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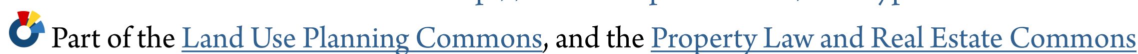
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Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609 (2004), *available at* http://scholarship.law.ufl.edu/facultypub/51

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California Law Review

VOL. 92 | MAY 2004 | NO. 3

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Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity

Mark Fenster†

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Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity

Mark Fenster

A vocal minority of the U.S. Supreme Court recently announced its suspicion that lower courts and state and local administrative agencies are systematically ignoring constitutional rules intended to limit, through heightened judicial review, exactions as a land use regulatory tool. Exactions are the concessions local governments require of property owners as conditions for the issuance of the entitlements that enable the intensified use of real property. Over the past two decades, the Court has established under the Takings Clause a logic and metrics for constitutionally permissible exactions that require concessions to have an "essential nexus" and be "roughly proportional" to the harms a proposed development is expected to cause. This Article argues that the Court's suspicions are well founded but that blame for judicial and administrative noncompliance lies with the Court's bifurcated approach to the Takings Clause. This approach, which the Court recently reaffirmed in Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency *(2002), requires certain types of regulatory acts, including exactions, to be reviewed under a rule-formalist heightened scrutiny, while the majority of regulatory acts enjoy deferential treatment in an ad hoc balancing test.*

The Supreme Court's formalist efforts in its exactions rules have failed to impose doctrinal clarity on the deal-making processes of local land use regulation. What the Article describes as the Court's takings formalism fails to constrain regulatory practices in its intended way and results in constraints on the variable, locally situated, and intensely political context of local governance. These constraints include incentives for local governments to develop preconstituted regulatory formulas and disincentives against individualized, negotiated concessions. These consequences of takings formalism result in regulatory practices and judicial review that promote neither the Court's preferred normative vision of strong property rights protection nor the Court's stated secondary concern for better, more efficient land use regulation. Most perniciously, the Court's limited doctrinal, normative, and utilitarian visions of takings law may block or even

damage the political and social processes essential to functional and legitimate local governance. Ultimately, the Court's failure in its exactions rules to impose a formalist discipline on land use regulation throws into doubt the integrity and legitimacy of takings formalism and the wisdom of the Court's bifurcated approach to the Takings Clause.

INTRODUCTION

The Supreme Court's takings jurisprudence may well be, as numerous commentators complain, a confused muddle.[1] Nevertheless, in its most recent takings decision, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court confidently declared that its decisions offered a settled, bifurcated approach to property owners' claims that a land use regulation's enforcement requires payment of compensation.[2] The general default standard that applies to the majority of takings claims (one associated most closely with *Penn Central Transportation Co. v. New York City*[3]) employs a relatively low level of scrutiny and balances a number of factors in an ad hoc, open-ended inquiry. Contrasting this default approach, takings claims that fall within a limited number of exceptional categories receive a form of heightened scrutiny that limits judicial discretion and favors the protection of property rights through clear, narrow rules of decision.[4]

The bifurcated approach may be settled, but it is not without controversy. In a recent dissent from a denial of a petition for certiorari, Justice Scalia announced his suspicion that state and lower federal courts are systematically ignoring or misapplying the Court's approach.[5] He voiced two

1. Carol Rose first applied the term "muddle" to the complicated, often confusing appearance of modern takings law. *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984). A recent footnote collected complaints about the muddle and noted that a comprehensive compilation of such complaints would be "very long" indeed. Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 n.2 (2002).

2. 535 U.S. 302 (2002).

3. 438 U.S. 104, 124 (1978).

4. *See Tahoe-Sierra*, 535 U.S. at 321-26; Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001). The most prominent of these categorical exceptions from *Penn Central*'s balancing test is for regulatory acts denying all economically beneficial or productive use of land. The Court held, in a decision authored by Justice Scalia, that such regulatory acts are "compensable without case-specific inquiry." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

5. Lambert v. City & County of San Francisco, 529 U.S. 1045, 1045 (2000) (Scalia, J., dissenting), *denying cert. to* 67 Cal. Rptr. 2d 562 (Cal. Ct. App. 1997). Joining Justice Scalia in his dissent were Justices Kennedy and Thomas. Some commentators have made similar complaints. *See, e.g.*, Richard A. Epstein, *The Harms and Benefits of* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 477, 492 (1995) ("One of the reasons for *Dolan* was the hostile response to the lower courts in *Nollan*."); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 555-56 (1995) (tracking state and lower federal courts' tendency to ignore or blunt the Supreme Court's decisions in *Nollan*, *Dolan*, and *Lucas*). The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Its application

concerns regarding the tension between the "categorical" takings rules and the default approach to takings. First, courts ignore the clear dictates of categorical takings rules and instead merely apply a less precise and more deferential standard. Second, in doing so, lower courts dissipate constitutional protections for property owners and thus dilute the conception of broad and stable property rights Scalia presumed the Court had firmly established.[6] The case that raised the Justices' suspicion, *Lambert v. City and County of San Francisco*, involved the city's denial of a conditional use permit that the Lamberts sought to convert rooms in their hotel from long-term residential to short-term tourist use. A local ordinance required the Lamberts either to replace the converted units or to pay a portion of the replacement costs. The Lamberts refused to pay a dollar figure the city had set based on two replacement cost appraisals. After the city denied their permit application, the Lamberts filed suit, claiming that the city's refusal effected a taking of their property.[7] Affirming the trial court, a California intermediate appellate court refused to apply the heightened scrutiny of one of the categorical exceptions to the *Penn Central* approach,[8] which the Court had developed in *Nollan v. California Coastal Commission*[9] and *Dolan v. City of Tigard*,[10] and which the Court has continued to endorse as a "special context" of takings jurisprudence, most recently in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[11]

Lambert, *Nollan*, and *Dolan* concerned the judicial review of "exactions," the concessions local governments have the discretion to require of property owners as conditions for the issuance of entitlements that enable the intensified use of real property.[12] Exactions include mandatory dedications of land, fees required in lieu of dedication, and impact fees given by property owners in exchange for permits, zoning changes, and other regulatory clearances.[13] The majority opinions in *Nollan* and *Dolan* declared that exactions must demonstrate both an "essential nexus"[14] and "rough proportionality"[15] to the expected harms that the new use would cause. A local government's failure to meet either requirement results in a taking, which entitles the property owner to just compensation. Although

extends to state and federal government. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239, 241 (1897).

6. *Lambert*, 529 U.S. at 1045.

7. *Id.*

8. *See id.* For a fuller discussion of the particularities of the disputed issue in *Lambert*, see *infra* text accompanying notes 146-57.

9. 483 U.S. 825 (1987).

10. 512 U.S. 374 (1994).

11. 526 U.S. 687 (1999).

12. *See infra* text accompanying notes 51-60.

13. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 478-79 (1991).

14. *Nollan*, 483 U.S. at 837.

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

somewhat inexact, the nexus and proportionality commands require that judicial review probe more deeply into exactions than the state courts had in their *Nollan* and *Dolan* decisions. Under such an inquiry, the Court would classify as takings those local land use regulatory practices that it believes constitute extortionate demands of property owners. Justice Scalia's frustration with the state court's decision in *Lambert*, then, resulted first from what he perceived as the failure of lower courts to apply the Supreme Court's rule-like principles correctly, and second from his perception that local governments have continued to use exactions to expropriate or threaten to expropriate private property.

This Article argues, however, that Justice Scalia and his like-minded colleagues have only themselves to blame for their frustrations. The logic and effects of the Court's efforts in its exactions decisions to constrain judicial and local government discretion through a constitutional rule formalism,[16] and to impose this formal discipline on the unruly, disparate practices of local land use regulation, have created this judicial indeterminacy and regulatory variability. In the ten years since the Court decided *Dolan*, the doctrinal and regulatory stakes of its exactions decisions have come more clearly into focus. These stakes include the narrow doctrinal status of exactions within the baroque universe of regulatory takings jurisprudence,[17] the impact of the Court's efforts on land use practice, and the merits of constitutional rule formalism, along with the

16. The term "formalism" has a variety of jurisprudential and historical meanings, invoking such diverse schools as classical Langedellian conceptualism and constitutional textualism. My use of the term is quite specific, however. By "rule formalism" I mean a commitment imposing, in the relevant context of this Article, highly predictive rule- or principle-bound constitutional common law commands to limit judicial discretion. *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 9-10 (1983) (distinguishing between classical legal conceptions of formalism and conceptualism). This approach correlates with, but is not necessarily tied to, other meanings of formalism. *See* Frank I. Michelman, *A Brief Anatomy of Adjudicative Rule-Formalism*, 66 U. CHI. L. REV. 934 (1999); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999). Throughout this Article, when I use the term "formalism" I mean rule formalism.

17. *Nollan*'s and *Dolan*'s status as either "regulatory takings" or "physical takings" decisions is the subject of some debate. *Compare* Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1651-52 (1988) (arguing that *Nollan*'s approach may apply more generally to regulatory takings cases) *with* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1608 (1988) (arguing that *Nollan* merely extends the compensation requirement for unconditional permanent physical occupations to occupations that are imposed conditionally). If *Nollan* and *Dolan* were simply physical invasion cases, however, then the Court would not have developed nexus and proportionality tests to evaluate whether the invasion required compensation—the Court would merely have found that an invasion had occurred and awarded compensation. Moreover, lower courts, with some prodding from the Supreme Court, have increasingly concluded that *Nollan* and *Dolan* apply to nonpossessory exactions, making them appear more like decisions limiting a wide variety of regulations than merely another prohibition against physical appropriations without compensation. *See infra* text accompanying notes 129-37. Because the Court seems to consider *Nollan* and *Dolan* and the land use practice they reviewed as constituting their own highly specific "special context," the decisions seem to complicate this regulatory-physical taking binary. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702-03 (1999).

Penn Central balancing test, to further the aims of the abstract command of the Takings Clause. Accordingly, the exactions decisions, seen from the current perspective of *Tahoe-Sierra* and Justice Scalia's *Lambert* dissent, beg the question: Does takings formalism make doctrinal and regulatory sense?

This Article asserts that the answer to this question is no, based on a reconsideration of commentary on the exactions decisions,[18] a review of studies of current land use regulatory practices in California,[19] and a consideration of larger debates regarding rule formalism and vagueness in takings law generally.[20] Local land use regulators rely heavily on bargaining or "deal making" with property owners as part of the development review and approval process, and exactions requiring necessary infrastructure or appealing amenities are an essential deal-making tool.[21] Local governments developed exactions as a political and administrative means to resolve highly charged, individualized, and localized disputes fraught with legal, financial, scientific, emotional, and ultimately political controversy. In this way, exactions constitute a flexible, open-ended set of conditions that serve regulatory and persuasive functions by offering both to internalize at least some of the external costs of development and to make a proposed land use either sufficiently attractive or minimally unattractive to decision makers and the voting public. The Court's desire for universally applicable, rule-like principles conflicts with the complicated, variable, and unstable nature of local governance and land use regulatory practices. Moreover, takings rules produce a bevy of unintended consequences and frustration among regulators, property owners, and other parties interested in fair, effcctive land use regulation. Nevertheless, the Court's specific concerns and rhetoric about individual property rights and extortionate regulations are not entirely misplaced. Rather, the Court's efforts to describe and prescribe exactions so misunderstand the complicated dynamics of land use regulation that they result in variable and unfortunate consequences—including, ironically, diminished property rights for landowners. Local context, in other words, often frustrates and complicates constitutional rules.

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18. The most prominent critiques of *Nollan*'s and *Dolan*'s logic and consequences are WILLIAM A. FISCHEL, REGULATORY TAKINGS 341-51 (1995); Becn, *supra* note 13; David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000).

19. The most important recent work in this field is DANIEL POLLAK, CALIFORNIA STATE LIBRARY, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA? (2000). *See also* 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 (2001) (reviewing and analyzing data from POLLAK, *supra*).

20. For a recent thorough review and reconsideration of that literature, see Poirier, *supra* note 1.

21. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 104-05 (2d ed. 2000); Been, *supra* note 13, at 474-83. For a description of exactions within a broader shift from static to flexible land use regulatory regimes, see *infra* text accompanying notes 52-60.

The Court's efforts in the exactions decisions, and in all of the Court's categorical takings rules, to impose doctrinal clarity in its application of the Takings Clause to land use regulation have not, and cannot, achieve the Court's goals of securely protecting property rights and disciplining regulatory practices. The exactions rules' failure to achieve the Court's goals, acknowledged in *Lambert* by the author of one of those rules,[22] demonstrates that these "judicial devices for putting some kind of stop to the denaturalization and disintegration of property"[23] cannot provide an extrinsic brake to a complicated internal process. To the extent that a universal, formal clarity for land use law can even be achieved—an assumption that this Article implicitly disputes—such clarity can be imposed only at great expense. Lower courts and state and local legislatures in part might be engaged in the overt ideological struggle that Justice Scalia in his *Lambert* dissent seemed to assume fuels their resistance to the Court's commands. It is more likely, however, that courts, legislatures, and regulators are struggling to find acceptable resolutions to complicated land use conflicts—resolutions made more difficult to craft by the relatively blunt instruments of the Court's categorical takings rules.

In performing a hybrid doctrinal and consequentialist analysis of recent empirical evidence and lower court decisions, this Article offers a critique of how the unresolvable tension between form and practice inherent in the Court's formalist constitutionalization of exactions operates on the regulatory ground. The Article's first three Parts introduce the concept of takings formalism and the most significant (though not universal) effect of such formalism in local land use regulatory practice: the development and enforcement of regulatory formulas. Part I describes the Court's trend toward developing takings rules with limited applicability as part of its bifurcated approach of categorical exceptions to the *Penn Central* multifactor test. Those exceptions, in limited cases, seek to strengthen property protection and to require administrative precision of the agencies that regulate land use. Part II describes the Court's decisions in *Nollan* and *Dolan* as establishing one such categorical exception for land use bargaining. Part III describes and critiques the effects of the Court's federal constitutionalization of exactions by focusing on local governments' increased reliance on legislative, formulaic land use regulatory practices in response to *Nollan* and *Dolan*.

Supporting and extending this critique, Part IV argues that the Court's constitutional rule formalism and the resulting formulaic administrative

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22. *See* Lambert v. City & County of San Francisco, 529 U.S. 1045, 1045 (2000) (Scalia, J., dissenting).

23. Michelman, *supra* note 17, at 1628. *See also* Margaret Jane Radin, *Diagnosing the Takings Problem*, 33 NOMOS 248, 264-66 (1991) (describing desire for stable and understandable general rules within the liberal ideal of the Rule of Law).

approach do not, in many instances, actually further the Court's stated goals of protecting individual property rights and forcing efficient regulation. On the contrary, they are likely to result in underregulation of land use in some jurisdictions and more extensive or more rigid regulation in others. Equally important, Part V claims, the Court's takings formalism has encouraged regulatory formulas at the expense of individualized, alternative means for resolving contested disputes over the expected costs of new development. These alternative means—including open, contentious political battles and nonjudicial methods of resolving them—are often quite messy. The tenor and results of these disputes shift over time as local political majorities change, new contentious issues arise, the externalities of earlier projects become more apparent and costly, the economic prosperity of the community rises and falls, and coalitions formed during earlier disputes remain strong or disintegrate. Enabling and resolving political disputes are essential paths to legitimate, effective decisions within the disparate and changing local contexts of land use regulation. Bargaining over individualized exactions offers a means to develop site- and dispute-specific terms of compromise. Judicial decision making that applies takings rules, by contrast, considers a single instance and sets stable precedent for the future that exists outside local politics and that applies equally to all property owners and all land. But the politics of land use disputes are constituent elements of local governance, and judicial efforts to remove politics and context from land use are doomed to have consequences that will disappoint takings rules proponents seeking to protect what they see as prepolitical property rights. The Conclusion points to the implications of this argument for the several still-unresolved issues regarding the reach of the exactions decisions and the viability of the Court's bifurcated approach to the Takings Clause.

I
TAKINGS FORMALISM AND THE BIFURCATED STRUCTURE OF TAKINGS JURISPRUDENCE

By applying heightened scrutiny to certain categories of alleged takings, the Supreme Court carved out exceptions to the ad hoc, fact-intensive balancing approach it established as the dominant test for regulatory acts requiring compensation in *Penn Central Transportation Co. v. New York City*.[24] *Penn Central* requires courts to balance, among other things,

24. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (explaining that in reviewing regulatory takings challenges, courts generally eschew set formulas and instead engage in "essentially ad hoc, factual inquiries"). *See also* Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 612 (1991); Margaret Jane Radin, *The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1681-82 (1988).

"[t]he economic impact of the regulation on the claimant" and "the character of the governmental action."[25] In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court reaffirmed the continuing vitality of *Penn Central*, declining to apply a formalistic rule as the default approach to alleged takings.[26] Rejecting petitioners' argument that temporary moratoria on the development of land effect a per se taking for the period they render the property unusable,[27] the Court explained that its default approach in considering takings claims is to "examine 'a number of factors' rather than a simple 'mathematically precise' formula."[28]

In describing the terrain of the Court's takings decisions, the *Tahoe-Sierra* majority distinguished between, on the one hand, claims alleging physical appropriation, physical invasion, or regulations that deprive an owner of all economically beneficial use of land, and, on the other hand, claims alleging regulations that prohibit a particular use of property but that leave some value in the property.[29] Courts subject the majority of takings claims, which are of the latter type, to a *Penn Central* inquiry, whereas they afford the former type some form of heightened scrutiny.[30] Leaving aside the nonregulatory instances of physical appropriation by the government,[31] the two most widely recognized exceptions to the *Penn Central* test are government acts that effect a permanent physical occupation of property, typically associated with the Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*,[32] and those that deny an owner "all economically beneficial [uses]" of her land, as established in *Lucas v. South Carolina Coastal Council*.[33] Permanent physical occupation constitutes a conceptually narrow and rare outer limit of land use regulation that

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25. *Id.* The extent of the Court's invitation to balance has reached absurd lengths in California, where the Supreme Court has articulated thirteen different, potentially relevant factors for consideration, and where courts occasionally weigh all thirteen in the balance. *See* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860-61 (Cal. 1997) (listing and explaining factors); Massingill v. Dep't of Food & Agric., 125 Cal. Rptr. 2d 561, 566-67 (Cal. Ct. App. 2002) (applying factors).

26. 535 U.S. 302, 326 (2002). *See also* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (reaffirming the *Penn Central* approach as the default for judicial review of regulatory takings claims); *id.* at 633 (O'Connor, J., concurring) (same).

27. *Palazzolo*, 533 U.S. at 606.

28. *Tahoe-Sierra*, 535 U.S. at 326 (2002) (quoting *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)).

29. *See id.* at 321-22.

30. *See id.* at 322-23.

31. *See id.* at 322 (citing as examples United States v. Pewee Coal Co., 341 U.S. 114 (1951); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945)).

32. 458 U.S. 419, 426 (1982). The physical invasion test may not be as simple as it appears, however. *See* Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURISPRUDENCE 217, 224-28 (1993); *see also* Poirier, *supra* note 1, at 108 n.56 (citing cases that complicate the physical invasion rule).

33. 505 U.S. 1003, 1019 (1991).

is relatively easy to spot and declare a taking.[34] At least in the abstract, the denial of all economic use is also an easily identifiable outlier that requires application of a simple command: if the regulation renders the property valueless, a court must apply a particularized type of heightened scrutiny to determine whether the regulation effects a taking that requires compensation.[35]

Such categorical takings rules operate via discernible dualities—total versus partial taking, and physical invasion or occupation versus no physical invasion or occupation. Although not entirely stable or complete, these dualities promise a number of advantages. First and foremost, for proponents, clear takings rules enhance decisional and allocative efficiency.[36] By offering clear declarations of the extent of property owners' constitutional rights and limiting the discretion of judges and administrative decision makers, clear rules ensure fair and value-neutral coherence, regularity, and predictability across disparate, individual cases.[37] As a result, decision makers waste few resources in applying a simple command to resolve

34. *See* Maureen Straub Kordesh, *"I Will Build My House with Sticks": The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 436-37 (1996).

35. Nevertheless, the latter category, typically referred to as the *Lucas* category in honor of the decision establishing it, is subject to numerous complications. First, *Lucas*'s compensation requirement for regulations that render land valueless excepts regulations based on background principles of the common law of property and nuisance that limit the property owner's antecedent rights to use and develop her property. *Lucas*, 505 U.S. at 1027. This formulation begs the question of how courts administer the unknown and possibly indeterminate exceptions that *Lucas* establishes under which the government may nevertheless avoid paying compensation despite its regulation's denial of all economic value. *See* Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 335 (1995); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 86-87 (1992). Second, as the dissents and concurrence in *Lucas* suggest, regulations rarely reduce a parcel's value to zero, and the regulation in question may not have done so even in *Lucas*. *See Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring), 1044 (Blackmun, J., dissenting), 1065 n.3 (Stevens, J., dissenting), 1076 (statement of Souter, J.); *see also* Wyer v. Bd. of Envtl. Prot., 747 A.2d 192 (Me. 2000) (holding that where property retains value for "parking, picnics, barbecues and other recreational uses," a law protecting dunes that prohibits construction on a building lot does not fall within the *Lucas* category).

In *Tahoe-Sierra*, the Court may have resolved a third complication—whether land can be severed into smaller parcels or must be considered as a whole for *Lucas* analysis. *See* 535 U.S. at 331 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) (declaring that the denominator, or the parcel under review in an alleged taking, is the "parcel as a whole" rather than the regulated portion, upholding a series of development moratoria, and in the process making it more difficult for property owners to be compensated for delays during which their property is denied economic value). *See generally* Poirier, *supra* note 1, at 109-11 (summarizing long-standing debates over the denominator issue and *Tahoe-Sierra*'s possible role in settling them).

36. *See* Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435, 1449 (2000); Thomas Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372, 416-17 (1986).

37. *See* Ross, *supra* note 36, at 416-17; Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638-39 (1999).

disputes.[38] Moreover, property owners and investors who believe that a rule-bound regulatory regime better protects their expectations than does an ad hoc balancing test in theory will commit more resources to capital projects, therefore enabling the highest and best use of property.[39]

A second advantage of takings rules, according to some advocates, is that they establish and help enforce increased protection for property owners from the regulatory overreach of local, state, and federal governmental entities. By providing a doctrinal shield against the intrusive overregulation of local governments, formal takings rules smooth the "frictions" caused by the struggles over regulatory indeterminacy and uncertainty, stabilizing and protecting property rights within the present distribution of property ownership and entitlements.[40] Viewed from this angle, categorical takings tests deploy formal rules to provide a doctrinal shield against the intrusive overregulation of local governments. Takings formalism thereby furthers a normative vision and narrative of judicial intervention against an expansionist regulatory state, linking a set of clear rules to a classical liberal conception of broad, static, and well-protected property rights.[41]

Underlying the utilitarian and normative claims about categorical regulatory takings is a jurisprudential desire for formal and doctrinal stability.[42] Categorical rules dictate to state courts and state and local legislatures "the jurisprudential spirit in which their general laws of property and

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38. *See* Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 536 (1999); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-80 (1989).

39. *See* Rose-Ackerman & Rossi, *supra* note 36, at 1449.

40. *See* Epstein, *supra* note 5, at 490-91. Theoretically, clear rules could be articulated and enforced in favor of government regulation and against property rights. For example, instead of an ad hoc balancing test for partial takings, a constitutional takings rule could command that any regulation that diminishes 90% or less of the value of the subject property does not require compensation. This rule, too, would provide decisional efficiency, at least in the abstract. But, as in *Lucas*, litigation would occur over the remaining value of the subject property. *See supra* note 35.

41. *See* MARGARET JANE RADIN, *The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings*, *in* REINTERPRETING PROPERTY 120, 133-35 (1993); Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1753-54 (1988).

42. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 238-39 (1990); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1219-20 (1999); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1437 (1993). To the extent that the Court has linked its rule formalism to a normative commitment to protect property rights, it clearly manifests a desire to limit the possibility for judicial discretion that would undercut property rights. I use the term "desire," whether for rules or for a whole and identifiable conception of property rights, with its intentionalist, psychological, and psychoanalytic implications. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO 143 (1994) (tying formalism's popularity to the appeal of its purported ability to resolve problems and disputes); Lyrissa Barnett Lidsky, *Defensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815, 832-33 (1995) (describing the psychological attractions of formalism); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 314-19 (1994) (describing the psychoanalytic desire for a discernible conception of property).

nuisance are to be read and construed."[43] This "spirit" in turn forces states to establish land use regulatory regimes that take the form of "monadic, specific rules [rather than] . . . complexly interactive open principles."[44] But the bifurcated structure of current takings law only partially fulfills the formalist desire of an occasional majority of the Supreme Court because it leaves judicial review of the majority of alleged takings untouched.[45] The inroads categorical takings rules make into the takings "muddle"[46] are limited, and their own stability may be vulnerable in practice and questionable in principle. Nevertheless, such rules at least convey "the feel of legality"[47] and thus inoculate the presumptively open ground of takings with a "good dose of formalization."[48]

This desire for clarity, precision, and protection has produced exceptional and formal rules that depart from default, multifactor balancing tests. Whether a full-scale retreat from categorical per se rules for takings,[49] a hesitation to expand the number of such categories, or merely a narrow refusal to declare that temporary moratoria effect a taking,[50] the six-Justice *Tahoe-Sierra* majority at minimum renewed the distinction between relatively bright-line takings rules and multifactor, ad hoc takings tests. Following *Tahoe-Sierra*, the Court is not likely to impose rule formalism on all regulatory takings claims or increase the number of categorical takings in the near future. Nonetheless, categorical takings rules continue to operate, and, at least with respect to exactions, have become a central part of the regulatory landscape of local governments.

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43. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 327 (1993).

44. *Id.*

45. *See* Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322, 332 (2002) (distinguishing condemnations and physical takings from regulatory takings, and characterizing *Lucas* as representing a rare departure from the default fact-specific inquiry for regulatory takings); Rose-Ackerman & Rossi, *supra* note 36, at 1446. *See also* Gregory S. Alexander, *Ten Years of Takings*, 46 J. LEGAL EDUC. 586, 594 (1996) (describing the Supreme Court's formalist interventions as symbolic and of limited application). Molly McUsic has made the most extensive argument explaining this bifurcation by placing the Court's vision of property rights and rule formalism within the conservative backlash against New Deal and Great Society programs and the ascendancy of the conservative majority in the Rehnquist Court. *See* Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591 (1998).

46. *See* Rose, *supra* note 1.

47. Michelman, *supra* note 17, at 1628.

48. Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988). *See also* Michelman, *supra* note 17, at 1622 (describing a noticeable movement of the Court "towards a reformalization of regulatory-takings doctrine").

49. *See* Richard J. Lazarus, *Celebrating* Tahoe-Sierra, 33 ENVTL. L. 1, 3 (2003); Marla E. Mansfield, Tahoe-Sierra *Returns* Penn Central *to the Center Track*, 38 TULSA L. REV. 263, 295 (2002); Danaya C. Wright & Nissa Laughner, *Shaken, Not Stirred: Has* Tahoe-Sierra *Settled or Muddied the Regulatory Takings Waters?*, 32 ENVTL. L. REP. 11, 11, 177, 189 (2002).

50. *See* J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1, 1 (2002).

II
TAKINGS FORMALISM AND THE CATEGORICAL EXCEPTION FOR EXACTIONS

The exactions decisions illustrate the Court's gradual, incomplete imposition of a more robust form of takings jurisprudence, one that increases protection for property owners against land use regulations. Like other categorical exceptions, *Nollan*'s and *Dolan*'s "essential nexus" and "rough proportionality" tests require courts to apply heightened scrutiny to challenged land use regulations. Below, I assert that the Court explicitly formulated these tests to protect both property owners as a group and the classical liberal conception of property itself from the incursion of powerful, overreaching government agencies. I associate this move with the Court's related desire to protect property owners from state and lower federal courts that, despite the Court's tests, might issue decisions that uphold local governments' use of exactions to obtain disproportionate or unrelated concessions from developers. To create a doctrinal shield sufficient to protect property rights, the Court has attempted to articulate a tight, rule-based principle to lower courts and government agencies. The exactions decisions' rules attempt to limit exactions to a single purpose: the direct abatement of nuisancelike impacts caused by the proposed land use. I begin below with a brief summary of *Nollan* and *Dolan* and the context within which they were decided and extended over time, and then explain how they are instances of categorical takings formalism.

A. The Exactions Decisions and the Federal Constitutionalization of Land Use Bargaining

In the past quarter century, planning theory and land use law have developed a relatively flexible regulatory model.[51] This model is more adaptive to changes in local market demand and identifiable regulatory need than the early- and mid-twentieth-century Euclidian model of zoning, in which local governments classified, limited, and separated uses on broad swaths of land for extensive periods.[52] Local regulators adapt to changing patterns in commercial, industrial, and residential uses by allowing piecemeal amendments and wholesale revisions of their comprehensive

51. *See* MICHAEL J. MESHENBERG, AMERICAN SOCIETY OF PLANNING OFFICIALS, THE ADMINISTRATION OF FLEXIBLE ZONING TECHNIQUES 3-4 (1976); Edward J. Kaiser & David R. Godschalk, *Twentieth Century Land Use Planning: A Stalwart Family Tree*, 61 J. AM. PLAN. ASS'N 365, 372-73 (1995); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 879-80 (1983).

52. *See* AM. PLANNING ASS'N, A GLOSSARY OF ZONING, DEVELOPMENT, AND PLANNING TERMS 94 (Fay Dolnick & Michael Davidson eds., 1999); Ira Michael Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 URB. LAW. 2 (1973), *reprinted in* THE LAND USE AWAKENING: ZONING LAW IN THE SEVENTIES 51 (Robert H. Freilich & Eric O. Stuhler eds., 1981). The term "Euclidian" refers to the municipal defendant in the 1926 Supreme Court decision that declared zoning to be constitutionally permissible. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-90 (1926).

plan.[53] Increasingly, municipalities have come to treat their regulatory policics (including plans, zoning ordinances and maps, subdivision ordinances, and variances) less as components of a permanent, fixed scheme and more as a negotiable set of parameters within which they establish contractual or conditional relationships with property owners seeking to change the use of their property.[54] To make significant changes to the existing use of their land—changes such as subdividing parcels, initiating major development, or shifting the type or intensity of use—property owners typically must seek one or more discretionary approvals from the jurisdiction's zoning authority or legislative body.[55] During this process, local governments and property owners often negotiate over the exactions an applicant will accept as conditions for issuance of the necessary planning approval.[56]

Exactions are therefore an essential tool of flcxible land use rcgulation. They typically require financial or in-kind provision of infrastructure that will at minimum remedy the proposed project's anticipated negative impacts and at maximum provide whatever conditions a jurisdiction deems necessary to persuade it to approve the project.[57] Such concessions may include dedication of land for the siting of public services or amenities (such as schools or parks), fees in lieu of dedication, and impact fees to

53. *See generally* Peter W. Salsich, Jr. & Timothy J. Tryniecki, LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW 162-75 (1998) (describing numerous "'innovative' land use controls" developed as responses to the rigidity of Euclidean zoning).

54. *See* IRVING SCHIFFMAN, ALTERNATIVE TECHNIQUES FOR MANAGING GROWTH 2-4 (2d ed. 1999).

55. *See* ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE 54-55 (1993); Daniel J. Curtin, Jr., *How the West Was Won: Takings and Exactions—California Style, in* TRENDS IN LAND USE LAW FROM A TO Z 193, 225-26 (Patricia E. Salkin ed., 2001). Such approvals take many forms, including the conditional redevelopment permits, code variances, and coastal development permits that were at issue in *Nollan* and *Dolan*. *See* Dolan v. City of Tigard, 512 U.S. 374, 377-80 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828-29 (1987).

56. *See* DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION 161-62 (1999).

57. *See* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 55, at 62-63, 77, 95-96. On thc extent to which exactions require property owners to perform duties and pay fees to cover the anticipated impacts of rezoning, see James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & COMTEMP. PROBS. 85, 88 (1987). Local governments increasingly rely on exactions to address a growing infrastructural deficit caused by explosive postwar growth together with the eombination of federal funding cuts, state and federal mandates regarding the extent and quality of public infrastructure provision, and financial restraints on municipalities brought on by the antitax revolt of the late-1970s and 1980s. *See* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 55, at 23-26; Paul P. Downing & Thomas S. McCaleb, *The Economics of Development Exactions*, *in* DEVELOPMENT EXACTIONS 42, 44 (James E. Frank & Robert M. Rhodes eds., 1987); Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 URB. LAW. 541, 542-43 (1994); Deborah Rhoads, *Developer Exactions and Public Decision Making in the United States and England*, 11 ARIZ. J. INT'L & COMP. L. 469, 472 (1994); R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 5-6 (1987).

fund the provision of public services.[58] Another type of exaction, known as "linkage," seeks to mitigate off-site impacts of an approved development such as the increased need for affordable housing that might result from commercial or office development.[59] Exactions thus shape the physical environment, generate revenue, force the internalization of external costs where private ordering is unlikely to do so, and resolve political conflict by persuading a majority of decision makers or voters that a project is worthy of approval.[60]

Prior to the U.S. Supreme Court's entrance into the field in *Nollan* and then *Dolan*,[61] state courts had applied various state statutory and constitutional doctrines to develop differing standards of review for land use exactions.[62] Some states, including Illinois and New Hampshire, adopted a strict "specifically and uniquely attributable" test that required an exaction to connect directly and to be precisely proportional to the harm created by the new land use.[63] Other states explicitly rejected the specifically and

58. *See* N.J. Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555, 558-59 (N.J. 1987); Been, *supra* note 13, at 475-76 (1989); Thomas W. Ledman, *Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation*, 45 FLA. L. REV. 835, 842-53 (1993).

59. *See* Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 524 (1988).

60. *See* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 55, at 7; ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 286 (2000). Although alternatives to exactions exist, they are unlikely to be either as financially effective or as politically feasible as imposing exactions. Such other, generally less attractive means include ad valorem property taxes, *see* Downing & McCaleb, *supra* note 57, at 49-50; special assessments, *see* ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 55, at 17; required subdivision improvements, *see* Smith, *supra* note 57, at 6; user fees, *see* JAMES C. NICHOLAS ET AL., A PRACTITIONER'S GUIDE TO DEVELOPMENT IMPACT FEES xix (1991); and the common law of nuisance, *see* Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 341 (2002).

61. Before *Nollan*, the Court had avoided property owners' challenges to exactions under the federal Constitution on a number of occasions. *See* Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971), *appeal dismissed*, 404 U.S. 878 (1971) (dismissed due to lack of substantial federal question); Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Bd. of County Comm'rs, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983), *appeal dismissed*, 469 U.S. 976 (1984) (same); Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442 (Wis. 1966), *appeal dismissed*, 385 U.S. 4 (1966) (same).

62. *See generally* John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 146-56 (1987) (summarizing differing state approaches before *Nollan*); Joseph D. Lee, Comment, *Sudden Impact: The Effect of* Dolan v. City of Tigard *on Impact Fees in Washington*, 71 WASH. L. REV. 205, 212-13 (1996) (summarizing judicial review of impact fees in Washington state, where courts used statutory, takings, and substantive due process approaches). Some state courts had also generally condemned negotiated land use regulatory acts as impermissible efforts by municipalities to contract away their police powers, but have increasingly upheld agreements prohibiting such challenges, especially when states have granted the municipalities the authority to negotiate. *See* DANIEL R. MANDELKER, LAND USE LAW § 9.11 (5th ed. 2003); SELMI & KUSHNER, *supra* note 56, at 162-65; Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1007 (1987).

63. *See* Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961) (adopting the specifically and uniquely attributable test); J.E.D. Assocs., Inc. v. Town of Atkinson, 432

uniquely attributable test in favor of either of two more deferential approaches. California and a few other states adopted a reasonable relationship test, in which courts upheld exactions that had some reasonable degree of connection to the proposed development.[64] More commonly, however, states opted for a more rigorous rational nexus test that considered two relationships[65]: that between the exaction and the needs the proposed development would create and that between the exaction and the benefits the development would enjoy.[66] Despite the relative deference of these approaches, neither assured municipalities victory in court.[67]

A.2d 12, 15 (N.H. 1981) (same). *See also* Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (holding that a fee imposed in lieu of land dedication would be unconstitutional unless the money collected was earmarked to benefit the proposed subdivision); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910, 913-14 (R.I. 1970) (adopting *Pioneer Trust* to review park and land dedications). States that have adopted the specific and uniquely attributable test tend to be those with relatively slow patterns of growth in the Midwest and Northeast. *See* Nicholas, *supra* note 57, at 95.

64. *See, e.g.*, *Associated Home Builders of the Greater East Bay*, 484 P.2d at 610, 611-13, 613 n.7 (adopting the reasonable relationship test and rejecting *Pioneer Trust*); Jenad, Inc. v. Vill. of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (adopting the reasonable relationship test); *Jordan*, 137 N.W.2d at 447 (rejecting *Pioneer Trust* in favor of the reasonable relationship test); Billings Props., Inc. v. Yellowstone County, 394 P.2d 182, 188-89 (Mont. 1964) (adopting reasonable relationship test and declaring that a legislatively determined exaction should be upheld unless the property owner demonstrates that the exaction is unreasonable). *See generally* William A. Falik & Anna C. Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 381-88 (1988) (recounting California's pre-*Nollan* exactions cases).

65. *See* Thomas M. Pavelko, Note, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269, 287 (1983).

66. *See generally* Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 993-96 (1989) (describing the rational nexus test developed in state courts before *Nollan*). These two relatively deferential approaches are difficult to distinguish in practice. The Utah Supreme Court, for example, has declared its approach to be based on a "reasonableness" test; however, in practice, the court has considered both the extent to which the need for an exaction is reasonably attributable to the proposed development and the extent to which the benefits are demonstrable to, if not solely directed to, the development's future residents. *See* Banberry Dev. Corp. v. S. Jordan City, 631 P.2d 899, 903-05 (Utah 1981).

67. *See, e.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Danbury, 230 A.2d 45, 46-47 (Conn. Super. Ct. 1967) (after upholding ordinance requiring dedication of parkland based on maximum and minimum that did not impose specifically and uniquely attributable test, court invalidated as unconstitutional a fee imposed in lieu of dedication because the local ordinance did not require that the fee benefit the proposed subdivision); Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984) (declaring unconstitutional an exaction imposed under county ordinance requiring a developer to reserve land indefinitely for a state road because exaction bore no reasonable nexus to the proposed development and deprived the developer of any use of his land).

In addition, prior to *Nollan*, state statutes granting municipalities limited authority to impose dedication requirements and impact fees also played an important role in limiting exactions. *See, e.g.*, City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (invalidating as beyond statutory authority fees imposed in lieu of a parkland dedication); *Haugen*, 359 P.2d at 111 (invalidating a fee imposed on residential developers in lieu of a parkland dedication because the ordinance's failure to limit use of the funds to benefit the new homes made the fee a tax, which the county had no statutory authority to impose). *See generally* Delaney et al., *supra* note 62, at 146 n.49 (citing cases in whieh courts invalidated exactions for lack of statutory authority). Indeed, such statutes continue to play that role. *See* Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development*

Thus, when it articulated its federal constitutional standards to evaluate the permissibility of exactions under the Takings Clause, the Supreme Court established a uniform set of property rights in what had previously been a diverse, experimental patchwork of state law.[68] Its exactions decisions established two tests to evaluate the degree of relationship between an exaction and a proposed development's anticipated harms. These tests imposed a heightened judicial scrutiny on exactions, and provided a rule-like principle for lower courts to apply. They limit the universe of permissible exactions to those that directly address, both qualitatively and quantitatively, a proposed project's harms.

Nollan v. California Coastal Commission, the first major Supreme Court exactions decision, involved plaintiffs seeking to demolish and replace a small, worn-down bungalow on their beachfront property with a three-bedroom house similar to those of their neighbors.[69] The California Coastal Commission, from whom the Nollans needed a discretionary permit to build their new beach house,[70] conditioned issuance of the permit on the Nollans' dedication of a public easement across the portion of their property between the high tide line and their seawall.[71] The commission justified this condition on the grounds that the Nollans' larger house would obstruct the public's visual access to the beach, increase private use of the shorefront, and burden the public's ability to traverse to and along the shorefront. The Court viewed the commission's decision as focusing on the "cumulative[] burden" of these impacts and the resulting adverse psychological effects on the public.[72]

The Supreme Court held that the commission's imposition of this condition violated the Takings Clause because the easement—which if required outside the context of a permit application would have effected a taking for which compensation unquestionably would have been due[73]—lacked an "essential nexus" to the harm created by the proposed building.[74]

Exactions, *in* DEVELOPMENT EXACTIONS 70, 76 (James E. Frank & Robert M. Rhodes eds., 1987); MANDELKER, *supra* note 62, §§ 9.11, 9.18, 9.21. *See, e.g.*, CAL. GOV'T CODE § 65909(a) (West 2003) (prohibiting permit approval and zoning variance conditions requiring land dedications that are not "reasonably related" to the proposed use of the property); COLO. REV. STAT. §§ 29-1-801 to 29-1-804 (2003) (authorizing imposition of "land development charges"); HAW. REV. STAT. § 46-142 (2002) (authorizing counties to collect impact fees); N.J. STAT. ANN. § 40:55D-42 (West 2003) (authorizing exactions for off-site improvements "necessitated or required" by a subdivision seeking approval); TEX. LOC. GOV'T CODE ANN. §§ 395.001-395.081 (Vernon 2003) (authorizing collection of impact fees).

68. *See generally* James E. Holloway & Donald C. Guy, *The Impact of a Federal Takings Norm on Fashioning a Means-End Fit Under Takings Provisions of State Constitutions*, 8 DICK. J. ENVTL. L. & POL'Y 143 (1999).

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

70. *See id.* (citing CAL. PUB. RES. CODE §§ 30106, 30212, 30600 (West 1986)).

71. *Id.* at 828-29.

72. *Id.* at 829 (internal quotation and citation omitted).

73. *Id.* at 831.

74. *Id.* at 837.

Writing for the majority, Justice Scalia suggested that the commission could have met the test for an essential nexus by requiring a more closely linked exaction—such as a "viewing spot," a public viewing platform that would allow visual access to the beach over the top of the development—but a lateral beach easement had little relation to the harm the commission sought to address.[75] Under its own regulations and without liability for a taking, the commission could have denied the Nollans' permit application. However, conditioning the permit's approval on the Nollans' granting an unrelated public easement constituted, in Justice Scalia's words, "an out-and-out plan of extortion" that as such required compensation.[76] *Nollan* thus settled two issues: whether exactions as a general matter are constitutionally permissible (they are) and what a specific exaction could require (a concession bearing an essential nexus, or substantive relationship, to the proposed land use's harms). It established a logic of harm reduction and a metric of qualitative connection (i.e., "essential"). *Nollan* left open, however, the issue of how much of a concession a government entity could permissibly require.

Seven years later, *Dolan* settled this lingering quantitative issue. In *Dolan*, the Court considered a property owner's challenge to two conditions the city of Tigard, Oregon, placed on its approval of the plaintiff's application to expand her hardware store. The city required that she dedicate a portion of her land as a public greenway to mitigate flooding from a nearby creek and that she dedicate a strip of land adjacent to the floodplain for a segment of a citywide bike path to mitigate the increased traffic congestion that would result from expansion of the store.[77] These conditions, unlike the beach easement in *Nollan*, bore an "essential nexus" to the harms of an expanded store—namely, increases in impervious surfaces and in traffic created by shoppers driving to the store's downtown location.[78] Establishing a test it claimed to divine from the variety of prior state supreme court exactions cases,[79] the Court held that the city's failure to demonstrate that the required concessions were in "'rough proportionality' . . . both in nature and extent to the impact of the proposed development"[80] rendered the exactions constitutionally impermissible without compensation.[81] The Court placed the burden of proof on the government entity to establish, with some rough degree of precision beyond

75. *Id.* at 836.

76. *Id.* at 837 (internal quotation and citation omitted).

77. Dolan v. City of Tigard, 512 U.S. 374, 378-80, 380 n.2 (1994).

78. *Id.* at 386-88.

79. *Id.* at 390-91. *But see* Julian R. Kossow, Dolan v. City of Tigard, *Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENVTL. L.J. 215, 231-32, 231 n.86 (1995) (arguing that the "rough proportionality" test had no support in state court precedent and was newly minted by the Court in *Dolan*).

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

81. *Id.* at 396.

simple "conclusory statement[s]," that its proposed exactions would remedy the effects of the proposed development.[82] *Dolan* thereby established a second constitutionally required metric of exactions under the logic of harm reduction: rough proportionality between the conditions and the extent of the project's expected harms.

In the decade since *Dolan*, the Court has reaffirmed the categorical nature of the exactions rules without clarifying the rules' applicability to exactions that differ from those before the Court in *Nollan* and *Dolan*. Unanimously rejecting dicta from the Ninth Circuit regarding the applicability of *Dolan* to the denial of a development proposal, the Court explained in its 1999 *Del Monte Dunes* decision that the rough proportionality test "was not designed to address, and is not readily applicable to, . . . questions arising where . . . the landowner's challenge is based not on excessive exactions but on denial of development."[83] When a court reviews a land use regulation or regulatory act that is "beyond the special context of exactions," the Court declared in a statement from which no Justice dissented, the exactions decisions are "inapposite."[84] Despite a narrow definition of exactions in *Del Monte Dunes*, which seemed to limit nexus and proportionality to a subset of land use conditions,[85] the Court has split on a number of petitions for certiorari seeking clarification of the exactions decisions' reach.[86] I discuss the issues involved in these disagreements further below.[87] As a general matter, the exactions rules remain in place as constitutional doctrines, although state and lower federal courts lack guidance on, and continue to disagree about, the precise boundaries of the category of regulations to which the exactions rules apply.

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82. *Id.* at 395-96. Whether the burden is on the government to prove an essential nexus is unclear, however, because *Nollan* did not directly address the issue. *See* Sam D. Starritt & John H. McClanahan, Comment, *Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After* Dolan v. City of Tigard, *114 S. Ct. 2309 (1994)*, 30 LAND & WATER L. REV. 415, 445 (1995).

83. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999).

84. *Id.* at 702-03.

85. *See id.* at 702 (defining exactions as "land-use decisions conditioning approval of development on the dedication of property to public use").

86. *See* Lambert v. City & County of San Francisco, 529 U.S. 1045 (2000) (Scalia, Kennedy, & Thomas, JJ., dissenting) (dissenting from the decision not to grant certiorari to consider whether exactions decisions apply to a refusal to grant an entitlement after the property owner refused an offered exaction); Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116 (1995) (Thomas & O'Connor, JJ., dissenting) (dissenting from the decision not to grant certiorari to consider whether exactions decisions apply to legislatively imposed exactions); Ehrlich v. City of Culver City, 512 U.S. 1231 (1994) (vacating and remanding, by a 5-4 vote, a decision refusing to apply exactions decisions to impact fee exactions in light of *Dolan*).

87. *See infra* Part II.D.

B. Nexus and Proportionality as Rule-Based Principles

Admittedly, the Court's rules governing exactions are less clear than its rules defining per se regulatory takings as those that result in the total deprivation of all economic use of land or its permanent physical occupation. The mere imposition of an exaction does not effect a taking; instead, courts must apply the nexus and proportionality tests to decide whether compensation is due. Furthermore, as I explain below,[88] the category of exactions to which *Nollan* and *Dolan* apply is subject to a significant amount of confusion.[89] Nevertheless, the decisions represent a similar effort to create stability and replicable precision for the judicial review of exactions.[90] Like the Court's other categorical takings tests, the nexus and proportionality tests represent a clear desire to circumscribe judicial discretion in reviewing exactions, and do so to establish broader protections for property rights and for the integrity of property generally. On the continuum between an impossibly absolute, mechanical rule and an impossibly indeterminate standard, the exactions decisions lie significantly closer to the rule.

The Court circumscribed municipal discretion in two ways. First, the "essential nexus" and "rough proportionality" tests require courts to apply a prescribed, focused logic to allegedly unconstitutional exactions.[91] As such, they differ strikingly from the comparatively open-ended inquiry of *Penn Central*, where the Court admitted its inability to develop "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."[92] Together, the nexus and proportionality tests consider the direct causal relationship between the harm of the proposed new use for the property, the regulation upon which the government relies in requiring the challenged concessions, the cost of the concessions, and the likelihood that the

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88. *See infra* Part II.D.

89. The *Lucas* category of takings is also subject to some uncertainty because of issues surrounding its nuisance exception and the valuation and denominator of the subject parcel. *See supra* note 35.

90. *See* Rose-Ackerman & Rossi, *supra* note 36, at 1446 (associating *Dolan* with *Lucas* to the extent that both attempt to formalize takings law, but do so incrementally and imperfectly).

91. Implicit in my argument is the assumption that when the Court established its federal constitutional rules to review exactions in *Nollan* and *Dolan*, the Court had some choice, including a more open-ended inquiry that resembled its ad hoc balancing test in *Penn Central*. *See* Dolan v. City of Tigard, 512 U.S. 374, 390-91 (1994) (choosing among different state court tests and rejecting the deferential "reasonable relationship" standard). As Justice Stevens noted in his dissent, the Court in *Dolan* simply assumed that it could adopt any test that state courts had developed—largely based on state constitutional or unenumerated grounds and generally not on federal constitutional grounds—as though that were the universe of proper choices for a new federal constitutional rule. *See id.* at 398-99 (Stevens, J., dissenting).

92. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (quoting Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).

concessions would mitigate the harms.[93] These tests narrow judicial review of exactions, focusing on harm causation and abatement as the basis of exactions' constitutional permissibility. Put another way, the Court has declared that exactions to which *Nollan* and *Dolan* apply do not require compensation when they directly address the harms of the proposed land use, because it is only when local governments so limit their exactions that they avoid curtailing property owners' constitutional rights. In this scheme, harm causation and harm reduction serve as both the basis and the limit of exactions as a regulatory practice. To require something more, or to require something different, in the Court's view, is to overregulate beyond legitimate land use planning and to effect a taking by going "too far."[94] Indeed, property rights advocates propose extending the rigorous, limiting logic of this regulatory ceiling to all regulatory takings cases.[95]

Second, and more significantly, the Court establishes metrics that a lower court must apply in reviewing the challenged exaction's nexus and proportionality to the proposed land use.[96] Of course, neither metric is exceptionally clear; indeed, each couples a fairly precise term—in *Nollan* the adjective "essential" and in *Dolan* "proportional"—with an imprecise one—*Nollan*'s "nexus" and *Dolan*'s "roughly." But these combinations do not signify the Court's desire to obfuscate or to be imprecise. In *Dolan*, for example, the Court explicitly rejected less precise metrics developed in state courts that required "very generalized statements as to the necessary connection between the required dedication and the proposed development" and were "too lax to adequately protect petitioner's right to just compensation."[97] Although the Court rejected as "too exacting" a strict "uniquely attributable" test that would have required courts to measure precisely the exaction against the proposed land use's harms,[98] it nevertheless commanded lower courts to measure exactions against a specific standard. Similarly, the Court in *Nollan* struck down a condition that "utterly fails to further the end advanced as the justification for the prohibition" and

93. *See* Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 DENV. U. L. REV. 893, 893 (1995) (explaining that a central inquiry in *Dolan* "involves causation: does the exaction relate to the harm 'caused' by the new development?").

94. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 853 (1987) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

95. *See* Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1044-45 (1997).

96. *See Dolan*, 512 U.S. at 391 ("[T]he 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."); *Nollan*, 483 U.S. at 837 ("[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'") (citation omitted).

97. *Dolan*, 512 U.S. at 389. *See supra* notes 61-67 (describing pre-*Nollan* state court tests for exactions).

98. *Dolan*, 512 U.S. at 389-90. *See supra* notc 63 and accompanying text.

thus lacked the essential nexus.[99] Although wary of establishing a precise command, the Court clearly hoped to provide some clear, rule-like protection for property owners. It attempted to do so by carving out specific judicial inquiries encompassing focused, limited considerations (compare the condition to the regulatory purpose and measure the burdens of the condition relative to the impact) and relatively clear, if not quite self-evident, calculations for courts to make ("essential nexus" and "roughly proportional").[100]

Nollan and *Dolan* thus establish takings rules. The argument posed by one recent commentator, that *Nollan*'s and *Dolan*'s tests are "hardly beacons of clarity" in form, force, or application,[101] rests on the false assumption that the jurisprudential category "rule" contains only simple, nondiscretionary, noncontingent commands.[102] But no such absolute command can exist. Rules and standards operate in relation, not in absolute contrast, to each other.[103] Considered closely, the rule-versus-standard dichotomy does not hold[104]; instead, commands may be more or less particularistic and more or less rule-based.[105] Indeed, neither the *Lucas* nor the *Loretto* takings rule is entirely stable or coherent.[106] The exactions decisions provide significantly greater direction and content to courts than an open-ended, ad hoc balancing or reasonable relationship test,[107] and they therefore demonstrate the same desire for formal stability evidenced in *Loretto* and *Lucas*.[108] A permanent physical invasion effects a taking, total diminution of value is likely to effect a taking, and an exaction that bears no essential nexus or that is not roughly proportional to the impacts of a regulated land use effects a taking.

As takings rules, nexus and proportionality offer numerous advantages, including limited judicial discretion, strong property rights protections, and allocative and decisional efficiency.[109] They avoid the

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99. *Nollan*, 483 U.S. at 837.

100. *Cf.* Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 148 (1995) (praising *Nollan* and *Dolan* for establishing an "objective standard" to determine whether a taking has occurred).

101. *See* Poirier, *supra* note 1, at 107 n.55.

102. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1700-01 (1976).

103. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 593-96 (1992).

104. *See generally* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 383 (1985) (characterizing the rule-standard binary as performing little more than an "arrested dialectic").

105. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 46 (1987); FREDERICK SCHAUER, PLAYING BY THE RULES 52, 77-78, 113 (1991).

106. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). *See supra* text accompanying notes 32 and 35.

107. *See generally* Kaplow, *supra* note 103, at 621 (distinguishing rules, which give content to the law before those subject to it act, from standards, which give content afterward).

108. *See* Heller, *supra* note 42, at 1219-20.

109. *See supra* text accompanying notes 36-44.

discretionary, individualized, and indeterminate realm of standards-based adjudication, associated with *Penn Central*, by imposing a rule-like logic and metrics on future judicial review of exactions. As such, they share with the Court's other rule-formalist efforts a commitment to clarity, precision, and property rights protection. The sections that follow describe the intent of the Court to establish a stable doctrinal shield for property rights, and the Court's subsequent uncertainty about that shield's reach.

C. Nexus and Proportionality as Doctrinal Shields

The Court majority constructed its exactions decisions to serve as doctrinal shields that would protect property owners and the integrity of private property rights against the effects of local governments' unchecked administration of their police powers. Concerned that local governments use their monopoly regulatory power to require vulnerable individuals to cede their constitutionally protected right to exclude others from their property, the Court assumed in its exactions decisions that property owners seeking issuance of a discretionary approval were powerless. Property owncrs have no option but to agree to the government's conditions, and thcy have no leverage to enable a bargain for a better deal.[110] The Court intended to protect property owners from the forced bargains resulting from the presumptively inequitable distribution of power.[111]

In *Nollan*, the Court made this suspicion explicit, characterizing the lateral beach easement required of the Nollans as "an out-and-out plan of extortion."[112] Finding no relationship between the California Coastal Commission's stated justification and the means used to achicve those ends, the Court implied that the government had engaged in little more than a sleight of hand meant to disguise its strong-arm tactics as a logical and pcrmissible regulatory act. The exaction's demonstrable illogic, the Court held, made the extortion plan manifest, and the essential nexus test uncovered such constitutionally impermissible efforts.[113]

The Court's interest in uncovering municipal extortion explicitly appeared in *Dolan* in its invocation of the unconstitutional conditions doctrine.[114] As thc Court describcd it, this doctrine prohibits the government

110. *See, e.g., Dolan*, 512 U.S. at 385-86 ("Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements."); *Nollan*, 483 U.S. at 841-42 (characterizing coastal commission's actions as compelling the Nollans to contribute land to the public when California was required to utilize its eminent domain power to pay for the land).

111. *See generally* Fennell, *supra* note 18, at 15 (describing Supreme Court's implicit distrust of local governments in its exactions cases).

112. *Nollan*, 483 U.S. at 837 (internal quotation and citation omitted).

113. *See id.* ("[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.").

114. *Dolan*, 512 U.S. at 385. *See also id.* at 387 (quoting *Nollan*'s characterization of exactions that lack an essential nexus as "an out-and-out plan of extortion").

from "requir[ing] a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."[115] The rough proportionality test precludes a forced exchange in which a duplicitous and untrustworthy governmental entity coerces the property owner to cede the full complement of rights in her land—a concession that would otherwise require compensation under the Fifth Amendment—as a condition for receiving the permit required to intensify the use of that land.[116] By imposing a metric that identifies when a required concession has forced a property owner to unfairly bear the entirety of public burdens,[117] the rough proportionality test extended *Nollan*'s effort to uncover constitutionally impermissible exactions. The exactions decisions thereby provide doctrinal shields that protect property owners who are most vulnerable to the exercise of police powers when local governments, susceptible to majoritarian influence,[118] overregulate undeveloped land and exploit individuals and newcomers.[119]

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115. *Id.* at 385. The unconstitutional conditions doctrine was also implicitly invoked in *Nollan*. *See* Been, *supra* note 13, at 473-74; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1463 (1989).

116. I assume throughout this Article that *Nollan* and *Dolan* are better understood as takings cases analogous to unconstitutional conditions precedents, rather than as unconstitutional conditions cases with a takings overlay. The Court's reasoning and analysis in *Nollan* and *Dolan* clearly viewed the challenged regulations as takings and applied the standard test for contemporary takings analysis, which asks whether the regulation "substantially advance[s] legitimate state interests." *See Dolan*, 512 U.S. at 385 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), and characterizing required dedication of easement as akin to permanent physical occupation of land in its deprivation of the right to exclude); *id.* at 393-94 (emphasizing that the loss of the right to exclude denied the property owners one of their fundamental rights); *Nollan*, 483 U.S. at 831-32, 834-35 (same). They also lacked a thorough discussion of the unconstitutional conditions doctrine. *Compare* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding, in the same term as *Nollan*, after thorough discussion and application of the unconstitutional conditions doctrine, a federal program conditioning highway funding on states' imposition of a minimum drinking age), *with Dolan*, 512 U.S. at 385 (citing only Perry v. Sindermann, 408 U.S. 593 (1972), and Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968)), *and Nollan*, 483 U.S. 825 (failing to cite any unconstitutional conditions cases or even naming the doctrine).

Ultimately, *Dolan* is best understood as a Fifth Amendment case with some coloring from the unconstitutional conditions doctrine. *See* Fennell, *supra* note 18, at 45 (asserting that in an exactions context the unconstitutional conditions doctrine plays a secondary role to the substantive takings doctrine by serving as a "lens for monitoring the things that the government is attempting to receive and give"). *But see* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 180-84 (1993) (reading *Nollan* as an unconstitutional conditions case providing necessary, but second-best, protection for property owners under siege from expansive land use regulations that should be, but are not, declared unconstitutional); Thomas W. Merrill, Dolan v. City of Tigard*: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 859-60, 866-67 (1995) (reading *Nollan* as an unconstitutional conditions case that protects the society-wide benefits of the Takings Clause against expansive regulations that inefficiently allocate real property resources).

117. *See Dolan*, 512 U.S. at 384 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

118. *See* William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1582 (1988) ("Local governments are more prone to majoritarianism than other

In addition to its concern with the government's unfair use of its bargaining power, the Court also noted the inefficiencies expected to follow if the judiciary failed to intervene in the exaction bargaining process. Commentators likewise have identified the dual concerns of Takings Clause jurisprudence: fairness and efficiency.[120] The dual concern is clearest in *Dolan*, which specifically requires careful, individualized determinations to ensure that exactions "relate[] both in nature and extent to the impact of the proposed development"; in this way, *Dolan* limits exactions to no more than the internalization by the property owner of the external costs of development.[121] According to the Court, this test curbs the government's authority to force property owners to accept a trade whose costs to them are greater than the benefits provided to the public.[122] *Nollan* relied on the same claim. In the absence of judicial intervention, the Court assumed, municipalities would increase their bargaining leverage by producing more stringent land use regulations, only to waive them in exchange for even more beneficial, unrelated amenities.[123] Local governments thus would realize fewer of the land use goals they purportedly sought to meet than if they imposed more lenient but nontradable development restrictions.[124] The Court assumed that, in the absence of judicial intervention, a local government would extort property from their citizens while harming all of the jurisdiction's property owners and residents by strategically bargaining away their regulations. The Court sought to protect the regulators,

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levels of government because they usually lack the electoral diversity that comes with large land area and large population and because, as derivative governments, they also lack the other constitutional checks on the will of the majority, such as bicameral legislatures and separation of powers."). *See also* FISCHEL, *supra* note 18, at 139 (observing that legislation by the national legislature should be given higher judicial deference than local legislative acts because it is less susceptible to majoritarian capture).

119. Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 195 (1989) (arguing that the land use regulatory process is especially susceptible to bias among large, homogenous factions).

120. *See* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998-99 (1999). *See also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1181-82 (1967) (relying on normative criteria of allocative efficiency and distributive justice to judge collective action). Courts more typically emphasize the fairness rationale, however. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) (stating that the Takings Clause is intended to prevent government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (quoting *Armstrong*, 364 U.S. at 49)); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) ("[C]oncerns for proportionality animate the Takings Clause . . . ."); Eastern Enters. v. Apfel, 524 U.S. 498, 528-29 (1998) (plurality opinion) (finding a regulatory taking where the retroactive burden was "substantially disproportionate to the parties' experience").

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

122. *See id.* at 393-95 (evaluating conditions required of the Dolans and concluding that each requires too much in light of the impacts of the proposed development).

123. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 n.5 (1987).

124. *Id.*

the regulated, and affected third parties alike from local governments' overreaching, rent-seeking tendencies.[125]

D. The Uncertain Reach of the Exactions Decisions

As the Court clarified unanimously in its 1999 *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* decision, the heightened scrutiny of its exactions decisions applies only in the "special context of exactions" and does not extend to decisions to deny applications for discretionary approvals.[126] As such, exactions were reaffirmed as a finite category of land use regulations excepted from the default *Penn Central* approach to takings claims. Despite this distinction between exactions-based regulatory acts and acts that lack conditions, the applicability of heightened scrutiny across the wide spectrum of exactions is not entirely certain.[127] Understandably, the reach of the exactions decisions is significant for interested parties. When the federal Constitution's heightened scrutiny does not apply, courts review challenged exactions under their own, often more deferential, tests,[128] meaning property owners may be less likely to win.

Three central issues regarding the exactions decisions' reach remain unclear. First, neither *Nollan* nor *Dolan* resolved whether the essential nexus and rough proportionality tests apply only to the category of exactions requiring dedication of land for public use or whether they extend to exactions such as impact fees (charges for the anticipated impacts of a project on infrastructure systems, with the fees collected used to mitigate those

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125. *See* Been, *supra* note 13, at 491 ("Requiring a local government to spend exactions on projects that are germane to the harm that the development causes limits the potential profit from overregulation and thereby helps to ensure the efficient level of regulation."). One of the strongest and most influential arguments doubting the ability and willingness of local governments to regulate fairly and efficiently is Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

126. 526 U.S. 687, 702-03 (1999) (declaring that *Dolan* was "not designed to address, and . . . [was] 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"); *id.* at 733 (Souter, J., concurring in part and dissenting in part) (rejecting the use of the *Dolan* standard "for reviewing land-use regulations generally"). Although not a clear distinction—as Richard Epstein has argued, any land use regulation can be described as an exaction to the extent that it forbids or limits a particular land use while enabling others—the Court in *Del Monte Dunes* explicitly declared the difference between stated and implied conditions of development to be constitutionally significant. *See* EPSTEIN, *supra* note 116, at 20.

127. *See generally* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 567-74 (1999) (describing open issues prior to *Del Monte Dunes*); Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court's* Nollan, Dolan, *and* Del Monte Dunes *Decisions*, 34 URB. LAW. 155, 161-64 (2002) (describing issues resolved and left open by *Del Monte Dunes*).

128. *See, e.g.*, San Remo Hotel Ltd. P'ship v. City & County of San Francisco, 41 P.3d 87, 105 (Cal. 2002) (finding that, where *Nollan* and *Dolan* do not apply, courts should review an exaction for its "reasonable relationship, in both intended use and amount, to the deleterious public impact of the development").

impacts) or other concessions that do not require the dedication of land, such as fees paid in lieu of land dedication.[129] The Court in *Del Monte Dunes* noted that none of its decisions had extended *Dolan* beyond exactions requiring the dedication of property.[130] This distinction is consistent with the Court's repeated statements, in *Nollan* and in other takings cases, that land dedications demand more careful judicial review because of the "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."[131] Some state and lower federal courts have relied on that distinction in refusing to extend heightened scrutiny to nonpossessory exactions, such as cash relocation assistance to displaced tenants, traffic impact fees, and open space allotments for future residents of a subdivision.[132] At the same time, a significant number of courts have applied heightened scrutiny to nondedicatory exactions used in individualized proceedings.[133]

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129. *See generally* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (distinguishing *Dolan*, in which the challenged exaction required the property owner to dedicate part of her land to the city, from other regulatory takings cases applying different standards of review, in which the challenged regulations imposed conditions that were "simply a limitation on the use" the property owners could make of their land). On the confusion in state and lower federal courts prior to *Del Monte Dunes* over whether *Nollan* and *Dolan* applied to exactions requiring something other than the dedication of land, see Nancy E. Stroud, Note, *A Review of* Del Monte Dunes v. City of Monterey *and Its Implications for Local Government Exactions*, 15 J. LAND USE & ENVTL. L. 195, 203-05 (1999).

130. *Del Monte Dunes*, 526 U.S. at 702 (limiting application of heightened scrutiny to those conditions for approval that require "the dedication of property to public use"). *But see* Isla Verde Int'l Holdings, Inc. v. City of Camas, 990 P.2d 429, 436 n.3 (Wash. Ct. App. 1999) (concluding that statements in *Del Monte Dunes* limiting *Dolan* to exactions requiring dedications of land were dicta), *aff'd on other grounds*, 49 P.3d 867 (Wash. 2002); Bruce W. Bringardner, *Exactions, Impact Fees, and Dedications: National and Texas Law After* Dolan *and* Del Monte Dunes, 32 URB. LAW. 561, 582 (2000) (asserting that the *Del Monte Dunes* statement was dicta and further arguing that the distinction between dedicatory and nondedicatory exactions is meaningless).

131. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841 (1987). *Accord* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (distinguishing permanent physical invasions, "no matter how minute the intrusion," from other land use regulations, unless the latter deny "all economically beneficial or productive use of land").

132. *See, e.g.*, Garneau v. City of Seattle, 147 F.3d 802 (9th Cir. 1998) (holding that *Nollan* and *Dolan* do not apply to an ordinance requiring landlords to provide cash relocation assistance to tenants displaced as a result of redevelopment); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) ("*Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure."); McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (holding that *Nollan* and *Dolan* do not apply to traffic impact fee ordinance); Henry v. Jefferson County Planning Comm'n, 148 F. Supp. 2d 698, 709 n.142 (N.D. W. Va. 2001), *aff'd in part, vacated in part*, 2002 WL 864267 (4th Cir. 2002) (unpublished opinion) (refusing to apply *Dolan* to use permit conditions that did not involve dedication of land for public use). Recently, the Maryland Supreme Court made an even finer distinction: *Dolan* applies to required dedications of land in which the land is made open to the public generally but not to required dedications that would be open only to the future residents of the subdivision for which the exaction was to be required. *See* City of Annapolis v. Waterman, 745 A.2d 1000 (Md. 2000).

133. *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (plurality opinion) (concluding that *Nollan* and *Dolan* "apply, *under the circumstances of this case*, to the *monetary* exaction imposed by Culver City as a condition of approving plaintiff's [rezoning] request"); Town of

Despite the Court's emphasis in *Nollan* and *Dolan* on forced dedication, it decided, by a 5-4 margin, to remand to the California Supreme Court the California Court of Appeals decision in *Ehrlich v. City of Culver City*,[134] which applied a relatively low standard of review to impact fee exactions. The Court directed the California court to review the decision in light of *Dolan*.[135] Although the Court has not yet faced the issue directly, its remand of *Ehrlich* and lower federal and state court decisions (including the California Supreme Court's subsequent decision in *Ehrlich* on remand)[136] may have settled the issue in favor of extending *Nollan* and *Dolan* to nonpossessory exactions such as impact fees.[137] Perhaps, in the end, the Court's apprehension over the vulnerability of property owners has overtaken its concern for the uniqueness and integrity of real property ownership rights. On the other hand, the *Del Monte Dunes* dicta associating the exactions cases solely with dedications leaves sufficient ambiguity to keep the issue open.

A second unresolved issue is whether the essential nexus and rough proportionality tests apply only to exactions imposed by adjudicative decisions regulating individual pieces of land or whether they extend also to legislative decisions regulating an entire jurisdiction or large units thereof.[138] This distinction, which is harder to discern in the smaller, less

Flower Mound v. Stafford Estates Ltd. P'ship, 71 S.W.3d 18, 34 (Tex. Ct. App. 2002) (applying *Nollan* and *Dolan* to exaction requiring improvements to public street); Benchmark Land Co. v. City of Battle Ground, 972 P.2d 944, 950 (Wash. Ct. App. 1999) (holding that *Nollan* and *Dolan* apply "where the City requires the developer as a condition of approval to incur substantial costs improving an adjoining street"), *aff'd on other grounds*, 49 P.3d 860 (Wash. 2002).

134. 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993), *vacated*, 512 U.S. 1231 (1994), *appeal after remand*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 519 U.S. 929 (1996).

135. Ehrlich v. City of Culver City, 512 U.S. 1231 (1994).

136. 911 P.2d at 433.

137. *See generally* Stroud, *supra* note 129, at 202-06 (discussing the split among courts on this point and possible implications of *Del Monte Dunes*). Commentators arguing against the possessory-nonpossessory distinction include J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 397-401 (2002); Callies, *supra* note 127, at 571-72; Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 513, 540-43 (1995); Kmiec, *supra* note 95, at 1036-37. Some commentators propose a test for challenges to impact fees based on substantive due process rather than the Takings Clause. *See* Julian C. Juergensmeyer & James C. Nicholas, *Impact Fees Should Not Be Subjected to Takings Analysis*, *in* TAKING SIDES ON TAKINGS ISSUES 357, 359-63 (Thomas E. Roberts ed., 2002) (citing Hollywood, Inc. v. Broward County, 431 So. 2d 606, 609-10 (Fla. Dist. Ct. App. 1983)) (arguing for a due process-based dual rational nexus test that would consider whether there was a reasonable connection between first, the locality's need for additional capital facilities and the new development and second, the funds collected and the benefits accruing to the new development).

138. *See Dolan*, 512 U.S. at 385 (distinguishing between challenges to "essentially legislative determinations classifying entire areas of the city," and the challenges reviewed in *Dolan* (and, by implication, *Nollan*), which were to "adjudicative decision[s] to condition petitioner's application for a building permit on an individual parcel"). *See also id.* at 391 n.8 (noting that judicial review of "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel" applies heightened scrutiny and places the burden on the government entity to prove that an exaction

formal governmental structures of municipalities than in federal and state governments,[139] assumes that the Takings Clause is most likely to be implicated when an individual is singled out through an adjudicative-type act by a government agency. Regulations affecting large segments of the public less commonly implicate the Takings Clause.[140] In addition, because a legislatively enacted exaction provides for regulatory certainty, it is less likely to frustrate property owners' investment-backed expectations.[141] Shortly after *Dolan*, the Court denied certiorari in a case in which the Georgia Supreme Court refused to apply heightened scrutiny in its review of land use regulations imposed by a zoning ordinance.[142] Lower federal and state courts tend to respect this adjudicative-legislative distinction and extend the nexus and proportionality tests only to individualized exactions,[143]

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did not effect a taking, as opposed to judicial review of "generally applicable zoning regulations," which proceeds under a more relaxed scrutiny with the burden on the property owner to demonstrate that the exaction constitutes a taking).

139. *See* Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525, 544-49 (1990); Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 260-61 (2000). In the smaller setting of local government, where greater access to representatives can help political minorities or individuals to overcome political majorities and where affected parties may have more constitutional due process protections, adjudicative procedures can often protect individuals' property rights better than legislative procedures can. *See Reznik, supra*, at 272-73. Indeed, the exactions reviewed in both *Nollan* and *Dolan* could be understood as broadly applicable rather than as individualized adjudications, as the majorities in both cases seem to treat them. *See Dolan*, 512 U.S. at 413 n.* (Souter, J., dissenting) ("The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions, . . . but the permit conditions were imposed pursuant to Tigard's Community Development Code. The adjudication here was of *Dolan*'s requested variance from the permit conditions otherwise required to be imposed by the Code.") (citations omitted); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 829 (1987) (noting that the coastal commission had placed similar conditions on "43 out of 60 coastal development permits along the same tract of land and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property."). State courts seem quite capable of making fine distinctions between legislated and individualized exactions, however. *Compare* Dudek v. Umatilla County, 69 P.3d 751 (Or. Ct. App. 2003) (applying *Dolan* to a legislatively adopted exaction scheme where the ordinance grants discretion to the county to determine the extent of the exaction), *with* Rogers Machinery, Inc. v. Washington County, 45 P.3d 966, 968 (Or. Ct. App. 2002) (refusing to apply the heightened scrutiny of *Nollan* and *Dolan* to a legislatively determined "system development charge" of traffic impact fees levied by a local government under the authority of a state statute).

140. *See* Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1348 (1991). Accordingly, as Lee Anne Fennell has noted, the distinction between legislative and adjudicative decisions continues to retain both logical coherence and conceptual importance given the distinction the Court stressed in *Del Monte Dunes* between exactions and development denial. *See* Fennell, *supra* note 18, at 10-11.

141. *See* Dana, *supra* note 18, at 1261 n.92; Douglas R. Porter, *Will Developers Pay to Play?*, *in* DEVELOPMENT IMPACT FEES 73, 76 (Arthur C. Nelson ed., 1988); *see also* George Wyeth, *Regulatory Competition and the Takings Clause*, 91 NW. U. L. REV. 87, 131 n.136 (1996) (arguing that competitive pressures among jurisdictions will also make it less likely that municipalities will effect takings through legislative acts than through individualized, site-specific regulation).

142. Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116 (1995) (denying certiorari).

143. *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (refusing to extend *Dolan* to a legislative water resources development fee); San Remo Hotel

although some courts, with the approval of some commentators, have nevertheless applied heightened scrutiny to legislatively enacted exactions.[144] Two Justices agreed with this approach in their dissent from the Court's denial of certiorari, attacking the adjudicative-legislative distinction as unclear, illogical, and essentially meaningless.[145]

Third, it is unclear whether a government's exaction proposal made during the application review process may be subject to heightened scrutiny, even if the property owner rejects the proposed exaction or the government withdraws it.[146] This situation differs from the exactions before the Court in *Nollan* and *Dolan*, where the municipalities had issued approvals subject to conditions and the property owners had assented to, or at least were informed of, the exaction that would be required.[147] In the case of rejected or withdrawn exactions, by contrast, the municipality denies a property owner's application after offering conditions that the property owner refused. The two courts that considered the issue reached different

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Ltd. P'ship v. City and County of San Francisco, 41 P.3d 87, 103 (Cal. 2002) (refusing to extend *Nollan* and *Dolan* to a generally applicable fee for converting residential hotel rooms); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 697 (Colo. 2001) (refusing to apply *Dolan* to, and subsequently upholding, generally applicable sewer fees); Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (refusing to apply *Dolan* to, and subsequently upholding, a generally applicable ordinance requiring mobile home park owners closing their parks to pay relocation costs to park residents); *Rogers Machinery*, 45 P.3d at 966 (refusing to apply the heightened scrutiny of *Nollan* and *Dolan* to a legislatively determined system development charge of traffic impact fees levied by local government under authority of state statute).

144. *See* Dakota, Minn. & E. R.R. v. South Dakota, 236 F. Supp. 2d 989, 1026-29 (D.S.D. 2002) (applying *Nollan* and *Dolan* to state eminent domain statute requiring private railroads that use statute to acquire land to grant easement to other public entities and groups); Home Builders Ass'n of Dayton and Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000) (applying *Nollan* and *Dolan* to a system of impact fees imposed on developers for financing roads); Lincoln City Chamber of Commerce v. City of Lincoln City, 991 P.2d 1080, 1082 (Or. Ct. App. 1999) (applying *Nollan* and *Dolan* to an ordinance requiring dedications, improvements, or fees for roads, drainage facilities, and other infrastructure as conditions for issuance of a building permit); Isla Verde Int'l Holdings, Inc. v. City of Camas, 990 P.2d 429, 429 (Wash. Ct. App. 1999) (applying *Nollan* and *Dolan* to ordinance requiring all development to set aside a fixed percentage of land for open space), *aff'd on other grounds*, 49 P.3d 860 (Wash. 2002). For approving commentary, see for example, Breemer, *supra* note 137, at 401-07 (arguing that, whether understood as relying on the Takings Clause or the unconstitutional conditions doctrine, *Nollan* and *Dolan* should apply to both legislative and adjudicative exactions).

145. *See Parking Ass'n*, 515 U.S. at 1116 (Thomas & O'Connor, JJ., dissenting).

146. This was the issue raised by the petition for certiorari denied in *Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000). *See also supra* text accompanying notes 5-11 (discussing dissent from petition for certiorari). *See generally* Andrew W. Schwartz, *The Application of* Nollan/Dolan *Heightened Scrutiny to Legislative Regulations and "Unsuccessful Exactions,"* Regulatory Takings Conference, Oct. 1999, Georgetown Environmental Law & Policy Institute, *available at* http://www.law.georgetown.edu/gelpi/conference/schwartz.htm.

147. *See* Dolan v. City of Tigard, 512 U.S. 374, 379, 381 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987). *See also* Dana, *supra* note 18, at 1290 ("[T]he developer's pre-construction assent to unconstitutional conditions does not constitute a waiver of the right to challenge them at a later date.").

conclusions.[148] The argument in favor of applying the Court's exactions decisions to rejected or withdrawn exactions asserts that if courts apply different tests depending upon whether the exactions are accepted by both parties and finalized in an approval, municipalities will offer an exaction that is politically popular and then, if the property owner refuses it, withdraw the offer and deny the application.[149]

But significant distinctions between exactions attached to an approval and exactions that do not become obligations for a property owner should affect how courts review these takings claims. A local government is likely to present numerous reasons for denying a property owner's development application. Unless the municipality (foolishly) states in the record of its review that its denial is based upon the refused exaction offer rather than on the unmitigated impacts of the proposed project,[150] a court will find it difficult to distinguish a municipality's unconstitutional purpose from its permissible ones.[151] And yet, in his *Lambert* dissent, Justice Scalia would have required courts not only to focus specifically on the rejected exaction but to use it as a basis for awarding compensation.[152]

A court will also struggle to determine a remedy for a property owner who demonstrates that the exaction she refused prior to the municipality's denial fails under heightened scrutiny. In *Nollan* and *Dolan*, the Court merely required compensation for certain unconstitutional conditions attached to permit approvals; to provide an adequate remedy for the property owner in a rejected exaction case, by contrast, a court must reverse a permit denial, despite the existence of legitimate reasons for a denial that may or may not be in the record. The Eighth Circuit faced

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148. *See* Goss v. City of Little Rock (Goss I), 90 F.3d 306, 309-10 (8th Cir. 1996); Lambert v. City and County of San Francisco, 67 Cal. Rptr. 2d 562, 568-69 (Cal. Ct. App. 1997), *superseded by* 950 P.2d 59 (Cal. 1998). In *Goss I*, the Eighth Circuit held that *Dolan* could apply to the city's denial of an application to rezone property after its owner refused the city's condition that he deed a portion of his land to the city to widen an adjacent road. In *Lambert*, by contrast, an intermediate appellate court in California held that a city's denial of a conditional use permit should not be reviewed under the heightened scrutiny of *Nollan* and *Dolan* despite evidence in the record showing that the city would have issued the permit if owners had agreed to pay an impact fee. Three sitting justices of the U.S. Supreme Court considered this issue worthy of certiorari review in 2000. *See Lambert*, 529 U.S. at 1045 (Justice Scalia, joined by Justices Thomas and Kennedy, dissenting from denial of certiorari).

149. *See Lambert*, 529 U.S. at 1045 (Scalia, J., dissenting). Justice Scalia argued that there is no logical reason to treat differently "the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met," because they are each examples of extortionate conditions illegally offered by the state. Therefore, heightened scrutiny should apply equally to both. *Id.* (citing *Lambert*, 67 Cal. Rptr. 2d at 569 (Strankman, J., dissenting)).

150. *See Goss I*, 90 F.3d at 309-10 (remanding to city to find legitimate reason for denying permit).

151. *See, e.g.*, *Lambert*, 67 Cal. Rptr. 2d at 567 (listing city's findings supporting its denial of conditional use permit, including that the proposed conversion would be incompatible with the city's Master Plan and with the building's surrounding neighborhood, and "would be injurious to property, improvements or potential development").

152. *See Lambert*, 529 U.S. at 1045 (Scalia, J., dissenting).

precisely this issue when the case returned on appeal from the court's earlier remand in *Goss I*.[153] In *Goss II*, the circuit court reversed the district court's order to issue an approval and instead allowed the city to utilize the available legitimate planning rationales to support its denial of the rezoning application.[154] Although the court denied that its application of heightened scrutiny and its finding of a taking in the rejected exaction was a Pyrrhic victory for the property owner, the property owner received no compensation for the taking he apparently suffered, at least temporarily, while the rejected exaction remained the basis of the city's denial. A property owner may be able to receive compensation for a temporary taking effected during the period between the unconstitutional denial and a correct, constitutional denial based on legitimate reasons. It appears that the temporary takings issue was not before the court in *Goss II*, although the court did grant attorney's fees to the plaintiff under 43 U.S.C. § 1983.[155] How, under the Takings Clause, can a court require compensation for a regulatory act that was not imposed? Justice Scalia never reached this issue in his *Lambert* dissent, stating only that if a jurisdiction clearly based its denial on a refused exaction, he would "remand for conduct of the *Nollan-Dolan* analysis."[156] He provided no guidance or insight as to a prevailing plaintiff's remedy following that analysis.

More important, if lower courts review both rejected exactions and permit denials resulting from failed negotiations with the same heightened scrutiny, then they will contradict recent Supreme Court pronouncements that exactions and outright denials pose "much different" questions.[157] Extending constitutional exactions rules to all conditions—whether or not property owners accepted them and whether or not the governing board issued an approval—would extend the categorical exception of *Nollan* and *Dolan* to most land use regulatory decisions, given the prevalence of such negotiations and discussions in the land use process. Indeed, Justice Scalia's suggested approach in *Lambert* of applying the nexus and proportionality tests to withdrawn or rejected exactions would begin to swallow the distinction between the categorical takings approach of the exactions decisions and the *Penn Central* multifactor test. Plaintiffs would simply claim that the underlying reason for the denial of their development application was their refusal of a proposed exaction. Local governments, in turn, would become exceedingly wary about offering, or even discussing, conditions on development, thereby harming not only communities that would

153. Goss v. City of Little Rock (Goss II), 151 F.3d 861 (8th Cir. 1998).
154. *Id.* at 864.
155. *See id.* at 866.
156. *Lambert*, 529 U.S. at 1045 (Scalia, J., dissenting).
157. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999).

approve development without conditions, but also property owners who would face summary denials without the opportunity to bargain.

In establishing a new category of heightened scrutiny for takings claims, *Nollan* and *Dolan* combine doctrinal force—property rights protections cloaked in the security of a constitutional rule formalism—with an uncertain, potentially cxpansive scope. The exactions decisions thus illustrate the logic and flaws of the bifurcated approach by requiring heightened scrutiny of particular types of regulatory acts on the assumption that some acts are more likely than others to result in uncompensated takings. But the distinctions upon which this logic rests threaten to break down and leave all regulations vulnerable to heightened scrutiny. And nexus and proportionality tests, as well as the indeterminacy of their applicability, have enormous, variable consequences on land use regulation. Indeed, this paradox of powerful clarity and indetcrminate scope has affected land use regulation in important ways, as the remainder of the Article explains.

III
CONSTITUTIONAL EXACTIONS AND REGULATORY FORMULAS

In the years following *Nollan* and *Dolan*, state and local governments have tended to move away from negotiated, ad hoc exactions and toward legislated, fee-based formulas as a preconstituted remedy for the harms and costs of development proposals. The combined clarity and indeterminacy of the Court's exactions decisions give local governments strong incentives to adopt such formulas to avoid or successfully defend against constitutional challenges. This Part first describes the costs and practical difficulties of complying with the Court's takings rules and then explains how regulatory formulas offer a solution that helps achieve fairness, regulatory precision, and administrative efficiency. It concludes with a critique of the Court's formalist approach to exactions.

A. The Costs and Difficulties of Compliance

The exactions cases have affected substantive decision making and the costs of the regulatory review process in at least some jurisdictions.[158]

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158. *See* POLLAK, *supra* note 19, at 31, 82-83; Jonathan Davidson & Adam U. Lindgren, *Exactions and Impact Fees*—Nollan/Dolan*: Show Me the Findings!*, 29 URB. LAW. 427 (1997); Ryan, *supra* note 60, at 368. Such costs may be borne by, or shared with, the property owner, thereby raising the cost of development. *See id.* at 366; *cf.* Lincoln City Chamber of Commerce v. City of Lincoln City, 991 P.2d 1080, 1080 (Or. Ct. App. 1999) (upholding city ordinance requiring land owner-applicant to submit civil or traffic engineer's report demonstrating that applicant could not be required to provide road, drainage, and sidewalk easements for land improvements, because such requirements would not be roughly proportional to the estimated impact of the development). One guide for land use attorneys suggests that counsel for developers or property owners hire their own economic consultants in preparation for litigation over the essential nexus and rough proportionality of any exaction required in the approval or development agreement process. Michael C. Spata, *Decision-makers and the Administrative Decision*, *in* HOW TO LITIGATE A LAND USE CASE 55, 61 (Larry J. Smith ed., 2000).

Because they can apply to exactions imposed as part of a wide variety of land use regulations, including subdivision approvals, rezoning, and annexation,[159] the exactions decisions have prompted regulatory changes that seek to reduce takings liability. These changes have been especially noteworthy in some contexts—namely, states that had previously engaged in more deferential judicial review of exactions, local governments that failed to comply with the nexus and proportionality tests, and local governments that developed constitutionally permissible exactions but failed to produce a sufficiently detailed record to demonstrate nexus and proportionality.[160]

Nollan and *Dolan* have raised the risk of litigation and the incidence of property owners' threats to sue.[161] A recent study of city and county planners in California found that litigation threats have increased since *Nollan*, *Dolan*, and other takings cases expanded the compensation rights of property owners subjected to regulation.[162] California counties with strong growth controls and the fastest-growing California cities have faced more threats of litigation than have progrowth counties and slower-growing cities.[163] Local governments bear the full risk[164] of compensating the property owner for an exaction found to be unconstitutional and for attorney's fees.[165] They may also be liable for compensation for a "temporary taking" for the period dating back to the imposition of the prohibited exaction.[166] Even accepting a condition proposed by an applicant for a discretionary approval may be risky, as one Idaho county recently

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159. *See generally* Jonathan M. Davidson et al., *"Where's* Dolan*?" Exactions Law in 1998*, 30 URB. LAW. 683, 684-86 (1998).

160. *See generally* POLLAK, *supra* note 19, at 81-88 (describing effects on California cities and counties).

161. *See* Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 STETSON L. REV. 675, 677 (2000) (describing property owners' negotiation stances after *Dolan* as changing from a "let's make a deal" approach to a "let's make a claim" approach); Douglas T. Kendall & James E. Ryan, *"Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep* Nollan *and* Dolan, 81 VA. L. REV. 1801, 1815 (1995) (noting the likelihood that *Nollan*'s and *Dolan*'s tests and burden shifting will increase landowners' litigation threats). It perhaps goes without saying that threats to litigate can and do result in lawsuits. *See* POLLAK, *supra* note 19, at 21-22 (describing the relationship between increases in threats of litigation and increases in suits filed).

162. *See* POLLAK, *supra* note 19, at 16-18 (finding that more than half of the planners in counties that responded to a survey reported a marked increase in the number of threats of litigation over the past decade, and further reporting that such threats occur especially frequently when municipalities consider discretionary approvals for intensification of land use, whether in the form of zoning changes, subdivision approvals, conditional use permits, or variances).

163. *See id.* at 125-29.

164. *See id.* at 23 (discussing the unavailability of takings insurance for municipalities in California).

165. Property owners typically file suit under a statutory provision, such as 42 U.S.C. § 1988, that allows prevailing plaintiffs to recover attorney's fees.

166. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987) (establishing the right of a property owner to compensation for "the period during which the taking was effective").

learned when a developer alleged a taking under *Dolan* arising from a road dedication that the developer itself initially offered.[167] The county ultimately prevailed in the litigation, in part because the developer had suggested the dedication in the first place. Nevertheless, it did not receive full compensation for its attorney's fees.[168] Threats to sue therefore undoubtedly affect land use decision making.

In light of the threat of litigation, many jurisdictions across California, and presumably elsewhere, have established new but costly procedures for calculating exactions.[169] Although *Dolan* did not require a precise "mathematical calculation" to meet its rough proportionality test,[170] courts have required local governments to adopt and apply fairly rigorous standards with defensible, continually updated methodologies and estimates to support the concessions they exact from property owners.[171] Such studies are expensive, and their cost has only increased with the threat of heightened scrutiny.[172] High costs of compliance are typically passed on to developers, in requirements that they pay for environmental review of the proposed development—costs that developers in turn are likely to pass on to landowners or consumers.[173] Compliance with exactions rules is costly; these costs delay development, are often passed on to developers (and, subsequently, home buyers and tenants), and require additional legal and administrative resources from local governments.

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167. *See* KMST, LLC v. County of Ada, 67 P.3d 56, 59 (Idaho 2003).

168. *Id.* at 61, 63-64.

169. *See* POLLAK, *supra* note 19, at 125-29.

170. Dolan v. City of Tigard, 512 U.S. 374, 395-96 (1994).

171. *See, e.g.*, Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 686-87 (Minn. 1997) (striking down impact fee system on the grounds that the system by which fees were assessed was not periodically updated); F & W Assocs. v. County of Somerset, 648 A.2d 482, 487 (N.J. Super. Ct. App. Div. 1994) (upholding traffic impact fees based on a study that devised volume-capacity ratios, measured the demand volume and existing road capacity, projected impacts from development based on industry standards and empirical data, suggested roadway improvements to mitigate impacts, and estimated costs of improvements).

172. *See* Recent Case, Home Builders Ass'n of Northern California v. City of Napa, *108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001)*, 115 HARV. L. REV. 2058, 2061, 2061 n.33 (2002) (estimating current cost of nexus studies sufficient to comply with *Nollan* and *Dolan* to be between $20,000 and $35,000); Edward J. Sullivan, Dolan *and Municipal Risk Assessment*, 12 J. ENVTL. L. & LITIG. 1, 1-2 (1997) (discussing increased cost of compliance following *Dolan*).

173. *See* Ryan, *supra* note 60, at 366-67 (reporting that increased compliance costs in Tigard, Oregon, following the *Dolan* decision, were passed along to developers); Clyde W. Forrest, *Planned Unit Development and Takings Post* Dolan, 15 N. ILL. U. L. REV. 571, 580-81 (1995) (noting that the expense required for studies required to support exactions is often borne by developers). Like impact fees, such costs may be borne by developers, or, depending upon a variety of market factors, passed backward to landowners when developers pay lower prices for undeveloped land or forward to new home purchasers through higher prices for new homes. *See* MARLA DRESCH & STEVEN M. SHEFFRIN, WHO PAYS FOR DEVELOPMENT FEES AND EXACTIONS? 25-26 (1997); Keith R. Ihlanfeldt & Timothy M. Shaughnessy, *An Empirical Investigation of the Effects of Impact Fees on Housing and Land Markets* 15-16 (Lincoln Institute of Land Policy, Working Paper No. CP02A13, 2000), *available at* http://www.lincolninst.edu/pubs/pub-detail.asp?id=563.

Even when local governments reviewed extensive engineering and planning reports before imposing an exaction, courts have sometimes dismissed municipalities' findings of rough proportionality.[174] Indeed, *Dolan* itself rejected a bicycle path exaction as constitutionally unacceptable, despite the City of Tigard's mathematical calculation of the increased number of car trips the proposed store expansion would create and a rough estimate of the decreased traffic congestion that the completed bikepath would produce.[175] Good faith efforts to comply do not insure against actual or threatened liability under the heightened scrutiny of exactions rules.

B. The Lure of Regulatory Formulas

As a result of the challenges and costs of complying with the Court's exactions decisions, local governments have shifted toward imposing legislatively enacted impact fees rather than in-kind exactions requiring the dedication of land.[176] Two doctrinal issues in *Nollan* and *Dolan* favor this shift. First, under a narrow reading of those decisions' reach, certain methods of imposing impact fees are less likely to face heightened scrutiny than are ad hoc, dedicatory exactions.[177] When derived as an impact fee ordinance and then applied equally to all similarly situated property owners, exactions formulas establish a legislative, rather than adjudicative, basis for

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174. *See, e.g.*, Art Piculell Group v. Clackamas County, 922 P.2d 1227 (Or. Ct. App. 1996) (overturning and remanding to county conditions placed on subdivision approval, despite local officials' findings that conditions had met rough proportionality standard); Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 391 (Ill. App. Dist. 1995) (ruling that municipality's requirement of a dedication of land as a condition of issuance of a special use permit failed to meet the rough proportionality test).

175. *Dolan*, 512 U.S. at 395; *cf.* Trimcn Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (upholding parks and recreation impact fee under *Dolan* because county had provided a detailed, individualized study of the need for more parkland).

176. *Compare* Carlson & Pollak, *supra* note 19, at 137-38 (noting that in recent years, following *Nollan* and *Dolan*, California cities and counties have shifted toward applying legislated fees, rather than individualized land dedications, in their exactions), *with* Elizabeth D. Purdum & James E. Frank, *Community Use of Exactions: Results of a National Survey*, *in* DEVELOPMENT EXACTIONS 128, tbl.6-5 (James E. Frank & Robert M. Rhodes eds., 1987) (summarizing results of a 1985 study of exactions practice in local governments finding that the exactions applied as part of the approval process were predominantly flexible rather than based on set formulas), *and* MESHENBERG, *supra* note 51, at 48 (discussing an exactions process before *Nollan* and *Dolan* and noting that although subdivision regulations may include formulas to calculate exactions, "negotiation is in reality an intimate part of the subdivision approval process" as local governments and developers seek to trade entitlements for quick and mutually beneficial approvals). *See also* Stephen P. Chinn et al., Dolan v. City of Tigard*: Kansas Local Governments Beware—The Supreme Court Further Restricts the Authority of Municipalities to Condition Development Approval*, J. KAN. BAR ASS'N, Nov. 1995, at 30, 37 (predieting a shift toward impact fee ordinances and away from individualized, in-kind dedications in exactions practice). The development of impact fees as a general approach predated *Dolan*, however. In states that applied a deferential test to challenged exactions, jurisdictions have long favored fees to mitigate certain types of impacts for which land dedication was inappropriate, or for projects on small land areas with no land to dedicate. *See* Julian Conrad Juergensmeyer, *The Legal Issues of Capital Facilities Funding*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES 51, 52-53 (Rachelle Alterman ed., 1988).

177. *See supra* notes 138-45 and accompanying text.

imposing exactions, thereby arguably sidestepping the reach of the Takings Clause.[178] Imposing legislative exactions also likely will avoid application of nexus and proportionality tests when exactions are rejected or withdrawn.[179] Even better, when such fees are imposed under the authority of state legislation,[180] they appear even more likely to be fairly derived and imposed, insofar as statutes require nexus and proportionality findings[181] and property owners in other jurisdictions within the state are subject to similar fees.[182] Negotiated exactions appear perilous when compared to these formulaic, legislated fees.[183]

Second, even if heightened scrutiny applies, formulaic exactions are more likely to withstand the nexus and proportionality tests. Exactions designed using widely accepted methodologies, such as those that calculate the costs and mitigation of a new development's traffic and school impacts, appear less vulnerable to claims of being disproportionate.[184] Mathematical formulas, whose scale responds directly to predictable and quantifiable impacts captured in the dollar costs of harms and mitigation, likely are more persuasive to courts that either lack expertise in land use planning or are protective of property owners.[185] Furthermore, because complex formulas can include individualized assessments of the impacts of a particular

178. *See supra notes* 138-45 and accompanying text.

179. *See supra* text accompanying notes 146-51.

180. Almost half of the states have authorized impact fees. *See* MANDELKER, *supra* note 62, § 9.21.

181. *See, e.g.*, CAL. GOV'T CODE §§ 66001(a)(3), 66005(c) (West 2003) (requiring "reasonable relationship between the fee's use and the type of development project on which the fee is imposed," and codifying "constitutional and decisional" law); TEX. LOC. GOV'T ANN. CODE §§ 395.001(4), 395.014(3) (Vernon 2002) (authorizing impact fees only if they fund capital improvements "necessitated by and attributable to . . . new development").

182. The Texas impact fee statute itself establishes a maximum fee. *See* TEX. LOC. GOV'T ANN. CODE § 395.015 (Vernon 2002).

183. Fred P. Bosselman, Dolan *Works*, *in* TAKING SIDES ON TAKINGS ISSUES 345, 350 (Thomas E. Roberts ed., 2002) ("[I]f negotiation with the developer creates a risk of liability for the city that does not exist if the city imposes a flat fee, the city lawyer is likely to discourage such negotiations.").

184. *See* WILLIAM FULTON, GUIDE TO CALIFORNIA PLANNING 227-300 (2d ed. 1999). *See, e.g.*, CONNIE B. COOPER, TRANSPORTATION IMPACT FEES AND EXCISE TAXES: A SURVEY OF 16 JURISDICTIONS (2000) (surveying impact fees and road-financing methodologies); JAMES C. NICHOLAS, THE CALCULATION OF PROPORTIONATE-SHARE IMPACT FEES 23-34 (1988) (reproducing calculations used by various local governments to establish fee formulas to mitigate impacts of new development on traffic, schools, parks, and libraries).

185. *See* COOPER, *supra* note 184, at 56 (reproducing the *American Planning Association Policy Guide on Impact Fees*, which describes legislative efforts to formalize impact fee regimes as a response to "substantial case law"); NICHOLAS ET AL., *supra* note 60, at 36 (stating that properly derived impact fees are less likely to be affected by Supreme Court exactions cases because of "the preciseness and sophistication with which economic analysis can be applied"); Carlson & Pollak, *supra* note 19, at 137-38 (concluding, based on case studies, that local jurisdictions find fees easier to use to quantify and scale exactions). They may also seem fairer to property owners. *See* POLLAK, *supra* note 19, at 87 (noting that more respondents to the survey identified challenges to individualized exactions than to generally applicable fees).

proposal, such formulas will appear more likely to calculate rough proportionality.[186]

Another reason to use formulas to determine impact fees and exactions is that formulas, once developed, can be used repeatedly for land use applications, thereby simplifying regulatory practices. Indeed, legislative formulas applied mechanically can settle disputes wholesale, as opposed to the more time-consuming and variable approach of designing individualized exactions.[187] To attract development, progrowth communities have made their formulas transparent to create a predictable and palatable project approval regime.[188] Moreover, municipalities that establish formulas based upon comprehensive, long-range plans are less likely to face takings liability. Courts are likely to find such formulas persuasive insofar as they appear to be part of an ordered, considered regulatory scheme rather than an effort to obtain concessions from individual landowners.[189]

For these reasons, exactions practice at the local level has become more cautious and systematic and is focused on preformulated planning decisions.[190] Pushing local governments toward long-range, comprehensive planning based on mathematical formulas is an ironic, though not unexpected, result of the Court's exactions cases.[191] In its logic and effects—testing for nexus and proportionality, which leads to mathematical, legislative formulas—the Supreme Court's formalist approach to the constitutionality of exactions appears consistent with the conception of planning as a discipline and practice.[192] Thus, in its effort to protect property owners by curbing overregulation, a conservative majority of the Supreme Court has endorsed the regulatory logic of planning, with its claims of modern scientific and engineering expertise, as a necessary intervention into the private

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186. *See* Roger K. Dahlstrom, *Development Impact Fees: A Review of Contemporary Techniques for Calculation, Data Collection, and Documentation*, 15 N. ILL. U. L. REV. 557, 558-59 (1995); Nelson, *supra* note 57, at 554-55.

187. *See* Nelson, *supra* note 57, at 552-53; NICHOLAS ET AL., *supra* note 60, at 54. *See generally* Kaplow, *supra* note 103, at 621 (discussing efficiency advantages of rules that regulate frequently recurring conduct).

188. *See* Elizabeth A. Deakin, *The Politics of Exactions*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES 96, 103 (Rachelle Alterman ed., 1988).

189. *See* NICHOLAS ET AL., *supra* note 60, at 37.

190. *See* POLLAK, *supra* note 19, at 81.

191. *See* Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (endorsing the "commendable task of land use planning, made necessary by increasing urbanization").

192. *See* Dahlstrom, *supra* note 186, at 569 (stating that *Nollan* and *Dolan* confirm the value of data collection and analysis in development impacts and the logic of impact fee programs); Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1743-44 (1988) (noting that a tight linkage between the mitigation required in an exaction and a proposed new project secures a measure of good planning and stability). This consistency with the logic of land use planning explains why planners apparently approve of *Nollan* and *Dolan* in the abstract. *See* POLLAK, *supra* note 19, at 33 (study of local government planners in California showing majority endorsing *Nollan* and *Dolan* as promoting "good land use planning practice").

ordering of land use.[193] To place this irony within Bruce Ackerman's terminology, the Court's efforts to provide an Ordinary Observer's conception of property—local governments should not extort major concessions from owners seeking to develop their land—have resulted in the legal tests and administrative rules of the Scientific Policymaker.[194]

The Court implicitly assumes that rules will protect individual property owners and, as a result, property rights generally. But the proper enforcement of those rules requires engineers and planners to develop and constantly update complex formulas, a task that almost certainly will be relegated to a formal bureaucracy. Ironically, bureaucracies by their nature may be incapable of providing the property protections that the Court seeks to enforce. As Max Weber noted, the formal rationality of bureaucratic organizations "unavoidably collide[s]" with efforts to provide substantive justice that protects individuals.[195] The collision itself is unavoidable in the modern administrative state, and it produces a range of consequences affecting both the regulation of property owners and communities, and the practices and legitimacy of local governance. These consequences are far more complicated than the Court presumes. I begin to outline them in the section that follows, which describes the collision of property rights and variable local context, before considering them more fully in Parts IV and V.

C. The Simplicity of Formalism and Formulas on the Complex Political Economic Ground of Property

The narrative of the good and bad actors of local land use regulation,[196] latent in all of the Court's exactions decisions, is unpersuasive on a number of grounds. First, the Court ignored the extent to which parties adversely affected by local government decisions and deferential state courts have recourse to higher and competing legislative bodies. Affected property owners and developers may, and often do, seek assistance from state and federal legislatures for statutory protections against rent-seeking, exploitative behavior by majoritarian local governments.[197] Such assistance may come in the general forms of state takings statutes that provide more

193. Of course, the Court's endorsement is ironic only insofar as planning as a discipline and profession defines itself against visions of unregulated land use and strong private property rights. But at least one critic of contemporary planning condemns the profession for functioning as little more than the utilitarian facilitator of land commodification for development. *See* MICHAEL J. DEAR, THE POSTMODERN URBAN CONDITION 124-26 (2000).

194. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10-15 (1977).

195. *See* MAX WEBER, FROM MAX WEBER 220-21 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

196. *See supra* Part II.C.

197. *See* Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1138-39 (1996) (reviewing FISCHEL, *supra* note 18). Of course, as Rose notes, higher levels of government are themselves subject to the constraints and failures of coalition politics. *See id.*

protection than federal constitutional guarantees do[198] and of more specifically targeted legislation that limits the authority, scope, and extent of the exactions municipalities may impose.[199]

Second, the Court failed to recognize a core tenet of urban economics: that property owners vote with their feet, seeking friendlier land use regulatory regimes in other jurisdictions when necessary.[200] Indeed, many jurisdictions across the country actively compete for particular development projects, offering not merely to waive exactions and cede other regulatory authority but to provide incentives to attract certain types of development.[201] Relocating to such accommodating jurisdictions can be an effective response to overregulation that frustrates financial, social, and political expectations.[202] Such movements free property owners from unfriendly jurisdictions' policies and damage those jurisdictions' property values and tax bases.[203] By portraying property owners as captives to local exactions policy, the Court ignores the exit option available to many landholders.[204] Admittedly, commercial and industrial property owners and property developers are better able to exit than are individual home owners, who prefer a particular nonfungible household location and cannot afford the transaction costs of exit, and property owners of all types with sunk costs in location or nonmobile infrastructure.[205] But the existence of variable exit opportunities supports a contextualist, balancing approach to

198. *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997); Carl P. Marcellino, Note, *The Evolution of State Takings Legislation and the Proposals Considered During the 1997-98 Legislative Session*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 143 (1998).

199. *See* MANDELKER, *supra* note 62, § 9.21.

200. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (developing a hypothesis of consumer-voters sorting themselves based on preferences for a package of taxes, services, and amenities). Of course, local governments can offer distinct public goods only to the extent that they have the legal authority (to tax, spend, and regulate) and fiscal ability to do so. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS (2001). Moreover, the Tiebout hypothesis can explain the exit and entrance of only those individuals with the capacity and wealth to opt out of and into communities; obviously, no one would choose to opt into poor local services. *See* Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 28-34 (1998).

201. *See* Been, *supra* note 13, at 527-28 (relying upon empirical studies to demonstrate that jurisdictions compete for residents by attempting to offer desirable, differentiated packages of public services and taxes); Bosselman, *supra* note 183, at 350 ("In many cases, developers pay no exactions whatsoever and receive contributions from the city for blessing it with a desirable project for which other communities are competing.").

202. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 15-17 (1970). The effects of exit on local tax bases vary. Although home owner exit affects a tax base only incrementally, because a resident's exit is often predicated upon the sale of her home to a replacement taxpayer, the exit of a large commercial entity or of a major residential developer is likely to have a more immediate impact either by shrinking existing revenues or slowing the growth of future revenues. *See* RONALD J. OAKERSON, GOVERNING LOCAL PUBLIC ECONOMIES 110-11 (1999).

203. Rose, *supra* note 51, at 882-87.

204. *See* Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 89-93 (1989).

205. *See* OAKERSON, *supra* note 202, at 109-11.

takings claims rather than heightened judicial scrutiny that produces a formulaic regulatory response.

Third, the Court assumed the political victimhood of a broad class of potential takings plaintiffs despite differences in their intentions, political leverage, wealth, and property. The developers that slow-growth jurisdictions tend to fight (with either denials or stringent exaction requirements) are often high-stakes players—those who are most capable of using their financial resources or political voice to combat attempted coercion[206] and, failing that, those who are best able to simply abandon the jurisdiction. Large developers are not the only potential takings plaintiffs who have strong sources of leverage at the municipal bargaining table: owners of undeveloped property they are seeking to sell can, in many instances, both constitute an interest group themselves and form political alliances with developers.[207] Politics are not static, and political victimhood is impermanent, as recently proved in Loudoun County, Virginia. Prodevelopment forces in this rural-suburban county outside of Washington, D.C., regained a majority on the board of supervisors from environmentalists and "smart growth" advocates and, according to one supervisor, established homebuilders as a "shadow board."[208]

On the other hand, individual property owners needing discretionary approval for specific and singular changes to their existing land use are less able to gain the political leverage necessary to counteract a local government's efforts to exact extortionate concessions.[209] The Court intervened in its exactions decisions precisely on behalf of individual plaintiffs who owned relatively modest amounts of property, who were unable to find similar property elsewhere, and who seemed especially vulnerable to

206. *See* NEIL K. KOMESAR, LAW'S LIMITS 120 (2001). *See also* Deakin, *supra* note 188, at 106 (noting close ties between the real estate development industry and elected officials in local communities). For example, a small number of property owners and developers can capture the local government decision-making power, successfully organize their intense interest in gaining lucrative development approvals over the dispersed interests of the majority of existing residents, and persuade their state legislature to pass statutes that are favorable to development and remove the authority of local governments. *See* Dana, *supra* note 18, at 1271-74. Carol Rose has characterized as "localism bashing" the pessimistic conception of local government regulators as thoughtless objeets of majoritarian influence. *See* Rose, *supra* note 197, at 1131-32.

207. *See* Rose, *supra* note 197, at 1135-36.

208. Michael Laris & Rosalind S. Helderman, *Five New Players May Chart New Course for Board*, WASH. POST, Nov. 9, 2003, at T1. In the same election cycle, another Washington suburb, Prince William County, Virginia, swung in the other direction, toward slower growth. *See* Steven Ginsberg, *A Slow-Growth Path for Pr. William; Voters Change Direction on Development, Expansion of Sheriff's Duties*, WASH. POST, Nov. 6, 2003, at B5.

209. Prior to *Nollan* and *Dolan*, state courts did distinguish between large-scale development interests and vulnerable small property owners. In one instance, a eourt declared that a more rigorous standard of review of exactions was appropriate for challenges by individual property owners, on the assumption both that the approval sought by a subdivider would have more impact on the community and that the subdivider would be less vulnerable to majoritarian exploitation. *See* Wald Corp. v. Metro. Dade County, 338 So.2d 863, 864, 868 (Fla. Dist. Ct. App. 1976).

political majorities.[210] But the decisions' formalist conception of property ownership as a single category for purposes of takings jurisprudence provides more leverage to the large-scale developers and landowners who need the Court's protections least. Repeat-playing and powerful landowners and developers can protect themselves politically through influence and contributions to candidates. They can also deploy their Fifth Amendment protections through capable legal counsel, diversify their investments and projects by purchasing or developing land in different jurisdictions, and exercise their exit option by abandoning an unfriendly jurisdiction. Indeed, even individual small landholders at some times in some jurisdictions have sufficient political voice and leverage to protect themselves without judicial intervention.[211]

In situations in which jurisdictions compete for development and property owners may exit with relative ease or successfully engage in political lobbying, the Court's story of powerful, unchecked local governments is inaccurate and unpersuasive. The heightened judicial scrutiny of nexus and proportionality, therefore, is not only unnecessary but also intrusive and overly protective of wealthy, powerful interests.[212] Nevertheless, some localities offer such attractive natural or geographical amenities that their local governments may ignore their competition and may not care—or indeed may hope—that new entrants will be scared away by a rigorous regulatory regime.[213] Vested developers and property owners in such unfriendly jurisdictions are stranded without an easy exit option.[214] The dynamics of local governance and property ownership may thereby render these individual plaintiffs especially vulnerable to the vicissitudes of majoritarian political sentiment and administrative overreaching.[215] Accordingly, judicial scrutiny is morc needed in some contexts and unnecessarily intrusive and disruptive in others.

But the Court's approach belies such variability and complexity. It ignores what Margaret Radin has called the "recalcitrant practice" of property—"the stubborn situatedness of people and their property, and the

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210. Many of the Court's takings decisions expanding property rights protections were litigated by the Pacific Legal Foundation, which represented the Nollans and Dolans before the Supreme Court. *See generally* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 539-42 (1998) (chronicling and criticizing the role of conservative legal advocacy groups in finding sympathetic plaintiffs and litigating takings cases).

211. *See* Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 485-86 (2000).

212. *See* Smith, *supra* note 57, at 30.

213. *See* Dana, *supra* note 18, at 1271 n.129.

214. *See* EPSTEIN, *supra* note 116, at 184-85.

215. *See* FISCHEL, *supra* note 18, at 4-5, 9 (arguing that exit is more available at the state or federal level than at the local level); *but see* Rose, *supra* note 197, at 1134-35 (arguing that exit is at least equally available at the local, state, and federal levels).

endless variations in property relations."[216] The factual scenarios in *Nollan* and *Dolan*, in contrast to the majority of discretionary approvals, enable a narrative of land use regulation that pits omnipotent government agencies against besieged property owners. The Court tells this story from an individual rights-based perspective with a utilitarian flavor that ignores issues of progressivity,[217] sustainability, environmental aesthetics, and social and environmental justice.[218] The Court assumes that only a sufficiently robust constitutional regime can limit the regulatory tendencies of overreaching local governments. As a result, the Court's solution to this narrative is a powerful doctrinal shield for the victims of extortionate regulatory arm-twisting whose protections extend to those with no need for them. The Court's simplistic assumption and formalist solution result in a series of unfortunate regulatory results. Those results are the focus of the remainder of this Article.

IV
THE CONSEQUENCES OF THE EXACTIONS DECISIONS

As formal concepts, nexus and proportionality should lead to land use regulations that protect property owners' expectations of the broad extent of their property rights while nevertheless requiring the full internalization of all external costs produced by a proposed new land use.[219] However, given the variable political, economic, and environmental contexts of local land use regulation, the Court's exactions doctrine is unlikely to achieve its apparent purposes of protecting robust property rights and restraining municipalities' tendencies to overregulate. Local governments respond differently to the Court's commands, because they work under varied state laws within varied economic and political contexts, face diverse housing markets, and protect unique environmental resources and local amenities.[220]

216. Radin, *supra* note 23, at 265.

217. *See* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 781-90 (1999) (offering a progressive, egalitarian conception of takings that considers the socioeconomic status of the affected landowner).

218. *See generally* Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63, 83-88 (2003) (listing and detailing various ethical impulses developed in the field of environmental ethics).

219. That is, if we assume that local government will seek to internalize all present and future costs that are known and unknown, and if we further assume that such costs could pass the nexus and rough proportionality tests, then *Nollan* and *Dolan* could produce an ideal cost internalization akin to the assumptions of the common law trespass and nuisance doctrines. *See* Robert H. Cutting, *"One Man's Ceilin' Is Another Man's Floor": Property Rights as the Double-Edged Sword*, 31 ENVTL. L. 819 (2001) (attempting to utilize common law doctrines to require full internalization of externalities).

220. *See generally* MICHAEL A. PAGANO & ANN O'M. BOWMAN, CITYSCAPES AND CAPITAL 2-4 (1995) (arguing that in matters of land use and urban development, politics and political leadership matter and operate within local historical, social, economie, and structural contexts); David L. Callies, *The Quiet Revolution Redux: How Selected Local Governments Have Fared*, 20 PACE ENVTL. L. REV. 277, 279-90 (2002) (summarizing distinct efforts of the city and county of Honolulu, the Portland

And yet the exactions decisions are descriptively and prescriptively simple and ultimately fail to recognize and respond to this complexity of local governance and land use. Takings rules impose external formality on local regulatory decision making, requiring local governments to demonstrate nexus and proportionality when those metrics are difficult to find, prove, and negotiate. In some instances, such formality will work as intended; in others, it will not.

Consequences matter in evaluating the Court's exactions decisions because the exaetions rules are themselves consequentialist. The terms "essential nexus" and "rough proportionality" appear nowhere in the text of the Fifth Amendment. They are modern tests developed by the Supreme Court to police land use regulation.[221] In adopting these tests, the Court relied both upon incorrect assumptions about the parties and processes of local land use regulation and upon similarly incorrect assumptions about the practicality, applicability, and legitimacy of its externally derived formal rules in the context of local land use regulation. The Court's imposition of strict takings rules in the context of exactions does not provide a mechanical, universal means to protect property rights judicially and ensure efficient regulation; rather, it produces varied responses, many of them unintended by the Court and perverse or ironic in effect. The exactions rules do not produce the expected consequences that form the basis and purpose of the rules themselves. Articulating a series of formal tests in an effort to curb unjust rent seeking both expresses a normative commitment and seeks to further a utilitarian end. As such, it is an effort to extend the bare text of the Takings Clause to check what the Court perceives to be unwise policy decisions that, in some instances, produce constitutionally unjust results. Assessing the consequences of the Court's effort is, therefore, a means by which to evaluate the Court's conception and protection of constitutional property rights.

No single vision of property and takings law can suffice to produce sufficiently flexible, contextualized responses to the regulatory needs and political and social circumstances of land use disputes.[222] This inherent

region, and the state of Florida to impose growth management controls); Durchslag, *supra* note 211, at 488 (noting that, within any particular local community, "[w]hether exit is possible and voice exists are empirical questions").

221. *See supra* text accompanying notes 62-68 (describing tests developed by state courts prior to *Nollan* and *Dolan*); Dolan v. City of Tigard, 512 U.S. 374, 389-90 (1994) (explaining derivation of proportionality test); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (explaining derivation of and reasoning behind nexus test).

222. *See* Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J. L. & JURIS. 161, 193 (1996); *cf.* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1401 (1991) (noting the impossibility of finding a unified theory of takings because "there are simply too many compelling and conflicting theories for any to account accurately for American attitudes toward the takings dilemma"); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280 (1998) (describing diverse rhetorical visions of property).

variability not only makes the Court's efforts appear simplistic or duplicitous in their assumption of a singular narrative of exploitation, but it also cannot help but undermine the Court's formal approach.[223] The unruly context of land use regulation and local politics ultimately leads to widespread, incremental departures from the Court's formal commands or, where jurisdictions obey the Court, to consequences that are frustrating and disruptive to local governance. In the preceding Part, I described in detail the variability of local land use practice and explained how such variability conflicts with the Court's takings formalism and its resulting regulatory formulas. In this Part, I consider more fully a series of predictable adverse consequences of formalism and formulas: more underregulation, when jurisdictions attempt to comply with the nexus and proportionality tests and require insufficient exactions; more regulation or fewer entitlements for property owners and developers, when jurisdictions deny development proposals with significant externalities to avoid the risk of constitutional liability for applying an exaction; and no effect, when jurisdictions simply disobey the commands and continue to require unconstitutional concessions. Ironically, as local governments step further back from engaging in case-specific consideration of a development's impacts, or selectively ignore the Court's commands, the exactions decisions result in the opposite of the constitutional regime of property protection and more efficient regulation the Court sought to impose. Even local governments that attempt to comply with the Court's constitutional commands by engaging in costly efforts to identify and seek compensation for the anticipated harms of a new development may face resistance by recalcitrant, litigious property owners and a skeptical empowered judiciary that views most regulatory efforts as takings.

A. Consequence 1: Underregulation Due to Insufficient Exactions

When local govemments—fearful of compliance and litigation costs, the risk of judicial review under *Nollan* and *Dolan*, and the costs of takings liability—either fail to impose an exaction or impose a less stringent exaction than necessary to capture the costs of the development, the exactions cases result in underregulation[224] that effects "givings" to property

223. In addition, imposing a rigorous federal constitutional regime on this area of law runs counter to federalist principles of preferring state and local control and of enabling widespread experimentation by statc legislatures. *See* Durchslag, *supra* note 211, at 491-92; Michelman, *supra* note 43, at 327.

224. By "underregulation" I mean that the regulating agency—typically a municipality, in the land use context—fails to force the property owner to internalize all costs associated with all negative impacts of a proposed development. Oddly, few commentators have considered in depth the extent to which *Nollan* and *Dolan* are likely to lead to underregulation. *See, e.g.*, Been, *supra* notc 13, at 505-06 (leaving discussion of underregulation "for another day" because the Supreme Court's focus has been on developers, not thc public, and because underregulation is an issue arising from the development approvals themselves rather than from the exactions that are imposed as part of the approvals); Fennell, *supra* note 18, at 40-41 (considering only briefly underregulatory effects, while emphasizing that nexus and proportionality might actually aid efforts to impose controls that would overregulate).

owners.[225] Indeed, some jurisdictions have responded to the exactions decisions by seeking smaller concessions from property owners. For instance, nearly one-half of California counties and more than one-quarter of California cities reduced impact fees and exactions relating to roads and traffic-related infrastructure, open space, trails, and public access to natural resources during the discretionary approval process in the years following *Dolan*.[226] Reduced exactions are at least in part a response to the vertical and horizontal limits to exactions bargaining that the nexus and proportionality tests establish.[227] The victimized property owner has a constitutional cause of action when an exaction requires quantitatively more than *Dolan*'s vertical limit of rough proportionality or qualitatively runs beyond *Nollan*'s horizontal limit of conditions with an essential nexus to the project's harms. No such formal protection—whether in the form of a constitutional right to challenge an insufficient exaction or of a floor that would correspond with *Nollan*'s and *Dolan*'s constitutional ceiling—exists for those who must pay the costs or suffer the consequences of an exaction that requires too little of the property owner.[228] Thus, in imposing an exaction, a municipality faces pressure on one side from the intense interests of a

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225. *See* Davidson et al., *supra* note 159, at 697 (characterizing "chilling effect" on municipalities' assertive exactions, leading to "increased capitulation, or perhaps to a negotiated development that is more compromising than that initially proposed by planning staff," as a possible result of *Nollan* and *Dolan*). "Givings" refers to the converse of "takings"—instances in which a government promulgates a regulation that grants benefits to, rather than confiscates the property of, an identifiable individual or individuals. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001); Eric Kades, *Windfalls*, 108 YALE L.J. 1489 (1999). Givings in the exactions context occur when a local government grants a development approval but fails to require sufficient offsets for the development's costs, thereby diminishing the value or enjoyment of others' property, draining the public fisc, and degrading environmental resources. The local government has thereby granted a giving to the developing property owner and imposed, at least indirectly, a taking on others. *See* Bell & Parchomovsky, *supra*, at 610.

226. POLLAK, *supra* note 19, at 23-25. Anecdotal reports confirm increased anxiety among planners and local government officials regarding the imposition of stringent exactions and a relaxing of bargaining demands. *See* Ryan, *supra* note 60, at 350 n.71.

227. Determining proper levels of regulation is challenging. So, although California's response to *Dolan* may represent systematic underregulation, it could also signify in some instances a reduction in exactions and impact fees that previously were exploitative to more fair and efficient levels.

228. Some commentators assert, without explanation, that *Nollan* and *Dolan* provide a third-party right to challenge regulations that fail to meet the nexus and proportionality tests. *See* FISCHEL, *supra* note 18, at 349-50; Fennell, *supra* note 18, at 40-41. Nothing in either decision indicates the Court's intent to create such a right; if anything, the Court's narrow focus on the rights of landowners seeking regulatory approvals demonstrates its clear lack of interest in the rights of other affected parties. It is the expropriation of the property owner's land, not effects on anyone else's land, that leads the Court to apply the Takings Clause in *Nollan* and *Dolan*. That said, state law may provide third parties with a cause of action for a judicial challenge of a local government's final land use decision. *See, e.g.*, STANDARD STATE ZONING ENABLING ACT § 7 (U.S. Dept. of Commerce 1926) (authorizing appeals from decisions of board of adjustment by "persons . . . aggrieved"); Butters v. Hauser, 960 P.2d 181 (Idaho 1998) (finding that neighboring landowner had standing to challenge ordinance and issuance of discretionary permit authorizing radio transmission tower that, she alleged, was in close proximity to her land and affected use of her electronic equipment). *See generally* MANDELKER, *supra* note 62, §§ 8.02, 8.04 (discussing third-party standing to challenge land use decisions in state court).

potential litigant with powerful legal rights who may also be able to muster a political interest group of property owners, and, from the other side, the more diffuse interests of a potential political interest group united around opposition to a specific proposal or to certain types of development generally. This balance may vary by community, but in progrowth or litigation risk-averse jurisdictions, the heightened scrutiny of nexus and proportionality provides a powerful weapon for property owners that third parties lack—a dynamic that could facilitate reduced regulation and community absorption of unmitigated impacts.

Even assuming that in the wake of the exactions decisions local governments attempt to exact the strongest concessions from property owners, the logic and metrics of nexus and proportionality and the record required to demonstrate constitutional compliance encourage underregulation. Quantitative showings of proportionality and formulas are imperfect tools for mitigating the impacts of new development because many impacts are difficult to forecast and quantify with precision.[229] Some impacts and mitigation programs, such as those that study the effects of new development on traffic and forecast the road improvements necessary to address those effects, are readily and repeatedly studied, anticipated, and quantified.[230] But methodologies that identify and measure impacts on recreational, transportation, and flood management infrastructure and that help formulate mitigation measures for those impacts are less precise and reliable, increasing their vulnerability to heightened scrutiny.[231] Yet this vulnerability may in no way reflect the absence of long-term costs and externalities. Impacts to wetlands, for instance, may be exceptionally difficult and expensive to mitigate—therefore failing to pass muster under *Dolan*—even though wetland developments impose well-documented, costly

229. LAURENCE J. MEISNER & LAURA FIRTEL, PRIVATE FUNDING FOR ROADS 5 (1990); *see also* Dahlstrom, *supra* note 186, at 564.

230. *See* Carlson & Pollak, *supra* note 19, at 134-36.

231. *See id.*; Dana, *supra* note 18, at 1268; Robert H. Freilich & Terry D. Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to* Nollan, *in* EXACTIONS, IMPACT FEES AND DEDICATIONS 21, 29 (Robert H. Freilich & David W. Bushek eds., 1995); Nick Rosenberg, Comment, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641, 646-48 (2003); Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 431 (2001); Starritt & McClanahan, *supra* note 82, at 444-48 (demonstrating the difficulty of meeting *Dolan* through the pre-*Dolan* practice in Jackson, Wyoming, of requiring new subdivisions along Flat Creek to donate a ten-foot public fishing easement along the stream bank for environmental and public recreational purposes). Planners and local governments have nevertheless attempted to develop analyses for impacts that are more difficult to quantify, such as the impacts of new development on parks and recreational facilities. *See, e.g.*, Trimen Dev. Co. v. King County, 877 P.2d 187, 189, 194 (Wash. 1994) (upholding imposition of a park impact fee imposed in lieu of land dedication, authorized by state statute, where the county calculated the number of dedicated acres of recreational parkland per new entrant into the community based on current needs and established a fee based on the cost of the dedicated land); NICHOLAS ET AL., *supra* note 60, at 188-94 (offering model park impact fee ordinance).

consequences for local ecologies and flood prevention over the long term.[232] And effects that have been studied and modeled extensively, such as impacts on traffic, may be better addressed through mitigation programs that lack a clear nexus, such as contributions to mass transit programs and other alternative transportation programs.[233] Such mitigation programs often are not explicitly or entirely tied to the proposed development yet correlate proportionately to the development's impacts. Nevertheless, jurisdictions face a difficult hurdle in proving nexus and quantifying proportionality between the mitigation program's benefits and the new development's harms.[234]

Consider as well local government efforts to address affordable housing shortages through inclusionary zoning conditions for residential housing projects. Typical inclusionary zoning ordinances require developers to include some percentage of affordable units in their residential projects; some ordinances allow developers to avoid this requirement by paying fees into a general fund used to increase public provision of affordable units.[235] An intermediate appellate court in California decided that a local government's general legislative enactment of an inclusionary zoning ordinance applying to all residential projects is not subject to nexus and proportionality requirements.[236] If the exactions rules did apply to such programs, however, jurisdictions would have to make difficult, individualized demonstrations of the connection between the proposed project and an increase in the affordable housing shortage, and demonstrate proportionality with the percentage of affordable units or fees required. Demonstrating nexus and proportionality would not be impossible insofar as each new unit of market-priced housing in an expensive region boosts the need for service workers who cannot afford to pay market prices in such an area.[237] Nevertheless, a burden of showing nexus and proportionality would raise the costs and risks for local governments that rely on inclusionary zoning as a tool for addressing affordable housing crises.

Some, or even many, local governments may not even attempt to require mitigation of all impacts from development. Local land use mitigation typically focuses on direct anthropocentric impacts that have political

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232. *See* Dana, *supra* note 18, at 1284.

233. *See* Dolan v. City of Tigard, 512 U.S. 374, 395 (1994) (holding that bike path easement effected a taking because findings demonstrated only that the path could, rather than would or would be likely to, offset an increase in traffic resulting from the hardware store expansion).

234. *See* Rosenberg, *supra* note 231, at 683-86 (summarizing trends in the judicial review of impact fees intended to mitigate nonexclusive and indirect costs of development).

235. *See* Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 973-74 (2002).

236. *See* Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 65-66 (Cal. Ct. App. 2001).

237. *See* Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 602 n.330 (1995).

salience among voters, such as traffic, schools, and recreational facilities.[238] It tends to ignore or insufficiently consider the indirect costs of development, such as the economic and health costs of air pollution.[239] *Nollan* and *Dolan*, and the formulas toward which they are biased, limit local governments that seek to find alternative means to address existing infrastructure deficits. For example, quantitative methodologies may insufficiently prove the nexus and proportionality of commuter buses and bicycle paths as means to mitigate the cumulative transportation impacts of new development, thereby systematically favoring roads over alternative transportation.[240] Except where required by federal and state environmental law,[241] some local governments discount potential environmental impacts, especially those that will spill over into other communities and those that incrementally but cumulatively cause significant impacts.[242] Local governments often lack the political will to consider, identify, and require mitigation of such impacts, especially in the costly manner required by the nexus and proportionality tests.[243] This tendency to underregulate comes at a time when local governments' role in environmental oversight has expanded to include not only incidental controls through traditional land use planning but also programs such as aquifer and wetlands protection, comprehensive environmental impact review, fish and wildlife habitat protection, stormwater management, and timber harvesting.[244]

Consider, too, the dynamic between judicial review and legislative prerogative created by the heightened scrutiny of the exactions decisions. Determining the "roughly proportional" width of an emergency access road or an impact fee for the provision of fire service is an exceptionally

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238. *See, e.g.*, WASH. REV. CODE § 82.02.090(7) (2003) (limiting state authority to impose impact fees for road building, schools, parks, open space, recreation areas, and fire stations).

239. *See* Vicki Been, *Smart Growth Requires Efficient Growth*, 34 CONN. L. REV. 611, 614 (2002).

240. *See generally* Dana, *supra* note 18, at 1278-80 (explaining that commuter bus mitigation for new development likely would not meet heightened scrutiny).

241. The plethora of relevant federal environmental statutes, and the complicated relationships among federal and state environmental laws and local land use and environmental laws, are beyond the scope of this Article. *See* Nancy Perkins Spyke, *The Land Use-Environmental Law Distinction: A Geo-Feminist Critique*, 13 DUKE ENVTL. L. & POL'Y F. 55 (2002); Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5 (1996).

242. *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 593-94 (1997) (noting the tendency of regulators to fail to disaggregate incremental but cumulatively significant impacts); Reynolds, *supra* note 139, at 566-69 (explaining the importance of considering cumulative impacts to which a single project may contribute in land use decisions).

243. *See* Kathryn C. Plunkett, Comment, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 212 (2002) (noting that the vast majority of states do not require local governments to engage in formal environmental review of local development projects).

244. *See* John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 386-410 (2002).

difficult endeavor, especially when the issue before the local government is whether to require an access road at all.[245] When a property owner's mitigation of impacts would be disproportionately burdensome—when, for example, construction of an emergency access road is exorbitantly expensive—local governments and residents may be unable to force mitigation without paying compensation.[246] For instance, in reviewing an exaction, one court held that where an emergency access road in an undeveloped area would have remained unfinished until the surrounding parcels were developed, a local government could not pass the nexus and proportionality tests without proving to the court's satisfaction that the emergency road would be completed in the "foreseeable future."[247] On those grounds, the court ultimately overruled the local government regarding the construction of the access road, and the property owner was able to subdivide his land without dedicating a road suitable for emergency services.[248] In this respect, the proportionality test invites courts to perform a rough cost-benefit analysis to consider whether a costly concession for mitigation is somehow proportional to the benefit it would provide.[249] Given the exactions decisions' heightened scrutiny and bias in favor of protecting property rights, the cost-benefit analysis courts undertake is unlikely to encompass the full extent either of a development's long-term impacts or of a local government's considerations when imposing exactions.[250]

Nollan's and *Dolan*'s formal logic is also likely to lead local governments to make conceptual errors that cause underregulation. As a general matter, most regulatory practices deeply discount the occurrence and cost of future harms, assuming regulators need to consider and mitigate only presently discernible impacts.[251] Fixed regulatory formulas exacerbate this problem, leading regulators to underestimate the dynamic nature of

245. *See* Faus, *supra* note 161, at 688.

246. Dana, *supra* note 18, at 1284.

247. Burton v. Clark County, 958 P.2d 343, 357 (Wash. Ct. App. 1998).

248. After the county won the property owner's administrative appeal of the imposition of the exaction, a trial court reversed and remanded the decision to the county on the grounds that the county had "failed to make an individualized determination that [the exacted road] related both in nature and extent to the impacts from the proposed development, as required to demonstrate 'rough proportionality' under the holding in *Dolan*." *Id.* at 349. The county examiner, reconsidering the property owner's appeal on remand, found that the county failed to meet *Dolan*'s test and approved the property owner's subdivision plan without the exacted road. *See id.* The intermediate state appellate court affirmed the county examiner's decision. *Id.* at 358.

249. Arguably, cost-benefit analysis generally should be a legislative rather than a judicial prerogative. *Cf.* Driesen, *supra* note 242, at 610-12 (arguing that weighing costs and benefits is a normative, political activity and therefore a task for legislatures rather than administrative agencies).

250. *Cf.* Victor B. Flatt, *Saving the Lost Sheep: Bringing Environmental Values Back into the Fold with a New EPA Decisionmaking Paradigm*, 74 WASH. L. REV. 1, 4-5 (1999) (criticizing cost-benefit analysis for its failure to consider the full range of issues and values implicated in environmental decisions).

251. *See* Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEO. L.J. 2025, 2027-28 (1999).

property across time and the relative uniqueness of any particular piece of land with respect to its geographic location, environmental resources, and relationship to its surroundings.[252] A regulatory approach that works once, by imposing exactions on a particular land use, may not work later when existing and newly approved activities cause more depletion to common resources than initially estimated. Because of judicial skepticism and governmental fear of retroactively adjusting a formula or making new formulas more rigorous, the supply and quality of common resources—and, therefore, of all property within the jurisdiction—may diminish over time.[253] Flexible, timely responses to changing resource conditions are essential political decisions for governments to makc. The role of takings jurisprudence is to protect the individual from exceptional unfairness as a result of the transition to a new land use regime,[254] not to prevent such decisions from being made in the first place. A constitutional logic leading to regulatory formulas that cannot adapt to local, regional, and national environmental changes ultimately provides greater individual property rights than the Constitution requires, and as a result adversely affects political, social, and environmental values made vulnerable to the entitlements these formulas create.[255]

But even if the exactions decisions lead to successful mitigation and cost internalization of developments' off-site impacts on common pool resources and public goods (such as traffic and schools), takings formalism would still result in flawed and incomplete land use regulation. Impacts whose external costs are difficult to quantify or mitigate—such as the Nollans' new beach house—cannot be addressed with permissible conditions, and mitigation measures that might be more politically popular and more effective—such as the City of Tigard's bike paths—cannot pass constitutional muster. In addition, new development may not be sustainable over the long run on thc land for which it is proposed. Owners seeking to intensify the use of their land may have incomplete information about their own long-term land use or may simply not care about the sustainability of

252. *See* Reynolds, *supra* note 139, at 563-66 (noting the unpredictability of negative land use impacts due to the likelihood of varied site- and project-specific characteristics); Wegner, *supra* note 62, at 960 (noting the benefits of land use dealing as enabling individually crafted solutions to the specific characteristics and problems of a proposed site on a particular parcel).

253. *See* Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 18. Rose considers the possibility of "zipping back" property rights across the board by imposing the more rigorous current regime on existing structures and land uses but dismisses the idea both because of the economic consequences of tearing down or retrofitting existing structures and the likely dcmoralizing effects on a wider populace. *Id.* at 19.

254. *See* Rose, *supra* note 197, at 1151.

255. *See* Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1113 (1981) (arguing that rather than protecting against the loss of property rights, the Constitution protects political rights in property, or "exposure to sudden changes in the major elements and crucial determinants of one's established position in the world, as one has come . . . to understand that position" (internal quotations omitted)).

their land under its proposed use.[256] Although the exactions decisions allow local governments to require on-site mitigation, the risk of underregulation is high because local governments prefer to avoid or safely meet the nexus and proportionality tests and local governments and the public are more concerned with off-site externalities than with long-term on-site impacts.

The exactions decisions' emphasis on property owners' right to exclude[257] also produces in some instances what Michael Heller has called an "anticommons," in which too many exclusionary property rights so fragment access to a valuable resource that they prevent the public from utilizing the resource at all.[258] Some conditions for development are efforts to address the impacts of development by considering and seeking to mitigate the external costs of strong property entitlements that would otherwise lead to the public's overexclusion from an important local resource.[259] Considered in this way, the California Coastal Commission's requirement that the Nollans cede a lateral beach easement sought to prevent an anticommons problem that could arise from the Nollans' ability to exclude the public from walking across their private beach to enjoy nearby public beaches and public trust lands. The Court's conclusion that the exaction effected a taking recognized an overbroad right—the Nollans' absolute, constitutionally protected right to exclude the public from a particularly inviting part of their property—that prevented the coastal commission from trading a desirable, discretionary entitlement held by the public to achieve an optimal social level of beach use.[260]

By their nature, some impacts and mitigation programs do not lend themselves to the logic and metrics of nexus and proportionality. If a local government cannot, or lacks confidence in its ability to, prepare a record sufficient to withstand the heightened scrutiny of the exactions cases, then a new land use will inevitably effect some degree of a giving to the property owner and pass along some of the costs of development to others.

B. Consequence 2: *Overregulation Due to Denials Without Exactions or Approvals with Inflexible Exactions*

By contrast, in jurisdictions with the political will to deny a proposal for development rather than approve a project with conditions that fail to

256. *See* ERIC T. FREYFOGLE, JUSTICE AND THE EARTH 26-42 (1993); Eric T. Freyfogle, *The Tragedy of Fragmentation*, 36 VAL. U. L. REV. 307, 329 (2002).

257. *See* Dolan v. City of Tigard, 512 U.S. 374, 393 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831-32 (1987).

258. *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622-25 (1998).

259. *See, e.g.*, *Nollan*, 483 U.S. at 828 (describing exaction intended to allow beach access); Starritt & McClanahan, *supra* note 82, at 445 (describing exactions intended to allow a public fishing easement along a stream bank).

260. *See* Heller, *supra* note 42, at 1209-10.

either internalize all costs or persuade local government officials, the exactions decisions will result in overregulation of land uses. Local governments incur significant risks, including an increased risk of litigation, by bargaining with property owners over discretionary approvals. To avoid such risks, they can deny proposals that will be politically unpopular or costly to the community rather than impose necessary exactions that might be vulnerable to constitutional challenge.[261] So long as a denial leaves the subject property with sufficient value and uses, and does not frustrate the owner's reasonable investment-backed expectations, courts will apply the *Penn Central* balancing test rather than the more searching nexus and proportionality tests.[262] Even when a developer or property owner would willingly choose an expensive condition over an outright denial, the burdens and risks imposed by the nexus and proportionality tests can keep local governments from offering such conditions.[263]

Formulaic exactions adopted in response to the exactions cases can also lead to more regulation. Unlike flexible bargains made with amenable governments, rigid, legislatively enacted formulas can be difficult for developers and property owners to change, even in the face of weakening markets.[264] In particular, developers operating in antigrowth jurisdictions may prefer negotiated exactions over inflexible, generally applicable exaction schemes that, by avoiding heightened scrutiny as legislative enactments, may prove to be overinclusive and expensive.[265] To the extent that the exactions decisions diminish local governments' willingness to bargain, they restrict property owners' ability to negotiate to a mutually agreeable position, thereby leaving property owners in a worse position than under a bargain for a more expansive use.[266]

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261. The Court in *Nollan* explicitly assumed that the coastal commission could have denied the plaintiffs' application for a building permit. *See Nollan*, 483 U.S. at 836. At oral argument in *Dolan*, the plaintiffs conceded that the city could have denied their building permit, which Justice Stevens confirmed in his dissent. *See* Transcript of Oral Argument at *4, *Dolan* (No. 93-518), *available at* 1994 WL 664939 (Mar. 23, 1994); *Dolan*, 512 U.S. at 397 (Stevens, J., dissenting).

262. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 104 (1978).

263. This irony has led one commentator to condemn *Nollan* and *Dolan* for creating "the worst of both worlds" insofar as they leave untouched local governments' broad authority under their police powers to deny development proposals while tightening restrictions on bargaining around or away that authority. *See* Fennell, *supra* note 18, at 4-5.

264. ALTSHULER & GÓMEZ-IBÁÑEZ, *supra* note 55, at 56.

265. *See* Dana, *supra* note 18, at 1293.

266. *See* FISCHEL, *supra* note 18, at 348-49; KOMESAR, *supra* note 206, at 111; 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, 48 (1991). As Lee Anne Fennell notes, the Court has thereby unwittingly taken a stick out of property owners' bundle of rights. *See* Fennell, *supra* note 18, at 50. Moreover, property owners could claim that in some instances the Court's nuisance abatement approach fails to take into account the benefits that a proposed project can bring to the community. To take these benefits into account, the Court instead could have utilized a cost-benefit analysis that would require the government to offset the development's community benefits against the exaction. (Of course, local governments might then claim that they should be able to offset the value of an approval

Governments are less likely to grant entitlements when mitigation of the impacts on an especially sensitive resource is expensive. Consider, for example, an impact that is particularly noticeable to the public and difficult or impossible to mitigate, such as shade thrown by a tall office building onto a public park or the development of especially beautiful open space near a well-traveled public street. The local government might be reluctant to require (because a property owner may be unwilling to pay) the cost of full mitigation or may be unable to identify any feasible form of mitigation and is therefore more likely to deny the development proposal than approve it, knowing the impacts will go unmitigated.[267] Where a proposed project is politically unpopular and mitigation of its negative impacts is insufficient to persuade the political majority, the property owner's offer of an unrelated but attractive and roughly proportional amenity may bring about an approval.[268] However, a local government that requires or accepts an amenity that lacks an essential nexus runs the risk of a property owner's challenge under *Nollan*. Finally, jurisdictions that have failed to force adequate internalization of earlier developments may experience a political backlash against growth because of adverse transportation, environmental, school, or recreational conditions arising from cumulative impacts. With existing capital facility deficits, local governments may not wish to approve projects that internalize only new harms.[269] The nexus requirement bans creative deals in which, instead of mitigating the impact, the property owner provides some unconnected and less expensive but politically popular offset.[270]

To illustrate this dynamic, consider the facts of *Nollan* and *Dolan*. In the former, the Court held that the coastal commission could not permissibly require the lateral beach easement on the assumption that it would mitigate the adverse psychological impacts on the public of a larger beach

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and any regulatory givings to the property owner as part of its mathematical estimate of rough proportionality.) A community that benefits from a development can therefore still require costly mitigation of the development's harms, even where the cost of mitigation is less than the community's benefits, so long as the mitigation meets the nexus and proportionality requirements. Put another way, "under *Dolan*, a 'proportional' solution need only be proportional to gross harms, not net harms, generated by the development." *Id.* at 33-34, 38. From the property owner's perspective, this formulation, too, constitutes a form of government rent seeking that results in overregulation.

267. *See* Been, *supra* note 13, at 543-44.

268. *See* Fennell, *supra* note 18, at 31; William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101, 101-05 (1987).

269. *See* Dahlstrom, *supra* note 186, at 568.

270. *See* Kayden, *supra* note 266, at 47-48; Fischel, *supra* note 268, at 105. *Nollan*'s nexus requirement limits the scope of exactions bargaining, even when a court might agree that the unrelated offset passes *Dolan*'s rough proportionality test by costing apparently the same or less than the harm the new land use would produce. *See* COOTER, *supra* note 60, at 302; FISCHEL, *supra* note 18, at 348-49. William Fischel has proposed that limiting the community's initial entitlements to the cost of eliminating nuisance spillovers and protecting such entitlements by a property rule would lead local governments and property owners to negotiate to maximize each other's benefits, especially where mitigation will be expensive and imperfect. Fischel, *supra* note 268, at 109.

house. In dicta, the Court suggested that the commission permissibly could have denied the application or required dedication of a public viewing spot. Assume (as is in fact likely) that the viewing spot, located at the front of the property and inviting the public to peer beside or over the house to the beach, would be more burdensome and intrusive to the property owners, and less appealing to the community, than would the beach easement. And yet the viewing spot apparently would pass constitutional muster under *Nollan*.[271] Thus, following *Nollan*, the commission has three safe choices: (1) require a viewing spot, (2) deny the project, or (3) approve the project without conditions. If the commission is concerned about an approval without conditions and fears that by suggesting the beach easement it will face constitutional liability, it is likely to either deny the permit or require a viewing spot. In either instance, the property owner is worse off; assuming that neither the commission nor the public prefers the viewing spot, all parties are worse off.[272] Although *Dolan*'s quantitative metric might protect property owners, *Nollan* blocks mutually beneficial bargaining by imposing a qualitative logic. Similarly, assume that, following *Dolan*, the decision makers in the City of Tigard know they cannot condition expansion of the hardware store on a bike path because, lacking a sufficient nexus (hardware store customers rarely ride bikes to the store) and proportionality, it would not pass muster under *Nollan* and *Dolan*. If voters prefer either a larger hardware store with a bike path or a smaller hardware store with no bike path to a larger hardware store with no bike path but increased automobile capacity, then decision makers are likely to deny the property owner's request to expand the hardware store. In such instances, *Dolan* leaves property owners in a worse position than if they could simply agree to the condition.

The facts of *Lambert v. City and County of San Francisco* and Justice Scalia's dissent to the Court's denial of certiorari demonstrate this dynamic as well by showing what would happen if the Court expanded its exactions rules to reach denial of an approval after failed negotiations.[273] In *Lambert*, San Francisco denied the property owner's project because the owner was unwilling to pay a fee the city sought in order to mitigate the project's projected impacts.[274] Suppose Justice Scalia could persuade a majority of the Court to extend the nexus and proportionality tests to such rejected conditions. In response, many local governments would likely choose not to risk offering exactions at all rather than face liability for conditions they offer.

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271. Whether such a viewing spot would pass constitutional muster under *Dolan*'s proportionality test is a separate issue that the Court never reached in *Nollan* and never addressed in *Dolan*.

272. *See* Dana, *supra* note 18, at 1277-82 (providing examples that demonstrate the potential inefficiency of nexus and proportionality); Fennell, *supra* note 18, at 31; Kayden, *supra* note 266, at 47-48.

273. *See* 67 Cal. Rptr. 2d 562 (Cal. Ct. App. 1997), *cert. denied*, 529 U.S. 1045 (2000).

274. 529 U.S. 1045, 1045 (Scalia, J., dissenting).

Of those risk-averse jurisdictions, many will still have the political will simply to deny the projects on which they could not propose conditions. In such instances, the property owner is significantly worse off than if she could bargain freely with the local government over conditions that might win an approval.

Risk-averse jurisdictions that otherwise would be willing to bargain to an approval are likely to deny a proposal that threatens to create harms when denial carries less risk of constitutional liability. This result is likely when political decision makers are more willing to frustrate a property owner's interests than to force the public to bear the costs of development. To the extent that property owners would be willing to agree to exactions that fail the logic and metrics of nexus and proportionality, the Court's efforts to protect property rights ultimately lead local governments to diminish owners' ability to develop their property.[275]

C. Consequence 3: No Effect Due to Noncompliance

Finally, some jurisdictions simply ignore the Court's rule formalism by bargaining outside the constitutionally required parameters of nexus and proportionality. Extra-legal bargaining is a likely result when a majority within the community demonstrates a strong political will for strict land use regulation, whether to protect an important amenity (such as coastline, a body of water, or attractive open space), to address existing infrastructure deficits, or to exclude others from the community. In jurisdictions willing to bear the risk of imposing unconstitutional exactions on development, property owners and developers will find it easier and faster to agree to the exaction and thus receive an available entitlement.[276] When local governments engage in this kind of bargaining, the Court's takings formalism has failed to curb the regulation it declared unconstitutional.

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275. I do not mean to suggest that open-ended bargaining for concessions will necessarily result in more effective regulation. Assume, for example, that the Court removed *Nollan*'s qualitative limits but retained *Dolan*'s quantitative metric and thereby enabled more freewheeling bargaining to ensue over concessions. The resulting bargains, and judicial review of those results, may be unable to consider the extent to which an exaction is equivalent to the required mitigation. That is, once bargaining is freed from any connection to the harms of the new development, neither the property owner nor the municipality and its citizens—especially those most subject to the proposed development's harms—may be able to estimate the fairness of a bargain. *See* Fennell, *supra* note 18, at 32 n.123 (arguing that nexus and rough proportionality must be linked because "[t]he nexus requirement keeps the bargaining chips in a common metric so that they can be counted, while rough proportionality requires that the chips be tallied up with at least rough accuracy"); *cf. id.* at 32 n.122 (positing that *Nollan* by itself might actually provide sufficient protection to property owners while enabling sufficient flexibility and range of possible exactions to encourage mutually beneficial bargaining); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 916 (noting the value of a *Nollan*-based germaneness requirement in checking excessive federal administrative arm-twisting).

276. *See* COOTER, *supra* note 60, at 299-302.

Consider, for example, efforts by the city of Livermore, California, and surrounding Alameda County to utilize long-term, coordinated planning techniques and development agreements with residential developers to promote local grape growing for wine manufacturing. The South Livermore Valley Area Plan requires property owners or developers seeking to develop residential subdivisions to contribute land and fees to support the preservation, promotion, and expansion of vineyards and winemaking facilities in an area that is both well suited and historically significant for viticulture.[277] By requiring dedications and fees from developers in exchange for discretionary approvals to build on the limited supply of developable land, Livermore unabashedly trades entitlements to promote what it sees as the economic, environmental, and aesthetic advantages of local agriculture in the wine-producing region of Northern California.[278] In requiring dedication of land for vineyards, the plan makes no distinction between previously undeveloped land and that being used for vineyards at the time of development.[279] Therefore, Livermore would struggle to prove an essential nexus between the impacts from development and the conditions for approval under the plan. Nevertheless, despite the plan's promulgation after *Nollan* and its continued reliance upon development agreements that lack the demonstrations of rough proportionality required by *Dolan*, developers have agreed to Livermore's conditions, in part because of the city's location within commuting distance of the East Bay, San Francisco, and Silicon Valley. To date, no developer seeking approvals has refused to sign the required development agreements or brought a constitutional challenge against the exactions.[280]

The dynamic at work in Livermore is more probable when a local government and a property owner sufficiently trust each other and when the benefit of the approval or development agreement is sufficient for the property owner to bear an exaction that may be unconnected to, or may cost more than, the harms the proposed land use would create.[281] Sufficient

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277. *See* Alameda County, Cal., South Livermore Valley Area Plan 3-8 (Feb. 23, 1993).

278. *See* City of Livermore, South Livermore Valley Specific Plan Model Development Agreement and Preannexation Agreement 1-4 (June 14, 1999).

279. *See, e.g.*, City of Livermore, South Livermore Valley Specific Plan 4-10 to 4-19 (describing "existing land use settings" for two defined subareas, only a portion of which was used for vineyards) (amended Feb. 16, 2001).

280. As of December 2003, Livermore had signed thirteen development agreements and approved sixteen tentative maps under the South Livermore Valley Area Plan, all of which included agricultural easement conditions. To date, no developer has filed a suit challenging these conditions. Email from Richard S. Taylor, attorney for City of Livermore to Mark Fenster, Assistant Professor of Law, Levin College of Law, University of Florida (Dec. 14, 2003, 10:31 A.M.) (on file with author).

281. *See* Frederik Jacobsen & Craig McHenry, *Exactions on Development Permission*, *in* WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 342, 348 (Donald G. Hagman & Dean J. Misczynski eds., 1978); *see also* Ryan, *supra* note 60, at 367 (reporting interview with planner in Cincinnati who observed that "bargaining was driven underground after *Dolan*" into meetings with staff to negotiate mutually agreeable exactions).

trust is especially likely between parties that transact business repeatedly with each other. "Repeat-playing" developers, who expect to interact again with a local government or hope to avoid a regional reputation for being litigious, are provided incentives to waive their constitutional claims to obtain fast approvals and cultivate a long-term relationship with the local government.[282] New entrants into a local or regional property development market may lack such an established relationship with regulators and thus may not be offered noncompliant exactions. This dynamic would adversely affect the competitiveness of the local land development industry and the quality and price of products offered. Accordingly, the exactions decisions produce inefficient results by leading local governments to favor certain individuals in the entitlement trading process.

Thus, even if we assume that the nexus and proportionality tests would successfully protect the most vulnerable small property owners (such as the plaintiffs in *Nollan* and *Dolan*) from extortionate overregulation, the Court's exactions decisions fail to impose standard, universal protection sufficient to achieve this goal. Developers in Livermore know that regulatory approval requires vineyards and thus willingly provide them without filing suit. If a developer accepted the condition and then filed suit, Livermore-like local governments would either limit the program to those the city could trust not to challenge the conditions—in which case new entrants into the market and consumers would suffer—or shut down the program—in which case property owners and developers generally would suffer. The Court, which sought to provide landowners with a shield against such practices, misunderstands land use practices and the efficacy of its own rule-formalist efforts. Its efforts to limit the authority of rent-seeking local governments leads to perverse results in land use regulation and property development.

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In too many of the common scenarios in which governments impose exactions, the exactions decisions either fail to protect or overprotect property rights. As a result, they help create inefficient and unfair regulation. The Court's efforts to formalize judicial review and establish uniform protections leave property owners, residents, and insufficiently protected environmental resources vulnerable to regulatory approaches skewed in response to nexus and proportionality requirements. The Court's efforts do not necessarily improve the bottom-line results of exactions, and in some instances they actually impede better, more flexible concessions and

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282. Dana, *supra* note 18, at 1294-99; *cf.* Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, 22 URB. LAW. 23, 50-55 (1990) (noting potential for abuse of development agreements by developers who shut out competing property owners by purchasing vested rights).

regulatory practices that are more efficient and legitimate for the affected parties and for the general public.

V
TAKINGS FORMALISM AND THE NARROWING OF LOCAL GOVERNANCE AND PROPERTY RELATIONS

Part IV considered the effects of the exactions decisions on the substantive exactions local governments impose. This Part focuses on the decisions' effects on how local governments consider and impose those exactions. As an inherently political and administrative tool for flexibly resolving land use disputes, exactions offer especially important means of enabling legitimate and effective responses to proposed development. The Court's strong emphasis on individual rights and its secondary emphasis on utilitarian conceptions of regulatory efficiency fail to consider the conflicting conceptions of local government and property, and block property's role in promoting political and social relationships within a broader community.[283] Takings formalism and regulatory formulas limit the political ground upon which affected parties activate democratic institutions and processes by voicing their claims, and frustrate the role that the social embeddedness of property ownership plays in establishing a functional community.

This Part elaborates on what is lost as a result of the Court's takings formalism and regulatory formulas. It focuses on the role of land use within local politics and on exactions as an open-ended, flexible means of achieving a political and administrative compromise to the disputes that arise over development. Some state and local communities at times choose rights-based and utilitarian approaches to resolve development issues, but others prefer, and would be better served by, more inclusive means of debating and collectively resolving land use disputes. The Court's rule-like principles, however, put communities that prefer more open-ended political and negotiated processes at risk of liability for compensation.

A. Takings Formalism, Political Contest, and Land Use Decision Making

In its exactions decisions, the Court limited the judiciary's role in reviewing challenged exactions to evaluating the extent of an exaction's precision. Absent from the Court's logic and metrics is any consideration of the political and social context of the bargain, the fairness and openness of

283. A useful introduction to conceptions of property as political and social relations is Stephen R. Munzer, *Property as Social Relations*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001); *see also* Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 331-33 (2002) (attempting to complicate and reconceptualize property theory in terms of environment and social context).

the proceedings leading to the exaction, or the long-term relationship among community members.[284] Put another way, the Court has made it constitutionally irrelevant whether the political process by which the concession and entitlement were derived and exchanged was fair or open to the concerns of all affected parties. All that matters, ultimately, is whether the resulting bargain meets the Court's logic and metrics. Moreover, in states and federal circuits in which legislatively imposed exactions avoid heightened scrutiny, local governments have even stronger incentives to avoid bargaining and individualized conditions by relying on regulatory formulas. Accordingly, the Court's constitutional exactions regime pushes local governments that seek to comply with exactions rules to adopt preconstituted formulas that are more likely to meet or avoid the constitutionally required logic and metrics of the nexus and proportionality tests. Formulas are inevitably safer and more attractive regulatory approaches for local governments than are open-ended political contests, with their attendant political compromises.

The Court has chosen to ignore the extent to which open-ended land use regulatory processes can enable robust, legitimate, and inclusive local politics, a context that may yield substantively better resolutions than abstract, preconstituted formulas can to complicated and intractable local disputes.[285] Local land use conflicts, and decisions about the distribution of land use entitlements and the costs of development, are inherently and deeply political. State law often enables political inclusion and participation by imposing constitutional procedural due process requirements and statutory requirements that affected parties be afforded notice and opportunity to be heard,[286] and by imposing requirements that local governments hold open meetings.[287] Indeed, democratic decision making may be not only helpful or beneficial but also necessary for a functional community. When decision-making processes enable the inclusion, debate, and compromise of fundamentally opposed positions within the complicated matrix of personal, social, environmental, and fiscal issues central to local

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284. *See* Dagan, *supra* note 217, at 774-78; Michelman, *supra* note 120, at 1248. Both of these elements—context and relationship—would be considered under *Penn Central*'s eonsideration of whether the regulation relates to "promotion of the general welfare" and provides an "average reciprocity of advantage" to all affected property owners. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131, 140 (1978).

285. *See* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 5-6 (2000) ("The normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes and have had the opportunity to influence the outcomes.").

286. *See, e.g.*, N.J. STAT. ANN. § 40:55D-12 (West 2003) (requiring notice to neighboring property owners of public hearings concerning eertain planning and zoning decisions); Horn v. County of Ventura, 596 P.2d 1134, 1141 (Cal. 1979) (applying federal due process standards to evaluate the adequacy of notice to adjoining landowners); *see also* J.R. Kemper, Annotation, *Construction and Application of Statute or Ordinance Provisions Requiring Notice as Prerequisite to Granting Variance or Exception to Zoning Requirement*, 38 A.L.R.3d 167 (1971).

287. *See* MANDELKER, *supra* note 62, § 6.76.

government, they play an important function in identifying and allowing contest over issues of local importance.[288] Open, inclusive, and substantive political contests over important land use decisions are likely to increase the loyalty of residents who, as a result of their participation or faith in the political processes of their local government, consider themselves part of a responsive and open community.[289]

An exactions process that avoids the inevitably political questions about trade-offs between property owners and the community merely frustrates citizens' dcsires to be involved in land use decisions, thereby contributing to a sense of disillusionment and demoralization regarding public life.[290] Neighbors and activists are more likely to support, or at least reduce their opposition to, a project that includes conditions that address their concerns. Similarly, as evidenced by slow-growth communities such as Livermore, California, that succeed in ignoring the nexus and proportionality tests, many property owners and developers would prefer to engage in political horse trading and creative bargaining through exactions rather than face outright denials of development applications. When, by contrast, constitutional rules and regulatory formulas limit political participation in land use decisions to the demand that decision makers either approve or deny a project, rule formalism reduces or eliminates exactions as a negotiated political solution. Lacking flexible tools for negotiation, local

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288. On the values of local participatory democracy at the municipal level, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1070-72 (1980). In this context, I use "local" to refer not merely to the physical boundaries of cities but to the more complicated communities that exist in neighborhoods within cities and in relationships between cities and suburbs in a larger metropolitan region. Jurisdictional governments make land use decisions, but when the terms of and debate about those decisions are constitutionally and administratively limited by cases such as *Nollan* and *Dolan*, they are more likely to exclude the concerns of smaller and larger social units within and across a single jurisdiction. *See* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 470-72 (2001) (complicating simplistic presumptions that the "local" equates with jurisdictional boundaries).

289. *See* HIRSCHMAN, *supra* note 202, at 15-17. Furthermore, if as part of their response to *Nollan* and *Dolan* all local governments within a region adopt relatively uniform, formulaic land use regimes, these jurisdictions' sameness blunts the threat and promise of exit for the politically disenfranchised. *Id.* at 124. Local and regional governments that negate or blunt voice and exit especially constrain and frustrate political involvement and loyalty, Hirschman suggests. Ideally, well-balanced regions provide opportunities not only for political dissent but, when voice is ineffective, for the ability to exit to jurisdictions that offer distinct political, social, and cultural offerings. *Id.* at 125. The proper mix of voice and exit creates loyalty among residents who are willing to trade the promise of exit for the uncertain possibilities of political change. *Id.* at 77.

290. *See* Carlson & Pollak, *supra* note 19, at 152-54. The demoralization of existing residents represents the reverse scenario from that identified by Frank Michelman as one of the costs of land use regulation requiring consideration for a taking. *See* Michelman, *supra* note 120, at 1214-17; *cf.* Poirier, *supra* note 1, at 182-83 (positing a notion of reverse demoralization of those adversely affected by a jurisdiction's decision to maintain the status quo in response to property owners' political and legal opposition to new regulation). Michelman defined the "demoralization costs" that should be balanced to decide whether compensation is necessary as the total of the dollar value necessary to offset disutilities of losers and their sympathizers and the present value of lost future production from property owners and their sympathizers who change their behavior in reaction to the perceived unfairness caused by a regulatory act. Michelman, *supra* note 120, at 1214.

regulators are more likely to face disputants who are overcommitted to an absolute political position.[291] As Albert Hirschman has noted, absolute political battles in which participants enter with an uncompromising dedication to a single issue produce a deep disappointment in the battles' losers.[292] And when such disappointment leads to a sense among property owners, neighbors, or political activists that the government's failure to consider and represent their concerns is institutionalized, the resulting disappointment will lead to a retreat from public life. Political withdrawal is particularly likely when the emotional, financial, and time costs of participating in the local regulatory and political process generate no return for the community or for property owners.[293] In this context, administrative efficiency substitutes for and suppresses political and social activity.

Disabling political contest over exactions thus broadly impacts democratic politics. Recent work in public finance theory has identified public engagement in localized decision making on the provision of public services, as opposed to large-scale, hierarchical commands from a centralized metropolitan government, as an essential element in the development of an efficient local public economy.[294] Because local citizen choice—"the constitutive principle of American local government"—succeeds over the long term only through the ongoing investment of community members in governance and in the development of a community's civic virtue, localities are often willing to bear the high transaction costs associated with fragmented and individualized decision making by small units of government.[295] Viewed in this context, negotiated land use decisions are an essential aspect of contemporary local American governance, an excellent opportunity for individual stakeholders to seek political and social involvement in an accessible set of institutions, and an integral aspect of the creation of a functional local public economy.[296]

Politicization of land use regulation has even broader external benefits. Community members' participation in the land use process demonstrates a level of engagement often lacking in contemporary federal and state politics.[297] Land use politics in this sense is a gateway toward political

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291. ALBERT O. HIRSCHMAN, SHIFTING INVOLVEMENTS 119 (1982).

292. *Id.* at 104-05, 111.

293. *Id.* at 79-80, 93, 102, 129.

294. *See* OAKERSON, *supra* note 202, at 106-24.

295. *Id.* at 116-17.

296. *See* Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1075 (1990).

297. *See generally* MATTHEW A. CRENSON & BENJAMIN GINSBERG, DOWNSIZING DEMOCRACY: HOW AMERICA SIDELINED ITS CITIZENS AND PRIVATIZED ITS PUBLIC 189-93, 240 (2002) (contrasting citizens' disengagement with politics caused by centralized, institutional remedies to political problems, such as those used by the mainstream environmental movement, with political engagement in localized NIMBYism and land use political battles); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 344-46 (2000) (arguing that

activism generally and toward ongoing participation on different sides of land use and environmental debates specifically. Withdrawing or limiting exactions as an outlet for political debate and compromise therefore not only may affect the local issues surrounding a development project but may also lead to wider disengagement from even the most lively and promising contemporary political forum.

The value of political contest and compromise over individualized, negotiated exactions lies in what Frank Michelman has called the "generative tension" between popular democratic rule and individual property ownership.[298] The exactions decisions' constitutional rule and administrative consequences diminish this tension. The Court's narrow concern with abstract conceptions of prepolitical property rights—rights removed from the historical situatedness of political institutions and practices—insulates property from political decision making and sees political disputes over property rights as dangers to avoid rather than as an integrative process for democracy and individual rights.[299] Formulaic quantification for its own sake or to meet constitutional standards may lead to a shaping of environmental and planning values based solely on that which can be quantified rather than on the interests of the community.[300] Overreliance on expertise and efficiency crowds out democratic values.[301]

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citizens' civic engagement in land use disputes and responses by local government are likely to raise social capital).

298. Michelman, *supra* note 255, at 1110.

299. *See* NEDELSKY, *supra* note 42, at 209-10. *See also* NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 112-13, 192-93 (1994) (contrasting decentralized local legal autonomy and discretion, which enable the construction of a locally specific sense of place, with legal and economic centralization of power within higher, nonlocal levels of government, which are more likely to result in the construction of reproducible, homogeneous space).

300. *See* JOSEPH R. DESJARDINS, ENVIRONMENTAL ETHICS: AN INTRODUCTION TO ENVIRONMENTAL PHILOSOPHY 4-5 (3d ed. 1993); James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000).

301. *See* CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 95-96 (2000). *See also* GERALD E. FRUG, CITY MAKING 22-23 (1999) (challenging the role of experts and an unelected bureaucracy in making decisions essential to local democratic legitimacy and process). *But cf.* Charles M. Haar & Michael Allan Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002) (arguing for a return to Progressive-era deference to expertise).

This critique of natural rights in property and utilitarian instrumentalism is analogous to critiques of deliberative democracy and communitarianism. In Stanley Fish's words, for example, communitarians "replace large P Politics—the clash between fundamentally incompatible visions and agendas—with small p politics—the adjustment through procedural rules of small differences within a field from which the larger substantive differences have been banished." Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2298-99 (1997); *see also* MOUFFE, *supra*, at 93 (criticizing communitarians' "attempt at insulating politics from the effects of the pluralism of value, this time by trying to fix once and for all the meaning and hierarchy of the central liberal-democratic values"); MARK REINHARDT, THE ART OF BEING FREE: TAKING LIBERTIES WITH TOCQUEVILLE, MARX, AND ARENDT 15-16 (1997) (criticizing communitarians for evading politics by deploying conceptions of the wholeness of a community to which all can and should belong to obscure the question of politics and power).

Political contest is not immune to failure or unfairness. In some contexts, democratic decision making may be dangerous and inefficient. Political decision making processes allow the eruption of intense conflict among factions and individuals that can disrupt and even destroy social ties and networks. Participants' interests in disputes may be parochial, even inequitable and exclusionary.[302] But such conflict can itself be an important means by which a locality or region identifies especially significant issues it must face rather than suppress.[303] And where dangerously or unfairly parochial, inequitable, and exclusionary interests prevail, judicial and state and federal legislative bodies have essential roles in correcting local political errors—roles that state courts played in sensitive and variable ways before the Court's exactions decisions and that state legislatures continue to play today.

Nor does privileging political contest require excluding formulaic, instrumental methods when they are appropriate. Such methods can solve disputes or aspects of disputes, especially when, within a specific political context, exactions would likely effect an extortion of an individual's property rights or would result in insufficient internalization of development costs because development interests capture decision makers. Legislatively imposed exaction formulas also provide a level of cost certainty and administrative efficiency that individualized exactions and complex negotiations, by definition, do not. When a project is uncontroversial and will have minimal impacts on those outside the jurisdiction, and the local community enjoys a relatively strong consensus over how and to what extent new land uses should be regulated, formulas represent an essential regulatory tool. The same is true when a specific type of impact is knowable and quantifiable and means for its mitigation are replicable and effective on different parcels.

Nevertheless, dispute is often at the core of politics, and political contest is an important means to resolve disputes if the local political

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302. The most famous example of parochial local tendencies to exclude disfavored projects and groups is the *Mount Laurel* trilogy of cases issued by the New Jersey Supreme Court. *See* S. Burlington County NAACP v. Township of Mt. Laurel (Mt. Laurel I), 336 A.2d 713 (N.J. 1975) (invalidating an exclusionary zoning ordinance as a violation of state constitutional due process and equal protection guarantees); S. Burlington County NAACP v. Township of Mt. Laurel (Mt. Laurel II), 456 A.2d 390 (N.J. 1983) (enumerating criteria for communities' "fair share" of affordable housing and providing remedies to builders affected by restrictive regulatory barriers); Hills Dev. Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986) (upholding the constitutionality of the Fair Housing Act and Council on Affordable Housing, which assumed enforcement of much of the lingering *Mount Laurel* litigation). The literature on *Mount Laurel* is vast; two useful summaries are Paula A. Franzese, Mount Laurel III*: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988), and John M. Payne, *General Welfare and Regional Planning: How the Law of Unintended Consequences and the* Mount Laurel *Doctrine Gave New Jersey a Modern State Plan*, 73 ST. JOHN'S L. REV. 1103 (1999).

303. *See* ALBERT O. HIRSCHMAN, *Social Conflicts as Pillars of Democratic Market Societies*, *in* A PROPENSITY TO SELF-SUBVERSION 231, 241-43 (1995).

context allows for a fair and inclusive contest.[304] Formulaic exactions purged of individualized political dispute may protect property owners from the vicissitudes of increased political participation and power by a majority opposed to development, but their removal also eliminates the inclusion, contingency, and openness that might be found in the deal making of political compromise.[305] Politics "consists of practices of settlement *and* unsettlement, of disruption *and* administration, of extraordinary events or foundings *and* mundane maintenances"[306]—it consists, that is, of the ebb and flow of dispute.[307] To rely merely on formal rules and regulatory formulas is to lose an essential characteristic of local land use regulatory proccsses. These processes includc a "web of community understandings—sometimes highly idiosyncratic—about the way things ought to be done."[308] They are also constituted by the idiosyncrasies and peculiarities of local public life, which may attract or repel residents and should, assuming no abrupt changes, allow those who are repelled to exit.[309] The Takings Clause serves to protect individuals unduly subjected to the harmful effects of abrupt changes in land use regulation. But formalistic rules and administrative formulas intended to animate the Takings Clause in a flexible land use regulatory regime do more than protect property owners. They foreclose political resolutions to political disputes. They undervalue the creative possibilities of compromise and overvalue a promised haven from democratic contest, unfairness, and inefficiencies through expertise and the judicial protection of prepolitical rights.[310] And they ultimately replace the educational and transformative capacity of law and politics within the social institutions of local government and local communities with the abstractions of ncxus and proportionality and of numerical harms and costs.[311]

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304. *See* Christopher H. Schroeder, *Deliberative Democracy's Attempt to Turn Politics into Law*, 65 LAW & CONTEMP. PROBS. 95, 123-24 (2002).

305. *See* BARBARA CRUIKSHANK, THE WILL TO EMPOWER 2-4 (1999); HIRSCHMAN, *supra* note 202, at 15-17, 124.

306. BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 205 (1993); *see also* MOUFFE, *supra* note 301, at 99-105 (advocating political institutions enabling a vibrant contest of democratic political positions that make room for dissent, that do not guarantee particular results in advance, and that invite a pluralism of voices).

307. *See* William E. Connolly, *Politics and Vision*, *in* DEMOCRACY AND VISION: SHELDON WOLIN AND THE VICISSITUDES OF THE POLITICAL 3, 15-16 (Aryeh Botwinick & William E. Connolly cds., 2001) (arguing against the control of "democratic spontaneity" by tight sets of "moral principles, constitutional rules, corporate dictates, or normative codes").

308. Rose, *supra* note 204, at 95.

309. *Id.* at 96-98, 101.

310. *See* F.R. ANKERSMIT, POLITICAL REPRESENTATION 197-210 (2002).

311. *See* Lisa Heinzerling, *Pragmatists and Environmentalists*, 113 HARV. L. REV. 1421, 1435, 1446 (2000) (reviewing DANIEL A. FARBER, ECO-PRAGMATISM (1999)).

B. Takings Formalism and Local Dispute Resolution

Exactions can play a mediating role in the land development process. They enable interested parties to trade entitlements in pursuit of mutually beneficial results and help bring about community-based resolutions of contested land use disputes. Indeed, by allowing negotiated compromise through creative, open-ended bargaining when eonsensus cannot be reached, individualized exactions are the necessary correlative to the inevitable and necessary political disputes that surround land use decision making.[312] Bargaining over individualized exactions is consistent with the open norms necessary to successful mediation because it provides an appropriate, flexible package of conditions and entitlements that respond to the particular concerns of property owners, government officials, and interested members of the community.[313] Whether overseen by the local government, or by the judiciary,[314] an alternative dispute resolution (ADR) professional,[315] or an independent local official,[316] a negotiation process may be especially important and successful in local land use disputes when disputants have ongoing relationships and where a limited universe of interested parties might enable all or a majority to reach some form of consensus on the terms of an agreement.[317] Negotiation by property owners and local governments over the exchange of entitlements is more likely to reach a mutually agreeable solution when parties can consider a wide universe of terms as part of a bargain than when the negotiation is limited in scope by formal rules imposed and enforced by external judicial agents.

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312. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 166 (William Rehg trans., 1996). According to Habermas,

> The compromises achieved by . . . bargaining [between diverse, success-oriented parties who are willing to cooperate] contain a negotiated agreement . . . that balances conflicting interests. Whereas a rationally motivated consensus . . . rests on reasons that convince all the parties *in the same way*, a compromise can be accepted by the different parties each for its own *different* reasons.

Id.; *see also* HIRSCHMAN, *supra* note 303, at 243 (noting the significance of social conflict in requiring both bargaining and arguing to reach effective resolution).

313. *See* Rose, *supra* note 51, at 891.

314. *See* Hon. Richard S. Cohen et al., *Settling Land Use Litigation While Protecting the Public Interest: Whose Lawsuit Is This Anyway?*, 23 SETON HALL L. REV. 844, 848-49 (1993) (advocating an active role for judges in overseeing negotiated settlements of land use litigation and protecting the public from agencies that may bargain away their duty to enforce existing law without fully explaining their motives in reaching the agreement during or after the process).

315. On the development of institutionalized land use dispute resolution programs in state governments, universities, independent commissions, and private consultants, see LAWRENCE SUSSKIND ET AL., USING ASSISTED NEGOTIATION TO SETTLE LAND USE DISPUTES: A GUIDEBOOK FOR PUBLIC OFFICIALS 24-25 (1999); Jonathan M. Davidson & Susan L. Trevarthen, *Land Use Mediation: Another Smart Growth Alternative*, 33 URB. LAW. 705 (2001).

316. *See* Ryan, *supra* note 60, at 386-88 (proposing a "third-party deputy" distinct from the property owner and decision-making authority to oversee mediation).

317. *See* WILLIAM FULTON, REACHING CONSENSUS IN LAND-USE NEGOTIATIONS 12 (1989) (explaining that seemingly small disputes over land development can escalate into large political struggles if they are inadequately or insufficiently resolved through negotiations among the parties).

External limits adversely affect more than the possibility of an immediate resolution. When the resolution to a land use conflict emerges from negotiation rather than from the administrative imposition of a legislated, predetermined formula, a decision to allow development can appear more legitimate. The collective process by which the result was reached enables all sides ultimately to support, or at least not to block, the agreement to allow development.[318] The resolution may be substantively better to the extent that the sides are able to communicate information about the proposal and their concerns and interests to each other, either directly or through a third party, and thus come to some understanding of their respective needs and expectations.[319] A negotiated resolution may also be more secure in the future. When an unforeseen event or impact arises, a prior negotiated resolution—especially among repeat players in a land use game with long-term relationships, such as developers, local governments, and political majorities—may enable inexpensive nonlegal adjustments in a good faith effort to preserve an ongoing consensus. By contrast, when new events or impacts call into question decisions imposed judicially or administratively, landowners are more likely to consider the prior result as declaring a binding entitlement and are more likely to litigate than to negotiate as a result.[320] Finally, negotiated solutions are generally less expensive and more amicable than litigation and administrative appeals over complicated and contentious legal and factual issues.[321]

This argument about administrative formulas is consistent with similar claims about the role of what Carol Rose has called the "muddy" and "crystal" rules in property law.[322] For Rose, muddy rules (or standards) characterize a recurring tendency within doctrinal cycles to shift toward "fuzzy, ambiguous rules of decision" and away from clear, crystal rules (only, at other times, to shift back again).[323] A benefit of vague and open-ended muddy rules, Rose argues, is their mimicry of negotiations and

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318. Deakin, *supra* note 188, at 108; *cf.* Richard H. Cowart, *Negotiating Exactions Through Development Agreements*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES, *supra* note 176, at 219, 231-32 (warning that development agreements may "insulat[e] development decisions from citizen review, opposition, or revocation" where governments and developers exclude citizen concerns from the negotiation and review process); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 110 (2000) (explaining a "legitimacy benefit" of negotiated environmental rule making).

319. *See* KOMESAR, *supra* note 206, at 138-39; Freeman & Langbein, *supra* note 318, at 110-12; Christian Hunold & Iris Marion Young, *Justice, Democracy, and Hazardous Siting*, 46 POL. STUD. 82 (1998); *cf.* Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121 (1999) (arguing that "muddy" standards can lead to more efficient results by forcing parties to bargain with each other without the certainty as to which of them holds the legal entitlement).

320. KOMESAR, *supra* note 206, at 139 (citing Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963)).

321. *See* Wegner, *supra* note 62, at 960.

322. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

323. *Id.* at 578.

communication within long-term, situated relationships and a community.[324] As such, according to Marc Poirier, the rhetorical and jurisprudential power of muddy rules' vagueness arises from how it "allows and forces citizens to participate in societal discourse" and to consider the terms of any judicial, political, or administrative resolution in a manner that is fair to all parties concerned.[325] Crystal rules, whether imposed by the judiciary (as in *Nollan* and *Dolan*) or by legislatures and administrators (as in regulatory formulas for exactions), may protect especially vulnerable individuals but are opposed to, and may inhibit, individualized and collective decision making.

Negotiated land use decision making and dispute resolution do not work under certain circumstances[326] and in practice may not be as inclusive and participatory as they appear in theory.[327] Certain communities at certain moments—such as when parties cannot trust each other to bargain in good faith or when weak political leadership fails to oversee and mediate negotiation, or when an interested party has captured the body overseeing regulation—may lack the willingness, ability, and information to negotiate fairly and inclusively. When negotiations are limited, property owners or the larger community may agree, or be compelled to agree, to an unfair or unwise compromise. Judicial review in such instances would impose a proper check on the resulting bargain and the process by which it was reached.[328] But to the extent that the exactions decisions shrink the universe

324. *Id.* at 602-03. *See also* Radin, *supra* note 23, at 270 (arguing that in deciding takings cases courts engage in "the pragmatic practice of situated judgment in light of both partial principles and the unique particularities of each case").

325. Poirier, *supra* note 1, at 190.

326. *See* SUSSKIND ET AL., *supra* note 315, at 3, 23 (concluding, based on a survey of participants in one hundred communities that had engaged in negotiated settlements of land use disputes, that mediation does not work when, among other conditions, participants do not recognize the other side's rights, the party providing financial support insists on controlling thc mediation process, and one or more parties to the dispute are most interested in setting precedents for future legal or administrative disputes or are using the process to delay real action or to create an illusion that something is being done).

327. *See* LAWRENCE SUSSKIND ET AL., MEDIATING LAND USE DISPUTES: PROS AND CONS 13 (2000) (summarizing criticisms of detractors of assisted negotiation, including claims that negotiation is neither faster nor less expensivc than traditional processes, fails to result in legitimate agreements and consensus, and ultimately ends in litigation anyway); Michelle Ryan, *Alternative Dispute Resolution in Environmental Cases: Friend or Foe?*, 10 TUL. ENVTL. L.J. 397, 412-14 (1997) (summarizing arguments of ADR critics); Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241, 253-54 (1994) (noting and theorizing about reasons for failure of Massachusetts law intended to aid in siting of locally undesirable land uses through required negotiation and dispute resolution).

328. As such, the task of judicial review of takings claims begins to resemble that of the actions of administrative agencies under the Due Process Clause. *See* Ronald J. Krotoszynski Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002) (arguing in favor of shifting claims made currently under the Takings Clause to the substantive Due Process Clause and reviewing them for intent to expropriate); David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 NOTRE DAME L. REV. 717, 721 (1999) (analogizing takings claims to claims against

of potential negotiating points, and to the extent that their consequences heighten the risk of takings claims and liability, takings formalism may frustrate efforts to utilize bargaining and negotiation to mediate land use disputes within the specific context of the affected parties.[329]

Parallel to the broad benefits of allowing greater political contest in land use decisions[330] are the benefits to the social conception of property and property rights that result from enabling negotiated settlements to those disputes. By facilitating a community-based resolution to a political dispute over property rights, development, and impacts, exactions serve what Rose has described as the "propriety" version of the Western conception of private property[331] and what Laura Underkuffler has described as the historically significant "comprehensive" approach to property in American law.[332] Rather than mere preference satisfaction or utilitarian consequentialism, the proprietarian version of property emphasizes responsibility and trusteeship by both the property owner and his surrounding community.[333] Rose finds the echoes of this conception of property in modern takings law's flexible, ad hoc balancing of private loss and public benefit.[334] Rather than an individualist conception of the exercise and realization of property rights, Underkuffler's comprehensive approach conceptualizes property as including "a broad range of human liberties understood within a collective context of both support and restraint."[335] Formalist and formulaic approaches to the law and to the administration of exactions frustrate this conception of property by substituting logics and metrics for the open-ended negotiations of situated, affected parties.

CONCLUSION: EXACTIONS, TAKINGS FORMALISM, AND THE FAILURES OF A BIFURCATED APPROACH TO TAKINGS

The Court's bifurcated approach to the Takings Clause subjects certain identifiable regulatory acts or results to heightened, formalist judicial

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administrative agencies under the rubrics of the Due Process Clause, the Equal Protection Clause, and the great administrative law statutes).

329. *See* LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 87 (1987) (noting the importance of trading entitlements, rather than merely seeking compromise, in resolving disputes).

330. *See supra* notes 296-97 and accompanying text.

331. Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 NOMOS 223 (1991).

332. Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 133-42 (1990).

333. Rose, *supra* note 331, at 239-40.

334. *Id.* Others have made similar arguments about the dual nature of American conceptions of property. *See* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 1-7 (1997); Kevin Gray, *Equitable Property*, 47 CURRENT LEGAL PROBS. 157, 208-09 (1994); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 (1971); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991).

335. Underkuffler, *supra* note 332, at 141; *see also* ALAN RYAN, PROPERTY 35-48 (1987) (describing the mixture of private ownership and public control in modern conceptions of liberty).

review and provides the majority of regulatory acts more deferential, open-ended consideration. This approach, which the Court powerfully restated in *Tahoe-Sierra*, relies upon two assumptions: first, there is a clear and identifiable distinction between takings claims that fall within and those that fall outside of the categorical exceptions, and second, the heightened scrutiny of the takings rules these exceptions receive will have direct and discernible limiting effects on the expropriatory regulations the exceptions are intended to curb. These assumptions perform a powerful sorting function, placing government actions into separate categories and then considering the constitutional requirement for compensation in profoundly different ways based upon that sorting. At bottom, the broad structure of the Court's takings decisions assumes that in some instances, at least, government is per se less trustworthy than in others.

Nollan and *Dolan* embody these assumptions in their conception of land use regulation and in their formalist efforts to limit that regulation. But the Court's exactions rules do not impose the clear doctrinal logic they promise and do not offer the universal, stable protection for property rights they seek to provide. At the same time, in their operation in judicial review and regulatory action, the decisions complicate the bifurcated approach in two important ways. First, exactions and bargaining are so pervasive that constitutional rules seeking to curb their use threaten to swallow the entirety of land use regulation. Such would be the case if the Court decided all of the still-unresolved issues associated with the exactions decisions expansively, thus making the nexus and proportionality tests applicable to all decisions that consider exactions requirements.[336] Second, in some instances the exactions decisions fail to constrain land use regulation and in fact create incentives for complete denials of development. In others, they lead to potentially dangerous and costly underregulation. Categorizing exactions subject to constitutional rule formalism is complicated, and constraining exactions uniformly and coherently, and enforcing those constraints, seems unachievable. Categorical takings formalism and its *Penn Central* shadow must operate on a complicated and highly politicized regulatory ground. The bifurcated approach, in which an emergent catalog of rules abuts an older set of standards, seems destined to lead proponents of strong land use regulation to fears of formalist encroachment and likewise to lead proponents of property rights protection to bitter disappointment.

Indeed, this Article has dwelled on the disappointment and frustration endemic to takings formalism. Justice Scalia suspects that courts and local governments knowingly and widely disobey the Court's takings rules. In jurisdictions facing difficult disputes over development, local governments, property owners, and third parties are dissatisfied with an increasingly

336. *See supra* Part II.D.

formalized and formulaic development process. The systematic under- and overregulation of land use have led in some areas to environmental and infrastructural regulation and in other areas to underutilization of developable land. The culprit, this Article has argued, may be the Court's takings formalism as an exception to *Penn Central*'s deferential standards. Protecting individual property owners from the vagaries of political majorities and regulatory transitions is an essential purpose of contemporary judicial review under the Takings Clause. But the excessive leverage that *Nollan*'s and *Dolan*'s protective commands provide for all property owners—which protect them even, in some instances, from bargains they would willingly make—not only demonstrates the commands' overinclusivity but also threatens the political, social, environmental, and economic benefits that land use regulation and undiminished local government can offer. Takings rules seek to limit the unruly, particularistic, politicized practices of land use law—practices that inevitably chafe at externally imposed, formalist constraints. As a general matter, judicial and administrative noncompliance and frustration with essential nexus and rough proportionality requirements are not the result of systematic resistance by ideological courts and authoritarian, rent-seeking local governments. Rather, noncompliance and frustration demonstrate the complicated dynamics of localities attempting to operate in the shadows of takings formalism.

The critique developed here suggests two propositions that I plan to explore in a future article. First, with respect to exactions rules, the Court should limit or abandon its takings formalism. At minimum, the Court should resolve the outstanding issues regarding the applicability of the nexus and proportionality tests—whether to distinguish dedications and fees, adjudicative and legislative decision making, and imposed and offered-but-not-imposed exactions—against the extension of *Nollan* and *Dolan*. Limiting or withdrawing nexus and proportionality as federal constitutional rules will not leave all property owners vulnerable to widespread extortionate practices that the Court assumes have taken place in the absence of its takings formalism, and that Justice Scalia and his fellow *Lambert* dissenters assume continue to take place despite the Court's efforts. Before the Court involved itself in exactions, state courts had developed their own approaches to protecting individuals from excessive regulatory conditions, and state legislatures continue to control the authority of local governments to impose exactions. At the same time, local politics, jurisdictional competition, and the real estate market discipline exactions practice. Decisions made at the state and local level better reflect the variability of the land use context than do consequentialist rules derived from the bare text of the Fifth Amendment. Allowing states and localities to experiment with judicial and legislative limits to exactions will enable more geographically and temporally flexible, democratic, and legitimate

protections for property rights, local infrastructure, public goods provision, and the environment.

Second, when the Court's bifurcated approach to takings extends beyond rudimentary distinctions between regulatory acts and their consequences, it faces an unresolvable conflict with locally administered land use regulation. Bifurcation assumes that courts and regulators can identify distinctive land use regulations, such as permanent physical invasions and exactions, and distinctive consequences, such as total deprivations of value. Whether a regulation passes constitutional muster therefore depends heavily upon stable distinctions and a judiciary capable of making them. When such distinctions are obvious and serve to identify extraordinary incidents of regulation—when, for example, regulators, property owners, and courts can identify the outlying practice of the state-sponsored occupation of land—then the bifurcated approach's presumption in favor of heightened scrutiny is conceptually defensible, easily administered, and likely to result in the protection of property rights. But when the regulatory practice is at the core of land use practice and provides critical regulatory, democratic, and dispute resolution functions that benefit all affected parties, as is the case with exactions, then the conceptual and practical advantages of the Court's bifurcated approach fall away. Bifurcation works only when the distinctions on which it depends are conceptually and consequentially meaningful. In the absence of such distinctions, advocates and interested parties on all sides of the takings debates will continue to fulminate about the frustrating practices of land use regulation and judicial review produced by the Court's uneven and partial imposition of takings formalism.