

Koontz in the Mansion and the Gatehouse

Steven J. Eagle*

This Article focuses on problems in implementing the U.S. Supreme Court's expansion in Koontz v. St. Johns River Water Management District of its doctrine of unconstitutional conditions pertaining to land development approvals. As earlier developed in Nollan v. California Coastal Commission and Dolan v. City of Tigard, the doctrine only applied to unrelated or disproportional exactions of interests in real property. The doctrine was expanded in Koontz to include denials of development approval after landowner refusal to accede to unreasonable exaction demands, and also to exactions of money as well as real property interests.

Drawing an analogy to Yale Kamisar's disparate treatment of criminal defendants in the "mansion" of the judicial system and the "gatehouse" of the police station, this Article discusses difficulties in implementing Koontz. It examines the difficulty of enforcing prohibitions on unreasonable coercion in informal bargaining between land development approval applicants and local regulators. The Article concludes by discussing specific procedural and substantive problems, and proposes some partial solutions.

I. Introduction

IN *KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT*,¹ the United States Supreme Court revisited the doctrine of unconstitutional conditions in the context of land development approvals. The Court unanimously held that denying development based on landowners' refusals to accede to extortionate demands is just as unconstitutional as granting approvals based on landowners' acquiescence in those demands.² The Court also held, with four Justices dissenting, that principles applicable to exactions of real property interests also apply to exactions

*Professor of Law, George Mason University, Arlington, Virginia 22201, seagle@gmu.edu.

1. 133 S. Ct. 2586 (2013).

2. *Id.* at 2603.

of money.³ On the question of remedies for coercive and unreasonable demands, the Court explicitly was silent. On the issue of prophylactic devices to discourage such demands, the Court said nothing. While *Koontz* significantly expands landowner rights in theory, its practical import remains to be determined. Demands for money typically are more difficult to categorize than demands for interests in land. Moreover, government demands for exactions that formally are stated and are based on agency evaluations of development applications are more amenable to judicial review than informal demands made earlier in the process.

In a seminal chapter on criminal justice,⁴ Professor Yale Kamisar contrasted the scrupulous respect accorded defendants' rights to remain silent in the "mansion" of the courts with the pervasive disregard of those rights in the "gatehouse" of the police station, where confessions often were coerced.⁵ This Article borrows Professor Kamisar's metaphor and asserts that *Koontz* will alleviate the imposition of unconstitutional conditions on development only if the courts effectively apply its holdings to the "gatehouse" of low-visibility local government practices as well as to the "mansion" of ordinances and formal administrative rulings.

That task will be difficult. Exactions, especially of money, are deeply imbedded in land use regulation and practice. More fundamentally, *Koontz* raises anew the question of when land use regulation is entitled to judicial deference and when it should be meaningfully scrutinized.

This Article briefly describes the holdings in unconstitutional conditions cases culminating in *Koontz*, sketches the problems in providing more transparency in development exactions, and suggests ways to better protect Takings Clause rights.

3. *Id.* at 2601-02. The majority opinion was written by Justice Alito; he was joined by Chief Justice Roberts, and Justices Scalia, Kennedy, and Thomas. *Id.* at 2591. Justice Kagan wrote the dissent, joined by Justices Ginsburg, Breyer, and Sotomayor. *Id.* The *Koontz* opinion has been discussed in a number of recent publications. *See, e.g.,* Robert H. Thomas, *Recent Developments in Regulatory Takings*, 45 URB. LAW. 769 (2013); Robert H. Freilich & Neil M. Popowitz, *How Local Governments Can Resolve Koontz's Prohibitions on Ad Hoc Land Use Restrictions*, 45 URB. LAW. 971 (2013) (suggesting solutions to problems presented by *Koontz's* scrutiny of monetary exactions).

4. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1 (A.E. Dick Howard ed., 1965).

5. *Id.*

II. The Unconstitutional Conditions Doctrine in the Land Use Context

In three cases, *Nollan v. California Coastal Commission*,⁶ *Dolan v. City of Tigard*,⁷ and *Koontz v. St. Johns River Water Management District*,⁸ the Supreme Court has outlined the greater part of a theory of how the doctrine of unconstitutional conditions applies to land development applications.⁹ These cases set forth the guidelines that state and local governments must comply with when regulating development.

A. *Nollan and Dolan Apply Unconstitutional Conditions to Development Exactions*

In *Nollan*, the petitioners had leased a lot on the Pacific Coast, north of Los Angeles.¹⁰ Their purchase of the lot was dependent on replacing the existing bungalow with a larger house, which required a permit from the California Coastal Commission.¹¹ The Commission granted the application to build a three-bedroom house on the condition that the Nollans grant an easement allowing the public to walk on the dry sand between the house and the Pacific Ocean, thus facilitating use of public parks to the north and south.¹² The Supreme Court held that a public agency could not condition development approval on the transfer of such an easement where the statutory mandate of the Commission was to protect public access to the ocean, and there was no “essential nexus” between public access to the beach and the demand for a lateral easement along the beach.¹³ Subsequently, in *Dolan*, the Court ruled that, even where an essential nexus is present, there must be “rough proportionality” between the demanded exaction and the police power burdens that the development would impose,¹⁴ and that this relationship would have to be established through an “individualized determination” involving the parcel for which the permit was requested.¹⁵

6. 483 U.S. 825 (1987).

7. 512 U.S. 374 (1994).

8. 133 S. Ct. 2586 (2013).

9. Most notably missing is whether the unconstitutional conditions doctrine applies to legislative determinations as well as “adjudicative” determinations by officials. See *infra* Part II.D.

10. *Nollan*, 483 U.S. at 827.

11. *Id.* at 828.

12. *Id.*

13. *Id.* at 837.

14. *Dolan*, 512 U.S. at 391.

15. *Id.*

In his dissent in *Dolan*, Justice Stevens stated:

The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.¹⁶

B. *Unconstitutional Conditions Extended in Koontz*

Koontz extended the *Nollan-Dolan* principle to provide relief to applicants whose development applications are denied because the applicants refuse to accede to the exactions upon which they are conditioned.¹⁷ It also held that monetary exactions would be treated the same way as exactions of real property.¹⁸ Finally, *Koontz* held that

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they *impermissibly burden the right not to have property taken without just compensation*. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.¹⁹

The Court's treatment of unconstitutional conditions in *Koontz* elevates to prime importance the tension between heightened scrutiny and deference that animated Justice Stevens' *Dolan* dissent.²⁰

C. *The Collision of Deferential Review and Heightened Scrutiny*

Notably, the opinions for the Court in neither *Nollan*, nor *Dolan*, nor *Koontz* explicitly refer to *Nollan/Dolan* as employing a heightened scrutiny standard of review. Justice Kagan's dissent in *Koontz*, however, made clear that the *Nollan/Dolan* "nexus" and "rough propor-

16. *Id.* at 405. (Stevens, J., dissenting) (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (holding that a Kansas statute making it a misdemeanor for any person to engage "in the business of debt adjusting," except as an incident to the lawful practice of law, did not violate the due process clause nor equal protection of the laws for non-lawyers).

17. *Koontz*, 133 S. Ct. at 2595 (District demanded that developer of wetlands either increase the size of the conservation easement or pay for offsite mitigation. The Court held that the district's demand for property must meet the *Nollan* and *Dolan* requirements of a nexus and rough proportionality to the expected impacts of the development, even though the permit was denied).

18. *Id.* at 2595-2597.

19. *Id.* at 2596 (emphasis added). The dissent agreed that a landowner refused a development permit because of failure to accede to an improper demand is entitled to have the improper condition removed, and may be entitled to a monetary remedy, but he "cannot be entitled to constitutional compensation for a taking of property." *Id.* at 2603 (Kagan, J., dissenting).

20. See *supra* text associated with note 16.

tionality” standards do constitute “heightened scrutiny.”²¹ She reiterated the concerns about heightened scrutiny and judicial overreaching that Justice Stevens expressed in *Dolan*.²² “By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously ‘difficult’ and ‘perplexing’ standards, into the very heart of local land-use regulation and service delivery.”²³

In *Dolan* Chief Justice Rehnquist seemed to have contemplated at least a standard of “rational basis in fact,” or “meaningful rational basis.”²⁴ This would comport with Professor Laurence Tribe’s “covert heightened scrutiny,”²⁵ and with the analysis used by the Supreme Court in cases such as *City of Cleburne v. Cleburne Living Center*,²⁶ where nominal rational basis review was conducted without deference, and with a penetrating examination comparing the city’s asserted basis for regulation with the actual facts.

It is not novel for the Supreme Court to use heightened scrutiny where an individual is allegedly coerced into surrendering other constitutional rights, and this is the case in the gatehouse of preliminary interactions as much as in the mansion of the courts. For instance:

The concept of due process would void a trial in which by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence.²⁷

Given the fundamental importance of property rights in America,²⁸ and the fact that regulatory takings law is rooted in due process,²⁹ it is not surprising that in *Koontz* the importance of due process analysis again comes to the fore.

21. *Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting).

22. *Id.*; see *supra* text accompanying note 16.

23. *Koontz*, 133 S. Ct. at 2607 (Kagan, J., dissenting).

24. STEVEN J. EAGLE, REGULATORY TAKINGS (5th ed. 2012) at § 7-10(b)(4) (discussing Rehnquist’s opinion for the court in *Dolan* and concluding that Rehnquist “envisioned the application of something stricter than the deferential rational basis test. . . [such as] ‘rational basis in fact’ or ‘meaningful rational basis’ test”). See *Dolan*, 512 U.S. at 391.

25. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1612 (2d ed. 1988).

26. 473 U.S. 432 (1985) (striking down, ostensibly using rational basis review, a requirement that group homes for the mentally disabled obtain a special use permit in a district where fraternity houses and hotels could operate as of right).

27. *Lisenba v. California*, 314 U.S. 219, 237 (1941).

28. See JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 92 (1990) (“The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty.”).

29. See Steven J. Eagle, Property Tests, Due Process Tests and Regulatory Takings Jurisprudence, 2007 BYU L. REV. 899, 905-907.

D. *Unconstitutional Conditions and Legislative Determinations*

The major issue regarding unconstitutional conditions and land development approvals left unanswered after *Koontz* is whether the doctrine applies not only to adjudicative decisions³⁰ by administrators but also to legislative determinations. In *Dolan*, the Court thought it “relevant” that the cases long sustaining land use planning generally had “involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.”³¹ Building upon this emphasis, courts interpreting *Dolan* typically have found heightened scrutiny inapplicable to broad-based legislative conditions.³²

The deference accorded comprehensive land use ordinances might become irrelevant, however, if, in response to *Koontz*, zoning ordinances become fine-grained and seem directed to particular situations. Some courts have taken the position that such small-scale (or “spot”) rezoning is not entitled to legislative deference.³³ This would set the stage for bargaining regarding proper zoning between local officials and individual landowners. In this respect, landowners are subject to coercion because they are deprived of the advantages of general law, transparently arrived at through the political process, regardless of whether the process is styled “legislative” or “adjudicative.”³⁴ “[R]ezoning actions which have an impact on a limited number of persons or property

30. *Nollan* addressed a decision of the California Coastal Commission, *Nollan*, 483 U.S. 825; *Dolan*, a decision by the Tigard City Planning Commission, *Dolan*, 512 U.S. at 2311, and *Koontz* considered a decision of the water district. *Koontz*, 133 S.Ct. at 2588. All three are administrative/adjudicative bodies, not legislative bodies.

31. *Dolan*, 512 U.S. at 385.

32. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 10:5 (3d ed. 2010).

33. *See, e.g.*, *Fasano v. Board of Comm’rs of Washington County*, 507 P.2d 23 (Or. 1973), *superseded by statute*, *Neuberger v. City of Portland*, 607 P.2d 722, 727 (Or. 1980). “Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.” *Fasano*, 507 P.2d at 26; *see also* *Board of Supervisors of Fairfax County v. Snell Const. Corp.*, 202 S.E.2d 889, 893 (Va. 1974) (holding that “piecemeal downzoning” must be justified by “mistake, fraud, or changed circumstances”).

34. *See* Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242 (2000) (discussing bargaining on a case by case basis).

owners . . . where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of . . . quasi-judicial action.’”³⁵

E. Takings Clause Burdens and Monetary Exactions

All of the justices in *Koontz* agreed that when a landowner refuses to accede to an improper exaction, there is no taking of property.³⁶ When the owner does accede, and is issued the permit, is a monetary exaction a taking of property? This question remains unanswered.

Governments routinely exact money in the form of taxes and user fees of all sorts, so that monetary exactions generally have not been associated with takings. Whether monetary exactions could constitute takings, however, was the critical issue in *Eastern Enterprises v. Apfel*.³⁷ There, a four-Justice plurality of the Supreme Court held that a statute that imposed a heavy financial liability for the support of industry health and benefit plans on companies based on the service of employees who had left decades earlier imposed such a severe and unexpected retrospective financial liability as to violate the Takings Clause.³⁸

Justice Kennedy concurred in the result on due process grounds, but joined the dissenters in arguing that “the Takings Clause does not apply to government-imposed financial obligations that ‘d[o] not operate upon or alter an identified property interest.’”³⁹

Justice Alito’s majority opinion in *Koontz* asserted that “[i]n this case, unlike *Eastern Enterprises*, the monetary obligation burdened petitioner’s ownership of a specific parcel of land.”⁴⁰ Justice Kagan, writing for the dissenters, responded that the Court “runs roughshod over *Eastern Enterprises v. Apfel*, which held that the government may impose ordinary financial obligations without triggering the Takings Clause’s protections.”⁴¹

Professor Thomas Merrill has asserted that “property,” for purposes of the Takings Clause, should be limited to a “specific property interest”

35. Board of County Comm’rs of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993) (quoting Snyder v. Bd. of County Comm’rs, 595 S.2d 65, 78 (Fla. Ct. App. 1991)).

36. *Koontz*, 133 S. Ct. at 2603-04 (Kagan, J., dissenting) (internal citations omitted).

37. 524 U.S. 498 (1998).

38. *Id.* at 523.

39. *Koontz*, 133 S. Ct. at 2599 (quoting *E. Enters.*, 524 U.S. at 540).

40. *Koontz*, 133 S. Ct. at 2599.

41. *Id.* at 2603-04 (Kagan, J., dissenting) (internal citations omitted).

in the sense of a “discrete asset,” and not an “incident of property.”⁴² Under this reasoning, *Nollan-Dolan-Koontz* might be limited to exactions of property and optional payments in lieu of property exactions. Although Merrill intended to capture monetary exactions insofar as they are explicit substitutes for exactions of real property, while excluding other types of impositions on development, he has acknowledged⁴³ that some older Supreme Court precedents do indicate that exactions without regard to benefit to affected landowners constitute takings.⁴⁴

The more difficult question is whether the unjustified imposition of monetary exactions incident to ownership of real property can be said to “impermissibly burden the right not to have property taken without just compensation.”⁴⁵ In this context, reservations respecting *Eastern Enterprises* seem less compelling. Whereas the referent of the Takings Clause is “property,”⁴⁶ the referent of “unconstitutional conditions” is the individual coerced to surrender his or her constitutional rights. A substantial monetary exaction upon the exercise of Takings Clause rights seems to be such a burden.

Justice Kagan’s dissenting opinion in *Koontz*, although asserting that the majority ran “roughshod” over *Eastern Enterprises*,⁴⁷ clearly was motivated by a more pragmatic concern that applying the unconstitutional conditions doctrine to monetary exactions “threatens

42. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 974 (2000). Merrill defined a discrete asset as “a valued resource that (1) is held by the claimant in a legally recognized property form . . . and (2) is created, exchanged or enforced by economic actors with enough frequency to be recognized as a distinct asset in the relevant community. An incident of property, in contrast, is a power or privilege that belongs to one who holds property, but is not itself a legally recognized form of property.” *Id.*

43. Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, at 55 & n.245 (Preliminary Draft) (Appendix to Thomas W. Merrill, *Constitutional Problems Associated with Dodd-Frank Title II*, Testimony Before House Financial Services Committee, July 9, 2013, available at (<http://financialservices.house.gov/uploadedfiles/hhrg-113-ba09-wstate-tmerrill-20130709.pdf>).

44. See, e.g., *Vill. of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (“[T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.”). Cf. *Louisville & N. R. Co. v. Barber Asphalt Pav. Co.*, 197 U.S. 430, 468 (1905) (“It may say that it is enough that the land could be turned to purposes for which the paving would increase its value.”).

45. *Koontz*, 133 S. Ct. at 2590; see *supra* text accompanying note 19.

46. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

47. *Koontz*, 133 S. Ct. at 2603-04 (Kagan, J., dissenting); see also *infra* Part III.

to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny.”⁴⁸

III. Bargaining and Coercion Are Intertwined in the Land Use Context

A. *The Nature of Exactions*

The term “exactions” has a multiplicity of meanings. In the context of unconstitutional conditions upon land development approvals that was the subject of *Nollan*, *Dolan*, and *Koontz*, “exactions” might refer to demands for interests in land or money that might justifiably offset burdens created by development. Alternatively, they might be thinly-disguised schemes for extortion. In a broader sense, as restated by Professor Vicki Been, “exactions” refers to requirements for dedications, fees, impact fees, and linkage fees that “local governments have used to shift the burden of providing infrastructure to developers.”⁴⁹

This ambiguity in meaning is captured neatly in *Koontz*, where Justice Alito expressed the majority’s fear that, so long as development approvals are worth more than the rights taken, “[e]xtortionate demands [may] frustrate the Fifth Amendment right to just compensation.”⁵⁰ The facts seem to justify this concern, considering that *Koontz* was given a choice between having the development on his own 13.9-acre site cut back from his requested 3.7 acres to one acre,⁵¹ or providing offsite mitigation that would enhance 50 acres of wetlands belonging to the Water District, at a cost of between \$90,000 and \$150,000.⁵² The trial court subsequently determined that the demands “had no essential nexus to the development restrictions already in place.”⁵³

Whether it is preferable to approach monetary exactions for infrastructure finance through the lens of possible extortion or reasonable development is unclear. For Justice Kagan, monetary exactions should

48. *Id.* at 2604.

49. Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 141 (2005).

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

51. *Id.* at 2598.

52. Petition for Writ of Certiorari, at 4, *Koontz*, 133 S. Ct. 2586 (2013) (No. 11-1447).

53. *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 10 (Fla. Dist. Ct. App. 2009), *decision quashed*, 77 So. 3d 1220 (Fla. 2011), *rev’d*, 133 S. Ct. 2586 (2013).

not be viewed in the same manner as the appropriation of interests in applicants' lands. In her dissent in *Koontz*, she wrote:

Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests. The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.⁵⁴

Current costs, such as trash collection or teacher salaries, reasonably are borne by current residents.⁵⁵ But large and typically nonrecurring costs for infrastructure present a more difficult problem. Professor Jan Brueckner posits that new residents could be charged for the new infrastructure they would use, such as the cost of new schools.⁵⁶ If existing residents had similarly paid impact fees when schools were built for their children, no unfairness would result. Suppose, however, that the traditional pattern had been for infrastructure to be financed through current real estate taxes, or by bonds to be paid from future real estate taxes, and thus shared by residents over time. "Historically, infrastructure financing in U.S. cities relied on the cost-sharing approach."⁵⁷ Under that approach, existing residents would pay towards the schools needed by newcomers, a burden partially offset by the fact that schools for their own children were partially paid for by their own predecessors.⁵⁸

If the cost of municipal infrastructure consistently is borne either by new residents or shared by all residents, the results are fair. But, there has been a dramatic change in regimes in the United States, so that newcomers must pay all of the cost of infrastructure to serve them, *plus* sharing in the cost of infrastructure of existing residents through real estate taxes.⁵⁹ Professor Been noted that, during the 1920s and 1930s, "widespread bankruptcies and subsequent delinquencies on property tax or special assessment payments left many local govern-

54. *Koontz*, 133 S. Ct. at 2607 (Kagan, J., dissenting) (internal citation omitted).

55. DAVID L. CALLIES, ROBERT H. FRELICH & THOMAS E. ROBERTS, *CASES AND MATERIALS ON LAND USE* 546 (6th ed. 2006).

56. Jan K. Brueckner, *Infrastructure Financing and Urban Development: The Economics of Impact Fees*, 66 J. PUB. ECON. 383, 384 (1997).

57. *Id.*

58. *Id.*

59. Been, *supra* note 49, at 143.

ments unable to recoup the costs of public improvements. Communities then sought ways to shift the initial costs of improvements (and the risk of failure to recoup those costs) to the developer.”⁶⁰

Professor Brueckner points to a possibly less benign reason for the expanded use of impact fees and similar devices:

By forcing developers to pay for incremental infrastructure, exactions are thought to raise the cost of development above the level that would be incurred under a cost-sharing scheme, thus retarding urban growth. The aversion to growth that underlies this explanation may in part reflect a dislike of traffic congestion, pollution, and crime. In addition, under traditional cost-sharing schemes, growth may have created a rising burden from provision of incremental infrastructure. By adopting an exaction scheme, current residents could ease this burden by shifting future infrastructure costs onto new residents, while simultaneously enjoying a better quality of life through limited growth.⁶¹

In other words, the switch from sharing infrastructure costs to imposing impact fees on new development is an exclusionary fiscal policy. This benefits existing residents not only by forcing newcomers to pay a (non-reciprocated) share of the cost of existing infrastructure, but also by increasing the value of their homes through decreasing the supply of new competing housing in the community.

As Professor Robert Ellickson observed the “ideal environment for a homeowner majority to work its ‘plans of oppression,’ to use Madison’s phrase, is a small suburb of mostly well-to-do homeowners who confront the single issue of urban growth. In such a suburb, the political process is stacked against those who benefit from new housing construction.”⁶² “Local officials who desire reelection will normally refuse to pay to stop development if they can stop it without expending tax revenues or, better yet, convert the pressures for urban growth into an opportunity for community, or even personal, fundraising.”⁶³ For these reasons, in the Ellicksonian view, exactions should not be required of developers who wish to make “normal use” of their land.⁶⁴ This point also was implicit in Justice Scalia’s observation in *Nollan* that the three-bedroom house for which a development permit was

60. *Id.* at 140.

61. Brueckner, *supra* note 56, at 385.

62. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 407 (1977) (quoting THE FEDERALIST NO. 10, at 53, 60-61) (James Madison) (Mod. Library ed. 1941) (additional internal citation omitted). James Madison observed that in small societies, with few distinct interests, the majority has a common motive and works its will. *See id.* at 405, n.49.

63. *Id.* at 392.

64. *See id.*

sought from the Coastal Commission would be “in keeping with the rest of the neighborhood.”⁶⁵ In many cases, however, exactions on development take the form of “incentive fees,” which are charges for the privilege of development in excess of normal. So-called “incentive zoning” is described next.⁶⁶

B. *Land Use Approvals for Dollars*

In *Zoning for Dollars*,⁶⁷ Jerold Kayden described “incentive zoning” as the process by which “cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features.”⁶⁸ Kayden noted that “[m]any large and medium size cities throughout the United States employ incentive zoning.”⁶⁹

Kayden noted, however, that the overriding of zoning, even to obtain very worthwhile local amenities, “intrinsically delegitimizes the entire regulatory system,” and he cautioned about “incentive zoning’s inherent dependence on a philosophy of sanctioned bribery.”⁷⁰ As Professor Nestor Davidson more recently observed: “Scholars have highlighted the risks associated with public entities in some sense ‘selling’ regulatory privileges in exchange for public benefits, including skewed regulatory priorities and the potential for outright corruption.”⁷¹

The distinction between normal and supra-normal land development is reflected in Kayden’s explanation that incentive zoning establishes two tiers of regulation:

Landowners are entitled as a matter of right to a first tier maximum zoning-defined density without obligation to provide amenities. At their option, landowners seek the incentive of exceeding that maximum zoning-defined density, in return for their agreement to provide specified amenities. Government invents *ex nihilo* development rights above the first tier and offers them strictly in its discretion

65. *Nollan*, 483 U.S. at 828.

66. See *infra* Part III.B.

67. Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991) (describing and defending the trend of municipalities using incentive zoning to fund various community needs and amenities).

68. *Id.* at 3 (enumerating examples including parks, affordable housing, and day-care centers).

69. *Id.* at 5; see also Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. REV. 177 (2006).

70. Kayden, *supra* note 67, at 7 (adding that such a regime abides the private development entity that “can ‘buy’ its way out of zoning restrictions”).

71. Nestor M. Davidson, *Values and Value Creation in Public-Private Transactions*, 94 IOWA L. REV. 937, 985 n.56 (2009).

. . . This touchstone of voluntary provision has made irrelevant the frequent resort to courts enveloping mandatory land use regulations of subdivision exactions, linkage, and inclusionary zoning, each of which requires private developers to provide public amenities before they can develop at all.⁷²

Kayden asserted that Justice Scalia's *Nollan* opinion did "not recognize incentive zoning's paradigm of 'voluntariness.' By thinking about the bonus development rights residing between the first and second tiers as the owner's private property, instead of newly created rights, the opinion vitiates the technique's operating presumption of owners who voluntarily provide amenities in return for such rights."⁷³

While *Zoning for Dollars* was published soon after *Nollan* was handed down, the Supreme Court's subsequent decisions, in *Dolan* and *Koontz*, did not share an enthusiasm for "zoning's paradigm of voluntariness" either. In *Dolan*, the Court was concerned that an asserted police power basis for an exaction "is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit."⁷⁴ In *Koontz*, the Court had a similar motivation:

So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.⁷⁵

Indeed, "[t]he widespread use of linkages demonstrates that exactions have grown from simple revenue-raising mechanisms into a tool for local governments to accomplish broader social policy goals."⁷⁶

A recent comprehensive study of the use of impact fees by Professor Ronald Rosenberg drew as its main conclusions "that impact fee policy has been influenced more directly by state legislative action and state court supervision than by federal constitutional rulings," and that "as the legal and political culture has evolved, state courts have generally accepted impact fees as the expression of social attitudes on a fundamental question of public responsibility."⁷⁷ He added, "development impact fees are truly products of the state law compromises balancing

72. Kayden, *supra* note 67, at 38-39.

73. *Id.* at 40.

74. *Dolan*, 512 U.S. at 390 (quoting *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

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

76. Benjamin S. Kingsley, Note, *Making It Easy to Be Green: Using Impact Fees to Encourage Green Building*, 83 N.Y.U. L. REV. 532, 552 (2008).

77. Rosenberg, *supra* note 69, at 183.

the competing interests in distributing development-related costs and increasing localities have deflected public responsibilities.”⁷⁸

The aggressive use of exactions and incentives, however, has contributed to public distrust of the zoning and planning enterprise. “The *Nollan/Dolan* rules are perhaps best understood as a highly visible symbolic protest against governmental excess.”⁷⁹ The Court’s broad interpretation of the Public Use Clause to encompass the taking of homes for private redevelopment for municipal revitalization in *Kelo v. City of New London*⁸⁰ led to massive controversy, thus adding to public distrust.⁸¹

C. Professional Developers and Principled Landowners

Broadly speaking, land development applicants might be classified in two categories. The first is professional developers, who see property rights in instrumental terms. The second is home- and small business-owners, who see land ownership in personal and subjective terms. Most developers, such as homebuilders, tend to be small and operate in a limited geographical area.⁸² Numerous anecdotal accounts document the perceived need for such developers to get along well with the local officials who have the power to approve their applications, now and in the future, and who eventually must issue certificates of occupancy in order for projects to be completed.⁸³

Ironically, *Nollan*, *Dolan*, and *Koontz* may increase the value of being a cooperative developer, since out-of-area competitors may be unwelcome by local officials who fear that exactions imposed on their projects might give rise to litigation.⁸⁴ The fact that local development interests often are overrepresented on zoning boards⁸⁵ seems consistent with local favoritism.

78. *Id.*

79. Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 13 (2000).

80. 545 U.S. 469 (2005).

81. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (documenting the political and legislative response to the decision).

82. See David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1294-95 (1997) (noting local specialization seems to be the norm).

83. *Id.* at 1294 n.179 (providing numerous newspaper and similar anecdotal accounts implying the importance of a favorable reputation with local officials and regulators).

84. *Id.* at 1297-99.

85. Jerry L. Anderson, et al., *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689, 698-705 (2008) (discussing

A potent device to counter the exclusion of non-local developers was developed by the New Jersey Supreme Court to buttress its holding in *Mount Laurel I* that localities must provide affordable housing.⁸⁶ In *Mount Laurel II*,⁸⁷ the court imposed a “builder’s remedy,” mandating that a developer who judicially establishes a local need for affordable housing be granted a development permit unless “the plaintiff’s proposed project is clearly contrary to sound land use planning.”⁸⁸ The court explained that “the builder’s remedy should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site.”⁸⁹

While the builder’s remedy “relied on the market sense of the builder as a surrogate for the affordable housing need in a town,”⁹⁰ sometimes the plaintiffs’ “feeding frenzy approached an obscene level.”⁹¹ Furthermore, “not surprisingly, builder-litigants in search of profit sought to build where they could build most easily, in the rapidly developing suburban ring, rather than in the cities or the older suburbs.”⁹²

The fact that professional developers treat possibly unjustified exactions simply as a cost of doing business does not mean that extortionate exactions are victimless wrongs. The economic incidence of such “voluntary” exactions largely is passed on to housing purchasers and their tenants. As the cost of housing increases, less of it will be demanded. Unfortunately, the production of more housing is the key to housing affordability.⁹³ On a national level, high housing costs

national study of composition of zoning boards, and noting, as an illustration, that “every single member [of New York City’s Planning Commission] had some sort of vested interest in the development process and none could be said to represent the point of view of the ‘average citizen.’”)

86. *S. Burlington Cnty. N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975) (imposing obligation to provide fair-share of regional low- and moderate-income housing needs on developing municipalities).

87. *S. Burlington Cnty. N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983).

88. *Id.* at 452.

89. *Id.*

90. Terry J. Tondro, *Connecticut’s Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115, 125 (2001) (noting also that the creation of a state administrative agency would be politically and administratively unfeasible).

91. John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 677 (1996).

92. *Id.* at 678.

93. See generally Edward L. Glaeser, et al., *Why is Manhattan so Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331 (2005) (suggesting sluggishness in the supply of apartment buildings accounts for high and rising prices in the Manhattan area).

may divert growth away from economically productive areas where human capital flourishes.⁹⁴ Indeed, Professor Peter Ganong and Daniel Shoag document that this phenomenon impairs national economic growth.⁹⁵ As Ganong commented, “[n]ow low-skilled workers can no longer afford to move to the high-wage places.”⁹⁶

If *Koontz* is utilized to resist the imposition of coercive conditions in the gatehouse of daily negotiation as well as in the mansion of formal rulings and judicial opinions, the impetus would have to come from the other group of land development applicants, which consists of home and small business owners,⁹⁷ with a smattering of small developers.⁹⁸ The most effective combination has been Takings Clause plaintiffs represented by public interest legal organizations.⁹⁹ Some affiliates of the National Association of Home Builders have brought similar suits on behalf of their members.¹⁰⁰

94. See David Schleicher, *City Unplanning*, 122 *YALE L.J.* 1670, 1692-93 (2013).

95. Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* 17-18 (Harvard Kennedy School, Working Paper No. RWP12-028, 2013), available at <http://ssrn.com/abstract=2081216>. The author thanks Bill Fischel for bringing this paper to his attention.

96. Binyamin Applebaum, *Housing Prices and Income Inequality*, *N.Y. TIMES Economix*, Oct. 17, 2012 (quoting interview with Peter Ganong) (available at <http://economix.blogs.nytimes.com/2012/10/17/housing-prices-and-income-inequality/>).

97. These include Jean Loretto, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and also the buyers of modest means who planned to use their lots near Lake Tahoe for retirement homes, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302 (2002).

98. The most notable was David Lucas, a local developer in South Carolina. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The group also includes Frank Kottschade, a developer in Rochester, Minnesota, who was able to get the Eighth Circuit to issue a plea that the Supreme Court reconsider its policy of allowing municipal takings defendants, but not landowner plaintiffs, to remove cases to federal court. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040 (8th Cir. 2003). Unfortunately the high court refused to accept the hint. 540 U.S. 825 (2003) (denying cert.).

99. These include those bringing the three major unconstitutional condition cases, *James and Marilyn Nollan*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Coy Koontz, Jr.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), and Anthony Palazzolo, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), all represented by the Pacific Legal Foundation. It also includes Florence and Bill Dolan, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), represented by Oregonians in Action, and Suzette Kelo, *Kelo v. City of New London*, 545 U.S. 469 (2005), represented by the Institute for Justice.

100. The California Building Industry Association has been particularly active, and the Supreme Court of California is reviewing its complaint that affordable housing ordinances mandating expensive set-asides of otherwise market-rate housing are unconstitutional exactions. *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 157 Cal. Rptr. 3d 813 (Ct. App. 2013), review granted and opinion superseded, *Cal. Bldg. Indus. Ass'n*, 307 P.3d 878 (Cal. 2013).

D. *Exactions for Remediation, Amenities, or Extortion*

The Supreme Court emphasized in *Koontz* that development exactions are often clearly justified.

[M]any proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. . . . Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.¹⁰¹

Similarly Professor Robert Ellickson has argued that “[c]ompensation should be measured only by the diminution in land value that stems from the prohibition of normal (or better) activities, and no compensation should be awarded for any diminution of value resulting from the prohibition of subnormal activities.”¹⁰² In the absence of objective definitions of Ellicksonian “normal” behavior, Justice Alito’s majority opinion in *Koontz* stressed the regulator’s immense leverage, so that monetary exactions easily could be employed for extortion.¹⁰³ Justice Kagan’s dissent, on the other hand, stressed monetary exactions as offsetting police power burdens, and incentive fees as ways to obtain public goods.¹⁰⁴ She described the majority’s “yen for a prophylactic rule,” which she deemed “a prophylaxis in search of a problem,” with no showing that extortion was actually a problem.¹⁰⁵

1. WHAT ARE “EXACTIONS” UNDER *KOONTZ*?

One of the most important tasks of courts considering exactions in connection with land development approvals after *Koontz* is to establish appropriate boundaries between deferential review and heightened scrutiny. Illustrative of the problem is the requirement that developers set aside some of their residential units for below-market rentals and sale under inclusionary housing ordinances. Are these requirements

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

102. Robert C. Ellickson, *Takings Legislation: A Comment*, 20 HARV. J.L. & PUB. POL’Y 75, 82 (1996).

103. *Koontz*, 133 S. Ct. at 2603 (noting the Court’s “[m]indful[ness] of the special vulnerability of land use permit applicants to extortionate demands for money”).

104. *See id.* at 2607 (Kagan, J., dissenting) and text associated with *supra* note 54.

105. *Id.* at 2608 (Kagan, J., dissenting). “No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development’s costs.” *Id.*

“exactions”? If so, should heightened scrutiny be applied? The issue now is before the Supreme Court of California.¹⁰⁶

In *Sterling Park, L.P. v. City of Palo Alto*,¹⁰⁷ the Supreme Court of California considered the issue in a procedural context, noting that the developer’s action against the municipality was time-barred unless it was encompassed by a statutory exception for “fees . . . or other exactions imposed on a development project.”¹⁰⁸

The City argues that the requirements it imposed under its below market rate program are not exactions but merely land use regulations We disagree. . . . The imposition of the in-lieu fees is certainly similar to a fee. Moreover, the requirement that the developer sell units below market rate, including the City’s reservation of an option to purchase the below market rate units, is similar to a fee, dedication, or reservation. It may be, as the City argues, that under traditional property law, an option to purchase creates no estate in the land. But a purchase option is a sufficiently strong interest in the property to require compensation if the government takes it in eminent domain. . . .¹⁰⁹

In *California Building Industry Association v. City of San Jose*,¹¹⁰ the Supreme Court of California is considering whether inclusionary zoning is an exaction or a land use regulation in a substantive context. The Court of Appeal had ruled that the City’s Inclusionary Housing Ordinance (“IHO”) was an exercise of the police power, and entitled to substantial deference from the courts.¹¹¹ It rejected the Association’s assertion that the ordinance constituted an exaction, because it only required a monetary payment, not a transfer of an interest in specific real property.¹¹² The U.S. Supreme Court’s decision in *Koontz*¹¹³ was handed down after the California Court of Appeal holding and before the California Supreme Court granted review.

While the Court of Appeal held the IHO was a legitimate way of effectuating California’s policy of furthering affordable housing, it did not determine whether the IHO constitutes a taking.¹¹⁴ As Justice Kennedy noted in his *Eastern Enterprise* concurring opinion, “[t]he [Takings] Clause operates as a conditional limitation, permitting the

106. See *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 307 P.3d 878 (Cal. 2013) (granting petition for review).

107. *Sterling Park, L.P. v. City of Palo Alto*, 310 P.3d 925 (Cal. 2013).

108. *Id.* at 925 (quoting CAL. GOV. CODE, § 66020, subd. (a)).

109. *Id.* at 12.

110. *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 157 Cal. Rptr. 3d 813 (Ct. App. 2013) (*review granted and opinion superseded*, 307 P.3d 878 (Cal. 2013)).

111. *Id.* at 824.

112. *Id.* at 823 n.8.

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

114. *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 157 Cal. Rptr. 3d 813 (Ct. App. 2013) (*review granted and opinion superseded*, 307 P.3d 878 (Cal. 2013)).

government to do what it wants so long as it pays the charge. The clause presupposes what the government intends to do is otherwise constitutional.”¹¹⁵ The fact that the direct benefit of a forced below-market sale would inure to the purchaser also is not relevant to a taking.¹¹⁶

2. ESTABLISHING BASELINES FOR NORMAL PROPERTY DEVELOPMENT

In discerning baselines against which sub-normal or supra-normal development is to be measured, ascertaining norms is imperative. Professor Robert Ellickson developed the well-known formulation that demands for compensation should be evaluated under a “normal behavior” standard.¹¹⁷ However, as Professor Nestor Davidson observed, “[n]ormal behavior,’ of course, is a comparative standard.”¹¹⁸

One aspect of this problem is whether approval of a development application would degrade the environment or the use of existing infrastructure, so as to require the developer to remediate or supplement existing facilities. Another aspect is whether the owner desires more-than-reasonable development in light of environmental or infrastructure considerations, so that the public should be compensated for possible future overburdening through incentive fees, which would give it corresponding reciprocal value.

In *Zoning for Dollars*,¹¹⁹ Jerold Kayden tried to grapple with the implications of government seeking valuable new amenities in exchange for permitting supra-normal development.

Does the Constitution bar the city from making this choice? Two principal objections come to mind. First, government will manipulate the base matter of right zoning FAR to a lower level than otherwise necessary in order to obtain amenities at no marginal physical planning cost.¹²⁰

In *Nollan*, Justice Scalia observed: “One would expect that [in] a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulations which the State then

115. *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

116. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (taking of physical possession of part of landlord’s building for benefit of cable TV company).

117. Ellickson, *supra* note 62, at 419-24.

118. Nestor M. Davidson, *The Problem of Equality in Takings*, 102 Nw. U. L. REV. 1, 53 n.131 (2008).

119. Kayden, *supra* note 67.

120. Kayden, *supra* note 67, at 46.

waives to accomplish other purposes. . . .”¹²¹ Professor Kayden responded by noting that “[a]lthough Justice Scalia is correct as to the real world possibility of the over-leveraged city, his scenario does not rise to the level of a judicially noticeable fact justifying a blanket conclusion about whose property rights are at stake.”¹²²

After *Koontz*,¹²³ the question appears to be not whether a blanket determination should be made regarding the extent of a plaintiff’s ownership vis-à-vis the police power, but rather the standard of review that should be employed in making parcel-specific determinations. As Justice Kennedy noted in the context of assertions that public use would be served by condemnation for subsequent retransfer for private revitalization, in situations in which a pattern of abuse has been shown, heightened scrutiny might be appropriate.¹²⁴

This concern also has an exact correspondence in the criminal justice system, a paradigmatic example of concern with low-level decision making in the “gatehouse” determining what happens in the “mansion.”¹²⁵

Where there are no limits on the size of plea discounts, as is typically the case, prosecutors can be expected to, and do routinely, overcharge simply because overcharging gives prosecutors bargaining leverage. In most cases, prosecutors overcharge not because they seek to impose unduly harsh sentences on defendants, but simply because of the bargaining leverage it provides.¹²⁶

In the same manner, the setting of baseline land uses gives the locality leverage over developers. The typical key to the voluntary creation of affordable housing, or the mitigation of economic impact through transferrable development rights (“TDR”s),¹²⁷ is that the recipient

121. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 n.5 (1987).

122. Kayden, *supra* note 67, at 47.

123. *Koontz*, 133 S. Ct. 2586 (2013).

124. *Kelo*, 545 U.S. 469, 493 at 72 (Kennedy, J., concurring) “My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted.” *Id.*

125. See *supra* note 4 and accompanying text.

126. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254 (2008) (internal citations omitted).

127. The TDR was popularized in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), where Justice Brennan declared that receipt of such rights would “undoubtedly mitigate” financial burdens of regulation that might otherwise constitute a taking. *Id.* at 137. However, the TDRs in *Penn Central* were to be used on the landowner’s own parcels in the vicinity. See also *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587 (N.Y. 1976) (holding the substitution

gains the bonus of greater density of development than other landowners enjoy in the target area where the incentives may be used. Thus, if land in a part of town is zoning for development at four dwelling units per acre (“DUA”), a recipient of a TDR could acquire land in that area and build eight DUA, or a voluntary provider of affordable housing could build at eight DUA if two of the units are sold at below market prices.

From an economic perspective, the beneficiaries of such schemes receive “regulatory property,”¹²⁸ the value of which lies in the owners’ ability to build at densities denied to others. However, even if sound planning would provide that only a few lots in the target neighborhood could be built at such high densities, there is no reason why the benefit of supra-normal development in the area should not be shared by all the existing landowners in the target area, instead of being taken, in Robin Hood fashion, for redistribution to others.¹²⁹

A second objection to incentive zoning noted in *Zoning for Dollars* is that “government’s willingness to sacrifice physical planning goals served by the base FAR regulation demonstrates a lack of seriousness about such goals.”¹³⁰ While the principal implication of *Zoning for Dollars* is that developers bargain to obtain favored positions consistent with sound planning, the corollary is that officials will reshape their goals in response to developer incentives.¹³¹ As noted earlier, the results can have regional and national, as well as local, consequences.¹³²

IV. Procedural Difficulties and Landowner Remedies

During recent decades, Euclidean zoning, which provides for development permits as of right when enumerated objective criteria are met, has become relatively unimportant, and land development has become

of property rights with transferable development rights of uncertain or contingent value a deprivation of due process).

128. See Bruce Yandle and Andrew P. Morriss, *The Technologies Of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 *ECOLOGICAL* L.Q. 123 (2001) (coining term).

129. See *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1989) (distributing fractional shares in development to neighbors). The issuance of similar fractional shares in development awarded owners who were not permitted to build themselves was deemed ripe for adjudication in *Suitum v. Tahoe Regional Plan. Agency*, 520 U.S. 725 (1997).

130. Kayden, *supra* note 67, at 47.

131. See Kayden, *supra* note 67, at 6-7 (noting that the “central criticism” of incentive zoning alleges that it “corrupts orthodox planning and zoning models by persuading planners to greenlight otherwise undesirable projects solely to obtain the privately financed amenities”).

132. See *supra* notes 92-96 and associated text.

marked by both flexibility and bargaining between regulators and landowners.¹³³ In the gatehouse in which such bargaining occurs, it is important that procedural impediments fostering the imposition of unconstitutional conditions be addressed, and that landowner remedies under *Koontz* be clarified.

A. *Instantiating Koontz in Development Approval Practice*

In *Koontz*,¹³⁴ the Supreme Court gave significant rhetorical support to the principle that unreasonable exactions on development is a serious problem, and that “[a]s in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.”¹³⁵

In *Kelo v. City of New London*,¹³⁶ the Court similarly expressed awareness of abuse of eminent domain for private benefit and assured that, although no general restrictions were required, such situations “can be confronted if and when they arise.”¹³⁷ Justice Kennedy’s concurrence held out the possibility of situations in which “the risk of undetected impermissible favoritism . . . is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted.”¹³⁸ Courts, however, have not responded to serious allegations of abuse with vigilance.¹³⁹

In the nature of things, adherence to *Nollan-Dolan* seems more easily respected in the “mansion” of formal adjudication than in the “gatehouse” of informal bargaining.¹⁴⁰ According to an empirical study involving questionnaires sent to planning directors in California and interviews by Professor Ann Carlson and Daniel Pollak,¹⁴¹ *Nollan* and *Dolan* “seem to have nudged many localities into more systematic, comprehensive planning through the preparation of reports and studies justifying and documenting the rationale for exacting money

133. See generally STEWART E. STERK & EDUARDO M. PEÑALVER, LAND USE REGULATION 31-51 (2011).

134. *Koontz*, 113 S. Ct. 2586.

135. *Id.* at 2596.

136. *Kelo*, 545 U.S. 469.

137. *Id.* at 487.

138. *Id.* at 493 (Kennedy, J., concurring).

139. See, e.g., *Kaur v. New York State Urb. Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010) (reversing appellate division ruling that eminent domain was pretextual and chastising it for going beyond record complied by defendant agency).

140. See Kamisar, *supra* note 4 and accompanying text.

141. 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, 104-06 (2001).

or land from developers.”¹⁴² The authors added that “[c]ontrary to initially negative reactions to the Court decisions, we found that an overwhelming percentage of California planners now view the *Nollan* and *Dolan* cases not as an encroachment upon their planning discretion but instead as establishing ‘good planning practices.’”¹⁴³

A 1995 study analyzing judicial applications of *Nollan* included a compilation of both state and federal cases that insisted on evidence of individualized determinations of rough proportionality.¹⁴⁴ Also, an article by Brett Gerry employed empirical comparisons and concluded that state and federal courts were at parity in applying *Nollan*.¹⁴⁵

On the other hand, with respect to the requirement for compensation imposed by the Supreme Court in *First English*,¹⁴⁶ Professor Gregory Stein asserted that an empirical analysis of case law would not be “particularly useful,” in light of the wide variety of local ordinances, the fact-specific nature of the case, and “the absence of any information on the many cases that never reach the courts.”¹⁴⁷

To be sure, there are a few cases in which extortionate behavior by government agents in other land use contexts is exposed in published judicial decisions.¹⁴⁸ In a remarkable recent case involving an extortionate exaction on development by ordinance, a Florida county required that landowners seeking development permits for lands outside designated transportation corridors “volunteer” to transfer fee simple title to their adjoining lands within the corridors. In *Hillcrest Properties, LLP v. Pasco County*,¹⁴⁹ the U.S. district court summarized the situation as follows:

If constitutional, the Ordinance undoubtedly will become quickly fashionable, as counties seize a singular opportunity to procure land for public use by the thrifty

142. *Id.* at 105.

143. *Id.*

144. Kristen Sosnosky, Note, *Dolan v. City of Tigard: A Sequel to Nollan’s Essential Nexus Test for Regulatory Takings*, 73 N.C. L. Rev. 1677, 1691-1705 (1995).

145. Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL’Y 233 (1999).

146. *First English Evangelical Lutheran Church of Glendale v. Cnty of L.A.*, 482 U.S. 304 (1987).

147. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 99, n.176 (1995).

148. *See, e.g.*, *Althaus v. United States*, 7 Cl. Ct. 688, 691 (1985) (describing National Park Service acquisition officer threatening “[e]ven though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar. . . .”); *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845 851 (6th Cir. 2012) (uncontested evidence of demand for \$100,000 donation to unaffiliated fund presented to rezoning applicant).

149. 939 F. Supp. 2d 1240 (M.D. Fl. 2013).

expedient of coerced conveyance rather than by the historically and constitutionally prescribed mechanism of eminent domain (which is, viewed from a county's vantage, encumbered by the strictures of "due process" and "just compensation" and burdened by both the supervision of an independent judge and the informed discretion of a disinterested jury).¹⁵⁰

Coercive exactions in the mansion of published ordinances, however, are the rare exception. The absence of information regarding the disposition of applications that never reach the courts pinpoints the real problem in formal analyses; that low-visibility messages to developers that if they want to get along, they have to go along never are reflected in the data.¹⁵¹

B. *Devices to Discourage Undue Permit Exactions*

1. PROVISIONS FOR TRANSPARENCY

Justice Alito's majority opinion in *Koontz* does not reflect disdain for development exactions,¹⁵² but may express irritation with the lack of transparency in the process by which developers are led to accede to informal demands for possibly unreasonable exactions. In the case of incentive fees or applicant-created infrastructure expenses of a routine nature, transparency could be furthered by legislatively-enacted fee schedules. Those are upheld unless clearly unreasonable.¹⁵³ Likewise, fine-grained ordinances setting out requisites for development would be transparent, but possibly deprived of judicial deference as constituting "spot zoning."¹⁵⁴

Administrative procedures incorporating standards and guidelines for different types of recurring development applications also are useful. While *Nollan* and *Dolan* require individualized determinations, that fact does not require that planning staff in each review reinvent basic concepts. Professor Mark Fenster has noted that flexibility in evaluating land development applications "can serve as a means to re-

150. *Id.* at 1243.

151. *See supra* note 83 and associated text. The present author similarly has heard accounts of coercion from developers and attorneys hesitant to go on the record.

152. *See, e.g., Koontz*, 133 S. Ct. at 2595 (suggesting that conditioning permit approval on the owner's agreement to deed over the land needed to widen a public road would be permissible).

153. *See, e.g., Town of Leesburg v. Giordano*, 701 S.E.2d 783, 787-88 (Va. 2010).

154. *See, e.g., Bd. of Supervisors of Culpeper County v. Greengael, L.L.C.*, 626 S.E.2d 357, 367 (Va. 2006) ("A court conducts a more expansive review, however, when a rezoning is a piecemeal downzoning, which is defined as a rezoning (1) that the local governing body initiates on its own motion, (2) that selectively addresses the landowner's single parcel, and (3) that 'reduces the permissible residential density below that recommended by a duly-adopted master plan.'" (quoting *Bd. of Supervisors of Fairfax County v. Snell Construction Corp.*, 202 S.E.2d 889, 892 (Va. 1974)).

solve disputes . . . by enabling regulator and regulated to find mutually agreeable terms.”¹⁵⁵ The process of reaching mutual agreement, if its fruits are to withstand judicial review, must involve the preparation of careful *Nollan-Dolan* analyses. This takes time and money. The basic fee for specified types of development applications might incorporate these expenses. Professor Fenster has suggested that the costs in individual cases might be passed on to the developer, especially if he or she has submitted large-scale or complex plans, or ones requiring significant modification and additional review.¹⁵⁶ However, taxes, carrying costs, and visions of market turns fall heavily upon developers as it is, and paying substantial sums, possibly for second and subsequent reviews occasioned by changes made at regulators’ insistence, may dissuade landowners from pressing valid concerns.

2. NOTICE TO PERMIT APPLICANTS OF UNCONSTITUTIONAL CONDITIONS RIGHTS

Partly stemming from Professor Yale Kamisar’s *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*,¹⁵⁷ the Supreme Court established the requirement that, prior to custodial interrogation, suspects be informed of their rights to remain silent in *Miranda v. Arizona*.¹⁵⁸ While it is unlikely that being informed of their rights under the unconstitutional conditions doctrine would affect decisions of professional developers, home owners and small business owners might find that knowledge an incentive to seek legal assistance in bargaining with planning commission staffs.

Nevertheless, the *Miranda* experience might suggest other lessons. According to Professor Louis Michael Seidman, “the best data available suggest that *Miranda* has had essentially no effect on the percentage of incarcerated defendants who confess.”¹⁵⁹ Professor Seidman attributed this to the fact that *Miranda* “is best characterized as a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance,”¹⁶⁰ and that “[t]he problem that *Miranda* addressed was how to curb [existing] protections so as not

155. Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623, 643 (2012).

156. *Id.*

157. Kamisar, *supra* note 4.

158. 384 U.S. 436 (1966). The similarities between the Court’s holding and Professor Kamisar’s chapter are detailed in Tracey Maclin, *Is Yale Kamisar as Good as Joe Namath?: A Look Back at Kamisar’s “Prediction” of Miranda v. Arizona*, 2 OHIO ST. J. CRIM. L. 33, 34-35 (2004).

159. Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 744 (1992).

160. *Id.*

to interfere with the preservation of interrogation as an effective weapon in the police crime-fighting arsenal.”¹⁶¹ A subsequent analysis by Professor Charles Weisselberg declared: “As for the ability of suspects to decline to waive their rights at the outset of questioning, or to affirmatively invoke them later, the effectiveness of Miranda’s regime has been greatly reduced by practices that the Supreme Court has tolerated if not openly encouraged.”¹⁶²

The thrust of these commentaries is that society does not want to take steps that truly would curb coercive practices because criminal confessions are too useful. That conclusion also might apply to unconstitutional exactions from land development applicants. According to Professor David Dana, the combination of majoritarian politics and interest-group influence largely thwart effective change from the status quo.¹⁶³ The work of Professor Jerry Anderson and others suggests that developers, lawyers, and others working in the land development field are disproportionately represented on planning boards.¹⁶⁴ However, this would not negate the perception of bias in granting development approvals.¹⁶⁵

3. REMOVING THE DELETERIOUS EFFECTS OF *TWOMBLY-IQBAL*

While information pertaining to their legal rights is not apt to be particularly helpful to professional real estate developers subject to unreasonable exactions, information pertaining to the real factors that led to such exactions might. Such information would buttress the claims of residential and small business plaintiffs, as well. However, in *Bell Atlantic Corp. v. Twombly*,¹⁶⁶ and *Ashcroft v. Iqbal*,¹⁶⁷ the Supreme Court established a “plausibility” requirement that makes it difficult for a plaintiff alleging an unreasonable exaction to avoid dismissal.¹⁶⁸

161. *Id.*

162. Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1590 (2008).

163. See Dana, *supra* note 82, at 1269-74.

164. See Anderson, *supra* note 85 and accompanying text; see also Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447, 448 (2004) (noting the “widespread perception that zoning boards are often biased.”).

165. See, e.g., ROBERT C. ELLICKSON & VICKI BEEN, *LAND USE CONTROLS* 365-68 (3d ed. 2005).

166. 550 U.S. 544 (2007).

167. 556 U.S. 662 (2009).

168. *Id.* at 678 (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Bell Atlantic Corp.*, 550 U.S. at 570)).

In *Goldstein v. Pataki*,¹⁶⁹ the Second Circuit considered a landowner's claim that the condemnation of his parcel and many others for the "Atlantic Yards" redevelopment project in Brooklyn, New York was pretextual, and that "the 'favored' developer is driving and dictating the process, with government officials at all levels obediently falling into line."¹⁷⁰ Atlantic Yards was a very large and complicated project, with the participants well-seasoned in the development process. While there was much circumstantial evidence supporting Goldstein's charges, the Second Circuit panel, which included now-Justice Sotomayor, concluded that the facts that were established were not sufficiently plausible to justify discovery. Without that chance to uncover evidence to support charges of the defendants' wrongful intent, the case simply could not be won.

Goldstein was not an incorrect decision under existing law, but it points out the untoward effects that result from a mixture of sophisticated private developers, local officials with whom they were aligned, the application of deferential review, and an inability to obtain evidence to document a claim that unreasonable exactions were unreasonably imposed.

In his concurring opinion in *Kelo v. City of New London*, Justice Kennedy agreed that heightened scrutiny generally was not required in considering whether exercises of eminent domain were for public uses, but that this would "not foreclose the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings."¹⁷¹ *Twombly-Iqbal* might be a prudential principle generally conducive to sound judicial administration, but in cases with strong circumstantial evidence favoring landowners' claims that they have been deprived of Takings Clause rights, it should not be fatal.

4. THE WILLIAMSON COUNTY FINALITY PRONG REDUX

In *Koontz*, Justice Alito noted that the Florida Supreme Court did not adjudicate how definitive the respondent's exaction demand was, and that this was open for its consideration on remand. To this effect, Alito wrote, "[t]his Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nolan* and *Dolan*."¹⁷²

169. 516 F.3d 50 (2d Cir. 2008).

170. *Id.* at 55.

171. *Kelo*, 545 U.S. at 493 (2005) (Kennedy, J., concurring); see also *supra* notes 124-27 and accompanying text.

172. *Koontz*, 133 S. Ct. at 2598.

It seems clear that for unconstitutional conditions litigants, the need to establish the concreteness and specificity of agency demands will present problems similar to the notorious difficulty in pinning down how much development an agency would allow in regulatory takings cases. In *Williamson County Regional Planning Commission v. Hamilton Bank*,¹⁷³ the Court stated that “[b]ecause respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent’s claim is not ripe.”¹⁷⁴ Obtaining a “final” decision of the extent of permissible development can be a task of Byzantine complexity, in part because applicants may have to file multiple applications, planners take into account the interplay of many aspects of a development proposal, and do not simply decide “how much” development is allowed, and it is not in the interest of officials to give definitive statements that might be a requisite to litigation.¹⁷⁵

Just as Justice Scalia observed that only “stupid staff” would draft an ordinance that leaves landowners with absolutely no economically viable uses of their land,¹⁷⁶ so would post-*Koontz* staff have to be intellectually challenged or intrepid to deliver written demands at any but the most final stage of formal negotiations, and with the support of extensive individualized determination of rough proportionality between those demands and the police power burdens that the proposed project would engender.

The typical bargaining process, however, is much less formal. The developer will be engaged in informal discussion at pre-application forums, possibly involving community residents. Or, the planning staff could indicate possible problems with the proposal in general terms, and ask the developer what might offset the difficulties. Or, the developer might be a repeat player, accosted in the hallway with a blunt oral demand. Or, the planning agency and other officials might say nothing, confident that a zoning ordinance providing only minimal development as of right would induce developers to submit proposals including substantial proffers.

173. 473 U.S. 172 (1985).

174. *Id.* at 186.

175. See, e.g., Stephen E. Abraham, *Williamson County Fifteen Years Later: When is a Takings Claim (Ever) Ripe*, 36 REAL PROP., PROB. & TR. J. 101 (Spring 2001) (describing complexities).

176. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

Justice Kagan expressed the fear that, given the broad inclusion of monetary exactions in *Koontz*, “no local government official with a decent lawyer would have a conversation with a developer.”¹⁷⁷ This concern seems hyperbolic, since local governments find conversations and bargaining with developers very useful and would be loath to give up the practice. If the price of continuing is to press demands that actually are tailored to the applicant’s parcel and proportionate to the burden of development, the ensuing utility would seem to far outweigh the costs of possible legal challenges.

C. Possible Remedies

During its two most recent terms, the Supreme Court has expanded the ability of landowners subject to significant restrictions and liability to litigate their cases. In *Sackett v. Environmental Protection Agency*,¹⁷⁸ the Court held that landowners subject to potentially heavy penalties for asserted violations of the Clean Water Act would not have to await a possible lawsuit by EPA, but could seek immediate judicial review of the underlying merits. In *Horne v. Department of Agriculture*,¹⁷⁹ the Court held that a raisin producer subject to substantial penalties for not transferring a large part of its crop to the “reserve” of an agricultural marketing board could assert its takings claim as a defense to USDA enforcement action in federal district court.

In *Koontz*, Justice Alito described the petitioner’s injury in different terms than the absence of just compensation regularly asserted in regulatory takings claims.

While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.¹⁸⁰

As noted in Justice Kagan’s dissent, however, Florida appears to have no specific remedy for burdening Takings Clause rights.¹⁸¹ Nevertheless, states do provide redress for violations of the rights of their citizens under the federal (and probably state) constitutions by local

177. *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting).

178. 132 S. Ct. 1367 (2012).

179. 133 S. Ct. 2053 (2013).

180. *Koontz*, 133 S. Ct. at 2597 (emphasis added).

181. *Id.* at 2612 (Kagan, J., dissenting).

and state officials. Such remedies would be analogous to the federal Civil Rights Act,¹⁸² which imposes liability for deprivation of federal Constitutional rights under color of law.¹⁸³ The U.S. Supreme Court has noted, in *Wilson v. Garcia*,¹⁸⁴ that tort actions for the recovery of damages for personal injuries are generally the best analogue to Section 1983 claims.¹⁸⁵

Other statutory remedies might be available. In Florida, for instance, the Bert J. Harris, Jr., Private Property Rights Protection Act¹⁸⁶ provides that an owner may sue where a government action “inordinately burdened an existing use of real property or a vested right to a specific use of real property.”¹⁸⁷ Furthermore, the Florida statute under which Koontz claimed the right to compensation, “[j]udicial review relating to permits and licenses,”¹⁸⁸ seems to emphasize the “unreasonable” nature of the government’s actions, and could easily be modified for the future to include “unreasonable burdens on Takings Clause rights.”¹⁸⁹

Koontz represents a positive development in the trend towards landowner challenges to land use restrictions more amenable to judicial review. It is perhaps an historical anomaly that, unlike other deprivations of federal constitutional rights under color of state law,¹⁹⁰ regulatory takings cases must be litigated in state court.¹⁹¹ In *San Remo Hotel, L.P. v. City and County of San Francisco*,¹⁹² four Justices openly questioned the necessity for takings plaintiffs seeking compensation

182. 42 U.S.C. § 1983 (1996).

183. *Id.*

184. 471 U.S. 261 (1985), (*superseded by statute*, 28 U.S.C. § 1658 (2002), as *recognized* in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004)).

185. *Id.* at 276 (“After exhaustively reviewing the different ways that § 1983 claims have been characterized in every Federal Circuit, the Court of Appeals concluded that the tort action for the recovery of damages for personal injuries is the best alternative available. We agree that this choice is supported by the nature of the § 1983 remedy”) (internal citation omitted).

186. F.S.A. § 70.001.

187. § 70.001 (2).

188. § 373.617.

189. § 373.617 (2). (“Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state’s police power constituting a taking without just compensation.”)

190. *See, e.g.*, *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) (regarding race and sex discriminating, and holding that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies).

191. *Williamson Cnty. Plan. Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (requiring use of state procedures for obtaining just compensation to ripen regulatory takings claims).

192. 545 U.S. 323 (2005).

in state court.¹⁹³ Recently, in *Horne v. Department of Agriculture*,¹⁹⁴ the Supreme Court gratuitously noted that under *Williamson County* “a Fifth Amendment claim is premature until it is clear that the Government has both taken property and denied just compensation. Although we often refer to this consideration as “prudential ‘ripeness,’” we have recognized that *it is not, strictly speaking, jurisdictional.*”¹⁹⁵ The Supreme Court’s regulatory takings doctrine is encrusted with the history of the *Williamson County* state litigation prong. When providing remedies for its new *Koontz* doctrine of imposing unreasonable burdens on Takings Clause rights, the Court has the opportunity for a new beginning. It could provide for injunctive relief against demands for unreasonable exactions, for instance, with damages for the time the burden was in force.

V. Conclusion

This Article suggests several ways in which states and localities could make their processes for review of land development applications more transparent and fair. However, it seems less than likely that jurisdictions will adopt meaningful reform. As Professor David Dana has articulated, existing residents, local officials, and entrenched local developers all have reasons to prefer things as they are.¹⁹⁶

It is most likely that a reduction in the imposition of unconstitutional conditions can come about only through strong judicial action. *Koontz* establishes a conceptual framework on which the judiciary can build. Without guidance from the Supreme Court regarding specific remedies and forums for their implementation, however, progress will be halting.

193. *Id.* at 349 (Rehnquist, C.J., concurring in judgment).

194. 133 S. Ct. 2053 (2013).

195. *Id.* at 2062 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1013 (1992)) (emphasis added).

196. See Dana, *supra* note 82, at 1300-02.