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court’s approach, a government order stating that a permit is “approved if” the owner turns over that property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words “denied until” would not.<sup>44</sup>

The Justices split over the question whether a demand for money fell within the boundaries of *Nollan* and *Dolan*. The five-Justice majority opinion by Justice Samuel Alito held that the Court’s exactions jurisprudence reached demands for money. The

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<sup>42</sup> See *McClung*, 548 F3d at 1226–28 (relying on *Lingle* to limit *Nollan* and *Dolan* analysis to adjudicated land use exactions); *Wisconsin Builders’ Association v Wisconsin Department of Transportation*, 702 NW2d 433, 446–48 (Wis App 2005) (same).

<sup>43</sup> See *St. Johns River Management District v Koontz*, 77 S3d 1220, 1230 (Fla 2011).

<sup>44</sup> *Koontz*, 133 S Ct at 2595–96. The dissent agreed. See *id* at 2603 (Kagan, J, dissenting).

dissenters, led by Justice Elena Kagan, rejected this position.

In reaching its conclusion, the *Koontz* majority had to navigate around the Court's 1998 decision in *Eastern Enterprises v Apfel*.<sup>45</sup> In *Eastern Enterprises*, a plurality of the Court had concluded that retroactively imposing liability on a former coal operator for retired coal miners' medical benefits violated the Takings Clause.<sup>46</sup> However, the four dissenters in *Eastern Enterprises*, along with Justice Anthony Kennedy (who concurred in the judgment on due process grounds), took the position that the Takings Clause did not apply at all when government imposes general obligations to pay money.<sup>47</sup> As Justice Kennedy put it, "the Government's imposition of an obligation . . . must relate to a specific property interest to implicate the Takings Clause."<sup>48</sup> Kennedy thereby distinguished cases like *Brown v Legal Foundation of Washington*,<sup>49</sup> in which the government had seized interest earned on specific accounts.

The concern with applying the Takings Clause to more generalized obligations to pay money was, as Justice Stephen Breyer noted in his dissenting opinion, the difficulty of distinguishing such obligations from taxes, which have long been understood to lie beyond takings scrutiny.<sup>50</sup> "If the Clause applies when the government simply orders A to pay B," he asked, "why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?"<sup>51</sup>

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<sup>45</sup> 524 US 498 (1998).

<sup>46</sup> Significantly, the plurality did not conclude that the imposition of retroactive liability constituted a *per se* regulatory taking under *Loretto* or *Lucas*. Instead, it found a taking only after applying the multifactor *Penn Central* analysis. *Eastern Enterprises*, 524 US at 529–37.

<sup>47</sup> *Id.* at 554–58 (Breyer, J., dissenting); *id.* at 543–45 (Kennedy, J., concurring in the judgment and dissenting in part).

<sup>48</sup> *Id.* at 544 (Kennedy, J., concurring in the judgment and dissenting in part).

<sup>49</sup> 538 US 216 (2003).

<sup>50</sup> *Eastern Enterprises*, 524 US at 556 (Breyer, J., dissenting). Although Richard Epstein has famously argued that takings analysis *should* apply to taxes, this approach has not been pursued by the judiciary or political branches. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 95 (Harvard, 1985) (casting all regulations, taxes, and changes in liability rules as "takings of private property *prima facie* compensable by the state"); *id.* at 283 ("The proposition that all taxes are subject to scrutiny under the eminent domain clause receives not a whisper of current support."); see also Eduardo M. Peñalver, *Regulatory Takings*, 104 Colum L Rev 2182, 2185–86 (2004) ("Whatever influence Epstein's theory has had on discussions of takings law generally, few have accepted his invitation to turn their backs on the unqualified power to tax.")

<sup>51</sup> *Eastern Enterprises*, 524 US at 556 (Breyer, J., dissenting).

Courts and commentators alike have read *Eastern Enterprises* to mean that general obligations to pay money do not fall within the ambit of “private property” protected by the Takings Clause.<sup>52</sup> In *Koontz*, the majority did not reject this reading of *Eastern Enterprises*—unsurprising, given that Justice Kennedy joined the *Koontz* majority. Instead, Justice Alito seized on Justice Kennedy’s specific language in *Eastern Enterprises* to argue that, unlike in *Eastern Enterprises*, “the demand for money at issue [in *Koontz*] did ‘operate upon . . . an identified property interest’ by directing the owner of a particular piece of property to make a monetary payment.”<sup>53</sup> As a consequence, the majority argued, “the demand for money burdened petitioner’s ownership of a specific parcel of land”<sup>54</sup> and takings scrutiny was appropriate.

## II. EXACTIONS UNBOUND

Having described the relevant legal terrain, let us return to our hypothetical Supreme Court Justice worried about both protecting private property rights from government abuse and safeguarding the ability of government to protect property expectations through tools like zoning law. Applying heightened means-ends scrutiny to land use regulation across the board would seem to tip the scales too far in the direction of limiting government power.<sup>55</sup> Even if the bulk of existing land use regulation could survive such scrutiny (a proposition that is by no means clear), subjecting every decision on zoning, taxation, and permits in tens of thousands of municipalities across the country to such searching review would generate prohibitive costs for local gov-

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<sup>52</sup> See, for example, Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L Rev 885, 903–07 (2000); *Koontz*, 133 S Ct at 2605–07 (Kagan, J, dissenting).

<sup>53</sup> *Koontz*, 133 S Ct at 2599, quoting *Eastern Enterprises v Apfel*, 524 US 498, 554–56 (1998).

<sup>54</sup> *Koontz*, 133 S Ct at 2599.

<sup>55</sup> The *Koontz* majority presumably shares this view, although the opinion leaves some room for doubt. After noting the need for exactions jurisprudence to accommodate both externality control and control of governmental overreaching, Justice Alito suggests that the *Nollan/Dolan* test can serve both functions by ensuring that landowners can be required to cover their own externalities, but nothing more. *Koontz*, 133 S Ct at 2594–95. If land use regulation is only legitimate to the extent that it actually controls quantifiable land-owner-caused externalities, as this passage almost implies, extending tests of nexus and proportionality to the whole of land use regulation might seem unproblematic. But that line of reasoning would ignore the very real costs of applying the scrutiny itself. It would also be at odds with the Court’s prior pronouncements and analysis, including that in *Euclid* (which Justice Alito cites in this very passage).

ernments and courts.<sup>56</sup> Such widely applied scrutiny would upend the established expectations of the very landowners that our Justice means to protect. And so a doctrine like *Nollan/Dolan* nexus and proportionality review must be kept within limits.

At first blush, the Court's exactions jurisprudence seems to occupy a well-bounded territory: Heightened scrutiny only applies when the government attempts to bargain with a landowner over the grant of a permit (or some other land use privilege). But this apparently straightforward means of firewalling off the domain of *Nollan* and *Dolan* depends on a doubtful proposition: that land use "bargains" (understood broadly as land use regulations that are somehow conditional in their application to particular landowners) can be readily picked out from land use controls more generally. For several reasons, including some exacerbated by *Koontz* itself, deal spotting is not so simple. As a consequence, defining the Court's exactions test in terms of bargaining alone risks allowing the test to slip its bonds and become the basis for wide-ranging heightened judicial scrutiny of land use regulation generally.

#### A. THE UBIQUITY OF DEAL MAKING IN LAND USE LAW

Discretionary, conditional, or negotiated applications of land use laws are not aberrations that stand out against a backdrop of well-ordered, prospectively announced, and uniformly imposed land use regulations. Instead, land use control typically proceeds in a piecemeal fashion.<sup>57</sup> Land use deal making frequently takes the form embodied in the Court's exactions cases: regulators have discretion to block a project or permit it to go forward, and they bargain with the landowner over the terms on which they will approve the project. As a consequence, the exactions test already potentially covers a large portion of land use regulation. But even in the absence of such explicit bargaining, most if not all land use law can be framed as deal making given that the laws are conditional in nature and subject to frequent and fine-grained revision.<sup>58</sup>

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<sup>56</sup> For further discussion of extending heightened scrutiny in this manner, see Part V.D.

<sup>57</sup> See, for example, Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal L Rev 837, 841 (1983) (describing piecemeal changes as "the everyday fare of local land regulations").

<sup>58</sup> Jurisdictions vary in their approaches to piecemeal changes as well as to the enterprise (and indeed necessity) of comprehensive land use planning. See text accompanying notes 187, 200–203. Nonetheless, all jurisdictions incorporate some flexibility into their land

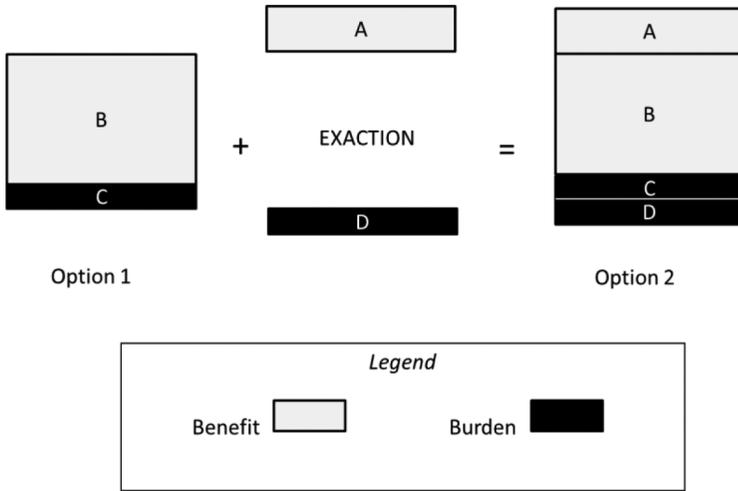


Figure 1. The exaction

To see why the fluid and highly individualized nature of land use regulation makes it difficult to isolate the phenomenon of bargaining, consider Figure 1's stylized depiction of an exaction. At its essence, an exaction pairs some desired land use benefit with some land use burden. We will defer for the moment the question of *which* burdens are sufficient to trigger scrutiny as an exaction, and assume that the burden depicted is of this nature.

An exaction, as envisioned by *Nollan* and *Dolan*, offers a bundled choice to a landowner. Option 1 in Figure 1 represents the status quo land use package, which includes benefits B and burdens C. In the prototypical exaction, the state offers the landowner the paired set of benefit A and burden D, which when added to the existing land use package comprises Option 2. For a concrete example, consider the facts in *Nollan*. The Nollans began with a land use package that gave them certain rights (B), including the right to maintain and use the existing residential structure on their beachfront property. This package also came with certain burdens (C), such as complying with zoning and building codes, not creating a nuisance, paying property taxes, and so on. The Nollans

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use control regimes, and hence afford some degree of discretion to local decision-making bodies.

wished to tear down the existing cottage and build a larger home on the property. The right to do this was not part of their initial land use package. The government offered this benefit (A) to them, but it coupled it with a new burden (D), which consisted of granting an easement allowing the public to cross their property. Thus, the Nollans were given a choice between Option 1 and Option 2.

This choice set was identified as an exaction, subjected to heightened means-ends scrutiny, and deemed constitutionally impermissible due to the lack of a logical nexus between the grant of A and the imposition of D. The impacts of building a larger house on private land, the Court reasoned, were completely unrelated to the government's stated interest in safeguarding public beach access.<sup>59</sup> In *Dolan*, the Court deemed a similar choice set—between forgoing the right to expand a hardware business and granting land of the public for a bike path and greenway—impermissible due to the lack of rough proportionality between the impact of expanding the store and the value of the property interests demanded by the state.<sup>60</sup> In both cases, the Court assumed for the sake of argument that the government had no duty to supply benefit A at all, but could instead leave the landowners with Option 1, their initial mix of burdens and benefits.<sup>61</sup> What the Court held that the government could not constitutionally do was condition the grant of benefit A on the concession of burden D—unless the deal passed the tests of nexus and rough proportionality.

Suppose, however, there were no other burden of interest to the government that would meet the *Nollan* and *Dolan* tests—or that the government did not want to bear the high cost of proving that it was in compliance with those tests. In that case, the government would be put to the following choice: leave the landowner with Option 1 or provide an alternative (Option 3) in which it simply grants benefit A without any additional burden. This is shown in Figure 2.

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<sup>59</sup> *Nollan*, 483 US at 837–38.

<sup>60</sup> See *Dolan*, 512 US at 392–96.

<sup>61</sup> See *Nollan*, 483 US at 835–36 (assuming without deciding that preventing blockage of the beach is a legitimate public purpose, “in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house . . . would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans’ use of their property as to constitute a taking.”); *Dolan*, 512 US at 387 (“Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld”).

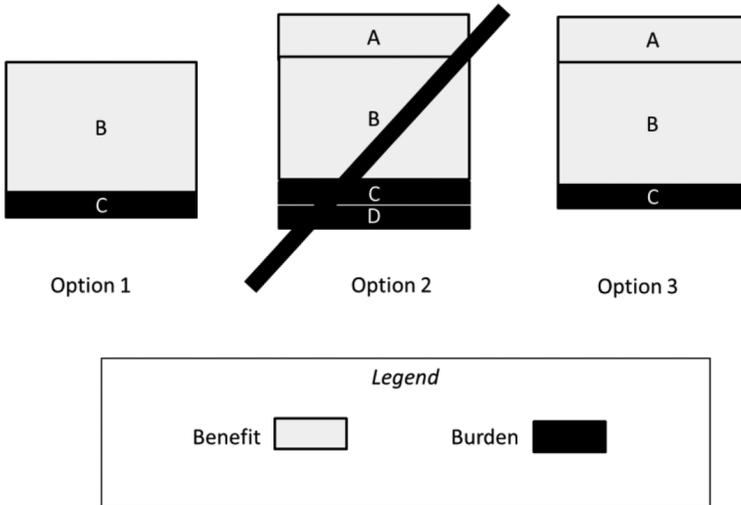


Figure 2. The government's choice set sans exaction

Why might the government choose Option 3 over Option 1? It would do so if it actually expected the additional development allowed by granting the landowner benefit A to be valuable on net for the community (due, say, to an enriched property tax base, new local employment opportunities, or otherwise).<sup>62</sup> Of course, there are also plenty of reasons a local government might just stick with Option 1—even if both it and the landowner would prefer the now unavailable Option 2.<sup>63</sup>

#### B. HIDDEN BARGAINS

Already, we can see how the category of exactions threatens to

<sup>62</sup> See Epstein, *Bargaining* at 183 (cited in note 7) (referencing the “empirical guess” in the *Nollan* situation that the government will choose not to deny the permit outright, since doing so “necessarily deprives the community of the increased taxes generated by a new residence which probably will not increase the demands on public facilities by the same amount”).

<sup>63</sup> A number of scholars have focused on the possibility that restrictions on exactions will block efficient bargains. See, for example, Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal L Rev 609, 661–65 (2004); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 Iowa L Rev 1, 28–33 (2000); William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 L & Contemp Probs 101, 104–06 (1987).

swallow a large proportion of land use control.<sup>64</sup> But the problem of unboundedness goes even deeper than the discussion to this point might suggest: How can we be sure that Option 1 is not itself a constitutionally improper bargain? If Option 1 is the starting point for negotiations, it might seem like it cannot possibly constitute a bargain itself. But Option 1 is never the only choice. This is so for three reasons: (1) the possibility that past bargains produced the law as presently incarnated in Option 1, (2) the existence of as-yet-unchosen options and trade-offs intentionally built into Option 1 (embedded bargains), and (3) the pervasive possibility that the existing law can be changed in the future (hypothetical bargains).

1. *Past bargains.* Option 1 is just one of many forms into which the law might have crafted the mix of benefits and burdens of landownership in a particular jurisdiction. It is possible, and indeed likely, that the law reached its present form only after lawmakers engaged in a great deal of bargaining with affected landowners, bundling burdens with benefits in ways that look very much like the paradigmatic exaction shown in Figure 1. For example, Lynne Sagalyn describes how, in the 1980s, New York City consulted with private developers, civic groups, and nonprofit foundations as it attempted to facilitate the redevelopment of Times Square.<sup>65</sup> As Sagalyn put it, “the political problem of rebuilding West 42nd Street involved an extraordinarily delicate act of balancing the city and state’s aggressive plan for large-scale ground-up development . . . with its other goals for preserving the historic midblock theaters and their symbolic sense of place . . . while accommodating the intense community and business concerns of Clinton and the Garment District. . . .”<sup>66</sup> To be sure, these negotiations—and the kinds of changes in New York’s zoning laws that grew out of them—happened at some point in the past. But this would not necessarily put them beyond the reach of constitutional scrutiny.

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<sup>64</sup> Not all governmental actions that count as exactions must necessarily be subjected to heightened scrutiny. It may be possible to identify some characteristic of the burden in question, or some distinguishing feature of the way in which the burden and benefit are paired or presented to the landowner, that pares down the category that will receive *Nollan/Dolan* review, even if the term “exactions” sweeps more broadly. See Parts III and IV.

<sup>65</sup> Lynne B. Sagalyn, *Times Square Roulette: Remaking the City Icon* 91–102 (MIT, 2001).

<sup>66</sup> *Id.* at 101.

The Court held in *Palazzolo v Rhode Island*<sup>67</sup> that the mere fact that a law was enacted in the past does not prevent a landowner from challenging it as a taking. As Justice Kennedy put it in his opinion for the *Palazzolo* Court, some “enactments are unreasonable and do not become less so through the passage of time or title.”<sup>68</sup> It is not obvious why similar logic would not apply to past bargains between landowners and the state that violated the requirements of *Nollan* and *Dolan*.

2. *Embedded bargains.* In addition, some versions of Option 1 will include what we might call “embedded bargains”—as yet unrealized bargains between the state and the landowner built into the very structure of the law. For instance, a “floor area ratio” (FAR) that is used to regulate building bulk invites landowners to make a kind of trade-off. Unlike traditional setbacks and height limits, floor area ratios control bulk by limiting the total internal square footage of a structure as compared with the square footage of the parcel as a whole. For example, if someone owns a 10,000-square-foot lot, assigning that lot a FAR of 0.5 means that the owner can build a 5,000-square-foot structure on the lot. How she uses that 5,000 square feet is up to her (within whatever other limits the state imposes). Thus, she could comply with the FAR by building a structure with a single floor of 5,000 square feet, with two floors of 2,500 square feet each, three floors of 1,667 square feet, and so on. In effect, the law constitutes an offer to the owner to trade the benefit of greater height for the burden of preserving more open space around the building, or the benefit of smaller setbacks for the burden of lower height.

Conditional use permits are another example of this kind of built-in bargain. Conditional uses are presumptively permissible under a zoning law provided that the landowner complies with the conditions specified in the zoning law. For example, the zoning code might permit a day-care business in a residential district if the owner (1) keeps off-street parking to the rear of the building, (2) operates only during certain hours, (3) installs a landscaping buffer between her business and neighboring owners, etc. So-called “incentive zoning,” in which landowners obtain permission to exceed zoning limits in exchange for providing various public

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<sup>67</sup> 533 US 606 (2001).

<sup>68</sup> *Id.* at 627.

goods (such as low-income housing or public space), similarly embeds bargains, but allows a broader divergence between the impacts of the landowner's development and the specified conditions.<sup>69</sup>

In these examples, the state's position on the terms of any bargain is spelled out in advance and available to all on the same basis. Thus, the law embeds a take-it-or-leave-it offer, not an invitation to haggle.<sup>70</sup> For instance, depending on the level of specificity of the conditions, obtaining a permit to engage in a conditional use can be a fairly ministerial act without any interaction with the state that we might characterize as bargaining. However, land use ordinances can also embed conditional elements that leave significant discretion to local governmental actors, whether explicitly or through the use of open-textured terms subject to official interpretation.<sup>71</sup>

3. *Hypothetical bargains.* Finally, as we have already observed, the highly individualized revision of land use law is a pervasive phenomenon. For any given pattern of land use benefits and burdens (Option 1), there is almost always some other package (call it Option X) that would be acceptable to the government. This alternative package, let us suppose, would vary from the existing law that applies to an owner's parcel by increments corresponding to Benefit Y and Burden Z, as shown in Figure 3.

If Benefit Y and Burden Z are actually paired together by the government and offered to the landowner, the situation is that of the prototypical exaction. But what if Benefit Y and Burden Z are simply "in the air," so to speak? The government may know very well that the landowner wants Benefit Y, or something like Benefit Y. Perhaps the landowner has asked for it, or it is the sort of benefit that anyone in the landowner's position would want. The landowner may also be aware that the government would like to impose Burden Z, or something like Burden Z. Perhaps the landowner looks around and sees other landowners who currently have

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<sup>69</sup> For an example of incentive zoning, see Barry D. Yatt, *Cracking the Codes: An Architect's Guide to Building Regulations* 154 (John Wiley, 1998) (describing incentive zoning in Seattle).

<sup>70</sup> See Epstein, *Bargaining* at 11 (cited in note 7) (observing that a wide variety of government regulations and taxes might be characterized "as take-it-or-leave-it offers that are extended by the government to all individuals").

<sup>71</sup> See text accompanying note 182.

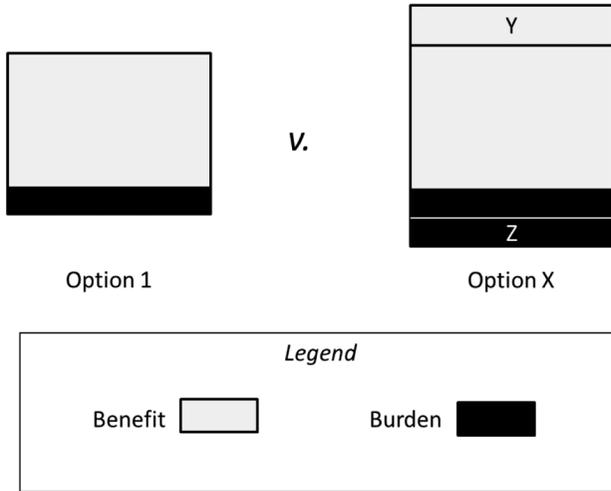


Figure 3. Option X

Option X and prefers their situation over her own, and voices a preference for this alternative.

How much must be said about Option X, and by whom, and in what way, in order for the situation to amount to “bargaining” (and therefore potentially an impermissible exaction)? Here it becomes important that, after *Koontz*, an exaction need not take the form of an explicit condition placed on permit approval in order to receive heightened scrutiny and be found unconstitutional. Instead, a demand made prior to a permit denial should, according to the Court, receive the exact same treatment.<sup>72</sup> But when do ambient discussions about an Option X (of which there may be innumerable versions) coalesce into a “failed exaction” that receives *Nollan/Dolan* review?

### III. LOOKING FOR NORMATIVE FOUNDATIONS

The discussion above establishes only that the domain of exactions is not self-limiting as a conceptual or practical matter—not that it cannot be somehow limited. The difficulty lies in finding a coherent way to identify what is in and what is out of the

<sup>72</sup> See *Koontz*, 133 S Ct at 2595–96.

realm of elevated scrutiny, given the conflicting goals of protecting landowners from the government and protecting them from each other. A principle for setting the boundaries of heightened scrutiny should ideally have two features: it should be relatively clear (so that one can tell at the outset what is included), and it should bear some relationship to what it is that makes exactions normatively problematic.<sup>73</sup> Trade-offs between the two goals may be necessary; a less good normative fit may be tolerated to produce a much more administrable test, or a less tractable test might be selected if it aligns much better with underlying normative concerns.

In crafting tools to define the reach of heightened exactions scrutiny it is helpful to start by asking a question that the Court in *Koontz* (and, for that matter, in *Nollan* and *Dolan*) largely ignored: what is it that is problematic about exactions in the first place? A land use exaction is, at its heart, a conditional regulation of land use. But why and how does conditionality raise constitutional worries? The question takes us back to the doctrine of unconstitutional conditions.

#### A. UNCONSTITUTIONAL CONDITIONS IN LAND USE

In a previous article, one of us identified three possible problems with the conditional grant of governmental benefits: (1) “receiving forbidden goods,” in which the government uses the leverage provided by conditionally applicable laws to obtain legal entitlements that it is not authorized to receive; (2) “bargaining with the opponent’s chips,” in which the government confiscates entitlements belonging to an individual for the sole purpose of selling them back to that individual; and (3) “appropriations from third parties,” in which the government obtains desired benefits by trading away entitlements belonging to third parties whose interests are not represented in the negotiation.<sup>74</sup>

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<sup>73</sup> These two criteria echo in some measure Frank Michelman’s pairing of “settlement costs” and “demoralization costs” in his analysis of compensable takings. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv L Rev 1165, 1214–15 (1967). Just as bright-line rules that mark out distinctive, easily identified cases help to limit the costs of settling up over compensable takings, so too would a clearly articulated boundary around heightened scrutiny reduce the costs of administering the system. And just as one would wish for the cases identified for compensation to track normative concerns like demoralization, so too would one wish for the region of heightened scrutiny to align with relevant normative criteria.

<sup>74</sup> The discussion in this section draws on Fennell, 86 Iowa L Rev at 42–56 (cited in note 63).

The first problem (receiving forbidden goods) can be illustrated by a governmentally initiated bargain that would require a person to change her religion in order to receive government benefits. A commitment to change one's religion is not something the government is authorized to receive from any citizen. This problem, however, is not really implicated by individually negotiated, conditional land use laws. We do not normally think of it as improper to sell or give *property* to the government. Indeed, unlike other contexts in which the unconstitutional conditions doctrine might apply, the Constitution itself explicitly envisions property rights as subject to (involuntary) alienation to the state for public use upon the payment of just compensation.

The second potential problem (bargaining with the opponent's chips) is readily illustrated by a gunman who threatens "your money or your life"—entitlements that both belonged to the victim before the gunman came along. Translated into the land use context, this concern about illicit appropriations can be more directly addressed by applying a standard takings analysis to the regulation that keeps the landowner from being able to develop as of right. The *Nollan/Dolan* analysis, however, like unconstitutional conditions doctrine generally, typically proceeds on the assumption that the government can lawfully decline to waive the land use restriction in question.<sup>75</sup> If this is so, then there has been no preliminary grab of entitlements, but rather only a legitimate governmental act in restricting development. Moreover, even if there *had* been an illegitimate confiscation of land use rights, nexus and proportionality review would hardly solve the problem.<sup>76</sup>

Only the third problem (third-party effects) is arguably addressed by the nexus and proportionality doctrine. In theory, these limits could ensure that the actual costs of development are properly remediated through connected and commensurate concessions, rather than left to fall on third parties while the government reaps (or confers on others) unrelated benefits. But this is not the typical exactions case. Exactions claims under *Nollan* and *Dolan* are brought by regulated landowners, not by neighbors who were

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<sup>75</sup> See *Nollan*, 438 US at 835–36.

<sup>76</sup> See, for example, Fennell, 86 Iowa L Rev at 53 (cited in note 63) (observing that the fact that a misappropriated good can only be swapped for connected and proportionate benefits does not do anything to address the initial misappropriation).

unrepresented in the negotiations and who object to the bargain that was struck.<sup>77</sup>

There is a fourth possibility, which we might understand as straddling the boundary between the second and third categories: that conditional regulations are objectionable because of the potential they create for government favoritism or even outright corruption. The prototypical exaction—the government’s demand for a payment or other concession from a landowner in exchange for regulatory relief—is structurally very similar to the prototypical bribe. The key distinction between the two is the end to which the regulator directs the payment or concession from the landowner. If the regulator directs the payment toward the pursuit of a legitimate public purpose, demanding it does not amount to soliciting a bribe. If the regulator directs the demanded payment to her own (or some favored third party’s) private benefit, then it becomes “corruption.”<sup>78</sup>

As with the “bargaining with the opponent’s chips” scenario, improper government favoritism requires the existence of legal roadblocks in order to thrive. Roadblocks generate the possibility for government favoritism and corruption when removing them is both highly discretionary and privately beneficial.<sup>79</sup> And, as with the “appropriations from third parties” scenario, government favoritism and corruption have harmful effects on disfavored third

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<sup>77</sup> This presumably follows from the nature of the alleged constitutional violation, which is premised on some property of the landowner being taken (or proposed to be taken) without just compensation. A neighbor or other third party would not be able to claim that specific constitutional injury. See Fenster, 92 Cal L Rev at 655 n 228 (cited in note 63) (“It is the expropriation of the property owner’s land, not effects on anyone else’s land, that leads the Court to apply the Takings Clause in *Nollan* and *Dolan*.”). However, neighbors and third parties can and do bring claims that land use bargaining practices, including incentive and contract zoning, violate other principles of law. See, for example, *Municipal Art Society of New York v City of New York*, 522 NYS2d 800, 803–04 (NY Sup Ct 1987) (striking down incentive zoning plan following challenge from third party, on the ground it amounted to an improper sale of zoning); *Hartnett v Austin*, 93 So2d 86, 89–90 (Fla 1956) (allowing a neighboring third party to challenge a zoning amendment that embedded a collateral contract requirement). See also Fenster, 92 Cal L Rev at 655 n 228 (cited in note 63) (discussing and collecting cites on possible bases for third-party challenges).

<sup>78</sup> See, for example, Susan Rose-Ackerman, ed, *International Handbook on the Economics of Corruption* xvii (Edward Elgar, 2006) (“In the most common [corrupt] transaction a private individual or firm makes a payment to a public official in return for a benefit.”).

<sup>79</sup> See Edward L. Glaeser and Raven E. Saks, *Corruption in America*, 90 J Pub Econ 1053, 1055 (2006) (“The benefits of corruption come from government actors being able to allocate resources, including the right to bypass certain regulations, to private individuals.”).

parties. The two scenarios come together in the following way: the government places roadblocks in front of landowners that it fully expects to remove at some price, but the price that it charges any particular landowner will determine whether that landowner foots more or less than her share of the costs associated with development.<sup>80</sup> The focus of this objection, however, is not only on distributive consequences, but also on the nature of the government action.

The structural similarity between exactions and corruption is the marker of a larger problem, one that exactions may raise even in the absence of any evidence of government corruption or favoritism. The problem stems from the very flexibility that the exactions device is designed to create, which may operate in tension with principles of rule of law.

## B. RULE OF LAW

Theorists working in divergent political and philosophical traditions have emphasized the importance of the rule of law.<sup>81</sup> The most influential accounts focus on several distinctive features deemed vital to law's ability to sustain a society of free and equal persons. The rule of law fosters freedom by increasing the predictability and intelligibility of the regulatory landscape within which the citizen operates and by constraining officials from exercising unfettered discretion.<sup>82</sup> John Rawls argues that the rule of law "constitute[s] grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled.

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<sup>80</sup> The question of what constitutes a party's proper share is itself subject to debate. See, for example, Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?* 34 Vt L Rev 157, 163–65 (2009) (examining the different fairness intuitions that follow from a resource-allocation rule based on space, rather than time).

<sup>81</sup> See, for example, F. A. Hayek, *The Constitution of Liberty* 133–61 (Chicago, 1960) (discussing the ability of the state, under certain conditions, to prevent coercion through law by creating a "private sphere" for the individual); John Rawls, *A Theory of Justice* 235–43 (Belknap, 1971) (discussing the rule of law and its connection to equality and individual autonomy); Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 Geo Wash L Rev 149, 149–52 (1987) ("There is no question that the rule of law is a necessary condition for a sane and just society . . . [I]t is a very different question to ask whether it is *sufficient* to achieve that result."); Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in James E. Fleming, ed, *NOMOS L: Getting to the Rule of Law* 3, 14–16 (NYU 2011) (discussing the importance of procedure, particularly in adjudicative settings, for administering the rule of law).

<sup>82</sup> See Scott J. Shapiro, *Legality* 395–96 (Belknap, 2011); see also Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* ch 9 (Oxford, 2013).

If the bases of these claims are unsure, so are the boundaries of men's liberties."<sup>83</sup> Scott Shapiro summarizes this line of thought nicely when he says that the rule of law "enables members of the community to predict official activity and hence to plan their lives effectively," and, at the same time, "constrains official behavior and hence protects citizens from arbitrary and discriminatory actions by officials."<sup>84</sup>

In addition to asserting its intrinsic connection to equality and liberty, theorists have posited that adherence to the rule of law generates a number of consequential benefits. Some have argued, for example, that excessive disregard of the forms of legality has a corrosive effect on citizens' respect for the law and on their willingness to follow it.<sup>85</sup> Others have argued that the rule of law fosters the kind of stability and predictability necessary for economic development.<sup>86</sup>

Lon Fuller's discussion of the "inner morality of law" is typical in terms of the formal features it identifies as crucial to the rule of law.<sup>87</sup> Fuller identifies eight ways that state action may deviate from the rule of law. Those are: (1) a failure to generate generally applicable rules ("generality"), "so that every issue must be decided on an ad hoc basis"; (2) a failure to publicize the law; (3) excessive use of retroactive legislation; (4) the use of rules that are not intelligible; (5) the enactment of rules that contradict one another; (6) use of rules that are beyond the power of the regulated party to follow; (7) changing rules too frequently; and (8) permitting "a failure of congruence between the rules as announced and their actual administration."<sup>88</sup>

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<sup>83</sup> Rawls, *A Theory* at 235 (cited in note 81).

<sup>84</sup> Shapiro, *Legality* at 395–96 (cited in note 82).

<sup>85</sup> See, for example, Lon L. Fuller, *The Morality of Law* 39–40 (Yale, rev ed 1969).

<sup>86</sup> See, for example, Kenneth W. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development*, chs 1, 10 (Brookings, 2006).

<sup>87</sup> See Fuller, *The Morality* at 39–43 (cited in note 85). This is not to suggest that Fuller's are the only possible requirements for satisfaction of the requirements of the rule of law, or that the only requirements are formal (as opposed to substantive). See generally Paul Gowder, *Equal Law in an Unequal World*, Iowa L Rev (forthcoming 2014), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2203735](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2203735) (arguing against a conception of the rule of law as exclusively formal). Jeremy Waldron similarly points out that, in addition to the formal features Fuller identifies, rule of law is also associated with procedural principles, such as "[a] right to hear reasons" for a decision, and substantive principles, such as "[r]espect for private property." See Waldron, *Procedure* at 5–7 (cited in note 81).

<sup>88</sup> Fuller, *The Morality* at 39 (cited in note 85). Fuller's list is perhaps the best known

Several of these deviations are present in the exactions context, particularly where the terms of exactions are not spelled out in advance or, in other words, where they are negotiated with landowners on a case-by-case basis. To the extent that different developers are offered different deals in exchange for regulatory relief, there is a failure of generality. When the terms on which the state actor is willing to grant regulatory relief are communicated to different developers privately, there is a failure of publicity. To the extent that exactions rely on frequent changes in the applicable zoning law, there may be excessive instability. And, where developers are frequently offered regulatory relief on an ad hoc basis, there can be a pervasive failure of congruence between the rules on the books and way the rules are actually applied.<sup>89</sup>

Understanding heightened scrutiny for exactions through the lens of a concern with the rule of law has the virtue of tying the third-party appropriations threatened by land use regulatory bargains to the landowners most likely to become actual *Nollan/Dolan* claimants: relatively inexperienced developers who feel abused by the land use process.<sup>90</sup> Their objection, on this view, is not to land use regulations as such, but to the degree of regulatory discretion surrounding land use bargains. Excessive discretion renders the law opaque to the unsophisticated and permits officials to strike vastly different deals with different landowners, demanding much less from favored landowners in exchange for the waiver of regulatory burdens.<sup>91</sup> This differential treatment smacks of arbitrar-

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of the “laundry lists” of principles generated to capture formal requirements of the rule of law. See Waldron, *Procedure* at 5–6 (cited in note 81).

<sup>89</sup> There is also a form of retroactivity at work in exactions, insofar as changes in conditions or requirements deviate from what was required at earlier points, when the property was purchased or when expectations were formed. To some extent this is an inherent feature of the need to apply law that is responsive to changing conditions to an enduring asset; it is not unique to the exactions context. However, the concerns associated with retroactivity gather added force in the exactions context if the rules for obtaining a permit can be unexpectedly changed in ways that are known (and indeed designed) to disadvantage particular parties based on their past conduct (here, investments in land).

<sup>90</sup> For a discussion of the types of plaintiffs who have appeared in (and who might be expected to appear in) exactions cases, see, for example, Eagle, *Koontz in the Mansion* at \*15–17 (cited in note 4).

<sup>91</sup> Note, however, that the facts in *Nollan* itself do not fully square with this interpretation, insofar as the same lateral easement condition was consistently required of other landowners along the same stretch of beachfront. See *Nollan*, 483 US at 829 (observing that the Commission reported similarly conditioning “43 out of 60 coastal development permits along the same tract of land”; of the others, “14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property”).

iness and can easily shade into favoritism and corruption. Lurking in the background is the possibility that favored landowners may have become so for improper reasons. Even when nefarious behavior is absent, the existence of bargaining around the law on the books may create the impression among outsiders that mischief is at work.

By imposing the limits of nexus and proportionality in its exactions cases, the Court might be understood as attempting to structure bargaining between governments and developers in ways that increase the conformity of that bargaining to the formal requirements of the rule of law. On this account, the exactions criteria impose (admittedly broad) outer limits on the relative disadvantage that favorable land use deals (which are obviously not going to be challenged by the favored developers) can inflict on disfavored landowners. The exactions test might thereby act as a crude price cap on the waiver of discretionary land use regulations.<sup>92</sup> Arguably, this cap attacks both the corruption problem (by reducing the value of the bargained-for discretionary override) and the horizontal equity problem (by limiting the potential gaps in burdens the state can impose on permit applicants).

This rule-of-law account of the exactions jurisprudence mirrors discussions of eminent domain's public use requirement, especially following *Kelo v City of New London*.<sup>93</sup> Arguments about public use in the economic redevelopment context have frequently cited the danger of governmental favoritism toward powerful and well-connected private interests to justify limiting the scope of eminent

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<sup>92</sup> The "rough proportionality" portion of the test seems most plausibly related to this equalizing function, but the "essential nexus" requirement could also make regulatory burdens easier to evaluate by limiting the complexity, reach, and heterogeneity of deal making in a given context.

<sup>93</sup> 545 US 469 (2005). In *Kelo*, a group of property owners challenged New London, Connecticut's use of eminent domain as part of an economic redevelopment scheme. See id at 473–76. The property owners argued that taking property that was not blighted to give to private developers for the purpose of economic development was not a valid "public use." See id at 475–76. The Supreme Court rejected the challenge, affirming prior cases holding the Takings Clause's "public use" requirement to permit the state to pursue through the use of eminent domain any public purpose (including economic development) that it could legitimately pursue through other means. See id at 483–84. See also *Hawaii Housing Authority v Midkiff*, 467 US 229, 240–43 (1984); *Berman v Parker*, 348 US 26, 33–36 (1954). As Justice Sandra Day O'Connor put it for the unanimous Court in *Midkiff*, "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." 467 US at 240.

domain.<sup>94</sup> This focus is also consistent with the general thrust of substantive due process review, which aims to root out situations in which the government acts arbitrarily and in ways that cannot be justified (even minimally) by reference to permissible government purposes. The Court has employed a similar approach in its equal protection jurisprudence.<sup>95</sup> A conclusion that government policy or distinction is not rationally related to a permissible government purpose, like a finding of no public use in eminent domain, often implies that government is impermissibly serving some private agenda (such as corruption or animus) at the expense of the public good.<sup>96</sup>

### C. SOME WRINKLES AND QUALIFICATIONS

Rule-of-law concerns, broadly construed, seem to offer a theoretically grounded normative explanation for the *Nollan/Dolan* inquiry. But it is not entirely clear that these concerns map well onto the way that inquiry has been structured. Moreover, certain features associated with rule of law may clash with normatively

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<sup>94</sup> For example, in a summary of the anti-*Kelo* backlash five years after the case was decided, the property-rights litigators at the Institute for Justice framed the conflict in terms of unequal political influence:

The parties who gain from eminent domain abuse—in particular, local government officials and financially powerful private business interests—have disproportionate influence in the political arena. Not surprisingly, those groups have fought hard against eminent domain reform in virtually every state where it has been proposed. Given their tremendous influence, as well as the fact that ordinary home and business owners do not have lobbyists or special access, the question that the critics should be asking is: “How on earth did the *Kelo* backlash meet with such success?”

*Five Years After Kelo: The Sweeping Backlash Against One of the Supreme Court’s Most-Despised Decisions* \*5 (Institute for Justice, 2010), online at [http://www.ij.org/images/pdf\\_folder/private\\_property/kelo/kelo5year\\_ann-white\\_paper.pdf](http://www.ij.org/images/pdf_folder/private_property/kelo/kelo5year_ann-white_paper.pdf).

<sup>95</sup> The similarity—both in terms of normative underpinnings and legal content—between the substantive due process and equal protection inquiries is most apparent in the so-called “class of one” equal protection cases, where the claimant alleges she has been singled out arbitrarily for adverse treatment. See, for example, *Village of Willowbrook v Olech*, 528 US 562, 564 (2000) (“[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination” (quoting *Sioux City Bridge Co. v Dakota County*, 260 US 441, 445 (1927))). But see *Engquist v Oregon Dept. of Agr.*, 553 US 591 (2008) (refusing to apply a “class of one” analysis to situations in which government action is necessarily “subjective and individualized” as in the context of public employment).

<sup>96</sup> See Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga L Rev 1, 31–32 (2008) (suggesting that an “orientation to the public good” is a necessary feature of law; thus, “we might say that nothing is law unless it purports to promote the public good” even if it does not always manage to do so).

valuable aspects of the way that land use control is carried out—or indeed with other rule-of-law principles. The sections below explore these issues.

1. *The problem of favoritism.* The *Nollan/Dolan* inquiry does not target favoritism directly. It does not engage in the sort of comparative analysis that one would expect from an inquiry motivated by horizontal equity. Instead, in considering challenges by disfavored developers, the *Nollan/Dolan* analysis focuses on nexus and proportionality within the challenged deal only.<sup>97</sup> Moreover, even if nexus and proportionality would produce a general tendency toward more equal deal making when consistently applied to all development-related deals, there is reason to doubt such consistency will actually obtain. Significantly, the kinds of developers who seem most likely to be *Nollan/Dolan* claimants are relatively inexperienced, one-time players, not the kinds of sophisticated repeat actors interested in maintaining favorable relationships with local governments.

Here it becomes important to underscore the difference between the allocation of proof burdens within the *Nollan/Dolan* framework and in other contexts that present concerns about favoritism. In the areas of substantive due process, equal protection, and eminent domain, courts approach their inquiries with a great deal of deference and with the burden of proof squarely on the shoulders of the party challenging the government's bona fides. In the exactions context, however, the presumption is reversed. A primary effect of designating such a domain of heightened scrutiny is to induce governmental avoidance of litigation within that domain. This might occur either openly, by causing governments to shift toward forms of regulation that lie outside the realm of intensified scrutiny,<sup>98</sup> or covertly, by steering their bargaining efforts toward parties who can be trusted not to sue.<sup>99</sup>

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<sup>97</sup> Arguably, evidence about other, more favorable deals might come in as part of the consideration of the proportionality prong of the test.

<sup>98</sup> An analogous point has been made about heightened standards for public use in the eminent domain context, given that governments have the capacity to select alternative ways of achieving their objectives. See, for example, Abraham Bell and Gideon Parchomovsky, *The Uselessness of Public Use*, 106 Colum L Rev 1412, 1416 (2006) (“The Achilles heel of the anti-*Kelo* movement is its failure to consider the place of the public use doctrine within the full arsenal of government regulatory powers over property.”).

<sup>99</sup> See Dana, 75 NC L Rev at 1286–99 (cited in note 37) (suggesting that *Nollan/Dolan* restrictions can be circumvented through local governments' reliance on repeat-play developers who can be trusted not to bring legal challenges).

The *Nollan/Dolan* framework therefore generates the costs of heightened scrutiny while leaving a great deal of space for back-room deals. Indeed, the test (particularly if it extends too widely) may well exacerbate the problem of horizontal inequity by making land use regulators reluctant to propose horse trading with anyone but those least likely to turn to the courts for redress: repeat-play developers.<sup>100</sup> Expansive *Nollan/Dolan* scrutiny, as currently formulated, might well have the effect of driving bargaining underground, which in turn may convert publicly motivated bargaining over regulatory burdens into a furtive act that does more (and not less) to undermine the rule of law.<sup>101</sup>

We might imagine courts using rule-of-law considerations to construct safe harbors (or domains of less intense scrutiny) into which local governments would be encouraged to channel their regulatory activity. In the eminent domain context, for example, the Court has treated the connection of a land use decision to a lengthy and public planning process as a reason for judicial deference.<sup>102</sup> The Court's exactions jurisprudence does not currently incorporate this consideration—either in the substantive nexus and proportionality analysis, or in setting boundaries for the application of *Nollan/Dolan* scrutiny. Nonetheless, it is possible that planning (or other procedures thought to undercut favoritism) could be used to help distinguish the realm within which the usual deferential stance should govern from the one in which heightened scrutiny prevails.<sup>103</sup>

2. *Overreaching against landowners generally.* So far, our description of the rule-of-law account of exactions jurisprudence might create the misimpression that the only axis of conflict is between different would-be developers. But characterizing exactions conflicts in this way would disregard the potential for conflict between a political majority and all those who stand to gain by developing

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<sup>100</sup> See *id.*

<sup>101</sup> See Rose-Ackerman, ed, *International Handbook* at xviii (cited in note 78) (discussing the role governmental discretion plays in generating low-level corruption).

<sup>102</sup> See *Kelo*, 545 US at 483–84 (emphasizing that the government's condemnation of land was undertaken pursuant to a lengthy and public planning process as a reason for finding the use to be sufficiently public). See also Nicole Stelle Garnett, *Planning as Public Use?* 34 Ecology L Q 443, 448 (2007) (“[I]n both regulatory takings and public use cases, the Court often has cited governmental planning efforts to bolster the case for judicial deference.”).

<sup>103</sup> See Shapiro, *Legality* at 195, 394–95 (cited in note 82) (discussing the conceptual links between planning, legality, and the rule of law).

land. Fears that majoritarian interests will overburden property owners lie at the heart of the Takings Clause's protections, and concern about governmental overreaching (as opposed to differential reaching) is evident in the Court's exactions jurisprudence. Thus, some Justices may locate the normative considerations underlying the exactions cases not (just) in concerns about the rule of law posed by the government's offers of disparate deals for different landowners, but (also) in the more straightforward potential for the government to abuse landowners (whether en masse or individually) through excessively burdensome land use regulation.<sup>104</sup>

For reasons already suggested in the “bargaining with the opponent’s chips” critique, restrictions on exactions are not especially well suited to deal with the problem of regulatory excess. Significantly, constraining governmental deal making is not the same as decreasing the average or total regulatory burden. It is certainly possible that constraining the government’s ability to bargain away restrictions would make the government less interested in imposing the restrictions in the first place.<sup>105</sup> But it is equally plausible that governments prohibited from bargaining will impose burdens on owners that are (on balance) the same, or perhaps even greater, than they would impose if they were able to negotiate customized packages of benefits and burdens with individual landowners. This is particularly true for local governments motivated, as William Fischel has hypothesized, by voters’ risk aversion about the value of their homes.<sup>106</sup> Thus, the possibility of tyranny by a local antidevelopment majority, which Fischel has argued is par-

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<sup>104</sup> For example, Justice Clarence Thomas asserted in dissent from the denial of certiorari in *Parking Association of Georgia v City of Atlanta*, 450 SE2d 200 (Ga 1994), that “the general applicability of the ordinance should not be relevant in a takings analysis,” and illustrated his point by observing it would clearly be a taking “if Atlanta had seized several hundred homes in order to build a freeway.” 515 US 1116, 1118 (1995) (Thomas, J, dissenting).

<sup>105</sup> Alienability limits have sometimes been proposed as a way to address strategic behavior by private actors, by removing the incentive to acquire an entitlement for leverage purposes only. For example, see generally Lee Anne Fennell, *Adjusting Alienability*, 122 Harv L Rev 1403 (2009); Ian Ayres and Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U Pa L Rev 45 (1999). Governmental bodies may enact land use restrictions, including inefficient ones, for a variety of reasons other than gaining bargaining leverage. See text accompanying notes 62–63. See also Fennell, 122 Harv L Rev at 1455 (discussing and critiquing the use of alienability limits to address insincere lawmaking in the land use context).

<sup>106</sup> William A. Fischel, *The Homevoter Hypothesis* 8–10 (Harvard, 2001).

ticularly salient in locally enacted land use law,<sup>107</sup> would not justify singling out exactions (as opposed to local land use law generally) for special scrutiny.

While a standard takings analysis of the burdens placed on landowners may offer a more direct and fruitful way to approach this problem, bargains may muddy the waters in ways that could call for special scrutiny. Consider, for example, the rise of community benefit agreements. These are private agreements between developers and community groups that promise community stakeholders specific benefits, such as jobs or local amenities, in exchange for their acquiescence in the development plan.<sup>108</sup> While governments may view these agreements as a politically attractive way of collaboratively addressing community concerns, the very involvement by government produces risks. If channeling benefits directly to third parties becomes a de facto requirement of development approval, bargains can generate burdens (and not just benefits) for developers that are not apparent from an examination of regulatory impositions alone.<sup>109</sup> Such opaque burdens raise many of the same concerns that we have already discussed.

Here it becomes helpful to separate two inquiries that can become entangled in evaluating land use bargains. The first, which standard takings analysis is well equipped to handle, is the severity of the burden that is imposed on a given landowner or group of landowners. The second is whether the government's overall dealings with landowners are consistent with the rule of law. This inquiry goes to the fit between the procedural and substantive framework the government has established and the legitimate goals of the governmental entity. By the Court's own doctrinal lights, this is the kind of inquiry that sounds in due process: whether the government is acting properly. The connection between the burden-severity and rule-of-law questions emerges in takings cases in the following way: one of the ways in which rule of law might be undermined is through bargaining processes that make it too difficult to answer the burden-severity question ac-

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<sup>107</sup> See William A. Fischel, *Regulatory Takings* 276–88 (Harvard, 1995).

<sup>108</sup> See, for example, Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?* 77 *U Chi L Rev* 5, 5–6 (2010).

<sup>109</sup> See, for example, *id.* at 27–28 (discussing the possibility that approval by community groups might be an implicit requirement for development approval, and the associated legal implications).

curately and that therefore make it impossible for courts to protect landowners from excessive regulatory burdens.

But the *Nollan/Dolan* criteria do not really address this problem. Their brand of heightened scrutiny is anchored in an application of the unconstitutional conditions doctrine that requires first identifying some governmental act that would qualify as an uncompensated taking if divorced from the bargaining context.<sup>110</sup> The concerns associated with rule of law, including the concern that impermissibly severe uncompensated burdens will be obscured by the bargaining apparatus, do not depend on first identifying such an uncompensated taking.<sup>111</sup> Conversely, the distinctions in the underlying takings doctrine that are considered critical to the question of burden severity—such as *Loretto*'s carve-out for physical takings—have no bearing on whether the government is acting *improperly* in its dealings with landowners. Instead, those distinctions go only to the compensability or noncompensability of the burdens imposed by governmental actors engaged in otherwise legitimate governmental acts.

There is therefore a fundamental mismatch between the *Nollan/Dolan* goals of ferreting out bad government behavior (that, among other things, might allow it to take from owners in a tricky or sneaky manner) and the presumption of the Takings Clause that the governmental conduct in question is otherwise legitimate but burdensome enough to require compensation.<sup>112</sup> Because bad behavior is notoriously shape-shifting and opportunistic, the tools for addressing it cannot be found in a toolkit devoted to categorizing and evaluating burdens for compensation purposes. What is required instead are principles that can channel governmental

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<sup>110</sup> See Part IV.A.3.

<sup>111</sup> Conversely, identifying an act that would be a taking if viewed in isolation outside of the bargaining context does not necessarily establish the existence of a constitutionally impermissible burden, since the bargain itself may supply the just compensation. See Part IV.A.4.

<sup>112</sup> Of course, an *uncompensated* regulatory taking implicates concerns that we might characterize as related to the rule of law. That is, a taking without compensation would be a kind of lawless act. But it is one anticipated by the Takings Clause itself, which provides for compensation that (once provided) fully legitimates the governmental act itself. To be sure, the Court's rhetoric in regulatory takings cases sometimes conveys outrage at what are perceived as attempts on the part of governmental entities to take without paying. But the underlying aims and methods of the governmental body are not in question in these cases, apart from the isolated issue of whether compensation is required—a question that, for all of its problems, the burden-focused regulatory takings inquiry has been crafted to address.

behavior along lines that reduce problems like obfuscation and corruption—problems that lie outside the domain of the Takings Clause.<sup>113</sup>

3. *The cost of reducing flexibility.* Perhaps the largest concern with using a rule-of-law approach to mark out the edges of heightened scrutiny is its potential tendency to swallow the entire field of land use control. We have already shown how bargains permeate the whole of land use regulation, and we have emphasized the conditionality and tentativeness inherent in the state's approach to a resource as unique, enduring, and essential as land.

If conditionality and bargaining are pervasive in land use law, and if such conditionality raises significant rule-of-law concerns, why not just say so much the worse for land use regulation? That is, why not just extend exactions scrutiny to land use regulation across the board? Taken to the extreme, doing so could make land use regulation prohibitively costly—a bad result for landowners and government alike. A more modest approach, some incarnations of which we will consider below, would attempt to bleed the discretion out of the land use process by applying elevated scrutiny only to those land use regulations that fail to satisfy rule-of-law criteria like generalizability and publicity—that is, actions that are ad hoc rather than legislative in character. The effect of applying heightened exactions scrutiny in this way would not be an unmitigated good, however. A likely result would be a net decrease in the flexibility and customizability of local land use laws, as compared to existing practices.

Efforts to specify and address all variations and contingencies in advance can make lawmaking unnecessarily cumbersome and costly. At the same time, inflexibly applying a single set of land use rules to every parcel would itself undermine the rule of law by treating differently situated people the same.<sup>114</sup> Moreover, as

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<sup>113</sup> We will suggest below that the Due Process Clause offers the most suitable home for this inquiry. See Part V.E.1.

<sup>114</sup> See Gowder, *Equal Law* at \*11–14 (cited in note 87). Of course, this possibility focuses our attention on the question of how to identify the sorts of differences that the law can appropriately take into account when justifying differential treatment. For instance, it would seem appropriate for the law to treat two parcels differently because of their drainage characteristics, but not because of the racial makeup of the residents of the neighborhood. See *id.* Identifying policy-relevant differences requires adopting or developing a theory of the kinds of “public reasons” on the basis of which the state is entitled to act. Such an undertaking, which in turn requires grappling with competing accounts of what is entailed by state rationality and nonarbitrariness, is beyond the scope of this article. Related ques-

even Fuller recognized, blanket rules that are a poor fit for individualized conditions can spur frequent amendments (instability) or encourage gaps between the law on the books and law as applied (incongruence).<sup>115</sup> Fuller's account of rule of law also suggests a crucial and robust role for market institutions and exchange—one in which heterogeneity of interests makes possible gains from trade.<sup>116</sup> The inefficiencies that may be associated with blocked bargains between landowners and governments can threaten rule-of-law values by generating pressure (in the form of unexploited surplus) for illicit deals.

Reducing discretion can also interfere with the ability of governments to appropriately price land use impacts—including positive ones. This consideration becomes increasingly important as the nation's population becomes overwhelmingly urbanized. Agglomeration benefits and congestion costs make the relative spatial placement of people, buildings, and uses—especially within cities—crucially important.<sup>117</sup> As John Logan and Harvey Molotch put it in their classic work on the political economy of land use, “[e]very parcel of land is unique in the idiosyncratic access it provides to other parcels and uses. . . . In economists' language, each property use ‘spills over’ to other parcels and, as part of these ‘externality effects,’ crucially determines what every other property will be.”<sup>118</sup> A local government intent on maximizing positive synergies within cities will not want to charge everyone the same regulatory “price” to locate or develop in a given place.<sup>119</sup> Applying

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tions often arise in tax policy discussions. See Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* 12 (Oxford, 2002) (referencing “the principle that like-situated persons must be burdened equally and relevantly unlike persons unequally”).

<sup>115</sup> See Fuller, *The Morality* at 39 (cited in note 85).

<sup>116</sup> *Id.* at 22–24.

<sup>117</sup> The benefits of agglomeration (including transportation savings, knowledge spillovers, and specialization gains) have long been recognized. See, for example, Alfred Marshall, *Principles of Economics* 328–29 (Macmillan, 1890); J. Vernon Henderson, *Urban Scale Economics*, in Ronan Paddison, ed., *Handbook of Urban Studies* 243, 243–48 (Sage, 2001). For recent discussions of trade-offs between agglomeration benefits and congestion costs in city formation and growth, see generally Luis M. A. Bettencourt, *The Origins of Scaling in Cities*, 340 *Science* 1438 (2013); Jeffrey C. Brinkman, *Congestion, Agglomeration, and the Structure of Cities* (Federal Reserve Bank of Philadelphia Working Paper No 13-25, May 2013), online at <http://ssrn.com/abstract=2272049>. For a discussion connecting agglomeration effects to the law and economics of cities, see generally David Schleicher, *The City as a Law and Economic Subject*, 2010 U Ill L Rev 1507 (2010).

<sup>118</sup> John R. Logan and Harvey L. Molotch, *Urban Fortunes: The Political Economy of Place* 23–24 (University of California, 20th ann ed 2007).

<sup>119</sup> This is because parties differ in the agglomeration benefits they contribute to urban

heightened exactions scrutiny too broadly could thus reduce local governments' ability to use forms of differential pricing—carried out through individualized bargaining and other flexibility-enhancing devices—to manage agglomeration effects.<sup>120</sup>

As this discussion suggests, rule-of-law considerations in the abstract cannot tell us where to strike the balance between flexibility and predictability.<sup>121</sup> But these considerations can tell us what *sort* of inquiry is required. This, in turn, can help us identify the best doctrinal hook for the analysis and, as important, can point up the shortcomings of existing approaches.

It is noteworthy that many state courts, years before the Supreme Court entered the fray, perceived the need to police bargaining in the land use context.<sup>122</sup> Like *Nollan/Dolan*, these state law exactions tests typically took the form of an evaluation of the fit between the conditions imposed and the impact of the proposed land use.<sup>123</sup> To be sure, many of these tests did not burden local governments with levels of scrutiny as demanding as those established in *Nollan* and *Dolan*.<sup>124</sup> Yet despite their differences, the existence of state-law exactions doctrine suggests a widespread

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environments (and may have differential effects on congestion as well). See, for example, Gideon Parchomovsky and Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 *Wm & Mary L Rev* 211, 215–16, 241–43 (2012) (noting the asymmetry in positive externalities bestowed by larger businesses on their smaller neighbors); see also *id.* at 241–45 (explaining how shopping malls adjust rents to reflect the relative contributions of “anchor stores” and smaller shops). Differential pricing is likewise used in a variety of other contexts where the mix of users or customers impacts the product or experience produced. See, for example, Michael Rothschild and Lawrence J. White, *The Analytics of the Pricing of Higher Education and Other Services in Which the Customers Are Inputs*, 103 *J Pol Econ* 573, 575–76 (1995).

<sup>120</sup> See Ronit Levine-Schnur, *Koontz, Bargained Land Development, and the Rationales of Land Use Law* \*47–52 (unpublished article, Apr 2013), online at <http://law.huji.ac.il/upload/KoontzBargained.pdf> (proposing an approach to exactions jurisprudence that would take into account differential contributions to and draws from urban surpluses). For reflections on how land use regulations influence and structure the “location market” within cities, see generally Daniel B. Rodriguez and David Schleicher, *The Location Market*, 19 *Geo Mason L Rev* 637 (2012).

<sup>121</sup> Shapiro, *Legality* at 398 (cited in note 82) (“Legal systems have no choice but to decide how to balance the needs for guidance, predictability, and constraint on the one hand against the benefits of flexibility, spontaneity, and discretion on the other. Legal systems, therefore, not only must heed the Rule of Law but also must have views about how the Rule of Law itself is best heeded.”).

<sup>122</sup> See *Dolan*, 512 US at 389–91 (discussing state law exactions scrutiny).

<sup>123</sup> See *id.*

<sup>124</sup> See, for example, *Jenad, Inc. v Village of Scarsdale*, 218 NE2d 673, 676 (NY 1966) (partial abrogation by *Dolan* recognized in *Twin Lakes Development Corp. v Town of Monroe*, 801 NE2d 821, 826 (NY 2003)).

perception that land use regulatory deal making constitutes a discrete and problematic identifiable category of governmental action in need of judicial oversight. We have suggested that this perception may find normative footing in rule-of-law concerns. While those normative roots fit imperfectly with exactions jurisprudence as it has developed, they may nonetheless offer useful guidance going forward.

#### IV. SEARCHING FOR LIMITS WITHIN KOONTZ

Having surveyed the normative terrain, we can return to the hard question of how the Court might cabin its exactions jurisprudence given its dual goals of protecting meaningful land use regulation and restraining local land use power. In this part, we turn explicitly to the *Koontz* decision for insight into the limiting principles that remain open to the Court, as well as the ones that it seems to have foreclosed.

Before *Koontz*, the unconstitutional conditions doctrine and substantive takings law seemed to embed constraints on the reach of *Nollan* and *Dolan*. A claimant seeking heightened means-ends exactions scrutiny would first need to clear two preliminary hurdles. For starters, she would need to show that the government was attempting to bargain—expressly offering to release the landowner from a discretionary regulatory burden in exchange for some valuable concession by the landowner. Second, she would have to show that the concession sought by the government was one that would, on its own, violate the Takings Clause if simply imposed by the state.

*Lingle* and *Del Monte Dunes* further hinted that only those land use interactions that cleared these two hurdles in the clearest and most prototypical way—bargains initiated *through an ad hoc or adjudicative process* to appropriate *tangible interests in real property*—would trigger *Nollan/Dolan* scrutiny.<sup>125</sup> The ad hoc element would have limited the exactions doctrine to the most unambiguous of bargains: those that were available only to particular landowners on an individually negotiated, case-by-case basis. Limiting the doctrine to demands for physical interests in real property would have reserved heightened exactions scrutiny for bargains involving the clearest, most easily identifiable type of takings: per se *Loretto*

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<sup>125</sup> See Part I.C.

takings, which the Court has deemed so uniquely intrusive as to justify categorical treatment.<sup>126</sup>

In *Koontz*, however, the Court jettisoned the requirement of a physical exaction and remained conspicuously silent (despite prodding from the dissent) about where it stood on the legislative/adjudicative distinction.<sup>127</sup> With one limit clearly off the table and the second deferred to another day, what can we discern from the *Koontz* opinion about the boundary principles it meant to apply? Such limits might relate either to the nature of the concession or burden the government demands, or to the nature of the interaction or bargain between the government and the landowner. The sections below examine the Court's treatment of each of these dimensions.

#### A. BURDEN-RELATED LIMITS

The *Koontz* majority decisively rejected the distinction between physical exactions of land and monetary exactions. It also indicated that it viewed at least some subset of monetary impositions connected to identifiable land as per se takings. But it left several crucial questions unanswered that will have profound implications for the scope of heightened exactions scrutiny and for takings analysis more generally. First, what distinguishes the monetary obligations that trigger exactions scrutiny from those that do not? Second, what is the status, for purposes of exactions analysis, of in-kind regulatory burdens that are neither physical appropriations of land nor monetary impositions? Third, and closely related, is it still necessary for a burden to constitute a “taking on its own” in order to trigger heightened scrutiny under *Nollan* and *Dolan*—and if so, what does “on its own” mean? Fourth, what role, if any, does in-kind compensation play in thinking about the constitutional foundations of exactions analysis?

1. *Which monetary obligations?* The *Koontz* majority held that

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<sup>126</sup> See *Lingle v Chevron*, 544 US 528, 538 (2005) (“The Court has held that physical takings require compensation because of the unique burden they impose . . .”). Although limiting qualifying burdens to physical takings might seem arbitrary, it tracks a quirk in the underlying takings jurisprudence: the categorical treatment that permanent physical occupations receive under *Loretto*, which diverges dramatically from the *Penn Central* treatment that usually governs regulatory takings inquiries, as well as from the treatment that most monetary burdens had received prior to *Koontz*. See Part I.A.

<sup>127</sup> We will take up below the possibility that the Court might ultimately adopt the legislative/adjudicative distinction it dodged in *Koontz*. See Part V.A.

conditioning development on a monetary obligation triggers heightened scrutiny under *Nollan* and *Dolan*. But which monetary obligations qualify for this treatment? Because there is no clear indication that the Court meant to jettison the requirement that the burden in question constitute a taking on its own—a point we will revisit below—we might start by supposing that only those monetary impositions that constitute per se takings will trigger heightened scrutiny. This approach gets us little traction, however.

Until *Koontz*, monetary impositions were not thought to constitute takings at all, much less per se takings, outside of very limited contexts. The relatively narrow exception articulated in *Brown v Legal Foundation of Washington*<sup>128</sup> involved situations in which the government seized some discrete pool of money (in *Brown*, the interest earned by a particular trust account). The basis for this exception has never fully been fleshed out by the Court, but its scope was typically understood to be self-limiting.<sup>129</sup> Even the plurality in *Eastern Enterprises* only concluded that the monetary obligation in that case worked a taking after going through the full *Penn Central* analysis.<sup>130</sup>

*Koontz* thus moved into uncharted waters by suggesting that generalized monetary obligations tied to identifiable land (or some not-fully-specified subset of such monetary impositions) count as per se takings. Justice Alito's opinion for the majority expressly refers to the petitioner's case as being premised on a per se taking of money, citing *Brown*.<sup>131</sup> Later, he states that "any such demand [for a monetary expenditure linked to land] would amount to a per se taking similar to the taking of an easement or a lien."<sup>132</sup> But all monetary obligations imposed on land holdings, including such ubiquitous tools as property taxes, special assessments, and permitting fees, share this connection to ownership of specific parcels of land.<sup>133</sup> And the *Koontz* majority insists that it does not mean to sweep all of these impositions into the compass of exactions scrutiny.

We know, then, that some subset (and only some subset) of

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<sup>128</sup> 538 US 216 (2003).

<sup>129</sup> See Merrill, 86 Va L Rev at 903–07 (cited in note 52).

<sup>130</sup> See *Eastern Enterprises*, 524 US at 522–23.

<sup>131</sup> *Koontz*, 133 S Ct at 2600.

<sup>132</sup> *Id.*

<sup>133</sup> See *id* at 2606–07 (Kagan, J, dissenting).

monetary impositions tied to land now qualify as per se takings that will trigger exactions analysis. But the *Koontz* majority does not articulate any principle that would distinguish the routine impositions it means to exempt from heightened scrutiny from the sorts of land-related monetary obligations it intended to subject to heightened scrutiny. Justice Alito's opinion instead points to the Court's distinction between takings and taxes in *Brown* as proof that such a distinction is possible—without acknowledging the sea change in the coverage of *Brown* that the *Koontz* opinion itself seems to work.

The majority also finds reassurance in state court cases defining “taxes.”<sup>134</sup> But these cases typically involve judicial efforts to interpret state-law restrictions on local governments' power to tax, restrictions generally understood not to reach things like “fees.”<sup>135</sup> The *Koontz* Court apparently meant to shield both taxes and fees (at least routine user fees) from heightened scrutiny.<sup>136</sup> The boundaries of state delegations of revenue-raising power to local governments seem entirely orthogonal to the meaning of a federal constitutional provision focused on the relationship between individual property owners and the state. It is not impossible, however, that state law procedural prerequisites for taxes, such as the requirement that they be enacted by the legislature, could provide a back-door way for the Court to import something like the legislative/adjudicative distinction that it studiously avoided drawing in *Koontz*.<sup>137</sup>

A different (if somewhat recursive) way of defining the subset

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<sup>134</sup> See *Koontz*, 133 S Ct at 2602 n 3.

<sup>135</sup> See, for example, *Elizabeth River Crossings OPCO v Meeks*, 749 SE2d 176 (Va 2013) (distinguishing “taxes” from “user fees” and rejecting a claim that the Virginia legislature had improperly delegated taxing power to a transportation authority responsible for operating a tunnel between Portsmouth and Norfolk); *Silva v City of Attleboro*, 908 NE2d 722 (Mass 2009) (reviewing the standards for distinguishing taxes from fees for state law purposes and finding that a charge for a burial permit falls in the latter category and hence was lawfully imposed by the city).

<sup>136</sup> 133 S Ct at 2600–01 (“It is beyond dispute that “[t]axes and user fees . . . are not “takings.” . . . This case therefore 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.”) (quoting *Brown*, 538 US at 243 n 2) (Scalia, J, dissenting)).

<sup>137</sup> Suggestive in this regard is the Court's explanation of why the monetary imposition in *Brown* could not have been a tax, due to state law: “in Washington, taxes are levied by the legislature, not the courts.” *Koontz*, 133 S Ct at 2601. Although the point is not developed further, it is likely that the Court will eventually have to confront the question of whether heightened exactions scrutiny exempts some or all legislative enactments. See Parts V.A and V.B.

of monetary impositions subject to heightened scrutiny would make the imposition's appearance in a bargaining context relevant to the question. The idea might be that the government's choice to isolate a particular burden by demanding it as a quid pro quo fundamentally alters the way the burden is understood. Thus, money demanded in exchange for development permission is viewed as different than money demanded unconditionally—with only the former, and not the latter, potentially amounting to a per se taking.

One piece of evidence for this interpretation is Justice Alito's puzzling statement that *Koontz's* claim—that a monetary imposition tied to land is a per se taking—is “more limited” than would be a claim that such a monetary imposition triggered a *Penn Central* inquiry.<sup>138</sup> How could declaring a wide swath of monetary impositions to be per se takings be “more limited” than applying the much more forgiving *Penn Central* standard to them? The answer could be that Justice Alito viewed his *Koontz* pronouncements about per se takings as somehow limited to the exactions context rather than applying to the larger realm of takings law. This way of viewing the case would confine the effects of *Koontz* to exactions cases, but it would put increased pressure on the problem of determining which interactions count as exactions.

The Court in *Koontz* clearly wanted to treat monetary exactions just like physical exactions to keep local governments from using the former as a substitute for the latter. The problem, however, is that physical appropriations had up until *Koontz* been treated differently under takings law than most monetary impositions. To maintain the symmetry between in-kind exactions and in-lieu payments by treating both as per se takings, the Court may have significantly widened the domain of takings law as it applies to monetary obligations.

2. *What about regulatory burdens?* Although *Koontz's* treatment of monetary impositions has received the lion's share of scholarly attention, the case leaves unanswered another question with far-reaching implications: what about the wide range of regulatory burdens that are accepted (or proposed) in exchange for development permission? Many conditions do not take the form of monetary impositions and also do not amount to physical appro-

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<sup>138</sup> See *Koontz*, 133 S Ct at 2600.

priations of property. Such in-kind regulatory conditions on development are ubiquitous, including set-back requirements, parking and landscaping requirements, limits on hours of operation, and many more. None of these would be a taking on its own under standard takings analysis. The post-*Koontz* treatment of regulatory burdens, then, depends crucially on another question that the Court left unanswered in *Koontz*—the status of the “taking on its own” requirement.

3. *A taking on its own.* The unconstitutional conditions doctrine is premised on the notion that the government is asking the claimant to trade away a constitutionally protected right in order to receive a discretionary government benefit.<sup>139</sup> Accordingly, it seems to require a burden that would constitute a taking on its own if imposed outright. And, indeed, in *Nollan* and *Dolan* the Supreme Court’s application of heightened scrutiny proceeded on the assumption that the government had conditioned development approval on the conveyance by the claimant of an interest in property that the government could not simply have taken on its own without triggering the duty to pay just compensation under the Takings Clause.<sup>140</sup> As Justice Kagan put it in her *Koontz* dissent, *Nollan* and *Dolan* “apply only if the demand would have constituted a taking when executed *outside* the permitting process.”<sup>141</sup>

Despite the dearth of substantive takings analysis in the majority opinion, there is no clear indication that the *Koontz* Court intended to do away with the requirement that the state’s demand—if unilaterally imposed—constitute a taking on its own. On the contrary, the majority considered the monetary obligation imposed by the state to be the sort of state action that would count as a per se taking if imposed by the state. But retaining the “taking on its

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<sup>139</sup> See, for example, Sullivan, 102 Harv L Rev at 1415 (cited in note 34) (“The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”).

<sup>140</sup> See *Nollan* 483 US at 831 (“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.”); *Dolan*, 512 US at 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.”); see also *Lingle*, 544 US at 546 (“In each case [*Nollan* and *Dolan*], the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking.”).

<sup>141</sup> 133 S Ct at 2607 (Kagan, J, dissenting).

own” prerequisite raises the question of how the idea of “on its own” should be interpreted outside of the specific facts in *Koontz*. Interestingly, the Court did not have to confront this question as long as it limited heightened scrutiny to physical exactions. The Court’s carve-out in *Loretto* makes any permanent physical appropriation—no matter how small, no matter how insignificant in proportion to the rest of the parcel—a taking on its own. The presence of a physical *Loretto* taking has the interesting effect of making the overall context in which the imposition occurs irrelevant—one can combine a permanent physical occupation with any other property elements one likes, and it is still a taking.

By contrast, context is tremendously relevant for the rest of takings analysis. *Penn Central*’s framework uses a “parcel as a whole” approach to determine whether landowners have been saddled with burdens that should instead be spread across society.<sup>142</sup> The infamous “denominator problem” arises in both *Penn Central* and *Lucas* analyses precisely because it is necessary to consider impositions in a context larger than the regulatory burden itself.<sup>143</sup> If every small regulatory act were treated as a *Loretto* taking, regardless of how it were situated within the overall framework of benefits and burdens, “government hardly could go on.”<sup>144</sup>

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<sup>142</sup> *Penn Central*, 438 US at 130–31.

<sup>143</sup> A central inquiry in takings analysis is the degree of diminution in value (or, at the extreme, deprivation of all economically viable use). To determine how much the value of a piece of property has diminished or whether all economically viable use has been eliminated, one must first establish the base against which the diminution is to be measured: the denominator. For example, a ten-acre plot might be subject to a regulation that destroys entirely the value of one acre. How much the plot’s value has diminished depends on whether each acre is considered separately, or whether the whole plot is considered together. See *Lucas v South Carolina Coastal Council*, 505 US 1003, 1016–17 n 7 (1992) (discussing this difficulty using a similar example and observing that “uncertainty regarding the composition of the denominator in our ‘deprivation’ fraction has produced inconsistent pronouncements by the Court”). The Court has, however, rejected “conceptual severance” that would enable a landowner to define the property interest by reference to the scope of the regulation itself. See *Taboe-Sierra Preservation Council, Inc. v Taboe Regional Planning Agency*, 535 US 302, 326–27, 331 (2002); see also Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum L Rev 1667, 1674–79 (1988) (coining the term “conceptual severance” and discussing how the concept had been treated in past takings cases).

<sup>144</sup> *Pennsylvania Coal v Mahon*, 260 US 393, 413 (1922) (Holmes, J). Oregon’s ill-fated experiment with Measure 37 demonstrates the unworkability of a compensation requirement that attaches to even the smallest diminutions in value. Before being largely gutted through the subsequent adoption of Measure 49, Measure 37 required local governments to either lift restrictions that reduced property values or compensate for them. Perhaps unsurprisingly, local governments overwhelmingly elected the former alternative, essentially making the regulation of land use impossible to carry on. See Bethany R. Berger, *What Owners Want and Governments Do: Evidence from the Oregon Experiment*, 78 Fordham

This is even more true where monetary impositions are concerned. Before *Koontz*, these had never even been treated as subject to takings analysis outside of the narrow context of specifically designated funds, liens placed on specific property, and the like. It is not workable or logically cohesive to treat all monetary obligations relating to land as *Loretto* takings. Yet to put some obligations outside the *Loretto* box while leaving others inside requires a preliminary sorting task that inevitably draws on the surrounding context and purpose of particular monetary obligations.<sup>145</sup>

The reason is simple. Very few governmental burdens—including taxes and fees—would survive even the most deferential constitutional review if they were examined in isolation from their wider contexts. If the government summarily ordered you to hand over a certain sum of money, or to undertake certain costly tasks, this surely would look like some sort of constitutional violation. But if the sum of money involved were your property tax liability, or if the task involved simply remediating harmful conditions on your property, the apparent infirmity would disappear—at least in the absence of some extraordinary facts not given here. The difficulty is in determining which aspects of the surrounding context can be taken into account in deciding whether there is a constitutional right up for trade that would trigger *Nollan/Dolan* analysis.

Now that the Court has unmoored *Brown* from its prior grounding in specific funds, monetary *Loretto* takings can no longer be identified in a context-free way. Yet the *Koontz* Court was adamant that no *Penn Central* analysis was necessary.<sup>146</sup> So it would seem that the Court has in mind some impressionistic initial step, conducted outside of ordinary takings doctrine, in which it classifies some monetary impositions related to land as *Loretto* takings that trigger *Nollan/Dolan* analysis, and some monetary impositions as taxes or fees that are wholly exempt from takings analysis.

Whether the Court has in mind a similar preliminary assessment

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L Rev 1281, 1284 (2009) (“In only one claim, out of the over 7000 Measure 37 claims filed, did the state or municipality choose to compensate the property owners rather than waive the regulation.”).

<sup>145</sup> To be clear, consideration of the surrounding context is built into the nexus and proportionality requirements used to assess the permissibility of a given exaction, after it is initially flagged for heightened scrutiny. The discussion in the text goes to an antecedent question: when and how will the surrounding context be used to decide *whether* heightened scrutiny applies in the first place?

<sup>146</sup> *Koontz*, 133 S Ct at 2600.

of conditional regulatory burdens that fall short of permanent physical occupations is unclear. The same circumvention concerns that led the Court to reject the distinction between monetary and physical exactions could lead the Court to reject an interpretation that would immunize non-*Loretto* regulatory burdens from exactions scrutiny. Here too, the Court's desire for consistency in the exactions arena may clash with distinctions that have been hammered out in the underlying takings doctrines, potentially putting pressure on those doctrines.

In *Koontz*, a nonphysical regulatory alternative was offered to the landowner: preserving more of the property in an undeveloped state under a conservation easement. Because that alternative would have apparently allowed Koontz to make viable use of his property, and because it would not have compromised his right to exclude as did the access easements at issue in *Nollan* and *Dolan*, it seems inconceivable that it would amount to a per se taking under existing doctrine.<sup>147</sup> And the Court never says that it does.<sup>148</sup> Curiously, though, Justice Alito's opinion implies that every alternative offered to Koontz was a potential *Nollan/Dolan* violation: the majority states that even one valid alternative would be sufficient to save the proposed bargain from unconstitutionality.<sup>149</sup>

We think the most plausible interpretation that emerges from the Court's discussion is that it reframed the regulatory alternative offered to Koontz in a way that effectively tainted it with the monetary exaction and thereby denied it status as a stand-alone alternative.<sup>150</sup> If this is so, then nothing in *Koontz* reads directly

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<sup>147</sup> But see Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2012–13 *Cato S Ct Rev* 215, 236 (2013) (observing in connection with the conservation easement condition in *Koontz* that "[f]orcing a property owner to allow an easement surely would be a taking even outside the permitting process"). The easement at issue in *Koontz* was a negative easement that restricted development (just as zoning codes do ubiquitously), not an affirmative easement that granted access to the property like the ones at issue in *Nollan* and *Dolan*. While Somin is aware of this distinction, see *id.* at 237, he does not appear to fully appreciate its potential significance under takings law.

<sup>148</sup> Had it engaged in a takings analysis of the restriction on development, the Court would have needed to proceed under *Penn Central* or (more implausibly) *Lucas*; there is no basis for claiming that such a restriction amounts to a *Loretto* physical taking.

<sup>149</sup> 133 S Ct at 2598 ("We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition.").

<sup>150</sup> In brief, because the regulatory burden could be avoided by paying money, and because paying money was framed as a per se taking, the regulatory avoidance opportunity was seemingly framed as just another way in which the District tried to "extort" money from the individual. See *id.* This interpretation is explored in Part V.C.2.

on the status of purely in-kind regulatory conditions (conditions, that is, that are not paired with a monetary alternative). The question remains, however, whether the usual rules of takings analysis—ones that examine the surrounding context to determine whether a burden rises to the level requiring just compensation—continue to apply after *Koontz* to limit the class of impositions that will trigger heightened exactions scrutiny.

The problem the Court confronts is not limited to takings jurisprudence; similar questions of bundling and framing run through the unconstitutional conditions doctrine more generally.<sup>151</sup> The Fourth Amendment challenge in *Wyman v James*<sup>152</sup> illustrates the problem well. There, receipt of welfare benefits under the Aid to Families with Dependent Children (AFDC) program was conditioned on a visit to the recipient's home. Considered on its own, the mandatory visit would seem to be plainly unconstitutional: a government agent cannot simply force her way into the home of a random citizen for a friendly chat. But the Court held that the AFDC home visit was not a search at all within the meaning of the Fourth Amendment, much less an unreasonable one, given the level of intrusion involved and the governmental interest in determining eligibility for benefits.<sup>153</sup> That is, the Court used the very benefit for which the burden was being traded to conclude that the burden did not implicate a constitutional right.

As this example shows, a key reason that the unconstitutional conditions doctrine is so disordered is that it is never quite clear when the benefit that is granted in exchange for ostensibly giving up a constitutional right is relevant to the question *whether* one is being asked to give up a constitutional right.<sup>154</sup> The problem is exacerbated in the takings context not only by the muddy and

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<sup>151</sup> See generally Adam B. Cox and Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J Legal Analysis 61 (2013); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 Yale L J 1311 (2002).

<sup>152</sup> 400 US 309 (1971).

<sup>153</sup> The Court first found that there was no search in the Fourth Amendment sense. *Id.* at 317–18. The Court went on to opine in the alternative that even if there were a search, it would be a reasonable one, given its nature and purpose. *Id.* at 318–24.

<sup>154</sup> A somewhat parallel issue arose in *Penn Central* with respect to the treatment of transfer development rights (TDRs). In the majority's view, the fact that the restrictions associated with historic landmark status were accompanied by TDRs counted as a point in favor of finding those restrictions not to work a taking. 438 US 136–37. The dissent argued that TDRs should enter the analysis only in order to determine whether they constituted just compensation for the taking. *Id.* at 150–52 (Rehnquist, J, dissenting).

context-specific nature of the underlying takings analysis, but also by the fact that one type of exchange—property for just compensation—can be constitutionally unproblematic even when it is involuntary.

4. *The role of compensation.* Substantive takings law contains a unique feature: the payment of just compensation removes the constitutional infirmity associated with an involuntary taking for public use. Only a broken bundle—a taking for public use *without* just compensation—presents a constitutional violation.<sup>155</sup> The takings context thus differs from other contexts in which parties may be asked to waive their constitutional rights in exchange for benefits. Where the waiver of a right must be voluntary to be effective, it is capable of being improperly coerced. However, there is no possibility of improperly coercing a property owner to accept just compensation in exchange for her property since her consent is not required at all; the government has every right to simply compel the exchange when it does so for public use.

How should this background fact change our assessment of the (ostensibly) *voluntary* interactions in which landowners and governments engage over development rights? In a sense, we can understand the parties to be bargaining in the shadow of eminent domain. This is not thought to be problematic in the actual context of eminent domain: the government can (indeed typically must) first attempt a voluntary purchase before resorting to condemnation, and if the landowner agrees to it, there is no claim that she has been coerced to give up her right to just compensation.<sup>156</sup>

Exactions present a similar scenario: a landowner's acceptance of an in-kind regulatory benefit (development permission) in exchange for a taking for which she could have otherwise received just compensation. The landowner's acceptance might suggest that the in-kind benefit was preferred to just compensation.<sup>157</sup> No less

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<sup>155</sup> Although the Takings Clause is the focus of the Court's exactions analysis, it is possible that monetary or regulatory impositions could implicate another constitutional provision, such as the Due Process Clause. See Eduardo Peñalver, *A Few More Thoughts About Koontz*, PrawfsBlawg (June 26, 2013), online at <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/takings-and-taxes-after-koontz.html> (observing that "there is no reason why the underlying constitutional violation has to be a taking—it could be a first amendment violation, a violation of the due process clause, etc.").

<sup>156</sup> See, for example, NY Eminent Domain Procedure Law § 303.

<sup>157</sup> Perhaps some landowners are not fully informed about their rights and would not understand that just compensation would be available for a given concession, if it were demanded in isolation. But it would be possible to offer just compensation as an explicit

of a property rights proponent than Richard Epstein has suggested that just compensation can be provided in kind as well as in cash.<sup>158</sup> If it is permissible for just compensation to be provided in kind, and if an individual prefers an in-kind benefit to monetary just compensation, hasn't just compensation then been provided?<sup>159</sup> Justice Alito's discussion of the constitutional problem with exactions in his majority opinion in *Koontz* provides an emphatic negative answer:

By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. . . . So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.<sup>160</sup>

This argument has implications for substantive takings law that are both puzzling and troubling. Why would providing something that the landowner herself deems *more valuable* than just compensation "frustrate the Fifth Amendment right to just compensation"? The implicit claim must be that the government has somehow acted wrongly in failing to provide the desired benefit for free. But nothing in the Court's analysis supplies the basis for this assertion.

The mystery only deepens when monetary exactions are considered. Here, the property that is being taken is *money*. What just compensation would a person be entitled to for a taking of money? Presumably, the money back again. But if every payment made to the government in connection with land will be evaluated in isolation and marked as a per se taking, and if nothing other than

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alternative to the regulatory benefit in question. Douglas Kendall and James Ryan proposed just such an approach, although they admitted some doubts about its constitutionality. Douglas T. Kendall and James E. Ryan, "*Paying*" for the Change: Using Eminent Domain to Secure Exactions and Sidestep *Nollan* and *Dolan*, 81 Va L Rev 1801, 1803–04 (1995).

<sup>158</sup> See Epstein, *Takings* at 195 (cited in note 50) ("The Constitution speaks only of 'just' compensation, not of the form it must take."); id at 195–215 (developing the idea of implicit in-kind compensation).

<sup>159</sup> See Kendall and Ryan, 81 Va L Rev at 1843–44 (cited in note 157) (suggesting that disallowing the waiver of monetary just compensation in favor of in-kind compensation would be inconsistent with the property-protection rationale underlying the just compensation requirement).

<sup>160</sup> *Koontz*, 133 S Ct at 2594–95 (internal citations omitted).

*monetary* just compensation will cure this constitutional infirmity, then the analysis spelled out in *Koontz* would appear to broadly disable local governments from collecting land-related monetary payments.<sup>161</sup> Even if—indeed, especially if—the benefits provided in exchange appeared much more attractive to the landowner than the monetary payment, nothing but having the money itself back would apparently suffice under the majority’s reading of the just compensation requirement. The Court’s expansion of exactions doctrine thus throws into doubt all manner of fees and assessments.

Clearly this is not what the Court had in mind. It obviously wanted to leave intact all monetary impositions related to land *except extortionate ones*. But sifting through every imposition to identify the bad ones is no trivial exercise; it involves a significant recalibration of the relationship between federal courts and other government actors. Courts need some principle for defining at the outset the boundaries separating heightened exactions scrutiny from its more traditional, deferential analysis. But, apart from rejecting the Florida Supreme Court’s use of the distinction between monetary and in-kind exactions, the Court in *Koontz* offers few clues for identifying those boundaries.

## B. BARGAIN-RELATED LIMITS

The distinction between ordinary land use restrictions and land use regulatory bargains is extremely unstable, for reasons that we

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<sup>161</sup> The difficulty stems from two facets of the Court’s analysis. First, in counting monetary impositions as an appropriate predicate for exactions scrutiny, the majority appears to be saying that as a matter of substantive takings law, some subset of monetary impositions linked to identifiable land will now count as per se *Loretto* takings. This on its own creates grave difficulties, ones that the majority tries to minimize by emphasizing that *of course* they do not mean for this new rule to reach ordinary taxes and fees, which have never been considered takings. The Court, however, does not offer a principled basis for its distinction between the different categories of monetary impositions. In addition, the problem reenters the analysis at a second point. Exactions analysis by its very nature separates out what is demanded from what is provided in return, and applies heightened scrutiny to interrogate the relationship between those elements. To exempt taxes and fees from this analysis means that in some category of cases courts will not undertake this separate-and-interrogate move at all. Yet the reason can never be, as Justice Alito’s analysis makes clear, that the implicit or explicit consent of the landowner to the payment arrangement pulls it out of the domain of constitutional concern. Something else—something not specified by the Court—must do so. To be sure, it is fully in alignment with unconstitutional conditions analysis to disregard a citizen’s consent to cede her constitutional rights. See generally Hamburger, 98 Va L Rev 479 (cited in note 34). What makes applying the principle so problematic here is that (unlike in any other context) the Court seems to be disabling landowners from consenting to *pay money* to the government, regardless of how highly they value what they receive in exchange.

have already discussed in Part II. The Court tiptoed around this instability in *Del Monte Dunes* and *Lingle*. But it plowed headlong into it in *Koontz*. Not only did it speak unclearly about the nature of the burden that qualifies for heightened scrutiny, it also disavowed some potential markers relating to the nature of qualifying bargains.

All of the Justices rejected as excessively formalistic the distinction the Florida Supreme Court had drawn between an exaction that takes the form of a condition precedent (denial of a permit “until condition X is satisfied”) and one that takes the form of a condition subsequent (issuance of a permit “subject to condition X”). Thus, “failed exactions,” as Mark Fenster has called them,<sup>162</sup> also receive *Nollan/Dolan* scrutiny. But failed exactions are far more heterogeneous than completed exactions, as Justice Kagan’s dissent underscores.<sup>163</sup> When a permit is actually issued with a burden attached to it, the link between the benefit proffered and the burden demanded is clear, as is the demand itself. When a permit is denied, however, the reasons may be opaque, multiple, or contested. The Court does not mean to second-guess all permit denials, presumably. But how is it possible to pick out which denials receive heightened scrutiny?

One possibility would be to examine the factual record for evidence that the local government explicitly demanded the burden in question prior to denying the permit, effectively linking the unmet demand to the denied permit. But determining whether a demand has been made is itself problematic, as *Koontz* illustrates. The dissent in *Koontz* disagreed that there was any such demand,<sup>164</sup> while the majority declined to address whether the District’s “demands for property were too indefinite to give rise to liability.”<sup>165</sup> This ambiguity about the existence and nature of the demand is unsurprising. The fluid and often informal nature of discussions between landowners and land use regulators make the identification of “demands” a difficult proposition, as our earlier discussion of Option X emphasized. In light of *Koontz*, we might expect more guarded and ambiguous conversations and less reason-giving

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<sup>162</sup> Fenster, 36 Vt L Rev 623 (cited in note 36).

<sup>163</sup> See *Koontz*, 133 S Ct at 2610–11 (Kagan, J, dissenting); see also Fenster, *Substantive Due Process* at \*8 (cited in note 4).

<sup>164</sup> 133 S Ct at 2609–11 (Kagan, J, dissenting).

<sup>165</sup> *Id* at 2598.

associated with permit denial if an explicit demand were a prerequisite to an exactions challenge.<sup>166</sup> This will have the effect of making it even harder to determine the existence of demands in the future.

While formalistic when considered on its own terms, the Florida Supreme Court's position had the virtue of providing a clear boundary principle for determining which demands would be subjected to the exactions test. Given *Koontz's* rejection of it, what other boundaries might be constructed to hive off the kinds of interactions that will trigger *Nollan/Dolan* analysis?

### C. TAKING STOCK

To appreciate where *Koontz* leaves us, it is helpful to briefly revisit the two dimensions along which boundaries on the scope of heightened scrutiny might be constructed: (1) the nature of the concession or burden that the government asks the landowner to accept, and (2) the nature of the interaction or bargain between the government and the landowner.

As Figure 4 illustrates, burdens can be arrayed along a spectrum that runs from general obligations (a requirement to pay or spend money) to the taking of specific assets (e.g., taking over an access easement).<sup>167</sup> Bargains can be arrayed along a spectrum from individualized (ad hoc deals) to formulaic (e.g., tax schedules). The facts of *Nollan* and *Dolan* fall in Cell I in this schematic; they involved exactions that would otherwise be per se takings of land, and were carried out through an individualized administrative or adjudicative process. The Court in *Koontz* expressly extended the reach of heightened scrutiny into (at least) Cell II by making a general obligation to spend or pay money, when tied to land, a qualifying burden type.<sup>168</sup> The *Koontz* majority also indicated that

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<sup>166</sup> Justice Kagan sensibly raises a concern about chilling communications between landowners and local governments if unequivocal demands are *not* required. See *id.* at 2610 (Kagan, J, dissenting) (“If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants.”). But if explicit demands *are* required, communication is still likely to change in ways that may not improve the administration of land use.

<sup>167</sup> There are other ways in which burdens might be differentiated. See Part V.C.

<sup>168</sup> See *Koontz*, 133 S Ct at 2598–2603. Significantly, the facts of *Koontz* suggest that the monetary impositions at issue might well be categorized as falling within Cell IV, and not Cell II. After all, the District's demands were based on policies it had implemented in negotiations with other landowners seeking permission to fill wetlands. See note 9 and



4 above can help to structure the inquiry. The Court might keep in place its existing pattern of decisions and construct boundaries around the domain of heightened scrutiny that would exempt all legislative enactments (Cells III and IV) or just formulaic monetary impositions (Cell IV). Or it might draw lines along different dimensions and split up one or more of Figure 4's cells. More radical (and much less likely) alternatives would involve the Court overruling past decisions to bring all of the quadrants in Figure 4 either inside or outside the domain of heightened scrutiny.<sup>171</sup> The sections below explore these possibilities.

#### A. THE LEGISLATIVE/ADJUDICATIVE DISTINCTION

Discussed by the dissent and adopted by a number of states, one possible distinction the Court might adopt would limit exactions scrutiny to burdens that are imposed on a discretionary, piecemeal (i.e., adjudicative) basis.<sup>172</sup> This approach would omit from heightened scrutiny any exactions or conditions that are imposed through a broad, prospective (i.e., legislative) enactment. The *Koontz* majority, perhaps unsurprisingly, did not focus on this distinction between so-called legislative and adjudicative exactions. Addressing the distinction was not strictly necessary to resolve the case, and doing so would have likely made it impossible for Justice Alito to hold together a majority.<sup>173</sup> But a newly constituted majority (perhaps containing some of the *Koontz* dissenters) might well choose the clarity and relative boundedness of this alternative over the morass of uncertainty left behind in *Koontz*. Although the distinction involves difficulties of its own (as we will see), some sort of legislative/adjudicative distinction might keep *Nollan* and *Dolan* from becoming the basis for completely open-ended heightened scrutiny.

1. *The distinction's traction.* The distinction between legislative and adjudicative state action is an appealing one for a number of reasons. First, it is well established in both the case law and legal

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<sup>171</sup> Domains exempted from heightened exactions scrutiny would not, of course, be exempted from all review. Rather, they would remain subject to due process and takings challenges, as well as to challenges based on other constitutional provisions.

<sup>172</sup> See 133 S Ct at 2608 (Kagan, J, dissenting).

<sup>173</sup> Justice Thomas, part of the five-Justice *Koontz* majority, had previously suggested in a dissent from a denial of certiorari that he viewed the legislative-adjudicative distinction as constitutionally irrelevant. See *Parking Ass'n of Georgia v City of Atlanta*, 450 SE2d 200 (Ga 1994), cert denied, 515 US 1116, 1118 (1995) (Thomas, J, dissenting).

commentary.<sup>174</sup> In a well-functioning democratic system, extensive political checks attend legislative enactments, and these arguably make it less necessary (and indeed, inappropriate) to add intrusive judicial checks. This is the usual explanation for why legislative enactments not burdening fundamental rights or employing suspect classifications are afforded the most deferential standards of judicial review.<sup>175</sup> The same justifications for judicial deference would seem to apply in the exactions context.<sup>176</sup> In *San Remo Hotel v San Francisco*, the California Supreme Court argued that

[a] city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition in the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.<sup>177</sup>

As we have discussed, the line between broadly applicable, legislative acts and more individualized, adjudicative land use bargains also coheres with what seems normatively problematic about some exactions. Although legislative acts often emerge from bargains between landowners (or coalitions of landowners) and government actors, the result appears to be (at least at first glance) a generally applicable law that similarly situated landowners will be able to enjoy (or under which they would chafe) equally. Such legislatively enacted bargains do not implicate concerns with the rule of law to the same degree as bargains that are available only to specifically favored (or disfavored) landowners. To return to Fuller's criteria, exactions promulgated through a legislative process meet the requirements of generality, publicity, prospectivity, and congruence.

<sup>174</sup> See note 38 and accompanying text.

<sup>175</sup> See *Bi-Metallic Investment Co. v State Bd. of Equalization*, 239 US 441 (1915) (contrasting broadly applicable legislation, where reliance on political checks is appropriate, with case-by-case, adjudicative decisions).

<sup>176</sup> See, for example, *McClung v City of Sumner*, 548 F3d 1219, 1228 (9th Cir 2008) (arguing that the concerns raised by legislative exactions are better addressed through the "ordinary restraints of the democratic process" (internal quotation marks omitted), quoting *San Remo Hotel v City and County of San Francisco*, 27 Cal 4th 643, 671 (2002). Although the Supreme Court expressly cited *McClung's* refusal to extend exactions scrutiny to monetary exactions with disapproval in *Koontz*, see 133 S Ct 2586, at 2594, the Ninth Circuit's decision was also grounded in its distinction between legislative and adjudicative exactions. Because the Supreme Court did not address the adjudicative/legislative distinction in *Koontz*, the latter ground for the *McClung* holding appears to remain intact after *Koontz*.

<sup>177</sup> *San Remo Hotel L.P. v San Francisco*, 27 Cal 4th 643, 671 (2002).

And, as long as the law is not amended too frequently, they may satisfy the requirement of stability as well.

More pragmatically, drawing the line between legislative and adjudicative exactions would successfully immunize taxes, broadly applicable fees, and many aspects of zoning from heightened scrutiny. Thus, if the distinction is judicially administrable, it could help stave off the concern that *Koontz* has so expanded the exactions doctrine that every land-related decision has become susceptible to heightened judicial scrutiny. And it would do so in a manner broadly consistent with the decided cases to date.<sup>178</sup>

2. *Caveats and complications.* There are some problems with the legislative/adjudicative distinction, however. Perhaps most importantly, the boundary between the categories of legislative and adjudicative is not nearly as clear-cut in the local government arena as it may be in other contexts.<sup>179</sup> It is far from clear on the facts of *Koontz* itself, for example, whether the exaction in that case was legislative or ad hoc in character.<sup>180</sup> The fluidity between the categories may spark concerns about gamesmanship by local governments.

Consider the typical zoning code, which most people would treat as a legislative enactment. In the usual Euclidean zoning law, the kind at work in virtually every community in the United States, the municipality divides its land up into various zones. These can vary in number, from as few as three or four to well over a hundred. Within each zone, certain uses are permitted as of right, certain uses are prohibited, and others are permitted with special approval, provided certain conditions are met.

In one sense, the zoning law operates through generally applicable provisions: all those who fall within the same zoning category are subject to the same regulations. But the higher the number of zones, the more that uniformity claim breaks down. (Imagine a city with a different zoning classification for each parcel.) And, of

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<sup>178</sup> Arguably, it is not fully consistent with *Nollan*, which seemed to involve a policy of requiring lateral easements from all beachfront owners in a particular area. See 483 US at 829. However, the facts in *Nollan* are susceptible to an interpretation in which the exaction in that case is individualized, notwithstanding some degree of standardization across property owners. Certainly this is the way the case was characterized by the Court in *Lingle*. See 544 US at 546 (“Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions[.]”).

<sup>179</sup> See Carol M. Rose, *New Models for Local Land Use Decisions*, 79 Nw U L Rev 1155, 1158–59 (1985).

<sup>180</sup> See note 168.

course, along the boundaries between zones, the lawmaker has to make highly individualized judgment calls about which individual parcels to include within which classification in a way that puts enormous pressure on the distinction between legislation and adjudication.

Even setting aside the problem of placing parcels into one or another of the possible zoning classifications, bargaining and discretion are built into most zoning and land use laws. Consider the three categories of bargains we introduced above in Part II:

**Past bargains.** The complexity of zoning laws makes them almost infinitely customizable. During a comprehensive rewriting of a zoning law, property owners can lobby lawmakers to place their parcel in one zone or another. They can also lobby lawmakers to include some borderline use in the category in which their land is ultimately placed. A landowner may lose the fight to have her property designated as commercial but convince zoning officials to include convenience stores as a conditional use in a high-density residential zone. Neighbors may insist that convenience stores in residential neighborhoods operate under strict limits on size and business hours. The negotiations can go on and on. In the end, they will be memorialized in generally applicable packages of benefits and burdens.

Despite the messiness and complexity of zoning code writing, it arguably still makes sense to place these past bargains in the legislative box. After all, the bargains built into the code are in some sense prospectively available to all similarly situated landowners. The mere fact that a particular zoning provision might have been crafted through a process of individualized horse trading is not so different from the way legislation is written in other areas. Rather than fixating on the fact of past horse trading, a concern with the rule of law would seem to argue in favor of considering the substance of zoning provisions on their own terms. That is, instead of asking whether a zoning provision is based on past bargaining, the question would be whether the lines it draws are unfair or arbitrary or leave excessive room for administrative discretion. These are questions that courts have typically (at least in recent years) answered by applying the most deferential standards of review.<sup>181</sup>

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<sup>181</sup> See, for example, *Hernandez v City of Hanford*, 159 P3d 33 (Cal 2007) (applying rational basis review in assessing an equal protection challenge to a zoning provision that

**Embedded bargains.** Embedded bargains are pervasive in zoning codes. As long as the conditions they impose are defined with sufficient precision, these need not present too much of a problem for the legislative/adjudicative distinction. Like past bargains embedded in existing law, formulaic trade-offs that are available on equal terms to all similarly situated landowners do not present the favoritism and rule-of-law concerns that seem to be the most plausible justifications for heightened exactions scrutiny.

Some embedded bargains, however, include conditions that place a great deal of discretion in the hands of land use regulators. The zoning code for the city of Puyallup, Washington, for example, is not unusual in specifying that, in considering an application for any conditional use, “[t]he hearing examiner shall have the authority to impose conditions and safeguards as he/she deems necessary to protect and enhance the health, safety and welfare of the surrounding area.”<sup>182</sup> Although formally embodied in a legislative work product, such a scheme clearly contemplates case-by-case, ad hoc judgments.<sup>183</sup>

In contrast, incentive zoning normally operates through schedules of the burdens the developer must undertake in exchange for the specified regulatory relief. The available regulatory benefits—and their “prices”—are typically spelled out in advance in a great deal of detail and publicly available to all prospective developers on equal terms. For example, under Seattle’s incentive zoning scheme, developers can exceed height restrictions by a specified amount if their building is LEED certified and they pay a certain amount of money per additional square foot into an affordable housing fund.<sup>184</sup>

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prohibited stand-alone furniture stores outside of the downtown commercial district while allowing the sale of furniture in large department stores in those areas).

<sup>182</sup> Puyallup Municipal Code, 20.80.015.

<sup>183</sup> Interestingly, the code goes on to say that “[n]o conditional use permit shall require as a condition the dedication of land for any purpose not reasonably related to the use of property for which the conditional use permit is requested, nor posting of a bond to guarantee installation of public improvements not reasonably related to the use of property for which the conditional use permit is requested.” *Id.* In effect, it incorporates a modified exactions analysis into the code itself in an attempt to structure the discretion of decision makers in tacking customized conditions onto embedded bargains. In so doing, it seems to invite a kind of means-ends scrutiny by a court tasked with evaluating the legality (under the municipal code) of a particular condition that a hearing examiner attaches to a conditional use permit. This approach is consistent with the idea that the need for robust review increases as discretion grows.

<sup>184</sup> See Seattle Planning Commission, *Incentive Zoning in Seattle*, 3 (2007), online at [http://www.seattle.gov/planningcommission/docs/SPC\\_IncZon.pdf](http://www.seattle.gov/planningcommission/docs/SPC_IncZon.pdf).

Where embedded bargains put broad discretion in the hands of regulators, and where regulators use that discretion to impose one-off exactions on landowners on a case-by-case basis, the mere fact that they do so pursuant to the language of a zoning code would not justify treating their impositions as “legislative.” Particularly in the state courts, judges have shown a willingness to scrutinize legislative enactments that place unbridled discretion in the hands of land use administrators.<sup>185</sup> But where the embedded bargains employ publicly available terms that are spelled out in detail and broadly available—as in incentive zoning—the scheme seems far more legislative in nature and the case for judicial scrutiny is weaker.<sup>186</sup>

**Hypothetical bargains.** Finally, hypothetical bargains reflect the reality that land use decision making often occurs through piecemeal modification of the zoning law. Even inchoate or unsuccessful efforts by landowners to revise the mix of burdens and benefits embodied in an existing zoning code present the same opportunities for favoritism and corruption that are present in the classic exactions cases. To be sure, if the negotiations break down because of a landowner’s objection to burdens the municipality proposes to write into the modified zoning law itself (burdens that would therefore be generally applicable to all similarly situated landowners), the adjudicative/legislative distinction would counsel against treating the hypothetical bargain as an exaction that calls for heightened scrutiny. But where a local government declines to modify the zoning code because of an owner’s refusal to accede to the municipality’s demands that the owner accept some customized burden, the refusal to rezone looks structurally identical

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<sup>185</sup> See, for example, *Anderson v City of Issaquab*, 851 P2d 744 (Wash App 1993) (finding a municipal regulation of aesthetic standards to be void for vagueness); *Kosalka v Town of Georgetown*, 752 A2d 183, 187 (Maine 2000) (holding that a regulation that is “totally lacking in cognizable, quantitative standards . . . violate[s] the due process clause.”).

<sup>186</sup> Scholars have pointed to the potential for abuse in incentive zoning, sometimes noting its structural similarity to bribery. See Eagle, *Koontz in the Mansion* at \*12–13, \*21–23 (cited in note 4) (citing Jerold Kayden, *Zoning for Dollars: New Rules for an Old Game?* 39 Wash U J Urb & Contemp L 3 (1991)); see also Nestor M. Davidson, *Values and Value Creation in Public-Private Transactions*, 94 Iowa L Rev 937, 954 n 56 (2009) (describing but not endorsing the position that “‘selling’ regulatory privileges in exchange for public benefits” may create “skewed regulatory priorities and the potential for outright corruption”). To the extent that critics think that the generality and transparency of incentive zoning are insufficient safeguards to justify deferential rational-basis review, the question arises whether their distrust of incentive zoning reflects a broader distrust of land use regulation more generally and a desire to see heightened judicial scrutiny of land use regulation across the board.

to the exaction at issue in *Koontz*. Heightened exactions scrutiny for individualized hypothetical deals would operate almost like a penalty on (attempted) contract zoning.

Not all states treat piecemeal zoning modifications as legitimate legislative acts. Some, such as Maryland, apply a kind of heightened scrutiny to such changes under the so-called “change-mistake” doctrine. Under that doctrine, piecemeal zoning changes, as opposed to comprehensive rezonings, must be justified as necessary to either fix a mistake in the original code or to respond to some change in circumstances since the code was comprehensively (re)written.<sup>187</sup> Applying heightened exactions scrutiny to some failed negotiations over zoning amendments would seem to push municipalities in the direction of states like Maryland. Indeed, in states where piecemeal rezoning is discouraged by doctrines like the change-mistake rule, the category of hypothetical bargains may largely disappear.

#### B. EVERYTHING BUT TAXES AND FEES

There is another way that the Court could keep its commitment to elevated scrutiny for most exactions without endangering taxes and fees. It could construct a test that effectively immunizes from heightened scrutiny only conditional burdens that fall within Cell IV of Figure 4: those that use a formulaic schedule to impose purely monetary burdens on landowners. To trigger heightened scrutiny, then, a landowner could show *either* that the government was engaging in an individualized deal with her (involving any sort of concession) *or* that it was requiring some in-kind concession (whether through a legislative or adjudicative process).

Such an approach would not exempt the sorts of Cell III legislative enactments at issue in *Parking Association of Georgia v City of Atlanta*<sup>188</sup>—a city ordinance that required surface parking lot owners to provide a specified quantum of landscaping.<sup>189</sup> It would,

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<sup>187</sup> See *Clayman v Prince George's County*, 292 A2d 689 (Md 1972).

<sup>188</sup> 450 SE2d 200 (Ga 1994), cert denied, 515 US 1116 (1995).

<sup>189</sup> It is possible, however, that such burdens might be deemed insufficient to trigger *Nollan/Dolan* analysis for another reason: that they do not amount to takings on their own. While it is true that the ordinance in *Parking Association of Georgia* required physically placing one tree for every eight parking spaces, it would seem that landscaping requirements, including the placement of privately owned trees, would be no different from the requirement of a smoke alarm that the *Loretto* Court suggested would not be a taking. See *Loretto*, 458 US at 440.

however, exempt property taxes, standardized permitting fees, and so on. This would help to address some of the concerns that the *Koontz* decision introduced. But what should remain problematic from the Court's perspective is the extension of scrutiny into the Cell III box. Virtually all of zoning law resides there (to the extent it is not captured in Cell I). Heightened scrutiny applied to everything but taxes would upend the generally deferential treatment that land use controls receive, unless it were coupled with some other boundary principle. The Court resisted such an open-ended extension of heightened scrutiny in *Del Monte Dunes*.<sup>190</sup>

Expanding heightened scrutiny to reach in-kind regulatory burdens that are legislatively applied would also have the interesting consequence of encouraging price schedules to stand in for contextualized, qualitative evaluations and in-kind adjustments. Thus, if a side-yard requirement would receive heightened scrutiny under this approach (because it conditions permission to build on leaving an area unbuilt, albeit legislatively), a local government could instead put a price on the right to build closer to the lot line. This could effectively make zoning more alienable by replacing property rules with liability rules—a result many law and economics scholars would find attractive, but that others might view with concern.<sup>191</sup> By extending heightened scrutiny so deeply into the heartland of land use, the Court could prompt changes—perhaps unintended ones—in the way that land use control is carried out.

### C. OTHER LIMITS

The Court need not approach each of our cells in Figure 4 as an all-or-nothing proposition, of course. There are any number of ways that the spectrums of concessions and interactions could be divided up, and features other than the ones emphasized in the figure—between specific assets and general obligations, and between individualized and particularized bargains—could play a role in marking out the exactions that would trigger *Nollan/Dolan* scrutiny.

1. *Burden sorting*. We have already suggested one way of iden-

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<sup>190</sup> 526 US 687, 702 (1999).

<sup>191</sup> For an argument in support of the extensive use of development taxes instead of land use regulation, see Stewart E. Sterk, *Exploring Taxation as a Substitute for Overregulation in the Development Process*, 78 Brooklyn L Rev 417 (2013).

tifying those concessions that will trigger heightened scrutiny: the existence of a burden that would constitute a taking on its own. It is unclear how the Court will ultimately square its claim in *Koontz* that some general monetary obligations are *Loretto* takings with the rest of takings jurisprudence. However, it is possible that some category of regulatory actions and financial obligations will be safeguarded against heightened scrutiny on the grounds that they would not constitute takings on their own. Although the Court seems to have doomed itself (and lower courts) to struggle with which land-related financial obligations will now constitute *Loretto* takings, it is still possible for it to apply this principle of a “taking on its own” to exempt from heightened scrutiny regulatory exactions that do not rise to the level of permanent physical occupations.

Setbacks, landscaping requirements, and all manner of ordinary zoning tools (such as conditional use permitting requirements) could be kept clear of the *Nollan/Dolan* framework through this expedient alone, even without drawing a distinction between legislative and adjudicative acts. This restriction on eligible burdens could also be combined with the exemption of formulaic monetary impositions (the Cell IV cases). In combination, these approaches would salvage most of what the Court likely wishes to protect from heightened scrutiny, while allowing it to keep *Nollan*, *Dolan*, and *Koontz* in place.

There are other possible ways to slice and dice the universe of concessions. Requirements to spend money could be distinguished from payments directly to the government.<sup>192</sup> Expenditures to bring one’s own property into compliance with particular requirements could be distinguished from off-site expenditures. Concessions that reduce the value of one’s property without benefiting identifiable people directly (such as by placing certain areas under a conservation easement) could be distinguished from concessions that are undertaken for the benefit of specific neighbors or third parties. All such alternatives must be assessed with an eye to the impact on administrability, the collateral effects on takings doctrine more generally, and the degree of fit with whatever normative goals are supposed to be served by heightening scrutiny in the exactions area.

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<sup>192</sup> See Justin R. Pidot, *Fees, Expenditures, and the Takings Clause* (working paper 2013), online at <http://ssrn.com/abstract=2298307>.

2. *Multiple-choice tests.* The practical reach of exactions scrutiny could also be limited through the treatment of multiple-option governmental offers. *Koontz* itself involved a landowner who could develop his parcel if he did enough to mitigate the effects on the wetlands. The District gave him at least two choices that it considered sufficient: cutting back the amount of developed land to one acre (that is, placing a larger amount under a conservation easement than he had initially contemplated), or providing funds necessary to carry out wetlands mitigation on another parcel. The Court found this to be a potentially extortionate choice set. Although Justice Alito suggested that the exaction would pass muster if even one of the alternatives were acceptable, this is not how his analysis played out. Because the monetary exaction was offered as an alternative to giving up the use of a greater proportion of the parcel, the majority opinion framed the monetary imposition as a charge for getting to use more of the parcel, which in its view collapsed the District's multiple-choice offering to a single extortionate demand.

In fact, the Court appears to be saying that, if money is offered as an alternative way to fulfill the landowner's obligation, all other choices will be viewed as tainted. The constitutional hook would be that the demand for money, if viewed in isolation, counts as a per se taking (although this had never been the law before *Koontz*). If so, the monetary choice might seem to dangle before the landowner the possibility of reducing regulatory burdens (including the burdens of the other available alternatives offered to the landowner) by giving up the right to just compensation for what in the *Koontz* majority's view amounts to a per se taking (i.e., the money itself). As actually carried out in *Koontz*, then, the addition of alternatives does nothing to avoid heightened scrutiny—as long as one of the choices is monetary in nature. On the contrary, adding a monetary choice seemingly subjects the entire enterprise to *Nollan/Dolan* analysis.

There are other ways the analysis could have proceeded, however. If Justice Alito had taken seriously his point about any valid alternative validating the exaction, then the ability of *Koontz* to glean viable economic use from his property without being required to cede anything that remotely resembled a per se taking should have been sufficient to keep the negotiation out of the realm of *Nollan* and *Dolan* scrutiny. Yet it is easy enough to see

why the *Koontz* majority proceeded as it did. The alternative that allowed development of a portion of the property without ceding anything that would count as a taking on its own simply became, in the Court's mind, part of the baseline against which a new bargain—this one involving money—was offered. And the same will always be true whenever money is allowed to stand in for other regulatory alternatives—even one that is presented as another conditional option.

But what if the governmental entity does not offer a monetary alternative at all, and also does not propose a physical taking? Suppose, to take the facts of *Koontz*, that the owner were simply told that he could develop one acre of his land if he placed another portion of the parcel under a conservation easement, or allowed it to be downzoned to a less intensive development classification. Would this constrained choice set avoid triggering heightened scrutiny? Seemingly yes, at least if the *Koontz* majority meant to retain the “taking on its own” requirement. What is being asked in exchange for development rights is the sort of concession that would not count as a taking under *Loretto*, nor under *Lucas* or *Penn Central*. This analysis suggests that by removing options, heightened scrutiny may be dodged, and by adding them, it may be triggered. Such a result might not seem surprising in the context of the unconstitutional conditions doctrine. After all, the doctrine of unconstitutional conditions is puzzling precisely because it frowns on governments adding, rather than removing, choices.

Is there a way to structure a menu of choices so that it reduces rather than exacerbates the normative concerns behind exactions? One possibility might involve offering landowners a choice between a fee generated by a formula or schedule and an individualized in-kind regulatory concession. The presence of the former, offered as a take-it-or-leave-it offer available on equal terms to all, could address worries about the rule of law and horizontal inequity, while the latter might allow mutually beneficial adjustments to be made from that baseline.

An obvious objection would be that the monetary schedule might be set artificially high, so that no one would elect it. All the real action would then occur within the individualized regulatory deals. But if this were so, then the monetary schedule would not actually serve the sort of illegitimate leveraging purpose that troubled the *Koontz* Court. An option that no one actually chooses

(and cannot be forced to choose) cannot plausibly constitute a form of extortion. It is true, however, that less powerful developers might find themselves limited to the monetary schedule, while the government offered favored developers lighter regulatory alternatives. Some of the regulatory alternatives offered by the government might also be problematically burdensome in their own right, even if they were insufficient to amount to takings on their own. The existence of a fixed menu of choices would not by itself ensure perfect equity or safeguard rule-of-law values. But it would be possible to reinterpret the significance of multiple alternatives in a manner that is more conducive to the efforts of local governments to arrive at alternatives that offset development impacts in the least costly manner.

#### D. SCRUTINY ALL AROUND

The impetus for our effort to craft a boundary principle for *Nollan/Dolan* analysis has been the need to maintain the two fixed points created by past takings cases: deferential review of most land use regulations and the carve-out of heightened judicial scrutiny for certain “exactions.” If, however, we were liberated from these two fixed points, the pressure to precisely define the domain of exactions scrutiny would diminish. In that situation, what direction should the law take? It is worth thinking about two very different scenarios. In the first, taken up in this section, courts would jettison the long-standing deference afforded to land use regulation since *Euclid*. Instead of deferring, courts would employ something like heightened exactions scrutiny to all land use regulations. This would be a kind of *Lochnerism*, but one reserved for the context of land use law. In the second, taken up in Section E, courts would broaden the domain of *Euclid* deference to exactions, abandoning the island of heightened scrutiny it has created under *Nollan* and *Dolan*.

It would certainly be (conceptually) possible to subject all or most land use controls to heightened scrutiny. The disadvantages of this approach are obvious. Although many land use regulations would withstand judicial scrutiny, the costs of adjudicating the legitimacy of those regulations would be enormous. Small local governments are particularly poorly situated to bear those costs. Rather than risk being hauled into court, local governments would be more likely to simply scale back their regulation. This might

superficially seem like a desirable outcome for a certain brand of naive libertarianism. But it would have the perverse effect of depriving local governments of their principal tools for protecting landowners against threats to the use and enjoyment of their property. Oregon's unhappy experience with Measure 37 suggests that, once they confront the unpredictability of unregulated land use, owners quickly come to realize the mutually protective value of at least some land use regulation.<sup>193</sup>

On the other hand, enhanced judicial scrutiny of land use regulation would have some silver linings. Although zoning is a crucial tool for protecting owners from the unpredictability of neighboring land uses, it is also a vehicle by which local governments give the force of law to those owners' prejudices and narrowly framed self-interest. From its inception, the story of zoning has been as much about exclusion, free-riding, and sprawl as it has been about the thoughtful coordination of conflicting land uses. Key among the benefits of extending the domain of heightened judicial scrutiny in the domain of land use regulation would be its ability to lay bare the thin justifications for many types of zoning restrictions.

While it is interesting to consider the implications of such a move, we view it as too unlikely to carry the day and too disruptive of settled expectations to warrant a full exploration here. Nor is it likely to be, all things considered, the most attractive or useful tack for addressing problems like exclusionary zoning. Nonetheless, it is helpful to bear in mind the nature of the constraints the Court faces as it seeks to avoid this outcome.

#### E. RELOCATE EXACTIONS

An alternative to extending the reach of heightened exactions scrutiny would be to give up on the exactions project, at least as understood as part of takings jurisprudence. It would be possible to revert to rational basis style means-ends review for all land use controls, including those that are packaged into bargains or that involve concessions that would otherwise be takings. This suggestion is less radical than it appears. The Supreme Court's exactions cases are of relatively recent vintage. And reverting to deferential review as a matter of federal constitutional law would

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<sup>193</sup> See Berger, 78 Fordham L Rev at 1281 (cited in note 144).

not mean abandoning all checks on governmental power. Takings analysis under *Penn Central*, *Lucas*, and *Loretto* would provide a continuing avenue for landowners seeking relief from the most onerous regulatory burdens. In addition, landowners would be able to seek judicial review of arbitrary and irrational regulation through the Due Process Clause. Further, any of a number of special purpose state-law doctrines constrain bargaining in various ways to protect landowners and third parties. We will discuss these last two options in turn.

1. *The Due Process Clause.* Courts can already review local land use bargains for basic fairness and rationality using the tools of substantive due process, and they could continue to do so in the absence of any federal exactions doctrine located within the Takings Clause.<sup>194</sup> Relying on due process review to police improper bargains would fit better with the Court's prior pronouncements about the division of labor between the Takings Clause and the Due Process Clause.<sup>195</sup> As the Court made clear in *Lingle*, the Takings Clause is focused on protecting owners from bearing excessive burdens. Scrutiny of the fit between the public ends served by a land use regulation and the means chosen is not a takings question, but one of substantive due process.

This distinction between due process questions and takings questions is not an empty formalism. The remedy for a violation of the Takings Clause is payment of just compensation. The remedy for a violation of due process is invalidation of the government action. This is because the wrong associated with the Takings Clause is simply the failure to structure a legitimate government

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<sup>194</sup> Many of the claims that would be amenable to due process scrutiny could just as easily be evaluated under an equal protection analysis. As we have already discussed, see text accompanying notes 93–96, the means-end inquiry at work in the substantive due process context closely resembles similar inquiries courts have used in both the due process and public use contexts. That similarity is likely generated by a common normative foundation in rule-of-law concerns about the dangers of arbitrary government action. And the fundamental exactions complaint in its most attractive form—that the government has treated the landowner arbitrarily—is largely the same under both theories. For an examination of how equal protection analysis might even address concerns that are currently treated as regulatory takings issues, see generally Nestor M. Davidson, *The Problem of Equality in Takings*, 102 Nw U L Rev 1 (2008).

<sup>195</sup> We are not alone in making this suggestion. See, for example, Echeverria, *Koontz: The Very Worst* at \*26–28 (cited in note 4). Indeed, Mark Fenster has suggested that the Court effectively adopted a substantive due process approach to exactions in *Koontz*, and that the majority's reliance on the unconstitutional conditions doctrine served to remove exactions from the realm of takings law altogether. See Fenster, *Substantive Due Process* at \*13–14 (cited in note 4).

action in a way that avoids putting an excessive burden on a particular property owner. This wrong is fixed by the payment of compensation. The wrong associated with a violation of substantive due process is more grave: a failure of the government to act according to basic rationality or to act in pursuit of legitimate ends.<sup>196</sup> And so the remedy is to block the government action in a more categorical way.

The rule-of-law harms that exactions doctrine seems designed to capture—favoritism and corruption—are much closer in their nature and seriousness to the harms encompassed by the Due Process Clause than they are to those that form the subject of protection against uncompensated takings. In recent years, Justice Kennedy has championed a more vigorous use of rational basis due process review to address problems ranging from “judicial takings”<sup>197</sup> to general obligations to pay money.<sup>198</sup> He has also connected due process concerns to the public use requirement within takings law.<sup>199</sup> Consistent with this approach, the Court should consider extending meaningful due process review into the domain of the kinds of adjudicative land use bargains we have been discussing. Grounding this inquiry in due process would eliminate the need for an anomalously heightened means-ends exactions review within the takings doctrine. At the same time, focusing it narrowly on the category of bargains most likely to provide opportunities for government favoritism and abuse would limit the danger of an ever-expanding domain of heightened judicial scrutiny in the land use context.

We do not mean to suggest that moving the exactions inquiry into the due process arena will automatically resolve all difficulties. Appropriate doctrines must be crafted or adapted to achieve rule-of-law ends. Our discussion has suggested that this undertaking will involve difficult trade-offs between flexibility and stability, uniformity and customization. Whatever tests are crafted—and we do not undertake to specify them here—will be imperfect and

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<sup>196</sup> See Eduardo M. Peñalver and Lior Jacob Strahilevitz, *Judicial Takings or Due Process?* 97 Cornell L Rev 305, 323–24 (2012).

<sup>197</sup> *Stop the Beach Renourishment, Inc. v Fla Department of Environmental Protection*, 130 S Ct 2592, 2614 (2010) (Kennedy, J, concurring in part and concurring in the judgment).

<sup>198</sup> *Eastern Enterprises v Apfel*, 524 US 498, 446–50 (1998) (Kennedy, J, concurring in the judgment and dissenting in part).

<sup>199</sup> *Kelo v City of New London*, 545 US 469, 490 (2005) (Kennedy, J, concurring).

subject to criticism. But they should at least be addressed to the right sort of inquiry. What makes grounding exactions doctrine in the Takings Clause so problematic is that it requires piggy-backing on a set of substantive doctrines that are asking an entirely different question (whether burdens should be borne without compensation) than the one to which exactions concerns are most plausibly addressed (has the government abused its power). Moving exactions doctrine into the Due Process Clause would produce conceptual congruence between the doctrinal foundation and the concerns that exactions generate. It would free the Court from the futile and destructive task of attempting to shoehorn its worries about government misbehavior into categories created to address compensable (but otherwise proper) governmental burdens. And it would reduce the risk that such shoehorning will (in the process) distort both exactions and takings doctrine.

2. *State law.* Apart from federal due process review, it is important to remember that state courts have developed a number of state-law doctrines to address the issues raised by bargaining and discretion in the land use context. These include (1) restrictions on contract and spot zoning;<sup>200</sup> (2) state law exactions doctrines;<sup>201</sup> (3) limitations on the ability to engage in piecemeal rezonings, such as the change-mistake rule;<sup>202</sup> and (4) standards of due process review that exceed those imposed by federal constitutional norms.<sup>203</sup> All of these doctrines work either to constrain the sort of discretion necessary to get land use bargains off the ground or to police those bargains once they are made.

An advantage of relying on state law is broader state court exposure to land use conflicts and more permissive standing doctrines in state courts that would permit a (potentially) all-encompassing approach to bargains. “Exactions” as a problem of federal constitutional law seems concerned only with landowners being

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<sup>200</sup> See *Little v Winborn*, 518 NW2d 384, 387–89 (Iowa 1994) (scrutinizing spot zoning); *Dacy v Village of Ruidoso*, 845 P2d 793, 796–98 (NM 1992) (discussing judicial scrutiny of contract zoning).

<sup>201</sup> See *Dolan v City of Tigard*, 512 US 374, 389–91 (1994) (surveying state-law exactions doctrines). Some state law limits on development conditions do not expressly use the term “exaction” or may find doctrinal footing outside the Takings Clause. See, for example, *Rosen v Village of Downers Grove*, 167 NE2d 230 (Ill 1960).

<sup>202</sup> See note 187 and accompanying text.

<sup>203</sup> See, for example, *Johnson v City of Paducah*, 512 SW2d 514 (Ky 1974) (striking down a local land use ordinance as violating Section 2 of the Kentucky Constitution, which prohibits “arbitrary” state action).

exploited, and that is the pattern that exactions claims have invariably taken: a landowner challenges the conditions imposed on her in exchange for development approval. But land use bargains raise important questions of fairness to third parties not included in the negotiations. Neighbors may have cause to challenge land use bargains that exact too little from developers in exchange for permission to develop land in ways that harm others. Having a layer of federal protection that applies only to a subset of the overall issue of improper bargains arguably impedes coherent state law solutions.

Another advantage to leaving (more) exactions review to the states is that state courts are well equipped to tailor solutions to the ways in which deals are typically accomplished in the particular jurisdiction. Most land use law is state law. State courts are far more familiar with the dynamics of land use regulation in their jurisdictions than federal courts can realistically hope to become.<sup>204</sup>

One concern of the *Koontz* dissent is that—if heightened review extends too broadly—communications between landowners and government will be inhibited. This is not necessarily a bad thing, if we examine some of the strategic implications of placing one party or the other into the position of making a take-it-or-leave-it offer.<sup>205</sup> Changing the way lines of communication work can be useful, but there is no reason to think that federal courts are best able to fine-tune these changes. Even if there is some best way to reduce leverage, experimentation at the state level seems more likely to arrive at it than occasional Supreme Court pronouncements.

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<sup>204</sup> See Stewart E. Sterk, *The Federalism Dimension of Takings Jurisprudence*, 114 Yale L J 203, 226–28 (2004) (discussing the difficulty that federal courts have in assessing land use laws for constitutional validity and arguing that state courts are better situated to undertake that role); Rick Hills, *Bill Fischel on Koontz: Why Federalism Should Limit Enforcement of the Takings Doctrine*, Prawfsblawg, Aug 16, 2013, 12:50 pm, <http://prawfsblawg.blogs.com/prawfsblawg/2013/08/bill-fischel-on-koontz-why-federalism-should-limit-enforcement-of-takings-doctrine.html> (making a case for using state law as the primary mechanism for policing exactions and quoting Fischel for the point that a more localized perspective dominates “the view from Olympus.”). See also Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 Tulsa L Rev 751, 762 (2009) (maintaining that “state courts, not federal courts, should be centrally responsible for limiting eminent domain abuses by state and local agencies”).

<sup>205</sup> See, for example, Ian Ayres and Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L J 1027, 1049–50 (1995) (discussing the bargaining advantages associated with take-it-or-leave-it offers).

## VI. CONCLUSION

In *Nollan* and *Dolan*, the Court started down a path that, if followed beyond a certain point, cannot be reconciled with broad judicial deference to garden-variety land use controls. When a particular fact pattern is placed in the *Nollan/Dolan* box, it receives astonishing treatment: the government must prove that the burdens it has imposed are logically related to and proportionate to the costs of the permitted development. Applying this approach to all of land use would mean that zoning and much else would either disappear or become prohibitively expensive to administer. This presumably would be unacceptable to the Court and to most property owners. Yet *Koontz* heedlessly lurched toward this unwanted endpoint, knocking over barriers that it found logically unconvincing, unaccountably confident that its exactions jurisprudence would obviously and automatically spare all “good” land use regulations.

The result is a doctrinally disordered decision. It is entirely possible, perhaps even likely, that some of the worst on-the-ground impacts will be significantly buffered. For example, Rick Hills has suggested that the *Koontz* Court’s failure to specify damages offers courts a viable “exit strategy.”<sup>206</sup> Anemic remedies or procedural blockades may keep many of the problems foreseen by the dissent from coming about, or from taking their most catastrophic

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<sup>206</sup> See Rick Hills, *Koontz’s Unintelligible Takings Rule: Can Remedial Equivocation Save the Court from a Doctrinal Quagmire?* Prawfsblawg, June 25, 2013, 3:41 pm, <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/koontzs-unintelligible-takings-rule-can-remedial-equivocation-make-up-for-an-incoherent-substantive-.html> (“*Koontz* carefully preserves a convenient albeit disingenuous ‘remedial’ exit strategy that should insure that the decision is a dead letter.”). Hills focuses on the following line from the majority opinion: “Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.” *Koontz*, 133 S Ct at 2597 (quoted in Hills). If Hills’s prognosis is correct, *Koontz* might never cash out in a meaningful way for landowners, echoing the outcomes in cases like *Loretto* and *Brown*. In *Loretto*, the Supreme Court remanded on the question of just compensation and the New York Court of Appeals upheld the power of the Commission on Cable Television to set the compensation rate. *Loretto v Teleprompter Manhattan CATV Corp.*, 446 NE2d 428 (NY 1983). This rate had been set by the Commission at \$1 as a general matter. See *Loretto v Teleprompter Manhattan CATV Corp.*, 423 NE2d 320, 325 (NY 1981). In *Brown*, the Court held that the transfer of interest from specific accounts could be a per se taking, but found that the compensation due in the case at hand would be zero, as the owners of the principal did not suffer any net loss. 538 US at 240. Expanding the range of exactions scrutiny, like extending the scope of per se takings, may thus have the effect of pushing contextual inquiries, such as those involving in-kind compensation, later in the analysis rather than suppressing them altogether. The threat of litigation and uncertainty over remedies could remain quite costly for local governments, however, at least in the short run.

forms.<sup>207</sup> Repeat-play developers may acquiesce with local governments in legally questionable but mutually beneficial deals.<sup>208</sup> In this sense, *Koontz* may turn out to be much ado about nothing. But in another sense, *Koontz* embodies a tension that the Court cannot ultimately avoid addressing—one over the best way to reconcile fundamentally inconsistent strands of property rights protection. We hope that by conveying something of this tension here, we have added to an understanding of the contradictory dictates of property protection itself—whether or not the Court manages to address them in a satisfying way.

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<sup>207</sup> It is even possible that procedural and remedial developments will inform courts' future understanding of the underlying exactions doctrine. See Fenster, *Substantive Due Process* at \*13–14 (cited in note 4) (reading into the *Koontz* Court's remedial ambivalence an understanding of exactions doctrine that would pull it out of the Takings Clause and permit remedies like invalidation that fit instead with substantive due process).

<sup>208</sup> See Dana, 75 NC L Rev at 1286–99 (cited in note 37). Doctrines of standing play a role here, including whether (and on what grounds) third parties such as neighbors are allowed to challenge deals that affect their interests. See note 77.