

THE COSTS OF *KOONTZ*

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INTRODUCTION

Frequently lost in the debates over constitutionally protected property interests are the costs of expansive protections for these interests. Governments sometimes overreach and sometimes act unfairly. The more vigorous the judicial scrutiny of government actions under the Takings Clause or the Due Process Clause, the greater the constraints on government action. The greater the specific and general deterrent effects of constitutional property rights litigation, the more robust the protections for developers and other property owners against potentially burdensome or unreasonable government decisions. From the perspective of private property rights advocates, the restraining effects of a robust reading of the Constitution on government are an unalloyed good. Indeed, from any perspective, if expanded government liability were costless, there would be no good reason to object to broader readings of the Constitution. But, in fact, expansive readings of the Constitution's property provisions impose considerable costs.

This Article seeks to catalogue the costs of the U.S. Supreme Court's 2013 decision in *Koontz v. St. Johns River Water Management District*.¹ It is appropriate to focus on *Koontz* because the rulings in that case mark a significant recent expansion of constitutional property rights protection (although whether the expansion occurred under the Takings Clause or the Due Process Clause is debatable) and because the majority essentially ignored the costs of its doctrinal innovations. The thesis of this Article is that the Court majority devoted too little attention to identifying, analyzing, and weighing the costs of its rulings. If the majority had paid more attention to these costs it might well have reached a different outcome. The holdings in *Koontz* raise important jurisprudential, separation of powers, federalism, and land use policy concerns. In other contexts, the Supreme Court, including some of those Justices who joined in Justice Samuel Alito's opinion for the Court in *Koontz*, has attached considerable significance to these types of costs. It is regrettable that the Court majority did not do so in this context as well.

As is now familiar, the *Koontz* case arose from regulatory obstacles a developer encountered in attempting to obtain permission to construct a

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1. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

small shopping center in northeastern Florida.² Like many other parts of Florida, the parcel of real property owned by the developer consisted largely of wetlands.³ The St. Johns River Water Management District determined, applying its regulations governing wetlands protection, that it had to deny Koontz's application for a permit because the project as proposed would have destroyed too large an area of wetlands without adequate mitigation.⁴ Rather than simply reject the development application outright (which, in retrospect, would have saved the District a considerable headache), the District took the initiative to suggest to Koontz that it could issue a permit if he either reduced the footprint of the proposed development (reducing the extent of the mitigation required) or agreed to expend money restoring degraded wetlands elsewhere in the basin (thereby meeting the District's mitigation goal for the project).⁵ When Koontz rejected both options, the District denied his development application.⁶ To challenge this regulatory action, Koontz asserted that the District's denial of his permit application constituted a taking under the standards established in *Nollan v. California Coastal Commission*⁷ and *Dolan v. City of Tigard*.⁸

Before the U.S. Supreme Court, the case presented two issues: (1) whether the standards for the review of "exactions" established in *Nollan* and *Dolan* apply not only to permit conditions requiring the dedication of interests in property to the public, but also to conditions requiring the expenditure of money to mitigate project impacts, and (2) whether the *Nollan/Dolan* standards apply if the government never actually imposes an exaction but instead rejects a development application because the developer refuses to accede to a "demand" for an exaction.⁹ The Supreme Court answered both questions in the affirmative and remanded the case to the Florida courts,¹⁰ where the case was still pending when this Article went to press.¹¹

2. *Id.* at 2592–93. See generally John D. Echeverria, Koontz: *The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1 (2014) (providing a detailed history of the Koontz case).

3. *Koontz*, 133 S. Ct. at 2592.

4. *Id.* at 2593.

5. *Id.*

6. *Id.*

7. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

8. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

9. *Koontz*, 133 S. Ct. at 2593–94.

10. *Id.* at 2603.

11. See *St. Johns River Water Mgmt. Dist. v. Koontz*, No. 5D06-1116, 2014 WL 1703942, at *1 (Fla. Dist. Ct. App. Apr. 30, 2014) (reaffirming its 2009 decision affirming the trial court's judgment in favor of Koontz on a takings theory); *St. Johns River Water Mgmt. Dist. v. Koontz*, 129 So. 3d 1069, 1069 (Fla. 2013) (remanding to Florida District Court of Appeals for further proceedings). The petition for review is pending in the Florida Supreme Court. See Petitioner's Brief on Jurisdiction at 10, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. SC14-1092 (Fla. June 9, 2014), 2014 WL 4276473 (asking

This Article describes and analyzes the costs of *Koontz* in systematic fashion. Part I focuses on the doctrinal costs of the Court's decision, arguing that the Court's two holdings represent incoherent departures from prior precedent and established doctrine; as a result, the Court has opened itself to the charge that it is behaving more like one of the political branches than a court, undermining the rule of law and the reputation of the Court itself. Part II discusses the separation of powers concerns raised by the Court's embrace of a new standard of judicial review that allows the judiciary to substitute its judgments for (1) those of elected representatives, and (2) those of agency personnel with technical land use expertise. Part III turns to the federalism concerns raised by the Court's decision, and explains how a one-size-fits-all national legal standard derived from the Constitution impairs the political accountability, diversity, and experimentation that are the hallmarks of local government within our federal system. Part IV assesses how *Koontz* affects the efficiency and effectiveness of land use regulation in the United States. The Conclusion offers some suggestions for how defenders of local land use authority can limit the fallout from *Koontz* and, over the long term, repair the damage it threatens to cause.

I. THE DOCTRINAL COSTS OF JUDICIAL ADVENTURISM

The *Koontz* decision undermines the Supreme Court as an institution by departing from prior precedent and established principles of takings doctrine without rhyme or reason. In his confirmation hearings, Chief Justice John Roberts famously stated that he saw the role of a Supreme Court Justice as akin to a baseball umpire calling "balls and strikes."¹² This statement reflects the idea that "the law" provides relatively clear guidelines, and the task of a judge is to determine how the guidelines apply in a particular case. While this description of the judicial role is surely simplified, it captures the widely embraced ideal of the judge as a neutral officer applying—not creating—the law. Implicit in this description of the judicial decision-making process is the notion that judges are not political actors in the way that the leaders of the other branches are.

Adherence to prior precedent is part and parcel of the ideal of the neutral judge. In interpreting the "majestic generalities" of the

the Florida Supreme Court to accept jurisdiction); Respondent's Brief on Jurisdiction at 10, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. SC14-1092 (Fla. July 7, 2014), 2014 WL 3699547 (asking the Florida Supreme Court to deny jurisdiction).

12. *Roberts: 'My Job is to Call Balls and Strikes and Not to Pitch or Bat,'* CNN.COM (Sept. 12, 2005, 4:58 PM), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html> (transcribing Judge John Roberts' opening statement during his nomination hearings before the Senate Judiciary Committee).

Constitution,¹³ the Court issues decisions that flesh out the spare constitutional language and create a more detailed legal framework for the resolution of future cases. We expect judges to resolve new questions in light of and in accord with prior decisions to the extent possible. When judges believe some departure from precedent is warranted, either to address some unanticipated issue or to resolve a conflict created by the precedents themselves, judges have a duty to acknowledge and to justify the departure.

Judged by these standards for judicial decision making, *Koontz* is an abysmal failure. Indeed, it is difficult to overstate how badly the Court stumbled in *Koontz* and how badly scrambled the law of takings has become as a result of this decision. I have already criticized the decision in *Koontz*,¹⁴ as have a number of other academics.¹⁵ Property rights advocates have generally cheered the outcome of the case, but without, to my knowledge, presenting a robust defense of the Court's reasoning.¹⁶ No such effort seems possible, so far as I can see.

First, the majority's ruling that a permit condition requiring the payment or expenditure of money is subject to challenge under the *Nollan/Dolan* standards¹⁷ is plainly incoherent when assessed in light of prior precedent, as Justice Elena Kagan forcefully explained in her dissent.¹⁸ In *Nollan* and *Dolan*, the Court set out new, heightened tests for reviewing exactions attached to permits under the Takings Clause. Those decisions establish that an exaction will be upheld against a takings challenge only if there is an "essential nexus" between the purpose served by the exaction and the purpose of the regulatory program,¹⁹ and if the burden imposed on the property owner by the exaction is "rough[ly] proportional[]" to the harm threatened by the proposed development.²⁰ The

13. *Fay v. New York*, 332 U.S. 261, 282 (1947).

14. Echeverria, *supra* note 2, at 42.

15. See generally Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287 (discussing how the *Koontz* decision "eschewed any boundary principle that would hive off its exactions jurisprudence from its land use jurisprudence more generally" thereby leaving "land use regulation vulnerable to the creeping expansion of heightened scrutiny under the auspices of its exactions jurisprudence"); Mark Fenster, *Substantive Due Process by Another Name: Koontz and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403 (2014) (arguing *Koontz* is "conceptually and practically outside of the federal constitutional takings realm entirely").

16. See, e.g., Larry Salzman, *Koontz Decision: Victory for Property Rights*, NAT'L REV. ONLINE (June 25, 2013, 5:45 PM), <http://www.nationalreview.com/corner/352016/koontz-decision-victory-property-rights-larry-salzman> (describing *Koontz* as a "model of judicial engagement" for holding that "[i]t is unconstitutional to use the permit process as a tool of extortion").

17. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

18. *Id.* at 2603 (Kagan, J., dissenting).

19. *Nollan v. Cal. Coastal Comm'n.*, 483 U.S. 825, 836 (1987).

20. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Court defined “exactions” triggering these new, special tests as government mandates that would have constituted *per se* takings if they had been imposed unilaterally, outside of any permitting process.²¹ Thus, in *Nollan*, the beach-access condition imposed by the California Coastal Commission warranted applying the “essential nexus” test because a unilateral demand by the Commission that the Nollans grant the public access to their beachfront property would have been a *per se* physical-occupation taking.²² And in *Dolan*, the city’s bike path and greenway requirements, though they satisfied the “essential nexus” test, had to be scrutinized under the “rough proportionality” test because a freestanding order that Mrs. Dolan allow the public to trespass on her property would have been a *per se* taking as well.²³ It was implicit in the reasoning of both cases that the *Nollan/Dolan* tests would *not* apply to a permit condition that would not be a *per se* taking if it were imposed unilaterally.

The centrality of the independent-taking requirement to the *Nollan* and *Dolan* decisions was underscored by the Supreme Court’s subsequent unanimous decision in *Lingle v. Chevron U.S.A. Inc.*²⁴ The *Lingle* Court stated that in both *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.”²⁵ Thus, the Court explained, the issue presented in each case “was whether the government could, without paying the compensation that would otherwise be required upon effecting *such a taking*, demand the easement as a condition for granting a development permit.”²⁶ The Court in *Lingle* returned to the independent-taking requirement at a later point in its analysis, stating that “*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.”²⁷ Thus, by the time it took up the *Koontz* case, the Court was (seemingly) firmly committed to the idea that, in order for the *Nollan/Dolan* tests to apply, the exaction, viewed independently, would have to be a *per se* taking.

The challenge for Justice Alito writing for the majority in *Koontz* and seeking to extend the *Nollan/Dolan* standards to so-called “monetary exactions” arose from the fact that the Court also was (and apparently still is) committed to the idea that unilateral government mandates that citizens

21. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 837.

22. *Nollan*, 483 U.S. at 831.

23. *Dolan*, 512 U.S. at 384.

24. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

25. *Id.* at 546.

26. *Id.* at 546–47 (emphasis added).

27. *Id.* at 547.

expend money are *not* takings. According to the Court's understanding, not only are such requirements not *per se* takings (like the physical takings at issue in *Nollan* and *Dolan*), they are not within the scope of the Takings Clause at all. Five Justices (albeit in separate opinions) adopted this position in *Eastern Enterprises v. Apfel*.²⁸ This cobbled-together majority read "property" within the meaning of the Takings Clause to only refer to "a specific property interest,"²⁹ meaning that a government mandate to make a monetary payment falls outside the scope of the Takings Clause.³⁰ Importantly for present purposes, Justice Alito, speaking for the majority in *Koontz*, did not dispute the proposition established by *Eastern Enterprises* that a naked demand for money is not a taking, much less a *per se* taking.³¹ Following the logic of *Nollan*, *Dolan*, and *Eastern Enterprises*, the Court should have quickly recognized in *Koontz* that the *Nollan/Dolan* standards cannot apply to monetary exactions.

Nonetheless, the Court ruled in *Koontz* that the *Nollan/Dolan* standards do apply to monetary exactions.³² The Court sought to justify this conclusion by pointing to the fact that the permit *Koontz* requested from the District related to the use of real property.³³ Thus, the Court said, the demand for money "did 'operate upon . . . an identified property interest,'" in the terminology of *Eastern Enterprises*, "by directing the owner of a particular piece of property to make a monetary payment."³⁴ This connection, the Court asserted, not only supported the conclusion that a monetary exaction can constitute a taking, but that such an exaction was equivalent to a *per se* taking.³⁵ This convoluted reasoning led to the result that monetary exactions are subject to the *Nollan/Dolan* tests in the same way as exactions involving *per se* physical takings.

There are two fundamental problems with this reasoning. First, it makes a hash of the logic of *Nollan* and *Dolan*. Those decisions justified applying special, demanding tests on the ground that the exactions,

28. *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554 (Breyer, J., dissenting).

29. *See id.* at 542 (Kennedy, J., concurring in the judgment and dissenting in part) (asserting that the Takings Clause only applies to an alleged taking of "a specific property interest"); *id.* at 554 (Breyer, J. dissenting) (asserting that the Takings Clause focuses on "a specific interest in physical or intellectual property").

30. *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

31. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599–600 (2013).

32. *Id.* at 2599.

33. *Id.* at 2600.

34. *Id.* at 2599 (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)).

35. *Id.* at 2600.

considered independently, would have constituted *per se* takings.³⁶ *Koontz*, by contrast, suggests that the mere fact that a requirement is attached to a land use permit is sufficient to trigger these tests, regardless of whether the requirement, considered independently, would constitute a taking. This reasoning flatly contradicts the reasoning of *Nollan* and *Dolan*. If a connection to real estate through a permitting process were all that were required to trigger *Nollan/Dolan*, the Court's discussion in those cases of the independent-taking requirement would have been superfluous because the permitting processes in both cases "operated upon" real property. But, in fact, as discussed above, the independent taking requirement was central to the Court's reasoning in both *Nollan* and *Dolan*, as the Court subsequently underscored in *Lingle*.³⁷ Thus, these decisions, accurately read, refute the idea that the existence of a real property permitting process can by itself trigger the *Nollan/Dolan* tests.

The second problem with the Court's reasoning is that it suggests that the *Nollan/Dolan* standards apply to *any* condition attached to a permit relating to real property. Once the limiting principle that an exaction, considered independently, must be a *per se* taking is eliminated, and the limiting principle becomes *any* connection to a permit relating to the use of real property, it follows that *any* term or condition attached to a land use permit should trigger *Nollan/Dolan*. Under this reasoning, *Nollan* and *Dolan* would apply to all manner of garden variety land use conditions, including set back requirements, height limitations, construction material standards, and so on.

It is doubtful that a majority of the Court intended to apply (or will apply) *Nollan* and *Dolan* to any and all conditions attached to land use permits. Justice Alito emphasized what he perceived as the similarity and apparent interchangeability of permit conditions requiring public dedication of an interest in land, on the one hand, and permit conditions requiring the expenditure of money, on the other.³⁸ He apparently viewed these as comparable exercises of governmental power in the sense that they both serve to mitigate the harmful effects of development and can potentially impose similar burdens on property owners.³⁹ Yet, even on that understanding, it is difficult to see how to limit the scope of *Nollan/Dolan* following *Koontz* to monetary exactions. All conditions serve in some fashion to mitigate the effects of development.

36. *See supra* notes 21–27 and accompanying text.

37. *See supra* notes 25–27 and accompanying text.

38. *Koontz*, 133 S. Ct. at 2596.

39. *See id.* at 2595, 2599 (“[F]ees are . . . functionally equivalent to other types of land use exactions.”).

A recent California Court of Appeals decision illustrates the challenge created for the lower courts by *Koontz*'s illogical approach to monetary exactions.⁴⁰ The plaintiff relied on *Koontz* to challenge the constitutionality of a permit condition that was neither a monetary exaction nor a *per se* taking under a physical-occupation theory.⁴¹ The court declined to read *Koontz* as abrogating the independent-taking requirement of *Nollan*, *Dolan*, and *Lingle*.⁴² But, in the face of the explicit holding in *Koontz*, the court of appeals felt compelled to recognize an exception to this requirement in the case of monetary exactions. Thus, the court said that, following *Koontz*, the *Nollan/Dolan* standards apply (1) when an exaction involves a requirement that, considered independently, would constitute a taking (based on the logic of *Nollan* and *Dolan*), and (2) when a permit condition requires the expenditure of money (because the Supreme Court said so in *Koontz*).⁴³ In sum, as this decision reflects, there is no principled theory supporting post-*Koontz* exactions doctrine.

As discussed below, one plausible way of limiting the scope of the *Koontz* Court's ruling on monetary exactions is to say that monetary requirements imposed through general legislation are not subject to *Nollan/Dolan*. This solution limits the adverse consequences of the Court's incoherent and unprincipled jurisprudence. But it does nothing to resolve the defective reasoning at the heart of *Koontz*.⁴⁴

The Court's second ruling in *Koontz* was that the *Nollan/Dolan* standards should apply, not only when an exaction is imposed through a permit condition, but also when an applicant is denied a permit because she refuses to accede to a government demand that she accept an exaction.⁴⁵ This second ruling is just as incoherent as the first ruling.

As discussed above, one of the premises of the *Nollan* and *Dolan* decisions is that exactions involve requirements that, imposed outside the permitting process, would be *per se* takings. But the second, equally important premise of these decisions is that the government, instead of issuing permits subject to exactions, could have rejected the applications outright based on the predicted impacts of the proposed projects without

40. Powell v. Cnty. of Humboldt, 166 Cal. Rptr. 3d 747, 747 (Ct. App. 2014).

41. *Id.* at 753.

42. *Id.* at 757.

43. *Id.*

44. *Cf.* Justin Pidot, *Fees, Expenditures and the Takings Clause*, 41 *ECOLOGY L.Q.* 131, 154 (2014) (arguing that, following *Koontz*, the courts can and should apply the *Nollan/Dolan* standards only to conditions requiring permittees to pay over money to the government and apply a more deferential standard to conditions requiring the expenditure of money).

45. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

violating the owners' constitutional rights.⁴⁶ Specifically, the Court assumed that any takings claims based on such denials would have to be evaluated under the deferential *Penn Central* standard⁴⁷ and would have failed.⁴⁸ The same result would have applied in *Koontz* because the District signaled that it was willing to allow some reasonable use of the property, and *Koontz* did not pursue a claim that the permit denial resulted in a regulatory taking under *Penn Central*.⁴⁹

In both *Nollan* and *Dolan* the Court relied on the fact that the government could have denied the permits without violating the Takings Clause to explain and justify the conclusion that exactions attached to permits are not necessarily takings and should be held to be takings *only* if they fail the "essential nexus" or "rough proportionality" tests.⁵⁰ Thus, these are special tests uniquely applicable to the situation where the public concerns that might justify an exaction also could justify outright denial of a permit without violating the Constitution. The Court reasoned that if government can *deny* a permit outright (thereby blocking the owner's proposed project) without incurring takings liability, it would be nonsensical to conclude that government necessarily violates the Takings Clause when it *grants* a permit (thereby allowing the project to proceed) subject to exactions.⁵¹ In other words, under the Court's reasoning, the scope and character of the *Nollan* and *Dolan* standards derive from the premise that any takings claim based on a permit denial would be subject to the forgiving regulatory takings analysis. By expanding the scope of *Nollan* and *Dolan*, and ruling that the *Nollan/Dolan* standards apply not only to permit exactions but to permit denials, the Court again flatly contradicted the logic of *Nollan* and *Dolan*. Under the reasoning of those decisions, the Court should have recognized that the *Nollan/Dolan* standards cannot plausibly be extended in this fashion.

46. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835–36 (1987).

47. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978) (identifying factors courts use to analyze regulatory takings claims: economic impact on claimant, extent to which regulation interferes with "distinct investment-backed expectations," and character of governmental action).

48. *Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 836.

49. See Brief for Respondent at 13–15, 17–18, 24, 32–33, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2012) (No. 11-1447), 2012 WL 6694053 (explaining options District suggested in lieu of denying permit and arguing petitioner "seeks to substitute the stricter 'nexus' and 'proportionality' test[s] of *Nollan* and *Dolan* in place of [more deferential] *Lucas* and *Penn Central* standards").

50. *Dolan*, 512 U.S. at 384, 386; *Nollan*, 483 U.S. at 835–36.

51. See *Nollan*, 483 U.S. at 836 ("The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree.").

The Court offered two reasons for not following the logic of *Nollan* and *Dolan* on the permit denial issue, neither of which is convincing.⁵² First, the Court said a permit grant subject to an exaction is indistinguishable from a permit denial based on a lack of agreement on a proposed exaction and, therefore, judicial challenges to both regulatory actions should be governed by the same standard.⁵³ As Justice Alito put it, the review standard should not vary based on whether the government expressed its demand for an exaction as a “condition[] precedent . . . [or a] condition[] subsequent.”⁵⁴ And, in truth, there is some superficial appeal to this argument: A government official’s determination that a development project should only go forward if certain exactions are implemented can be easily expressed in either fashion. But this reasoning overlooks a crucial point.

Although the *reason* for the government’s actions may be the same in both cases, these two regulatory decisions affect private property very differently. When the government grants a permit subject to an exaction, it imposes a requirement that, outside the permitting process, would constitute a taking of the exacted property interest. But when the government denies an application instead of granting a permit subject to an exaction, regardless of the motivation for the decision, the permit denial affects different property in a different way. The government plainly has not taken an exacted property interest because nothing has been exacted.⁵⁵ Instead, by denying the permit the government has restricted the uses of the property the owner seeks to develop. Because a permit denial restricts the same property in the same fashion regardless of whether the denial is motivated by a dispute over a proposed exaction or not, ordinary regulatory takings analysis should apply to a takings claim based on a permit denial whether or not the denial was motivated by a dispute over a proposed exaction. The

52. Justice Kagan, speaking for the dissenters, expressed agreement that the *Nollan/Dolan* standards apply “when the government denies a permit until the owner meets [a] condition” that would trigger *Nollan/Dolan* review, but without endorsing the majority’s reasoning to support this conclusion or offering any other rationale to support this conclusion. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013) (Kagan, J., dissenting). It seems fair to assume that the dissenters’ commitment to this ruling is of the weakest kind.

53. *Id.* at 2595–96 (majority opinion).

54. *Id.* at 2596.

55. Justice Alito acknowledged this point repeatedly in his opinion for the Court. For example, he stated, “Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause *not because they take [private] property* but because they impermissibly burden the right not to have property taken without just compensation.” *Id.* (emphasis added). In the same vein, he acknowledged that “[w]here the permit is denied and the condition is never imposed, *nothing has been taken.*” *Id.* at 2597 (emphasis added). The dissenters agreed, stating that “when the government denies a permit because an owner has refused to accede to . . . [a] demand, nothing has actually been taken.” *Id.* at 2603 (Kagan J., dissenting).

Koontz majority erred in thinking that a permit denial and a permit grant subject to an exaction are substantively identical for the purpose of takings analysis simply because the *motivations* for the decisions are the same. The Takings Clause imposes liability on the government for what it does, not what may be in government officials' heads.

The Court also invoked the “unconstitutional conditions” doctrine to support its conclusion that a permit denial should be analyzed using the *Nollan/Dolan* standards.⁵⁶ The Court pointed to cases involving the First Amendment in which the Supreme Court ruled that a citizen can invoke First Amendment protections not only when government restrains speech directly, but also when government denies a citizen a benefit (such as a job) because she insists on exercising her right to speak.⁵⁷ Attempting to transfer the logic of those decisions to the land use field, Justice Alito said that *Nollan* and *Dolan* should apply not only when an exaction is imposed, but also when the benefit of a land use permit is denied because the owner refuses to accept an exaction.⁵⁸ But this reasoning does not scan either.

In a general sense, the *Nollan/Dolan* inquiry involves alleged unconstitutional conditions, since it addresses “conditions” as well as their alleged “unconstitutionality.” But the unconstitutional conditions doctrine developed in the First Amendment context cannot be mechanically transferred to the takings context, as signaled by the Court’s statement in *Lingle v. Chevron U.S.A. Inc.* that *Nollan/Dolan* represent a “special application” of the unconstitutional conditions doctrine.⁵⁹ The specialness of the *Nollan/Dolan* version of the unconstitutional conditions doctrine is crucial in this context. As explained above, under *Nollan* and *Dolan* a different test applies to a denial of the benefit, *i.e.*, the permit (regulatory takings doctrine), than to the imposition of an exaction as a permit condition (*Nollan/Dolan*). This contrasts with a First Amendment case, in which the same constitutional test resolves both if a direct limitation on speech is unconstitutional and if the imposition of a condition on speech is unconstitutional.⁶⁰ The *Nollan/Dolan* standards, which are unique to takings law, are based on a different premise than the First Amendment test: An exaction, if imposed independently, would automatically be a taking; but the exaction imposed as a condition to a permit would not necessarily be a

56. *Id.* at 2594 (majority opinion).

57. *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974)).

58. *Id.* at 2595.

59. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005).

60. *See Perry*, 408 U.S. at 597 (holding that First Amendment protections apply to both restrictions on speech and the denial of benefits because of one’s speech).

taking. Thus, the special character of *Nollan/Dolan* unconstitutional conditions analysis refutes the idea that a takings claim based on a permit denial should be analyzed under the *Nollan/Dolan* standards.

There is yet another conceptual problem with the notion that the unconstitutional conditions doctrine supports applying *Nollan/Dolan* standards to permit denials. Justice Alito's conclusion that the *Nollan/Dolan* standards should apply to a permit denial was based in part on the idea that a government "demand" for an exaction threatens a landowner with a constitutional infringement.⁶¹ But even if a proposed exaction would violate the *Nollan* and *Dolan* standards, this does not mean that a property owner's rights are threatened by a demand that he accept such an exaction. This conclusion is grounded in settled takings doctrine. Actually imposing an exaction that violates the *Nollan* and *Dolan* standards is not itself unconstitutional, if the owner can seek and obtain just compensation in accord with the Takings Clause. The Supreme Court has said many times that only a taking without compensation is unconstitutional.⁶² So long as an owner has the opportunity to seek whatever compensation he may be entitled to for a taking after the fact, the government action triggering the obligation to pay compensation is not itself unconstitutional.⁶³ Because *actually* imposing an exaction that violates *Nollan* and *Dolan* is not unconstitutional, it follows that a demand that an owner accept such an exaction cannot be unconstitutional either. In either case, the property owner can obtain all (and the only) relief to which she is entitled under the Takings Clause by accepting the condition and suing for compensation; or, if the owner rejects the demand and the permit is denied, the owner can challenge that decision on some other basis but not under *Nollan/Dolan*. In the end, Justice Alito's invocation of the concept of

61. See *Koontz*, 133 S. Ct. at 2596 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

62. See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981) ("[A]n alleged taking is not unconstitutional unless just compensation is unavailable."); *Duke Power Co. v. Carolina Envtl. Study Grp. Inc.*, 438 U.S. 59, 94 n.39 (1978) ("[I]f the Tucker Act remedy would be available in the event of a nuclear disaster, then [the] constitutional challenge to the Price-Anderson Act under the Just Compensation Clause must fail."); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987) (explaining that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power"—the requirement to pay just compensation).

63. The Court has repeatedly said that the remedy for a taking need not be offered "in advance of or even contemporaneously with the taking." *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990). "All that is required is the existence of a 'reasonable, certain and adequate provision for obtaining compensation' at the time of the taking." *Id.* (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 124–25 (1974) (quoting *Cherokee Nation v. S. Kan. R.R. Co.*, 135 U.S. 641, 659 (1890))).

unconstitutional conditions does nothing to explain or justify the result in *Koontz*.⁶⁴

If neither ruling in *Koontz* fits within the *Nollan* and *Dolan* tests for identifying takings under the Takings Clause, does some other provision of the Constitution provide a doctrinal footing for these rulings? The ready answer is “yes”; as a number of commentators have already recognized, the Due Process Clause provides a natural support for both rulings, though for different reasons.⁶⁵ Substantive due process analysis focuses on the rationality or reasonableness of government action⁶⁶ and, therefore, provides a natural framework for addressing whether the government has treated a land owner irrationally or unreasonably by rejecting a development application because the owner refuses to accede to an excessive exaction demand. (Alternatively, a property owner denied a permit can always challenge the denial—regardless of the motivation—based on the traditional regulatory takings tests.) A challenge to a monetary exaction is also properly viewed as involving a due process issue. While a mandate to spend or pay money may not affect “property” within the meaning of the Takings Clause, it does affect “property” within the meaning of the Due Process Clause, according to the five-Justice majority in *Eastern Enterprises*.⁶⁷ It follows that monetary exactions should be subject to challenge under the Due Process Clause as well. (It is also possible that monetary exactions could be either so irrational that they would support a claim that the owner has been denied the right to due process in the land he seeks to develop, or so burdensome that they would support a claim that the real property has been taken on a regulatory takings theory.)

Because the Takings Clause so clearly does not provide the doctrinal basis for either of the claims recognized in *Koontz*, and because the Due Process Clause plainly can provide a doctrinal basis for both rulings, it is only sensible to read the *Koontz* case as a due process case. Indeed, a careful reading of *Koontz* reveals that Justice Alito was, in substance if not in name, actually applying a due process analysis, not a takings analysis: He

64. Cf. *Pidot*, *supra* note 44, at 147 (“While the unconstitutional conditions doctrine—such as it is—plays an important role in defining the vocabulary that courts use in explaining the constitutional limits on exactions, it is unclear what work the doctrine actually does.”).

65. See *supra* note 15.

66. See *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (emphasizing that the Due Process Clause serves to protect the individual against “the exercise of power without any reasonable justification in the service of a legitimate governmental objective”).

67. *E. Enters. v. Apfel*, 524 U.S. 498, 548–50 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 556–58 (Breyer, J., dissenting).

acknowledged that the aim in applying the *Nollan* and *Dolan* standards in *Koontz* was to address

the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, *thereby diminishing without justification the value of the property*.⁶⁸

The underscored language confirms that *Koontz* ultimately rests on the Due Process Clause, not the Takings Clause.

To recap, the doctrinal wreckage left by *Koontz* is extraordinary. The Court has ruled that the *Nollan/Dolan* tests for identifying compensable takings should be applied in two novel contexts where, based on the logic of those decisions as well as other Supreme Court precedent, the *Nollan/Dolan* tests do not apply. In so doing, the Court has cast doubt on the doctrinal underpinnings of *Nollan* and *Dolan* and unleashed doctrinal innovations that have no defined basis or boundary. The most plausible justification for *Koontz* is that the Court's rulings rest on the Due Process Clause rather than the Takings Clause. On that understanding, although *Koontz* ostensibly extends the application of takings precedents, the decision does not actually involve the Takings Clause at all. Rather, the Court has, in effect, invoked the analytic framework provided by the *Nollan* and *Dolan* takings tests to develop a new species of substantive due process review. The Court has done all this without acknowledging what it is doing, much less seeking to justify the outcome by reference to constitutional text, history, or prior precedent. In so doing, the Court has also implicitly cast aside its previous, seemingly secure commitment to deferential review of economic regulation under the Due Process Clause, a topic to which I now turn.

II. UPSETTING THE SYSTEM OF SEPARATED POWERS

In addition to wreaking havoc doctrinally, the *Koontz* decision undermines the traditional system of separation of powers enshrined in the U.S. Constitution by granting the courts overly broad authority to resolve social, economic, and technical disputes traditionally and more appropriately resolved by the other branches of government.

68. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (emphasis added).

Since the New Deal revolution eighty years ago, the Supreme Court has generally rejected an expansive role for the courts in determining the nation's social and economic policies in the field of land use and in other realms.⁶⁹ As the Court put it in *Vance v. Bradley*: “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”⁷⁰ This judicial policy of nonintervention reflects a preference, under our Republican system of government, for having the people's elected representatives rather than unelected judges decide public policy questions; a perception that decisions based on complex scientific and other technical analyses are best formulated by experts within administrative agencies; and the legitimate concern that the broad language of the Bill of Rights provides a weak foundation for assertions of judicial decision-making authority.

For present purposes, the most important and most directly relevant reaffirmation of this attitude of judicial deference is the Court's unanimous 2005 decision in *Lingle v. Chevron U.S.A. Inc.*⁷¹ The case involved a challenge under the Takings Clause to a gas station rent control law adopted by the State of Hawaii.⁷² Invoking the theory that a regulation results in a taking if “it fails to substantially advance a legitimate state interest,” the U.S. Court of Appeals for the Ninth Circuit ruled that the statute was unconstitutional because the statute was not likely to effectively protect consumers from higher gasoline prices.⁷³ The Supreme Court reversed, in a unanimous decision,⁷⁴ despite the fact that several prior Supreme Court cases had endorsed this takings theory.⁷⁵ The Court first ruled that this ostensible takings test, because it focused on the alleged ineffectiveness of the challenged law rather than the economic burden it imposed, involved an inquiry that more naturally fit under the Due Process Clause rather than the

69. See, e.g., Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 637–38 (1990) (discussing the Supreme Court's commitment to judicial restraint since the New Deal era).

70. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

71. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 530 (2005).

72. *Id.* at 528.

73. *Chevron U.S.A., Inc. v. Bronster*, 363 F.3d 846, 848, 855–57 (9th Cir. 2004) (internal quotation marks omitted), *rev'd sub nom.* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

74. *Lingle*, 544 U.S. at 548.

75. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334 (2002) (“[P]etitioners might have argued that the moratoria did not substantially advance a legitimate state interest.”); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (applying the “substantially advance” test).

Takings Clause.⁷⁶ Second, the Court observed that the substantially advance test

would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.⁷⁷

The Court concluded by stating: “The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.”⁷⁸

To appreciate how radically *Koontz* departs from the principle of judicial deference toward the other branches reflected in *Lingle*, it is useful to focus on the very practical question at the heart of the *Koontz* case: whether the St. Johns River Water Management District would be permitted to determine the appropriate level of mitigation for Koontz’s proposed land development or whether the courts should resolve this technical issue. The resolution of this question had profound separation of powers implications, which the Supreme Court majority completely ignored.

The St. Johns River Water Management District is one of five regional districts in the State of Florida charged with protecting and managing the State’s water resources.⁷⁹ The District is governed by a nine-member board appointed by the governor, subject to confirmation by the Florida Senate.⁸⁰ It has scores of water resource specialists and other technical staff to help carry out its statutory responsibilities.⁸¹ The District’s organic statute, the Water Resources Act of 1972, established a comprehensive, statewide program for management of water resources.⁸² The other primary statute at issue in *Koontz*, the Wetlands Protection Act of 1984, established a state policy to preserve and protect the State’s remaining wetlands “to the greatest extent practicable, consistent with private property rights and the

76. *Lingle*, 544 U.S. at 540.

77. *Id.* at 544.

78. *Id.* at 545.

79. *Water Management Districts*, FLA. DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/secretary/watman/> (last updated June 5, 2014).

80. *Governing Board*, ST. JOHNS RIVER WATER MGMT. DIST., <http://www.sjrwm.com/governingboard/> (last visited Apr. 3, 2015).

81. *Employee Directory*, ST. JOHNS RIVER WATER MGMT. DIST., <http://floridaswater.com/directory-office.html> (last updated Mar. 23, 2015).

82. Fla. Water Res. Act of 1972, ch. 72-299, §§ 1–2, 1972 Fla. Laws 1082, 1083–84 (codified at FLA. STAT. §§ 373.013–373.016).

balancing of other state vital interests.”⁸³ Pursuant to the Florida Administrative Code, the District has issued extensive rules and policies to guide its implementation of these laws.⁸⁴

After reviewing Koontz’s application in light of the relevant statutory goals and regulatory standards, the District determined that to qualify for a permit Koontz needed to reduce the size of his proposed project or carry out wetlands restoration elsewhere in the basin to mitigate the project’s adverse effects.⁸⁵ Koontz then filed suit in Florida Circuit Court, alleging a taking under *Nollan* and *Dolan*.⁸⁶ Following a full trial, the circuit court issued a succinct “final judgment” in favor of Koontz.⁸⁷ The court concluded, without elaboration, that “[t]here was neither a showing of a nexus between the required off-site mitigation and the requested development of the tract, nor was there a showing of rough proportionality to the impact of site development.”⁸⁸ Accordingly, the court concluded, “the St. Johns District’s required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking.”⁸⁹ Following an extended series of appeals, the case made its way to the U.S. Supreme Court, which basically upheld the superior court’s application of the *Nollan/Dolan* standards.⁹⁰

The Supreme Court’s opinion in *Koontz* is remarkable for its disregard of the cautionary words of the *Lingle* decision about judicial second-guessing of the judgments of elected representatives and “expert agencies.”⁹¹ The laws the District was seeking to enforce in *Koontz* were adopted by the state legislature and approved by the governor, and therefore reflected the considered judgments of the citizens’ elected representatives. Because the District board is selected jointly by the governor and the senate, its judgments are at least indirectly representative of the citizens of Florida. By upholding the ruling that the District’s permit denial was unconstitutional under *Nollan/Dolan*, the Supreme Court sanctioned the trial court’s determination to override the judgment of the political branches.

83. Warren S. Henderson Wetlands Prot. Act of 1984, ch. 84-79, 1984 Fla. Laws 202, 204.

84. FLA. ADMIN. CODE ANN. r. 40C-4.041(1), (2)(b) (2004); FLA. ADMIN. CODE ANN. r. 62-4.055(1), (2) (2004).

85. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2593 (2013).

86. *Koontz v. St. Johns River Water Mgmt. Dist.*, No. CI-94-5673, 2002 WL 34724740 (Fla. Cir. Ct. Oct. 30, 2002) (trial order).

87. *Id.* at *1.

88. *Id.* at *10.

89. *Id.*

90. *Koontz*, 133 S. Ct. at 2594.

91. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005).

In addition, the Court's ruling trumped the technical judgments of the Board's expert staff. Resolution of how much mitigation, and in what form, was necessary to offset the impacts of Koontz's project called for expertise in wetlands science and hydrology. The choice to permit off-site mitigation, though apparently suspect in the mind of the superior court, represented a cost-effective, ecologically sound approach to wetland protection in the expert judgment of the District staff, supported by reputable scientific analysis.⁹² By holding the District's permit denial unconstitutional, the Supreme Court implicitly accepted the trial court's determination that its technical judgment should trump that of the agency staff. Even setting aside the agency's greater technical expertise, it is difficult to fathom, as a matter of ordinary common sense, how the superior court could have concluded that a wetlands restoration requirement lacked an essential nexus with the statutory goal of wetlands protection. It is also difficult to discern on what basis, apart from judicial intuition, the trial court could have concluded that the level of mitigation mandated by the District was not "roughly proportional" to the project impacts.⁹³ While the correctness of the superior court's application of the *Nollan/Dolan* standards was not technically before the Supreme Court in *Koontz*, the Supreme Court's decision can and will be read as affirming the trial court's cavalier approach.

The larger significance of the *Koontz* decision lies, of course, in the fact that it represents a precedent to guide the resolution of many other similar cases in the future. State, regional, and local government agencies make many thousands of decisions each year regarding the level of mitigation required for different kinds of development projects. As a result of *Koontz*, courts now may have broad license to reject the considered judgments of the other branches and to resolve on their own how much mitigation is warranted for individual development projects. Read as broadly as possible, *Koontz* appears to threaten searching judicial examination of *any* aspect of land use regulation.

The approach implicitly endorsed in *Koontz* is particularly striking because the Supreme Court effectively embraced the kind of intrusive trial court proceedings that the Court condemned a few years earlier in *Lingle*.⁹⁴ In *Lingle*, Chevron offered expert testimony to support its argument that the gas station rent control law was ineffective, and the State offered its own expert evidence to support the opposite view.⁹⁵ The Supreme Court explained:

92. *Koontz*, 133 S. Ct. at 2593.

93. *Koontz*, 2002 WL 34724740, at *7.

94. *Lingle*, 544 U.S. at 544.

95. *Id.* at 540, 545.

[T]he District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be "more persuasive" than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. . . . We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.⁹⁶

In *Koontz*, the trial court conducted a similar de novo review of the District's permitting decision, hearing testimony from both sides on whether the proposed off-site mitigation was properly calibrated to address the project impacts and then making its own determination about what level of mitigation was justified.⁹⁷ The proceedings before the Florida Superior Court were no less "remarkable" than the trial court proceedings in *Lingle*, but the Supreme Court ignored this similarity.

The contradiction between *Koontz* and *Lingle* is all the more patent because the stringent judicial standard for review of regulatory policies rejected in *Lingle* and then embraced in *Koontz* arises from a virtually identical confounding of takings and due process doctrines. As discussed, the *Lingle* Court repudiated the "substantially advance" takings theory because it concluded that, in substance, the theory sounded in due process, not takings.⁹⁸ But the Court condemned this ostensible takings test not only because it mixed up legal categories but because it could "be read to demand heightened means-ends review of virtually any regulation of private property."⁹⁹ In the course of mistakenly inserting due process-type analysis into takings law, the Court explained, some of the Court's prior decisions had also mistakenly endorsed a heightened standard of judicial review the modern Court had "long eschewed."¹⁰⁰

In *Koontz*, the five-Justice majority effectively reversed course and embraced both the muddling of takings and due process doctrines and the heightened standard of review the Court rejected in *Lingle*. For the reasons discussed above, the Court's extension of the *Nollan/Dolan* standards beyond their logical boundaries has produced a novel constitutional test,

96. *Id.* at 544–45 (quoting and citing *Chevron U.S.A., Inc. v. Cayetano*, 198 F. Supp. 2d 1182, 1187–93 (D. Haw. 2002)).

97. *See Koontz*, 133 S. Ct. at 2593 (describing the trial court proceedings).

98. *See supra* notes 76–78 and accompanying text.

99. *Lingle*, 544 U.S. at 544.

100. *Id.* at 545.

which rests, if it rests on anything, on the Due Process Clause. By ruling that the stringent *Nollan/Dolan* standards apply to this new claim, the Court, in effect, sanctioned searching judicial review of economic regulation under the Due Process Clause for the first time in eighty years. Remarkably, neither the majority nor the dissent reveals the slightest awareness of the historic significance of this innovation or its blatant conflict with the *Lingle* decision.

Moreover, in one important respect, *Koontz* is actually more destructive of separation of powers principles than the pre-*Lingle* “substantially advances” test. Under the substantially advances test, the plaintiff bore the burden of proof to demonstrate a constitutional violation.¹⁰¹ However, under the *Nollan/Dolan* tests (and presumably under *Koontz*’s extended version of those tests) the burden of proof rests on the government.¹⁰² Thus, under *Koontz*, government officials bear the responsibility to build a case to defend their judgments on appropriate mitigation levels. If their case is ultimately no more persuasive than the case presented by the developer, the government will lose. Under this regime, state and federal trial courts are accorded even greater latitude to override legislative and administrative agency judgments than was possible under the substantially advances test. In this sense, the legal standard adopted in *Koontz* is more “remarkable” than the substantially advances test.

The decision in *Koontz* is also problematic from a separation of powers standpoint for another reason. Several members of the *Koontz* majority, including Justice Antonin Scalia and Justice Clarence Thomas, have criticized, on separation of powers grounds, precisely the kind of intrusive judicial review of social and economic policies endorsed in *Koontz*. Justice Scalia has long lamented judicial reliance on the Due Process Clause to invalidate policy choices adopted through the political process. Thus, he has endorsed the Court’s New Deal repudiation of a robust version of substantive due process.¹⁰³ Specifically in the land use context, Justice Scalia, joined by Justice Thomas, has taken the position that allegations of arbitrary land use regulation cannot support a substantive due process claim because the Due Process Clause only protects “fundamental liberty

101. *Agins v. City of Tiburon*, 447 U.S. 255, 260–61 (1980).

102. *Dolan v. City of Tigard*, 512 U.S. 374, 391 & n.8 (1994).

103. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part) (referring to “the Court’s erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal” under the banner of substantive due process); J. Peter Byrne, *Regulatory Takings and “Judicial Supremacy,”* 51 ALA. L. REV. 949, 952 (2000).

interests” and the “mere regulation of land” does not implicate fundamental liberty interests.¹⁰⁴

In light of Justice Scalia and Justice Thomas’s position on the scope of substantive due process in the land use context it is impossible to understand why they joined in the *Koontz* majority opinion upholding stringent judicial review of land use regulation using the *Nollan/Dolan* standards. Even if the *Koontz* case did involve application of a takings test rather than a due process test, there is no more justification for reading into the general language of the Takings Clause a judicial warrant for close judicial supervision of the political branches of government than there is in the Due Process Clause. But, for the reasons discussed above, the analysis applied in *Koontz* is not in fact a takings analysis at all, but instead represents a revival of substantive due process analysis. Under a consistent interpretive approach, Justices Scalia and Thomas should have rejected application of the stringent *Nollan/Dolan* standards in this context. The illegitimacy of the stringent standard applied in *Koontz* is only made more illegitimate by the majority’s pretense that what in reality is a due process claim is governed by takings precedent.

The Court’s error in embracing a stringent standard in *Koontz* can perhaps be explained, if not excused, by observing that there is some understandable confusion about how separation of powers applies in takings cases as opposed to due process cases. As reflected in *Lingle*, the Court has a well-honed conviction that, to the extent challenges to economic regulation can be brought under the Due Process Clause at all, they must be adjudicated with considerable deference to the judgments of the other branches.¹⁰⁵ In the takings context, a very deferential standard akin to the due process rational basis standard governs the threshold issue of whether an alleged taking is for a “public use.”¹⁰⁶ But the Court has never squarely addressed the question of what level of deference should apply in resolving the distinct question of whether government action results in a “taking.” The Court’s clarity on the need for deference in due process cases is perhaps attributable to the fact that the basic inquiry under the Due Process Clause (Is the government action rational?) tends to have the same normative character as the legislative or administrative judgment

104. See *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring) (emphasis omitted).

105. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005) (observing that when hearing a due process claim, courts must give substantial deference to other government branches).

106. See *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”).

being challenged. By contrast, the basic issue in a takings case (How burdensome is the government action?) presents a less obvious overlap with the policy choice of another branch as to whether or not to adopt a particular regulation.

To be sure, the Supreme Court has frequently indicated that the category of government actions that qualify as “takings” must be defined narrowly, reasoning that “[g]overnment hardly could go on” if it had to pay compensation every time its actions adversely affected private property values.¹⁰⁷ But that traditional caution lacks the same punch as the explicit separation of powers justifications for the deferential rational basis test under the Due Process Clause. The requirement to pay compensation under the Takings Clause has the same deterrent effect on many government actors as equitable relief under the Due Process Clause, if not a greater effect; thus, the default remedy under each provision cannot by itself explain why the courts would accord greater deference to the other branches when adjudicating cases under the Due Process Clause rather than under the Takings Clause. In sum, how much deference the courts should apply in determining whether a taking has occurred deserves further work.

Importantly, however, it is unnecessary to unravel this larger mystery in order to establish that the rulings in *Koontz* seriously offend established separation of powers principles. As discussed, due process precedents plainly require judicial deference to the judgments of the other branches in suits brought under the Due Process Clause. Since the rulings in *Koontz* rest (if they rest on anything) on the Due Process Clause, the Supreme Court should have ruled that the courts should have adjudicated *Koontz* claims, not using the stringent *Nollan/Dolan* standards, but rather using the deferential rational basis test applicable to a due process claim.¹⁰⁸

One potential response to these criticisms of *Koontz* is that they are more appropriately directed at *Nollan* and *Dolan*, which established the exacting “essential nexus” and “rough proportionality” tests to begin with. There is some force to this argument. Both *Nollan* and *Dolan* were decided by 5 to 4 votes, with the dissents in both cases criticizing the majority for

107. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

108. Justice Alito sought to deflect potential criticism of the intrusiveness of the tests he embraced in *Koontz* by asserting that extending *Nollan/Dolan* to monetary exactions “does not implicate ‘normative considerations about the wisdom of government decisions.’” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part)). As I have discussed before, this statement is plainly disingenuous because “[e]mpowering the courts to conduct intrusive review of whether government has demonstrated that a condition meets the essential nexus and rough proportionality tests obviously leads the courts into making normative judgments about the wisdom of government regulatory decisions.” Echeverria, *supra* note 2, at 42.

launching a revival of *Lochner*.¹⁰⁹ And both *Nollan* and *Dolan* raise the same concerns about separation of powers as *Koontz* because they too granted the courts expanded power to reject the policy judgments of elected officials as well as the technical judgments of administrative experts.¹¹⁰ On the other hand, there is arguably a special justification for applying a heightened standard of review in *Nollan*- and *Dolan*-type cases given that both cases, accurately understood, involve exactions which, viewed independently, would be *per se* takings. Thus, *Nollan* and *Dolan* present scenarios that are inherently problematic from the standpoint of the Takings Clause. Moreover, the independent-taking requirement confines (or should have confined) the *Nollan/Dolan* standards to a well-defined, discrete set of cases—a point which cannot be made in favor of *Koontz*. In sum, there is no necessary contradiction between accepting *Nollan* and *Dolan* as settled precedent and rejecting the reasoning and outcome in *Koontz*.

Just as the doctrinal incoherence of the analysis in *Koontz* undermines the Supreme Court, so too the stringent standard of review adopted in *Koontz* undermines the Court. As Justice Scalia aptly put it in another context:

[I]f . . . our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.¹¹¹

III. UNDERMINING FEDERALISM

The decision in *Koontz* also undermines the values of federalism. Strict judicial review of property regulation under the property-protective

109. See *Dolan v. City of Tigard*, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) (“The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case, however, is the Court’s resurrection of a species of substantive due process analysis that it firmly rejected decades ago.”); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 846 (1987) (Brennan, J., dissenting) (criticizing the majority for adopting “a narrow conception of rationality . . . [that] has long since been discredited as a judicial arrogation of legislative authority”).

110. See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 544 (1991) (commenting in aftermath of *Nollan*, that “[t]he calculation of harms caused by a development, and the allocation of costs among new developments, or between new residents and existing residents, is fraught with complexities for which judges enjoy no special competence”).

111. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (1992) (Scalia, J., concurring in part and dissenting in part).

provisions of the Constitution necessarily limits the policy options available to citizens as well as state and local government officials. Authority over land use decisions is shifted to the national government and away from the local level. This shift, too, imposes considerable costs.¹¹²

The United States' federalist structure of government provides significant advantages to the citizens of the United States. In its original conception, the federalist structure was regarded as a safeguard for individual liberty. As James Madison explained in Federalist No. 51:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.¹¹³

This original rationale still has considerable currency with the modern Supreme Court: As Justice Anthony Kennedy has put it, "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."¹¹⁴ At the same time the Framers' original rationale for federalism has arguably been superseded to a degree by the subsequent

112. For previous articles making arguments along the same lines, see Melvyn R. Durchslag, *Forgotten Federalism, The Takings Clause, and Local Land Use Decisions*, 59 MD. L. REV. 464, 472–73 (2000) ("[T]he place private property deserves in our hierarchy of values, while certainly germane, is not the only factor that ought to determine the outcome of a zoning dispute. It does not alone determine the latitude that *federal courts* ought to give to local legislative bodies in distinguishing those land uses that are, *to that community*, tolerable from those that are not. Indeed, my argument is that more than other rights protecting provisions, when the Takings Clause is applied to local land use regulation, it must be tempered with a concern for federalism."). Another way of thinking about takings law and federalism, not particularly pertinent in the context of the *Koontz* case, is to focus on the tension between expansive judicial interpretations of the Takings Clause and traditional state primacy in defining the scope and character of private property rights. See, e.g., Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 321–22 (1993) (noting the tension between expansive judicial interpretations of the Takings Clause and traditional state primacy in defining private property rights).

113. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 46, at 298 (James Madison) (Clinton Rossiter ed., 1961) (predicting that "ambitious encroachments of the Federal government on the authority of the State governments . . . would be signals of general alarm. Every [state] government would espouse the common cause").

114. *United States v. Lopez*, 514 U.S. 549, 576 (1993) (Kennedy, J., concurring); see also *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.").

adoption of the Bill of Rights, as later supplemented by the Fourteenth Amendment, defining an extensive set of individual liberties protecting citizens from government at all levels.¹¹⁵

Today, the advantages of federalism tend to be framed in more instrumental terms, including: decentralized government that is more sensitive to the diverse needs of a heterogeneous society; increased opportunities for citizen involvement in democratic processes; greater opportunities for innovation and experimentation in government; and more responsive governments which are forced to compete for the allegiance of a mobile citizenry.¹¹⁶

All of these acknowledged advantages of our federalist structure of government apply in the land use field. First, vesting land use authority at the state and local level permits the development of different approaches to land use regulation and management that are responsive to the diverse values of different communities. Different regions of the country vary widely in their attitudes toward growth and development as well as their tolerance for government supervision of private land use decisions. An approach to land use protection and management that takes advantage of the nation's federalist structure permits, for example, the City of Houston to thrive without zoning and the State of Oregon to preserve its productive farmlands through strict land use controls.

Second, keeping land use decision making at the state and local level provides increased opportunities for citizens to engage in effective political action to influence land use decisions that have importance for their communities and in their own lives. In smaller units of government, individual citizens have more chances to have their voices heard and to exert meaningful influence on elected officials. Citizens can walk down the street or take a short ride in a car to attend a selectboard or city council meeting at which a proposed municipal plan or an ordinance amendment will be considered. Administrative land use regulation at the local level also provides opportunities for citizen engagement in the form of oral or written comments to planning boards or development review boards.

115. Cf. Ilya Somin, *Libertarianism and Federalism*, POL'Y ANALYSIS (Cato Inst., Washington, D.C.), June 30, 2014, at 1, 3, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/pa751_web_1.pdf ("Intuitively, it might seem that multiplying the number of governments simply multiplies the opportunities for government coercion and restrictions on liberty.")

116. See generally Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (discussing three advantages to decentralized decision-making); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 4-5, 7-9 (1988) (discussing the general benefits of federalism).

Third, vesting land use authority at the state and local level allows valuable opportunities for innovation and experimentation.¹¹⁷ There are fifty states in the United States and over eighty thousand units of local government.¹¹⁸ Different states have adopted different approaches to land use regulation at the state level, as well as to the design of state legislation authorizing land use planning and regulation at the local government level. The greater the number of government actors in the land use field the greater the potential for novel approaches which may serve as a model for other communities.

Finally, vesting land use authority at the state and local level provides an opportunity for states to compete among each other based on the strength of their commitment to effective landscape protection. For instance, Oregon and New York State, both leaders in land use protection, have mounted familiar public relations campaigns to attract visitors based on the quality of their (protected) natural and recreational lands.¹¹⁹ Land use protection and management policies may also provide some states advantages over other states in terms of attracting new businesses and other investment.

All of the values associated with federalism in the land use context are threatened by intrusive national legal rules constraining local policy options. In her dissent in *Koontz*, Justice Kagan correctly observed that the Court's ruling on monetary exactions "extend[ed] the Takings Clause, with its notoriously 'difficult' and 'perplexing' standards, into the very heart of local land-use regulation and service delivery."¹²⁰ She observed that "[c]ities and towns across the nation impose many kinds of permitting fees every day," and "[a]ll now must meet *Nollan* and *Dolan*'s nexus and proportionality tests."¹²¹ She continued: "The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly."¹²²

117. See Durchslag, *supra* note 112, at 464–65 (noting the wide range of local land use regulations).

118. *Census Bureau Reports There Are 89,004 Local Governments in the United States*, U.S. CENSUS BUREAU (Aug. 30, 2012), <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>.

119. See, e.g., Barry Popik, *Oregon, Things Look Different Here (Oregon Slogan)*, THE BIG APPLE (June 19, 2012), http://www.barrypopik.com/index.php/new_york_city/entry/oregon_things_look_different_here_oregon_slogan; N.Y. Dep't of Econ. Dev., *Places to Go in New York*, I LOVE NY, <http://www.iloveny.com/places-to-go/> (last visited Apr. 12, 2015).

120. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2607 (2013) (Kagan, J., dissenting).

121. *Id.*

122. *Id.*

Supreme Court decisions suggest that the Court is more attuned to impairments of federalism caused by the congressional or executive branches than to those caused by its own decisions.¹²³ But the Court's constitutional rulings can surely conflict with federalism values to the same extent as decisions by the other branches, as Justice Kagan recognized. To cite another recognition, in another context, that the Court's constitutional rulings can impair federalism, Justice Scalia criticized a majority opinion for "continuing the imposition of a rigid national rule instead of allowing for regional differences."¹²⁴ To the extent the Supreme Court prescribes substantive rules and procedures that local governments must follow in the land use field, it weakens the capacity of local government to play their independent role within the federalist scheme. As Justice Kennedy has explained: "If, as Madison expected, the Federal and State Governments are to control each other . . . citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function."¹²⁵ Decisions expansively interpreting the Bill of Rights against local governments may not be identical to congressional measures "commandeering" state and local governments,¹²⁶ but they surely raise similar federalism concerns.

Notwithstanding the serious federalism concerns raised by expansive constitutional rulings against local governments, it can also be contended that there are dangers in vesting too much power in local governments. Indeed, James Madison argued for a strong federal government in part on the ground that smaller units of government would be subject to capture by factions:

[T]he greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the

123. See, e.g., *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

124. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in part and dissenting in part).

125. *United States v. Lopez*, 514 U.S. 549, 576–77 (1993) (Kennedy, J., concurring) (citing THE FEDERALIST NO. 51 (James Madison)).

126. *New York v. United States*, 505 U.S. 144, 175 (1992).

compass within which they are placed, the more easily will they concert and execute their plans of oppression.¹²⁷

Building on Madison's thinking, some commentators have argued that the danger of "faction" at the local level supports applying the Takings Clause more strictly to local governments than to other levels of government.¹²⁸ According to this viewpoint, smaller communities are more likely to be dominated by factions than larger communities with more complex interest-group politics.¹²⁹ Because the Takings Clause can help check the effects of faction, the argument proceeds, the Takings Clause should be applied more vigorously at the local level, where the asserted evil of faction is thought most likely to appear.¹³⁰ Commentators go on to argue that the case for deploying the Takings Clause to combat faction is even more compelling in the land use context because land is an immovable asset; citizens cannot easily exercise the option of "exit" when their rights in their land are threatened.¹³¹

Professor Carol Rose has observed that, notwithstanding the popularity of variants of this theory among academics, the Supreme Court has never expressed the least sympathy for the idea of applying the Takings Clause more vigorously to local governments than to other levels of government.¹³² To the contrary, the Court's decisions presume that the Takings Clause applies in the same fashion to all levels of government.¹³³ Moreover, far from embracing this academic theory, Justice Anthony Kennedy, often the swing vote on the Court on takings issues, has expressed the view that the Court should exercise restraint in reading the Takings Clause to avoid

127. THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

128. See Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1686–87 (2007) (tracing this argument, at least in modern scholarship, to several pieces published in the 1960s, including Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 709–11 (1964), and Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965)).

129. See *id.* (observing that courts should be aware of the risk of faction at the local level due to "permanent majorit[ies]").

130. See *id.*

131. See Ilya Somin, *Federalism and Property Rights*, U. CHI. LEGAL F. 53, 58–66 (2011) (arguing that competitive federalism is unlikely to protect property rights in land and other immobile assets); WILLIAM FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 282–88 (1995) [*hereinafter* FISCHER, *REGULATORY TAKINGS*].

132. See Rose, *supra* note 128, at 1681 (agreeing with other commentators that "differently scaled legislatures are likely to behave differently in dealing with individuals' property," but "sharply disagree[ing]" that these differences support "imposing strict takings requirements on local legislatures").

133. *Id.* at 1695 (observing that modern Supreme Court regulatory takings cases include "string cites of cases about legislatures at all different levels, without acknowledging the potential differences in legislative decisionmaking").

imposing onerous liabilities on local governments.¹³⁴ Thus, in *Eastern Enterprises v. Apfel*, he declined to join the plurality in adopting an expansive interpretation of the Takings Clause in a suit against the United States, commenting:

Our definition of a taking, after all, is binding on all of the States as well as the Federal Government. The plurality opinion would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts.¹³⁵

It could be contended that there has been a change in the Supreme Court's attitude to takings claims against local governments in recent decades. For example, *Nollan* and *Dolan* can be read to reflect particular suspicions about state and local decision making and an effort to subject state and local governments to especially rigorous scrutiny under the Takings Clause. *Nollan* involved a state government agency¹³⁶ and *Dolan* involved a city.¹³⁷ Further, both cases addressed a form of regulatory activity (permit conditioning) that is especially prevalent at the local level. Tellingly, *Nollan* and *Dolan* have only been cited a handful of times in takings cases involving the federal government.¹³⁸ In addition, *Koontz* can be viewed as targeting local governments. While *Koontz* says that a permit denial based on an owner's refusal to accede to an exaction should be reviewed under the *Nollan* and *Dolan* standards, the Court recognized that no takings claim will lie because no property interest has been exacted in this scenario.¹³⁹ The doctrinal basis for what the Court calls "a *Nollan/Dolan* unconstitutional conditions violation"¹⁴⁰ remains obscure, though, for the reasons discussed above, the Due Process Clause is the most plausible candidate. In any event, property owners could likely sue local governments for money damages under 42 U.S.C. § 1983 on the theory that "a *Nollan/Dolan* unconstitutional conditions violation" falls within the scope of a "deprivation of rights, privileges, or immunities secured by the

134. See *E. Enters. v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

135. *Id.*

136. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

137. *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994).

138. By my count, the U.S. Court of Appeals for the Federal Circuit, which hears most appeals in takings cases against the federal government, has cited *Dolan* fourteen times; it has cited *Nollan* twenty times. By contrast, the Federal Circuit has cited *Lucas* sixty-eight times.

139. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2602 (2013).

140. *Id.* at 2597.

Constitution.”¹⁴¹ But since § 1983 does not apply to the federal government,¹⁴² and the Due Process Clause is not a money-mandating provision of the Constitution,¹⁴³ a property owner cannot sue the federal government for monetary relief based on “a *Nollan/Dolan* unconstitutional conditions violation.” Thus, *Koontz* implicitly recognizes a new constitutional cause of action for monetary relief based on property rights violations that applies exclusively to local governments.

Nonetheless, it is unlikely that the Court will adopt an explicitly distinct takings jurisprudence for local governments, and for good reasons. First, at the most practical level, cities are too varied in size and character to justify judicial invention of a special version of takings jurisprudence for local government. Many cities in the United States have substantially larger populations than some states.¹⁴⁴ Moreover, cities vary enormously in their political operations and structure, making it impossible to generalize about whether they are prone to domination by factions. In some ways, the governments of New York City and Los Angeles are more like the U.S. government than that of a small Vermont village.

Second, I am skeptical of the claim that local governments systematically deny property owners the ability to have their concerns heard and considered. Thus, I agree with commentators who point to “exit” and “voice” as considerable constraints on local policy making.¹⁴⁵ As Carol Rose contends in characteristically evocative terms, at the local level, “one can talk directly to local decision makers, show up at the meetings, and in the worst-case scenarios, take one’s marbles and leave for a more accommodating town, in the standard model explicated in Charles Tiebout’s theory of local governmental competition.”¹⁴⁶

Third, and most importantly, to whatever extent their generally small size increases the risk that local governments may threaten developers’ property rights, the risk is counterbalanced by the fact that the Takings Clause has a far more powerful effect on local governments than on the federal government. The risk that the United States will incur takings liability has only a modest deterrent effect on actions and policies at the

141. 42 U.S.C. § 1983 (2012).

142. See *District of Columbia v. Carter*, 409 U.S. 418, 424–25 (1973) (“[A]ctions of the Federal Government and its officers are at least facially exempt from [§ 1983’s] proscriptions.”).

143. *Smith v. United States*, 709 F.3d 1114, 1116 (Fed. Cir. 2013).

144. According to 2010 data, the ten cities in the United States with the largest populations have larger populations than the six states with the smallest populations (seven if one includes the District of Columbia). *Resident Population Data*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/data/apportionment-dens-text.php> (last visited Apr. 12, 2015).

145. Rose, *supra* note 128, at 1688.

146. *Id.*

federal level. Takings awards against the United States are paid out of the Judgment Fund, a permanent, unlimited appropriation that covers all takings awards against the United States.¹⁴⁷ Because any takings award against the United States is miniscule in the context of the entire federal budget, and paying a takings award requires no affirmative action by either Congress or administrative agency leaders, neither actual takings awards nor the prospect of takings liabilities have a significant effect on the day-to-day conduct of either Congress or the administrative agencies.

By contrast, takings awards and the prospect of takings liability have very powerful deterrent effects at the local government level. Local governments do not have and cannot afford judgment funds, they generally lack insurance coverage for takings liabilities,¹⁴⁸ and even when insurance is available, it is often inadequate.¹⁴⁹ A major, unexpected takings award based on regulatory activity can throw a small, finely-tuned municipal budget into complete disarray. When Half Moon Bay, California, suffered a takings judgment in a land use case of over \$36 million (three times its total annual budget),¹⁵⁰ it promptly fired its legal counsel and explored the option of filing for bankruptcy.¹⁵¹ After spending years paying down the liability in small increments, the community ended up with a vastly diminished government.¹⁵² The plight of Half Moon Bay, which received widespread press coverage in California, sent a powerful message to local government officials and their counsel. There is no need to invent a new, expanded

147. 31 U.S.C. § 1304 (2012).

148. See Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 369 (2002) (“Although 49% of counties and 22% of cities report receiving takings litigation threats at least once a year, very few have insurance to cover liability arising from takings claims.”).

149. See, e.g., Clay Lambert, *Arbiter Awards \$10 Million to City of Half Moon Bay in Beachwood Case*, HALF MOON BAY REV. (Sept. 20, 2012), http://www.hmbreview.com/news/arbiter-awards-million-to-city-of-half-moon-bay-in/article_26b95da6-0376-11e2-952e-001a4bcf887a.html (reporting that after losing a major takings lawsuit, the city was only able to recoup a portion of its liabilities from its insurance companies).

150. See *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1040, 1112 (N.D. Cal. 2007) (awarding a judgment of over \$36 million).

151. John Coté, *Half Moon Bay Grapples with \$36.8 Million Judgment Against It*, SFGATE (Dec. 18, 2007, 4:00 AM), <http://www.sfgate.com/bayarea/article/Half-Moon-Bay-grapples-with-36-8-million-3234399.php>.

152. Bill Silverfarb, *City Bond Debt to Be Paid Early: Half Moon Bay Using Insurance Settlement Money for Beachwood Development*, SAN MATEO DAILY J. (July 31, 2013, 5:00 AM), <http://www.smdailyjournal.com/articles/Inews/2013-07-31/city-bond-debt-to-be-paid-early-half-moon-bay-using-insurance-settlement-money-for-beachwood-development/1772704.html> (“The costly litigation has transformed the city dramatically since it lost the case, forcing it to get rid of its own police department and reducing staff drastically. The city is now primarily a contract city, partnering with the Sheriff’s Office, for instance, to provide police service for the coastal city.”).

version of takings law in order get the attention of local governments about potential takings liabilities.

To emphasize the deterrent effect of the takings compensation remedy, especially against local governments, may seem out of place in a case that, according to my argument, actually rests on the Due Process Clause, not the Takings Clause. As a general matter, this point might hold some weight. But it has no particular force as applied to the *Koontz* case because, for the reasons discussed above, local governments will be uniquely vulnerable in suits for monetary relief based on the two novel causes of action recognized in this case. In sum, to whatever degree abstract political theory may support applying the Takings Clause with special vigor to local governments, the uniquely powerful deterrent effect of the Takings Clause on smaller units of government defeats the argument for applying the Takings Clause differently at the local level than at other levels of government.

Professor William Fischel has made a career of arguing for vigorous enforcement of the Takings Clause against local governments, based on what he dubs the “homevoter hypothesis.”¹⁵³ He argues that local government regulation of land use is determined by an “environmental fussiness (the NIMBY syndrome)” in which local homeowners, driven by a desire to protect and enhance the value of their most important financial asset, unreasonably oppose new development that they perceive as a threat to their property values.¹⁵⁴ The theory is contestable on numerous grounds.

First, using the pejorative term “NIMBY” to label property owners who seek to protect themselves from negative externalities needlessly suggests that they are less worthy of respect and protection than property owners who seek to advance their self-interest by exploiting property in a way that may impose negative externalities on the community. There is no *a priori* reason to favor property owners whose interests are served by developing property over property owners whose interests are served by community protection. The Constitution protects the interests of property owners but it also protects the interests of citizens in the benefits of representative government.

In addition, the notion that local politics are driven by homeowners’ desires to protect their property values unduly discounts the considerable collective-action problem homeowners face in organizing to exert effective

153. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4 (2001) [*hereinafter* FISCHEL, THE HOMEVOTER HYPOTHESIS]; *see also* FISCHEL, REGULATORY TAKINGS, *supra* note 131, at 285.

154. FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 153, at 262.

political pressure to advance their interests. Homeowners represent a majoritarian interest in many communities, but that hardly means this interest has any significant power in political terms. If Fischel's thesis were correct, one would expect him to cite numerous examples of local officials punished at the ballot box for permitting too much development; that is certainly not a phenomenon I have recently observed nationwide. Homeowners are chronically preoccupied with numerous other concerns, including work and family, unrelated to protecting their property values. As a result, homeowners' involvement in local land use issues often tends to be episodic, tardy, unorganized, and ultimately ineffectual. It is telling that Professor Fischel's "light bulb" moment inspiring him to embrace the homevoter hypothesis was a zoning hearing in which "neighbors" of a proposed development, "particularly two" neighbors who lived very close to the project, objected to the developer's plan to build a driveway across a wetland area.¹⁵⁵ This kind of ad hoc intervention in a proceeding involving a single development proposal with highly localized effects is hardly a template for effective political action. One might imagine that Professor Fischel, in his capacity as chair of the Hanover zoning board,¹⁵⁶ rejected the neighbors' concerns out of hand and that was that. Certainly, in the general run of such proceedings, that is the way things turn out for citizens raising concerns about proposed development in their communities.

The relative political powerlessness of the disorganized homeowner constituency stands in marked contrast to the relatively greater power of other interest groups at the local level. In my hometown of Strafford, Vermont (across the Connecticut River from Professor Fischel's hometown of Hanover, New Hampshire), the best organized and most powerful citizen group in the community consists of local public school children's parents. Because these citizens have a direct and long-term interest in the local school, they are generally well organized, vocal, and effective. In addition, as Professor Fischel is forced to concede, "developers and their allies are active players in municipal affairs."¹⁵⁷ Although they may be relatively few in number, the significant stake that developers have in land use decisions makes them powerful political players at the local level. In sum, Professor Fischel's idea that local community development policies are driven by the economic interests of homeowners remains only an interesting hypothesis.

155. *Id.* at 9.

156. *Id.*

157. *Id.* at 15.

IV. UNDERMINING EFFECTIVE AND EFFICIENT LAND USE GOVERNANCE

The final costs to be assigned to the rulings in *Koontz* are reductions in the efficiency and effectiveness of local land use regulation. The majority's self-evident goal in *Koontz* was to subject governments to closer judicial supervision in order to provide greater protection from regulatory burdens for property owners seeking to develop their lands. But providing these protections for developers will come at the price of undermining and, to some extent, defeating the objectives of the regulatory programs themselves.

Koontz does not, of course, outlaw exactions. The Court majority went out of its way to assert: "Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."¹⁵⁸ *Nollan* and *Dolan* only require, and now *Koontz* requires in a wider range of cases, that the government justify exactions by demonstrating that they meet the "essential nexus" and "rough proportionality" tests.¹⁵⁹ But an important question after *Koontz* is what, if anything, has the community lost as a result of government now being subjected to these stringent standards, as opposed to, say, rational basis due process review or traditional regulatory takings analysis. The Court assumed that more vigorous policing of "extortionate demands" by local governments would have no adverse effects on their ability to advance valuable local land use policies,¹⁶⁰ but that assumption is plainly unrealistic.

First, *Koontz* makes it more difficult for developers to complete the local land use review process by making the process more complicated and exacting. The Court's rulings require governments to more frequently conduct analyses of potential development conditions to ensure they satisfy the "essential nexus" and "rough proportionality" tests. *Koontz* does this, first, by extending the *Nollan/Dolan* requirements to monetary exactions. Second, *Koontz* effectively requires local officials to document that exactions they propose during the course of negotiations with developers will satisfy *Nollan/Dolan*. If local officials fail to do this work, they run the risk of facing a lawsuit under *Nollan/Dolan* if negotiations subsequently collapse, the government denies the developer's application, and the developer files suit alleging that the application was rejected because the developer refused to accede to an exaction "demanded" by the government.

158. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

159. *Id.* at 2599; *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

160. *Koontz*, 133 S. Ct. at 2602–03.

The Supreme Court has provided relatively little guidance on how to document compliance with *Nollan/Dolan*, but prudent local officials will spend considerable time and effort to ensure they have met the Supreme Court's requirements.

While the legal responsibility to apply *Nollan/Dolan* and justify exactions under those standards rests on the government, the government will typically not bear the brunt of the financial burden of paying for these analyses. Because it is the developer's choice to file an application that triggers the need for governmental review, the community can justifiably demand that the developer reimburse the public for the cost of expert consultants and other expenses related to conducting the review mandated by *Nollan/Dolan*. Especially as applied in the context of complex negotiations between a local government and a developer, the *Nollan/Dolan/Koontz* requirements will add considerable delay and expense to the development review process. Some valuable development projects that would have gone forward prior to *Koontz* will surely not go forward in the aftermath of *Koontz* because the regulatory gauntlet has become too difficult to run.

Second, *Koontz* creates a perverse set of incentives for local officials that will make them less willing to work with developers to formulate project plans that may serve the interests of both the developer and the community. The Court ruled in *Koontz* that a judicial challenge to a permit denial based on a developer's refusal to accede to an exaction is subject to review under the *Nollan/Dolan* standards.¹⁶¹ But *Koontz* does not affect prior precedent establishing that the outright denial of a development proposal will be evaluated under the relatively forgiving regulatory takings standards.¹⁶² After *Koontz*, if the government explicitly denies an application because of a disagreement over a proposed exaction, a subsequent takings lawsuit will trigger review under *Nollan/Dolan*. But if the government never enters into a discussion about potential exactions with a developer, and instead simply reviews the development application as submitted by the developer and rejects it, a subsequent takings lawsuit will be evaluated under the regulatory takings standards. The appropriate course for many local government officials under this new legal regime will be clear: Whenever the prospects for a successful negotiation are uncertain and there is risk of litigation, better to deny an unacceptable application outright and avoid entering into any type of negotiations. After *Koontz*,

161. *Id.* at 2595.

162. *Id.* at 2600; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978) (listing regulatory takings claim factors).

prudent local government officials will negotiate less than they did in the past.¹⁶³

From the perspective of the Supreme Court majority in *Koontz*, fewer negotiations may be a positive result because it will reduce the opportunities for “extortion.”¹⁶⁴ But fewer negotiations will come at a considerable cost as well. Negotiations provide a way for developers and government officials to explore a range of development options, in addition to the developer’s opening proposal, which may serve the developer’s goals as well as or better than its initial proposal while also addressing the goals and needs of the community. With less frequent negotiations, opportunities to search out initially overlooked “win-win” solutions will be reduced. The upshot will frequently be inferior development, both from the developer’s perspective and the community’s perspective.

Mechanical application of the *Nollan/Dolan* standards is also likely to limit the creativity of the development review process.¹⁶⁵ *Nollan* and *Dolan* can be read to require that, once the level of mitigation that should be required of a developer has been determined, the mitigation measures adopted should directly remedy the projected development impacts.¹⁶⁶ Such a requirement would be costly because the public welfare would sometimes be better served by using mitigation funding to finance some other public project. More generally, to avoid litigation risks, *Nollan* and *Dolan* may encourage regulators to adopt a uniform, cookie-cutter approach to mitigation that will undermine the valuable diversity of America’s communities.¹⁶⁷

The final category of potential costs associated with *Koontz* includes declines in environmental conditions, infrastructure quality and reliability, community character, and property values due to the higher legal obstacles communities now face in attempting to impose permit exactions designed to

163. See Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 175–76 (2015) (explaining how *Koontz* rendered land use negotiations less efficient).

164. *Koontz*, 133 S. Ct. at 2595.

165. See Been, *supra* note 110, at 545 (“[T]he nexus requirement has the cost of chilling local governments’ creative attempts to resolve the pressing problem of harmonizing demands for economic development with the goals of preserving the environment and improving the quality of life within the community.”).

166. *Id.* at 543 (“[*Nollan*] will prevent local governments from spending exactions for something other than a remedy for the harm at issue, even when that course would be most efficient.”).

167. Cf. Timothy M. Mulvaney, Presentation at the 17th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations at the University of California, Davis, School of Law: Secondary Effects of the Legislation-Adjudication Distinction in Exaction Takings Law (Sept. 19, 2014) (on file with author) (cataloguing potential adverse secondary effects of greater reliance on legislative exactions if local governments avoid using ad hoc adjudications to avoid the risk of liability under *Nollan* and *Dolan*).

compel developers to internalize the external costs of their development projects. Common sense suggests that the more opportunities developers have to sue or credibly threaten to sue over exactions, the less leverage local government will have to impose protective exactions. An informal survey I conducted of appellate court decisions involving challenges under *Dolan* indicated that the plaintiff landowners prevailed in about half the cases, suggesting that takings litigation under *Dolan* serves as a powerful “hammer to the head”¹⁶⁸ for local governments. Property owners prevail far more frequently under *Nollan/Dolan* than they do in regulatory takings cases or in traditional economic due process cases.¹⁶⁹ Property owners’ impressive litigation results using *Nollan* and *Dolan* have undoubtedly been noticed by lawyers representing local governments and have led to the abandonment of certain kinds of exactions that they would have imposed prior to *Nollan*, *Dolan*, and *Koontz*.

The one major empirical study of local governments’ use of exactions following *Nollan* and *Dolan* reported somewhat ambiguous results, but generally supports the supposition that these decisions have weakened community protections.¹⁷⁰ The authors, based on a survey of California planners, found that in some cases the threat of takings liability caused local officials to abandon proposed exactions.¹⁷¹ In other cases, they found that the more rigorous assessment of development impacts mandated by *Nollan* and *Dolan* led communities to conclude that they were underestimating the adverse effects of development and to increase the level of exactions.¹⁷² The authors concluded that communities would find it easier to justify exactions for certain types of impacts, such as increased traffic, and harder to justify exactions for other types of impacts, such as degradation of the environment, which “could mean a loss of open space, fewer bike paths and nature trails, and less wetlands and habitat protection.”¹⁷³ *Koontz*, by expanding the domain of *Nollan* and *Dolan*, will likely compound these losses.

168. See 152 CONG. REC. 20,709 (2006) (statement of Representative Jerrold Nadler) (referring to the National Association of Home Developers’ statement in favor of HR 4772, designed to increase opportunities for developers to sue local governments in property rights disputes).

169. See F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL’Y F., 121, 141 (2003) (presenting empirical data showing that government defendants prevail 87% of the time in *Penn Central* cases).

170. Anne E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court’s Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 106–08 (2001).

171. See *id.* at 134 (noting that cities “reported reducing their use of some types of fees or exactions”).

172. *Id.* at 122.

173. *Id.* at 156.

In the end, the amount of damage to communities and property owners caused by *Koontz* is difficult to predict. The topic is worthy of empirical investigation. In the meantime, the generally negative trend is plain to see, as is the Court's failure to consider these costs.

CONCLUSION

An important practical question going forward is how government attorneys should deal with *Koontz* in future legal challenges to land use regulations. In my view, government litigators should respectfully but forcefully contest the validity of both holdings in *Koontz* on the ground that they are inconsistent with prior Supreme Court precedent and established principles of takings jurisprudence. State and lower federal courts obviously lack the authority to ignore or contradict square holdings of the Supreme Court, and litigators need to acknowledge that reality in this context. But the "inferior courts" can certainly comment on the ways in which the rulings of the Supreme Court are problematic and tee up erroneous Supreme Court decisions for eventual reversal. However, the lower courts need help from litigators so they can play this creative role in correcting Supreme Court errors. A direct, principled assault on *Koontz* by government attorneys will help set the stage for eventually correcting *Koontz* and, in the meantime, reinforce efforts to narrow the scope of *Koontz*'s erroneous rulings.¹⁷⁴

Government attorneys should not suggest that either type of regulatory action at issue in *Koontz* is immune from constitutional challenge. As discussed above, permit denials and monetary exactions both should be subject to challenge under the Due Process Clause, or under the Takings Clause on a regulatory takings theory. It will be harder for litigants to prevail based on such claims than it would be if the *Nollan/Dolan* standards applied to such claims. But that would simply be the natural and proper outcome of respect for the separation of powers and federalism concerns implicated by these types of claims.

Even if they accept for the sake of argument that monetary fees are subject to challenge under *Nollan/Dolan*, government attorneys should

174. There is precedent for the Supreme Court reversing itself on a virtually identical question. For twenty-five years the Supreme Court maintained that the failure of a government measure to "substantially advance legitimate state interests" constituted a valid basis for a takings claim. See *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In 2005, in a unanimous ruling in *Lingle v. Chevron U.S.A. Inc.*, the Court repudiated this ostensible takings test. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). One of the greatest obstacles to getting the Supreme Court to reverse itself on this feature of takings law was persuading government attorneys to assert and preserve the issue from the outset of their cases in the lower courts. Hopefully, it will not take twenty-five years to get *Koontz* reversed.

argue that monetary fees are not subject to *Nollan/Dolan* when they are imposed through a general legislative mandate rather than in an ad hoc administrative proceeding. In *Koontz*, Justice Kagan in dissent raised the question of whether fees imposed through legislation should be subject to *Nollan/Dolan*,¹⁷⁵ but the majority was pointedly silent on the point, suggesting that the Justices in the majority were divided over the issue or at least unwilling to express themselves. Many federal and state courts have ruled that exactions imposed through general legislative mandates, especially those involving fees, are not subject to *Nollan* and *Dolan*.¹⁷⁶ Thus, there is a significant opening for the argument that *Nollan/Dolan* do not apply to takings claims based on monetary fees so long as the fees have been imposed through general legislation.

Moreover, as a matter of first principles, there are sound reasons for not extending the ruling in *Koontz*, which involved an ad hoc calculation of charges, to fees determined through a formula set by statute. The Supreme Court crafted the *Nollan* and *Dolan* standards out of concern that local governments might “coerce” property owners into giving up property interests for purposes unrelated to the mitigation of project impacts.¹⁷⁷ In general, legislatively determined fees raise less serious concerns about possible coercion than fees determined administratively. Legislation is generally adopted by more senior and more responsible government officials than those who oversee administrative proceedings, and the legislative process is generally more transparent and open to public scrutiny than individual administrative proceedings. In addition, because legislative measures, by their nature, affect citizens across the board, there is a lower risk that legislative measures will tend to single out one or a few individuals to bear burdens that, in fairness and justice, should be borne by the community as a whole. For all these reasons, the courts are justified in not extending the *Nollan/Dolan* standards to legislative measures.

175. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2608 (2013) (Kagan, J., dissenting) (“The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable.”).

176. *See, e.g., Rogers Mach., Inc. v. Washington County*, 45 P.3d 966, 982 (Or. Ct. App. 2002) (“The nature of the exaction involved here—a monetary assessment in the form of a traffic impact tax or fee—coupled with its imposition and calculation through a detailed legislative formula meaningfully distinguishes this condition from those in *Nollan/Dolan*.”); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (noting that the rules developed in *Nollan* and *Dolan* should only be applied in cases of “physical taking”).

177. *See Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (“[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” (quoting *J.E.D. Assoc., Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (1981))).

From the perspective of government defendants, there are several long-term strategic advantages to advancing the argument that a *Koontz* permit-denial claim must be understood to rest on the Due Process Clause. First, as discussed above, several members of the *Koontz* majority have taken the position that the Due Process Clause only applies to certain fundamental rights, a category which does not, according to their viewpoint, include interests in the use of land for development.¹⁷⁸ Thus, accurately reframing a *Koontz* claim as a due process claim will tend to undermine the current majority's support for *Koontz*. Some of the other Justices on the Court who dissented in *Koontz* take a broader view of substantive due process than certain members of the *Koontz* majority,¹⁷⁹ and therefore might theoretically help form a majority to support a due process-based theory to support the *Koontz* permit-denial holding. But these dissenters are unlikely to come to the support of their conservative brethren in order to help salvage *Koontz*.

Second, framing a *Koontz* permit-denial claim as a due process claim will, at a minimum, support the argument that such a claim must be evaluated under a deferential standard. For many decades, the Court has emphasized that, at least in the realm of economic regulation, judicial review of economic regulation under the Due Process Clause is exceedingly deferential,¹⁸⁰ far more so than the *Nollan/Dolan* inquiry. It is possible, if the *Koontz* majority could be persuaded to recognize that the permit-denial claim rests on the Due Process Clause, that the majority also could be persuaded to embrace a special, particularly demanding version of substantive due process analysis in this special context. But such a conclusion is so seriously at odds with the established reading of the Due Process Clause that it seems unlikely. Certainly the dissenters in *Koontz* would be unlikely to embrace a novel, stringent standard for the review of a narrow category of land use decisions under the Due Process Clause.

Even if government attorneys accept for the sake of argument that the *Nollan/Dolan* standards govern a *Koontz* permit-denial claim, they should seek to narrow the scope of *Koontz* by arguing that these standards do not apply when government regulators explicitly deny an application based on unacceptable project impacts, even if some general discussion about possible permit conditions may have preceded the decision to reject the application. Instead, any constitutional claim in this scenario should be evaluated as a substantive due process claim or as a regulatory takings

178. See *supra* notes 103–04 and accompanying text.

179. *Koontz*, 133 S. Ct. at 2609 (Kagan, J., dissenting).

180. Echeverria, *supra* note 2, at 12.

claim under either the *Penn Central* framework¹⁸¹ or the *Lucas per se* test.¹⁸²

The Supreme Court was persuaded in *Koontz* that the *Nollan/Dolan* standards should apply when, as on the facts of that case, the government explicitly denies an application because the owner refuses to accede to a demand for an exaction.¹⁸³ The Court apparently regarded the substance of the regulatory decision as the same regardless of whether the government imposed the exaction or denied an application for lack of an exaction. For the reasons discussed above, this reasoning is deeply problematic. But passing over that important objection, it is appropriate, at a minimum, to limit *Koontz* to its facts and reaffirm the logic of *Nollan* and *Dolan* to the extent possible consistent with *Koontz*. This can be accomplished by recognizing that the *Nollan/Dolan* standards do not apply in the situation where government rejects a development application because the project impacts are unacceptable, rather than because the applicant refused to accept proposed exactions. *Nollan* and *Dolan* make clear that government officials have the option, in lieu of imposing an exaction, of simply denying the application, and any takings claim based on such a denial should be analyzed as a potential regulatory taking.¹⁸⁴ Nothing in *Koontz* changes this aspect of *Nollan* and *Dolan*—except in the scenario where the government has made the mistake of expressly denying the application because the applicant has refused to accede to an exactions demand. To be sure, drawing the boundary between permit denials based on a failure to agree on a proposed exaction and permit denials based on unacceptable project impacts may be difficult in some circumstances. This challenge is simply the unavoidable consequence of *Koontz*'s peculiar holding.

Finally, it can plausibly be contended that a *Koontz* permit-denial claim should be analyzed using the same deferential standard that applies in an ordinary due process case. It must be acknowledged, of course, that the Court in *Koontz* explicitly ruled that the *Nollan/Dolan* framework governs a *Koontz* claim based on a permit denial.¹⁸⁵ However, the Court in *Koontz* did not expressly address the standard of review or the burden of proof that should apply in this application of the *Nollan* and *Dolan* standards. Thus, *Koontz* does not completely foreclose the lower courts from reaching their own sensible solution to the standard of review and burden of proof issues.

181. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978).

182. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

183. *Koontz*, 133 S. Ct. at 2595.

184. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 (1987).

185. *Koontz*, 133 S. Ct. at 2595.

* * *

The issue of the constitutional basis for a *Nollan/Dolan* permit-denial claim may soon be addressed, appropriately enough, in the *Koontz* case itself on remand from the U.S. Supreme Court. Following the Supreme Court's decision, it remanded the case to the Florida Supreme Court,¹⁸⁶ which in turn remanded the case to the Florida Court of Appeals.¹⁸⁷ On April 30, 2014, the court of appeals, in a 2-to-1 ruling, reaffirmed its 2009 decision affirming the trial court's judgment in favor of Koontz on a takings theory.¹⁸⁸ The majority observed that the Florida Supreme Court had overturned the court of appeals' 2009 decision, but the U.S. Supreme Court had, in turn, overturned the Florida Supreme Court decision.¹⁸⁹ Therefore, the majority reasoned, it was appropriate for the court to reinstate its earlier decision upholding the finding of a taking.¹⁹⁰ The court asserted that the U.S. Supreme Court "concluded that an exactions taking may occur even in the absence of a compelled dedication of land and even when the unconstitutional condition is refused and the permit is denied,"¹⁹¹ and that the court's 2009 decision "is entirely consistent with the decision of the United States Supreme Court."¹⁹²

In dissent, Judge Jacqueline Griffin argued that the U.S. Supreme Court decision, which she said was "ground-breaking in many respects," presented a more complex issue than the majority perceived.¹⁹³ The question presented on remand, in her view, was whether Koontz was entitled to recover damages under § 373.617 of the Florida statutes, which states that damages are available whenever a state agency action is an "unreasonable exercise of the state's police power constituting a taking without just compensation."¹⁹⁴ In Griffin's view, this provision only authorizes recovery of damages for constitutional takings, making it necessary for the court to determine on remand whether, in light of the U.S. Supreme Court's decision, Koontz's claim rested on the Takings Clause or had some other basis.¹⁹⁵ Her reading of the U.S. Supreme Court decision, in accord with that laid out above, was that the *Koontz* decision did not

186. *Id.* at 2603.

187. *St. Johns River Water Mgmt. Dist. v. Koontz*, No. 5D06-1116, 2014 WL 1703942, at *1 (Fla. Dist. Ct. App. Apr. 30, 2014).

188. *Id.* at *1.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at *6 (Griffin, J., dissenting).

194. *Id.* at *4 (quoting FLA. STAT. § 373.617 (2012)) (internal quotation marks omitted).

195. *Id.* at *6.

squarely identify the substantive basis for a *Koontz* permit-denial claim, but that the Court had made crystal clear that the Takings Clause did not apply.¹⁹⁶ Accordingly, since § 373.617 was the only basis for relief Koontz had asserted, Griffin concluded that Koontz was barred from recovering damages on remand.¹⁹⁷

The St. Johns River Water Management District has filed a petition for review in the Florida Supreme Court, and the petition was still pending when this Article went to press.¹⁹⁸ If the Florida Supreme Court grants review, Judge Griffin's thoughtful and accurate reading of the U.S. Supreme Court decision should be persuasive to the Florida Supreme Court. Time will tell.

196. *Id.*

197. *Id.*

198. See Petitioner's Brief on Jurisdiction at 10, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. SC14-1092 (Fla. June 9, 2014), 2014 WL 4276473 (asking the Florida Supreme Court to accept jurisdiction); Respondent's Brief on Jurisdiction at 10, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. SC14-1092 (Fla. July 7, 2014), 2014 WL 3699547 (asking the Florida Supreme Court to deny jurisdiction).

