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THE BIG CHILL? – THE LIKELY IMPACT OF *KOONTZ* ON THE LOCAL GOVERNMENT/DEVELOPER RELATIONSHIP

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The doctrine of unconstitutional conditions has come to be regarded as an accepted and integral part of American constitutional law.[1] However, it currently finds itself at the center of a controversy that may revolutionize the relationship between property owners, local governments, and the federal judiciary. This controversy involves development exactions, a rapidly changing area of property law that has been the subject of several landmark Supreme Court decisions over the past three decades.[2] Once a relatively unknown tool used by a handful of local governments,[3] exactions, in many ways, now define the relationship between property owners and local govern-

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[1] *See* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001) (stating that the doctrine of unconstitutional conditions "has been recognized for well over a century and appears in dozens of doctrinal contexts.").

[2] *See* Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277, 278 (2011) (discussing how the Supreme Court's exactions jurisprudence has developed over the past three decades).

[3] *See* Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 516, 518 (2012) (stating that "leading up to the Great Depression, subdividing land required only a whim, a pen, and a map. . . . large landholders bore no responsibility for constructing public improvements needed to serve these subdivided lands.").

ments.[4] This relationship took an abrupt turn at the end of the Supreme Court's 2012 term when it decided *Koontz v. St. Johns River Water Management District*.[5] This case, hailed as a major victory for developers and a setback for communities across the country,[6] placed the doctrine of unconstitutional conditions into the center of controversy.

This article will explore the doctrine of unconstitutional conditions, showing how it has evolved in the context of land use and come to be the logical underpinning of controversial Supreme Court decisions regarding exactions. Part I will explain the doctrine of unconstitutional conditions, providing a brief overview of its development over the course of the past century. Part II will then discuss how this doctrine has come to be the logical foundation on which the Supreme Court's exactions jurisprudence rests. Part III will discuss the *Koontz* decision and its impact on the doctrine of unconstitutional conditions. In Part IV, we will shift our focus to the *Koontz* decision, and explain why it has been called by some commentators the worst takings decision in Supreme Court history. Finally, in Part V, we will discuss how local governments should proceed in the post-*Koontz* world.

I. WHAT IS THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS?

The doctrine of unconstitutional conditions, first articulated by the *Lochner* Court over a century ago,[7] holds that the government may not condition the provision of a discretionary benefit (e.g., a permit, license, grant, contract, etc.) on a requirement that an individual surrender a constitutionally protected right.[8] For example, the

[4] Mark Fenster, *Regulating Land Use in A Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 741 (2007).

[5] 133 S. Ct. 2586 (2013).

[6] *See* Jonathan Stempel & Lawrence Hurley, *U.S. top court backs Florida property owner in land-use case*, REUTERS (June 25, 2013, 4:00 PM), http://www.reuters.com/article/2013/06/25/us-usa-court-property-idUSBRE95O0XM20130625 (stating "[i]n a victory for advocates of private property rights, the U.S. Supreme Court ruled on Tuesday that governments may owe compensation to property owners who are denied permits to develop their land.").

[7] *See* W. Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 51 (1910); Pullman Co. v. Kansas *ex rel.* Coleman, 216 U.S. 56, 70 (1910) (demonstrating the Supreme Court's first use of the term "unconstitutional condition" in these cases decided in January 1910).

[8] *Koontz*, 133 S. Ct. at 2595 (explaining that "the unconstitutional conditions doctrine for-

government cannot force a television station receiving public funds to refrain from endorsing a candidate for public office[9] because then the constitutionally protected right (freedom of speech) would be impermissibly burdened by the government's refusal to provide public funds to the television station. The doctrine applies even if the government is authorized to withhold the benefit altogether.[10] This doctrine is a reflection of the view that the government "may not do indirectly what it cannot do directly."[11]

There is a continuum of the degree to which a "benefit" is a discretionary gift of the government, and when it is a constitutionally protected right. For example, welfare is a discretionary benefit that the government is under no legal right to provide.[12] The right to develop property, on the other hand, is a constitutionally protected right,[13] albeit one that can be regulated.[14] Therefore, the degree to which a benefit is a fundamental right rather than an optional gift provided by the government dictates the degree to which the doctrine of unconstitutional conditions may be applied.[15] The more the condition restricted is a fundamental right, the less the government may burden it. The doctrine of unconstitutional conditions has survived a number of ideological shifts on the Court[16] and has become an ac-

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bids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

[9] *See* FCC v. League of Women Voters, 468 U.S. 364, 381-82 (1984) (holding that Congress may not require a public television station to refrain from engaging in editorializing as a condition for receiving public funds).

[10] Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178, 1189 (6th Cir. 1997).

[11] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

[12] *See* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (explaining that once the decision to provide welfare benefits has been made, the government may not deny the benefits for unfair reasons or through unfair procedures); *see also* Sherbert v. Verner, 374 U.S. 398, 399, 410 (1963) (finding that a state may not refuse to pay unemployment benefits to a Seventh Day Adventist who rejects a job that requires her to work on Saturdays).

[13] Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989).

[14] Norman v. United States, 63 Fed. Cl. 231, 266 (Fed. Cl. 2004) (stating "simply because a private property owner is in a highly-regulated field, does not, by itself, mean that the owner has no reasonable investment-backed expectations in its ability to develop or otherwise utilize its property.").

[15] James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 411 (2009).

[16] *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 596 (1990) (recognizing that the doctrine of unconstitutional conditions survived the radical changes of the New Deal, and reemerged under the Warren Court to protect personal liber-

cepted and essential aspect of American constitutional law.

II. THE DEVELOPMENT OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE IN LAND USE LAW: *NOLLAN*, *DOLAN*, AND *LINGLE*

While the Supreme Court continued to expand the doctrine of unconstitutional conditions throughout the twentieth century, it was not until the 1980s that it applied the doctrine to land use. Since that time, the unconstitutional conditions doctrine has become one of the hottest areas of property law,[17] providing the logical underpinning for the Court's exactions jurisprudence, which has redefined the relationship between local governments and property owners.

An exaction is a condition placed on land by the government[18] that requires a property owner seeking to develop his property to mitigate the negative impacts of the owner's proposed development.[19] This often requires the developer to dedicate land for streets, sidewalks, or parks, or to pay money to offset the government's cost of providing infrastructure like sewers, water pipes, and garbage collection.[20] The use of exactions increased substantially during the 1970s and 1980s,[21] and local governments increasingly demanded greater concessions from developers, which often bore little relationship to

ties); *see, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Speiser v. Randall, 357 U.S. 513 (1958).

[17] *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1513 (2006) ("In the last several decades, there has been a marked shift in local government financing away from the use of general revenue taxes and toward nontax revenue-raising devices such as exactions.").

[18] Usually a local government imposes an exaction.

[19] *See* Kamaole Pointe Dev. LP v. Cnty. of Maui, 573 F. Supp. 2d 1354, 1369 (D. Haw. 2008); *see generally* DAVID L. CALLIES, CECILY TALBERT BARCLAY & JULIE A. TAPPENDORF, DEVELOPMENT BY AGREEMENT: A TOOL KIT FOR LAND DEVELOPERS AND LOCAL GOVERNMENTS (2012) (providing a general discussion of development exactions).

[20] These fees are known as monetary exactions.

[21] The use of exactions increased in the 1970s because municipal governments were increasingly strained financially due to the burgeoning anti-tax movement, the rise of the anti-growth movement, a reduction in federal contributions to local communities, and increased state and federal mandates requiring municipalities to increase their services. *See* Mulvaney, *Exactions for the Future*, *supra* note 3, at 518 ("In the face of federal and state funding cuts to local governments in the 1970s and 1980s, developer-borne exactions looked more and more like an attractive option to the public and its elected representatives . . . ."); *see also* Ball & Reynolds, *supra* note 17, at 1524-28 (explaining the growth of exactions through the 20th century).

the negative impacts of the development.[22] This attracted the attention of the Supreme Court, and in 1987, the Court began to develop its exactions jurisprudence in *Nollan v. California Coastal Commission*.[23]

A. *Nollan v. California Coastal Commission*

In *Nollan*, the plaintiffs sought to demolish their beachside house and replace it with a larger one.[24] The California Coastal Commission agreed to these plans on the condition that the plaintiffs grant the public an easement across the beachfront portion of their property.[25] The Commission justified this easement on the basis that "the new house would increase blockage of the view of the ocean,"[26] and would "burden the public's ability to traverse to and along the shorefront."[27] The plaintiffs appealed this decision in state courts to no avail, but were able to obtain a writ of certiorari from the United States Supreme Court.

The issue before the Supreme Court was whether the Takings Clause permitted the government to require an uncompensated conveyance from a property owner as a condition for a land use permit when the government otherwise would not be able to require this conveyance without paying just compensation.[28] The Court's answer was no, unless the government could show that the condition "substantially advance[s] legitimate state interests" and the condition did not "den[y] an owner economically viable use of his land."[29] For purposes of the case, the Court assumed that the condition met this threshold requirement.[30] It then focused on the lack of congruence between the easement demanded and the purposes articulated by the

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[22] *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 201 (2006).

[23] 483 U.S. 825 (1987).

[24] *Id.* at 828.

[25] *Id.* at 829.

[26] *Id.* at 828.

[27] *Id.* at 829.

[28] *Nollan*, 483 U.S. at 834.

[29] *Id.* (alteration in original) (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)). The Court did not specifically state what would constitute substantially advancing state interests, but that a broad range of purposes and regulations would satisfy these requirements. *Agins*, 447 U.S. at 260-61.

[30] *Nollan*, 483 U.S. at 836.

commission.[31] The Court noted that the "lack of nexus between the [building] condition and the original purpose of the building restriction"[32] was critical because "unless the permit condition serves the same governmental purpose as [a] development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.' "[33] *Nollan*, thus, established that an "essential nexus" must exist between a development condition and the amelioration of a legitimate public problem arising from the development.[34] While this holding essentially stated that the right to develop property could not be impermissibly burdened by the government except in limited circumstances, conspicuously absent from the Court's language was any mention of the unconstitutional conditions doctrine. The Court clarified this absence in another landmark property rights case, *Dolan v. City of Tigard*.[35]

B. *Dolan v. City of Tigard*

In *Dolan*, the plaintiff sought to redevelop her property, and as a condition of this redevelopment, the city required her to build a walk/bike path that would extend across fifteen percent of her property.[36] The plaintiff contested this condition,[37] but lost at all state court levels.[38] The United States Supreme Court granted certiorari, and expanded and clarified its holding in *Nollan*. The Court explained that its holding in *Nollan* was an application of the unconstitutional conditions doctrine.[39] When the government imposes an exaction, it burdens the property owner's right to receive just compensation for the taking of property.[40] The Court held that the government may not burden this right except in limited circumstances. Specifically, in order to impose an exaction, the government needed to show two things: 1) there must be an "essential nexus" between the exaction

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[31] *Id.* at 837-39.
[32] *Id.* at 837.
[33] *Id.*
[34] *Id.*
[35] 512 U.S. 374 (1994).
[36] *Id.* at 377-80.
[37] *Id.* at 381.
[38] *Id.* at 382-83.
[39] *Id.* at 385.
[40] *Dolan*, 512 U.S. at 385.

and a legitimate state interest;[41] and 2) there must be a "rough proportionality" between this state interest and the exaction.[42] If the government could not meet both of these conditions, then it impermissibly burdened the property owner's right to development, and the exaction was unconstitutional.[43] In *Dolan*, the Court found that the second condition had not been satisfied, as the city did not prove that the proposed walk/bike path was necessary to offset the increased traffic caused by the development.

Nollan and *Dolan*, thus, created a framework that allowed local governments to continue to impose exactions but made it easier for a property owner to assert a takings claim.[44]

C. *Lingle v. Chevron U.S.A., Inc.*

In 2005, the Supreme Court further elevated the importance of the unconstitutional conditions doctrine in *Lingle v. Chevron U.S.A., Inc.*[45] In *Lingle*, the State of Hawai'i enacted a statute that limited the amount of rent an oil company could charge a dealer.[46] The plaintiff, an oil company, sued the state, claiming that the statute effectuated a taking of its property.[47] The district court granted summary judgment for the plaintiff, holding that the statute "fail[ed] to substantially advance a legitimate state interest, and as such, effect[ed] an unconstitutional taking."[48] The district court came to this holding by relying upon language in *Nollan*, *Dolan*, and *Agins* that seemed to require that a valid taking "substantially advance" a legitimate state inter-

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[41] *Id.* at 386. The Court devised the "essential nexus" requirement in *Nollan*, 483 U.S. at 837.

[42] *See Dolan*, 512 U.S. at 391 (explaining that to determine rough proportionality, "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

[43] *Id.* at 391.

[44] The Court has allowed property rights to be burdened to a greater extent than other constitutional rights. For example, the First Amendment would probably apply to a government policy that refused to allow permits to hold worship services in a church unless the parishioners agreed to perform repair work on government property several miles away.

[45] 544 U.S. 528 (2005).

[46] *Id.* at 533.

[47] *Id.*

[48] *Id.* at 534 (quoting Chevron U.S.A., Inc. v. Cayetano, 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998)).

est.[49] The Ninth Circuit affirmed the district court's holding and its reliance upon this "substantially advance" language.[50]

However, the Supreme Court reversed the Ninth Circuit, rebuking its reliance on the "substantially advance" language.[51] The Court unanimously held that despite statements it made in *Nollan* and *Dolan*, a court should not review whether the government's action substantially advances a legitimate state interest.[52] The Court explained that the legitimacy of governmental action is not a proper takings inquiry, as "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[53] The "substantially advance" language, on the other hand, improperly focuses on the policy supporting the regulation,[54] and not the essential takings question: whether a regulation is "functionally comparable to government appropriation or invasion of private property."[55] The Court held that the constitutional underpinning of *Nollan* and *Dolan* is the unconstitutional conditions doctrine,[56] while it is the Due Process Clause for the "substantially advance" test.[57] By repudiating the "substantially advances" language, *Lingle* broadened the rights of local governments to regulate land use, as the court would no longer inquire into the reasonableness of government action. This decision clarified the Court's exactions jurisprudence, but left one crucial question unresolved: Did *Nollan* and *Dolan* apply to monetary exactions? The Court resolved this question in *Koontz*.

III. *KOONTZ*: A REVOLUTION IN LAND USE LAW?

Koontz v. St. Johns Water Management District was decided at the end of the Supreme Court's 2012 term[58] and was somewhat overshadowed by other landmark cases involving the validity of the

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[49] *Id.* at 531-32.
[50] *Lingle*, 544 U.S. at 536.
[51] *Id.* at 545.
[52] *Id.* at 542-45.
[53] *Id.* at 543.
[54] *Id.* at 542.
[55] *Lingle*, 544 U.S. at 542.
[56] *Id.* at 547-48.
[57] *Id.* at 540.
[58] *Koontz*, 133 S. Ct. 2586. The case was decided on June 25, 2013.

preclearance provisions of the Voting Rights Act,[59] the use of race in school admissions,[60] and historic rulings on same-sex marriage.[61] While *Koontz* may not have received as much fanfare as those cases, it has potentially wider ranger implications.

The case involved Coy A. Koontz, an owner of a 14.9-acre tract of Florida wetlands, who sought a permit from the St. Johns River Water Management District ("District") to develop a 3.7 acre portion of his land.[62] As a condition to this development, Koontz proposed giving "the District a conservation easement on [a] portion of his property."[63] The District rejected this initial proposal and countered with a proposal asking Koontz to either dedicate a larger conservation easement or hire contractors to improve another part of the District's property.[64] After receiving this counteroffer, Koontz dropped out of the negotiations and sued the District under a state law permitting property owners to recover money damages in the event of an unconstitutional taking.[65] Koontz argued that the District's demands failed to meet the "essential nexus" and "rough proportionality" standards established in *Nollan* and *Dolan*.[66] The trial and appellate courts held that the District's demand failed the *Nollan/Dolan* tests and, therefore, constituted a taking.[67] The Florida Supreme Court reversed, holding that Koontz did not have a claim for two reasons.[68] First, the court held that the *Nollan/Dolan* standard does not apply to the denial of a permit (as opposed to the approval).[69] Second, the court held that the *Nollan/Dolan* standard does not apply to a demand for the payment of money (a monetary exaction) and instead

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[59] Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

[60] Fisher v. Univ. of Texas, 133 S. Ct. 2411 (2013).

[61] United States v. Windsor, 133 S. Ct. 2675 (2013); Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[62] *Koontz*, 133 S. Ct. at 2591-93.

[63] *Id.* at 2592-93.

[64] *Id.* at 2593.

[65] *Id.* (indicating that Koontz "argued that he was entitled to relief under FLA. STAT. § 373.617(2), which allows owners to recover 'monetary damages' if a state agency's action is 'an unreasonable exercise of the state's police power constituting a taking without just compensation.' ").

[66] *Id.* at 2595-96.

[67] *Koontz*, 133 S. Ct. at 2593.

[68] *Id.*

[69] *Id.*; *see also* St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1230 (Fla. 2011).

only applies to a specific burden on a property interest.[70]

The Supreme Court granted certiorari and reversed the Florida Supreme Court on both grounds.[71] First, the Court unanimously held that the *Nollan/Dolan* standard does apply to the denial of a permit, and that Koontz could assert "a *Nollan/Dolan* unconstitutional conditions violation."[72] The Justices agreed that refusing to grant a development permit unless a property owner agreed to an unconstitutional condition was no different from granting the development permit on the condition that the property owner relinquish his constitutional right to just compensation.[73] The Court noted that "[u]nder *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts."[74]

Addressing the argument that Koontz had lost no property and, therefore, could not assert a takings claim, the majority held that Koontz had indeed suffered a constitutional injury.[75] This injury was not that the government took property without just compensation, but rather that by its making an "extortionate demand" on Koontz, it "impermissibly burden[ed] the right not to have property taken without just compensation."[76] Thus, the government's action ran afoul of the doctrine of unconstitutional conditions. This would have been true even if the benefit was one that the government "would have been entirely within its rights in denying."[77] The Court recognized that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take."[78] This

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[70] *Koontz*, 133 S. Ct. at 2594; *St. Johns River Water Mgmt. Dist.*, 77 So. 3d at 1230.

[71] *Koontz*, 133 S. Ct. at 2594.

[72] *Id.* at 2594-97.

[73] *Id.* at 2595.

[74] *Id.*

[75] *Id.* at 2596.

[76] *Koontz*, 133 S. Ct. at 2596.

[77] *Id.*

[78] *Id.* at 2594. The Court explained:

> Our decisions in [*Nollan/Dolan*] reflect two realities of the permitting process. The first is that land-use permit applicants are especially vul-

could easily "pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation,"[79] and, therefore, required that the heightened standards of *Nollan/Dolan* be applied to government rejection of a land use permit.

The second part of the Court's holding bitterly divided it 5-4 along ideological lines. The Court held that a government's demand for money from a land use permit applicant, known as a monetary exaction, must satisfy the *Nollan/Dolan* requirements.[80] The majority explained that holding otherwise would allow the government to evade *Nollan/Dolan* by simply imposing monetary exactions on a property owner instead of requiring him to surrender property.[81] However, the majority noted that taxes are not takings, and therefore not subject to the *Nollan/Dolan* requirements.[82] It dismissed the argument that the difficulty in distinguishing monetary exactions from taxes might lead to judicial review of all fees imposed by a municipality, writing that "teasing out the difference between taxes and takings is more difficult in theory than in practice."[83] The Court then remanded the case to the Florida Supreme Court to determine whether the District's rejection of the land use permit was a *Nollan/Dolan* violation.[84]

Justice Kagan, writing for the dissent, proclaimed that the Court would come to "rue" its decision.[85] First, Kagan noted that in *Eastern Enterprises v. Apfel*,[86] the Court held that "requiring a person

> nerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. . . . Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

Id. at 2594-95.

79 *Id.* at 2594.

80 *Koontz*, 133 S. Ct. at 2598-2602.

81 *Id.* at 2595.

82 *Id.* at 2600.

83 *Id.* at 2601.

84 *Id.* at 2603.

85 *Koontz*, 133 S. Ct. at 2612 (Kagan, J., dissenting).

86 524 U.S. 498 (1998).

to pay money to the government, or spend money on its behalf, [does not] constitute a taking."[87] Rather, a taking only occurs when the government impairs a "specific and identified propert[y] or property right."[88] Under this standard, a monetary exaction could never be a taking. However, she explained that *Nollan/Dolan* only applies when the government has effectuated a taking.[89] Therefore, *Koontz*'s subjection of monetary exactions to the *Nollan/Dolan* requirements was inconsistent with *Eastern Enterprises*. Justice Kagan blasted the majority for "run[ning] roughshod over *Eastern Enterprises.*"[90]

Second, Kagan worried that the majority's holding "threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny."[91] She was particularly concerned about the ability of lower courts to distinguish monetary exactions, held to the higher *Nollan/Dolan* standard, from taxes, not held to this standard.[92] Kagan noted that "[t]he boundaries of the majority's new rule are uncertain."[93]

Third, Justice Kagan challenged the majority's factual findings. She argued that the government never made a demand on Koontz.[94] Rather, it merely engaged in a process of negotiation, suggesting ways Koontz could mitigate the negative effects of his development.[95] Kagan noted that *Nollan/Dolan* does not apply to excessive regulatory burdens on land use, but instead prevents the government from imposing the unconstitutional condition that a property owner surrender his right to "just compensation 'in exchange for a discretionary benefit' having 'little or no relationship' to the property taken."[96] "[Therefore], the *Nollan*/*Dolan* test only applies when the property the government demands . . . is the kind [for

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[87] *Koontz*, 133 S. Ct. at 2605 (Kagan, J., dissenting); *E. Enters.*, 524 U.S. at 543 (Kennedy, J., concurring and dissenting in part).

[88] *Koontz*, 133 S. Ct. at 2605 (Kagan, J., dissenting) (alteration in original); *E. Enters.*, 524 U.S. at 540-41 (Kennedy, J., concurring and dissenting in part).

[89] *Koontz*, 133 S. Ct. at 2606 (Kagan, J., dissenting).

[90] *Id.* at 2603.

[91] *Id.* at 2604.

[92] *Id.* at 2607-08.

[93] *Id.* at 2604.

[94] *Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting).

[95] *Id.* at 2611.

[96] *Id.* at 2604-05 (citing *Lingle*, 544 U.S. at 547).

which] it otherwise would have to pay. . . ."[97] If the government never makes a demand, no taking could occur.[98] Therefore, according to Justice Kagan, Koontz had no claim.[99]

Fourth, Justice Kagan argued that challenges to monetary exactions should be evaluated under the *Penn Central* regulatory takings framework or as a violation of another constitutional provision, like the Due Process Clause.[100] As noted above, she explained that *Nollan/Dolan* only applies when the government imposes an exaction for which it otherwise would have to pay just compensation.[101] As a result, the Takings Clause is not the appropriate constitutional provision to apply to monetary exactions.

IV. *KOONTZ*: THE WORST TAKINGS DECISION OF ALL TIME?

While the reception to the Koontz decision was initially mixed,[102] the decision has engendered an increasingly critical response.[103] Scholars question the legal foundation on which it rests, developers worry about the chilling effects it will have on negotiations with local governments, and local governments worry about the lawsuits they will face from developers. Cumulatively, these issues

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[97] *Id.* at 2605.

[98] *Id.* at 2604.

[99] *Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting).

[100] *Id.* at 2609. Kagan argues that "a court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands . . . ." *Id.*

[101] *Id.*

[102] A number of commentators praised the decision in the days after it was issued. *See* Larry Salzman, Koontz *Decision: Victory for Property Rights*, NAT'L REV. ONLINE (June 25, 2013, 5:45 PM), http://www.nationalreview.com/corner/352016/koontz-decision-victory-property-rights-larry-salzman; Paul J. Beard II, *Ruling Protects Landowners But Won't Hurt 'Collaboration'*, THE SACRAMENTO BEE (July 10, 2013, 12:00 AM), http://www.sacbee.com/2013/07/10/5556066/ruling-protects-landowners-but.html. However, the decision was also criticized. John D. Echeverria, *A Legal Blow to Sustainable Development*, N.Y. TIMES (June 26, 2013, 12:00 AM), http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?ref=opinion&_r=1&.

[103] *See* John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, VT. L. SCH. PAPER (Aug. 26, 2013), http://ssrn.com/abstract=2316406; Adam Lovelady, *The* Koontz *Decision and Implications for Development Exactions*, COATES' CANONS BLOG (July 1, 2013), http://canons.sog.unc.edu; *Potential Impacts of* Koontz *Decision on Local Land Use Decisions*, CMAP (Aug. 5, 2013), http://www.cmap.illinois.gov/about/updates/-/asset_publisher/UIMfSLnFfMB6/content/potential-impacts-of-koontz-decision-on-local-land-use-decisions.

might make *Koontz* the Supreme Court's worst takings decision of all time.

A. *Koontz* Rests on a Shaky Legal Foundation

One major problem with the Court's decision in Koontz is the shaky legal foundation upon which it rests. The Court ignored past precedent and created an amorphous, ill-defined legal standard that lower courts will have difficulty applying. First, as Justice Kagan notes in her dissent, the majority's holding in *Koontz* "runs roughshod over *Eastern Enterprises.*"[104] In that case, the Court held that requiring an individual to pay money to the government or spend money on its behalf did not constitute a taking to which the *Nollan/Dolan* requirements would apply.[105] This would seem to encompass monetary exactions. However, the majority in *Koontz* does not address the inconsistency between its holding and *Eastern Enterprises*. Its failure to resolve the discrepancy between these cases creates uncertainty as to when monetary exactions apply, and how *Eastern Enterprises* fits into the takings analysis.

Second, *Koontz* contradicts the Court's holding in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[106] In that case, a unanimous Court held that *Dolan*'s rough proportionality test does not apply to permit denials.[107] The Court stated:

> *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.[108]

Koontz squarely contradicts this statement by applying the *Dolan* rough proportionality test to permit denials.[109] Amazingly, the majority makes no mention of *City of Monterey* and leaves us wondering

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[104] *Koontz*, 133 S. Ct. at 2603 (Kagan, J., dissenting).

[105] *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring and dissenting in part).

[106] 526 U.S. 687 (1999).

[107] *Id.* at 703.

[108] *Id.*

[109] *Koontz*, 133 S. Ct. at 2594-95.

how to resolve the inconsistencies between these cases.

While *Koontz* rides roughshod over established Supreme Court precedent, it leaves in its wake a murky legal standard that lower courts will find difficult to apply. This murkiness will be most clear when a lower court attempts to determine when a permit denial should be held to the *Nollan/Dolan* requirements. *Koontz* held that the *Nollan/Dolan* requirements will be triggered when a local government makes a demand on a permit applicant.[110] However, what constitutes a demand? *Koontz* gives no guidance. The majority merely states in conclusory fashion that the District made a demand on Koontz.[111] It does not explain why the District made a demand and not merely a proposal, or give any guidance for lower courts to distinguish between the two. Justice Kagan struggles to find the line between them, and ultimately comes to an opposite conclusion from the majority, finding that the District merely made proposals, and not demands, on *Koontz*.[112] The absence of any framework by which to distinguish a demand from a proposal means that lower courts will create their own framework, leading to a haphazard application of *Koontz* throughout the country. Justice Kagan fears the consequences of the murky line between a demand and a proposal, writing that "[the] danger would rise exponentially if something less than a clear condition . . . triggered *Nollan/Dolan* scrutiny."[113]

This murky line between a demand and a proposal is further complicated by the realities of the permitting process. Negotiations between developers and local government often consist of informal conversations and mutual understandings not documented in formal letters or contracts. Several exaction options may be discussed, none of which were clearly defined or identified. How does either side prove whether an unconstitutional demand was made? It is difficult

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[110] *Id.* at 2595.

[111] *Id.* at 2594-96.

[112] *Id.* at 2611 (Kagan, J., dissenting).

[113] *Id.* at 2610. Justice Kagan worries about the inability of local governments and courts to distinguish a demand from a suggestion, noting:

> unless *Nollan* and *Dolan* are to wreck land-use permitting throughout the country—to the detriment of both communities and property owners—that demand must be unequivocal. If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants.

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

enough for a court to determine whether an exaction imposed violates *Nollan/Dolan*. However, when no exaction has been imposed, the challenge becomes ever more difficult.

Furthermore, the majority strains the limits of the *Nollan/Dolan* test by applying it to monetary exactions. In both *Nollan* and *Dolan*, the Court stated that heightened review applied because the exactions demanded by the government would have constituted *per se* takings[114] had they been assessed directly.[115] Both cases suggest that had the exactions not constituted *per se* takings, then it would have been inappropriate to impose the Court's heightened review.[116] However, monetary exactions can never constitute a *per se* taking because they do not require a property owner to suffer a permanent physical invasion of his property, nor do they completely deprive an owner of all beneficial use of his property.[117] Therefore, *Nollan* and *Dolan* were never meant to apply to monetary exactions. Justice Kagan recognizes this, writing that "[t]he majority offers no theory to . . . explain, as it must, why the District's [monetary] condition was 'unconstitutional.' "[118]

B. *Koontz* Makes an Orderly System of Land Use Regulation Significantly More Difficult

Conspicuously absent from the majority's opinion in *Koontz*

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[114] *See Lingle*, 544 U.S. at 547. The Court noted that there are "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property," as in *Loretto*; and second, when a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property," as in *Lucas*. *Id.* at 538 (alteration in original).

[115] The exaction demanded in *Nollan* was a public easement along the property owner's beachfront property. The exaction demanded in *Dolan* was the walk/bike path along fifteen percent of the property owner's land. Both of these would constitute *per se* takings under the *Loretto* takings test. *See Nollan*, 483 U.S. at 827-28; *Dolan*, 512 U.S. at 379-80. *See Lingle*, 544 U.S. at 538 (discussing the *Loretto* takings test).

[116] *Nollan* and *Dolan* rest on the premise that heightened review is necessary because the constitutional right to just compensation is burdened by the taking of property. *See Nollan*, 483 U.S. at 838; *Dolan*, 512 U.S. at 386. *Eastern Enterprises* also suggests this. Justice Kennedy, in a concurring opinion, wrote that "in all of the cases where the regulatory taking[s] analysis has been employed, a specific property right or interest has been at stake." *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring and dissenting in part).

[117] These are the two requirements for a per se taking. *See Lingle*, 544 U.S. at 538 (discussing the *Loretto* takings test).

[118] *Koontz*, 133 S. Ct. at 2607 n.1 (Kagan, J., dissenting).

was any discussion regarding the practical effects of its decision on land use regulation. One would expect a decision that rests on such a shaky legal foundation to at least make good policy, but this too is lacking in the *Koontz* decision.

One of the most significant consequences of *Koontz* will be the changes it makes to the relationship between local governments and developers. As part of the development process, local governments frequently meet with developers to discuss the potential negative impacts of development and how the developer might mitigate them.[119] This type of collaboration is essential to an orderly and efficient system of land use regulation.[120] Unfortunately, *Koontz* serves as a major obstacle to this collaboration.

Koontz makes it significantly easier for developers to drop out of negotiations and sue the local government over the allegedly "extortionate" demands that it has made during the permitting process. *Koontz* itself demonstrates all too clearly how this could happen. Koontz, upset with the District's rejection of his development proposal, broke off his negotiations with it and filed suit.[121] The dissent points out that Koontz was in the early stages of the negotiation process[122] and that it is unclear whether the "extortionate demands" made by the District were in fact demands or merely nonbinding proposals.[123] In fact, the Court's refusal to provide standards to distinguish between the two is a serious obstacle to collaboration between a local government and a developer.

In the back-and-forth process of negotiations over land use permits, whenever the government makes a request that the developer does not like, the developer now has the option to drop out of the negotiations and bring a lawsuit against the government for making unconstitutional demands. In order to avoid this lawsuit, local governments will be reluctant to engage in any negotiations with

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[119] Collaboration between land use owners and developers is an integral part of local government development guides. *See, e.g.*, Thomas P. DiNapoli, Office of the N.Y. State Comptroller, *Shared Services in Local Government*, LOCAL GOV'T MGMT GUIDE 3-9 (DEC. 2009), http://www.osc.state.ny.us/localgov/pubs/lgmg/sharedservices.pdf.

[120] *See* Karalee Browne & Steve Sanders, *Collaboration Promotes Economic Development and Advances Sustainability*, W. CITY (May 2013), http://www.westerncity.com/Western-City/May-2013/Collaboration-Promotes-Economic-Development/.

[121] *Koontz*, 133 S. Ct. at 2593.

[122] *Id.* at 2610-11 (Kagan, J., dissenting).

[123] *Id.*

developers.[124] As Justice Kagan noted in her dissent, when faced with this situation, "no local government official with a decent lawyer would have a conversation with a developer."[125] In order to avoid the lawsuits resulting from negotiations with developers, local governments are more likely to either deny a permit outright or grant one without imposing any exactions.[126] This is a suboptimal outcome for both sides.

In addition to discouraging collaboration between developers and local governments, *Koontz* will make development more costly. As noted above, *Koontz* will almost certainly spawn more litigation between local governments and developers.[127] Fights over development, once waged in local zoning board hearings, will now take place in federal court, where it will be more expensive and time consuming. Furthermore, *Koontz* never resolved the issue as to when a local government's exactions are "roughly proportional" to its demands. Litigation will surely arise to determine the boundaries of this standard.

Another problem with the *Koontz* decision is that it takes power away from communities and puts it into the hands of federal judges. As developers can now bypass zoning boards and contest a land use decision in federal court, federal judges, often unfamiliar with the land use negotiation process and unaware of local conditions, will be making important land use decisions previously made by local zoning boards comprised of elected community representatives.[128]

Additionally, the majority in *Koontz* was concerned about local governments extracting concessions from developers. Yet, its

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[124] Sacramento Bee Editorial Board, *Court Ruling a Blow to Land Use Collaboration*, SACRAMENTO BEE (June 27, 2013), blogs.sacbee.com/capitol-alert-insider-edition/2013/06/editorial-court-ruling-a-blow-to-land-use-collaboration.html. *See also* Sean F. Nolan, *Bargaining for Development Post-*Koontz*: How the Supreme Court Invaded Local Government*, VT. L. SCH. (discussing how the ruling in *Koontz* makes land use negotiations less efficient).

[125] *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting). Justice Kagan worries about the consequences of the majority's decision on collaboration between local governments and developers, noting that "[i]f a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants." *Id.*

[126] *Id.*

[127] *Id.* at 2611-12.

[128] *Id.* at 2612 ("The majority turns a broad array of local land-use regulations into federal constitutional questions. . . . [P]lac[ing] courts smack in the middle of the most everyday local government activity.").

holding makes it easier for *developers* to extract concessions from local governments. Developers, who are generally multi-million dollar entities capable of providing the investment and infrastructure that are the lifeblood of communities,[129] already carry significant leverage in their negotiations with local governments.[130] Making it easier for them to bring a lawsuit against financially-strained local governments only increases their power at the bargaining table and their ability to extract concessions from communities.

Furthermore, the majority's casual dismissal of the difficulties involved in distinguishing a monetary exaction from a tax ignores the realities faced by local governments. Is it really so easy to distinguish a monetary exaction levied in exchange for a building permit from a tax on all new houses to be built in a community? As Justice Kagan notes, lower courts have been all over the map on "how to make the distinction"[131] between an exaction and a property tax. In fact, the majority's inability to articulate a clear standard to distinguish the two shows the difficulty in doing so.

Ultimately, *Koontz* creates a new paradigm in the relationship between local governments and developers. *Koontz* gives developers special protections that local governments and taxpayers currently lack. In this new world, local governments must avoid falling into traps that will subject them to litigation or allow developers the upper-hand in the negotiating process.

V. HOW DO LOCAL GOVERNMENTS PROCEED IN THE POST-*KOONTZ* WORLD?

In the aftermath of *Koontz*, local governments must be extra-cautious when negotiating with developers. Specifically, they must avoid certain actions that may bring about a lawsuit.

First, when negotiating with developers, local governments must make clear that their discussions are exploratory only, that no demands are being made, and that the city council or zoning board

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[129] *See* Browne & Sanders, *supra* note 120 ("cities are working to attract business investments that will bring jobs, skilled workers and new tax revenue. . . . [C]ompetition to attract employers can be fierce.").

[130] *See id.* ("[C]ompetition between neighboring cities and counties [for developers] . . . pits communities against one another . . . ."). This gives developers significant leverage in negotiations with cities.

[131] *Koontz*, 133 S. Ct. at 2607- 08 (Kagan, J., dissenting).

are the only entities authorized to formally approve any conditions necessary to obtain a permit. As explained above, it is unclear what constitutes a demand that might give rise to a *Koontz*-style takings claim.[132] However, it should be clear that a takings claim cannot proceed until a demand is made. By making it clear at the outset that any discussions with a developer are exploratory only and that no formal demands are being made, a local government may be able to prevent this type of lawsuit from being initiated. Furthermore, a local government must carefully craft a record to show its negotiations were exploratory only and not formal demands.

Second, local governments should make greater use of development agreements. A development agreement is a contract between a developer and a local government specifying the terms of the development[133] and can be beneficial for both parties.[134] For example, a local government can specify the exactions it will require from the developer, while the developer can freeze zoning laws, obtain support during the development process, and streamline the approval of permits.[135] As part of the agreement, the developer and the local government can also immunize each other from liability during the negotiation process.

The use of a voluntary development agreement to set the terms and conditions of development of a particular property should reduce the likelihood of a *Koontz* challenge and help ensure a dialogue between a local government and a developer. A number of states have statutes enabling local governments to enter into development agreements,[136] and courts have been willing to uphold

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[132] *See Koontz*, 133 S. Ct. at 2494-96 (majority opinion) (stating that "[t]he Florida Supreme Court [was] puzzled over how the government's demand for property can violate the Takings Clause . . . .").

[133] *Development Agreements in Plain English*, MUN. RESEARCH & SERV. CTR. OF WASH., *available at* http://www.mrsc.org/subjects/planning/lu/developagreements.aspx (last visited Mar. 31, 2014); CALLIES, BARCLAY, & TAPPENDORF, *supra* note 19.

[134] For a detailed explanation of development agreements, see *Development Agreements in Plain English*, MUN. RESEARCH & SERV. CTR. OF WASH., *available at* http://www.mrsc.org/subjects/planning/lu/developagreements.aspx (last visited Mar. 31, 2014), *and* DAVID L. CALLIES, DANIEL J. CURTIN, & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES (2003).

[135] *See* Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 726-27 (2001).

[136] *See* ARIZ. REV. STAT. ANN. § 9-500.05; CAL. GOV'T CODE §§ 65864-65869; COLO.

them.[137] However, a local government must avoid mandating the use of these agreements. While development agreements can be an effective way to ensure that development in fact occurs and is done fairly, any conditions set forth in a mandatory development agreement could be construed as demands subject to the heightened scrutiny of *Nollan/Dolan*.[138] However, as long as entering into a development agreement is voluntary, conditions of the agreement will probably not be held as demands.[139]

Third, a local government must make a developmental impact fee seem different from an individualized assessment on property. The more an impact fee appears to be directed toward a specific property, the more likely that the court will determine it to be a monetary exaction subject to the heightened standards of *Nollan/Dolan.*[140] Because of the potential for a particular fee or exaction being considered an exaction subject to *Nollan/Dolan*, some communities already go through the analysis of applying the takings tests to all new impact fees prior to imposing them. That approach may be broader than necessary in most cases, but should discourage a devel-

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REV. STAT. ANN. §§ 24-68-101-24-68-106; FLA. STAT. ANN. §§ 163.3220-163.3243; HAW. REV. STAT. §§ 46-121-46-132; IDAHO CODE § 67-6511A; LA. REV. STAT. ANN. § 33:4780.22; NEV. REV. STAT. ANN. § 278.0201; VA. CODE ANN. § 15.2-2303.1; N.J. STAT. ANN. 40:55D-45.2; MD. ANN. CODE §§ 24-301-24-311; WASH. REV. CODE §§ 36.70B.170-36.70B.210; ME. REV. STAT. ANN. tit. 30-A, § 4352(8) (allowing, in Maine, "contract zoning" agreements").

[137] *See* Meredith v. Talbot Cnty., 560 A.2d 599, 604 (Md. Ct. Spec. App. 1989) (holding that the developer was bound by the development agreement and could not invalidate it under a claim of duress, because the developer made a "reasonable and informed business decision" which conferred benefits upon all the parties).

[138] *See Koontz*, 133 S. Ct. at 2603 (Kagan, J., dissenting) (noting that while it is not clear what actually constitutes a demand, a mandatory development agreement would force developers to abide by the conditions of the agreement, which a court would likely construe as demands tied to the receipt of a permit and, therefore, subject to the *Nollan/Dolan* requirements).

[139] *See* Leroy Land Dev. v. Tahoe Reg'l Planning Agency, 939 F.2d 696, 698-99 (9th Cir. 1991) (holding that the takings analysis of *Nollan/Dolan* did not apply because the parties chose to execute a development agreement supported by consideration). The court noted that "[s]uch a contractual promise which operates to restrict a property owner's use of land cannot result in a 'taking' because the promise is entered into voluntarily, in good faith and is supported by consideration." *Id.* The voluntary nature of the development agreement suggests that developers have negotiated a deal with a local government and are not having their land taken. *Id.*

[140] *Dolan*, 512 U.S. at 391 (stating that the "rough proportionality" test applies to "individualized determination[s]" made by the local government on property). The more a fee is tied to a specific property, the more likely it will be construed as an "individualized determination," and subject to the *Nollan/Dolan* standards.

oper from bringing suit against a local government, and provide support to a local government if a lawsuit is filed to challenge the fee.

Fourth, most commentators interpret *Koontz* to apply only to exactions imposed on a particular project, not to fees and exactions imposed through legislation. A local government may be able to circumvent the heightened standards of *Nollan/Dolan* by imposing impact fees and exactions through legislation, as these fees appear to be governed by the more deferential standard of *Penn Central*.[141]

VI. CONCLUSION

The doctrine of unconstitutional conditions has become an integral part of American constitutional law, evolving over the course of a century to become an important guarantor of rights. The doctrine has come to play a crucial role in the Court's exactions jurisprudence, a controversial and changing area of law. Developed largely in three landmark cases over the past three decades, the Court's exactions jurisprudence has become muddied by *Koontz*.

Koontz raises many questions and answers few, and puts a veil of uncertainty over formerly clear standards. One consequence of the decision that is clear, however, is that collaboration between local governments and developers will become more difficult. Fearful of lawsuits, local governments may be reluctant to negotiate with developers. Emboldened by *Koontz*, developers may hold the threat of a lawsuit over local governments to extract conditions favorable to them. Local governments and courts will struggle to determine the difference between a monetary exaction and a tax.

In this new world, local governments must proceed with extra caution. Although they can continue to negotiate with developers, they must take pains to create a record that shows they did not make demands, but rather engaged in an informal dialogue. Local governments should consider making greater use of development agreements, which might immunize them from liability during the negotiation process and rebuild some of the trust lost in the wake of *Koontz*. With its indifference to practical realities, *Koontz* is reminiscent of a

[141] *See id.* (recognizing that the "rough proportionality" test applies to "individualized determinations" made by the local government on property). Since legislation cannot be an individualized determination, it would seem that *Nollan*/*Dolan* does not apply to it; therefore, *Penn Central*, which governs most regulatory takings, is the standard that would apply. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

Lochner Court decision, the Court that created the doctrine of unconstitutional conditions, which some regard as one of the worst in American history.[142]

[142] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980) (noting that the *Lochner* Court decisions are "now universally acknowledged to have been constitutionally improper . . . .").