

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

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## Abstract

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. In two cases decided over the past two decades, *Nollan v. California Coastal Commission* (1987) and *Dolan v. City of Tigard* (1994), the Court has established under the Takings Clause a logic and metrics for constitutionally permissible exactions that requires 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 non-compliance lies with the Court itself.

The Supreme Court’s efforts in *Nollan* and *Dolan* to establish doctrinal clarity in the individualized, local land use regulatory process have not, and cannot, achieve their goals of securely protecting property rights and discipline regulatory practices. What the Article describes as the Court’s takings formalism fails to constrain regulatory practices in their intended way, and results in constraints on the variable, locally situated, and intensely political context of local governance. These constraints, which include incentives for local governments to develop preconstituted regulatory formulas and disincentives against individualized, negotiated concessions, often 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 and damage the essential political and social processes necessary to legitimate and functional local governance.

## Table of Contents

Introduction.....	1
I. Land Use Bargaining and Exactions Practice.....	5
A. The Flexibility of Contemporary Land Use Regulation.....	5
B. Exactions Bargaining.....	7
C. Exactions as a Flexible Tool for Land Use Bargaining.....	10
II. <i>Nollan</i> and <i>Dolan</i> and the Federal Constitutionalization of Land Use Bargaining.....	13
A. Judicial Review and Statutory Limits to Exactions Prior to <i>Nollan</i> and <i>Dolan</i> .....	14
B. <i>Nollan</i> and <i>Dolan</i> .....	16
C. The Confused Scope of <i>Nollan</i> and <i>Dolan</i> 's Heightened Scrutiny.....	19
1. The Possessory/ Non-Possessory Exaction Distinction.....	20
2. The Adjudicative/ Legislative Distinction.....	22
III. Takings Formalism, Regulatory Formulas.....	24
A. Takings Rules and the Desire for Doctrinal Clarity.....	25
B. Nexus and Proportionality as Doctrinal Shields.....	30
C. Nexus and Proportionality as Rule-Based Commands.....	39
D. <i>Nollan</i> , <i>Dolan</i> , and the Doctrinal Bias Towards Regulatory Formulas.....	42
IV. Formalism, Formulas, and the Variability of Local Land Use Regulation: <i>Nollan</i> and <i>Dolan</i> 's Consequences on Property Rights Protection and Regulatory Efficiency.....	48
A. Result 1: Underregulation, Due to Insufficient Exactions.....	50
B. Result 2: More Permissible Regulation, Due to Denials without Exactions.....	57
C. Result 3: No Effect, Due to Non-Compliance.....	61
V. Takings Formalism and the Narrowing of Local Governance and Property Relations.....	62
A. Takings Formalism, Political Contest, and Land Use Decision-Making.....	63
B. Takings Formalism and Local Dispute Resolution.....	69
Conclusion.....	74

## Introduction

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 Supreme Court's takings decisions.<sup>1</sup> His frustration emanated in part from what he saw as lower courts' willful or negligent confusion about the bifurcated structure of contemporary regulatory takings law.<sup>2</sup> The general default takings standard that applies to most takings claims (one associated most closely with *Penn Central Transportation Co. v. City of New York*) employs a relatively low level of scrutiny and balances a number of factors in an ad hoc, open-ended inquiry.<sup>3</sup> Contrasting this default approach, takings claims that fall within a limited number of exceptional, identifiable categories receive a form of heightened scrutiny, one which limits judicial discretion and favors the protection of property rights through clear, narrow rules of decision.<sup>4</sup> Justice Scalia expressed two concerns regarding the tension between "categorical" takings rules and the default approach to takings: first, that courts misapply or refuse to apply the clear dictates of categorical takings rules and instead merely apply the less precise and more deferential *Penn Central* standard; and second, that in doing so, lower courts dissipate

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<sup>1</sup> See *Lambert v. City and County of San Francisco*, 67 Cal.Rptr.2d 562 (Cal.App. 1997), *review granted*, 71 Cal.Rptr.2d 215 (1998), *appeal dismissed*, 87 Cal.Rptr.2d 412 (1999), *cert. denied*, 120 S.Ct. 1549, 1551-52 (2000) (Scalia, J., dissenting). 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 appears in the Fifth Amendment, and provides: "... nor shall private property be taken for public use without just compensation." Its application extends to state and federal government. See *B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239, 241 (1897).

<sup>2</sup> *Lambert*, 120 S.Ct. at 1551.

<sup>3</sup> See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Following the lead of courts and commentators, I will refer to this as the *Penn Central* test.

<sup>4</sup> See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321-26 (2002); *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, which, the Court held in a decision authored by Justice Scalia, are "compensable without case-specific inquiry." *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1015 (1992).

constitutional protections for property owners and thus dilute the conception of broad and stable property rights Scalia and his dissenting colleagues thought the Court had firmly established.

The case that raised the justices' suspicion, *Lambert v. City and County of San Francisco*, involved a California intermediate appellate court's refusal to apply the heightened scrutiny of one of the categorical exceptions to the *Penn Central* approach,<sup>5</sup> which the Court had developed in *Nollan v. California Coastal Commission*<sup>6</sup> and *Dolan v. City of Tigard*.<sup>7</sup> *Nollan* and *Dolan* concerned the judicial review of "exactions," the concessions local governments require of property owners as conditions for the issuance of entitlements that enable the intensified use of real property.<sup>8</sup> The majorities in those decisions declared two rule-like commands: any exactions required as conditions for an approval to intensify the use of property must both demonstrate an "essential nexus"<sup>9</sup> and be in "rough proportionality"<sup>10</sup> to the expected harms that the new use would cause. Though somewhat inexact, these commands require that judicial review perform a more probing inquiry into exactions than the state courts had in *Nollan* and *Dolan*. This inquiry would identify and classify as takings what the Court believed were flawed local land use regulatory practices that result in extortionate demands of besieged property owners than conducted. Justice Scalia's frustration with the state court's decision in *Lambert* (and presumably untold numbers of similar lower court decisions), then, relates first to what he perceived as the failure of lower courts to apply *Nollan* and *Dolan*'s rule-like commands

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<sup>5</sup> The specific issue that concerned Justice Scalia in *Lambert* was whether the categorical exception to *Penn Central* developed in *Nollan* and *Dolan* applied to exactions offered by a local government and rejected by a property owner, where there is evidence that the owner's rejection was a cause of the government's ultimate denial of a necessary entitlement for development. See *Lambert*, 120 S.Ct. at 1550. For a fuller discussion of the particularities of the disputed issue in *Lambert*, see *infra* note 89.

<sup>6</sup> 483 U.S. 825 (1987).

<sup>7</sup> 512 U.S. 374 (1994).

<sup>8</sup> See *infra* Part I.B.

<sup>9</sup> *Nollan*, 483 U.S. at 837.

<sup>10</sup> *Dolan*, 512 U.S. at 391.

correctly and second to his perception that local governments have continued to use exactions to expropriate or threaten to expropriate private property.

This Article concerns the Court's efforts in *Nollan* and *Dolan* to constrain judicial and local government discretion through a constitutional rule-formalism,<sup>11</sup> and to impose this formal discipline on the unruly, disparate practices of local land use regulation. It argues that the Court's efforts to establish doctrinal clarity—resulting in what Frank Michelman has called “judicial devices for putting some kind of stop to the denaturalization and disintegration of property”<sup>12</sup>—have not, and cannot, achieve their goals of securely protecting property rights and disciplining regulatory practices. Moreover, the Article argues, the Court's efforts have had complicated, often unintended consequences insofar as they limit the political and social dynamics essential to legitimate and effective local land use regulation. In short, the Court's constitutional rules for exactions fail to constrain regulatory practices in their intended way, and result in largely unfortunate constraints on the variable, locally situated, and intensely political context of local governance. In making this argument, the Article extends existing commentary on *Nollan* and *Dolan*,<sup>13</sup> and connects that literature to larger debates regarding rule-formalism and vagueness in takings law generally.<sup>14</sup>

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<sup>11</sup> 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 in order 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 the term formalism. *See* Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999); Frank I. Michelman, *A Brief Anatomy of Adjudicative Rule-Formalism*, 66 U. CHI. L. REV. 934 (1999). When I use the term “formalism” throughout this Article, I mean rule-formalism.

<sup>12</sup> Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1628 (1988); *see also* Margaret Jane Radin, *Diagnosing the Takings Problem*, 33 NOMOS 248, 264-66 (1991) (describing desire within liberal ideal of the Rule of Law for stable and understandable general rules).

<sup>13</sup> The most prominent critiques of *Nollan* and *Dolan*'s logic and consequences are WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 341-51 (1995); Vicki Been, “Exit” as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1989); David

The first three Parts of this Article explain the relationship among exactions, takings formalism, and regulatory formulas. Exactions, as Part I explains, are individualized means to resolve contested issues about proposed development within the variable, locally situated content of land use decisions. Part II characterizes the Court's decisions in *Nollan* and *Dolan* as the result of broader efforts by an occasional majority of the Court to establish far-reaching, formalist rules that would provide stronger property protection and require administrative precision of agencies that regulate land use. *Nollan* and *Dolan* have had some discernible effects on land use regulatory practices, which Part III describes. Most significantly, the decisions have contributed to local governments' abandonment of individualized negotiations with property owners over exactions, and have prompted them to favor instead legislative and often formulaic approaches to calculating and imposing exactions.

In all, the Court's efforts have had diverse effects on jurisdictions' ability and willingness to require property owners to agree to exactions that internalize the external costs of development. Part IV argues that the Court's constitutional rule-formalism and the resulting formulaic administrative approach do not, in many instances, actually further the Court's stated goals of protecting individual property rights and forcing efficient regulation. In fact, they are likely to result in the widespread underregulation and occasional overregulation of land use. 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 non-judicial methods of resolving them—are often quite messy.

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A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997); and Lee Ann Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000).

<sup>14</sup> For a recent thorough review and reconsideration of that literature, see Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

But enabling and resolving political disputes are frequently essential ways to arrive at legitimate, effective decisions within the disparate local contexts of land use regulation. The politics of land use disputes, in sum, are constituent elements of legitimate, effective local governance, and judicial efforts to remove politics from land use are doomed to disappoint their proponents.

The Article argues ultimately that while the Court's concerns about individual property rights and extortionate regulations are not entirely misplaced, they fail to consider the varied and complicated situations of local governance and the competing visions of property within which land use disputes emerge.<sup>15</sup> 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 only be imposed at great expense. In cases like *Lambert*, then, lower courts and state and local legislatures may not be engaged in the ideological struggle that Justice Scalia seems to assume causes their resistance to the Court's commands. Rather, they may be struggling to find acceptable resolutions to the complicated, locally situated, political land use conflicts that the Court's relatively blunt instruments fail to achieve.

## **I. Land Use Bargaining and Exactions Practice.**

### **A. The Flexibility of Contemporary Land Use Regulation.**

Since 1926, when the U.S. Supreme Court declared the practice constitutionally permissible, a municipality has been able to utilize its police powers to utilize zoning regulations within its jurisdiction in order to protect the public health, safety, and general welfare.<sup>16</sup>

Zoning's early availability as a constitutionally permissible land use tool led to its widespread

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<sup>15</sup> In this sense, the Article is an effort to use as critique and offer as alternatives competing rhetorical modes of understanding property from the limited approaches on which the Court relies. See Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280 (1998).

<sup>16</sup> See *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387-90 (1926).



adoption by local governments,<sup>17</sup> and all fifty states now either require or enable their municipalities to perform some level of comprehensive planning.<sup>18</sup> Consistent with the municipality's comprehensive or general plan,<sup>19</sup> the zoning ordinance and map define, with variable specificity, the generally permissible land uses on specific parcels within the jurisdiction.<sup>20</sup> At its inception and during its early implementation, American zoning theory proceeded from a series of presumptions that compromised what has been referred to as "Euclidean" zoning.<sup>21</sup> This approach strictly separates different types of land uses in discrete zones, identifies uses within zones as early as possible in the development of a jurisdiction, and keeps zoning designations stable over time, allowing only slight variances rarely and on a parcel-by-parcel basis.<sup>22</sup> Euclidean zoning's formal, geographic conception of urban and suburban development established, for long periods and with limited flexibility, the rules of land use within a jurisdiction.

The static, inflexible Euclidean model began to break down after World War II, due in particular to suburban development and to the vast social and economic changes wrought by

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<sup>17</sup> Developments in the Law—Zoning, 91 HARV. L. REV. 1427, 1434-35 (1978).

<sup>18</sup> See DANIEL R. MANDELKER, LAND USE LAW, § 1.01 (5<sup>th</sup> ed. 2003); see generally Eric H. Steel, *Participation and Rules—The Functions of Zoning*, 1986 AM. B. FOUND. RES. J. 709, 713 (speculating that zoning's persistence as a regulatory practice can be traced to the "widespread, if unarticulated, perception that the institution is serving some vital social function").

<sup>19</sup> In contemporary land use and planning practice, a municipality's zoning ordinance works as a second-level regulation beneath the constitution-like comprehensive or master plan, which attempts to guide future land use development within the jurisdiction. See MANDELKER, *supra* note 18, at § 3.01.

<sup>20</sup> See "Zoning," "Zoning Code," and "Zoning Map," in A GLOSSARY OF ZONING, DEVELOPMENT, AND PLANNING TERMS 260-61 (Fay Dolnick & Michael Davidson eds., American Planning Association Planning Advisory Service Report No. 491/492, 1999) [hereinafter A GLOSSARY OF ZONING].

<sup>21</sup> See ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 104 (2<sup>nd</sup> ed. 2000). The term refers to the municipal defendant in the 1926 Supreme Court decision declaring zoning to be constitutionally permissible. See *supra* note 16 and accompanying text.

<sup>22</sup> See Ira Michael Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 URB. L. 2 (1973), reprinted in THE LAND USE AWAKENING: ZONING LAW IN THE SEVENTIES 51 (Robert H. Freilich & Eric O. Stuhler eds., 1981); "Euclidean zoning," in A GLOSSARY OF ZONING, *supra* note 20, at 94. Euclidean zoning's appeal to early zoning advocates and early adopting local governments was both economic and social: zoning promised to protect property values by settling and enforcing expectations that land uses would be stable and segregated, and similarly secured segregation of residential neighborhoods by class and race. See RICHARD E. FOGLESONG, PLANNING THE CAPITALIST CITY: THE COLONIAL ERA TO THE 1920S 224-25 (1986).

postwar growth.<sup>23</sup> Especially in the past quarter-century, planning theory and land use law have evolved into a relatively flexible regulatory model, one more reactive to changes in market demand and regulatory need.<sup>24</sup> Local governments adapt to changing patterns in commercial, industrial, and residential uses by allowing piecemeal amendments as well as wholesale revisions or redraftings of their comprehensive plan.<sup>25</sup> Increasingly, municipalities have come to treat their comprehensive plans, zoning ordinances and maps, subdivision ordinances, and issuance of variances less as components of a permanent, fixed scheme and more as a fluid set of parameters within which they establish contractual or conditional relationships with property owners seeking to change the use of their property.<sup>26</sup> It is within this context that local governments have developed the practice of “exacting” concessions from property owners.

#### **B. Exactions Bargaining.**

In order to make significant changes to the existing use of their land—changes like subdividing parcels, initiating major construction projects, or shifting the type of use from residential to commercial or to more intense residential or commercial uses—property owners typically must seek one or more discretionary approvals from the jurisdiction’s zoning authority or legislative body.<sup>27</sup> Local governments reach their decision to approve or deny development

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<sup>23</sup> See MICHAEL J. MESHENBERG, THE ADMINISTRATION OF FLEXIBLE ZONING TECHNIQUES 3 (American Society of Planning Officials Planning Advisory Service Report No. 318, 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).

<sup>24</sup> See MESHENBERG, *supra* note 23, at 3-4; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 879-80 (1983).

<sup>25</sup> 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).

<sup>26</sup> See IRVING SCHIFFMAN, ALTERNATIVE TECHNIQUES FOR MANAGING GROWTH 2-4 (1999).

<sup>27</sup> See 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 permit to redevelop with the conditions that the City of Tigard granted and the variances from the conditions imposed by the Community Development Code that Tigard denied in *Dolan*, as well as the coastal development permit that the California Coastal Commission granted, with conditions, in *Nollan*. See *Dolan*, 512 U.S. at 377-80; *Nollan*, 483 U.S. at 828-29.

proposals after considering a specific project proposed for a particular piece of land.<sup>28</sup> In this process, local governments and property owners often negotiate over the concessions that an applicant will agree to as the condition for issuance of the approval necessary to change the existing land use on the subject parcel. State courts, which early on tended to condemn flexible, negotiated land use regulatory practices as impermissible efforts by municipalities to contract away their police powers,<sup>29</sup> have increasingly upheld such agreements, especially when states have granted the municipalities authority to do so.<sup>30</sup>

Exactions are a type of conditional zoning by which local governments, as a condition for issuing a discretionary approval for development of land, require property owners and/or developers to finance or provide public facilities.<sup>31</sup> The typical exaction requires that in exchange for the required regulatory approval by the local government for a proposed new land use, the property owner provides or pays for some concession or package of concessions based on the anticipated impacts of the proposed new land use and the actions (to be provided either by the landowner or the local government) required to mitigate those impacts. 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 fund the provision of public services.<sup>32</sup>

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<sup>28</sup> ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 54-55 (1993).

<sup>29</sup> See PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 5.01 (1987); 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).

<sup>30</sup> See MANDELKER, *supra* note 18, at § 9.11; DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION 162-65 (1999). Many states authorize the imposition of concessions in exchange for regulatory approvals. See, e.g., CAL. GOV'T CODE § 66000 (West 2003) (California's Mitigation Fee Act, authorizing imposition of impact fees); COLO. REV. STAT. § 30-28-133(4)(a) (2003) (authorizing dedications and in-lieu fees for park and school sites); N.J. STAT. ANN. § 40:55D-42 (West 2003) (authorizing exactions for off-site improvements "necessitated or required" by a subdivision seeking approval).

<sup>31</sup> See SELMI & KUSHNER, *supra* note 30, at 161-63.

<sup>32</sup> See *New Jersey Builders Ass'n v. Mayor of Bernards Township*, 528 A.2d. 555, 558-59 (1987); Been, *supra* note 13, at 475-76 (1989); Thomas W. Ledman, *Local Governmental Environmental Mitigation Fees: Development Exactions, The Next Generation*, 45 FLA. L. REV. 835, 842-53 (1993). Another type of exaction is the "linkage," an

Exactions require financial or in-kind provision of needed or desired infrastructure; as such they shape the physical environment, generate revenue, force the internalization of external costs where private ordering is unlikely to do so, and resolve political conflict.<sup>33</sup> Given the variety of ends they promise to meet and their role in shaping the conditions for development, exactions are fraught with political, legal, and emotional controversy not only for landowners, but also for other affected parties (including neighbors, interest groups, and residents of the jurisdiction and, possibly, region) and the regulatory agency itself.

Two parallel developments in municipal finance explain local governments' increased reliance on exactions to provide infrastructure. First, local governments face enormous fiscal constraints from the combination of federal funding cuts, state and federal mandates regarding the extent and quality of public infrastructure provision, and financial restraints on municipalities resulting brought on by the anti-tax revolt of the late-1970s and 1980s.<sup>34</sup> And at the same time, local governments across the country suffer from an infrastructural deficit.<sup>35</sup> By financing infrastructural improvements, exactions help address this problem. Second, exactions respond to the concern shared by regulators and the public that the external costs of new development

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off-site development impact exactions intended to address effects linked to an approved development, such as the increased need for affordable housing that might result from commercial and/or office development. See Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 524 (1988).

<sup>33</sup> ALTSHULER & GOMEZ-IBANEZ, *supra* note 28, at 7; ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 286 (2000).

<sup>34</sup> See Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 URB. LAW. 541, 542-43 (1994); reprinted in EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA 87, (Robert H. Freilich & David W. Bushek eds., 1995); ALTSHULER & GOMEZ-IBANEZ, *supra* note 28, at 23-26; Paul P. Downing & Thomas S. McCaleb, *The Economics of Development Exactions*, in DEVELOPMENT EXACTIONS 43, 44 (James E. Frank & Robert M. Rhodes eds., 1987); Louis F. Wechsler et al., *Politics and Administration of Development Exactions*, in DEVELOPMENT EXACTIONS, *supra*, at 15, 34-36.

<sup>35</sup> See 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 (Winter 1987); Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions*, in DEVELOPMENT EXACTIONS, *supra* note 34, at 70, 73.

should not be passed on to surrounding landowners, the existing infrastructure, state and local government treasuries, and the environment. By ordinance or by individualized, ad hoc decision, a jurisdiction may require that a property owner and/or developer who seeks discretionary approval for an entitlement to intensify land use make monetary or non-financial concessions that will at minimum remedy the proposed project's anticipated negative impacts.<sup>36</sup>

### **C. Exactions as a Flexible Tool for Land Use Bargaining.**

Although alternatives to exactions exist, they are unlikely either to be as financially effective or as politically palatable as imposing exactions.<sup>37</sup> Accordingly, local governments faced with a controversial and potentially costly approval may simply deny the applications, seek assistance from similarly cast-strapped state and federal governments, raise general revenues through property taxation, or allow their infrastructure to deteriorate.<sup>38</sup> Because of the practical or political improbability of all these options except denial, a local government's choice is most often between denial or approval with exactions. When a property owner seeks additional rights to engage in a more intensive and valuable use of her land, exactions enable the property owner and local government to trade critical entitlements and achieve a mutually advantageous end by avoiding the denial option.<sup>39</sup> In this sense, exactions can enable growth both by funding necessary infrastructure and by fending off anti-growth sentiment; at the same time, they can

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<sup>36</sup> See ALTSHULER & GOMEZ-IBANEZ, *supra* note 28, at 62-63, 77, 95-96. On the extent to which exactions requiring 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 (Winter 1987).

<sup>37</sup> Such other, generally less attractive means include ad valorem property taxes, see Downing & McCaleb, *supra* note 34, at 49-50; special assessments, see ALTSHULER & GOMEZ-IBANEZ, *supra* note 28, at 17; required subdivision improvements, see Smith, *supra* note 29, at 6; user fees, see JAMES C. NICHOLAS ET AL., A PRACTITIONER'S GUIDE TO DEVELOPMENT IMPACT FEES at 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).

<sup>38</sup> ALTSHULER & GOMEZ-IBANEZ, *supra* note 28, at 2-3.

<sup>39</sup> See Fennell, *supra* note 13, at 21-26.

also limit growth by requiring expensive, and perhaps prohibitive, concessions from developers.<sup>40</sup>

Consider a few admittedly simplistic hypotheticals. In the first, a local government chooses between (1) the legally permissible denial of an application for an entitlement to develop land, and (2) an approval of that entitlement conditioned upon the property owner's mitigation of the project's impacts that it thinks will not internalize fully the costs of the development. Here, the rational local government will deny the entitlement. By contrast, consider a second hypothetical local government faced with an option (2) that would enable it to require or accept an offset that at least internalizes all costs and may even benefit its constituents or its treasury. Bargains like this may provide the property owner with a significantly better result than an outright denial, but may also provide benefits to—and will at least not push costs onto—the jurisdiction and its residents.<sup>41</sup>

Considered this way, exactions may appear allocatively efficient by forcing property owners to bear the costs of the impacts of the development of their land.<sup>42</sup> However, they can also be inequitable as well as expensive and uncertain to administer. For example, they can constitute a regressive form of redistribution that discriminates against newcomers and renters by raising the cost of new housing.<sup>43</sup> In addition, they rely upon estimates of the costs and harms of development, which can be difficult to ascertain, evaluate, and remediate and which can therefore lead to imprecise and potentially inaccurate and inefficient assumptions about the terms

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<sup>40</sup> Elizabeth A. Deakin, *The Politics of Exactions*, in PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES 96, 98-103 (Rachelle Alterman ed., 1988).

<sup>41</sup> COOTER, *supra* note 33, at 299-302.

<sup>42</sup> See THOMAS J. MICELI & KATHLEEN SEGERSON, COMPENSATION FOR REGULATORY TAKINGS: AN ECONOMIC ANALYSIS WITH APPLICATIONS 55-59 (1996). Conditions on development that generate greater social benefits than total social costs efficiently allocate costs and benefits. See Dana, *supra* note 13, at 1247.

<sup>43</sup> ALTSHULER & GOMEZ-IBANEZ, *supra* note 28, at 134-36.

of the resulting bargain.<sup>44</sup> Their flexibility can lead to wide disparities in the types and extent of exactions required of property owners in the same jurisdiction, sometimes because of favoritism for or discrimination against particular property owners or sometimes because of regulatory changes over time. Exactions can also vary widely in and across jurisdictions due to political, market, environmental, and competitive differences among cities and counties (and at times in the same jurisdiction). In communities seeking to protect or enhance especially attractive but fragile resources (beaches and mountains or proximity thereto, for example), the concessions required from property owners seeking discretionary approvals are likely to be greater; and the same is likely the case in jurisdictions that are at or near build-out and are suffering from infrastructure deficits that they wish at least to hold steady, if not reverse, and where local majorities are able to wield political power to exclude newcomers through exclusionary zoning.<sup>45</sup> By contrast, concessions are likely to be smaller in jurisdictions that for political or financial reasons wish to attract development, and that are willing to ignore or knowingly bear the costs of that development's impact.<sup>46</sup>

In sum, exactions vary, and their great strength as a tool for governance—providing flexibility to solve otherwise intractable regulatory blockages that would result in denials—is also their greatest liability, rendering them neither a precise nor predictable regulatory tool.<sup>47</sup>

Nevertheless, when used effectively and based upon relatively complete information about a

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<sup>44</sup> See *infra* Part IV.A.

<sup>45</sup> See 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, 128-30 (2001); Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 834-35 (1992).

<sup>46</sup> See Carlson & Pollak, *supra* note 45, at 128-30; Sterk, *supra* note 45, at 859.

<sup>47</sup> Empirical studies demonstrate the variability of effects that impact fees have on land values and new and existing housing prices. See MARLA DRESH & 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*, Lincoln Institute of Land Policy Working Papers # CP02A13, at 15-16 (July 2002) (visited July 21, 2003) <<http://www.lincolninst.edu/pubs/pub-detail.asp?id=563>>.

proposed land use and its likely impacts, exactions appear to be the best available regulatory tool within the modern, flexible land use regulatory framework for forcing the internalization of external costs. “Best” in this context does not necessarily mean effective or even especially good,<sup>48</sup> but rather best *available*.<sup>49</sup> But exactions at least evoke and theoretically enable a roughly equitable, roughly efficient solution to the recurring problem of the future harms and external costs attributable to the increased intensity of land use. Moreover, to the extent that parties affected by the new land use have some say in the process by which concessions are identified and calculated, exactions at least create the conditions for a regulatory process by which the issuance of approvals for new development can be inclusive, negotiated, and politically productive and legitimate.

## II. *Nollan and Dolan* and The Federal Constitutionalization of Land Use Bargaining.

Prior to the U.S. Supreme Court’s entrance into the field in *Nollan and Dolan*,<sup>50</sup> state courts had applied various state statutory and constitutional doctrines to develop differing standards of review for land use exactions.<sup>51</sup> These standards varied considerably.<sup>52</sup> When it articulated its pair of federal constitutional standards to evaluate the permissibility of exactions

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<sup>48</sup> See Vicki Been, *Smart Growth Requires Efficient Growth*, 34 CONN. L. REV. 611, 613 (2002) (decriing the tendency of local governments that enable sprawl development to require insufficient exactions).

<sup>49</sup> The list of theoretically better regulatory practices includes local property taxation, aid passed to local governments from federal and state government tax revenues, and user charges for services. See ALTSHULER & GOMEZ-IBANEZ, *supra* note 28, at 2-3, 132-38. Although more progressive and/ or more efficient, these alternatives are less popular politically than exactions and require statutory authority or beneficence from rival levels of government. See *id.*

<sup>50</sup> Before *Nollan*, the Court had avoided property owners’ challenges to exactions under the federal Constitution on a number of occasions. See *Associated Home Builders v. City of Walnut Creek*, 4 Cal.3d 633 (1971), *appeal dismissed*, 404 U.S. 878 (1971); *Home Builders & Contractors Ass’n v. Board of County Comm’rs*, 446 So.2d 140 (Fla. Dist. Ct. App. 1983), *appeal dismissed*, 469 U.S. 976 (1984); *Jordan v. Vill. of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1966), *appeal dismissed*, 385 U.S. 4 (1966) (dismissed due to lack of substantial federal question).

<sup>51</sup> 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 (Winter 1987) (summarizing differing state approaches pre-*Nollan*); see, e.g., Joseph D. Lee, Note, *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 in which courts used statutory, takings, and substantive due process approaches).

<sup>52</sup> See *Dolan*, 512 U.S. at 389-91.



under the Takings Clause, the Supreme Court established a uniform floor of property rights on what had previously been a diverse, experimental patchwork of state law.<sup>53</sup> Before discussing the *Nollan* and *Dolan* decisions and their applicability to different types of exactions (the subjects of the second and third sections of this Part), the next section briefly describes the earlier state approaches.

**A. Judicial Review and Statutory Limits to Exactions Prior to *Nollan* and *Dolan*.**

State courts considering exactions before *Nollan* generally took one of three approaches.<sup>54</sup> Some states, including Illinois and New Hampshire, adopted a strict “specific and uniquely attributable” test, which required an exaction to connect directly and be precisely proportional to the harm created by the new land use.<sup>55</sup> In the Illinois case establishing the test, for example, the state supreme court struck down an exaction requiring plaintiffs to provide recreational and educational facilities because the municipality’s need for such facilities arose from the “total development of the community” rather than directly from the marginal increase in infrastructure costs that the plaintiff’s proposal would cause.<sup>56</sup> Without an extremely close relationship to the harms generated, the court reasoned, an exaction would be confiscatory rather than a “reasonable regulation under the police power.”<sup>57</sup>

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<sup>53</sup> See 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).

<sup>54</sup> See *Dolan*, 512 U.S. at 389-91; Michael H. Crew, *Development Agreements After Nollan v. California Coastal Comm’n*, 22 URB. LAW. 23, 26-27 (1990); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 750 & nn.80-82 (1988).

<sup>55</sup> See *Pioneer Trust & Savings Bank v. Vill. of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961) (specific and uniquely attributable test); *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 15 (N.H. 1981) (same); see also *Haugen v. Gleason*, 226 Or. 99, 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). The 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 36, at 95.

<sup>56</sup> *Pioneer Trust*, 176 N.E.2d at 802.

<sup>57</sup> *Id.*

Other states, most notably California, explicitly rejected the “specific and uniquely attributable” test in favor of a more deferential test requiring only that the municipality produce general proof and conclusions as to the connection between the exaction and proposed development.<sup>58</sup> The more deferential approaches generally appeared in two forms: in reasonable relationship tests, courts upheld exactions that had some reasonable degree of connection to the proposed development,<sup>59</sup> or, most commonly,<sup>60</sup> in somewhat more rigorous dual rational nexus tests.<sup>61</sup> These dual nexus tests considered the relationships between the exaction and the needs the proposed development would create, as well as that between the exaction and the benefits the development would enjoy.<sup>62</sup> Despite the relative deference of these approaches, neither assured municipalities victory.<sup>63</sup>

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<sup>58</sup> See *Associated Home Builders v. City of Walnut Creek*, 4 Cal.3d at 638, 640-41 & n.7 (adopting reasonable relationship test and rejecting *Pioneer Trust*); *Jordan*, 137 N.W.2d at 447 (same).

<sup>59</sup> See, e.g., *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); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966) (adopting reasonable relationship test); 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).

<sup>60</sup> See Thomas M. Pavelko, Note, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269, 287 (1983).

<sup>61</sup> 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, but has in practice 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, if not solely directed to, the development’s future residents. See *Banberry Dev. Corp. v. South Jordan*, 631 P.2d 899, 903-05 (Utah 1981).

<sup>62</sup> See Pavelko, *supra* note 60, at 993-96.

<sup>63</sup> See, e.g., *Aunt Hack Ridge Estates, Inc. v. Planning Comm’n of Town of Danbury*, 230 A.2d 45, 46-47 (Conn. Super. 1967) (after upholding ordinance requiring dedication of park land 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 indefinitely reserve land for a state road because exaction bore no reasonable nexus to the proposed development and deprived the developer of any use of his land).

State legislatures played an important role in limiting exactions before *Nollan* and *Dolan*,<sup>64</sup> and continue to do so today.<sup>65</sup> By providing municipalities explicit authority to impose exactions, state statutes have limited exactions that require the dedication of land<sup>66</sup> and impose impact fees.<sup>67</sup> Prior to *Nollan*, state courts often invalidated exactions that lacked or exceeded statutory authority.<sup>68</sup>

## **B. Nollan and Dolan.**

*Nollan* and *Dolan* established two tests that the Supreme Court described as reflecting the mainstream of state court precedent for the relationship between a development proposal's harms and an exaction's conditions.<sup>69</sup> These tests evaluate the degree of relationship between the exaction to the proposed development's anticipated harms by imposing a heightened judicial scrutiny on exactions, one based on a rule-like command lower courts must apply. In *Nollan*, the plaintiffs sought to demolish and replace a small, worn-down bungalow on their beachfront property and replace it with a three-bedroom house similar to those of their neighbors.<sup>70</sup> The California Coastal Commission, from whom the Nollans needed a discretionary permit to build their new beach house,<sup>71</sup> made issuance of the permit conditional on the Nollans' dedication of a public easement across the portion of their beachfront property that lay between the high tide line

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<sup>64</sup> See Bosselman & Stroud, *supra* note 35, at 76.

<sup>65</sup> See MANDELKER, *supra* note 18, at §§ 9.11, 9.18, 9.21.

<sup>66</sup> 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).

<sup>67</sup> See, e.g., COLO. REV. STAT. § 29-1-801 *et seq.* (2003); (authorizing imposition of "land development charges") HAW. REV. STAT. § 46-142 (2002) (authorizing counties to collect impact fees); TEX. LOC. GOV'T CODE ANN. Title 12, § 395.001 *et seq.* (2003) (authorizing collection of impact fees).

<sup>68</sup> 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 park land dedication); *Haugen*, 359 P.2d at 111 (invalidating fee imposed on residential developers in lieu of park land dedication because failure of ordinance to limit use of funds to benefit made the fee a tax, which the county had no statutory authority to impose); see generally *Delaney et al.*, *supra* note 51, at 146 & n.49 (citing cases in which courts invalidated exactions for lack of statutory authority).

<sup>69</sup> See *Nollan*, 483 U.S. at 839-40; *Dolan*, 512 U.S. at 391.

<sup>70</sup> *Nollan*, 483 U.S. at 828.

<sup>71</sup> See *id.* (citing CAL. PUB. RES. CODE §§ 30106, 30212, 30600 (West 1986)).

and the seawall that separated the beachfront from the rest of their property.<sup>72</sup> 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. In all, the Commission concluded, these impacts would have adverse psychological effects on the public.<sup>73</sup>

The Supreme Court held that the Commission's imposition of this condition violated the Takings Clause on the grounds that the easement—which if required outside the context of a permit application would have effected a taking for which compensation would unquestionably have been due<sup>74</sup>—lacked an “essential nexus” to the harm created by the proposed building.<sup>75</sup> 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 that a lateral beach easement lacked such a nexus because it had little relation to the harm the Commission sought to address.<sup>76</sup> Under its own regulations and without liability for a taking, the Commission could have denied the Nollans' permit application; nevertheless, conditioning the permit's approval on the Nollans' granting of an unrelated easement to the public constituted, in Justice Scalia's words, “an out-and-out plan of extortion” which as such required compensation.<sup>77</sup>

*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

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<sup>72</sup> *Id.* at 828-29.

<sup>73</sup> *Nollan*, 483 U.S. at 829 (internal quotation and citation omitted).

<sup>74</sup> *Id.* at 831.

<sup>75</sup> *Id.* at 837.

<sup>76</sup> *Id.* at 836.

<sup>77</sup> *Id.* at 837 (internal quotation and citation omitted).

essential nexus, or substantive relationship, to the proposed land use's harms). It left open, however, the issue of *how much* of a concession a government entity could permissibly require. That is, *Nollan* had settled the qualitative limits of exactions; seven years later, *Dolan* settled the 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 property owner's application to expand her hardware store. The city required that she dedicate a portion of her land as a public greenway in order to mitigate flooding from a nearby creek, and that she dedicate a strip of land adjacent to the floodplain for a segment of a continuous bike path throughout the city in order to mitigate the increased traffic congestion that would result from the increased size of the hardware store.<sup>78</sup> These conditions, unlike the beach easement in *Nollan*, bore an "essential nexus" to the harms expanding store would create, namely increases in impervious surfaces and in traffic created by shoppers driving to the store's downtown location.<sup>79</sup> Establishing a test it claimed to divine from the variety of prior state supreme court exactions cases,<sup>80</sup> the Court held that the city had failed to show that the required concessions were in "rough proportionality" . . . both in nature and extent to the impact of the proposed development."<sup>81</sup> The Court placed the burden of proof on the government entity to establish, with some rough degree of precision and with more than simply "conclusory statement[s]," that its proposed exactions on land development would remediate the effects of the proposed development.<sup>82</sup>

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<sup>78</sup> *Dolan*, 512 U.S. at 379-80 & n.2.

<sup>79</sup> *Id.* at 386-88.

<sup>80</sup> *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 & n.86 (1995) (arguing that the "rough proportionality" test had no support in state court precedent, and was in fact newly minted by the Court in *Dolan*).

<sup>81</sup> *Dolan*, 512 U.S. at 391.

<sup>82</sup> *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, *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).

In the final paragraph of his majority decision, Justice Rehnquist praised the city of Tigard for having undertaken the “commendable task of land use planning, made necessary by increasing urbanization,” as well as for seeking to further the “laudable” goals of “reducing flooding hazards and traffic congestion, and providing for public greenways.”<sup>83</sup> But, the Court cautioned, there are “outer limits” to the methods of achieving worthy land use planning goals.<sup>84</sup> Those goals could not be reached “by a shorter cut than the constitutional way of paying for the change.”<sup>85</sup> Implicit in these remarks, and in the Court’s conclusion that in undertaking this task and furthering these goals the city had exceeded its constitutional authority, is the Court’s approval of the constitutionally permissible ends of land use exactions, and its articulation of exactions’ constitutional limits as quantitative and qualitative.

To summarize the Court’s particularized approach to exactions: *Nollan* established the constitutionally required logic of exactions, a logic that limits concessions to those that address and seek to internalize the harms and costs of the proposed project. That logic’s constitutional minimum is an “essential nexus.” *Dolan* established the constitutionally required metric of exactions, extending *Nollan*’s logic to a quantitative measure—rough proportionality—of the extent of the project’s expected harms.

### **C. The Confused Scope of *Nollan* and *Dolan*’s Heightened Scrutiny.**

As the Court clarified unanimously in its 1999 decision in *Del Monte Dunes, Nollan* and *Dolan*’s heightened scrutiny applies only in the “special context of exactions”; it cannot be applied to decisions to deny applications for discretionary approvals.<sup>86</sup> As such, exactions are a

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<sup>83</sup> *Dolan*, 512 U.S. at 396.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

<sup>86</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1635 (1999) (declaring that *Dolan* was “not designed to address, and . . . not readily applicable to, the much different questions arising where, as here, the

category of land use regulations excepted from the default *Penn Central* approach to takings claims. Notwithstanding the relative precision of the tests *Nollan* and *Dolan* declare, the applicability of this heightened scrutiny within the wide variety of exactions is not entirely certain.<sup>87</sup> *Nollan* and *Dolan*'s reach is significant for the various entities interested in exactions, because when the federal constitution's heightened scrutiny does not apply, courts review challenged exactions under their own, often more deferential, tests in which property owners may be less likely to win.<sup>88</sup> I consider below the two central issues that remain unclear regarding the reach of *Nollan* and *Dolan*.<sup>89</sup>

### 1. *The Possessory/ Non-Possessory Exaction Distinction.*

Neither *Nollan* nor *Dolan* resolved whether the essential nexus and rough proportionality tests apply only to exactions that require the dedication of land for public use (as in the facts of

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landowner's challenge is based not on excessive exactions but on denial of development"); *id.* at 1650 (Souter, J., dissenting) (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 other uses—the Court in *Del Monte Dunes* explicitly declared the difference between stated and implied conditions to be constitutionally significant. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 20 (1993).

<sup>87</sup> See generally 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*); 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*).

<sup>88</sup> See, e.g., *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (Cal. 2002) (where *Nollan* and *Dolan* do not apply, reviewing exaction for its "reasonable relationship, in both intended use and amount, to the deleterious public impact of the development").

<sup>89</sup> I do not consider below an additional issue whose complexity renders it beyond the scope of this Article. It is unclear whether the mere offer of an unconstitutional exaction made during the application review process may be subject to heightened scrutiny under the federal Takings Clause, even if the property owner rejects or the government withdraws the offered exaction. See generally Andrew W. Schwartz, *The Application of Nollan/Dolan Heightened Scrutiny to Legislative Regulations and "Unsuccessful Exactions,"* presented to October 1999 Litigating Regulatory Takings Claims Conference, Georgetown University Law Center, available at <http://www.law.georgetown.edu/gelpi/conference/schwartz.htm> (discussing *Goss v. City of Little Rock*, 90 F.3d 306, 309-10 (8<sup>th</sup> Cir. 1996); *Lambert*, 67 Cal.Rptr.2d at 568-69). In *Goss*, 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 permit should not be reviewed under the heightened scrutiny of *Nollan* and *Dolan* despite evidence in the record showing the city would have issued the permit if owners had agreed to pay an impact fee.

*Nollan* and *Dolan* themselves), or whether they extend to exactions such as impact fees or other concessions that do not require the dedication of land.<sup>90</sup> The Court in *Del Monte Dunes* noted that none of its decisions had extended *Dolan* beyond exactions requiring dedication of property<sup>91</sup> and some state and lower federal courts have relied on that distinction when they have refused to extend heightened scrutiny to non-possessory exactions.<sup>92</sup> At the same time, a significant number of courts have applied heightened scrutiny to non-dedicator exactions applied in individualized proceedings.<sup>93</sup>

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<sup>90</sup> See generally *Dolan*, 512 U.S. at 385 (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 made of their land). This distinction between dedicatory and non-dedicator exactions is consistent with the Court’s repeated statements, both in *Nollan* and in other takings cases, that required 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.” *Nollan*, 483 U.S. at 841; see also *Lucas*, 505 U.S. at 1015 (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”). On the confusion in state and lower federal courts prior to *Del Monte Dunes* over whether *Nollan* and *Dolan* apply to exactions requiring other than the dedication of land, see Nancy E. Stroud, *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).

<sup>91</sup> *Del Monte Dunes*, 119 S.Ct. at 1635 (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, 437 (Wash. Ct. App. 1999), *aff'd on different grounds*, 49 P.3d 860 (Wash. 2002) (concluding that statements in *Del Monte Dunes* limiting *Dolan* to exactions requiring dedications of land were dicta); 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 *Del Monte Dunes* statement was dicta, and further arguing that distinction between dedicatory and non-dedicator exactions is meaningless).

<sup>92</sup> See, e.g., *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998) (*Nollan* and *Dolan* do not apply to 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) (*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) (refusing to apply *Dolan* to use permit conditions that required public improvements to property, in part because conditions did not involve dedication of land for public use). One recent state supreme court case 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).

<sup>93</sup> 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 Flower Mound v. Stafford Estates Ltd. P’ship*, 71 S.W.3d 18, 34 (2002), *rehearing overruled* (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



Courts have reason to assume the applicability of *Nollan* and *Dolan* to impact fees. Prior to its decision in *Del Monte Dunes*, the Court had remanded to the California Supreme Court the California Court of Appeal decision in *Ehrlich v. Culver City*, 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 the recently issued decision in *Dolan*.<sup>94</sup> Although it has yet to face the issue directly, the Court's remand of *Ehrlich* and lower federal and state court decisions (including the California Supreme Court's decision in *Ehrlich*) may have settled the issue in favor of extending *Nollan* and *Dolan* to non-possessory exactions like impact fees.<sup>95</sup>

## 2. *The Adjudicative/ Legislative Distinction.*

Also unresolved is whether the essential nexus and rough proportionality tests apply only to exactions imposed by adjudicative decisions regulating individual piece of land, or if they extend also to legislative decisions regulating an entire jurisdiction or larger units thereof.<sup>96</sup> This

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costs improving an adjoining street"), *aff'd on different grounds*, 49 P.3d 860 (Wash. 2002).

<sup>94</sup> 512 U.S. 1231, 1145 S.Ct. 2731 (1994).

<sup>95</sup> See generally Stroud, *supra* note 90, at 202-06 (discussing the split among courts on this point and possible implications of *Del Monte Dunes*). Commentators arguing against the possessory/ non-possessory 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 87, at 568-72; Douglas W. Kmiec, *Inserting the Last Remaining Pieces Into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1036-37 (1997); Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 540-43 (1995). 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: THE PUBLIC AND PRIVATE PERSPECTIVES 357, 359-63 (Thomas E. Roberts ed., 2002) (citing *Hollywood Inc. v. Broward County*, 431 S. 2d 606, 609-10 (Fla. Dist. Ct. App. 1983)) (arguing for due process-based dual rational nexus test that would consider whether there was a reasonable connection between, first, locality's need for additional capital facilities and the new development, and second, the funds collected and the benefits accruing to the new development).

<sup>96</sup> 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 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 rests on the government entity to prove that an exaction 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). More recently, the Court denied *certiorari* in a case in which the Georgia Supreme Court refused to apply heightened scrutiny to its review of land use regulations imposed by a zoning

distinction, which is harder to discern in the smaller, less formal governmental structures of municipalities than in federal and state governments,<sup>97</sup> 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. When the regulation affects large segments of the public, the Takings Clause is less commonly implicated.<sup>98</sup> In addition, because a legislatively enacted exaction provides regulatory certainty to property owners, it is less likely to be an unanticipated frustration of property owners' investment-backed expectations.<sup>99</sup> Lower federal and state courts

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ordinance. A dissent written by Justice Thomas, and joined only by Justice O'Connor, attacked the legislative/adjudicative distinction as unclear, illogical, and essentially meaningless. See *Parking Ass'n of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas & O'Connor, JJ., dissenting).

<sup>97</sup> See 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); Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525, 544-49 (1990). In the smaller setting of local government, where political minorities or individuals can sometimes more easily overcome political majorities through greater access to representatives and where effected parties may have more constitutional protections of due process rights, adjudicative processes can often be more protective of individuals' property rights than legislative ones. 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 414 n.\* (Souter, J., dissenting) (citations omitted) ("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."); *Nollan*, 483 U.S. at 829 (noting that the Coastal Commission had placed similar conditions on "43 out of 60 coastal development permits along the same tract of land. . . . [O]f 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, however. Compare *Dudek v. Umatilla County*, 69 P.3d 751 (Or. Ct. App. 2003) (applying *Dolan* to legislatively adopted exaction scheme where ordinance grants discretion to county to determine extent of exaction); with *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App. 2002), *rev. denied*, 52 P.3d 1057 (Or. 2002), *cert. denied*, 123 S.Ct. 1482 (2003) (refusing to apply 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).

<sup>98</sup> See Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1348 (1991). Accordingly, as Lee Ann 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 13, at 10-11.

<sup>99</sup> See Dana, *supra* note 13, at 1261 n.92; Douglas R. Porter, *Will Developers Pay to Play*, in DEVELOPMENT IMPACT FEES: POLICY RATIONALE, PRACTICE, THEORY, AND ISSUES 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 jurisdiction will also make it less likely that municipalities will effect takings through legislative acts than through individualized, site-specific regulation).

tend to respect this distinction and extend *Nollan* and *Dolan* only to individualized exactions,<sup>100</sup> although some courts,<sup>101</sup> with the approval of some commentators,<sup>102</sup> have nevertheless applied heightened scrutiny to legislatively enacted exactions.

### **III. Takings Formalism, Regulatory Formulas.**

In their logic and metrics, *Nollan* and *Dolan* are instances of the Supreme Court's uneven, gradual imposition of a more robust Takings jurisprudence that provides stronger protection for property owners against land use regulations. Like other categorical exceptions to the multi-factor, ad hoc balancing test that generally applies to Takings claims, *Nollan* 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's explicit purpose in formulating these tests was to protect property owners and the classical liberal conception of property from the incursion of powerful, overreaching government agencies. I associate this move with the Court's similar desire to protect property owners from state and lower federal courts that might, despite the Court's tests, still issue decisions that uphold local governments' "extortion" through exactions. To create a doctrinal shield that would sufficiently protect property rights, the Court has attempted to articulate a fairly tight, rule-based command to lower

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<sup>100</sup> See, e.g., *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (refusing to extend *Dolan* to legislative water resources development fee); *San Remo Hotel*, 41 P.3d at 103 (refusing to extend *Nollan* and *Dolan* to generally applicable fee for converting residential hotel room); *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); *Rogers Machinery*, 45 P.3d at 966 (refusing to apply 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).

<sup>101</sup> 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) (D. S.D. filed Dec. 6, 2002); *Home Builders Ass'n of Dayton and Miami Valley v. Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Lincoln City Chamber of Commerce v. Lincoln City*, 991 P.2d 1080, 1082 (Or. Ct. App. 1999), *rev. denied*, 6 P.3d 1101 (Or. 2000); *Isla Verde*, 990 P.2d at 429.

<sup>102</sup> See, e.g., *Breemer*, *supra* note 95, at 401-07 (2002) (arguing that, whether understood as relying on the Takings Clause or the unconstitutional conditions doctrine, *Nollan* and *Dolan* should apply to legislative as well as adjudicative exactions).

courts and government agencies, one that limits exactions to the abatement of nuisance-like impacts caused by the proposed land use. At once clear—exactions must pass tests of nexus and proportionality—and indeterminate—the reach of these tests is expansive and indeterminate—the Court’s commands have affected land use regulation in important ways. Specifically, they have helped lead to the increased use of regulatory formulas rather than individualized, negotiated exactions.

This Part establishes the linkage between doctrine and regulatory practice through a series of related claims. It begins by placing *Nollan* and *Dolan*’s formalist desire—composed of a particular jurisprudential vision of rule-like commands and a normative vision of robust property rights—within the Court’s general trend towards excepting certain types of regulatory acts or effects from the generally applicable deferential standard for takings claims. The first three sections thereby establish what the Article means by “takings formalism.” The final section describes the result of this vision of takings in the context of exactions: a trend among state and local governments of movement away from negotiated, ad hoc exactions and towards legislated, fee-based formulas as a preconstituted remedy for the harms and costs of all relevant development proposals. Although it cannot be proved that *Nollan* and *Dolan* caused this trend, I note that their combined clarity and indeterminacy give local governments strong incentives to adopt such exaction formulas in order to avoid or successfully defend against constitutional challenges to the resulting exactions, and that the limited empirical evidence to date on the cases’ impact shows some significant effect.

**A. Takings Rules and the Desire for Doctrinal Clarity.**

In establishing separate, heightened scrutiny of certain categories of alleged takings, the Supreme Court has carved out exceptions to the ad hoc, fact-intensive balancing approach it has

established as the dominant test for regulatory acts that require compensation.<sup>103</sup> *Penn Central Transportation Co. v. New York City* established the “essentially ad hoc, factual inquiries” of alleged regulatory takings,<sup>104</sup> which require courts to balance, among other things, “[t]he economic impact of the regulation on the claimant”<sup>105</sup> and “the character of the governmental action.”<sup>106</sup> The two most widely recognized categorical exceptions to the *Penn Central* test concern government acts that effect a permanent physical occupation of land, typically associated with the Court’s decision in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>107</sup> and those that deny an owner “all economically beneficial uses” of her land, as established in *Lucas v. South Carolina Coastal Council*.<sup>108</sup> The “permanent physical occupation” category constitutes a conceptually narrow and rare outer boundary of land use regulation that, in the opaque universe of takings law, is relatively easy to spot and administer. The “denial of all economic use” rule is, at least in the abstract, also an easily identifiable outlier of land use regulation’s effects 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 if

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<sup>103</sup> See *Penn Central*, 438 U.S. at 124 (explaining that in reviewing regulatory takings challenges, courts generally eschew set formulas and instead engage in “essentially ad hoc, factual inquiries”); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (reaffirming *Penn Central* approach as default for judicial review of regulatory takings claims); *id.* at 633 (O’Connor, J., concurring) (same); 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: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1681-82 (1988).

<sup>104</sup> 438 U.S. at 124.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Id.* at 124. 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 (1997) (listing and explaining factors); see, e.g., *Massingill v. Dep’t of Food & Agriculture*, 102 Cal.App.4th 498, 507-08 (2002) (applying factors).

<sup>107</sup> 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. Beerman, *The Social Origins of Property*, 6 CAN. J.L. & JURIS. 217, 224-28 (1993); see also Poirier, *supra* note 14, at 108 n.56 (citing cases that complicate physical invasion rule).

<sup>108</sup> 505 U.S. at 1019.

the regulation does not in fact require compensation.<sup>109</sup> With respect to takings claims that do not fall within the ambit of one of these categories, the Court “still resist[s] the temptation to adopt *per se* rules . . . , preferring to examine ‘a number of factors’ rather than a simple ‘mathematically precise’ formula.”<sup>110</sup>

Proponents of takings rules claim there are a number of advantages to clear declarations of the extent of property owners’ constitutional rights and to simple tests for courts to ascertain whether a regulatory action violates those rights. First and foremost, clear takings rules could enhance decisional and allocative efficiency.<sup>111</sup> By limiting the discretion of judges and administrative decisionmakers in evaluating whether any regulation or its application would

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<sup>109</sup> Nevertheless, the latter category, typically referred to as the *Lucas* category in honor of the decision establishing it, is subject to numerous complications. At least two additional major questions remain about *Lucas*, however. First, *Lucas* excepts from its compensation requirement for regulations that render land valueless those background principles of the common law of property and nuisance that limit the property owner’s antecedent rights to use and develop her property. *See id.* 1027. This simply 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. Second, as the dissents and concurrence raise in *Lucas* itself, it is the rare regulation that reduces a parcel’s value to zero, and it may not have even been the case for the *Lucas* plaintiff’s land. *See id.* at 1034 (Kennedy, J., concurring), 1044 (Blackmun, J., dissenting), 1065 n.3 (Stevens, J., dissenting); 1076 (statement of Souter, J.); *see also* *Wyer v. Board of Env’tl. 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 *Lucas* category). Given the benefit to plaintiffs of falling within the *Lucas* category, parties will likely expend significant effort in litigating the issue of economic value. *See Lucas*, 505 U.S. at 1065-66 (Stevens, J., dissenting).

A third complication was resolved by the Court in its recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). There, the Court considered the issue of whether a moratorium rendering a property owner’s parcel temporarily valueless effects a categorical taking. In doing so, the Court considered whether a parcel could be conceptually severed—in terms of time as well as space—for purposes of a takings analysis. That is, if a regulation rendered *part* of a larger parcel valueless, or a parcel valueless for a *period* of an owner’s fee simple absolute, could the property owner utilize *Lucas* to seek compensation for that part or period? The Court clearly rejected a temporal severance approach in *Tahoe-Sierra*, and seemed also to resolve the spatial severance issue similarly. *See id.* at 331 (quoting *Penn Central*, 438 U.S. at 130-31) (declaring that the denominator, or the parcel under review in an alleged takings, is the “parcel as a whole” rather than the regulated portion, and 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 14, at 109-11 (2002) (summarizing long-standing debates over denominator issue and *Tahoe-Sierra*’s possible role in settling them); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967) (initially establishing debate over denominator issue).

<sup>110</sup> *See Tahoe-Sierra*, 535 U.S. at 326 (quoting *Palazzolo*, 533 U.S. at 633, 634 (O’Connor, J., concurring)).

<sup>111</sup> *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).

effect a taking, clear constitutional commands promise a level of value-neutral doctrinal coherence, which ostensibly would enable the smooth deduction of regular results across disparate, individual cases.<sup>112</sup> Such stability would force fairness and predictability across decisions, with the result that like cases would be treated equally by decision-makers who would waste few resources in applying a clear rule to resolve every dispute.<sup>113</sup> Coherence, predictability, and fairness in turn would affect the behavior of property owners and investors, who typically view rule-bound certainty as better protecting their expectations than the ex post nature of the Court's ad hoc balancing tests. The stability promised by formalist takings rules thus would invite individuals to commit resources to capital projects, and therefore enables the highest and best use of property.<sup>114</sup>

A second advantage of takings rules, according to some advocates, is that they would establish and help enforce increased protection for property owners embattled by the regulatory overreach of local, state, and federal governmental entities. Formal takings rules would thereby 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.<sup>115</sup> Seen from this angle, categorical takings tests deploy formal rules in order to redistribute power from local government to property owners; thus, they further a normative

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<sup>112</sup> See Ross, *supra* note 111, at 416-17.

<sup>113</sup> Scholars who advocate clear rules cite this as a general advantage of clear commands over ad hoc standards. See Larry Alexander, “*With Me, It’s All ‘er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 532-36 (1999); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-80 (1989).

<sup>114</sup> See Rose-Ackerman & Rossi, *supra* note 111, at 1449.

<sup>115</sup> See Epstein, *supra* note 1, 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 leaves 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 109.

vision and narrative of judicial intervention against an expansionist regulatory state.<sup>116</sup> Rule-based formalism in the takings context, then, links a set of clear rules to a classical liberal conception of broad, static, and well-protected property rights.<sup>117</sup>

Underlying the utilitarian and normative claims about categorical regulatory takings is a jurisprudential desire for formal and doctrinal stability.<sup>118</sup> In the areas in which they operate, categorical rules dictate to state courts and state and local legislatures “the jurisprudential spirit in which their general laws of property and nuisance are to be read and construed.”<sup>119</sup> This “spirit” in turn forces states to establish land use regulatory regimes that take the form of “monadic, specific rules [rather than] that of complexly interactive open principles.”<sup>120</sup> The formalist desire of an occasional majority of the Supreme Court has been incompletely instantiated within the bifurcated structure of current takings law, leaving the majority of alleged takings untouched<sup>121</sup> and specific issues within categories unresolved.<sup>122</sup> Although their inroads

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<sup>116</sup> See Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1753-54 (1988).

<sup>117</sup> See MARGARET JANE RADIN, *The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings*, in REINTERPRETING PROPERTY 120, 133-35 (1993).

<sup>118</sup> See JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 238-39 (1990); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1219-20 (1999). To the extent that the Court’s rule-formalism is linked to its 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, in 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); Lyriisa Barnett Lidsky, *Defensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815, 832-33 (1995) (describing 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 psychoanalytic desire for discernible conception of property).

<sup>119</sup> Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 327 (1993).

<sup>120</sup> *Id.*

<sup>121</sup> See *Tahoe-Sierra*, 535 U.S. at 322, 332 (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 111, at 1446; see also Gregory S. Alexander, *Ten Years of Takings*, 46 J. LEGAL EDUC. 586, 594 (1996) (describing Supreme Court’s formalist interventions as symbolic and of limited application).

<sup>122</sup> See *supra* Part II.C.



into the Takings “muddle”<sup>123</sup> may be limited and their own stability may be vulnerable in practice and questionable in principle, formal, categorical takings rules at least bear “the feel of legality”<sup>124</sup> and provide a “good dose of formalization” to the presumptively open ground of takings.<sup>125</sup> Thus, the occasionally triumphant desire for clarity, precision, and protection has produced exceptional and categorical formal rules that depart from default, multi-factor balancing tests. The two sections that follow explain how *Nollan* and *Dolan* fit within this general effort to stabilize and protect property rights under the Takings Clause.

### **B. Nexus and Proportionality as Doctrinal Shields.**

The Court intended *Nollan*’s nexus test and *Dolan*’s rough proportionality test to serve as doctrinal shields, protecting property owners and the integrity of private property rights against the effects of local governments’ unchecked monopoly over their police powers. Concerned that local governments used their monopoly regulatory power to require vulnerable individuals to cede their constitutionally protected right to exclude others from their property, the Court in *Nollan* and *Dolan* assumed that property owners seeking issuance of a discretionary approval are powerless—they have no option but to agree to the conditions imposed by the local government, and they have no leverage that would enable them to bargain their way to a better deal. The Court’s intent in *Nollan* and *Dolan* was to protect property owners from the forced, inequitable bargains that result from the presumptively inequitable distribution of power in the relationship between the land use regulatory body and the regulated individual property owner.<sup>126</sup>

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<sup>123</sup> Carol Rose coined the term “muddle” for 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).

<sup>124</sup> Michelman, *supra* note 12, at 1628.

<sup>125</sup> Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988); see also Michelman, *supra* note 12, at 1622 (describing noticeable movement of Court “towards a reformalization of regulatory-takings doctrine”).

<sup>126</sup> 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*,

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.”<sup>127</sup> Finding no relationship between the California Coastal Commission’s stated justification and the means used to achieve 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 permissible regulatory act. But the exaction’s demonstrable illogic, the Court held, made the extortion plan manifest, and the essential nexus test, by requiring application of a particular logic, can uncover such constitutionally impermissible efforts.<sup>128</sup>

The Court’s further uncovering of municipal extortion explicitly appeared in *Dolan* in its invocation of the unconstitutional conditions doctrine.<sup>129</sup> As the Court described it, this doctrine prohibits the government 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.”<sup>130</sup> The rough proportionality test precludes a forced exchange in which the property owner is coerced by a deceitful and untrustworthy governmental entity 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

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483 U.S. at 841-42 (characterizing Coastal Commission’s actions as compelling Nollans to contribute land to the public when it was required to utilize its eminent domain power to pay for the land); *see generally* Fennell, *supra* note 13, at 15 (describing Supreme Court’s implicit distrust of local governments in its exactions cases).

<sup>127</sup> *Nollan*, 483 U.S. at 837 (internal citation and quotation omitted).

<sup>128</sup> *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.”).

<sup>129</sup> *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”).

<sup>130</sup> *Id.* at 385. The unconstitutional conditions doctrine was also implicitly invoked in *Nollan*. *See* Been, *supra* note 13, at 474; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1463 (1989).

intensify the use of that land.<sup>131</sup> By imposing a metric that identifies when a required concession has forced a property owner to bear unfairly the entirety of public burdens,<sup>132</sup> the rough

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<sup>131</sup> 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 emphasized takings precedents over a thorough discussion of the unconstitutional conditions doctrine. As in other takings cases, the *Nollan* and *Dolan* decisions begin their analysis with the regulatory act's effect on property rights, stressing in both cases that the dedication requirement constituted a "permanent physical occupation" that removed from the plaintiffs' bundle of property rights the essential stick of the right to exclude. See, e.g., *Dolan*, 512 U.S. at 384 (characterizing required dedication of easement as akin to permanent physical occupation of land in its deprivation of right to exclude); *id.* at 393-94 (emphasizing that loss of right to exclude denied the property owners a fundamental right of property owners); *Nollan*, 483 U.S. at 831-32 (same). The Court then applied the standard test for contemporary takings analysis, which asks whether the regulation "substantially advance[s] legitimate state interests." *Dolan*, 512 U.S. at 385 (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)); *Nollan*, 483 U.S. at 834-35 (same). Assuming (in *Nollan*) or conceding (in *Dolan*) that the state's interests were legitimate (see *Dolan*, 512 U.S. at 387; *Nollan*, 483 U.S. at 835-36), the Court devised the essential nexus and rough proportionality tests to evaluate whether the conditions that effected takings for which compensation was due substantially advanced those interests. See *Nollan*, 483 U.S. at 837 (describing essential nexus standard as test to evaluate whether "the condition substituted for the prohibition . . . fails to further the end advanced as the justification for the prohibition"); see also *Dolan*, 512 U.S. at 386 (characterizing rough proportionality standard as logical second test for exactions that applies more precise standard to evaluate whether the state's legitimate interest is substantially advanced).

Ultimately, the Court's reliance on takings rather than unconstitutional conditions may be because, notwithstanding Justice Rehnquist's strange claim in *Dolan* that the latter doctrine is "well-settled," the unconstitutional conditions doctrine is perhaps even more indeterminate than the muddled Takings clause jurisprudence. Compare *Dolan*, 512 U.S. at 385, with Sullivan, *supra* note 130, at 1416 (describing judicial application of doctrine as "riven with inconsistencies"); and Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984) (complaining of inconsistent judicial application of the doctrine so marked "as to make a legal realist of almost any reader"). Attempts to impose theoretical coherence to the doctrine have failed to settle the field in the least. See generally Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 4-6 (2001) (summarizing earlier attempts, noting their failures, and offering still another such attempt). *Nollan* only implicitly invokes the unconstitutional conditions doctrine, makes no mention of either the doctrine or any cases (including *Dole v. South Dakota*, a decision explicitly relying upon the unconstitutional conditions doctrine that had been decided earlier in the same term) that apply the doctrine, and includes little more than unspecific citations to two free speech cases decided within the unconstitutional conditions rubric. Compare *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding, after thorough discussion and application of unconstitutional conditions doctrine, 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. Board of Ed. of Township High School Dist. 205, Will Cty., Ill.*, 391 U.S. 563 (1968)).

At minimum, the Court's willful lack of interest in working through the difficult uncertainties of the unconstitutional conditions doctrine and its comparatively fulsome efforts in sorting precedent and doctrine in the takings field demonstrate the Court's recognition that *Dolan* is best understood as a Fifth Amendment case with some coloring from unconstitutional conditions doctrine. See generally Fennell, *supra* note 13, at 45 (asserting that in 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 Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 976 n.331 (2000) (arguing that *Dolan* is an unconstitutional conditions, rather than regulatory takings, case); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859 (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); EPSTEIN, *supra* note 86, at 180-83 (reading *Nollan* as an unconstitutional conditions case providing necessary, but second-best, protection for property owners under siege

proportionality test extended *Nollan*'s effort to uncover constitutionally impermissible exactions. *Nollan* and *Dolan* thereby provide doctrinal shields that protect property owners who are most vulnerable to the police powers' exercise when local governments, susceptible to majoritarian influence,<sup>133</sup> overregulate undeveloped land and exploit individuals and newcomers.<sup>134</sup>

In addition to its concern with the government's unfair use of its bargaining power, the Court in *Nollan* and *Dolan* also noted the inefficiencies that it predicted would follow if the judiciary failed to intervene in the exaction bargaining process. This is consistent with what commentators have noted are the dual concerns of Takings Clause jurisprudence with fairness and efficiency.<sup>135</sup> 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 order to limit them to no more than the internalization

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from expansive land use regulations that should be, but are not, declared unconstitutional). When it explicitly invoked the unconstitutional conditions doctrine, then, the Court in *Dolan* implicitly adopted Cass Sunstein's suggestion that it substitute the set of specific questions it has developed and applied inconsistently in the unconstitutional conditions context with a more specific inquiry into "first, the nature of the incursion on the relevant [constitutional] right [made vulnerable by an extortionate condition by the state], and second, the legitimacy and strength of the government's justifications for any such incursion." Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 620-21 (1990).

<sup>132</sup> See *Dolan*, 512 U.S. at 384 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>133</sup> 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 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 13, at 137 (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).

<sup>134</sup> 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).

<sup>135</sup> 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 Michelman, *supra* note 109, at 1181-82 (relying on normative criteria of allocative efficiency and distributive justice to judge collective action). Courts more typically emphasize the fairness rationale, however. See *Del Monte Dunes*, 119 S.Ct. at 1635 ("[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"); *Palazzolo*, 533 U.S. at 617-18 (stating that 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).

by the property owner of the external costs of development.<sup>136</sup> According to the Court, this test curbs the government's authority to force upon property owners a trade whose costs to them are greater than the benefits it provides to the public.<sup>137</sup> *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.<sup>138</sup> This would lead local governments to realize fewer of the land-use goals they purportedly sought to meet than if they imposed more lenient but nontradeable development restrictions.<sup>139</sup>

In *Nollan* and *Dolan*, then, the Court posited that municipalities have the incentives and authority both to *overregulate*, by establishing stricter controls than they otherwise would promulgate, and to *underregulate* (at least in contrast to their stated aim in establishing land use ordinances and regulation), by using their enhanced bargaining leverage to bargain for even greater, unrelated amenities.<sup>140</sup> The Court assumed that local governments would, in the absence of judicial intervention, extort property from their citizens and regularly shift between strategic over- and underregulation, thereby harming all of the jurisdiction's property owners and residents. *Nollan* and *Dolan* accordingly sought to protect the regulators, the regulated, and affected third parties alike from local governments' overreaching, rent-seeking tendencies.

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<sup>136</sup> *Dolan*, 512 U.S. at 391.

<sup>137</sup> *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).

<sup>138</sup> *See Nollan*, 483 U.S. at 837 n.5.

<sup>139</sup> *Id.*

<sup>140</sup> *See Been, supra* note 13, at 491 ("Requiring a local government to spend exactions on projects that are germane to the harm 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).

As a broad assertion, the Court’s narrative of the good guys and bad guys of local land use regulation 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 governments to provide statutory protections against rent-seeking, exploitative behavior by local governments.<sup>141</sup> Such assistance may come in the general forms of state takings statutes that provide more protection than federal constitutional guarantees<sup>142</sup> and of more specifically targeted legislation that limits the authority, scope, and extent of the exactions municipalities may impose.<sup>143</sup>

Second, the Court failed to recognize that property owners may seek friendlier land use regulatory regimes in other jurisdictions.<sup>144</sup> Indeed, jurisdictions may 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.<sup>145</sup>

Utilizing an opportunity to exit is an individual’s response to her frustrated financial, social, and

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<sup>141</sup> See Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1037-39 (1996) (reviewing WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995)).

<sup>142</sup> See Carl P. Marcellino, *The Evolution of State Takings Legislation and the Proposals Considered During the 1997-98 Session*, 2 N.Y.U. J. LEGIS. & PUB POL’Y 143 (1998-99); Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L. Q. 187 (1997).

<sup>143</sup> See MANDELKER, *supra* note 18, at § 9.21.

<sup>144</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (developing hypothesis of consumer-voters sorting themselves based on preferences for package of taxes, services, and amenities). Of course, local governments can only offer distinct public goods to the extent that they have the legal authority (to tax, spend, and regulate) and fiscal ability to do so. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001). Moreover, the Tiebout hypothesis can only explain the exit and entrance of those individuals with the capacity and wealth to opt out and in to communities; obviously, no one would “choose” to opt in to poor local services. See Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 28-34 (1998). As noted below, some property owners or developers may be better able to exit than others—an argument that leads inexorably to a contextualist, balancing approach to takings claims, rather than to a formulaic, rule-like command for judicial review.

<sup>145</sup> See Fred P. Bosselman, *Dolan Works*, in *TAKING SIDES ON TAKINGS ISSUES*, *supra* note 95, at 350; Been, *supra* note 13, at 511-28.

political expectations.<sup>146</sup> But the Court ignores the exit option available to property owners who, faced with an unfriendly, overregulating jurisdiction, may simply move to a friendlier one and, as a result, damage the first jurisdiction's property values and tax base.<sup>147</sup> Assuming that local governments are more susceptible to corruption or more likely to extort not only undervalues the role of exit, but it also overvalues the roles of coalition politics and interest group pluralism that would lead majoritarian local governments to exploit vulnerable property owners.<sup>148</sup>

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 most tend to fight (either with denials or stringent exaction requirements) may be "high-stakes players," capable of seeking their own financial or political solutions to instances of attempted coercion through their own political voice,<sup>149</sup> or of simply abandoning the jurisdiction. Large developers are not the only potential takings plaintiffs who can fend for themselves. Owners of undeveloped property that developers might buy can, in many instances, both constitute an interest group themselves and form political alliances with developers.

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<sup>146</sup> See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 15-17 (1970).

<sup>147</sup> Rose, *supra* note 24, at 882-87.

<sup>148</sup> 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). The Court also undervalues the importance of political voice, both as a bulwark against exploitation and, ultimately, as a crucial value in local politics. See Part V-B, *infra*.

<sup>149</sup> See NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 120 (2001); see also Deakin, *supra* note 40, at 106 (noting close ties between real estate development industry and elected officials in local communities). For example, one or more 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 13, at 1271-74. Carol Rose has characterized as "localism bashing" the pessimistic conception of local government regulators as thoughtless objects of majoritarian influence. See Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131-32 (1996) (reviewing WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)).

At the same time, individual property owners needing discretionary approval for specific and singular changes to their existing land use may be less able to gain the political leverage necessary to counteract a local government's efforts to exact extortionate concessions.<sup>150</sup> These are the kinds of property owners on whose side the Court intervened in *Nollan* and *Dolan*: individual plaintiffs who owned relatively modest amounts of property, who were unable to find similar property elsewhere, and who seemed especially vulnerable to political majorities.<sup>151</sup> But the decisions' formalist conception of property ownership as a single category for purposes of takings jurisprudence provides the greatest legal leverage and commercial advantage to those who need the Court's protections least—large scale developers who can purchase land in different jurisdictions within a region, and who are quite capable of exercising their exit option and of protecting themselves politically.

In situations where 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 less accurate and persuasive, and the heightened judicial scrutiny of *Nollan* and *Dolan* therefore may be not only unnecessary but also intrusive and overly protective of wealthy, powerful interests.<sup>152</sup> Nevertheless, some localities offer such attractive natural or geographical amenities that their local governments may ignore their

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<sup>150</sup> Prior to *Nollan* and *Dolan*, state courts were able to make this distinction between large scale development interests and vulnerable small property owners. In one instance, a court 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).

<sup>151</sup> Many of the Court's takings decisions expanding property rights protections were litigated by the Pacific Legal Foundation, who represented the Nollans and Dolans before 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).

<sup>152</sup> *See* Smith, *supra* note 35, at 30.



competition and may not care—or indeed may hope—that new entrants will be scared away by a rigorous regulatory regime.<sup>153</sup> In such instances, those already-located developers and property owners are “stuck” without an easy exit option from an unfriendly jurisdiction.<sup>154</sup> The dynamics of local governance and property ownership may thereby render individual plaintiffs especially vulnerable to the vicissitudes of majoritarian political sentiment and administrative overreaching.<sup>155</sup> Accordingly, judicial scrutiny may be more necessary in some contexts and unnecessarily intrusive and disruptive in others.

Attending to such variability and complexity of what Margaret Radin has called the “recalcitrant practice” of property—“the stubborn situatedness of people and their property, and the endless variations in property relations”<sup>156</sup>—is not a part of the Court’s approach, however. The Court’s narrative of land use regulation relies on relatively stock figures of nearly omnipotent government agencies and besieged property owners. The Court tells this story from an individual rights-based perspective with a utilitarian flavor that ignores issues of progressivity,<sup>157</sup> sustainability, environmental aesthetics, and social and environmental justice.<sup>158</sup> As a result, the Court’s solution to this narrative is a powerful doctrinal shield for the victims of a widespread regulatory onslaught that may only exist in certain places at certain times. The Court assumes that only a sufficiently robust—and, as the next section explains, sufficiently

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<sup>153</sup> See Dana, *supra* note 13, at 1271 n.129,

<sup>154</sup> EPSTEIN, *supra* note 86, at 184-85.

<sup>155</sup> See FISCHER, *supra* note 13, at 4-5, 9 (arguing that exit is not as available as an option at the local level as it is at the state or federal level); *but see* Rose, *supra* note 149, at 1134-35 (arguing that exit is at least equally available at the local, state, and federal levels).

<sup>156</sup> Radin, *supra* note 12, at 265.

<sup>157</sup> 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).

<sup>158</sup> 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).

formal—constitutional regime can limit the regulatory tendencies of overreaching local governments.

### C. Nexus and Proportionality as Rule-Based Commands.

Admittedly, *Nollan* and *Dolan* articulate less clear rules than those commanding courts to find virtually per se takings in regulations 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 explained above,<sup>159</sup> the category of exactions to which *Nollan* and *Dolan* apply is subject to a significant amount of confusion.<sup>160</sup> Nevertheless, they represent a similar effort to create stability and replicable precision for the judicial review of exactions.<sup>161</sup> But like the Court’s other formal, categorical takings tests, the nexus and proportionality tests represent a clear desire to circumscribe judicial discretion in reviewing exactions, and to do so in order further to establish broad protections for property rights and for the conception of property generally.

*Nollan* and *Dolan* circumscribe discretion in two ways. First, the “essential nexus” and “rough proportionality” tests require courts to apply focused and finite logic to the specific impacts and mitigation on the subject property.<sup>162</sup> As such, they differ strikingly from the

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<sup>159</sup> See *supra* Part II.C.

<sup>160</sup> Of course, the *Lucas* category of takings is also subject to a certain degree of uncertainty because of issues surrounding the valuation and denominator of the subject parcel. See text accompanying *supra* notes \_\_\_\_

<sup>161</sup> See Rose-Ackerman & Rossi, *supra* note 111, at 1446 (associating *Dolan* with *Lucas* to the extent that both attempt to formalize takings law, but do so incrementally and imperfectly).

<sup>162</sup> Implicit in my argument is the assumption that when it established its federal constitutional rules to review exactions in *Nollan* and *Dolan*, the Court had some choice, and that choice included a more open-ended inquiry that resembled its ad hoc balancing test in *Penn Central*. See *Dolan*, 512 U.S. at 390-91 (choosing among different state court tests, and rejecting deferential “reasonable relationship” standard). As Justice Stevens noted in his dissent, the Court in *Dolan* assumed, without proof, that it could simply 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. *Id.* at 398-99 (Stevens, J., dissenting). In short, the Court *could* have chosen to adopt the reasonable relationship test, or even simply applied

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.”<sup>163</sup> 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, and the cost of the concessions and the likelihood that the concessions would mitigate the harms.<sup>164</sup> 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 are directed at and address the harms of the proposed land use, because it is only when local governments so limit their exactions that they are not extorting rights from property owners. In this scheme, harm causation and harm reduction serve both as the basis and limit of exactions as a regulatory practice. To require more or different, in the Court’s view, is both to overregulate beyond the basis of legitimate land use planning and to effect a taking by going “too far.”<sup>165</sup> Property rights advocates propose extending the rigorous, limiting logic of this regulatory ceiling to all regulatory takings cases.<sup>166</sup>

Second and more significantly, *Nollan* and *Dolan* also provide direction in the form of metrics to apply to the exaction’s nexus and proportionality to the proposed land use.<sup>167</sup> Of

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*Penn Central*’s ad hoc balancing test, but instead chose the more precise and confining nexus and proportionality tests.

<sup>163</sup> *Penn Central*, 438 U.S. at 123 (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

<sup>164</sup> 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?”).

<sup>165</sup> *Nollan*, 483 U.S. at 853 (quoting *Pennsylvania Coal*, 260 U.S. at 415).

<sup>166</sup> See *Kmiec*, *supra* note 95, at 1045.

<sup>167</sup> 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

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 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.”<sup>168</sup> 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,<sup>169</sup> it commanded lower courts to measure exactions with a particular metric. Similarly, the Court in *Nollan* rejected as lacking essential nexus a condition that “utterly fails to further the end advanced as the justification for the prohibition.”<sup>170</sup> Although wary of establishing a precise command, the Court clearly hoped to provide some clear, rule-like protection for property owners.

Each decision thus carves out a specific set of judicial inquiries that provides a focused, limited set of considerations (compare the condition to the purpose of the regulation and measure the condition to the impact) and relatively clear, if not quite crystalline, computations for courts to make (“essential” and “roughly proportional”).<sup>171</sup> The argument that *Nollan* and *Dolan*’s tests are “hardly beacons of clarity” in form, force, or application<sup>172</sup> rests on the false assumption that the category “rule” contains only simple, non-discretionary, non-contingent commands. But no

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(citation omitted) (“[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.’”).

<sup>168</sup> *Dolan*, 512 U.S. at 389. See *supra* Part II.A (describing pre-*Nollan* state court tests for exactions).

<sup>169</sup> See *supra* note 55.

<sup>170</sup> *Nollan*, 483 U.S. at 837.

<sup>171</sup> 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” for whether a taking has occurred).

<sup>172</sup> Poirier, *supra* note 14, at 107 n.55.

such absolute command can exist. Rules and standards operate in relation, not in absolute contrast, to each other.<sup>173</sup> Considered closely, the rule versus standard binary does not hold;<sup>174</sup> instead, commands may be more or less particularistic, and more or less rule-based.<sup>175</sup> *Nollan* and *Dolan* provide significantly greater direction and content to courts than an open-ended ad hoc balancing or reasonable relationship test,<sup>176</sup> and in their efforts to do so demonstrate the same desire for formal stability demonstrated in *Loretto* and *Lucas*.<sup>177</sup> 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. Notwithstanding their somewhat open texture, *Nollan* and *Dolan* limit judicial discretion by prescribing *what* factors courts may consider when reviewing exactions for alleged takings, and *how* courts may consider them.

#### **D. *Nollan, Dolan, and the Doctrinal Bias Towards Regulatory Formulas.***

At minimum, in at least some jurisdictions the exactions cases have likely affected substantive decisionmaking and the costs of the regulatory review process.<sup>178</sup> *Nollan* and

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<sup>173</sup> See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 593-96 (1992).

<sup>174</sup> See generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 383 (1985) (characterizing the rule/standard binary as performing little more than an “arrested dialectic”).

<sup>175</sup> FREDERICK F. SCHAUER, *PLAYING BY THE RULES* 52, 77-78, 113 (1991); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 46 (1987).

<sup>176</sup> See generally Kaplow, *supra* note 173, at 621 (distinguishing rules, which give content to the law before those subject to it act, from standards, which give content afterward).

<sup>177</sup> See *Heller*, *supra* note 118, at 1219-20.

<sup>178</sup> See DANIEL POLLAK, *HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA?* 31, 82-83 (California Research Bureau, CRB-00-004, 2000); Jonathan M. Davidson & Adam U. Lindgren, *Exactions and Impact Fees--Nollan/Dolan: Show Me the Findings!*, 29 URB. LAW. 427 (1997); Ryan, *supra* note 37, at 368. Such costs may be borne by, or shared with, the property owner, thereby raising the cost of development. See *id.* at 366; *c.f.* Lincoln City Chamber of Commerce, 991 P.2d at 1080 (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. See Michael C. Spata, *Decision-makers and the Administrative*

*Dolan*'s commands can apply to exactions imposed as part of a wide variety of land use regulatory decisions, including those regarding subdivision approvals, rezoning, and annexation.<sup>179</sup> In states that had previously engaged in more deferential judicial review of exactions, local governments that failed to comply with *Nollan* and *Dolan*, or local governments that developed constitutionally permissible exactions but had failed to produce a sufficiently detailed record to demonstrate compliance with *Nollan* and *Dolan*, have needed to change their regulatory practices or face an increased likelihood of takings liability in light of *Nollan* and *Dolan*.

*Nollan* and *Dolan* have also raised the risk of litigation and the incidence of property owners' threats to sue.<sup>180</sup> A recent study of city and county planners in California found that litigation threats have increased since *Nollan*, *Dolan*, and other important recent takings cases expanding the rights of property owners to be compensated for regulatory takings.<sup>181</sup> Those California counties that have instituted strong growth controls, as well as the fastest growing California cities, have been more likely to face an increased number of threats of litigation than pro-growth counties and slower growing cities.<sup>182</sup> Local governments bear the full risk<sup>183</sup> of

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*Decision*, in HOW TO LITIGATE A LAND USE CASE: STRATEGIES AND TRIAL TACTICS 55, 61 (Larry J. Smith ed., 2000).

<sup>179</sup> See generally Jonathan M. Davidson et al., "Where's Dolan?": Exactions Law in 1998, 30 URB. LAW. 683, 684-86 (1998).

<sup>180</sup> 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 post-*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). It perhaps goes without saying that threats to litigate can and do result in lawsuits. See POLLAK, *supra* note 178, at 21-22.

<sup>181</sup> See *id.* at 16-17 (finding that more than half of the planners in counties that responded to survey reported a marked increase in the number of threats of litigation in recent years and over the past decade); see also *id.* at 18 (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).

<sup>182</sup> See *id.* at 125-29.

<sup>183</sup> See *id.* at 23 (discussing the unavailability of takings insurance for municipalities in California).

compensating the property owner for an exaction found to be unconstitutional as well as for attorney's fees;<sup>184</sup> they may also be liable for compensation covering the temporary period dating back to the imposition of the prohibited exaction.<sup>185</sup> Threats to sue are therefore likely to have some effect on decisionmaking.

Unsurprisingly, many jurisdictions have modified their regulatory behavior by demanding more modest exactions or by changing the way in which the exactions they impose are calculated.<sup>186</sup> Although *Dolan* did not require a precise "mathematical calculation" in order to meet its rough proportionality test,<sup>187</sup> courts have required local governments to adopt and apply fairly rigorous standards with defensible, continually updated methodologies and estimates in order to support the concessions they exact from property owners.<sup>188</sup> Even where local governments review extensive engineering and planning reports before imposing an exaction,

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<sup>184</sup> This assumes the property owner has filed suit under some statutory provision, such as 42 U.S.C. § 1988, that allows prevailing plaintiffs to recover attorney's fees.

<sup>185</sup> See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 321 (1987) (establishing right of property owner to compensation for "the period during which the taking was effective").

<sup>186</sup> See POLLAK, *supra* note 178, at 125-29.

<sup>187</sup> *Dolan*, 512 U.S. at 395.

<sup>188</sup> 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. Assoc. v. County of Somerset*, 648 A.2d 482, 487 (N.J. Super. Ct. App. Div. 1994) (upholding traffic impact fees based on 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). The threat of heightened scrutiny has raised the costs of performing such studies. See Recent Case, *Constitutional Law—Fifth Amendment Takings Clause—California Court of Appeal Finds Nollan's and Dolan's Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance—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 & 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*). Such costs may be passed on to developers in requirements that they pay for all environmental review of the proposed development. See Ryan, *supra* note 37, at 366-67 (reporting increased compliance costs in Tigard, Oregon, following *Dolan* decision, 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 evidence required for studies required to support exactions is often borne by developers). Like the impact fees themselves, such costs are either passed backward to landowners by developers in a lower price they pay for undeveloped land, or forward to new home purchasers in higher prices for new homes, or are borne by developers themselves, depending upon a variety of market factors. See *supra* note 47 (discussing research on who bears the costs of impact fees).

courts have nevertheless dismissed the municipality's findings of rough proportionality.<sup>189</sup>

Indeed, *Dolan* itself rejected as constitutionally unacceptable a bicycle path exaction, 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.<sup>190</sup>

As a result, in the years following *Nollan* and *Dolan*, local governments have shifted their exactions practice towards imposing impact fees rather than in-kind exactions, especially those that require the dedication of land.<sup>191</sup> Two doctrinal issues in *Nollan* and *Dolan* favor this shift. First, under a narrow reading of *Nollan* and *Dolan*'s reach, certain methods of imposing impact fees are less likely to face heightened scrutiny than ad hoc, dedicatory exactions.<sup>192</sup> When derived before the fact in an impact fee ordinance and then applied to all similarly situated property owners, exactions formulas establish a legislative, rather than adjudicative, basis for

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<sup>189</sup> See e.g., *Amoco Oil Co. v. Vill. of Schaumburg*, 661 N.E.2d 380, 391 (Ill. App. Dist. 1995) (ruling defendant municipality's requiring a dedication of land as condition of issuance of a special use permit failed to meet rough proportionality test); *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 findings that local officials found had met rough proportionality standard).

<sup>190</sup> *Dolan*, 512 U.S. at 395; cf. *Trimen 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 park land).

<sup>191</sup> Compare Carlson & Pollak, *supra* note 45, at 137-38 (noting that in recent years following *Nollan* and *Dolan*, California cities and counties have shifted towards 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, *supra* note 34, at 128, Table 6-5 (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 23, at 48 (pre-*Nollan* and *Dolan* discussion of exactions process 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 Approvals*, J. KAN. BAR ASS'N, Nov. 1995, at 30, 37 (predicting a shift towards 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, *supra* note 40, at 51, 52-53.

<sup>192</sup> See *supra* Part II.C.2.



imposing exactions, thereby arguably avoiding the scope of *Nollan* and *Dolan*.<sup>193</sup> Even better, when such fees are imposed under the authority of state law,<sup>194</sup> they may seem even more likely to be fairly derived and imposed, insofar as the state statute may require nexus and proportionality findings<sup>195</sup> and property owners in other jurisdictions within the state may also be subject to similar fees.<sup>196</sup> Negotiated exactions appear perilous when compared to such formulaic, legislated fees.<sup>197</sup>

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 developed to calculate the costs and mitigation of the traffic and school impacts of new development, appear less assailable as unproportional.<sup>198</sup> Mathematical formulas whose scale responds directly to predictable and quantifiable impacts and that are quantified in terms of the dollar costs of harms and mitigation, seem likely to be more persuasive to courts that either lack expertise in the area of land use planning or are protective of property owners.<sup>199</sup> Furthermore, because more complex equations within formulas can include

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<sup>193</sup> *See id.*

<sup>194</sup> Almost half of the states have authorized impact fees. *See* MANDELKER, *supra* note 18, at § 9.21

<sup>195</sup> *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) (West 2002) (authorizing only impact fees that fund capital improvements “necessitated by and attributable to . . . new development”).

<sup>196</sup> The Texas impact fee statute itself establishes a maximum fee. *See* TEX. LOC. GOV'T ANN. CODE §§ 395.015.

<sup>197</sup> Bosselman, *supra* note 145, at 350 (“[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.”).

<sup>198</sup> *See* WILLIAM B. FULTON, GUIDE TO CALIFORNIA PLANNING 227-300 (1999); *see, e.g.,* JAMES C. NICHOLAS, THE CALCULATION OF PROPORTIONATE-SHARE IMPACT FEES 23-34 (American Planning Association Planning Advisory Service Report Number 408, 1988) (reproducing calculations used by various local governments to establish fee formulas to mitigate traffic, schools, parks, and library impacts of new development).

<sup>199</sup> *See* NICHOLAS ET AL., *supra* note 37, 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 45, at 137-38. They may also seem fairer to property owners. *See* POLLAK, *supra* note 178, at 87 (noting more respondents to survey noted challenges to individualized exactions than to generally applicable fees).

individualized assessments of the impacts of a particular proposed land use, such formulas will appear more likely to calculate rough proportionality.<sup>200</sup>

Third, once a municipality develops impact fee and exactions formulas, they serve as administratively simple regulatory practices that can be used repeatedly for similar, recurring development applications. In order to attract development, progrowth communities have long established exaction schemes in advance to create a predictable and palatable project approval regime.<sup>201</sup> Legislative formulas applied mechanically can settle disputes wholesale, as opposed to the more time-consuming and variable approach of designing individualized exactions.<sup>202</sup> Municipalities may establish such formulas in, or based upon, comprehensive, long-range plans, another factor likely to be persuasive to courts insofar as they therefore would appear more likely to be part of an ordered, considered regulatory scheme rather than an effort to extort concessions from individual landowners.<sup>203</sup>

Exactions practice at the local level has thereby become more cautious, systematic, and related to pre-formulated planning decisions.<sup>204</sup> Pushing local governments towards long-range, comprehensive planning based on mathematical formulas is a fairly ironic, though not unexpected,<sup>205</sup> result of the Court's exactions cases. In its logic and effects—testing for proportionality and nexus, which leads to mathematical, legislative formulas—the Supreme Court's formalist approach to the constitutional law of exactions appears analogous to a certain

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<sup>200</sup> 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 34, at 554-55.

<sup>201</sup> See Deakin, *supra* note 40, at 103.

<sup>202</sup> See Nelson, *supra* note 34, at 552-53; NICHOLAS ET AL., *supra* note 37, at 54; *see generally* Kaplow, *supra* note 173, at 621 (discussing efficiency advantages of rules that regulate frequently recurring conduct).

<sup>203</sup> See NICHOLAS ET AL., *supra* note 37, at 143.

<sup>204</sup> See POLLAK, *supra* note 178, at 81.

<sup>205</sup> See *Dolan*, 512 U.S. at 396 (endorsing the “commendable task of land use planning, made necessary by increasing urbanization”).

conception of planning as a discipline and practice.<sup>206</sup> Oddly, in its effort to protect property owners by curbing overregulation, a conservative majority of the Supreme Court has endorsed and enforced the regulatory logic of planning, with its claims of modern scientific and engineering expertise, as a necessary intervention into the private ordering of land use.<sup>207</sup> 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 property rights from owners seeking to develop their land—have resulted in the legal tests and administrative rules of the Scientific Policymaker.<sup>208</sup> In the abstract, the development of regulatory formulas is neither necessarily bad nor necessarily good, but it does have consequences, affecting both the regulation of property owners and communities, and the practices and legitimacy of local governance. Parts IV and V consider these consequences of *Nollan* and *Dolan*'s efforts to establish formal clarity in exactions and local governments' legislative, formulaic response.

#### **IV. Formalism, Formulas, and the Variability of Local Land Use Regulation: *Nollan* and *Dolan*'s Consequences on Property Rights Protection and Regulatory Efficiency.**

As formal concepts, nexus and proportionality should lead to land use regulation that settles and protects all property owners' expectations of the broad extent of their property rights

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<sup>206</sup> See Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1743-44 (1988) (noting that a tight linkage between mitigation required in an exaction and a proposed new project secures a measure of good planning and stability); Dahlstrom, *supra* note 200, 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). This explains why planners apparently approve of *Nollan* and *Dolan* in the abstract. See POLLAK, *supra* note 178, at 33 (study of local government planners in California showing majority endorsing *Nollan* and *Dolan* as promoting "good planning practice").

<sup>207</sup> Of course, this is only ironic 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 utilitarian facilitators of the commodification of land development. See MICHAEL J. DEAR, *THE POSTMODERN URBAN CONDITION* 124-26 (2000).

<sup>208</sup> See BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 10-15 (1977).

and that requires the full internalization of all external costs produced by any proposed new land use.<sup>209</sup> But given the variable political, economic, and environmental contexts of local land use regulation, the formal protections *Nollan* and *Dolan* aspire to establish and the formulaic regulations that are likely to result will not ultimately achieve the Court's purposes of robust property rights protection and utilitarian curbs on municipalities' tendencies to overregulate. Rather, *Nollan* and *Dolan* are more likely to lead to instances of under- and overregulation as local governments step further back from engaging in ample consideration of development's harms, or respond by denying entitlements to property owners, or selectively ignore the Court's commands. Even local governments attempting to comply in good faith with the Court's constitutional commands may engage in costly, full-scale environmental review that fully identifies and charges for all the anticipated harms of new development, only to face resistance by recalcitrant, litigious property owners and a skeptical, empowered judiciary that concludes such regulatory efforts effect a taking.

In short, the Court's effort in *Nollan* and *Dolan* to impose its desire for takings rules fail to provide a mechanical, universal solution to the messy diversity of locally devised and administered regulation and is unlikely to achieve a uniform approach sufficient to fulfill their dual purposes of protecting property rights and enabling more efficient regulation with rule-like commands. Different local governments, working under different state laws and within specific economic and political contexts, faced with diverse housing markets and unique environmental

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<sup>209</sup> 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 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).

resources and local amenities, respond differently to the Court’s commands.<sup>210</sup> And implicit within this Part and Part V, I argue that no single vision of property and takings law can suffice to produce the kinds of flexible, contextualized responses to the regulatory needs and political and social circumstances of land use disputes.<sup>211</sup> This inherent variability not only makes the Court’s efforts seem simplistic or duplicitous in their willful imposition of a singular narrative of exploitation, but it also cannot help but undermine the Court’s formal approach. The unruly ground of land use regulation and local politics lead, ultimately, to widespread, incremental departure from the Court’s formal commands as well as, where jurisdictions obey the Court, to consequences that are frustrating and disruptive to local governance. I consider below three different possible adverse consequences: more underregulation when jurisdictions attempt to comply with *Nollan* and *Dolan* and require insufficient exactions; more overregulation when jurisdictions decide to deny development proposals rather than comply with the Court’s commands; and no effect, when jurisdictions simply disobey the commands and continue to require unconstitutional concessions.

**A. Result 1: Underregulation, Due to Insufficient Exactions.**

When local governments—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 they otherwise might, the exactions cases result

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<sup>210</sup> See generally MICHAEL A. PAGANO & ANN O’M. BOWMAN, CITYSCAPES AND CAPITAL: THE POLITICS OF URBAN DEVELOPMENT 2-4 (1995) (arguing that in matters of land use and urban development, politics and political leadership matter and operate within local historical, social, economic, and structural contexts).

<sup>211</sup> See Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANADIAN J. L. & JURIS. 161, 193 (1996); cf. Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1401 (1991) (noting impossibility of finding unified theory of takings because “there are simply too many compelling and conflicting theories for any to account accurately for American attitudes toward the taking dilemma”).

in underregulation<sup>212</sup> that effects givings<sup>213</sup> to property owners.<sup>214</sup> Indeed, some jurisdictions have responded to *Nollan* and *Dolan* by seeking smaller concessions from property owners.<sup>215</sup>

The nexus and proportionality tests establish a ceiling to exactions bargaining; when an exaction requires quantitatively or qualitatively too much, the victimized property owner has a constitutional cause of action. No such protection—whether in the form of a constitutional right to challenge an insufficient exaction or a statutory floor that would correspond with the 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.<sup>216</sup> Thus in imposing an exaction, a

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<sup>212</sup> By “underregulation” in this context I mean that the regulating agency—mostly municipalities 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 on *Nollan* and *Dolan* have considered in depth the extent to which *Nollan* and *Dolan* are likely to lead to underregulation. See, e.g., Fennell, *supra* note 13, at 40-41 (only briefly considering underregulatory effects, while emphasizing that nexus and proportionality might actually aid neighbors); Been, *supra* note 13, at 505-06 (leaving discussion of underregulation “for another day” because the Supreme Court’s focus has been on developers, not the 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). Accordingly, this section is longer than the two that follow, because each of those arguments—that *Nollan* and *Dolan* will lead to overregulation and municipalities’ refusal to comply with the Court’s commands—have been covered extensively by other commentators, and I largely summarize their arguments here. See FISCHER, *supra* note 13, at 341-51; KOMESAR, *supra* note 149, at 106-11; Been, *supra* note 13, at 504-06; Dana, *supra* note 13, at 1274-86; Fennell, *supra* note 13, at 33-40.

<sup>213</sup> “Givings” refers to the converse to “takings”—instances in which a government promulgates a regulation that grants benefits, 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.

<sup>214</sup> See Davidson et al., *supra* note 179, 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*).

<sup>215</sup> 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*. See POLLAK, *supra* note 178, 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 37, at 350 n.71.

<sup>216</sup> 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 FISCHER, *supra* note 13, at 349-50; Fennell, *supra* note 13, 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

municipality faces pressure on one side from the intense interests of a potential litigant who may 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. In different communities, this balance may tip differently, but in pro-growth or litigation risk-averse jurisdictions, *Nollan* and *Dolan*'s heightened scrutiny provides a powerful weapon for property owners that third parties lack, and will likely lead to less regulation and more unmitigated impacts.

Even assuming that in the wake of *Nollan* and *Dolan* 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 may nevertheless lead to underregulation. Quantitative showings of proportionality and formulas are imperfect as tools for mitigating the impacts of new development because impacts may be difficult to quantify and formulaic mitigation programs based upon future projections may not mitigate impacts fully.<sup>217</sup> 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 more readily and repeatedly studied, anticipated, and quantified. Methodologies to establish impacts and related exactions to support improvements of drainage systems, bicycle infrastructure, parks, in-town pedestrian walkways and rural and exurban hiking

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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 Zoning Enabling Act § 7 (authorizing appeals from decisions of board of adjustment by "persons . . . aggrieved"); *Butters v. Hauser*, 960 P.2d 181 (Id. 1998) (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 18, at §§8.02, 8.04 (discussing third-party standing to challenge land use decisions in state court).

<sup>217</sup> LAWRENCE J. MEISNER, PRIVATE FUNDING FOR ROADS 5 (American Planning Association Planning Advisory Report No. 426, 1990); Dahlstrom, *supra* note 200, at 564.

trails are less precise and reliable, and may be unable to withstand heightened scrutiny.<sup>218</sup>

Impacts to wetlands may be exceptionally difficult and expensive to mitigate, and may therefore fail to pass muster under *Dolan*.<sup>219</sup> Even those impacts that have been studied and modeled extensively, like impacts on traffic, may be better addressed through mitigation programs that lack clear nexus, such as contributions to mass transit programs or other alternative transportation programs.<sup>220</sup> Such mitigation programs are often not explicitly and entirely tied to the proposed development, and it may be difficult to prove or quantify the nexus and proportionality between the mitigation program's benefits and the new development's harms.<sup>221</sup>

But 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 anthropocentric impacts that have more political salience among voters, such as traffic, schools, and recreational facilities.<sup>222</sup> It tends to ignore or insufficiently consider the indirect costs of development, such as the costs of traffic congestion and air pollution.<sup>223</sup> Except where required by federal and state

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<sup>218</sup> See 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); Carlson & Pollak, *supra* note 45, at 134-36; Dana, *supra* note 13, at 1268; Robert H. Freilich & Terry D. Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to Nollan*, in EXACTIONS, IMPACT FEES AND DEDICATIONS, *supra* note 34, at 21, 29. See, e.g. Starritt & McClanahan, *supra* note 82, at 444-48 (demonstrating the difficulty of meeting *Dolan* through Jackson, Wyoming's pre-*Dolan* practice 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*, 877 P.2d at 189, 194 (upholding imposition of park impact fee imposed in lieu of land dedication, authorized by state statute, where fee 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 37, at 188-94 (offering model park impact fee ordinance).

<sup>219</sup> See Dana, *supra* note 13, at 1284.

<sup>220</sup> See *Dolan*, 512 U.S. at 395 (holding that bike path easement effected a taking because findings only demonstrated that the path *could* rather than *will* or *is likely to* offset increase in traffic from hardware store expansion); see generally Dana, *supra* note 13, at 1278-80 (explaining that commuter bus mitigation for new development likely would not meet heightened scrutiny).

<sup>221</sup> See *id.*

<sup>222</sup> See, e.g., WASH. REV. CODE § 82.02.090(7) (2003) (limiting state authority to impose impact fees to road building, schools, parks, open space, recreation areas, and fire stations).

<sup>223</sup> See Been, *supra* note 48, at 614.



environmental law,<sup>224</sup> some local governments are more likely to discount potential environmental impacts, especially those that will spillover into other communities and those that incrementally but cumulatively cause significant impacts.<sup>225</sup> Local governments may not have the political will to consider, identify, and require mitigation of such impacts, especially in the costly manner required under *Nollan* and *Dolan*.

Consider, too, the dynamic *Nollan* and *Dolan*'s heightened scrutiny establishes between judicial review and legislative prerogative. Determining a "roughly proportional" width of an emergency access road or impact fee for the provision of fire service is an exceptionally difficult and risky endeavor, especially where the issue before the local government is whether to require an access road at all.<sup>226</sup> 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 under *Nollan* and *Dolan* to force mitigation.<sup>227</sup> Moreover, as one court recently held, where the required emergency access road would be in an undeveloped area and would remain unfinished until the surrounding parcels are developed, a local government may be unable to meet *Nollan* and *Dolan*'s burdens if it fails to prove to a court's satisfaction that the emergency road would be

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<sup>224</sup> The plethora of relevant federal environmental statutes, and the complicated relationship among federal and state environmental law and local land use and environmental law, 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).

<sup>225</sup> See David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L. Q. 545, 593-94 (1997) (noting tendency of regulators to fail to disaggregate incremental but cumulatively significant impacts); Reynolds, *supra* note 97, at 566-69 (explaining importance of considering cumulative impacts to which a single project may contribute in land use decisions). Some local governments are increasingly getting involved in wetlands protection, as well as other areas (most prominently the protection of open space and historic preservation) that had previously been the domain of federal and state governments. See John R. Nolon, *The Importance of Local Environmental Law*, 5 PACE CENTER FOR ENVTL. L. STUDIES J. 1, 4 (2001).

<sup>226</sup> See Faus, *supra* note 180, at 688.

<sup>227</sup> See Dana, *supra* note 13, at 1284.

completed in the “foreseeable future.”<sup>228</sup> 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.<sup>229</sup> In this respect, the proportionality test invites courts to perform a rough cost-benefit analysis—generally a legislative, rather than judicial prerogative—to consider whether a costly concession for mitigation is somehow proportional to the benefit it would provide.<sup>230</sup> Given *Nollan* and *Dolan*’s heightened scrutiny and bias in favor of protecting property rights, the cost-benefit analysis courts undertake is unlikely to encompass the full range and extent either of a development’s impacts or of the kinds of considerations that a local government takes into account in imposing exactions.<sup>231</sup>

*Nollan* and *Dolan*’s formal logic is also likely to lead local governments to conceptual errors that will cause underregulation. As a general matter, current dominant regulatory practices too deeply discount the occurrence and cost of future harms, assuming only that presently discernible impacts need to be considered and mitigated.<sup>232</sup> Fixed regulatory formulas may lead regulators to underestimate both the dynamic nature of property across time and the relative uniqueness of any particular piece of land in its geographic location, environmental

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<sup>228</sup> *Burton v. Clark County*, 958 P.2d 343, 357 (Wash. Ct. App. 1998).

<sup>229</sup> After the county had won the property owner’s administrative appeal of the county’s imposition of the exaction, a trial court had reversed and remanded the decision on the grounds that had 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 348. On remand, the county examiner, reconsidering the property owner’s appeal found that the county failed to meet *Dolan*’s test and approved the property owner’s subdivision plat without the exacted road. *See id.* The intermediate state appellate court affirmed the county examiner’s decision. *See id.* at 358.

<sup>230</sup> *Cf. Driesen, supra* note 225, at 610-12 (arguing that weighing costs and benefits is a normative, political activity and therefore a role for legislatures rather than administrative agencies).

<sup>231</sup> *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 full range of issues and values implicated in environmental decisions).

<sup>232</sup> *See Lisa Heinzerling, Environmental Law and the Present Future*, 87 GEO. L.J. 2025 (1999).

resources, and relationship to its surroundings.<sup>233</sup> A regulatory approach that works at one time and in one place by imposing a certain set of exactions on a particular land use may not work later when existing and newly approved activities further deplete common pool resources. An existing formula, and judicial skepticism and governmental fear about making that formula more rigorous, may foreclose later responses to the decreasing supply of essential resources to serve all property within the jurisdiction.<sup>234</sup> Flexible, timely responses to the conditions causing increasingly scarce or congested resources are essential political decisions that governments make; 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,<sup>235</sup> not to prevent such decisions 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.<sup>236</sup>

In addition, the *Nollan* and *Dolan* approach, like that of common law nuisance, focuses largely on the off-site impacts of development on common pool resources and public goods (such as traffic and schools) that affect other residents and the natural and built environment that surrounds the subject land. But even if impacts on the land outside the boundaries of the subject

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<sup>233</sup> See Reynolds, *supra* note 97, at 563-66 (noting the unpredictability of negative land use impacts due to the likelihood of quite varied site- and project-specific characteristics); Wegner, *supra* note 29, at 960 (noting benefits of land use dealing as enabling individually crafted solutions to the specific characteristics and problems of a proposed site on a particular parcel).

<sup>234</sup> 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 for its economic consequences in tearing down or retrofitting existing structures and its likely demoralizing effects on a wider populace. *Id.* at 19.

<sup>235</sup> Rose, *supra* note 149, at 1151.

<sup>236</sup> See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112-13 (1981) (arguing that rather than protection 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”).

property are entirely internalized, a new development may not be sustainable over the long run on the 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 their land under its proposed use.<sup>237</sup> Limiting exactions to off-site externalities will also lead to the overprotection of property rights within the property owner's parcel and produce what Michael Heller has called an "anticommons" in which a powerful right to exclude results in preventing the public from utilizing a rare and valuable resource at all.<sup>238</sup> Considered this way, the California Coastal Commission's requirement that the Nollans cede a lateral beach easement sought to prevent a tragedy of the anticommons by excluding the public from access to the beach and public trust lands. The Court's conclusion that the exaction effected a taking recognized an overbroad right in a specific legal thing—the Nollans' absolute, constitutionally protected right to exclude the public from a particularly inviting part of their property—that prevents an optimal social level of beach use.<sup>239</sup>

Because of their very nature, some impacts and some mitigation programs simply do not lend themselves to the logic of *Nollan* and *Dolan*. 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. Result 2: More Permissible Regulation, Due to Denials without Exactions.**

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<sup>237</sup> See ERIC T. FREYFOGLE, JUSTICE AND THE EARTH: IMAGES FOR OUR PLANETARY SURVIVAL 26-42 (1993); Eric T. Freyfogle, *The Tragedy of Fragmentation*, 36 VAL. U. L. REV. 307, 329 (2002).

<sup>238</sup> See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

<sup>239</sup> See Heller, *supra* note 118, at 1209-10.

But in some jurisdictions, *Nollan* and *Dolan* may have the opposite effect. Fearful of the risks and costs of litigation, local governments may decide not to bargain with property owners over discretionary approvals, deciding instead to deny proposals that will be politically unpopular or costly to the community without exactions that might be vulnerable to constitutional challenge.<sup>240</sup> A denial that leaves the subject property with sufficient value and use and that does not frustrate the owner's reasonable investment backed expectations will likely not lose a constitutional challenge under the *Penn Central* ad hoc balancing test.<sup>241</sup> Although a developer or property owner might choose an expensive condition over an outright denial, the fear of *Nollan* and *Dolan* may keep local governments from offering such conditions, or from offering conditional approvals to developers who are more likely to sue.<sup>242</sup> Rigid, legislatively enacted formulas may be especially frustrating for developers and property owners because such formulas can be difficult to change, even in the face of weakening markets, unlike more flexible bargains with amenable governments.<sup>243</sup> To the extent that *Nollan* and *Dolan* diminish local governments' willingness to bargain, the essential nexus and rough proportionality tests restrict property owners' ability to negotiate with a willing partner to a mutually agreeable position, and

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<sup>240</sup> 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 Oral Argument, Dolan v. City of Tigard*, 1994 WL 664939, at \*4 (Mar. 23, 1994); *Dolan*, 512 U.S. at 397 (Stevens, J., dissenting).

<sup>241</sup> *Penn Central*, 438 U.S. at 104.

<sup>242</sup> 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 13, at 4-5.

<sup>243</sup> ALTSCHULER & GOMEZ-IBANEZ, *supra* note 28, at 56. Developers operating in anti-growth jurisdictions may prefer negotiated exactions over inflexible, generally applicable exaction schemes which, by avoiding heightened scrutiny as legislative enactments, may prove to be overinclusive and more costly. *See Dana, supra* note 13, at 1293.

thereby leave them in a worse position than when they might at least have been able to bargain their way to a more expansive use.<sup>244</sup>

This unintended consequence of the exactions cases is more likely to occur in certain circumstances. Where mitigation of the impacts on an especially sensitive resource is expensive, for example, a local government might be loathe to require (because a property owner may be unwilling to pay) the cost of full mitigation, and is likely to deny the proposal.<sup>245</sup> *Nollan* and *Dolan* would ban creative deals in which, instead of mitigating the impact, the property owner would provide some unconnected, less expensive, but politically popular offset.<sup>246</sup> Similarly, where a proposed project is politically unpopular and mitigation of its negative impacts is insufficient to persuade the political majority, the offer of an unrelated but attractive and roughly proportional amenity by the property owner may bring about an approval.<sup>247</sup> A local government

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<sup>244</sup> See KOMESAR, *supra* note 149, at 111; FISCHEL, *supra* note 13, at 348-49; Jerome 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 Ann Fennell notes, the Court has thereby, and unwittingly, taken a stick out of property owners' bundle of rights. See Fennell, *supra* note 13, 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 could have instead 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 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 too constitutes a form of government rent-seeking that results in overregulation.

<sup>245</sup> Been, *supra* note 13, at 544 (noting that "the remedy for the harm may be more costly than the value of preventing the harm," and using hypothetical example of shade thrown by tall office building onto public park as a negative impact that cannot be effectively mitigated).

<sup>246</sup> Kayden, *supra* note 244, at 48; William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101, 105 (1987). *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 33, at 302; FISCHEL, *supra* note 13, 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 in order to maximize each other's benefits, especially where mitigation will be expensive and imperfect. See Fischel, *supra*, at 109.

<sup>247</sup> See Fennell, *supra* note 13, at 31; Fischel, *supra* note 246, at 101-05.

that would require or even accept amenity that lacks an essential nexus runs the risk of facing a property owner's challenge under *Nollan*.<sup>248</sup> Finally, jurisdictions that have failed adequately to force internalization of earlier developments may experience a political backlash against growth due to adverse transportation, environmental, school, or recreational conditions. With existing capital facility deficits, local governments may not wish to approve projects that only internalize their new harms.<sup>249</sup>

In sum, the risk-averse jurisdiction that might otherwise be willing to bargain to an approval is likely to deny a proposal that threatens to create harms. To the extent that property owners would be willing to agree to exactions that fail the logic and metrics of *Nollan* and *Dolan*, the Court's efforts to protect property rights ultimately lead local governments to overregulate and diminish owners' ability to develop their property.<sup>250</sup>

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<sup>248</sup> To illustrate this dynamic, consider the facts of *Nollan*. The Court held that the Coastal Commission could not permissibly require the lateral beach easement, but noted in dicta that the Commission could permissibly deny the application or require dedication of a public viewing spot. (Whether such a viewing spot would pass constitutional muster under *Dolan*'s proportionality test is a separate issue.) 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, is more burdensome and intrusive to the property owners, and less appealing to the community, than the beach easement. If the Commission fears that by even suggesting the beach easement it will be liable for a constitutional challenge, it is more likely to deny the permit, leaving both parties worse off. See Kayden, *supra* note 244, at 47-48; Dana, *supra* note 13, at 1277-82 (providing examples that demonstrate the potential inefficiency of nexus and proportionality); Fennell, *supra* note 13, at 31. Although *Dolan*'s quantitative metric might provide protection for property owners, *Nollan* has blocked mutually beneficial bargaining by imposing a qualitative logic.

<sup>249</sup> See Dahlstrom, *supra* note 200, at 568.

<sup>250</sup> This is not to say 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 free-wheeling 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 13, 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).

### C. Result 3: No Effect, Due to Non-Compliance.

Finally, in some instances and in some jurisdictions, bargains may simply take place outside the constitutional parameters set by *Nollan* and *Dolan*. Local governments may be willing to risk litigation in order to impose exactions that exceed constitutional limitations. This is a likely result when there is strong political will for strict land use regulation. It will also occur when a local government and a property owner sufficiently trust each other and 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.<sup>251</sup> It may be easier and faster for the property owner simply to agree to the exaction in order to receive the offered entitlement. In either instance, *Nollan* and *Dolan* will have failed to curb the over-regulation they were intended to stop.

Sufficient trust is especially likely between parties that repeatedly transact business with each other. “Repeat playing” developers who expect to interact again with the local government or hope to avoid a reputation of being litigious among local governments within a region are likely to be willing to waive their constitutional claims to obtain fast approvals and cultivate a long-term relationship with the local government.<sup>252</sup> New entrants into a local or regional property development market may lack such an established relationship with regulators and, for that very reason, may not be offered non-compliant exactions. This dynamic would adversely affect the competitiveness of the local land development industry and the quality and price of products offered.

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<sup>251</sup> 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 37, 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).

<sup>252</sup> Dana, *supra* note 13, at 1294-99; cf. Crew, *supra* note 54, at 50-55 (noting potential for abuse of development agreements by developers who shut out competing property owners by purchasing vested rights).



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Thus, even if we assume that *Nollan* and *Dolan* would successfully protect the most vulnerable small property owners (like the plaintiffs in those cases) from extortionate overregulation, the decisions fail to impose standard, universal protection sufficient to achieve the Court's stated goals. In too many of the likely scenarios in which governments impose exactions, *Nollan* and *Dolan* fail to protect or over-protect property rights and help cause inefficient and unfair regulation. The Court's effort to formalize judicial review and establish uniform protections leave property owners, existing residents, and insufficiently protected environmental resources vulnerable to regulatory approaches skewed in response to *Nollan* and *Dolan*. The Court's efforts will not necessarily improve the bottom lines and results of exactions, and may in some instances actually impede better, more flexible concessions.

#### **V. Takings Formalism and the Narrowing of Local Governance and Property Relations.**

Part IV considered the effects of *Nollan* and *Dolan* on the substantive exactions local governments impose. This Part focuses on the decisions' effects on *how* local governments consider and impose those exactions. The Court's strong emphasis on individual rights and secondary emphasis on utilitarian conceptions of regulatory efficiency fail to consider competing and conflicting conceptions of local government and property as requiring and enabling political and social relationships with others in a broader community.<sup>253</sup> Takings formalism and regulatory formulas limit the political ground upon which affected parties activate democratic institutions and processes by voicing their claims, and frustrates the role that the social embeddedness of property ownership plays in establishing community and a sense of social

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<sup>253</sup> 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)

propriety. As inherently political and administrative means of flexibly resolving land use disputes, exactions offer especially promising means of enabling legitimate and effective means of responding to proposed development.

This Part elaborates on what is lost as a result of takings formalism and regulatory formulas by focusing on land use's place within local politics and on exactions an open-ended, flexible means of achieving a political and administrative compromise to the disputes that arise over development. Although some communities might choose rights-based and utilitarian approaches to resolve development issues, others might choose otherwise and be better served by seeking more inclusive means of debating and collectively resolving land use disputes than through regulatory formulas. But the Court's rule-like command puts communities that would prefer more open-ended political and negotiated processes at risk of liability for compensation if their resulting exactions fail to meet *Nollan* and *Dolan*'s criteria.

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

In *Nollan* and *Dolan*, 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 the proceedings leading to the exaction, or the long-term relationship among community members.<sup>254</sup> 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

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<sup>254</sup> See Dagan, *supra* note 157, 774-78; Michelman, *supra* note 109, at 1248. Both of these elements—context and relationship—would be considered under the *Penn Central*'s test consideration of whether the regulation relates to “promotion of the general welfare” and provides an “average reciprocity of advantage” to all affected property owners. *Penn Central*, 438 U.S. at 124.

whether the resulting bargain meets the Court’s logic and metrics.<sup>255</sup> Accordingly, those regulatory means of meeting the constitutionally required logic and metrics—preconstituted formulas that either avoid or are more likely to meet *Nollan* and *Dolan*’s tests—are inevitably safer and more attractive for local governments than an open-ended political contest with attendant political compromises.

The Court has thereby chosen to ignore the extent to which open-ended land use regulatory processes may enable a more robust, legitimate, and inclusive local politics, one that may yield substantively better resolutions to complicated and intractable local disputes than abstract, preconstituted formulas.<sup>256</sup> Local land use conflicts, and decisions about the distribution of land use entitlements and the costs of development, are inherently and deeply political. As such, democratic decision-making may not only be helpful or beneficial, but 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 government, they play an important function in identifying and allowing contest over issues of local importance.<sup>257</sup> In

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<sup>255</sup> State law may impose procedural due process requirements that affected parties be afforded notice and opportunity to be heard. *See, e.g.*, N.J. Stat. Ann. § 40:55D-12 (requiring notice to neighboring property owners of public hearings concerning certain planning and zoning decisions); *Horn v. County of Ventura*, 596 P.2d 1134, 1141 (Cal. 1979) (applying federal due process standards to evaluate adequacy of notice to adjoining landowners); *see also* J.R. Kemper, *Construction 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).

<sup>256</sup> *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.”).

<sup>257</sup> 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. 1059, 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 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 like *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).

allowing political contest, they may increase the loyalty of residents who would consider themselves part of a responsive and open political community.<sup>258</sup>

An exactions process that avoids the inevitably political questions about trade-offs between property owners and the community merely frustrates citizens' desires to become more involved in land use decisions, thereby contributing to a sense of disillusionment and demoralization regarding public life.<sup>259</sup> This frustration may develop among neighbors and environmentalists opposed to a project, as well as among property owners and developers who would prefer to engage in political horse-trading and creative bargaining through exactions rather than face outright denials of development rights. When political participation in land use decisions is defined by the demand that decisionmakers deny a project because no negotiation is possible, limits on exactions as a political solution may lead disputants to overcommit to an absolute political position.<sup>260</sup> As Albert Hirschman has noted, absolute political battles in which participants enter with an uncompromising dedication to a single issue tend to produce in the battles' losers a sense of deep disappointment.<sup>261</sup> And when government's failure to consider and represent constituent concerns seems institutionalized, and the affective, financial, and time

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<sup>258</sup> See HIRSCHMAN, *supra* note 146, 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 not only opportunities 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.

<sup>259</sup> See Carlson & Pollak, *supra* note 45, 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 in finding a taking. See Michelman, *supra* note 109, at 1214-17; cf. Poirier, *supra* note 14, 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. *Id.* at 1214.

<sup>260</sup> ALBERT O. HIRSCHMAN, SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION 119 (1982).

<sup>261</sup> *Id.* at 104-05, 111.

commitments community members make to the regulatory process bring forth no return to the community and to property owners, the resulting disappointment will lead to a retreat from public life.<sup>262</sup> In this context, administrative efficiency substitutes for and suppresses political and social activity.

Disabling political contest over exactions thus also has wider effects on democratic politics. Land use decisions are both an essential aspect of contemporary local American governance and an excellent opportunity for individual stakeholders to seek political and social involvement in an accessible set of institutions.<sup>263</sup> Community members' participation in the land use process at least demonstrates a level of engagement often lacking in contemporary federal and state politics.<sup>264</sup> Land use politics is, in this sense, a gateway to political activism for environmental and property-rights activism, as well as for interest in larger political issues for the less active but still engaged participant. Withdrawing or limiting exactions as an outlet for political debate and compromise may therefore affect not only 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.<sup>265</sup> *Nollan* and *Dolan*'s constitutional rule and

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<sup>262</sup> HIRSCHMAN, *supra* note 260, at 79-80, 93, 102, 129.

<sup>263</sup> See Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1075 (1990).

<sup>264</sup> 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, to political engagement in localized NIMBY and land use political battles); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 344-46 (2000) (arguing that citizens' civic engagement in land use disputes and responses by local government are likely to raise social capital).

<sup>265</sup> Michelman, *supra* note 236, at 1110.

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—insulate property from political decision-making and see political disputes over property rights as dangers to avoid rather than as an integrative process for democracy and individual rights.<sup>266</sup> 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.<sup>267</sup> The same is true for an equally narrow concern with allocative efficiency that instantiates as a primary regulatory model the pursuit of abstract utilitarian consequences, which are identified and measured by distant, rational experts.<sup>268</sup>

Political contest certainly is not immune to failure or unfairness. In some contexts, democratic decision-making may be dangerous and inefficient. Political decision-making

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<sup>266</sup> NEDELSKY, *supra* note 118, 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, non-local levels of government, which are more likely to result in the construction of reproducible, homogenous space).

<sup>267</sup> *See* James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000).

<sup>268</sup> *See* CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 95-96 (2000); *see also* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 22-23 (1999) (challenging the role of experts and an unelected bureaucracy making decisions essential to local democratic legitimacy and process); JOSEPH R. DESJARDINS, ENVIRONMENTAL ETHICS: AN INTRODUCTION TO ENVIRONMENTAL PHILOSOPHY 4-5 (1993) (challenging role of technical experts as sole or primary decisionmakers in solving environmental problems); *but cf.* Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002) (arguing for 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 that, in Stanley Fish's words, "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* note 268, 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).

processes may allow the eruption of intense conflict between factions and individuals that disrupts and even destroys existing social ties and networks. Participants' interests in disputes may be parochial, even inequitable and exclusionary. But such conflict may itself be an important means by which a locality or region identifies especially significant issues it must face rather than suppress, and will thereby force decision-makers and interested parties to manage current and future disputes.<sup>269</sup> 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.

Nor does privileging political contest require excluding formulaic, instrumental methods where they are appropriate. Such methods can solve specific disputes or aspects of disputes, especially in those instances 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 of the capture of the decision-maker by development interests. Legislatively imposed exaction formulas also provide a level of cost certainty and administrative efficiency that individualized exactions and complex negotiations, by definition, do not.

Nevertheless, dispute is at the core of politics, and political contest is an important means to resolve that dispute where the local political context would allow the contest to take place fairly and inclusively.<sup>270</sup> 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,

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<sup>269</sup> See ALBERT O. HIRSCHMAN, *Social Conflicts as Pillars of Market Societies*, in *A PROPENSITY TO SELF-SUBVERSION* 231, 241-43 (1995).

<sup>270</sup> See Christopher H. Schroeder, *Deliberative Democracy's Attempt to Turn Politics into Law*, 65 *LAW & CONTEMP. PROB.* 95, 123-24 (2002).

and openness that might be found in the deal-making of political compromise.<sup>271</sup> Politics “consists of practices of settlement *and* unsettlement, of disruption *and* administration, of extraordinary events or foundings *and* mundane maintenances”<sup>272</sup>—it consists, that is, of the ebb and flow of political dispute.<sup>273</sup> To rely merely on formal rules and regulatory formulas is to lose the distinctive characteristic of local land use regulatory processes. These processes include a “web of community understandings—sometimes highly idiosyncratic—about the way things ought to be done,”<sup>274</sup> and are constituted as well by the idiosyncrasies and peculiarities of local public life, which may attract or repel residents and should, assuming no abrupt changes in those particularities, allow those who are repelled to exit.<sup>275</sup> Formulaic rules 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 numerical harms and costs.<sup>276</sup> And they ultimately undervalue the creative possibilities of political compromise and overvalue a promised haven from democratic contest, unfairness, and inefficiencies through expertise and the judicial protection of pre-political rights.<sup>277</sup>

## **B. Takings Formalism and Local Dispute Resolution.**

Exactions can play a mediating role in the land development process. They can enable

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<sup>271</sup> BARBARA CRUIKSHANK, *THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS* 2-4 (1999); HIRSCHMAN, *supra* note 146, at 15-17, 124.

<sup>272</sup> BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 205 (1993); *see also* MOUFFE, *supra* note 268, at 99-105 (advocating political institutions that enable a vibrant contest of democratic political positions that make room for dissent, do not guarantee particular results in advance, and invite a pluralism of voices).

<sup>273</sup> *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 eds., 2001) (arguing against the control of “democratic spontaneity” by tight sets of “moral principles, constitutional rules, corporate dictates, or normative codes”).

<sup>274</sup> Rose, *supra* note 148, at 95.

<sup>275</sup> *Id.* at 96-98, 101.

<sup>276</sup> Lisa Heinzerling, *Pragmatists and Environmentalists*, 113 *HARV. L. REV.* 1421, 1435, 1446 (2000) (reviewing DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (1999)).

<sup>277</sup> F.R. ANKERSMIT, *POLITICAL REPRESENTATION* 197-210 (2002).



interested parties to trade entitlements in pursuit of mutually beneficial results, and help bring about community-based resolutions of contested land use disputes. Indeed, individualized exactions' value in allowing negotiated dispute resolutions is the necessary correlative to the political value of allowing dispute in land use decision-making.<sup>278</sup> In her influential work on the “planning and dealing” of land use decisions, Carol Rose has argued that compromises arising out of the political contests described in the previous section play important roles within communities—they allow resolution of the disputes that arise when a property owner seeks to intensify the use of her land. The bargaining over individualized exactions, she argues, is consistent with the open norms necessary to successful mediation. It provides “an appropriate solution” that may not offer “a single answer complying with fixed standards, but rather a mix of accommodations.”<sup>279</sup> Whether overseen by the local government, or by the judiciary,<sup>280</sup> an ADR professional,<sup>281</sup> or an independent local official,<sup>282</sup> a negotiation process may be especially important and successful in local land use disputes where situated disputants have ongoing relationships and where a limited universe of interested parties might enable all or a majority to reach some form of consensus as to the terms of an agreement.<sup>283</sup>

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<sup>278</sup> See HIRSCHMAN, *supra* note 269, at 243 (noting the significance of social conflict in requiring both bargaining and arguing in order to reach effective resolution).

<sup>279</sup> Rose, *supra* note 24, at 889-92.

<sup>280</sup> 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 its duty to enforce existing law without fully explaining its motives in reaching the agreement during or after the process).

<sup>281</sup> 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).

<sup>282</sup> See Ryan, *supra* note 37, at 386-88 (proposing a “third-party deputy” distinct from the property owner and decision-making authority to oversee mediation).

<sup>283</sup> See WILLIAM FULTON, REACHING CONSENSUS IN LAND-USE NEGOTIATIONS 12 (American Planning Association Planning Advisory Service Report No. 417, 1989) (explaining that seemingly small disputes over land development

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 ultimate agreement to allow development.<sup>284</sup> The resolution may also be substantively better to the extent that the sides are able to communicate information about the proposal as well as 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.<sup>285</sup> A negotiated resolution may also be more secure in the future. When an unforeseen event or impact arises, a prior negotiated resolution among repeat players in a land use game with long-term relationships—such as developers, local governments, and political majorities—may better lend itself to inexpensive non-legal adjustments in a good faith effort to preserve an ongoing consensus. By contrast, when new events or impacts call into question decisions that had been judicially or administratively imposed, landowners are more likely to consider the prior result as declaring a binding entitlement, and community-members are more like to litigate than to negotiate as a result.<sup>286</sup> Negotiated solutions are also generally

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can escalate into large political struggles if they are inadequately or insufficiently resolved through negotiations among the parties).

<sup>284</sup> Deakin, *supra* note 40, at 108; *cf.* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 110 (2000) (explaining “legitimacy benefit” of negotiated environmental rulemaking); Richard H. Cowart, *Negotiating Exactions through Development Agreements*, in PRIVATE SUPPLY OF PUBLIC SERVICES, *supra* note 40, 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).

<sup>285</sup> See KOMESAR, *supra* note 149, at 139; Freeman & Langbein, *supra* note 284, 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. 139 (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).

<sup>286</sup> KOMESAR, *supra* note 149, at 139 (citing Stewart Macaulay, *Noncontractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963)).

less expensive and more amicable than litigation and administrative appeals over complicated and contentious legal and factual issues.<sup>287</sup>

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.<sup>288</sup> For Rose, muddy rules (or standards) characterize a recurring tendency within doctrinal cycles to shift towards “fuzzy, ambiguous rules of decision” and away from clear, crystal rules (only, at other times, to shift back again).<sup>289</sup> A benefit of vague and open-ended mud rules, Rose argues, is their mimicry of negotiations and communication within long-term, situated relationships and a constituted community.<sup>290</sup> And 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.<sup>291</sup> 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 decisionmaking and dispute resolution do not work under certain circumstances<sup>292</sup> and may not in practice be as inclusive and participatory as they appear in

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<sup>287</sup> See Wegner, *supra* note 29, at 960.

<sup>288</sup> See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

<sup>289</sup> See *id.* at 578.

<sup>290</sup> See *id.* at 602-03; see also Radin, *supra* note 12, 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”).

<sup>291</sup> Poirier, *supra* note 14, at 190-91.

<sup>292</sup> See SUSSKIND, *supra* note 281, at 23 (concluding, based on survey of participants in 100 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 the mediation process, and one or more parties to the dispute are more 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).

theory.<sup>293</sup> Certain communities at certain moments may lack the willingness, ability, and information to negotiate fairly, inclusively, and in good faith. When this occurs, property owners or the larger community may agree, or be forced 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. But to the extent that *Nollan* and *Dolan* and their consequences heighten the risk of takings liability for negotiated solutions and shrink the universe of potential negotiating points by limiting the scope and quantity of entitlements governments can require and accept, they may frustrate efforts to utilize bargaining and negotiation to mediate land use disputes within the specific context of the affected parties.<sup>294</sup>

Parallel to the wider political benefits of allowing greater political contest in land use decisions,<sup>295</sup> enabling more negotiated settlements to those disputes has wider benefits to the social conception of property and property rights. By enabling 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<sup>296</sup> and what Laura Underkuffler has described as the historically significant “comprehensive” approach to property in American law.<sup>297</sup> Rather than mere preference satisfaction or utilitarian consequentialism, the “proprietary” version of property emphasizes responsibility and

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<sup>293</sup> 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 expensive 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 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).

<sup>294</sup> See LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 87 (1987) (noting importance of trading entitlements, rather than merely seeking compromise, in resolving disputes).

<sup>295</sup> See *supra* notes 263-264 and accompanying text.

<sup>296</sup> Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 NOMOS 223 (1994).

<sup>297</sup> Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 133-42 (1990).

trusteeship both by the property owner and the community within which the owner is socially located. Rose finds in modern takings law's flexible, ad hoc balancing of private loss and public benefit the echoes of this conception of property.<sup>298</sup> And rather than an individualist conception of the exercise and realization of property rights, Underkuffler's comprehensive approach conceptualizes property as including a "a broad range of human liberties understood within a collective context of both support and restraint."<sup>299</sup> 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

If Justice Scalia's suspicion that courts and local governments are knowingly and widely disobeying the Court's takings rules is valid; and if local governments, property owners, and/ or third parties are dissatisfied with an increasingly formalized and formulaic development process; and if the systematic under- and overregulation of land use has led in some areas to environmental and infrastructural regulation and in other areas to underutilization of developable land, then, this Article has argued, the culprit may be *Nollan* and *Dolan*'s takings formalism. Protecting individual property owners from the vagaries of political majorities and regulatory transitions is clearly an essential purpose of contemporary judicial review under the Takings Clause. But the excessive leverage that *Nollan* and *Dolan*'s protective commands provide for all property owners—which protect them even, in some instances, from bargains they would

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<sup>298</sup> See Rose, *supra* note 296, at 239-40. Others have made similar arguments about the dual nature of American conceptions of property. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997); Kevin Gray, *Equitable Property*, 47 *CURRENT LEGAL PROBS.* 157, 208-09 (1994); William H. Simon, *Social-Republican Property*, 38 *UCLA L. REV.* 1335 (1991); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149, 150 (1981) (describing property as "an interdependent network of competing uses" and rejecting conception of individual parcels and rights as "a number of independent and isolated entities").

<sup>299</sup> Underkuffler, *supra* note 297, at 140-41; see also ALAN RYAN, *PROPERTY* 35-48 (1987) (describing the mixture of private ownership and public control in modern conceptions of liberty).

willingly make—not only demonstrates the commands’ overinclusivity, but also threatens the political, social, environmental, and economic benefits that land use regulation and local government offer. Takings rules seek to limit the unruly, particularistic, politicized sites of land use law. As a general matter, judicial and administrative noncompliance and frustration with essential nexus and rough proportionality requirements is not caused by the systematic resistance of ideological courts and local governments. Rather, this noncompliance and frustration demonstrates the complicated dynamics of locality operating in the shadows of takings formalism.