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**SUBSTANTIVE DUE PROCESS BY ANOTHER NAME:  
KOONTZ, EXACTIONS, AND THE REGULATORY TAKINGS  
DOCTRINE**

*Mark Fenster\**

In *Koontz v. St. Johns River Water Management District*,<sup>1</sup> a 5-4 majority of the United States Supreme Court reversed a state court decision that had limited the application of *Nollan v. California Coastal Commission*<sup>2</sup> and *Dolan v. City of Tigard*.<sup>3</sup> *Nollan* and *Dolan* concern the imposition of regulatory conditions on proposed development, also called exactions, which commonly occurs in land use regulation. In *Koontz*, a property owner challenged a regulatory agency's denial of his permit application following failed negotiations over exactions.<sup>4</sup> The Florida Supreme Court had concluded that *Nollan* and *Dolan* did not extend to conditions that the agency had not officially approved and applied to the owner's property, nor did they extend to conditions that imposed fees on property owners.<sup>5</sup> The United States Supreme Court reversed both conclusions, holding that *Nollan* and *Dolan*'s heightened scrutiny, which reviews exactions for their "rough proportionality"<sup>6</sup> and "nexus"<sup>7</sup> to the proposed development, can apply in both contexts.<sup>8</sup>

Unsurprisingly, in a public law doctrine as contested as regulatory takings, the initial responses to the decision, on blogs and in one early article, are fairly predictable—those sympathetic with government defendants or critical of the Court's occasional efforts to ex-

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<sup>1</sup> 133 S. Ct. 2586 (2013).

<sup>2</sup> 483 U.S. 825 (1987).

<sup>3</sup> 512 U.S. 374 (1994).

<sup>4</sup> *Koontz*, 133 S. Ct. at 2592-93.

<sup>5</sup> *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013).

<sup>6</sup> *Dolan*, 512 U.S. at 391.

<sup>7</sup> *Nollan*, 483 U.S. at 837.

<sup>8</sup> *Koontz*, 133 S. Ct. at 2591.

pand federal constitutional property rights disdain it,<sup>9</sup> while those committed to robust constitutional property rights have embraced it.<sup>10</sup> I suggest in this brief essay that we might best understand *Koontz* not as signaling a new direction in regulatory takings law, but as solidifying the Court's exactions jurisprudence as one of its curious carve-outs from the *Penn Central* test<sup>11</sup>—the deferential test that the Court firmly ensconced as the default approach to regulatory takings claims in the most recent chapter of the doctrine's last half-century.<sup>12</sup> *Koontz*, I argue, completes the move that the Court's 2005 decision in *Lingle v. Chevron U.S.A. Inc.*<sup>13</sup> began, rendering the exactions decisions in *Nollan*, *Dolan*, and now *Koontz*, as conceptually and practically outside of the federal constitutional takings realm entirely, and existing in the astral realm, known as unconstitutional conditions. There, the exactions tests for nexus and proportionality can float free from the textual and remedial constraints that the Fifth Amendment, at least nominally, imposes on the regulatory takings doctrine. From that distant point, *Nollan* and *Dolan* should have little effect on the core regulatory takings tests—but they will, now, after *Koontz*, cause some considerable challenges for state and lower federal courts, especially when they must fashion a remedy besides the just compensation that the Fifth Amendment requires for a taking. In a brief final conclusion, I suggest that we cannot know the effects that *Koontz* will have on land use regulation, although we can expect that they will vary across jurisdictions and, like *Nollan* and *Dolan*, will, in some instances lead to more regulation and in others, lead to less.

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<sup>9</sup> See, e.g., John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22.1 N.Y.U. ENVTL. L.J. (forthcoming 2014); Rick Hills, *Koontz's Unintelligible Takings Rule: Can Remedial Equivocation save the Court from a Doctrinal Quagmire?*, PRAWFSBLAWG (June 25, 2013, 3:41 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/koontzs-unintelligible-takings-rule-can-remedial-equivocation-make-up-for-an-incoherent-substantive-.html>.

<sup>10</sup> See, e.g., Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, CATO SUP. CT. REV. 215, 228 (2012-2013); Richard Epstein, *Koontz v. St. Johns River Water Management District: Of Issues Resolved—and Shoved under the Table*, POINTOFLAW.COM (June 26, 2013, 1:07 PM), <http://www.pointoflaw.com/archives/2013/06/koontz-v-st-johns-river-water-management-district-of-issues-resolved--and-shoved-under-the-table.php>.

<sup>11</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (establishing ad hoc balancing test for regulatory takings doctrine).

<sup>12</sup> See generally Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729 (2007) [hereinafter Fenster, *Regulating Land Use*] (discussing the Takings Doctrine).

<sup>13</sup> 544 U.S. 528 (2005).

## I. *KOONTZ'S ANTI-COERCION PRINCIPLE*

To boil the facts in *Koontz* down to their essence, the petitioner (“Koontz”) approached the government agency (St. Johns Water Management District, or “District”) that regulates water resources in the region where Koontz’s property was located to obtain a permit that was necessary for him to develop his property.<sup>14</sup> The District, with permitting authority delegated to it by the state, discussed with Koontz various potential mitigation schemes for the expected effects of his development.<sup>15</sup> Koontz did not agree with the District’s proposals and made proposals of his own, which the District rejected.<sup>16</sup> Lacking any acceptable mitigation, Koontz’s permit application was denied by the District.<sup>17</sup> He filed suit alleging, among other things, that the denial effected a taking of his property for which he was owed compensation under the Fifth Amendment’s Takings Clause.<sup>18</sup> A majority of the Florida Supreme Court, unanimously reversing lower state courts, held that Koontz’s claim could not benefit from the heightened scrutiny afforded by *Nollan* and *Dolan*, with the majority concluding that *Nollan* and *Dolan* do not apply both because no mitigation measures were imposed and because the mitigation measures were fees rather than land.<sup>19</sup>

The U.S. Supreme Court reversed.<sup>20</sup> The five-justice majority’s main concern was with what it characterized as the coercive nature of the land use regulatory process to which the property owner had been subjected.<sup>21</sup> The decision’s opening paragraph made plain its distaste for the kind of discretionary authority that the District wielded, characterizing *Nollan* and *Dolan* in its first sentence as providing “important protection against the misuse of the power of land-use regulation” and then describing, in its brief summary of the case, the District’s condition as a requirement to “surrender” a property interest and the property owner’s response as a “refus[al] to yield.”<sup>22</sup> Property owners, the Court explained, are always potential-

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<sup>14</sup> *Koontz*, 133 S. Ct. at 2592.

<sup>15</sup> *Id.* at 2593.

<sup>16</sup> *Id.* at 2592-93.

<sup>17</sup> *Id.* at 2593.

<sup>18</sup> *Id.* at 2591, 2593.

<sup>19</sup> *Koontz*, 133 S. Ct. at 2593-94.

<sup>20</sup> *Id.* at 2594.

<sup>21</sup> *Id.* at 2594-95.

<sup>22</sup> *Id.* at 2591.

ly at risk of coercion in the land use permitting process:

[T]he government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. . . . Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.<sup>23</sup>

More than even its strong statement in *Lingle*, situating *Nollan* and *Dolan* as takings decisions with a foot also in the unconstitutional takings doctrine,<sup>24</sup> the Court in *Koontz* appeared, at first glance, to situate the constitutional review of land use conditions only partially in the Takings Clause.<sup>25</sup> The unconstitutional conditions doctrine, the Court noted, vindicates disparate individual rights, including the right to free speech under the First Amendment, as well as the constitutional right to travel.<sup>26</sup> The doctrine's application to the Takings Clause is "special," however, because the conditions may be permissible without liability for a taking if they mitigate the costs created by the approved land uses to which the conditions are attached.<sup>27</sup> Though its application may be "special," the doctrine must operate in this context because of the government's coercive power to impose excessive demands that bear little relationship, in quantity and quality, to the proposed land use.<sup>28</sup> Hence, *Nollan* and *Dolan* established the "rough proportionality" (quantitative) and "nexus" (qualitative) tests to protect against the state's unequal bargaining power to enforce constitutional limits on conditions that are insufficiently related and are, therefore, likely to be coercive.<sup>29</sup>

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<sup>23</sup> *Id.* at 2594-95.

<sup>24</sup> See *Lingle*, 544 U.S. at 547 (delineating the explicit linkage between the unconstitutional conditions doctrine and the exactions decision begun in *Dolan*); see also *Dolan*, 512 U.S. at 385 (discussing this relationship).

<sup>25</sup> *Koontz*, 133 S. Ct. at 2594-95.

<sup>26</sup> *Id.* at 2594 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Memorial Hospital v. Maricopa Cnty.*, 415 U.S. 250 (1974)). See *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (stating that the right to travel has no clear textual source in the Constitution).

<sup>27</sup> *Koontz*, 133 S. Ct. at 2594-95.

<sup>28</sup> *Id.* at 2594.

<sup>29</sup> *Id.* at 2594-95.

Having explained the doctrine's singular focus on checking government coercion, the Court held that there was no material distinction between the factual differences at play in the regulatory conditions in *Koontz*—threatened conditions rather than imposed conditions, and money exactions, rather than real property dedications—and those in *Nollan* and *Dolan*, which addressed regulatory approvals with attached conditions that required dedications of real property interests.<sup>30</sup> The Court could deploy the unconstitutional conditions doctrine's trans-substantive status as “an overarching principle” in order to “vindicate[] the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”<sup>31</sup> Coercion is coercion, no matter if the state has yet to impose any formal conditions as part of its issuance of an official approval, and no matter if the as-yet imposed condition is an interest in real property or the money from a fee tied to an interest in real property.<sup>32</sup> Taking a legal realist perspective on what it viewed as meaningless formal distinctions, the Court pierced the veil of this class of government actions to find the coercive character lurking within.<sup>33</sup>

The Court faced three significant issues in applying *Nollan* and *Dolan* to the facts in *Koontz*, each of which arises from the challenge of applying the Takings Clause to land use exactions. The unconstitutional conditions doctrine's freestanding status allowed the Court to overcome each issue, at least to its satisfaction if not to the dissent's.<sup>34</sup> The first issue was the District's credible argument that monetary fees are somehow different from real property exactions and are not, therefore, “property” cognizable under the Takings Clause.<sup>35</sup> In response, the *Koontz* majority answered that money exactions can be property because the conditional fees that the District allegedly sought to impose were tied to *Koontz*'s application to develop his property.<sup>36</sup> Under this logic, fees fall squarely within the otherwise confusing precedent regarding the taking of money.<sup>37</sup> Equally significant, however, the Court noted that the unconstitution-

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<sup>30</sup> *Id.* at 2590, 2595-96.

<sup>31</sup> *Id.* at 2594.

<sup>32</sup> *Koontz*, 133 S. Ct. at 2595-96.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2594.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2599.

<sup>37</sup> *Koontz*, 133 S. Ct. at 2600.

al conditions doctrine could not allow a government entity to enjoy a lower level of scrutiny for its exactions simply by shifting its demands from real property to money.<sup>38</sup> To allow the government to do so would simply enable it to abuse its regulatory authority—precisely the wrongdoing that the doctrine is intended to prevent.<sup>39</sup>

The second and third issues were related. The second was the absence of an actual taking in *Koontz*, since, as all nine justices agreed, the District took no constitutionally cognizable property.<sup>40</sup> The unconstitutional conditions doctrine allowed the majority to hold that *Koontz* need not have shown the actual loss of property to state a *Nollan* and *Dolan* claim:

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.<sup>41</sup>

The demand for property, combined with the denial of a permit rather than an actual taking, constituted an injury because the District allegedly based its decision on *Koontz*'s refusal to accede to an illegally coercive demand.<sup>42</sup>

Third, the Court faced the argument that a regulatory act in which no property is taken cannot serve as the basis for a takings claim because the Takings Clause's sole and required remedy for a violation, just compensation, could not apply.<sup>43</sup> Reframing the issue, the Court stated that a remedy for a violation of the *unconstitutional conditions doctrine*, rather than for a violation of the Takings Clause, would be available under state law, and remanded the case to the

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<sup>38</sup> *Id.* at 2599.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2597 (characterizing *Koontz* as a case of “an excessive demand but no taking”); *id.* at 2612 (“In what legal universe could a law authorizing damages only for a ‘taking’ also provide damages when (as all agree) no taking has occurred?”) (Kagan, J., dissenting).

<sup>41</sup> *Koontz*, 133 S. Ct. at 2596.

<sup>42</sup> *Id.* at 2593, 2596.

<sup>43</sup> *Id.* at 2611-12 (Kagan, J., dissenting).

Florida Supreme Court to consider the appropriate remedy.<sup>44</sup> The Takings Clause thus served neither as the legal basis for Koontz's claim, nor did it provide the remedy.

In responding to all three counter-arguments, the Court explained that the unconstitutional conditions doctrine and its broad anti-coercion principle could at once resolve and even transcend any formalist concerns about takings doctrine and the Fifth Amendment's text.<sup>45</sup> Justice Alito's decision in *Koontz* thus made two basic moves. First, it identified and described a class of regulatory acts that are symptomatic of programmatic unfairness in the land use regulatory process that, as such, hold the potential for extortionate government overreach.<sup>46</sup> It then deployed the unconstitutional conditions doctrine which is tied loosely to the Takings Clause and embodied in the precedent of *Nollan* and *Dolan*. The heightened scrutiny of those decisions established the prophylactic protection necessary to prevent such programmatic unfairness.<sup>47</sup>

Justice Kagan's four-justice opinion dissented on both issues, arguing that Koontz failed to state a cognizable claim under *Nollan* and *Dolan* and that the intermediate scrutiny established in those decisions did not apply to money exactions.<sup>48</sup> Some commentators have incorrectly asserted that her dissent agreed entirely with the majority's decision that *Nollan* and *Dolan* apply in the absence of formal conditions.<sup>49</sup> Justice Kagan agreed that heightened scrutiny *could* apply to a singular demand the government makes, whether the permit is approved (in a condition subsequent) or not (and therefore constitutes a condition precedent).<sup>50</sup> But she quite clearly stated that *Nollan* and *Dolan* can only apply when a court finds that "the permit denial occurred because the government made a demand of the landowner, which he rebuffed," and that the demand be "unequivocal."<sup>51</sup> The record did not support Koontz's claim in this regard, the dissent concluded<sup>52</sup>—a problem that property owners will frequently face in *Koontz*-like cases, because in most such cases they will only have a

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<sup>44</sup> *Id.* at 2597-98.

<sup>45</sup> *Id.* at 2594.

<sup>46</sup> *Koontz*, 133 S. Ct. at 2594-95.

<sup>47</sup> *Id.* at 2595.

<sup>48</sup> *Id.* at 2603-04 (Kagan, J., dissenting).

<sup>49</sup> See Somin, *supra* note 10, at 227-28; Epstein, *supra* note 10, at 2.

<sup>50</sup> *Koontz*, 133 S. Ct. at 2603-04 (Kagan, J., dissenting).

<sup>51</sup> *Id.* at 2610.

<sup>52</sup> *Id.* at 2611.



claim based on informal discussions and negotiations rather than a clear, final, formal statement. Requiring a clear, formal demand is necessary for a *Nollan* and *Dolan* claim, Justice Kagan warned, or else the threat of heightened scrutiny will subsume all discussions between owners and regulatory agencies.<sup>53</sup> Moreover, a court will have no basis for deciding whether and what property had been taken—a problem that *Koontz* itself illustrates, as the District had proposed numerous possible conditions, no one of which clearly emerged in the record as the single condition rejected by the property owner which led the government to deny his permit application.<sup>54</sup> Although the dissent agreed with the majority in theory, then, the strict limits Justice Kagan would place on that theory's application reveal the four dissenting justices' deep misgivings about inviting courts into the weeds of the regulatory process.<sup>55</sup>

The dissent's concerns also extended to the money exactions issue. Under existing precedent, Justice Kagan argued, fees that impose a general liability were not property whose taking the Fifth Amendment prohibits without compensation.<sup>56</sup> Placing limits on the unconstitutional conditions doctrine when tied to the Takings Clause, the dissent stated:

[T]he heightened standard of *Nollan* and *Dolan* is not a freestanding protection for land-use permit applicants; rather, it is “a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken”—in exchange for a land-use permit. As such, *Nollan* and *Dolan* apply only if the demand at issue would have violated the Constitution independent of that proposed exchange. Or put otherwise, those cases apply only if the demand would have constituted a taking when executed *out-*

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<sup>53</sup> *Id.* at 2610.

<sup>54</sup> *Id.* at 2609-10. The *Koontz* dissent's concern is consistent with an issue that Justice Scalia had raised a decade earlier in a dissent from a denial of certiorari in a similar case, when he questioned whether a taking actually occurs in the absence of an identifiable, formal condition. See *Lambert v. City & Cnty. of S.F.*, 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting).

<sup>55</sup> *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting).

<sup>56</sup> *Id.* at 2605-07.

side the permitting process.<sup>57</sup>

If money is not property that is cognizable under the Takings Clause, the dissent reasoned, then *Nollan* and *Dolan* cannot apply.<sup>58</sup>

The *Koontz* dissent thus also made two moves. First, it refused both to characterize the case as one in which the government imposed an extortionate demand and to view the land use regulatory process as one marked by widespread coercion.<sup>59</sup> Second, it would have limited the applicability of the unconstitutional conditions doctrine under the Takings Clause to instances in which the state had required a definite condition that resulted in the taking of an identifiable real property interest.<sup>60</sup> Put simply, whereas the majority viewed the unconstitutional conditions doctrine as a trans-substantive means to fight the coercive negotiations that are endemic to the area of land use regulation, the dissent viewed the doctrine as subject to textual and precedential constraints under the Takings Clause and would have drawn a much smaller category of formal negotiations that are subject to *Nollan* and *Dolan*. I consider the meaning and significance of the majority and dissent's competing visions of exactions and the most appropriate doctrinal approaches to them in the next part.

## II. *KOONTZ*, REGULATORY TAKINGS, AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE: OR, SUBSTANTIVE DUE PROCESS BY ANOTHER NAME

Capturing a fifth justice, the majority's understanding of the case and of the class of regulatory actions prevailed, as did its apparent vision of the relationship between *Nollan* and *Dolan* (and now *Koontz*) and the unconstitutional conditions doctrine. For commentators sympathetic to the *Koontz* decision it marks a welcome return of vigorous property rights enforcement in a contested takings case, and especially applauded is the Court's explicit acknowledgement of the need to check government efforts at imposing extortionate demands on vulnerable property owners.<sup>61</sup> The Court's factual narrative and

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<sup>57</sup> *Id.* at 2606-07 (quoting *Lingle*, 544 U.S. at 547).

<sup>58</sup> *Id.* at 2606.

<sup>59</sup> *Id.* at 2608, 2611.

<sup>60</sup> *Koontz*, 133 S. Ct. at 2609 (Kagan, J., dissenting).

<sup>61</sup> See Somin, *supra* note 10, at 241. See also Epstein, *supra* note 10 (characterizing *Koontz* as a "victory of sorts" for property owners because it provides the "second best" protection to property owners who are "held up" by the government).

justification for its decision sound in the classic rights-friendly version of the regulatory takings doctrine—one that views the doctrine as an essential constitutional means to provide strong protection for individuals from the state’s use of its police power to take their property in actions that go “too far” (in Justice Holmes’s famous, cryptic phrase),<sup>62</sup> and that “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole” (as the *Armstrong* principle declares).<sup>63</sup>

But this explanation of the Takings Clause is just one among numerous competing ones that the Court and commentators have developed, and the Court has not been consistent in its reliance on them.<sup>64</sup> The dissent’s concern that *Koontz* “threatens the heartland of local land-use regulation and service delivery” and the multitude of varied state and local approaches to land use regulation<sup>65</sup> represents what I have argued is the most important and oft-cited justification for denying regulatory takings claims, and one that had found significant purchase in takings decisions over the past decade—the relative institutional competence of legislative, regulatory, and judicial entities, especially at the state and local level, to decide land use issues.<sup>66</sup>

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<sup>62</sup> Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

<sup>63</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See generally Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CON. L. 667, 694-706 (2007) [hereinafter Fenster, *Legal Process*] (describing the fairness rationale as the most significant and oft-cited justification for constitutional property rights protection).

<sup>64</sup> Another such rationale is the utilitarian concern with the consequences of excessive or inadequate regulation. Academic property rights advocates have argued that *Koontz* will not only protect property owners but that it will promote more efficient regulation by forcing government entities to internalize the costs they would otherwise shift to property owners through compensation, see Somin, *supra* note 10, at 234, and by moving the law incrementally towards having the benefits that the government seeks through a condition match more precisely the harms that an approved land use creates. See Epstein, *supra* note 10. Such consequential conceptions of the Takings Clause as a mechanism for regulatory efficiency are another set of justifications that the Court and commentators have frequently relied upon in explaining the Takings Clause. See Fenster, *Legal Process*, *supra* note 63, at 706-10. But as in most takings decisions, see *id.* at 710-12, the majority in *Koontz* did not consider such concerns; instead, its only discussion of cost internalization occurred when it explained that *Nollan* and *Dolan* allow the government to impose conditions without compensating property owners in order to keep property owners from externalizing harms on others. *Koontz*, 133 S. Ct. at 2595 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

<sup>65</sup> *Koontz*, 133 S. Ct. at 2608-10 (Kagan, J., dissenting).

<sup>66</sup> See Fenster, *Legal Process*, *supra* note 63, at 733-39 (articulating this critique on *Koontz*). See also Rick Hills, *Bill Fischel on Koontz: Why Federalism should limit enforcement of Takings Doctrine*, PRAWFSBLAWG, (Aug. 16, 2013, 12:50 PM) <http://prawfsblawg.blogs.com/prawfsblawg/2013/08/bill-fischel-on-koontz-why-federalism->

*Lingle* doubted the wisdom of allowing open-ended federal constitutional standards to decide the takings issue in the absence of the regulations that are “functionally equivalent” to confiscation.<sup>67</sup> By drawing tight limits around the regulatory takings doctrines and especially around those categories of regulatory effects that receive more than deferential scrutiny, *Lingle* appeared to place institutional competence and deference to political and state and local institutions over the federal constitutional protection of property owners from all but the worst regulatory unfairness.<sup>68</sup>

Read superficially with an emphasis on its result, *Koontz* would appear to have signaled the reemergence in contested regulatory takings decisions of fairness, rather than institutional competence, as the Takings Clause’s preeminent function and justification—at least by the margin of one justice. But did it? In a blog post that appeared soon after *Koontz* was issued, Richard Epstein, the preeminent academic property rights advocate and longtime *bête noir* of those who seek to narrow the reach of the Takings Clause, lamented that the decision provided little more than a second best solution to the state’s systematic overreach in its regulatory actions beyond the limits of common law nuisance.<sup>69</sup> Epstein had hoped for a “robust critique of all exactions”; instead, the Court issued a narrow decision with some beneficial components (from his perspective) that failed to provide a coherent or even adequate remedy.<sup>70</sup> Whereas Ilya Somin, a libertarian of a younger generation writing in the *Cato Institute* review of the Supreme Court term, considered the decision a step in the

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should-limit-enforcement-of-takings-doctrine.html (quoting an email from William Fischel); Hills, *supra* note 9 (critiquing the decision in federalist terms, as an invasion “of subnational governments’ land-use prerogatives” and a violation of important federalist principles). As I have argued, federalism constitutes a justification for regulatory takings decisions, particularly when viewed as a check on the Court’s tendency to expand federal constitutional property rights to supersede state property law, *see* Fenster, *Legal Process*, *supra* note 63, at 719-22, but it is rarely a core justification upon which the Court relies, *see id.* at 722-26; Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 *UCLA L. REV.* 1681, 1693-1701 (2007), perhaps in part because those justices who more prominently claim to uphold federalist values prioritize property rights over the rights of subnational governments to regulate under the police power. *See, e.g.,* *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 560 U.S. 702, 726-27 (2010) (Scalia, J., plurality opinion) (showing no hesitation in asserting that federal courts can and may impose takings liability for a state court’s interpretation of its own property law); *but see* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *YALE L.J.* 203 (2004).

<sup>67</sup> *Lingle*, 544 U.S. at 539.

<sup>68</sup> *Id.* at 539-40.

<sup>69</sup> *See* Epstein, *supra* note 10.

<sup>70</sup> *Id.*

right direction,<sup>71</sup> Epstein yearned for “coherence”—which is to say a thoroughgoing, muscular approach to property rights protection that would sweep away the existing approach to the Takings Clause and make strict judicial scrutiny the rule rather than the exception in challenges to land use and environmental regulation.<sup>72</sup>

Epstein is right to be disappointed, and one would not need to look any further than the Court’s incoherent and faint-hearted remedy to see the decision’s incrementalism. The Fifth Amendment prescribes a remedy for a taking—just compensation—that the Court could find no way to impose on the District because, it conceded, no property had in fact been taken from *Koontz* for which compensation could be awarded.<sup>73</sup> Dodging this textual challenge and seeking to establish a remedy outside the constitutional text, the Court held that under the unconstitutional conditions doctrine, a property owner like *Koontz* can seek a remedy in state law rather than under the federal constitution.<sup>74</sup> Remanding the case back to the lower courts, the Court suggested that because *Koontz* brought his takings claim under state law, he could rely on the state courts to find a remedy under Florida law, such as a statute allowing the award of damages for a state agency action that is “an unreasonable exercise of the state’s police power constituting a taking without just compensation.”<sup>75</sup> But the Court provided neither an answer as to whether this or any other state law could provide a remedy, nor any guidance for future litigants and lower courts as to how to apply such remedies in particular cases. Instead, it simply remanded the case for the lower courts to decide on a remedy. This was, as Epstein noted, neither robust nor coherent.<sup>76</sup>

The Court’s nebulous remedy not only blunts *Koontz*’s result, but also unveils the emergence of a somewhat new vision for the constitutional rules regarding exactions. The relationship between the Court’s exactions decisions and the unconstitutional conditions doctrine had begun as an implicit logic in *Nollan*<sup>77</sup> and in *Dolan*, with the

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<sup>71</sup> See Somin, *supra* note 10, at 243.

<sup>72</sup> See Epstein, *supra* note 10.

<sup>73</sup> *Koontz*, 133 S. Ct. at 2597 (“While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings.”).

<sup>74</sup> *Id.* at 2595.

<sup>75</sup> *Id.* at 2597-98 (quoting FLA. STAT. ANN. § 373.617).

<sup>76</sup> See Epstein, *supra* note 10.

<sup>77</sup> *Nollan* did not mention the unconstitutional conditions doctrine explicitly, but several

latter, unlike the former, at least providing a brief mention of the doctrine and a string citation to its canonical decisions.<sup>78</sup> It was not until *Lingle*, when the Court was forced to extricate *Nollan* and *Dolan* from the shadow of substantive due process and the “substantially advance legitimate state interests” language from *Agins v. City of Tiburon*,<sup>79</sup> that the Court revealed that its exactions decisions were in fact, a “special application” of the unconstitutional doctrine.<sup>80</sup> Because the property owners in *Nollan* and *Dolan* suffered the loss of an interest in an identifiable piece of property, the Court could appropriately invoke just compensation as a remedy.<sup>81</sup>

Tellingly, when discussing its remand to the Florida Supreme Court to consider the appropriate state law remedy, the *Koontz* majority stated: “Whether that provision covers *an unconstitutional conditions claim like the one at issue here* is a question of state law that the Florida Supreme Court did not address and on which we will not opine.”<sup>82</sup> Justice Alito’s characterization of *Koontz*’s claim revealed the logic of the majority’s decision. Because *Koontz* concerned the application of *Nollan* and *Dolan*, one must similarly conclude that those decisions are now not takings decisions either. The entire field of exactions now, apparently, falls under the unconstitutional conditions doctrine rather than the Takings Clause.

State and lower federal courts could read this decision as thus widening the scope of judicial remedies to include invalidation or other measures not available under the Fifth Amendment.<sup>83</sup> Recall the statute to which Justice Alito would refer the Florida Supreme Court—one that offers a remedy to “an unreasonable exercise of the state’s police power constituting a taking without just compensa-

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commentators viewed it as an implicit authority on which the decision relied. See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 473-75 (1991); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1463-64 (1989).

<sup>78</sup> *Dolan*, 512 U.S. at 385.

<sup>79</sup> 447 U.S. 255, 260 (1980).

<sup>80</sup> *Lingle*, 544 U.S. at 547.

<sup>81</sup> See, e.g., *Dolan*, 512 U.S. at 385-86, 389 (noting compensation as the appropriate remedy); *Nollan*, 483 U.S. at 842 (“[I]f [California] wants an easement across the Nollans’ property, it must pay for it.”).

<sup>82</sup> *Koontz*, 133 S. Ct. at 2597-98 (emphasis added).

<sup>83</sup> See *id.* at 2597 (“Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.”).

tion.”<sup>84</sup> That sounds, quite clearly, like the kind of substantive due process theory that the Court had banished from the Takings Clause in *Lingle*. As a matter of remedy, *Koontz* might work a subtle but important shift into the judicial review of exactions. Specifically, it creates an issue going forward regarding the remedy available for a *Nollan* and *Dolan* claim—can a claimant who challenges an approval with conditions, and not simply the threat of conditions, seek something other than or in addition to just compensation? That is, can *Koontz*’s notable characterization of itself as an unconstitutional conditions case shift the entire constitutional exactions doctrine wholly out of the traditional regulatory takings doctrine? The decision certainly suggests as much.

In terms of the larger picture of regulatory takings law, however, *Koontz* is likely to have little significance. Despite the hope among property rights advocates that *Dolan*’s proportionality logic and heightened scrutiny would overtake *Penn Central*’s deferential multi-factor test,<sup>85</sup> the exactions decisions have since operated as narrow carve-outs like the *Lucas* wipe-out rule<sup>86</sup> and the *Loretto* permanent occupation rule.<sup>87</sup> *Koontz* only further solidifies a status that had long been recognized in the complex doctrinal mess that is the regulatory takings doctrine. Only practitioners and judges—and, perhaps, seasoned land use professionals with the patience necessary to overcome their struggle with the doctrine—need understand the subtle distinctions the Court’s categories make. The regulatory takings doctrine’s technical complexity continues to grow in order to meet the challenge of providing occasional federal constitutional protection against the vast multitude of land use regulators and regulations. It is a convoluted game that few can play but that affects, at least indirectly, everyone. The state of this game is not new, and *Koontz* has only added to it despite the decision’s facial appearance as a simple and fair intervention against coercive regulation on behalf of downtrodden landowners.

Viewing this new wrinkle—that *Nollan* and *Dolan* are (now) really unconstitutional conditions cases—explains a few mysteries, and further illustrates how *Koontz*’s influence will be limited. Justice

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<sup>84</sup> *Id.* at 2597-98 (quoting FLA. STAT. § 373.617 (2012)).

<sup>85</sup> See Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1011-12. (1997).

<sup>86</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>87</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Kennedy has come to occupy Justice O'Connor's former role as the swing vote in contested takings decisions. He has also expressed repeatedly in separate opinions, most recently in the 2010 decision in *Stop the Beach*,<sup>88</sup> that he has a particular interest in substituting the substantive due process doctrine for the regulatory takings doctrine in cases when the latter is not easily applied.<sup>89</sup> *Koontz* fits that description—property owners facing exploitative government entities may not lose their *property* every time they are coerced by excessive conditions, but they do face coercion. The Fifth Amendment's text does not easily address this situation, as the Court noted in *Lingle*,<sup>90</sup> demonstrating the need for a trans-substantive doctrine unburdened by the constitutional text that can provide relief against “arbitrary or irrational” regulation—like substantive due process.<sup>91</sup> But, the Court's conservative members either reject substantive due process in this context,<sup>92</sup> or have drawn extremely tight limits around its application.<sup>93</sup> Perhaps for Justice Kennedy, the unconstitutional conditions doctrine achieves what he believes substantive due process would achieve more broadly, while the doctrine offers a far more satisfying solution than substantive due process to the problem of protecting property rights for the other justices.

Viewed this way, *Koontz* can be little more than a footnote. Professor Epstein is right—the decision does not augur an imminent rollback of the regulatory state via a broad constitutional requirement for compensation.<sup>94</sup>

### III. CONCLUSION: ANTICIPATING *KOONTZ*'S EFFECTS WITHOUT PREDICTING THEM

Will *Koontz* have influence at all in the quotidian world of land use and environmental regulation? Making predictions about the effects of a new, complex Supreme Court decision on the com-

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<sup>88</sup> *Stop the Beach Renourishment*, 560 U.S. at 736-37 (Kennedy, J., concurring).

<sup>89</sup> *Id.*; *Lingle*, 544 U.S. at 548-49 (Kennedy, J., concurring).

<sup>90</sup> *Lingle*, 544 U.S. at 544-45.

<sup>91</sup> *Id.* at 548 (Kennedy, J., concurring).

<sup>92</sup> See *Stop the Beach Renourishment, Inc.*, 560 U.S. at 721-22 (Scalia, J., plurality opinion) (rejecting the use of substantive due process doctrine and arguing against its expansion).

<sup>93</sup> See *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 401-02 (3d Cir. 2003) (holding that substantive due process test in challenges to land use regulation is a “shocks-the-conscience” standard).

<sup>94</sup> Epstein, *supra* note 10.



plex and widely varied practices of state, regional, and local land use regulators is a fool's errand. *Nollan* and *Dolan*'s federal constitutionalization of exactions only presaged the practice's wide expansion over the past few decades—in other words, the decisions correlated with an expansion of the regulatory practice about which the Court expressed skepticism, and the expanded use of exactions no doubt also led to a greater absolute number of abusive conditions that landowners did not challenge. The Court's prophylactic rules thus perversely might have made things worse for some landowners.<sup>95</sup> As a study published in 2000 of California planners found, land use regulators have had a mixed reaction to the proportionality and nexus requirements that *Nollan* and *Dolan* announced: planners respected the tests for expressing good planning principles, and thus presumably incorporated them into their practice, which itself expanded with the real estate boom of the late twentieth and early twenty-first centuries; and planners feared the climate of enhanced judicial review that the Supreme Court seemed to have ushered in, and are cautious and more bureaucratic in their use of exactions.<sup>96</sup> *Nollan* and *Dolan* thus had no single effect. Regulatory agencies varied in the ways in which they incorporated or ignored them in practice.<sup>97</sup>

This suggests that except around the margins, *Koontz* is not likely to cause any radical change to regulatory practice. The hallmarks of *Nollan* and *Dolan*—wide variability and a turn towards regulatory formulas and bureaucratic caution at the agency level,<sup>98</sup> and increased state and local legislation to limit regulatory abuse<sup>99</sup>—will continue. Indeed, in 2004, Florida by statute and regulation established formal regulatory formulas for calculating, through quantitative and qualitative scoring, wetland impact and mitigation, precisely the issue that the District sought to address informally in its dealings with *Koontz*.<sup>100</sup> Other agencies will quite rationally stop or at least

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<sup>95</sup> Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 661-65 (2004) [hereinafter Fenster, *Takings Formalism*].

<sup>96</sup> DANIEL POLLAK, CAL. RESEARCH BUREAU, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA? 33-34, 83 (2000).

<sup>97</sup> Fenster, *Takings Formalism*, *supra* note 95, at 652-68.

<sup>98</sup> *Id.* at 642-48.

<sup>99</sup> Fenster, *Regulating Land Use*, *supra* note 12, at 759-60.

<sup>100</sup> See FLA. ADMIN. CODE ANN. r. 62-345.100 (2013) (seeking to establish "a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation

limit negotiations and informal conversations with property owners about possible mitigation measures; still others will increase the amount of bureaucratic red tape they impose before placing conditions on development in order to establish, early in the approval process, *Nollan* and *Dolan* compliance; and many will know that they can always simply deny a permit application and face lower constitutional scrutiny than if they discuss conditioning its issuance with the property owner.<sup>101</sup> *Koontz*'s practical effects, then, will not necessarily help property owners—it may protect them in some places, but it likely will not in others—and will merely continue and expand the dynamics at work for decades.<sup>102</sup>

*Koontz*'s subtle but real doctrinal effects, however, could augur significant changes in the Court's exactions doctrine and in litigation. It is here, and especially in providing a remedy, that courts will have to reckon with the Court's newly emerged understanding of *Nollan* and *Dolan* as unconstitutional conditions cases—which is to say, as a line of cases that rely more on the logic of substantive due process than on the text of the Takings Clause and the regulatory takings doctrine that the Court has established since deciding *Penn Central*.

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necessary to offset that loss" in order to execute FLA. STAT. § 373.414(18) (2012)); see generally Memorandum from Jeff Littlejohn, Deputy Sec'y for Regulatory Programs, Fla. Dep't of Env'tl. Prot., on Interpreting and Applying the Unif. Mitigation Assessment Method (June 15, 2011) (on file with the Fla. Dep't of Env'tl. Prot.), available at [http://www.dep.state.fl.us/secretary/watman/files/007\\_umam\\_guidance\\_061511.pdf](http://www.dep.state.fl.us/secretary/watman/files/007_umam_guidance_061511.pdf) (providing general guidance for how regulators must "score" impact and mitigation under the Uniform Mitigation Assessment Method); Bonnie Malloy, *Symbolic Gestures or Our Saving Grace: The Relevance of Compensatory Mitigation for Florida's Wetlands in the Climate Change Era*, 27 J. LAND USE & ENVTL. L. 103, 125-26 (2011) (describing history of UMAM and regulatory processes that follow it).

<sup>101</sup> See Echeverria, *supra* note 9, at 2.

<sup>102</sup> See Fenster, *Takings Formalism*, *supra* note 95, at 653.