Legislative Exactions and Progressive Property (forthcoming)

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LEGISLATIVE EXACTIONS AND PROGRESSIVE PROPERTY

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I. INTRODUCTION

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.\(^1\) 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*

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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;\(^2\) 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.

\(^2\) 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 a decision on an individual permit application as legislative was “astonishing” and “wholly unconvincing,” and “takes 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 quotations omitted) (quoting Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 266 (2000))).
The Fifth Amendment’s Takings Clause provides that “private property [shall not] be taken for public use, without just compensation.” 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. 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.

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 and Dolan v. City of Tigard that the government, as the defendant, 

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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).


shoulders the burden of proving that administrative exactions bear an “essential nexus” to and are in “rough proportionality” with the proposed development’s impacts to avoid having to pay takings compensation. These decisions have been described as imposing a form of heightened scrutiny. Their tests shift the burden of

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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 Cal. 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
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. John’s River Water Management District*—which of the other two approaches to judicial review takings law will adopt.

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

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

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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, Eduardo M. Peñalver, Joseph W. Singer, and Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009). However, as I have said elsewhere, it seems most 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. CIR. 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, Hanooh Dagan, Benjamin Davy, Jennifer Nedelsky, Lorna Fox O’Mahony, Richard Shay, and Andre van der Walt.
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 II 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 non-delegation 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”\textsuperscript{12} under the traditional regulatory takings framework first discussed in the Supreme Court’s 1978 decision in \textit{Penn Central}.

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. 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. In this sense, cabining the

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 ENVIRONS ENVTL. L. & POL’Y J. 189, 226 (2010).

15 See, e.g., Starr International 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
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 III, 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 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.
spillover effects into the many eminent domain and regulatory takings situations that involve administrative acts unrelated to exactions.

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.

Part IV concludes 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.

II. 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, procedural due process,

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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
and the non-delegation doctrine. While the justifications advanced 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 sufficiently broad such 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.” *Id.* 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. 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 County*, 338 F.3d 1288, 1293 (11th Cir. 2003).

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).
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. 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

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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).
privately owned land to build forts), the Clause has come to constrain regulations 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. 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. 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

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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).

21 As noted above, the framework for such an analysis was first discussed in Penn Central Transp. 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 . . . .”).

alleviate the stated development impact.\textsuperscript{23} According to the \textit{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.\textsuperscript{24}

\textit{Dolan}, handed down seven years later, involved a landowner’s desire to expand an existing hardware store and pave a gravel parking lot.\textsuperscript{25} The town alleged that this development’s expanded footprint would increase traffic congestion in the area and lead to flooding problems.\textsuperscript{26} 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 \textit{Dolan} Court declared that, in addition to proving the “nexus” called for in \textit{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.\textsuperscript{27}

\textsuperscript{23} \textit{Id.} at 841–42.

\textsuperscript{24} \textit{Id.} at 837.


\textsuperscript{26} \textit{Id.} at 381–82.

\textsuperscript{27} \textit{Id.} at 391 (finding that “the city must make some sort of individualized determination” regarding the quantitative nature of the condition).
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.\textsuperscript{28} Again, though, where one might draw these lines is less important for purposes of this Article than one’s acknowledgement that, in most jurisdictions, 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 \textit{Nollan} and \textit{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

\textsuperscript{28} For a recent decision assessing whether certain municipal inclusionary housing requirements are exactions or non-exactions, see generally \textit{Cal Building Industry Association v. City of San Jose} (\textit{CBIA}), 61 Cal. 4th 435 (2015). In \textit{CBIA}, 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, for exactions are limited to development conditions that intend specifically and exclusively to mitigate development impacts. \textit{See id.} at 473-74.
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.\textsuperscript{29} Doctrinal tea

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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. 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 (U.S. 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 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
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,30 while others counter that the takings disputes in those cases involved individual judgments about the applicability of those policies to 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.

particular parcels.\textsuperscript{31} Second, some assert that the Court’s repeated reference to \textit{Nollan} and \textit{Dolan} scrutiny as applying to “adjudicative decisions”\textsuperscript{32} distinguishes not between different types of exactions but only between large-scale regulatory mechanisms, like zoning, and smaller-scale regulatory mechanisms, like exactions,\textsuperscript{33} though others interpret these references as insinuating that such

\textsuperscript{31} The City of San Jose and a group of interveners recently set out this position in \textit{CBIA}. \textit{See} City of San Jose’s Answer Brief on the Merits at 46–48, \textit{CBIA}, 61 Cal.4th 435; Affordable Housing Network of Santa Clara County, et al.,’s Answer Brief on the Merits at 38, \textit{CBIA}, 61 Cal.4th 435.

\textsuperscript{32} \textit{See} Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 544 (2005) (“Both \textit{Nollan} and \textit{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) (“\textit{[H]ere the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel}”). \textit{See also} City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) (Kennedy, J., plurality) (“\textit{[W]e have not extended the rough-proportionality test of \textit{Dolan} beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use}.”).

scrutiny is not relevant in takings suits involving exactions that are part of a communitywide plan and broadly applicable. Third, some scholars point to the Supreme Court’s unconstitutional conditions doctrine jurisprudence as supportive of applying Nollan and Dolan scrutiny to legislative exactions, while others contend 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.


35 See Burling, 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

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that the unconstitutional conditions doctrine either is more appropriately applied in non-property contexts (such as free speech cases) or “lacks a consistent animating

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.

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.
theory” altogether.\textsuperscript{37} In the end, 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, such that the Court’s decision-making 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. 38 Many others, though, conceive of takings

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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 Association 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
protections, at least in part, in process terms.\textsuperscript{39} And in a decision that has been labeled the “polestar” of its regulatory takings jurisprudence,\textsuperscript{40} the Supreme Court offered some support for this position by asserting that the economic impact is but one factor in determining takings liability.\textsuperscript{41}

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.\textsuperscript{42} In the words of one jurist, “A public agency can just as easily extort


\textsuperscript{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,
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.”

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.

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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, 39 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.”).

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. 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.” But suspicions can arise where discussions surrounding the parameters of individual permits are conducted behind closed doors and anchored by relatively lower-level permitting officials.

On this view, the risk of coercive government action—or, as one court put it, “distributive injustice in the allocation of civic costs”—simply is greater in the administrative context than in the legislative context. “Judicial scrutiny,” according to David Westbrook, “bears an inverse relationship to the political accountability of the government organ in question.”

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45 See Echeverria, Very Worst, supra note 36, at 55.

46 San Remo, 41 P.3d at 105.


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 not 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.50

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

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50 San Remo, 41 P.3d at 109.
logrolling to ensure that they do not receive an unfair share of the public's burden.”

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, and crafting exaction schedules that are categorically applied to a general class fits well within these responsibilities.

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 non-delegation 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 decision-making 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.

III. 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 below that pressing the idea that legislative exactions are significantly less likely to abuse property owners than administrative exactions (and thereby 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, 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.

A. Marginalizing Administrative Acts

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 & ENVT'L. L. 441, 448–49 (2007).
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.54 In such an instance, as Carol Rose describes it, all participating parties can expect “at least partial satisfaction.”55 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.56 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.57

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.58 In short, they contend that small, localized constituencies can be more homogenous than those represented by larger governmental entities and are

54 *See The Federalist No. 10* (James Madison).


56 *See The Federalist No. 10* at 60 (James Madison) (Harv. Univ. Press ed., 2009).


58 *See, e.g.*, *The Federalist No. 10, supra* note 56, at 58–59.
thereby more apt to generate corruption or factionalization.\textsuperscript{59} 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.\textsuperscript{60}

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

\textsuperscript{59} See, e.g., Lee Anne Fennell, \textit{Hard Bargains and Real Steals: Land Use Exactions Revisited}, 86 IOWA L. REV. 1, 26 n.105 (2000); Kent, \textit{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 a particular expertise. Rose, \textit{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. \textit{Id.} at 846–47.

insignificant, for it generally does not distinguish between 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.

i. 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*61—or if the compensation paid is not “just.”62 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

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Court deemed a public use in *Hawaii Housing Authority v. Midkiff*.

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.

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

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63 Haw. Hous. Auth. v. Midkiff, 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. Cty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2005).

64 New Orleans Redev. Auth. v. Burgess, 16 So.3d 569 (La. Ct. App. 4 Cir. 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). 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.
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 her
property,65 or (ii) the factors set out in Penn Central Transportation Co. v. City of
New York66—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.67 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. 68 But there are many more Penn Central cases involving
administrative acts, only a small number of which succeed. Jentgen v. United
States69 and Palazzolo v. State70 are two of the more prominent of the many cases

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67 See id. at 124.

68 Keystone Bituminous Coal Ass’n. v. DeBenedictis, 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.


applying the *Penn Central* factors to reject takings challenges to the specific denial of wetland fill permits.⁷¹

ii. 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 doctrine

⁷¹ *Friedenburg v. N.Y. State Dep’t of Envtl. Conservation*, 767 N.Y.S.2d 451 (N.Y. 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.
jurisprudence\textsuperscript{72}—and, perhaps, on the fringes or even outside of takings jurisprudence\textsuperscript{73}—provide a window of opportunity to recognize the legislative-administrative distinction in the context of exactions but not in any “normal” takings contexts.\textsuperscript{74} 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


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

\textsuperscript{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. \textit{See} Fennell & Peñalver, \textit{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, for lawmakers’ decisions to enact or repeal laws commonly are dependent on the enactment or repeal of other laws. \textit{Id.} They critique the \textit{Nollan} and \textit{Dolan} exercise, then, for focusing “on nexus and proportionality within the challenged deal only.” \textit{Id.} at 12. 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. \textit{See} RICHARD A. EPSTEIN, \textit{BARGAINING WITH THE STATE} 11 (1993); \textit{see also} Abraham Bell & Gideon Parchomovsky, \textit{Givings,} 111 YALE L.J. 547, 611 (2001) (“[T]here are an enormous number of government actions that can be creatively described as exactions.”).
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. This section 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 non-delegation 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

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 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).
level of judicial scrutiny applicable to administrative acts in the due process and non-delegation contexts is still quite deferential to the state when compared to the strictures of Nollan and Dolan.76

Second, the principal remedy for an unconstitutional taking is just compensation, not injunctive relief,77 and, it appears from recent jurisprudence, the compensation remedy in exaction cases is retroactive in accordance with “temporary takings” principles.78 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,

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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, 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).

even if it withdrew that condition on or before the date of the takings judgment.\textsuperscript{79} 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 non-delegation doctrine, government entities presumably will be more concerned about takings violations than due process and non-delegation 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 (which would be subject to \textit{Nollan} and \textit{Dolan}'s heightened takings scrutiny and the associated retroactive compensation remedy) in lieu of legislative exactions (which would not) seems quite slim.\textsuperscript{80}


Third, while the due process and non-delegation 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*, the county granted a developer’s rezoning request against the recommendation of the local planning commission, a decision neighbors challenged. 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. 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

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81 264 Ore. 574 (1973).

82 Id. at 577–78.

Dolan considers only whether the government has, in the immortal words of Justice Holmes, gone “too far” in serving the public interest,\(^8^4\) and not whether it has gone far enough. Consistent with the reasoning noted above, a risk-averse government will be inclined to walk back from its use of administrative exactions when there is no discomfiting takings barrier behind it into which it might bump.\(^8^5\)

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 than if Nollan and Dolan were to be abandoned completely).\(^8^6\) 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

\(^8^4\) Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

\(^8^5\) The cautionary message, supra note 80, applies here as well.

\(^8^6\) It is conceivable that, instead of implementing a mix of legislative and administrative exactions given that both would be subject to the same heightened takings scrutiny, the state could refrain from using exactions altogether. Their prevalence over the past century, though, makes this an unlikely course, and one that I will not take up here. Cf. Mark Fenster, Regulating in the Post-Koontz World, 67 Fla. L. Rev. Forum 26, 27 (2015).
leaves something to be desired. As set out in the remainder of this section, identity considerations suggest that it does.\textsuperscript{87}

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.\textsuperscript{88} 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.\textsuperscript{89} To Underkuffler, that additional justification is an implicit accounting of the human stories behind the particular lawbreaker and her objectors.\textsuperscript{90}

\textsuperscript{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 \textit{Nollan} and \textit{Dolan}. This Article merely suggests it is important to give these benefits a full airing.


\textsuperscript{89}Id. at 366.

\textsuperscript{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
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 varying ways raised similar themes in recent work.  

Under 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”).}

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
dispossession cases, lawmakers might consider “the importance of this home to this person.” Dyal-Chand advocates tying legal claims to an “individualized portrait of the parties pursuing those claims” to expose and protect “subaltern voices.” 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. 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. And van der Walt asserts:

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.”).


[W]e tend to forget that people find themselves on 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.96

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.97 I will reserve a full-throated defense of the identity thesis for future work,

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).

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

i. 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. 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 relation 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

98 Id. at 367.
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.\(^99\) Instead, this course starts from the premise that ownership can be morally justified only if it offers widespread benefits to owners and non-owners.\(^100\) That is,


\(^100\) 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 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, Liberties, 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
ownership and non-ownership should orbit around identity, not the other way around.

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.\textsuperscript{101} This common perception about the personal and social-economic importance of ownership regularly translates into an assumed presumptive power on behalf of individual owners, whose rights, on this view, are ordinarily immune from competitive interference by non-owners.\textsuperscript{102}

\textsuperscript{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”).

\textsuperscript{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.”).
However, lawmakers can define ownership in many ways, 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 assumptively (and exclusively) 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. 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. 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, the unavoidable task for lawmakers is to decide which actions to safeguard and which actions to restrain.

103 See, e.g., Eric T. Freyfogle, Property and Liberty, 34 HARV. ENVTL. L. REV. 75, 102 (2010); Singer & Beerman, 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 access”); Singer, After the Flood, supra note 99, at 258 (“[R]egulations are generally designed to limit one person’s
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.108 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, health care, progressive income taxes, and myriad subsidies—fit the

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 STELENBOSCH 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.
description as well.109 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 instance, disparate impact law is necessarily dependent on the identity and circumstances of the parties given that claimants can successfully assert that facially neutral housing, employment, and other practices produce an unjustified adverse impact on individual members of a traditionally marginalized class.

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.110 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, such that 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

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

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, after allegedly having slept on a train station bench for more than eleven years before joining Tent City, argued that “there’s just no other place to go right now.” 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.


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?type=source. 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
and the individuals had no options of their own. He denied the town’s motion seeking immediate ejectment “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.” 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.


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 ejectment 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 96 (Hart, 2006).

115 See Transcript of Motion for Summary Judgment, supra note 112, at 19. 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 confirmed that the City of Miami could not arrest homeless people for urinating in public when the city did not offer enough beds in city shelters to accommodate its homeless population. See Pottinger v. City of Miami, Consent Decree February 27, 1998, as amended on December 11, 2013. The decision did not impede continued enforcement of the city’s
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 concedes that security in certain instances can afford important societal advantages. 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. 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

prohibition on public urination against members of less vulnerable populations. See, e.g., Former Dolphin Tyrell 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).

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.

in which it offers widespread benefits to owners and non-owners, in both present and future generations.\(^{118}\)

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.\(^{119}\) 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, historically-accountive,

\(^{118}\) 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, *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 need-based contingency.”).
and non-destructive balance between the forces of stability and justice-inspired change.\textsuperscript{120} 

Admittedly, explicit considerations of identity are, to date, few and far between in American property law.\textsuperscript{121} 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

\textsuperscript{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 transformational constitutionalism does not guarantee certainty or closure on questions about social, economic, and political reform but, at most, can assist in opening up 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.

\textsuperscript{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).
administrative exactions allow space to attend to the affected parties’ stories.122 The next section explores how identity considerations might manifest themselves in administrative exactions under the shadow of Nollan/Dolan and takings principles more generally.

ii. Identity and Administrative Exactions

The Supreme Court famously noted in *Armstrong v. United States*123 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.”124 The indefinite nature of this statement has led scholars from across the spectrum of philosophical perspectives to cite it favorably.125 Yet—and this is

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


124 *Id.* at 49.

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.” 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 that the community deems meaningful.” 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.”


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’?”).


128 See Freyfogle, Methodically, supra note 127, at 10316 (emphasis added).
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 that 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 imposing that usual exaction on a given non-marginal applicant 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.\textsuperscript{129} 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 emission 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 circumstance 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 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.

\textsuperscript{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.
It would be difficult to reach a similar result through rigid application of an inelastic legislative exaction formula for at least two reasons. 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 a nimble mechanism seems 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 the umbrella of a context-based

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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, supra note 1, at 767; Fenster, 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. ENVT. AFF. L. REV. 583, 604–05 (2001).
standard that allows for an accounting of the affected parties’ circumstances.\(^\text{131}\) 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.\(^\text{132}\) 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 be ill fit to


counter. 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 emission 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.

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.”). There, of course, are disadvantages to administrative solutions, as well. See, e.g., Alejandro Esteban Camacho, Mustering 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, but rather 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).
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\textsuperscript{135} 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.\textsuperscript{136} More moderately, this section suggests that perhaps administrative exactions should remain a tool in regulators’ tool box, 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 decision-making process to implement in response to a given or forecasted problem or harm. But recognizing the legislative-

\textsuperscript{135} Extortion conceivably could be intentional or subconscious. See Jeffrey Rachlinski, \textit{Rulemaking Versus Adjudication: A Psychological Perspective}, 32 \textit{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).

\textsuperscript{136} See, \textit{e.g.}, Dana, \textit{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 distinction in the exaction-takings context could foreclose the likelihood that the state will choose 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 II 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—Part III—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.

IV. 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, or, even more dramatically, reinvigorate the long

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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 13 (land use exactions versus non-land use exactions); Pidot, *supra* note 37, at 137 (on-site exactions versus off-
dormant and admittedly uphill battle to reverse *Nollan* and *Dolan* in their entirety.¹³⁸

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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).