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## Legislative Exactions and Progressive Property

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# LEGISLATIVE EXACTIONS AND PROGRESSIVE PROPERTY

Timothy M. Mulvaney\*

*Exactions—a term used to describe certain conditions that are attached to land-use permits issued at the government’s discretion—ostensibly oblige property owners to internalize the costs of the expected infrastructural, environmental, and social harms resulting from development. This Article explores how proponents of progressive conceptions of property might respond to the open question of whether legislative exactions should be subject to the same level of judicial scrutiny to which administrative exactions are subject in constitutional takings cases. It identifies several first-order reasons to support the idea of immunizing legislative exactions from heightened takings scrutiny. However, the Article suggests that distinguishing between legislative and administrative measures in this context could produce several second-order consequences that actually undercut the goals of progressive property theory.*

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## INTRODUCTION

Exactions—a term used to describe certain conditions that are attached to land-use permits issued at the government’s discretion—ostensibly oblige prop-

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erty owners to internalize the costs of the expected infrastructural, environmental, and social harms resulting from development.<sup>1</sup> There are two broad, source-based categories of exactions: *those imposed via case-by-case administration* (consider a permitting official determining in the course of an application review that a specific applicant must dedicate an identifiable portion of land before converting tennis courts to condominiums) and *those imposed via broadly applicable legislative formulas or schemes* (consider a local ordinance requiring all developers to replace every acre of wetlands they destroy with two acres of newly created wetlands). It admittedly is not always evident whether a specific exaction should be deemed administrative or legislative;<sup>2</sup> for purposes of the principal issue taken up here, however, where one might draw the line between the two is less important than one's acknowledgement that at least some government acts fall into each category. This Article explores how proponents of progressive conceptions of property might respond to the open question of whether legislative exactions should be subject to the same level of judicial scrutiny to which administrative exactions are subject in constitutional "takings" cases.

The Fifth Amendment's Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."<sup>3</sup> This language has been interpreted to constrain not only physical appropriations by the state but also regulatory actions, including exactions, that affect the myriad incidents of property. As foreshadowed above, debate persists over the level of judicial scrutiny applicable to administrative and legislative exactions in takings cases.<sup>4</sup> In simplest terms, there are three possible combinations: subject both categories to a level of scrutiny that is quite deferential to the government's stated regulatory policy, as often is required in regulatory takings cases outside the exactions context; subject both categories to heightened scrutiny; or subject only administrative exactions to heightened scrutiny.

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1. See, e.g., Vicki Been, "Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 482–83 (1991); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 734–35 (2007) [hereinafter Fenster, *Constitutional Shadow*].
  2. For a prominent example, compare Judge Richard Posner's decision in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988)—where he concluded that a city council's rejection of a site plan application over the recommendation of the city's planning commission was legislative—with Richard Epstein's article asserting that Judge Posner's classification of this decision on an individual permit application as legislative was "astonishing" and "wholly unconvincing," and "[took] the common deferential stance in land use to new heights." See Richard A. Epstein, *Coniston Corp. v. Village of Hoffman Hills: How to Make Procedural Due Process Disappear*, 74 U. CHI. L. REV. 1689, 1697–98 (2007); see also B.A.M. Dev., *L.L.C. v. Salt Lake Cty.*, 87 P.3d 710, 728 n.23 (2006) ("[S]ome exactions are somewhere in the middle of adjudicative and legislative because the legislature [may give] some guidelines, [while] the administrative body retains considerable discretion as well." (alterations in original) (internal quotation marks omitted) (quoting Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 266 (2000))).
  3. U.S. CONST. amend. V.
  4. In a recent article, David Callies efficiently describes this legislative-administrative question in the exactions context as a "key remaining issue" in takings law. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 48 (2014).

The first of these combinations is foreclosed by Supreme Court precedent. Seemingly out of concern that administrative exactions present the possibility for extortionate, targeted conduct by government officials acting in an executive capacity, the Court asserted in the companion cases of *Nollan v. California Coastal Commission*<sup>5</sup> and *Dolan v. City of Tigard*<sup>6</sup> that the government, as the defendant, shoulders the burden of proving that administrative exactions bear an “essential nexus” to and are in “rough proportionality” with the proposed development’s impacts if it wants to avoid having to pay takings compensation.<sup>7</sup> These decisions have been described as imposing a form of heightened scrutiny.<sup>8</sup> Their tests shift the burden of proof away from the claimant and toward the defendant government entity, authorize review of the relationship between an exaction’s design and the public goals in imposing that exaction (a traditional due process question, only more probing), and allow for takings liability findings in instances where the economic impact of the exaction is quite modest. But it remains uncertain—as acknowledged in the dissenting opinion of the Court’s most recent decision on exactions in *Koontz v. St. Johns River Water Management District*<sup>9</sup>—which of the other two approaches takings law will adopt.<sup>10</sup>

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5. 483 U.S. 825 (1987).

6. 512 U.S. 374 (1994).

7. *Id.* at 386, 391. The government’s ability to impose exactions was once largely unbridled. On the history of exactions in the United States, see Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 516–20 (2012).

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

9. 133 S. Ct. 2586, 2604 (2013) (Kagan, J., dissenting).

10. *Id.* at 2608 (“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

Progressive property scholars generally are more amenable to understanding property interests as contingent and seeing distributive consequences as a core part of property than those who conceive of property through a law-and-economics or libertarian lens. This scholarly camp is construed very broadly here to include those writers who express confidence that recognizing property interests can foster widespread common good but, in doing so, attend to the ways that property also can be used to enhance inequality and dominate politics and public discussions.<sup>11</sup> On this view, property laws are value-laden and, since human values regarding relationships with others and with nature change over time, those laws regularly must be reevaluated. There are several first-order reasons why scholars who adopt this view might support the idea of immunizing legislative exactions from the heightened takings scrutiny to which administrative exactions are subject. However, this Article asserts that adopting such a position could produce some second-order consequences that actually undercut the goals of progressive conceptions of property. It may be that progressive property theorists ultimately will decide to tolerate the second-order consequences of adopting the legislative-administrative distinction. Only by confronting these consequences, however, will that decision be fully informed.

Below, Part I examines the numerous first-order reasons why progressive property scholars might support distinguishing between legislative and administrative acts in the exactions context, which has been done for government acts challenged on due process and nondelegation rationales for some time. Such reasoning is grounded in the checks and balances of democratic government, the likelihood of reciprocal advantages stemming from legislation, and an aversion to judicial usurpation of the legislative process.

This reasoning might be coupled with the more general concern of broadening in *any way* the application of what could be considered flawed original decisions. Though the details are quite fine, the basic *Nollan/Dolan* critique can be summarized in the following manner: *Nollan* and *Dolan* accept that the government could deny the relevant permit application outright under the current state of the law “unless the denial would interfere so drastically with the [claimants’] use of their property as to constitute a taking”<sup>12</sup> under the traditional

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that are generally applicable. Maybe today’s majority opinion accepts this distinction; or then again, maybe not.” (internal citations omitted)).

11. The authors of *A Statement of Progressive Property*, the centerpiece of a highly regarded and influential symposium at Cornell Law School in 2009, of course fit within this group. Gregory S. Alexander, et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009). However, as I have said elsewhere, it seems more accurate to describe that symposium as seeking to give existing progressive understandings of property new traction in legal scholarship and to encourage continuing work that delineates and clarifies the content of these understandings in the present day than to describe it as setting out a brand new theory or agenda. See Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIRCUIT 349, 354 (2014). Other U.S. scholars writing in this general vein include, but are by no means limited to, Jane B. Baron, Zachary Bray, Nestor Davidson, Rashmi Dyal-Chand, Eric Freyfogle, John A. Lovett, and Ezra Rosser. A whole host of scholars outside the U.S. are doing the same, including Susan Bright, Hanoch Dagan, Benjamin Davy, Jennifer Nedelsky, Lorna Fox O’Mahony, Richard Shay, and Andre van der Walt.
12. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835–36 (1987); see also *Dolan*, 512 U.S. at 387.

regulatory takings framework first discussed in the Supreme Court's 1978 decision in *Penn Central Transportation Co. v. City of New York*.<sup>13</sup> Few, if any, would suggest that denials of the permit applications on the *Nollan* and *Dolan* facts would constitute such a drastic interference, for the claimants in those cases already were putting their respective parcels to significant use.<sup>14</sup> It is rather peculiar, then, that the Court found it appropriate to apply heightened judicial scrutiny when reviewing (and to afford the possibility of a compensatory remedy for) government proposals that the applicant might prefer to the legal status quo.<sup>15</sup> In this sense, cabining the application of *Nollan* and *Dolan* scrutiny to administrative exactions amounts to a pragmatic effort to halt expansion of what is perceived as an ill-conceived and dangerous roadblock to government regulation in the land use arena.

In Part II, while I assert that the first-order arguments in support of explicitly recognizing the legislative-administrative distinction in exaction takings law deserve serious consideration, I raise the possibility that supporting this distinction could produce secondary effects that actually impede the goals of progressive property theory. In this Article, I highlight and offer my preliminary impressions on two such second-order effects.

First, I suggest that the argument to immunize legislative exactions from heightened scrutiny is necessarily imbued with a tacit criticism of administrative exactions. Such tacit criticism could create a broader assumption of administrative interference, which threatens to uproot some of the more progressive characteristics of takings law. While eminent domain and traditional regulatory takings jurisprudence currently afford wide deference to both legislative and administrative acts, marginalizing administrative acts as regularly interfering with constitutionally protected property interests in the exactions context could have spillover effects on the many eminent domain and regulatory takings situations that involve administrative acts unrelated to exactions.

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13. 438 U.S. 104 (1978). There are two types of regulations outside the exactions context that are not subject to a deferential level of takings scrutiny, for the Supreme Court has asserted that they, with some limited exceptions, amount to categorical takings: those regulations that result in a permanent physical invasion, as set out in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or a total economic wipeout, in accord with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
  14. See *Nollan*, 483 U.S. at 825 (concerning parcel used as oceanfront home); *Dolan*, 512 U.S. at 374 (concerning parcel used as hardware store); see also Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVIRONMENTAL L. & POL'Y J. 189, 226 (2010).
  15. See, e.g., *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428, 444 (2015) ("The AIG Board of Directors decided that accepting the loan was a better alternative than bankruptcy."); see also Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 334; Laura S. Underkuffler, *From Bailouts to Bogs—Shaking the Takings Money Tree* (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 15-16, 2015), <http://perma.cc/GL9B-BY22>. A more moderate claim than that set out in the text would suggest that *Nollan* and *Dolan* are justified as exceptions to the rule handed down in *Loretto* that regulations requiring the permanent physical invasion of property ordinarily amount to takings. On this view, while the government usually would need to pay compensation if it simply appropriated a strip of land or a public access easement thereon, conditioning a development permit on such an appropriation would not require compensation so long as that appropriation bore an essential nexus to and was in rough proportionality with the development's impacts. See Mulvaney, *supra* note 14, at 225–27.

Second, I contend that a pronounced shift in land use policy toward broad, unbending legislative measures to avoid the heightened scrutiny to which only administrative acts are subject could come with significant social implications, given that in many contexts only administrative processes afford crucially important attention to the affected parties' human stories. By human stories, I am referring to the personal, political, and economic identities of those persons or groups affected by resolution of conflicts over resources. To be sure, there are a host of "rule of law" and related objections to considering identity when resolving property contests. However, in engaging with these objections, I contend here that identity considerations not only are, in a normative sense, a potentially worthy component of a progressive conception of property, but that, in a descriptive sense, such considerations already are of relevance across select areas of existing property law.

The conclusion argues that both of the remaining options in exaction-takings law—subjecting legislative exactions to either a heightened or a deferential level of takings scrutiny—pose serious challenges to fulfilling the goals of a progressive conception of property. It suggests that, moving forward, progressive property scholars might concentrate more readily on evaluating other potential boundary principles in exaction-takings law as alternatives to the legislative-administrative divide or even, more dramatically, reinvigorating the admittedly uphill battle to reverse *Nollan* and *Dolan* in their entirety.

## I. EXACTIONS AND THE LEGISLATIVE-ADMINISTRATIVE DEBATE IN THE FIRST ORDER

For more than a century, courts consistently have distinguished between legislative and administrative acts when reviewing a number of different challenges to land-use controls outside the takings context, including those grounded in substantive due process and related substantive claims,<sup>16</sup> procedural due process,<sup>17</sup> and the nondelegation doctrine.<sup>18</sup> While the justifications ad-

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16. See, e.g., *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 683–84 (1976) (Stevens, J., dissenting) (“[State] courts have repeatedly identified the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels. In the former situation there is generally great deference to the judgment of the legislature; in the latter situation state courts have not hesitated to correct manifest injustice.”); *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988).
  17. Compare *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 386 (1908) (concluding that the City of Denver unconstitutionally instituted a roadway-improvement tax based on the individual circumstances of each landowner who abutted the newly paved road without affording those landowners notice and a hearing), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915) (deciding that a state law imposing a tax on all real property in Denver was sufficiently broad that individual landowners were not due individualized hearings to challenge the assessments). According to the *Bi-Metallic* Court, “Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. . . . There must be a limit to individual argument in such matters if government is to go on.” *Bi-Metallic*, 239 U.S. at 445; see also *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 746 (1st Cir. 1995); *Philly's, the Original Phila.*

vanced for this distinction differ slightly across jurisdictions, the consistent theme underlying the greater judicial deference afforded legislative acts in these contexts is that legislative acts are considered fairer—in the sense that they are broadly applicable and enacted by politically accountable representatives—than individualized exercises of government power by officials who evaluate specific pieces of evidence in specific cases and are less directly constrained by the political process. Interestingly, though, there seems to be similar consensus that takings jurisprudence generally does *not* apply a different, heightened level of judicial scrutiny when reviewing administrative acts.<sup>19</sup> However, heated debate persists as to whether this legislative-administrative distinction should be recognized in the narrow but important corner of takings law involving exactions. After the first section below sets out the basic contours of exaction-takings law, the second section explains why proponents of progressive conceptions of property might support the majority of lower courts that have addressed the question in advocating that legislative exactions should not be subject to the same level of takings scrutiny to which administrative exactions traditionally are subject.

### A. Situating Exaction Takings

While most agree that the Takings Clause originally referred only to uncompensated physical acquisitions (such as the government's appropriating privately owned land to build forts),<sup>20</sup> the Clause has come to constrain regulations

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Cheese Steak, Inc. v. Byrne, 732 F.2d 87, 92 (7th Cir. 1984). The distinction articulated in *Londoner* and *Bi-Metallic* lives on in modern administrative law: procedural due process theories provide a potential avenue of redress for claimants in instances involving administrative actions, while a claimant "generally is not entitled to procedural due process above and beyond that which already is provided by the legislative process." 75 Acres, LLC v. Miami-Dade Cty., 338 F.3d 1288, 1293 (11th Cir. 2003).

18. The U.S. Constitution limits congressional delegation of power to administrative agencies by demanding that Congress confine such power by an "intelligible principle" in the delegating statute. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001); *see also* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). While federal courts generally have been quite deferential in enforcing the intelligible principle doctrine—meaning that Congress in practice holds wide discretion to delegate policymaking to federal agencies—state legislatures and, even more so, local legislatures (e.g., city councils) are given far less leeway by state courts (on not only nondelegation but also state zoning enabling act grounds) to confer policymaking authority on local agencies. *See, e.g.*, *PRB Enters., Inc. v. S. Brunswick Planning Bd.*, 518 A.2d 1099, 1101–03 (N.J. 1987).
19. Significant debate continues on the separate question of whether the *judiciary* is or should be subject to Takings Clause review when it modifies common law rules and, if so, what level of judicial scrutiny should apply. For a lengthy if still partial listing of thoughtful recent works on the topic of "judicial takings," *see* Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 839 n.11 (2013) (listing sources).
20. *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" (internal citations omitted)); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995).



on the use of property, as well. Supreme Court jurisprudence directs lower courts to conduct an ad hoc analysis that is quite deferential to the state in most takings cases involving regulations on the use of property.<sup>21</sup> However, in the conveniently rhyming cases of *Nollan* and *Dolan*, the Court announced a shift from this approach where the regulatory act at issue in a takings challenge is an administrative exaction.

In *Nollan*, the California Coastal Commission concluded that the conversion of an oceanfront cottage to a large home would block the public's view of the ocean.<sup>22</sup> The Supreme Court concluded that the exaction attached to the Commission's approval of that conversion—a public walking easement along the ocean—did not alleviate the stated development impact.<sup>23</sup> According to the *Nollan* Court, the state must prove that exactions bear an “essential nexus” to the impacts caused by the permitted development and for which it could have denied the application outright in order to avoid takings liability.<sup>24</sup>

*Dolan*, handed down seven years later, involved a landowner's desire to expand an existing hardware store and pave a gravel parking lot.<sup>25</sup> The town alleged that this development's expanded footprint would increase traffic congestion in the area and lead to flooding problems.<sup>26</sup> On this understanding, it conditioned the requested permit on the dedication of a creek-front strip of the applicant's land for a bicycle path and floodplain management. The *Dolan* Court declared that, in addition to proving the “nexus” called for in *Nollan*, the state must make an “individualized determination” proving that the harms attributable to the proposed development are “rough[ly] proportion[ate]” to the burden borne by the applicant via the exaction.<sup>27</sup>

Admittedly, there remains debate as to whether a specific government act should be deemed a legislative or administrative exaction, or even an exaction at all.<sup>28</sup> Again, though, where one might draw these lines is less important for purposes of this Article than one's acknowledgement that, in most jurisdictions,

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21. As noted above, the framework for such an analysis was first discussed in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). On the deferential nature of the *Penn Central* analysis, see, e.g., James L. Huffman, *Beware of Greens in Praise of the Common Law*, 58 CASE WESTERN RES. L. REV. 813, 861 (2008) (“[A]s interpreted by the Supreme Court over the past century, [the Takings Clause] has seldom been an obstacle to governments' regulatory ambitions.”).

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

23. *Id.* at 841–42.

24. *Id.* at 837.

25. *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994).

26. *Id.* at 381–82.

27. *Id.* at 391 (finding that “the city must make some sort of individualized determination” regarding the quantitative nature of the condition).

28. For a recent decision assessing whether certain municipal inclusionary housing requirements are exactions or non-exactions, see generally *California Building Industry Ass'n v. City of San Jose (CBLA)*, 61 Cal. 4th 435 (2015). In *CBLA*, the California Supreme Court declared that an ordinance requiring developers of twenty or more residential units to set aside at least fifteen percent of those units for affordable housing amounted to an ordinary regulatory restriction on the use of property to benefit the general welfare, not an exaction, because exactions are limited to development conditions that intend specifically and exclusively to mitigate development impacts. See *id.* at 473–74.

at least some government acts fall into each of these categories (legislative exactions, administrative exactions, and non-exactions). If one assumes that some government acts fall into each of these categories, then takings jurisprudence must determine whether the heightened scrutiny of *Nollan* and *Dolan* applies to each of those categories.

There is broad judicial and scholarly consensus that such scrutiny does not apply to non-exactions. In simplest terms, then, there are three possible combinations of takings review: subject both legislative and administrative exactions to a deferential level of scrutiny; subject both categories to heightened scrutiny; or subject only administrative exactions to heightened scrutiny. The cases themselves readily indicate that such scrutiny is applicable to administrative exactions. Therefore, the open question—and the one on which this Article concentrates—is whether the heightened scrutiny applicable to administrative exactions also applies to legislative exactions.

The Supreme Court has provided very limited doctrinal guidance on the issue to date, having denied at least fourteen petitions for certiorari raising this legislative-administrative question in the exaction-takings context.<sup>29</sup> Doctrinal

29. See *Petition for Writ of Certiorari, Alto Eldorado P'ship v. Cty. of Santa Fe*, 132 S. Ct. 246 (2011) (No. 11-50), 2011 WL 2705218; *Petition for Writ of Certiorari, Mead v. City of Cotati*, 131 S. Ct. 2900 (2011) (No. 10-828), 2010 WL 5323977; *Petition for Writ of Certiorari, Action Apartment Ass'n v. City of Santa Monica*, 556 U.S. 1237 (2009) (No. 08-1139) 2009 WL 663951; *Petition for Writ of Certiorari, McClung v. City of Sumner*, 556 U.S. 1282 (2009) (No. 08-1102), 2009 WL 559324; *Petition for Writ of Certiorari, Drebbick v. City of Olympia*, 549 U.S. 988 (2006) (No. 06-223), 2006 WL 2354951; *Petition for Writ of Certiorari, Long Clove LLC v. Town of Woodbury*, 546 U.S. 1215 (2006) (No. 05-812), 2005 WL 3551096; *Petition for Writ of Certiorari, Rogers Mach. Co. v. City of Tigard*, 538 U.S. 906 (2003) (No. 02-750), 2002 WL 32133655; *Petition for Writ of Certiorari, Orange La Esperanza Corp. v. Orange Cty. Bd. of Supervisors*, 538 U.S. 916 (2003) (No. 02-638), 2002 WL 32133520; *Petition for Writ of Certiorari, Nat'l Ass'n of Home Builders of the U.S. v. Chesterfield Cty.*, 519 U.S. 1056 (1997) (No. 96-656), 1996 WL 33439030; *Petition for Writ of Certiorari, Ehrlich v. City Of Culver City*, 519 U.S. 929 (1996) (No. 96-238), 1995 WL 17018491; *Petition for Writ of Certiorari, Vill. of Schaumburg v. Amoco Oil Co.*, 519 U.S. 976 (1996) (No. 96-343), 1996 WL 33438500; *Petition for Writ of Certiorari, New York v. Manocherian*, 514 U.S. 1109 (1995) (No. 94-1560), 1995 WL 17047573; *Petition for Writ of Certiorari, Lenox Hill Hosp. v. Manocherian*, 514 U.S. 1109 (1995) (No. 94-1555), 1995 WL 17047635. The petition in *San Remo Hotel, L.P. v. City & County of San Francisco* sought review on several questions, including whether legislatively imposed exactions should be scrutinized under the *Nollan/Dolan* standard. *Petition for Writ of Certiorari, San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323 (2005) (No. 04-340), 2004 WL 2031862. While the Court granted that petition, it did so only to address a question surrounding issue preclusion in federal court when a state court previously rules on a takings claim under state constitutional law. See *San Remo Hotel*, 545 U.S. 323, 334–35. As this Article went to press, the California Building Industry Association filed a petition for writ of certiorari that asks the Supreme Court to address “whether *Nollan* and *Dolan* apply to development conditions that are imposed pursuant to a legislative mandate.” *Petition for Writ of Certiorari at 29, Cal. Bldg. Indus. Ass'n v. City of San Jose*, No. 15-330 (Sept. 14, 2015).

In the Court's most recent brush with exactions, a four-Justice dissent chastised the majority for failing to wrestle with the legislative-administrative issue. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2608 (2013) (Kagan, J., dissenting) (“Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish . . . . The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not

tea leaves that do exist have generated three areas of dispute. First, some commentators contend that the Court effectively already has deemed the legislative-administrative distinction irrelevant given that the exactions at issue in the Court's three exaction takings cases—*Nollan*, *Dolan*, and *Koontz*—were themselves legislative exactions,<sup>30</sup> while others counter that the takings disputes in those cases involved individual judgments about the applicability of those policies to particular parcels.<sup>31</sup> Second, some assert that the Court's repeated reference to *Nollan* and *Dolan* scrutiny as applying to "adjudicative decisions"<sup>32</sup> distinguishes not between different types of exactions but only between large-

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to fees that are generally applicable . . . Maybe today's majority opinion accepts that distinction; or then again, maybe not." (internal citations omitted)). However, there is a subtle argument that the *Koontz* majority in dicta subliminally at least set the stage for extending *Nollan* and *Dolan* to legislative exactions. At issue in the oft-discussed California case of *Ehrlich v. City of Culver City* was Culver City's conditioning the approval of a rezoning request on a recreation mitigation fee imposed ad hoc and an "in-lieu" fee imposed pursuant to the city's "art in public places" ordinance. 911 P.2d 429, 435 (Cal. 1996). The California Supreme Court found *Nollan* and *Dolan* applicable to the former, but not the latter. *Id.* at 439, 450. One could contend that *Koontz* was signaling its disapproval of *Ehrlich*'s legislative-administrative distinction by citing *Ehrlich* as a case holding that *Nollan/Dolan* can apply to fees (in addition to dedications of land), see *Koontz*, 133 S. Ct. at 2594, but, later in the opinion, only citing cases applying *Nollan/Dolan* to legislative exactions—and thus declining to include *Ehrlich*—when asserting that state courts in the most populous states have applied *Nollan/Dolan* to fees without the "significant harm" forecasted by the dissent, *id.* at 2602.

30. See, e.g., J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. ENVTL. L. & POL'Y 247, 265 (2004) [hereinafter Breemer, *What Property Rights*] (discussing *Dolan* and *Nollan*); Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 539–40 (1995) (discussing *Dolan*); Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1861 (2010) (discussing *Dolan*); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1040–41 (1997) (discussing *Dolan*); Deborah M. Rosenthal, Commentary, *Nollan, Dolan and the Legislative Exception*, 66 PLAN. & ENVTL. L. 4, 4–5 (discussing *Dolan*, *Nollan*, and *Koontz*). For a particularly thorough discussion on the *Dolan* Court's classifying the exaction before it as "adjudicative," see Stephen M. Johnson, *Avoid, Minimize, Mitigate: The Continuing Constitutionality of Wetlands Mitigation After Dolan v. City of Tigard*, 6 FORDHAM ENVTL. L.J. 689, 720 n.172 (1995) (explaining that while city policy required only that developers provide "sufficient open space"—a legislatively stated aim that officials met by determining in individual cases the amount and location of the land to be dedicated—the Supreme Court found constitutionally infirm not the amount or location of the dedication required of *Dolan* but the legislative requirement that *Dolan* and other applicants dedicate any land at all).
31. The City of San Jose and a group of interveners recently set out this position in *CBLA*. See City of San Jose's Answer Brief on the Merits at 46–48, *CBLA*, 61 Cal. 4th 435; Appellant/Defendant Intervenors' Answer Brief on the Merits at 38, *CBLA*, 61 Cal. 4th 435.
32. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 544 (2005) ("Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit."); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("[H]ere the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."); see also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (Kennedy, J., plurality opinion) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.").

scale regulatory mechanisms, like zoning, and smaller-scale regulatory mechanisms, like exactions,<sup>33</sup> though others interpret these references as insinuating that such scrutiny is not relevant in takings suits involving exactions that are part of a communitywide plan and broadly applicable.<sup>34</sup> Third, some scholars

33. See, e.g., James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 405–07 (2009) [hereinafter Burling & Owen, *Implications of Lingle*]; Steven J. Eagle, Del Monte Dunes, *Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100, 10103–05 (2000); Kent, *supra* note 30, at 1861; see also J. David Breemer, *The Evolution of the “Essential Nexus”: How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 401–02 (2002) [hereinafter Breemer, *Essential Nexus*]; David L. Callies & Christopher T. Goodin, *The Status of Nollan v. California Coastal Commission and Dolan v. City of Tigard After Lingle v. Chevron U.S.A., Inc.*, 40 J. MARSHALL L. REV. 539, 563–64 (2007); Christopher T. Goodin, Note, *Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions: “A Distinction Without a Constitutional Difference,”* 28 U. HAW. L. REV. 139, 158–67 (2005). This position is buttressed by the reality that each of the five state cases *Dolan* cited as the foundation for its rough proportionality test involved what according to many scholars would be deemed legislative exactions. See Mulvaney, *supra* note 7, at 539–40. However, the majority of lower-court opinions to have broached the issue recognize the legislative-administrative distinction in exaction takings law. See, e.g., McClung v. City of Sumner, 548 F.3d 1219, 1227–28 (9th Cir. 2008); Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999–1000 (Ariz. 1997); Home Builders Ass’n of N. Cal. v. City of Napa, 90 Cal. App. 4th 188, 196–97 (2001); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 691–92, 696 (Colo. 2001); Wolf Ranch, LLC v. City of Colo. Springs, 207 P.3d 875, 880–81 (Colo. App. 2008), *aff’d*, 220 P.3d 559 (Colo. 2009); Dudek v. Umatilla Cty., 69 P.3d 751, 756 (Or. Ct. App. 2003); Homebuilders Ass’n of Metro. Portland v. Tualatin Hills Park & Recreation Dist., 62 P.3d 404, 408–10 (Or. Ct. App. 2003); City of Olympia v. Drebbick, 126 P.3d 802, 808–09 (Wash. 2006). *But see* Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); Home Builders Ass’n of Dayton & Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355–56 (Ohio 2000). There do not appear to be any occasions since *Lingle* where courts have decided as a matter of first impression to apply *Nollan* and *Dolan* to a legislative exaction, though three cases are worth noting. In *Sefzik v. City of McKinney*, a Texas appellate court declared itself bound by a pre-*Lingle* decision of the Texas Supreme Court, *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620 (Tex. 2004), that it read as rejecting the legislative-administrative distinction. *Sefzik v. City of McKinney*, 198 S.W.3d 884, 894 (Tex. App. 2006). Yet *Sefzik’s* reliance on *Flower Mound* is questionable in light of the fact that, in that case, the Texas Supreme Court affirmed an appellate ruling in favor of the takings claimant but stated that it “need not and [did] not” actually decide the legislative-administrative question. 135 S.W.3d at 642. Dicta in a Utah decision suggested that, prior to the enactment of a state statute codifying “rough proportionality” treatment of all development exactions, *Nollan* and *Dolan* applied to both legislative and administrative exactions. B.A.M. Dev. L.L.C. v. Salt Lake Cty., 128 P.3d 1161, 1170–71 (Utah 2006). And in a recent takings decision involving not land use exactions but legislation calling for the seizure of a portion of a farmer’s crop in an effort to control the market price of raisins, the U.S. Supreme Court noted that “[s]elling produce in interstate commerce, although certainly subject to reasonable government regulation, is . . . not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection.” See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2430–31 (2015). The extent to which this holding will impact the legislative-administrative debate in the land use exactions context is not yet evident, though proponents of a strong unconstitutional conditions doctrine are optimistic. See generally, e.g., Brian T. Hodges & Christopher M. Kieser, *Horne v. United States Department of Agriculture: The Takings Clause and the Administrative State*, ENGAGE, Oct. 2015, at 34, <http://perma.cc/FZR3-FST5>.
34. See, e.g., Fenster, *Constitutional Shadow*, *supra* note 1, at 754–55; Fenster, *Takings Formalism*, *supra* note 8, at 628; Benjamin S. Kingsley, *Making It Easy To Be Green: Using Impact*

point to the Supreme Court's unconstitutional conditions doctrine jurisprudence as supportive of applying *Nollan* and *Dolan* scrutiny to legislative exactions,<sup>35</sup> while others contend that the unconstitutional-conditions doctrine either is more appropriately applied in non-property contexts (such as free speech cases)<sup>36</sup> or "lacks a consistent animating theory" altogether.<sup>37</sup> In the end,

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*Fees to Encourage Green Building*, 83 N.Y.U. L. REV. 532, 560–61 (2008); Mulvaney, *supra* note 14, at 212–14; Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 609 (2009).

35. See Burling & Owen, *Implications of Lingle*, *supra* note 33, at 407–16 (arguing that since Supreme Court precedent on the unconstitutional conditions doctrine before *Nollan* never distinguished between conditions imposed by different sources of government—i.e., it does not distinguish between situations where an agency official imposes an unconstitutional condition and situations where Congress imposes the same restriction—there is no doctrinal reason to side with those scholars who suggest takings law does so now); see also Breemer, *Essential Nexus*, *supra* note 33, at 401–02; Kent, *supra* note 30, at 1863 n.145.
36. Some scholars in favor of a more progressive understanding of property than that favored by the likes of Burling contend that the values underlying an individual right to free speech (such as the expression values underlying a newspaper's claim to publish a story) are often different from the values underlying the competing public interests in restraining that speech (such as the public safety values underlying a government interest in silencing that newspaper story for national-security reasons), while the values underlying an individual right to use land (such as protecting *A*'s autonomy to use her land as she pleases) are very often the same as the values underlying the competing public interest (given that allowing *A* to use her land as she pleases necessarily impedes *B*, *C*, *D*, and *E*'s ability to use their land as they please). See, e.g., Laura S. Underkuffler, *When Should Rights "Trump"? An Examination of Speech and Property*, 52 ME. L. REV. 311 (2000). Therefore, on this view, demonstrable "rights" should be presumed to trump in the former case (i.e., the newspaper's alleged free speech right should presumptively prevail over the government's alleged national security interest), but not in the latter (i.e., *A*'s alleged property right should *not* presumptively prevail over *B*, *C*, *D*, and *E*'s alleged property right that a given regulation aims to protect). Consistent with this position, proponents of progressive conceptions of property highlight *Lingle*'s deference to predictions about the effectiveness of public policies relating to property made by legislatures and agencies as illustrative of the Court's comfort that "democratic forces can counterbalance attempts at coercion." See Siegel, *supra* note 34, at 611. Richard Epstein counters that the Free Speech Clause and the Takings Clause are both concerned about the abuse of government power, and, therefore, there should be no presumption in favor of regulation of either speech or property. See Richard A. Epstein, *Property and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992). Yet even assuming Epstein's position on the unconstitutional-conditions doctrine controls, it is not clear that application of that doctrine—even a "special application," as the Supreme Court has described it in the takings context, *Lingle*, 544 U.S. at 547—is appropriate in a case like *Koontz*, where the majority (i) held that no unconstitutional taking occurred and (ii) remained neutral on the issue of whether the state had ever proposed an exaction. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013) (concluding that "nothing has been taken"); *id.* at 2598 (stating that the Court was not answering the question of whether the Water Management District "issued a demand of sufficient concreteness to trigger the special protections of *Nollan* and *Dolan*"). John Echeverria colorfully explains the Court's folly: "Justice Alito has implicitly adopted the novel, indeed bizarre position that the unconstitutional conditions doctrine should apply even in the absence of government action that violates the Constitution." John D. Echeverria, *Koontz, The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 27 (2014) [hereinafter Echeverria, *Very Worst*].
37. See Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 ECOLOGY L.Q. 131, 146–47 (2014); see also Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 485–504 (1991); Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 404 (2014) [hereinafter Fenster, *Another Name*];

there is no Supreme Court precedent so clear as to be binding on future matters addressing the appropriate level of takings scrutiny in cases involving legislative exactions, and therefore the Court's decisionmaking on this question is more likely to be influenced by policy than by ruminations in prior opinions. The next section turns to the competing first-order policy considerations.

### B. Democracy, Reciprocity of Advantage, and Fiscal Discretion

Some observers suggest that the Takings Clause should be applied in a manner that focuses exclusively on the extent to which government action causes a detrimental economic impact to the claimant's holdings. On this view, the burden imposed on a landowner by an exaction is precisely the same regardless of the process through which the exaction is devised and regardless of which governmental branch imposes it.<sup>38</sup> Many others, though, conceive of takings protections, at least in part, in process terms.<sup>39</sup> And in a decision that has been labeled the "polestar" of its regulatory takings jurisprudence,<sup>40</sup> the Supreme Court offered some support for this position by asserting that the economic impact is but one factor in determining takings liability.<sup>41</sup>

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Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 869–79 (1995).

38. See, e.g., RICHARD EPSTEIN, TAKINGS 94 (1985); Breemer, *Essential Nexus*, *supra* note 33, at 403; Breemer, *What Property Rights*, *supra* note 30, at 266; David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 575 (1999); Steven J. Eagle, *Judicial Takings and State Takings*, 21 WIDENER L.J. 811, 839 (2012); Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Administrative Divide*, 38 URB. LAW. 487, 501–21 (2006); James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 ENVTL. L. 143, 150 (1995); Julian R. Kossow, *Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENVTL. L.J. 215, 224 (1995); Rosenthal, *supra* note 30, at 8. Justice Thomas, joined by Justice O'Connor, said as much in a dissent from the denial of a petition for certiorari in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1116 (1995) (Thomas, J., dissenting) (differing from colleagues on the decision whether to review the Georgia Supreme Court's decision that applied a takings test since proscribed in *Lingle* to conclude that a landscaping ordinance substantially advanced a legitimate state interest and therefore did not implicate the Fifth Amendment's compensation requirement). A few lower-court decisions prior to *Lingle* pointed to Justice Thomas's dissent from the denial of certiorari in *Parking Association* in concluding that municipalities should not be provided space to avoid the heightened scrutiny of *Nollan* and *Dolan* by altering the source of exactions. See, e.g., *Amoco Oil Co. v. Vill. of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995) (citing *Parking Ass'n of Georgia, Inc.*, 515 U.S. at 1117–18).
39. See, e.g., WILLIAM A. FISCHER, REGULATORY TAKINGS (1995); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279 (1992); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333 (1991); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992); Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243 (1993); Treanor, *supra* note 20.
40. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) ("Our polestar . . . remains the principles set forth in *Penn Central* itself," which call for a "careful examination and weighing of all the relevant circumstances.") (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)).
41. See *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 131 (1978).

Select proponents of a process-based view of takings law contend that with both legislative and administrative exactions, the government is taking advantage of the leverage provided by a specific development application to impose the condition.<sup>42</sup> In the words of one jurist, “[a] public agency can just as easily extort unfair fees legislatively from a class of property owners as it can administratively from a single property owner. The nature of the wrong is not different or less abusive to its victims.”<sup>43</sup> But others offer several overlapping reasons, which are briefly sketched out below, to suggest that the legislative arena is significantly less likely than the administrative one to generate extortionate government conduct.<sup>44</sup>

For one, legislative measures are devised by the most high-ranking government officials through a more transparent process with more political checks and balances than administrative decisions.<sup>45</sup> As the California Supreme Court describes it, “A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.”<sup>46</sup> But suspicions can arise where discussions surrounding the parameters of individual permits are conducted behind closed doors and anchored by lower-level permitting officials.<sup>47</sup> On this view, the risk of coercive government action—or, as one court put it, “distributive injustice in the allocation of civic costs”<sup>48</sup>—simply is greater in the administrative context than in the legislative context. “Judicial scrutiny,” according to

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42. See, e.g., RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 143 (2008) [hereinafter EPSTEIN, SUPREME NEGLECT]; Richard A. Epstein, *Property Rights, Public Use, and the Perfect Storm: An Essay in Honor of Bernard H. Siegan*, 45 SAN DIEGO L. REV. 609, 615–16 (2008). Deborah Rosenthal recently suggested that all legislative exactions should be subject to *Dolan* on their face at adoption, though not as applied, on the theory that “the least intrusive time to challenge them is upon adoption.” Rosenthal, *supra* note 30, at 8.
43. *San Remo Hotel v. City & Cty. of S.F.*, 41 P.3d 87, 124 (Cal. 2002) (Brown, J., dissenting); see also Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1567 (2006) (“The government can act with antilandowner animus in the adoption of inflexible fees, just as it can in the application of a fee to a particular landowner.”); Kent, *supra* note 30, at 1863. *But see* Michael A. Greene, *Spilling Secrets: Trade Secret Disclosure and Takings in Offshore Drilling Regulation*, 17 RICH. J.L. & TECH. 15, \*49 n.194 (2011) (“[T]hough in exceptional circumstances a legislative rule could also implicate concerns of pretext[,] a rule should not be fashioned from the exception here.”).
44. Among other scholars who generally support progressive conceptions of property and have promoted immunizing legislative exactions from heightened scrutiny, see, for example, John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573, 610–11 (2015); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577 (2009); Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543, 581–82 (2006).
45. See Echeverria, *Very Worst*, *supra* note 36, at 55.
46. *San Remo*, 41 P.3d at 105.
47. The five-Justice majority opinion in *Koontz* referred to the prospect of permitting officials attempting to “circumvent[ ] Nollan and Dolan,” “maneuver,” “coerc[e],” “evade,” make “extortionate demands,” “leverage [their] legitimate interests,” and “pressure [applicants] into doing [some task].” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591, 2594–96 (2013).
48. Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (Arabian, J., plurality opinion).

David Westbrook, “bears an inverse relationship to the political accountability of the government organ in question.”<sup>49</sup>

Secondly, the generality of a legislative act helps ensure some measure of reciprocal advantage. A rule limiting development to two stories burdens landowners subject to it by precluding the construction of tall buildings, yet it also benefits those same landowners by, for instance, preserving their access to natural light and, more generally, the overall character of the neighborhood. This is not to suggest that a strict accounting of the burdens and benefits of such an act is necessary. The reciprocity of advantage lies:

[N]ot in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.<sup>50</sup>

In contrast, case-by-case administration necessarily concentrates on a very narrow subset of the citizenry by focusing on individual applicants. These applicants are “without power to ‘protect themselves through the political process [by] engaging in logrolling to ensure that they do not receive an unfair share of the public’s burden.’”<sup>51</sup>

Lastly, exposing legislative exactions to *Nollan* and *Dolan* scrutiny has the potential to threaten separation-of-powers principles by putting the judiciary in the position of regularly micromanaging local governments’ fiscal decisions. Such judicial engagement could constrain municipalities’ abilities to make responsible land-use plans for the future. For example, if each landowner were afforded the ability to subject the individual application of a legislatively adopted traffic fee program to heightened judicial scrutiny, it would be quite difficult for municipalities—who hold a far greater understanding of local traffic patterns and challenges than members of the statewide or federal judiciary—to construct roads, for there would be no clarity regarding the extent of the fees ultimately generated to support them. Comprehensive planning responsibilities long have been entrusted to state and local governments,<sup>52</sup> and crafting exaction schedules that are categorically applied to a general class fits well within these responsibilities.

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

50. *San Remo*, 41 P.3d at 109.

51. See Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL’Y 1, 39 (2004) (quoting Treanor, *supra* note 20, at 871).

52. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926).



C. *Summary: The Legislative-Administrative Distinction in the First Order*

The foregoing section suggests that there are sound first-order, policy-based reasons for progressive property scholars to support the legislative-administrative distinction in exaction-takings law, just as courts have done for decades in the due process and nondelegation contexts. These arguments are based on claims grounded in the checks and balances of the democratic governance model, the reciprocity of advantage stemming from legislation, and the institutional advantages of cordoning off the judiciary from legislatures' fiscal and monetary decisionmaking processes. In a practical sense, such an approach could immunize from heightened takings scrutiny those exactions routinely imposed on developers via broadly applicable legislation, such as exactions stemming from certain wetland banking schemes and solid waste impact fee formulas. However, as discussed in the Part that follows, it seems possible that broad adoption of the legislative-administrative distinction in the exaction-takings context could promote secondary effects that actually impede movement toward accomplishing the goals of a progressive understanding of property.

II. EXACTIONS AND THE LEGISLATIVE-ADMINISTRATIVE DEBATE  
IN THE SECOND ORDER

In this Part, I identify and assess two potential anti-progressive secondary consequences of recognizing the legislative-administrative distinction in exaction takings law. I contend in the first section that pressing the idea that legislative exactions are significantly less likely to abuse property owners than administrative exactions (and thus deserve greater judicial deference) necessarily risks marginalizing case-by-case administration more generally, which could have important ripple effects on takings law outside the exactions context. I assert in the second section that formal acceptance of the legislative-administrative distinction in the exactions context could prompt governmental entities to retreat from employing administrative exactions and other administrative measures,<sup>53</sup> a move that could come with substantial costs given that in many contexts only administrative processes can respond comprehensively to the heterogeneous impacts of a given development project and afford crucially important attention to the affected parties' personal, social, political, and economic identities.

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53. While I concentrate on federal constitutional controls on government discretion in the land use arena, there certainly are other mechanisms that control local government discretion to impose exactions, namely state legislation, state courts, local ordinances, and the jurisdictional competition for residents and businesses. For a particularly thoughtful paper addressing these alternative mechanisms, see Fenster, *Constitutional Shadow*, *supra* note 1. More generally, Tony Arnold astutely cautions against viewing the land use regulatory system strictly through a constitutional lens. See Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 448-49 (2007).

### A. *Marginalizing Administrative Acts*

It is difficult to deny that legislation bears certain features that facilitate fair outcomes. At least where the constituency is large, as James Madison famously explained in the *Federalist No. 10*, legislation often results only from persuasion and interest group convergence.<sup>54</sup> In such an instance, as Carol Rose describes it, all participating parties can expect “at least partial satisfaction.”<sup>55</sup> Indeed, the nature of building coalitions minimizes the likelihood that one group will use particularly harmful tactics against an opponent, for each group is aware it may need a current opponent on its side in a later legislative crusade.<sup>56</sup> Moreover, according to Hannah Pitkin and others, the reality of multiple competing interests forces legislatures to spend time reflecting on the choices that most benefit the common good.<sup>57</sup>

It is of course the case that many observers (including Madison himself), confident that such checks and balances exist where constituencies are large, have expressed concern that such checks and balances exist where constituencies are small.<sup>58</sup> In short, they contend that small, localized constituencies can be more homogenous than those represented by larger governmental entities and are thereby more apt to generate corruption or factionalization.<sup>59</sup> It follows, according to at least some commentators, that perhaps heightened takings scrutiny should apply in certain instances but not others, depending upon the jurisdictional reach of the governing entity involved in a given dispute.<sup>60</sup>

But regardless of if or where the jurisdictional line is drawn, scholars across the ideological spectrum are more suspicious of piecemeal regulations than those that are broadly applicable. Yet even if one concedes that the risk of coercive government action is greater in the administrative context than in the legislative context, such a concession on ordinal rank says nothing about their cardinal rank, i.e., the distance between them. The first section below explains that takings jurisprudence surrounding both outright exercises of eminent domain and those government regulations that are the functional equivalent perceives this distance as insignificant, for it generally does *not* distinguish between

54. See THE FEDERALIST NO. 10 (James Madison) (Harv. Univ. Press ed., 2009).

55. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 854 (1983).

56. See THE FEDERALIST NO. 10, *supra* note 54, at 60.

57. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 195–96 (1967).

58. See, e.g., THE FEDERALIST NO. 10, *supra* note 54, at 58–59.

59. See, e.g., Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 26 n.105 (2000); Kent, *supra* note 30, at 1863. Rose eschews the very idea of classifying local land use decisions as “legislative” or “administrative,” for local government actors, unlike administrative actors, are not impartial and do not possess particular expertise. Rose, *supra* note 55, at 846, 849. She contends that any test of the reasonableness of local government acts must draw upon the factors that “lend legitimacy and institutional competence to local decisionmaking,” namely the regulated party’s ability to exit the jurisdiction and to have her voice heard within it. *Id.* at 846–47.

60. See, e.g., William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1583 (1988); Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525, 544–49 (1990).

legislative and administrative acts in terms of the applicable level of judicial scrutiny. The second section asserts that recognition of the legislative-administrative distinction in the exaction context would suggest that this distance is considerable, which could have broad jurisprudential reverberations in the takings context, where many administrative acts currently are not subject to heightened scrutiny.

1. *The Absence of a Legislative Administrative Distinction in Eminent Domain and Regulatory Takings Jurisprudence*

Exercises of eminent domain are deemed unconstitutional only if the project does not serve a “public use”—which, to many observers, now equates to a mere public purpose following the Supreme Court’s decision in *Kelo v. City of New London*<sup>61</sup>—or if the compensation paid is not “just.”<sup>62</sup> Some condemnations result from broadly applicable legislation. Consider, for example, a land-reform statute that sought to undo an oligopoly in land ownership on Oahu, a goal the Supreme Court deemed a public use in *Hawaii Housing Authority v. Midkiff*.<sup>63</sup> But there also are exercises of eminent domain that could be considered administrative that are subject to the very same deferential level of public use scrutiny. For instance, the New Orleans Redevelopment Authority recently survived a public-use challenge to its condemnation of a vacant individual lot for transfer to the nonprofit organization Habitat for Humanity.<sup>64</sup>

Similarly, whether a claimant challenges a regulation as a taking of all affected properties or as applied administratively to a specific parcel via a permit denial, such a regulation will be considered a regulatory taking requiring compensation on the same grounds. That is, a taking will be found only if (i) that government act deprives a given landowner of all conceivable economic uses of

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61. 545 U.S. 469, 480 (2005). On the Court’s equating “public use” and “public purpose,” see, e.g., Yxta Murray, *Peering*, 22 GEO. J. POVERTY L. & POL’Y 249, 259 (2015); Kellen Zale, *The Government’s Right to Destroy*, 47 ARIZ. ST. L.J. 269, 293 (2015); Callies, *supra* note 4, at 61.
62. See Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. (forthcoming 2016) (manuscript at 35), <https://perma.cc/KS48-NU5H>.
63. 467 U.S. 229, 239–43 (1984). There are limited examples of cases where a legislative act of outright condemnation was stricken on “public use” grounds. The most prominent decision is *County of Wayne v. Hathcock*, which involved a local resolution to appropriate properties adjacent to a county airport for development as a business and industrial center. 684 N.W.2d 765 (Mich. 2005).
64. *New Orleans Redev. Auth. v. Burgess*, 16 So.3d 569 (La. Ct. App. 2009). For a thoughtful discussion of the case, see John A. Lovett, “*Somewhat at Sea*”: *Public Use and Third Party Transfer Limits in Two U.S. States*, in *RETHINKING PUBLIC INTEREST IN EXPROPRIATION LAW* (H. MOSTERT & L.C.A. VERSTAPPEN eds., forthcoming 2016) (manuscript at 30–31) (<https://perma.cc/BT6E-KASG>.) Decisions striking down administrative condemnations on “public use” grounds are rare. For one recently reported example, a state court concluded that an Illinois town’s plan to condemn one acre of privately owned property and pass it on to a car dealership for additional parking to entice the dealership to remain in the town did not constitute a public use. See Lee Filas, *Judge Turns Down Eminent Domain Move by Fox Lake*, DAILY HERALD - ARLINGTON HEIGHTS, IL (Dec. 10, 2005), <http://perma.cc/6KEQ-5FEU>.

her property,<sup>65</sup> or (ii) the factors set out in *Penn Central Transportation Co. v. City of New York*<sup>66</sup>—which require judicial consideration of the economic impact, the claimant’s investment-backed expectations, and the character of the government action—otherwise lean in the claimant’s favor.<sup>67</sup> There are a number of *Penn Central* cases involving takings challenges to legislative acts, and most all of the claims in those cases have failed. For a representative example, the Supreme Court applied the *Penn Central* factors to reject a takings challenge to a broadly applicable subsurface support requirement in *Keystone Bituminous Coal Ass’n. v. DeBenedictis*.<sup>68</sup> But there are many more *Penn Central* cases involving administrative acts, only a small number of which succeed. *Jentgen v. United States*<sup>69</sup> and *Palazzolo v. State*<sup>70</sup> are two of the more prominent of the many cases applying the *Penn Central* factors to reject takings challenges to the specific denial of wetland fill permits.<sup>71</sup>

## 2. *The Legislative-Administrative Distinction’s Marginalizing Effect*

The preceding paragraphs attest that the same deferential level of judicial scrutiny systematically is applied in eminent domain and regulatory takings cases regardless of whether the state acted in its legislative or administrative capacity. Pressing the idea that legislative exactions are considerably less prone to interfere with property interests than administrative exactions thus leaves open the possibility of contradiction in the many eminent domain and regulatory takings cases that involve administrative acts unrelated to exactions, including single-lot condemnations, landmark designations, and ordinary denials of permit applications, variance applications, and rezoning requests.

Of course, it is possible that recent Supreme Court decisions situating *Nollan* and *Dolan* within the larger, mystifying body of unconstitutional-conditions jurisprudence<sup>72</sup>—and, perhaps, on the fringes or even outside of takings jurisprudence<sup>73</sup>—provide a window of opportunity to recognize the legislative-administrative distinction in the context of exactions but not in any “normal”

65. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

66. 438 U.S. 104 (1978).

67. See *id.* at 124.

68. 480 U.S. 470, 485 (1987). There are a limited number of *Penn Central* cases where a landowner successfully challenged broadly applicable legislation as a compensable regulatory taking. For one such rare example, consider *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1065–66 (N.Y. 1989).

69. 657 F.2d 1210, 1212–14 (Ct. Cl. 1981).

70. No. WM 88-0297, 2005 WL 1645974 (R.I. Super. Ct. 2005).

71. *Friedenburg v. Department of Environmental Conservation*, 767 N.Y.S.2d 451 (App. Div. 2003), is an example of the rare case in which a court applied the *Penn Central* factors to award takings compensation when confronted with a takings challenge to the specific denial of an individual request (here, a wetland fill permit). *Id.* at 458–59.

72. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

73. See Fenster, *Another Name*, *supra* note 37, at 409 (interpreting the *Koontz* Court to say that the “Takings Clause . . . served neither as the legal basis for *Koontz*’s claim, nor did it provide the remedy”).

takings contexts.<sup>74</sup> The simple message here is only that it might be prudent for proponents of progressive conceptions of property to proceed cautiously so as not to let several questionable decisions—*Nollan*, *Dolan*, and now *Koontz*—prompt adoption of a position that successfully cabins those decisions (by limiting their applicability to administrative exactions) but simultaneously opens the door to courts' reconsidering gains already made in other areas of takings law, such as the currently broad interpretation of "public use" applicable to both legislative and administrative exercises of eminent domain and the prevalent application of *Penn Central's* context-dependent analysis in regulatory takings cases involving both legislative and administrative acts.

### B. Identity Considerations: The Lost Benefits of Administration

If the concerns raised in the prior section materialize such that eminent domain law and regulatory takings law begin to subject ordinary administrative acts to a more stringent level of judicial scrutiny than that to which legislative acts are subject, the state's willingness to take any administrative measures affecting property interests likely will be chilled. But even if recognizing the legislative-administrative distinction in exaction-takings law does not marginalize administrative acts in other areas of takings law, it nevertheless could produce a chilling effect in the exactions context. While the discussion below will focus on this latter, narrower context, it can be neatly mapped onto the former. The background point is that limiting heightened scrutiny to administrative exactions could prompt government entities to avoid takings litigation by increasing reliance on the relative safe haven of legislative exactions, even where conditions on the ground seemingly warrant an administrative response.<sup>75</sup> This sec-

74. However, it can be very challenging to identify deal-making situations in the land-use context that trigger the unconstitutional-conditions doctrine. In a new paper, Lee Fennell and Eduardo Peñalver contend that *all* of land use law—including, say, an act as seemingly broadly applicable as zoning—could be construed as involving deal-making. See Fennell & Peñalver, *supra* note 15, at 314–17. According to Fennell and Peñalver, such deal-making (1) might stem from landowner feedback in the public-comment period on precisely where to draw the lines on the initial zoning map; (2) might be intentionally built into the system via variances, conditional uses, or related tradeoffs; or (3) might occur on a grander scale through the legislative process, since lawmakers' decisions to enact or repeal laws commonly are dependent on the enactment or repeal of other laws. *Id.* They critique the *Nollan* and *Dolan* exercise, then, for focusing "on nexus and proportionality within the challenged deal only." *Id.* at 316. Richard Epstein, among others, contends that almost every regulatory action can be conceived of as conditioning some government benefit or burden on an individual's action or choice. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 11 (1993); see also Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *YALE L.J.* 547, 611 (2001) ("[T]here are an enormous number of government actions that can be creatively described as exactions.").

75. There is some evidence that *Nollan*, *Dolan*, and dicta in recent Supreme Court cases (such as *Lingle* and *Del Monte Dunes*) referring thereto already have generated movement in this direction in light of the implicit support offered in these cases for the legislative-administrative distinction. See, e.g., Fenster, *Another Name*, *supra* note 37, at 418 (including among other "hallmarks of *Nollan* and *Dolan*" a "turn towards regulatory formulas and bureaucratic caution at the agency level"); Fenster, *Constitutional Shadow*, *supra* note 1, at 772; Fenster, *Takings Formalism*, *supra* note 8, at 645; Ronald H. Rosenberg, *The Changing Culture of*

tion contends that the reduction in flexibility and customizability in land-use law that would result from such a system could have important social implications by excluding from consideration the human stories, or *identities*, of the individuals and communities impacted by specific land uses.

Before proceeding into the discussion on identity, it bears noting that while it is possible that recognition of the legislative-administrative distinction in the due process and nondelegation contexts may already be producing the chilling effect described above, that chilling effect seemingly would be much more pronounced and meaningful in the takings context for at least three reasons. First, the more probing level of judicial scrutiny applicable to administrative acts in the due process and nondelegation contexts is still quite deferential to the state when compared to the strictures of *Nollan* and *Dolan*.<sup>76</sup>

Second, the principal remedy for an unconstitutional taking is just compensation, not injunctive relief,<sup>77</sup> and, it appears from recent jurisprudence, the compensation remedy in exaction cases is retroactive in accordance with “temporary takings” principles.<sup>78</sup> Thus, where a city issues a conditional permit and the landowner-permittee successfully challenges the condition as a compensable exaction taking, the city would be required to pay the landowner/permittee compensation for the period of time during which the condition was on the table, even if it withdrew that condition on or before the date of the takings judgment.<sup>79</sup> Given that compensation attaches to a self-imposed injunction—i.e., withdrawal of the condition—in the takings context, whereas no compensation is due when a court issues an injunction upon finding a violation of the Due Process Clause or the nondelegation doctrine, government entities presumably will be more concerned about takings violations than due process and nondelegation violations. If the legislative-administrative distinction is recognized in exaction-takings law, the likelihood that fiscally conscious, risk-averse governmental entities will resort with any regularity to administrative exactions

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*American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 258–59 (2006); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 366–68 (2002). Many other commentators have suggested local governments choose this course. See, e.g., Carlos A. Ball & Laurie Reynolds, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 465–69 (2005).

76. See generally Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 631–59 (1996).
77. See John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475, 482 (2010) (“If there is one thing we think we know about takings law, it is that . . . the purpose of the Takings Clause is ‘to secure compensation in the event of [an] otherwise proper interference amounting to a taking.’” (quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987))). *But see* Thomas W. Merrill, *Essay, Anticipatory Remedies for Takings*, 128 HARV. L. REV. 1630 (2015) (suggesting that federal courts should be allowed to enter declaratory and other “anticipatory” decrees in takings cases).
78. See Timothy M. Mulvaney, *Temporary Takings, More or Less*, in CLIMATE CHANGE IMPACTS ON OCEAN AND COASTAL LAW: U.S. AND INTERNATIONAL PERSPECTIVES 461, 463–65 (Randall S. Abate ed., 2015).
79. Indeed, this is precisely what occurred on remand in *Koontz*. See Timothy M. Mulvaney, *On Bargaining for Development*, 67 FLA. L. REV. FORUM 66, 68–71 (2015).

(which would be subject to *Nollan* and *Dolan*'s heightened takings scrutiny and the associated retroactive compensation remedy) in lieu of legislative exactions (which would not) seems quite slim.<sup>80</sup>

Third, while the due process and nondelegation doctrines police both government discrimination against and government favoritism towards owner-applicants, the exaction-takings tests of *Nollan* and *Dolan* protect only against government discrimination. For illustrative purposes, consider the case most cited for the proposition that rezonings should be considered quasi-administrative and, upon a substantive challenge, be subject to a more probing standard than that used in assessing the substantive validity of traditional zoning ordinances. In *Fasano v. Board of County Commissioners*,<sup>81</sup> the county granted a developer's rezoning request against the recommendation of the local planning commission, a decision neighbors challenged.<sup>82</sup> The court reached the conclusion to apply heightened scrutiny out of concern that government entities were too *lenient* on developers in individual situations at the expense of the public, not that they were too demanding of developers to the public's advantage.<sup>83</sup> The point of offering the *Fasano* example is not to claim that *Fasano*'s classification of rezonings as administrative is right or wrong, but rather to demonstrate that heightened substantive review of government decisions on due process and non-delegation grounds includes outer bounds on both sides—that is, decisions that discriminate against the applicant or favor the applicant *both* raise suspicion. The exaction-takings standards of *Nollan* and *Dolan*, on the other hand, are a one-way ratchet in the sense that review under *Nollan* and *Dolan* considers only whether the government has, in the immortal words of Justice Holmes, gone “too far” in serving the public interest,<sup>84</sup> and not whether it has gone far enough. Consistent with the reasoning noted above, a risk-averse government will be inclined to step back from its use of administrative exactions when there is no discomfiting takings barrier behind it into which it might bump.<sup>85</sup>

The foregoing suggests that if all exactions are subject to the same heightened takings scrutiny, government permitting entities will be more likely to resort to a continuing mix of legislative and administrative exactions as they see fit for the context within which they are acting (albeit of course at a rate lesser

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80. In making this point, I assume that democratic measures hold government officials to some account for their budget (mis)management. I am not contending, however, that monetary costs are always wholly commensurate with political costs. On this issue, see, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 994–95; Daryl J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1644–65 (2006); Katrina Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 246–48 (2007). For the argument that local governments are particularly likely to be risk-averse when it comes to takings liability, see Serkin, *supra* at 1665–79.

81. 507 P.2d 23 (Or. 1973).

82. *Id.* at 577–78.

83. *Id.* at 587–88; see also Rose, *supra* note 55, at 862–63; Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 1004–05.

84. Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

85. The distinction between monetary and political costs applies here as well. See *supra* note 80.

than if *Nollan* and *Dolan* were to be abandoned completely).<sup>86</sup> And, conversely, limiting heightened scrutiny to administrative exactions could prompt the state to avoid takings litigation by increasing reliance on the safer alternative of legislative exactions. If one agrees with these premises, the question then becomes whether an exaction system consisting primarily or even exclusively of legislative exactions leaves something to be desired. As set out in the remainder of this section, identity considerations suggest that it does.<sup>87</sup>

In remarking on a recent book that suggests the acts of “property outlaws”—trespassers, squatters, pirates, file-sharers, etc.—actually can improve regulation, Laura Underkuffler acknowledges that there are efficiency and rectification reasons to selectively tolerate property law-breaking.<sup>88</sup> But she suggests that such selective toleration must involve an additional justification, for, firstly, most property could be used more efficiently, and, secondly, acknowledging prior injustice does not always and automatically allow the descendants of those who suffered that injustice to take the property of the descendants of those who perpetrated it.<sup>89</sup> To Underkuffler, that additional justification is an implicit accounting of the human stories behind the particular lawbreaker and her objectors.<sup>90</sup>

Underkuffler is not alone in calling for consideration of human stories when attempting to understand the meaning of ownership. Susan Bright, Rashmi Dyal-Chand, Lorna Fox O’Mahony, Joseph Singer, and Andre van der Walt, among other proponents of progressive conceptions of property, have in

86. It is conceivable that, given that both legislative and administrative exactions would be subject to the same heightened takings scrutiny, the state could refrain from using exactions altogether instead of implementing a mix of the two. Cf. Mark Fenster, *Regulating in the Post-Koontz World*, 67 FLA. L. REV. FORUM 26, 27 (2015). Their prevalence over the past century, though, makes this an unlikely course, and one that I will not take up here.

87. It very well may be the case that the benefits of keeping administrative mechanisms in the government’s toolbox are outweighed by the damning effects of subjecting certain types of legislative acts to the heightened scrutiny of *Nollan* and *Dolan*. This Article merely suggests it is important to give these benefits a full airing.

88. See Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL’Y 363, 363–66 (2010) [hereinafter Underkuffler, *Politics of Need*] (discussing EDUARDO M. PEÑALVER & SONIA KAYTAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (2010)).

89. *Id.* at 366.

90. See, e.g., *id.* at 367 (“In the case of patent-breaking by foreign governments, there was little save the HIV/AIDS patients’ poverty—and the severity of their illnesses—that was argued to justify the governments’ threatened redistribution of corporate wealth.”); *id.* at 368 (noting that we are open to “toleration of a breach of the usual property rules in [some] cases . . . not because a man who is starving or freezing [subjectively] desires the property of others . . . [but] because his need to sustain life is recognized as justification for the bending of [those] usual rules”); see also Laura S. Underkuffler, *A Theoretical Approach: The Lens of Progressive Property*, 3 PROP. L. REV. 152, 156 (2014) (“[U]nder traditional American legal principles it is often insisted—as a matter of form—that all property is protected equally, regardless of the identity of the holder or the broader circumstances involved. . . . [However,] our instincts—and the law—often demand consideration of the identities and needs of parties, and the influence of broader social and economic circumstances.”); *id.* (explaining that, under a progressive property approach, “[e]quity’ in treatment and ‘equity’ in property principles do not require that all borrowers be treated alike, regardless of whether they will be forced by foreclosure to live on the street or to simply lose a property bought for pure speculation”).



varying ways raised similar themes in recent work.<sup>91</sup> Bright explores whether, in the context of dispossession cases, lawmakers might consider “the importance of *this* home to *this* person.”<sup>92</sup> Dyal-Chand advocates tying legal claims to an “individualized portrait of the parties pursuing those claims” to expose and protect “subaltern voices.”<sup>93</sup> O’Mahony supports the perspective that law must always have subjects and that those subjects should not be de-personalized to the point where they are concealed beneath a façade of apoliticism.<sup>94</sup> Singer, in the course of contemplating the contours of a “free and democratic society that treats each person with equal concern and respect,” renews his call for consideration of social power dynamics in assessing reliance interests.<sup>95</sup> And van der Walt asserts:

[W]e tend to forget that individuals and communities find themselves in the margins of the property regime and of society for a variety of reasons—some because they are indeed socially weak . . . ; some because they have been deliberately marginalized by society through unjust social, economic or political processes . . . ; others because of natural or economic disaster [and] still others by choice . . . . In a free and open democratic society that values plurality and difference, the impact and meaning of the property regime on each of these groups should be considered when we ask whether the property regime is just and whether it needs to be changed or transformed.<sup>96</sup>

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91. Hanoch Dagan could very well be included on this list, though his approach is more cautious than that of those scholars listed in the text. Dagan has suggested a method of using the diminution-in-value test in regulatory takings law as a “proxy” for identity considerations, or what he calls “an overt (and problematic) consideration of the socioeconomic status of the affected landowner.” See Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 746, 782–83, 798 (1999). Dagan does not explain why this indirect, proxy approach is preferred to an overt approach, other than to suggest that it will be more palatable overall because some people either may not know that identity is being considered or otherwise may be able to pretend that it is not. *Id.* at 782 (“Frequently, when we feel uneasy about the types of factors that decision-makers take into account in their decisions, we use proxies.”).
  92. Susan Bright, *Dispossession for Arrears: The Weights of Home in English Law*, in *THE IDEA OF HOME IN LAW: DISPLACEMENT AND DISPOSSESSION* 13, 13 (Lorna Fox O’Mahony & James A. Sweeney eds., 2011).
  93. Rashmi Dyal-Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683, 1742–45 (2014).
  94. See generally Lorna Fox O’Mahony, *Property Outsiders and the Hidden Politics of Doctrinalism*, 67 CURRENT LEGAL PROBS. 409 (2014).
  95. See Joseph W. Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1301–03 (2014); Joseph W. Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141, 142 (2012); see also Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) [hereinafter Singer, *Reliance Interest*].
  96. ANDRE VAN DER WALT, *PROPERTY IN THE MARGINS* 233 (2009); see also Andre van der Walt, *The Modest Systemic Status of Property Rights*, 1 J.L. PROP. & SOC’Y 15, 92 (2014) (suggesting that life, dignity, and equality rights are systematically prioritized over property rights, and other non-property rights often are deemed at least presumptively superior to property rights).

Inspired by this work, I outlined in a recent essay my preliminary thoughts on the idea that some ownership interests may enjoy more protection than others due to the identities of those persons implicated by a given declaration of a property right.<sup>97</sup> I will reserve a full-throated defense of the identity thesis for future work, as my claim in this section is only that, *to the extent progressive property scholars see some form of identity considerations as important*, such considerations may fall by the wayside if legislative exactions are subject to a lower level of judicial scrutiny than administrative exactions in takings cases. Still, I will dedicate a modest amount of space in the first section below to sketch some of the basic parameters and criticisms of identity considerations to illustrate, as set out in the second section, that proponents of progressive conceptions of property may need to sacrifice something of value if they choose to advocate for the legislative-administrative distinction in exaction takings law.

### 1. Considering Identity

The idea that lawmakers should be attentive to implicated parties' stories when fashioning property standards and resolving property disputes does not simply suggest that, after considering wealth effects, the party assigning greater economic value to some land or personal item should prevail.<sup>98</sup> Rather, it suggests considering individual human stories in their full complexity, concentrating, for instance, not only on individuals' present status, established property holdings, and current wealth, but also on (i) individuals' and communities' personal, social, political, and economic identities that have impacted their life courses and relations to property law to date, and (ii) the overall effects of continuing to recognize those property holdings presently in place. Undertaking this course departs from the premise that property is, at least principally, a story about owners, and that acts of owners on behalf of vulnerable populations thus result only outside of property law and at some later point in time via the owners' acting out of altruism, mercy, or guilt.<sup>99</sup> Instead, this course starts from the premise that ownership can be morally justified only if it offers widespread benefits to owners *and* non-owners.<sup>100</sup> That is, ownership and non-ownership should orbit around identity, not the other way around.

97. Mulvaney, *supra* note 11. The next several paragraphs draw heavily from this recent work.

98. *Id.* at 367.

99. See JOSEPH W. SINGER, THE EDGES OF THE FIELD 47 (2001) ("The obligation to care for those in need is not a matter of charity. It is not a matter of generosity alone or pity or selflessness. . . . The duty to provide support for those in need is a matter of justice, not a matter of choice."); Gregory Alexander, *Socio-Economic Rights in American Perspective: The Tradition of Anti-Paternalism in American Constitutional Thought*, in THEORIES OF SOCIAL AND ECONOMIC JUSTICE 6, 18–25 (Andre van der Walt ed., 2005); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1502–09 (1991); Joseph W. Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 314 (2006) [hereinafter Singer, *After the Flood*] ("[W]e must avoid cruelty to those who are in dire straits by withholding necessities, making them feel guilty or humiliated by the need to rely on others.").

100. See JOSEPH W. SINGER, ENTITLEMENT 209 (2000) ("Because each individual is of infinite worth and deserving of respect and common decency, entitlements can only be justified to

On a very general level, the notion of explicitly considering identity in real property law admittedly may, at least initially, cause one to shudder, for it can clash with the common perception that property promotes the singular values of economic productivity, security, and stability.<sup>101</sup> This common perception about the personal and social-economic importance of ownership regularly translates into a presumptive power on behalf of individual owners, whose rights, on this view, are ordinarily immune from competitive interference by non-owners.<sup>102</sup>

However, lawmakers can define ownership in many ways,<sup>103</sup> and fashioning rules or standards on the meaning of ownership therefore inevitably requires lawmakers to make value choices. The common perception that property is necessary and justified because it serves the values of productivity, security, and stability, while holding powerful rhetorical force, is inaccurate. This perception fails to acknowledge that ownership is regularly subject to qualifications and deviations in service of both other people and other values, such as those related to human dignity, social obligations, democratic governance, community relationships, and biodiversity.<sup>104</sup> The current set of property rules resulted from value choices; therefore, continuing open conversations about the reasons for preferring one set of rules or standards over the alternatives are paramount.<sup>105</sup> Given that there are almost always interests on the side of the claimant owner and on the side of everyone else (including other owners and non-owners) when considering the meaning of ownership,<sup>106</sup> the unavoidable task for

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the extent they are compatible with the legitimate interests of others.”); Jeremy Waldron, *Property, Justification and Need*, 6 CAN. J.L. & JURIS. 185, 195–96 (1993) (explaining that an individual’s ownership rights impose duties on all others not to interfere with those rights without that individual’s permission, such that to believe that a certain right is “a good sort of right to recognize in our society” is to believe that the correlative duty “is a good sort of duty to impose”). On the propriety of widespread ownership, see Frank I. Michelman, *Liber- ties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 99–101 (1992); Joseph W. Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURIS. 217, 241–43 (1993). On the many ways that private ownership both can benefit and disadvantage non-owners, see Eric T. Freyfogle, *Private Ownership and Human Flourishing: An Exploratory Overview*, 24 STELLENBOSCH L. REV. 430, 435–40 (2013) (explaining, for example, that “[p]roperty’s ability to encourage economic activity” can promote human flourishing for tenants and employees, but, in a world of scarcity, owners also can extract the benefits of land by charging non-owners exorbitant sums to use the land or paying them minimal wages to work the land).

101. Proponents of progressive conceptions of property have offered a variety of labels for this conventional perception of property. See, e.g., SINGER, *supra* note 100, at 3–5 (“ownership model”); LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY* 38–42 (2003) (“common conception”); VAN DER WALT, *supra* note 96, at 27–41 (“rights paradigm”).
102. See SINGER, *supra* note 100, at 6 (“If property means ownership, and if ownership means power without obligation, then we have created a framework for thinking about property that privileges a certain form of life—the life of the owner.”).
103. See, e.g., Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 102 (2010); Singer & Beermann, *supra* note 100, at 228–30.
104. See SINGER, *supra* note 100, at 3; Alexander, *supra* note 99, at 7–8; Freyfogle, *supra* note 100, at 430.
105. See Mulvaney, *supra* note 11, at 359.
106. See, e.g., C.B. MACPHERSON, *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 201 (1978) (juxtaposing the “individual right to exclude” with the “individual right to equal ac-

lawmakers is to decide which actions to safeguard and which actions to restrain.<sup>107</sup>

On this latter, more progressive view, there seemingly is space for explicit identity considerations in property discussions. This claim is not meant to suggest that property law is the primary catalyst for promoting justice; at the same time, it does not see property law's place as insignificant.<sup>108</sup> Indeed, human need *already* is a factor in many areas of property law. Rent-control measures triggered by an individual's extreme hardship are one obvious illustration, though a variety of property-related means-tested programs—such as welfare, social security, disability benefits, health care, progressive income taxes, and myriad subsidies—fit the description as well.<sup>109</sup> While these examples might be construed as distributing the responsibility for attending to such hardships quite broadly (as occurs with legislative exactions), there also are at least select examples of hardship-focused protections that result in more individualized impositions of responsibility (as occurs with administrative exactions).

For a more specific illustration, one might consider what recently transpired in a lawsuit involving a homeless encampment in the town of Lakewood, New Jersey. At its peak population, nearly 150 people resided in tents, under tarps, and beneath makeshift structures on two acres of municipally owned woodlands.<sup>110</sup> Under the common conception of property outlined above, Lakewood's "Tent City" offers a remarkably simple case: the town holds an ownership right and the residents do not. Therefore, the town is entitled to a speedy eviction of these trespassing residents at the time of its choosing. And yet the state trial court judge charged with evaluating the town's motion for summary eviction saw the matter differently.

The Honorable Joseph Foster proved sympathetic to claims such as those from a resident who allegedly had slept on a train-station bench for more than eleven years before joining Tent City, and argued that "there's just no other

cess"); Singer, *After the Flood*, *supra* note 99, at 258 ("[R]egulations are generally designed to limit one person's freedom to protect another's freedom. In such cases, the question is not whether government should intervene but on whose behalf it should do so."). Non-property rights, such as free speech, are not rivalrous in this sense. See Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1039 (1996).

107. See Mulvaney, *supra* note 11, at 360–61.

108. See *id.* at 358 n.38; Andre van der Walt, *Property, Social Justice and Citizenship: Property Law in Post-Apartheid South Africa*, 19 STELLENBOSCH L. REV. 325, 344 (2008) (expressing hope "that property, among other institutions and practices, can foster democratic forms of governance, advance social justice, promote citizenship, build sustainable and supportive communities, and enhance stewardship of the global environment and its natural resources"). For the contrary perspective that, to the extent property rights produce inequality society finds unacceptable, such issues should be addressed solely through tax and transfer policies, see, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994). Responding directly to Kaplow and Shavell, Singer notes that "[a] property system that denies some people the chance to participate in the national economy, except as recipients of public charity, strips them of basic human dignity." SINGER, *supra* note 100, at 163.

109. See Underkuffler, *Politics of Need*, *supra* note 88, at 369–70.

110. See Narmeen Choudhury, *Officials Dismantle NJ "Tent City"*, PIX11 (July 1, 2014), <http://perma.cc/D57K-DTQE>; Kevin Pentón, *Tent City in Lakewood to Close*, DAILY REC. (May 29, 2014), <http://perma.cc/R5T9-6A5F>.

place to go right now.”<sup>111</sup> Judge Foster pointed to resident certifications that alleged the town not only acquiesced in the occupation of the land, but actively encouraged continued occupation; indeed, some of these certifications suggested that township police drove individuals to Tent City when they had no other place to put them<sup>112</sup> and the individuals had no options of their own.<sup>113</sup> He denied the town’s motion seeking immediate ejection “given this history” of the town’s failure to attend sufficiently to providing shelter to all individuals within its borders and in light of the fact that “one could easily conclude that people have changed their life circumstances in reliance upon the position taken by the township.”<sup>114</sup> In so doing, Judge Foster noted that in these types of situations “there is a governmental *responsibility* . . . to provide for the poor” that cannot summarily be disregarded when determining the meaning of ownership.<sup>115</sup>

The suggestion that identity should be included in discussions on the crafting of property standards and in attempting to resolve property disputes like that at issue in Lakewood is not meant to negate wholesale the stabilizing influence of secure property rights. Indeed, the approach discussed here con-

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111. *Judge Rules in Favor of Lakewood Tent City*, CBS N.Y. (Jan. 6, 2012), <http://perma.cc/JW2D-U32K>.

112. Transcript of Motion for Summary Judgment at 10–11, *Lakewood Township v. Brigham*, No. L-2462-10 (N.J. Super. Ct. Law Div. Jan. 6, 2012), <https://perma.cc/V3SX-NV5Z>. This claim by select Tent City residents bears the markings of Bruce Ackerman’s support for approaches that take the specific nature of the owner–occupant relationship into account. See Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093, 1173 (1971) (“[O]ne may affirmatively argue that in a society in which wealth is unjustly distributed it is fair to impose a requirement of decency upon those in the relatively privileged classes who engage in long-lasting relationships with the impoverished.”). More recently, Jedediah Purdy has advanced a similar idea in contending that property law includes “terms of recruitment,” or qualitative, democratic conditions on which people enter into long-term, collaborative relationships with others. See Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom–Promoting Approach to Property*, 56 *DUKE L.J.* 1047, 1094–98 (2007).

113. See Transcript of Motion for Summary Judgment, *supra* note 112 at 13. At oral argument on the motion of summary judgment, counsel for the residents of Tent City, in requesting delay of the ejection action until the city provided emergency shelter, plainly asserted, “We’re not fighting for the right to stay indefinitely in the woods. None of my clients want to live in the woods in the winter.” *Id.*

114. *Id.* at 11. Lorna Fox O’Mahony has suggested that creditors bear a similar delay in enforcement of their right to eviction to satisfy debts in light of the home interests of occupiers. LORNA FOX, *CONCEPTUALISING HOME: THEORIES, LAW, AND POLICIES* 79–96 (2006).

115. See Transcript of Motion for Summary Judgment, *supra* note 112, at 19 (emphasis added). Judge Foster’s opinion, steeped as it is in language of history, circumstance, and responsibility, is reminiscent of (if more broad-ranging than) the 1992 federal court decision in *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992). The *Pottinger* court found that the City of Miami could not arrest homeless people for “harmless, life-sustaining conduct,” *id.* at 1561, defined in the subsequent consent decree to include “[p]ublic nudity where necessary to carry on the daily necessities of life, such as bathing or responding to a call of nature,” Settlement Agreement at 9, *Pottinger v. City of Miami*, No. 88-2406 (S.D. Fla. Feb. 27, 1998), <https://perma.cc/9GPS-7YU8>. The decision did not impede continued enforcement of the city’s prohibition on public urination against members of less vulnerable populations. See, e.g., *Former Dolphin Tyrrell Johnson Arrested for Peeing in Public on Miami Beach*, *MIAMI NEW TIMES* (Sept. 23, 2013), <http://perma.cc/S8RF-BHJ3> (describing the arrest of a former professional football player on charges of urinating in public).

cedes that security in certain instances can afford important societal advantages.<sup>116</sup> But if a democratic society thinks that security, stability, and economic productivity are good things, one would think that it believes they are good things for all people, not just the privileged propertied class.<sup>117</sup> In this sense, perhaps a progressive conception of property is best thought of as reflecting not only a commitment to plural values but to testing those values with the identity of property's subjects in mind. Supporting identity considerations calls for dissolution of the baseline that private property exists principally to advantage owners and create market gains, in favor of a system of property that regularly realigns so that it remains justified in terms of the ways in which it offers widespread benefits to owners and non-owners, in both present and future generations.<sup>118</sup>

Some may counter that taking identity into account when fashioning property standards and resolving property disputes represents a disregard for uniform application of law that can have a corrosive effect on citizens' respect for and willingness to follow law. Yet, as noted above, human need and human stories already have been considered in some instances in the past, and there is little evidence that such incidents have generated disrespect for the idea of property more generally.<sup>119</sup> Supporting identity considerations does not automatically call for a wholesale redistribution of property and wealth to the point of grave risk of systemic instability, but rather only for a context-driven and non-destructive balance between the forces of stability and justice-inspired change.<sup>120</sup>

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116. Some scholars point out that existing uses need far more protection than prospective, anticipated uses, the latter of which do not generate the same widespread economic benefits as the former. *See, e.g., Freyfogle, supra* note 100, at 444.
117. *Cf. Gregory S. Alexander, Constitutionalising Property: Two Experiences, Two Dilemmas, in PROPERTY AND THE CONSTITUTION* 88, 89–90 (Janet McLean ed., 1999).
118. On this theme, *see, e.g., Robert W. Gordon, Paradoxical Property, in EARLY MODERN CONCEPTIONS OF PROPERTY* 95, 95, 102 (John Brewer & Susan Staves eds., 1995) (defining a perception of property as individual absolute dominion as allowing “a single owner[ ] the rights to enjoy and exploit the owned resources without restriction” and suggesting that “[t]o endow someone with a full private-property right does not increase the sum of security in the world [but rather] merely redistributes uncertainty away from the owner to those who will be subject to his rights’ exercise”); Mulvaney, *supra* note 11, at 368; Singer, *Reliance Interest, supra* note 95, at 657; Singer, *After the Flood, supra* note 99, at 289 (“[T]he most basic foundational insight of moral theory [is] the idea that we must give reasons for our actions that affect other people.”).
119. Underkuffler, *Politics of Need, supra* note 88, at 372–73 (“The idea of property as individual protection . . . has survived circumstances far more extreme and far more challenging than the simple, occasional recognition by government of its need-based contingency.”).
120. Van der Walt makes such a claim in the context of South Africa’s continued attempts to distance itself from the vestiges of apartheid. *See VAN DER WALT, supra* note 96, at 7–9 (“The idea of transformative constitutionalism does not guarantee certainty or closure on questions about social, economic, and political reform but, at most, can assist in opening the debates about them up for further critical analysis and discussion.”). If identity considerations *do* generate disrespect for the idea of property more generally, that does not necessarily mean they should be disregarded in any event; perhaps, instead, the property regime itself is in need of a more fundamental alteration.

Admittedly, explicit considerations of identity are, to date, few and far between in American property law.<sup>121</sup> Moreover, when such considerations are evident, they have tended to revolve around squatting, adverse possession, and tenant-landlord disputes, such that particularly deep challenges remain in terms of incorporating these considerations into broader areas of property, such as the more traditional aspects of land use law. However, that they exist at all leaves room for continuing conversations about their relevance and application. And, to circle back directly to the original issue at hand here, while legislative exactions highlight broad, structural aspects of a given harm associated with development, only administrative exactions allow space to attend to the affected parties' stories.<sup>122</sup> The next section explores how identity considerations might manifest themselves in administrative exactions under the shadow of *Nollan/Dolan* and takings principles more generally.

## 2. Identity and Administrative Exactions

The Supreme Court famously noted in *Armstrong v. United States*<sup>123</sup> that the Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>124</sup> The indefinite nature of this statement has led scholars from across the spectrum of philosophical perspectives to cite it favorably.<sup>125</sup> Yet—and this is where proponents of the statement diverge—interpreting *Armstrong*'s message requires an understanding of just which owners should be deemed similarly situated and thereby capable of being unfairly singled out for a burden they should not bear “alone.”<sup>126</sup> On this score, according to Eric Freyfogle, “[a] lawmaking community can properly subject individual owners to disparate treatment only when there exist, between or among them, differences

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121. Lorna Fox O'Mahony suggests the same is often the case in English property law. See Lorna Fox O'Mahony, *Property Outsiders and the Hidden Politics of Doctrinalism*, 67 CURRENT LEGAL PROBS. 409, 418–28 (2014).

122. Of course, administrative exactions are just one of many administrative mechanisms by which identity can be taken into account.

123. 364 U.S. 40 (1960).

124. *Id.* at 49.

125. See, e.g., WILLIAM A. FISCHER, REGULATORY TAKINGS 141–42 (1995); Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and the Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 646–51 (2007); Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 TOURO L. REV. 265, 280 (2014); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 300–03 (1992); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1338 (1991); Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 64–65 (1964). See generally Dagan, *supra* note 91; Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

126. See Thomas Merrill, *Essay on Takings: Private Property and the Power of Eminent Domain*, by Richard Epstein, 80 NW. U. L. REV. 1561, 1580 (“We are told that the law must treat all similarly situated persons alike. But what does it mean to be ‘similarly situated?’”).

that the community deems meaningful.”<sup>127</sup> Freyfogle goes on to suggest that unacceptable disparate treatment “can arise when a law or act imposes *peculiar* requirements on a landowner, as well as when a law, uniform on its face, works an *unusual burden because of a landowner’s differing circumstances*.”<sup>128</sup>

By extension, then, it seems worth considering the possibility that “similarly situated” comparisons are contingent on what the community decides are the relevant variables for determining which persons or groups traditionally have been pushed to the periphery of ownership. In this way, evolving community understandings of marginalization are themselves an account for identity. Specifically in the exactions context, this could mean that attaching an exaction to a marginalized applicant’s permit which would be a “usual” exaction to non-marginalized applicants would work an “unusual burden” on that applicant because of her marginality, and that therefore a less demanding exaction should be applied. But it also could mean that imposing an exaction that is *more demanding* than what would be a “usual” exaction to a non-marginal applicant is appropriate when that would work an unusual burden on impacted third parties because of those third parties’ marginality.

For a simple illustration, imagine that developers Andrew and Barry buy vacant lots in similarly valued neighborhoods in the same town on the same date with the intent to build the same model condominiums. The developers’ situations are identical except for the fact that the impacts of the air pollution stemming from Andrew’s project are anticipated to fall on traditionally marginalized persons, while the impacts of the air pollution stemming from Barry’s project are anticipated to fall on those who are economically and politically well heeled.<sup>129</sup> The idea proffered in this section is that perhaps the town might be justified in attaching more demanding exactions—say, in the form of more stringent emissions limitations—to Andrew’s permit than Barry’s permit due to the reality that the specific people affected by Andrew’s development find themselves on society’s margins. Even though the substance of the impacts felt by the people affected by Andrew’s development are the same as the effects felt by the people affected by Barry’s development, the people affected by Andrew’s development sustain a sharper blow from unchecked emissions; for instance, it is more difficult for them, given their circumstances, to move away from or purchase equipment to counteract the detrimental effects of the pollution. In other words, in light of the marginal nature of the people affected by

127. Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 ENVTL. L. REP. 10313, 10314–15 (2001) [hereinafter Freyfogle, *Methodically*] (emphasis added); see also Eric T. Freyfogle, *The Owning and Takings of Sensitive Lands*, 43 UCLA L. REV. 77, 120 (1995) (asserting that courts “must at all times keep one eye on the community and its evolving norms and expectations, and mix the values they find there with the heritage and language of the law”); T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1715 (1988) (suggesting that justice could be “not absolute, but relative to the group that reaches a consensus and to the presuppositions of their discourse”).

128. See Freyfogle, *Methodically*, *supra* note 127, at 10316 (emphasis added).

129. The impacts of air pollution can fall on residents in the source’s vicinity or on residents in downwind areas significantly far afield. Therefore, the hypothetical does not raise the possibility that a city may be inclined to impose minimal exactions on developers willing to invest in traditionally marginalized neighborhoods.



their respective development proposals, Andrew and Barry are not similarly situated. Therefore, the burden imposed on Andrew might not single Andrew out for mistreatment but rather be deemed a sensible duty of citizenship.

It would be difficult to reach a similar result through rigid application of an inelastic legislative exaction formula for at least two reasons.<sup>130</sup> First, policies adopted via legislation cannot be applied retroactively. Therefore, a legislation-only approach could result in the excessive tailoring of activities that produce a harm that to some degree can be forecasted, while the infinite harms of specific development projects that are less predictable go completely unaddressed. Thoughtfully constructed individualized requirements are more cautious in this sense, and such nimble mechanisms seem preferable to homogenous dictates in at least some circumstances.

Second, a legislative exaction formula might be able to determine a point of departure for emissions limitations, but the need to increase (or decrease) the stringency of those limitations in individual situations can be addressed only through administrative judgment exercised under a context-based standard that allows for an accounting of the affected parties' circumstances.<sup>131</sup> The modern movement from strict "Euclidean zoning" to flexible land use regulation that leaves room for negotiated solutions is instructive on this point. Rigidly applying uniform rules risks failing to recognize important differences between what, on a cursory glance, may appear to be similarly situated parcels, when in actuality land is part of a much more complex ecological fabric than the lines of any subdivision map can suggest.<sup>132</sup> Rigid application of uniform rules likewise risks failing to recognize important differences between what, on a cursory glance, may appear to be similarly situated people. Case-by-case determinations allow room to address the fact that development on particular lots will create in particular ways quite diverse harms that a one-size-fits-all menu of exactions may

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130. It is true that, in some instances, the government could via legislation fairly accurately specify in advance one-size-fits-all monetary, dedication, or conservation requirements for permit applicants. Select development impacts today, including traffic impacts, are conducive in some ways to these planning-based, broadly applicable exaction formulas. *See, e.g., Fenster, Constitutional Shadow, supra* note 1, at 767; Fenster, *Takings Formalism, supra* note 8, at 673. Still, say, in the wetlands context (much like the air pollution context presented in the hypothetical offered in the text), formulas cannot be too specific in light of the multitude of variables associated with lost and created/restored wetland functionality that must be considered in evaluating the adequacy of wetlands mitigation. *See Johnson, supra* note 30, at 720 n.173; Jonathan Douglas Witten, *Carrying Capacity and the Comprehensive Plan: Establishing and Defending Limits to Growth*, 28 B.C. ENVTL. AFF. L. REV. 583, 604–05 (2001).

131. Among the wealth of scholarship addressing the larger general question of differentiating—and the difficulty of differentiating—between “rules” and “standards” in property law. *See generally* Amnon Lehari, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L.J. 81 (2010); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285 (2008); Joseph W. Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

132. *See, e.g., Ball & Reynolds, supra* note 75, at 468; David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1301 (1997); Mulvaney, *supra* note 11, at 364; Serkin, *supra* note 80, at 1682–83; Singer, *supra* note 131, at 1407–09.

be ill fit to counter.<sup>133</sup> And in terms of subjecting the exaction in this illustration to the specific *Nollan* and *Dolan* nexus and proportionality requirements, there is little concern: the emissions limitations imposed on Andrew bear an obvious nexus to his proposed development's emissions and the weight of those limitations are proportionate, in a holistic sense, to the impact the project imposes on third parties.<sup>134</sup>

Though the above illustration involving Andrew and Barry touts the identity-related advantages of administrative exactions, it is not offered as part of a call for mass exercise of administrative powers over legislative ones in the exactions context. Administrative concern for marginalized persons expressed through imposing a more demanding exaction on the likes of Andrew than on the likes of Barry cannot serve as a substitute for broader responses by lawmakers to contemporary environmental and economic challenges. Moreover, it is of course the case that administrative exactions, if employed haphazardly, can result in extortion<sup>135</sup> or, on the flip side, encourage weak and even corrupt bargains that allow developers to reap the benefits of their projects while passing their burdens on to the surrounding community.<sup>136</sup> More moderately, this section suggests that perhaps administrative exactions should remain a tool in regulators' toolbox, to be employed transparently and only in suitable circumstances. And it would seem that permitting entities generally stand in the best position to situationally choose the appropriate policy instrument or decisionmaking process to implement in response to a given or forecasted problem or harm. Recognizing the legislative-administrative distinction in the exaction-takings context could foreclose the likelihood that the state will choose

133. See, e.g., Edward J. Sullivan, *Dolan and Municipal Risk Assessment*, 12 J. ENVTL. L. & LITIG. 1, 30 (1997) (“[Exaction] formula[s] should have some flexibility of application, so that if there are particular instances of inequitable application, an administrative process is available to smooth out the roughness of proportionality.”). Of course, there are disadvantages to administrative solutions, as well. See, e.g., Alejandro Esteban Camacho, *Mastering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions* (pt. 1), 24 STAN. ENVTL. L.J. 3, 35–65 (2005) (asserting that, among other flaws in land-use-regulation models that rely heavily on administratively negotiated agreements with developers, public participation is limited, decisions are made ad hoc, and negotiators are not effectively held accountable “to those most impacted by the land use decision”). The point I seek to make in this paper is not to call for mass case-by-case administration over legislation in the exactions context, but rather to generate discussion on the benefits of an approach that allows government officials the ability to choose between these two policy instruments. On the advantages of imposing exactions via legislation, see, e.g., Fenster, *Takings Formalism*, *supra* note 8, at 646–47.

134. *Nollan* and *Dolan* do not explicitly require that similarly situated permittees be treated the same, only that the nexus and proportionality strictures are followed in each case. *But see* Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 433, 457–60 (2015) (critiquing the federal government for attaching conditions to AIG's bailout loan that were more stringent than those attached to bailout loans extended to other entities).

135. Extortion conceivably could be intentional or subconscious. See Jeffrey Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 542–43 (2005) (suggesting that considering the details of a human story can lead to misleading judgments or misplaced emotional responses).

136. See, e.g., Dana, *supra* note 132, at 1261 n.92 (“Formulaic statutes . . . may help prevent undesirable discrimination by local regulators in favor of politically well-connected developers and against other developers.”).

administrative exactions over legislative ones, even when doing so would better promote a progressive conception of property's normative aim of affording widespread collective benefits.

*C. Summary: The Legislative-Administrative Distinction in the Second Order*

While I noted in Part I that there are credible first-order reasons for progressive property scholars to support the legislative-administrative distinction in the exaction-takings context, I have raised concern in this Part that broad adoption of the distinction could promote secondary effects that actually impede movement toward accomplishing the goals of a progressive understanding of property. First, in a functional sense, I have asserted that recognizing the legislative-administrative distinction in exactions law threatens to uproot some of the more progressive characteristics of takings jurisprudence, for it could have spillover effects into the many eminent domain and regulatory takings situations that involve administrative acts unrelated to exactions. Second—and more controversially, given its broader theoretical implications—I have contended that formal judicial recognition of the legislative-administrative distinction could prompt governmental entities to shy away from administrative exactions in favor of broad, unbending legislative measures in an effort to avoid the heightened scrutiny of *Nollan* and *Dolan*. The possible consequences of such a shift in land use policy are significant, given that administrative exactions can present an opportunity to more thoroughly consider the human identities of all parties affected, in very numerous and diverse ways, by new development.

#### CONCLUSION

Scholarly debate continues on the question of whether the heightened scrutiny of the Supreme Court's decisions in *Nollan* and *Dolan* should be applicable in takings cases involving exactions that result from generally applicable legislation. Proponents of progressive conceptions of property have strong first-order reasons to support immunizing legislative exactions from such heightened scrutiny, reasons that are grounded in the checks and balances of democratic government, the likelihood of reciprocal advantages stemming from legislation, and an aversion to judicial usurpation of the legislative process. However, this Article raises the possibility that distinguishing between legislative and administrative exactions could produce two secondary effects that ultimately prove detrimental to progressive property's aims.

First, pressing the idea that administrative exactions are significantly more likely to abuse property owners than legislative exactions necessarily risks marginalizing case-by-case administration across the board, which could lead courts to incorporate the heightened scrutiny of *Nollan* and *Dolan* in takings cases involving administrative acts unrelated to exactions. Second, formally recognizing the legislative-administrative distinction could prompt governmental entities to shy away from administrative actions in favor of broad, unbending

legislative measures to avoid heightened scrutiny, and deserting case-by-case administration can come with weighty social costs, given that it is administration that at least in certain instances can better respond to varied and unpredictable development impacts and invariably focuses attention on the affected parties' human stories.

It follows that both remaining options in the wake of *Nollan*, *Dolan*, and *Koontz*—subjecting legislative exactions to either a deferential level of takings scrutiny or the heightened standard to which administrative exactions currently are subject—pose significant complications for proponents of progressive conceptions of property. In the end, then, perhaps progressive property scholars might concentrate more readily on evaluating and advocating for other potential boundary principles in exaction-takings law,<sup>137</sup> or, even more dramatically, reinvigorate the long dormant and admittedly uphill battle to reverse *Nollan* and *Dolan* in their entirety.<sup>138</sup>

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137. The potential alternative boundary principles in exaction-takings law are extensive. See, e.g., Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 131 (2001) (exactions imposed in built-out communities versus those imposed in communities with large amounts of developable land); *id.* (exactions imposed in communities with "unique amenities, such as beach towns" versus those imposed in run-of-the-mill towns); Greene, *supra* note 43, at \*17–18 (land-use exactions versus non-land-use exactions); Pidot, *supra* note 37, at 137 (on-site exactions versus off-site exactions); *id.* at 152–63 (exactions amounting to fees versus exactions more akin to expenditures); Recent Case, *Home Builders Ass'n of Northern California v. City of Napa*, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001), 115 HARV. L. REV. 2058, 2062–63 (2002) (exactions constituting takings-on-their-own versus those that do not).

138. Laura Underkuffler offered some compelling, wide-ranging remarks in this regard in her keynote address at the Association for Law, Property and Society Annual Conference in May of 2015. See Underkuffler, *supra* note 15 (written presentation of remarks).