

## FAILED EXACTIONS

Mark Fenster<sup>\*†</sup>

### INTRODUCTION

This Article considers the doctrinal quandary created by “failed exactions”—regulatory conditions on property development that government agencies contemplate but that are never finalized or enforced. In *Nollan v. California Coastal Commission*<sup>1</sup> and *Dolan v. City of Tigard*,<sup>2</sup> the Supreme Court provided a quantitative and qualitative framework for judicial review under the Takings Clause of conditions that government agencies attach to approvals of a property owner’s application to intensify land use.<sup>3</sup> Reaffirmed most recently in *Lingle v. Chevron U.S.A. Inc.*,<sup>4</sup> *Nollan* and *Dolan* both blessed and limited these so-called land use “exactions.” The Court established two standards for lower courts to apply when deciding whether an individual condition takes private property without just compensation. Under *Nollan* and *Dolan*, agencies must demonstrate that a condition bears an “essential nexus”<sup>5</sup> and has a “rough proportionality”<sup>6</sup> to the impact the condition intends to address. Considerably more rigorous than the deferential review established in *Penn Central*<sup>7</sup> for takings challenges to most regulatory acts, *Nollan* and *Dolan*’s intermediate scrutiny is considerably less rigorous than the strict scrutiny that courts apply to certain limited categories of regulatory acts.

The most significant legal question that failed exactions raise is whether *Nollan* and *Dolan*’s intermediate scrutiny applies to them. Given exactions’ prevalence in land use regulation,<sup>8</sup> the issue’s resolution could

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\* Samuel T. Dell Research Scholar, Levin College of Law, University of Florida. The author collaborated on an amicus brief representing the Florida Leagues of Cities and Counties before the Florida Supreme Court in a case discussed extensively below; this Article, however, represents only my views.

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

2. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

3. Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Context of Exactions*, 58 HASTINGS L.J. 729, 741–43 (2007) [hereinafter Fenster, *Regulating Land Use in a Constitutional Shadow*].

4. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

5. *Nollan*, 483 U.S. at 835.

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

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

8. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 9.9, at 345 (2d ed. 2007) (“An ever increasing number of local governments—even those without full scale growth management programs—have adopted policies and

have significant effects on court dockets and regulatory practice. Unfortunately, current law provides no clear path to resolution because *Nollan* and *Dolan* do not present a clear, comprehensive definition of an exaction. Two central questions have repeatedly divided courts and commentators about *Nollan* and *Dolan*'s reach: first, whether a monetary condition (typically referred to as an "impact fee") is an exaction subject to *Nollan* and *Dolan*; and second, whether a broadly applicable, legislated condition (as opposed to an individualized one) receives intermediate scrutiny.<sup>9</sup> The failed exaction issue has received much less attention.<sup>10</sup> This is likely because in the vast majority of cases—including *Nollan* and *Dolan*<sup>11</sup>—the regulatory agency whose conditional approval faces intermediate scrutiny has completed its administrative process and attached an identifiable condition to an approved permit or other entitlement. This condition serves as the basis for local and state administrative review,<sup>12</sup> judicial review under *Nollan* and *Dolan*,<sup>13</sup> as well as the determination of a compensation remedy under the Takings Clause.<sup>14</sup>

A decade ago, the issue of whether *Nollan* and *Dolan* applied to failed exactions reached the Supreme Court in a petition for certiorari from the denial of which Justice Scalia dissented. Joined by Justices Kennedy and Thomas, Scalia somewhat tentatively stated that an extortionate demand could, and perhaps should, trigger review under *Nollan* and *Dolan*, even if the demand is not made part of an agency's final approval of a regulatory entitlement.<sup>15</sup> At the same time, he also conceded that it is "far from clear" whether conditions that are never attached to a permit can effect a taking of property under *Nollan* and *Dolan*.<sup>16</sup> Both before and after Justice Scalia's ruminations, courts have struggled with this question. As the recent Florida Supreme Court decision in *St. Johns Water Management District v. Koontz*

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programs designed to make new development and not existing residents bear the cost of new capital improvements . . . necessitated by the new development.").

9. See generally Fenster, *Regulating Land Use in a Constitutional Shadow*, *supra* note 3, at 744–45 (summarizing issues); Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277, 287–89 (2011) (providing comprehensive literature and case law review).

10. I previously identified this unresolved issue in Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 639–42 (2004) [hereinafter Fenster, *Takings Formalism*]. An excellent recent discussion of the issue is Mulvaney, *supra* note 9.

11. See *infra* Part II.

12. See *infra* Part IV.D.

13. See *infra* Part IV.A.

14. See *infra* Part IV.B.

15. *Lambert v. City & Cnty. of San Francisco*, 529 U.S. 1045, 1047 (2000) (Scalia, J., dissenting from denial of certiorari).

16. *Lambert v. City & Cnty. of San Francisco*, 67 Cal. Rptr. 2d 562 (Cal. App. 1997), *review granted*, 71 Cal. Rptr. 2d 215 (Cal. 1998), *appeal dismissed*, 87 Cal. Rptr. 2d 412 (Cal. 1999), *cert. denied*, 529 U.S. at 1047 (Scalia, J., dissenting).

reveals, judicial effort to put the unruly peg of an unenforced condition into the narrowly defined hole that *Nollan* and *Dolan* established creates an excess of confusion, perhaps beyond even that which Justice Scalia intuited would accompany such an inquiry.<sup>17</sup> In reversing a lower court decision, the Florida Supreme Court clarified the law yet failed to provide a thorough or exceptionally clear explanation for its holding.<sup>18</sup> Justice Scalia's challenge thus still stands at the ready for other courts who might sympathize with vulnerable landowners being exploited by extortionate government agencies.

This Article identifies the doctrinal, remedial, procedural, and consequential dangers of any effort to apply *Nollan* and *Dolan*'s constitutional tests for failed exactions. When viewed in light of *Lingle* and the Fifth Amendment, *Nollan* and *Dolan*'s tests and remedy only make sense when a discernible, identified interest in property is in fact taken following the completion of an administrative process. The simple threat of possible extortion may warrant federal constitutional remedy and remedies from other sources of law, but it does not justify a remedy under the Takings Clause, in which the exclusive remedy is inappropriate and irrelevant to a failed exaction challenge. To extend *Nollan* and *Dolan* backwards in the regulatory process would stifle the reasonably functional, albeit imperfect and second-best universe of land use regulations and processes that have developed in a post-*Euclid* world.<sup>19</sup>

Because of the issue's administrative and factual complexity, I begin in Part I with a stylized hypothetical example of when and how failed exactions arise, based loosely on the facts in *Koontz*. Part II briefly lays out the legal and administrative context for *Nollan* and *Dolan*, including an account of both decisions and the Court's restatement of them more recently in *Lingle*. Part III summarizes the existing case law on failed exactions. Finally, Part IV argues why *Nollan* and *Dolan* cannot apply to non-finalized, failed exactions, and identifies other legal means to check extortionate threats by government agencies.

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17. *St. Johns River Water Mgmt. Dist. v. Koontz (Koontz IV)*, No. SC09-713 (Fla. Nov. 3, 2011), available at <http://www.floridasupremecourt.org/decisions/2011/sc09-713.pdf>.

18. *Id.* at 3.

19. By characterizing land use regulation as imperfect and second-best, I build on an insight that Neal Komesar developed more than three decades ago, in which he modeled various institutional approaches to handling land use externalities disputes and illustrated how two potentially perfect models—private behavior with a judicial backstop under nuisance law and an omniscient (and omnipotent) dictator—prove impossible to implement. See Neal K. Komesar, *Housing, Zoning, and the Public Interest*, in *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 218, 219–23 (Burton A. Weisbrod et al. eds., 1978).

## I. HOW AND WHEN EXACTIONS FAIL

To understand how exactions fail and what is at stake in the judicial review of their failure, consider the following hypothetical.

Having noticed increased development in the area surrounding the property that she owns in the City of Bishop, Audrey wants to improve her currently undeveloped land to make it viable for commercial use. To do so, she needs the approval of a panoply of agencies that regulate the effects that property owners' development are likely to have on, among other things, the traffic, schools, floodplains, and animal habitat in the neighboring area and throughout Bishop. Bishop's relevant regulatory agencies enjoy the authority, delegated by state constitution and statute as well as by municipal charter and ordinance, to deny property owners' applications and require owners to mitigate the anticipated effects of their development as a condition of receiving necessary regulatory approvals. Such conditions might include fees, the dedication of property or the permanent restriction of its use, the building and contribution of infrastructure for the public use, or some combination thereof. These requirements, called "exactions," may be calculated with relative precision based on one or more factors, such as: the proposed footprint; number and size of residential units; type of commercial development; the current conditions of the property and its surroundings; and the estimated impact that the use of the development and the structures themselves may have. However, both the mitigation measures and their effects are often difficult to calculate, and different measures might meet the same goals. As a result, agencies can be flexible in what they are willing to accept in exchange for a regulatory approval.

Let us assume that Audrey has retained some flexibility in her plans and that she is not entirely settled on precisely how much of her property she will improve and where on her property she will build. Let us assume, too, that one agency from which she must receive a permit, the Bishop Water Management District (BWMD), has concluded that a variety of mitigation measures would satisfy its concern about the effects Audrey's development project might have on the surrounding floodplain and riparian habitat. In such a situation, it might behoove both Audrey and BWMD to discuss their individual positions: for Audrey, her willingness and ability to pay mitigation fees, dedicate land, or limit the size of her development; for BWMD, its concerns about the project and the regulatory options it is willing to accept. Such initial discussions might lead to an agreement that would result in one or more conditions of an acceptable type and quantity for both parties. Audrey would agree to a certain package of mitigation measures in exchange for a required approval—a result that might be

superior to a flat denial of her permit application.<sup>20</sup> The agency might also prefer this negotiated agreement because it meets the agency's regulatory goals while limiting or eliminating the risk and cost of litigation that might follow a permit denial or a unilaterally imposed condition.

Audrey's story illustrates a number of characteristics of contemporary land use regulation. Because each regulated parcel has unique features, property owners make distinct, individualized development decisions, and agencies often prefer to enforce their regulations in an individualized manner. Numerous agencies, operating at different levels (federal, state, regional, and local) with authority over different aspects of a development, are typically granted broad regulatory authority over land development. These agencies seek to exercise their authority with the utmost discretion, and often do so with the vocal support of existing residents. This is especially true of the owners of affected neighboring property who are most likely to engage in the regulatory and local political process that can check and direct regulatory enforcement. Although she would undoubtedly prefer to face only an ex post threat of nuisance litigation as a limit to her property development, Audrey must contend with the existing regulatory and political environment that prevails in Bishop—one that, in this hypothetical, provides BWMD with the regulatory authority and political will to impose exactions on her development.

Nevertheless, she might attempt to challenge the exactions. Imagine two alternative scenarios in which this might occur. First, suppose that Audrey is so upset at the *very idea* of being forced to conduct and pay for the mitigation that the agency requires—mitigation that the agency considers in good faith but has not yet formalized—that she rejects the agency's reasonable proposal. In response, the agency denies Audrey's permit application. Alternatively, suppose that the agency engages in an unreasonable, extortionate effort that would require Audrey to spend significantly more money and deed or restrict the use of significantly more land than is required to mitigate her proposal's effects. When she refuses, the agency denies her permit application. In either scenario, Audrey is likely to file suit.

What is the basis or grounds for her suit—that her permit application was denied or that she was being forced to accede to a condition to which she refused to agree? The way that a court poses that question—whether it reviews the claim as a constitutional challenge to a permit denial or an exaction—triggers different levels of judicial scrutiny under existing

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20. Assume for this example that a denial would leave value in Audrey's property—a likely result in most instances anyway—and that the BWMD would not be required to compensate Audrey under the *Penn Central* test.

Supreme Court tests in which the differences are likely to prove outcome-determinative.

## II. EXACTIONS AS A CONSTITUTIONAL CATEGORY

The vast academic literature on regulatory takings narrates, explains, and critiques the development of these differing standards of review for regulatory enforcement under the Takings Clause.<sup>21</sup> This Part broadly outlines exactions' place within the Supreme Court's scheme and logic. As the Court comprehensively restated in *Lingle*, the regulatory takings doctrine channels analysis into a small set of limited categories of regulatory effects; the level of judicial scrutiny that courts must apply in an individual case follows from the category into which the effects fall.<sup>22</sup> Two types of regulatory effects receive strict scrutiny and constitute "*per se* takings"<sup>23</sup>—those regulatory acts that deprive an owner of "*all* economically beneficial uses" of a fee interest in real property<sup>24</sup> and those regulatory acts that impose a permanent physical occupation of property.<sup>25</sup> In both instances, the Takings Clause requires the state to compensate the owner for the value of the taken property. If, however, the regulatory effect falls outside these two "relatively narrow"<sup>26</sup> categories, then the Court usually follows the "principal guidelines"<sup>27</sup> and default approach for resolving regulatory takings claims established in *Penn Central*.<sup>28</sup> The *Penn Central* balancing test defers to agencies by having courts balance "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."<sup>29</sup>

This schematic approach, the Supreme Court explained in *Lingle*, proceeds from a "common touchstone":

Each [category and inquiry] aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests

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21. See Mark Fenster, *Takings, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CON. L. 667 (2007) (reviewing some of the vast literature on regulatory takings).

22. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39, 548 (2005).

23. *Id.* at 538.

24. *Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003, 1019 (1992).

25. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

26. *Lingle*, 544 U.S. at 538.

27. *Id.* at 539.

28. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978).

29. *Lingle*, 544 U.S. at 540.

focuses directly upon the severity of the burden that government imposes upon private property rights.<sup>30</sup>

A complete diminution of all economically beneficial use places an absolute burden on an owner who can neither use nor alienate her property.<sup>31</sup> A permanent physical invasion “eviscerates” the right to exclude, which is “perhaps the most fundamental of all property interests.”<sup>32</sup> Finally, the *Penn Central* balancing test weighs the extent to which a regulation is so onerous as to approach confiscation.<sup>33</sup> In sum, to effect a regulatory taking, the impact of a challenged regulation must approximate the experience of condemnation, where a property owner loses all rights to and control over her property. The precise nature of how the regulation approximates confiscation dictates the manner and level of scrutiny a court will apply.

The exactions decisions constitute a narrow, unique category that operates, both factually and doctrinally, as a distinct inquiry that lies between the per se takings categories and the default balancing test.<sup>34</sup> By the 1980s, government agencies involved in urban and suburban planning regulation had grown increasingly dependent upon such conditions to supply needed infrastructure.<sup>35</sup> The Supreme Court’s development of federal constitutional limits to these conditions was a reaction to the vast array of circumstances that developed on the ground in local land use regulations.<sup>36</sup>

Land use conditions require a level of constitutional scrutiny distinct from command-and-control regulation. This is because the government can impose a land use condition in certain circumstances that, if imposed in isolation, would amount to a taking.<sup>37</sup> Such a taking would require no compensation if the exaction imposing the condition is qualitatively (via *Nollan*’s concern with “nexus”) and quantitatively (via *Dolan*’s concern

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30. *Id.* at 539.

31. *Id.* at 539–40.

32. *Id.*

33. *Id.*

34. *Id.* at 546 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 379–80 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 828 (1987)).

35. See generally Fenster, *Takings Formalism*, *supra* note 10, at 622–26 (summarizing the development of conditional land use regulation).

36. See generally Fenster, *Regulating Land Use in a Constitutional Shadow*, *supra* note 3, at 758–68 (describing differentiation in the approach to exactions among state legislatures, courts, and local governments).

37. *Id.* at 746.

with “proportionality”) related to the anticipated consequences of the regulatory approval.<sup>38</sup>

The Court has consistently repeated that *Nollan* and *Dolan*, in which the inquiries into regulatory reasons and reasonableness smack of constitutional due process, have never been extended “beyond the special context of . . . exactions.”<sup>39</sup> In *Lingle*, a unanimous Court emphasized this caveat about its exactions decisions, expelling from regulatory takings doctrine the suggestion made in *Agins v. City of Tiburon* that courts may consider whether a regulation will “substantially advance legitimate state interests” as part of a *Penn Central* balancing test.<sup>40</sup> Regulatory “nexus” and “proportionality” at minimum echo a substantive due process-type reasonableness inquiry.

Therefore, broad application of *Nollan* and *Dolan* to regulatory takings claims threatens to confuse regulatory takings and due process. Only by requiring an actual taking as a factual predicate to the challenged exaction could the Court cabin *Nollan* and *Dolan* to preserve its effort in *Lingle* to clarify regulatory takings jurisprudence.<sup>41</sup> If a Takings Clause challenge to a regulatory decision falls outside of the special context of exactions by lacking that factual predicate, a court must apply either strict scrutiny or the *Penn Central* balancing test.<sup>42</sup>

### III. EXISTING CASE LAW ON FAILED EXACTIONS

Do these exactions tests apply to failed exactions, and if so, how? A small number of courts have reviewed challenges to failed exactions brought under the Takings Clause. This Part considers four such examples, then concludes with a brief discussion of the range of responses to the issue and the difficulties that courts have encountered when applying *Nollan* and *Dolan* to failed exactions in an attempt to fashion a remedy for prevailing plaintiffs.

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38. *Lingle*, 544 U.S. at 546–47 (explaining *Nollan*’s “essential nexus” requirement and *Dolan*’s “rough proportionality” requirement).

39. *Id.* at 547 (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999)).

40. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). See generally *Lingle*, 544 U.S. at 540–43.

41. *Lingle*, 544 U.S. at 546–47.

42. *Id.* at 538.

*A. Koontz v. St. Johns Water Management District*

In *Koontz*, a property owner sought to develop part of a parcel located along a state road with commercial and residential property in its vicinity. To do so, Koontz needed to dredge and fill wetlands. However, because his property was located within a designated riparian habitat protection zone, he needed a permit from the St. Johns Water Management District.<sup>43</sup> Staff members from the District offered alternative mitigation measures, while Koontz offered a third, less costly one. Ultimately, the parties could not agree upon any particular mitigation scheme.<sup>44</sup> Numerous trial and appellate court decisions ensued. A first intermediate appellate decision overruled a trial court determination that Koontz's claim was not ripe, because he had not received a final determination about the condition that would attach to an approved permit.<sup>45</sup> On remand, the trial court applied *Nollan* and *Dolan* and found the District liable. This decision was affirmed by two intermediate appellate decisions: the first, in 2003, affirmed the trial court's order overturning the permit denial on the grounds that it was an unreasonable exercise of the police power under *Nollan*, *Dolan*, and *Agins*;<sup>46</sup> and the second, in 2009, affirmed the trial court's decision to award Respondent compensation for a temporary taking of his land for the period in which the permit was denied.<sup>47</sup>

The 2009 district court of appeal decision (*Koontz III*), which the Florida Supreme Court reversed two years later, illustrates how courts struggle to classify failed exactions. There, a three-judge panel issued three separate opinions. The majority and concurrence rested their decisions to affirm the trial court's application of *Nollan* and *Dolan* on their reading of precedent and on what they viewed as the District's unfair and extortionate treatment of the property owner. Both the majority and concurrence agreed, incorrectly,<sup>48</sup> that *Dolan* had extended the exactions decisions to instances in which no condition was attached to a permit approval.<sup>49</sup> Furthermore, both cited several additional decisions from other jurisdictions that they

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43. *Koontz IV*, No. SC09-713, slip op. at 5 (Fla. Nov. 3, 2011).

44. *Id.* at 5–6 (quoting *St. Johns River Water Mgmt. Dist. v. Koontz (Koontz II)*, 861 So. 2d 1267, 1269 (Fla. Dist. Ct. App. 2003) (Pleus, J., concurring specially)).

45. *Koontz v. St. Johns River Water Mgmt. Dist. (Koontz I)*, 720 So. 2d 560, 561–62 (Fla. Dist. Ct. App. 1998).

46. *Koontz II*, 861 So. 2d at 1268.

47. *St. Johns River Water Mgmt. Dist. v. Koontz (Koontz III)*, 5 So. 3d 8, 12 (Fla. Dist. Ct. App. 2009).

48. *See infra* Part IV.A.

49. *Koontz III*, 5 So. 3d at 11; *id.* at 14 (Orfinger, J., concurring).

claimed had applied *Nollan* and *Dolan* to failed exactions.<sup>50</sup> Although Judge Torpy's decision mentions the bargaining power that the District leveraged to force the property owner to agree to an unconstitutional condition,<sup>51</sup> Judge Orfinger's concurrence more strongly presents the protection-against-extortionate-demands rationale for applying *Nollan* and *Dolan* in cases like *Koontz III*.<sup>52</sup> He wrote:

As the instant case demonstrates, when the government has the absolute discretion to grant or deny a privilege or benefit, it still

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50. See *id.* at 11–12 (citing *Goss v. City of Little Rock (Goss I)*, 90 F.3d 306 (8th Cir. 1996); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004); *Salt Lake County v. Bd. of Educ.*, 808 P.2d 1056 (Utah 1991)). Only one of the cited cases concerns a failed exaction. In *Flower Mound*, a property owner sought approval to construct a residential subdivision. 135 S.W.3d at 622. The Town approved the development permit with an attached condition that required the property owner to rebuild an abutting road. *Id.* After exhausting all available administrative remedies, the property owner acquiesced to the condition and rebuilt the road. *Id.* at 624. The Town refused to reimburse any portion of the road renovation cost. *Id.* The property owner sued, alleging that the condition placed on the Town's regulatory approval amounted to a taking of property without just compensation in violation of the state and federal constitutions. *Id.* In *Parks*, property owners applied for a zoning change and the vacation of certain platted City streets across their property in order to increase land development. 716 F.2d at 649. The City required that a twenty-foot strip of property, containing ownership interests to two geothermal wells, be dedicated as a condition of the permit approval. *Id.* at 649–50. When property owners refused, the City voted to deny the vacation petition. *Id.* at 650. The Ninth Circuit held that the condition violated the Fifth Amendment since it required the dedication of the geothermal wells, which had “no rational relationship to any public purpose related to the vacation of the platted streets.” *Id.* at 653. However, *Parks* was decided before *Nollan* and *Dolan* and therefore could not have answered the question of whether those later decisions apply to a permit approval. In addition, *Parks* used terms and levels of scrutiny that the Court explicitly rejected in its later decisions and confused Due Process and Takings Clause analysis. *Id.* at 652 (requiring the condition to be “rationally related to the benefit conferred”); *id.* at 651 (requiring the plaintiff to show that “the City's condition . . . amount[s] to a taking of property without due process of law”). In *Lingle*, the Supreme Court forcefully rejected the approach taken in *Parks* that mixed the two constitutional doctrines indiscriminately. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) (declaring that a due process analysis “has no proper place in our takings jurisprudence”). The Florida Supreme Court had similarly and earlier warned against mixing the doctrines. See *Tampa-Hillsborough Cnty. Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 57 (Fla. 1994) (“[T]he analysis under due process is different from the analysis under just compensation.”). Perhaps most egregiously, *Salt Lake County*, 808 P.2d 1056 (Utah 1991), was decided solely on state law grounds and did not mention either *Nollan* or the Fifth Amendment. The issue addressed in *Salt Lake County* concerned the existence of a Utah state statute that exempted school districts from paying “local assessments for any purpose.” 808 P.2d at 1057. The County sought a declaratory judgment stating that the school district was not exempt from paying the drainage fee imposed by the county flood control ordinance. *Id.* at 1058. The school district claimed exemption under the statute alleging that the drainage fee was a type of “local assessment.” *Id.* The Supreme Court of Utah, without any mention of *Nollan* or the Fifth Amendment, held that the drainage fee was an impact fee and as such fell outside of the local assessment category. See *id.* at 1061. *Goss* in fact was a failed exactions decision and represents an exception that illustrates why it should be the rule that *Nollan* and *Dolan* do not apply to such regulatory acts. See *infra* Part III.B.

51. *Koontz III*, 5 So. 3d at 12 n.4 (characterizing the plaintiff as “an aggrieved property owner [forced] to accede to unconstitutional conditions to preserve his right to challenge the abusive practice”).

52. *Id.* at 14–15 (Orfinger, J., concurring).

may incur significant liability if, at the conclusion of the land use/development decision, it is found to have improperly pressured or coerced the landowner to give up or waive a constitutional right. And even more troubling, the potential for governmental liability may be just as likely if the government simply reaches a bit too far in the bargaining process. . . . The consequence of the government asking for a bit too much (but far short of extortion) is governmental liability for damages premised on the exactions theory.<sup>53</sup>

The *Koontz III* majority was appalled by what they viewed as the District's unreasonable pressure and coercion and held the District liable for a taking. The court awarded the plaintiff remedies that only awkwardly relate to the Fifth Amendment's textual remedy of compensation for the taken property: It invalidated the District's rejection of the property owner's permit application and ordered compensation based on the temporary taking of the property owner's land for the period in which the permit was denied.<sup>54</sup>

The Florida Supreme Court reversed the district court of appeal unanimously in two separate, quite different opinions (*Koontz IV*). The four-justice majority focused not on the reasonableness of the District's actions, but on the limited reach of *Nollan* and *Dolan* to exactions.<sup>55</sup> The *Koontz IV* majority held that *Nollan* and *Dolan* apply only to exactions conditioning permit approval upon a dedication of a landowner's interest in real property when the regulatory agency actually issued the permit containing such an exaction.<sup>56</sup> The majority asserted that this limited reading has two advantages over an approach that would have held the District liable. First, land use regulation would become "prohibitively expensive" if a property owner were allowed to file suit any time unsuccessful negotiations with the regulatory agency led to a permit denial.<sup>57</sup> Second, regulatory agencies would respond to the risk of large takings judgments by denying permits outright in order to shield themselves

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53. *Id.* at 14.

54. *Id.* at 10–11 (majority opinion); *Koontz II*, 861 So. 2d 1267, 1268 (Fla. Dist. Ct. App. 2003).

55. *Koontz IV*, No. SC09-713, slip op. at 18 (Fla. Nov. 3, 2011). ("[W]e are guided only by decisions in which the Supreme Court has expressly applied, or commented upon the scope of, exactions takings.")

56. *Id.* at 19. The court therefore overruled the lower court on the grounds both that *Nollan* and *Dolan* do not apply to failed exactions and only apply to conditions requiring the dedication of land. The latter grounds, the court does not explain in any detail. *See id.* at 9 (citing *Iowa Assurance Corp. v. City of Indianola*, 650 F.3d 1094, 1096–97 (8th Cir. 2011); *W. Linn Corporate Park, LLC v. City of W. Linn*, 428 F. App'x 700, 702 (9th Cir. 2011)) (justifying its decision based on recent decisions in two federal circuits).

57. *Id.* at 20.

from the hazard of liability that could result from negotiating and discussing potential alternatives with landowners seeking permit approval.<sup>58</sup>

The two-justice concurrence did not reach the regulatory takings issues.<sup>59</sup> Instead, it asserted that the property owner was required to exhaust all administrative remedies referenced in the applicable Florida statute before initiating the present regulatory takings action.<sup>60</sup> Refusing to reach the constitutional issues that the majority decided, the concurrence believed that the claim was unripe and thus not justiciable. Consequently, all of the justices agreed that the property owner could not seek his preferred remedy for failed negotiations from a court.

### B. *Goss v. City of Little Rock*

The Eighth Circuit in *Goss v. City of Little Rock* struggled to apply *Nollan* and *Dolan* to failed exactions.<sup>61</sup> In *Goss*, a property owner challenged the City of Little Rock's denial of a rezoning application as a regulatory taking after the owner refused to dedicate 22% of his 3.7 acre parcel of land for a highway extension, which the City had sought as a condition for approval.<sup>62</sup> Apparently viewing the petition as a challenge to the City's denial of a zoning application, the district court had initially dismissed the suit.<sup>63</sup> In the first appeal, the Eighth Circuit, with little explanation or reasoning, construed the complaint as stating a claim under *Nollan* and *Dolan* and remanded the case to the trial court for further consideration.<sup>64</sup> Reviewing the permit denial as a failed exaction to which the Supreme Court's exactions decisions applied, the district court held on remand that the dedication requirement effected a taking and ordered the City to rezone the property owner's land as commercial without attaching any such condition.<sup>65</sup> It found, however, that the property owner was not entitled to receive compensatory damages, punitive damages, or attorney's fees.<sup>66</sup>

Considering the case on appeal for a second time, the Eighth Circuit refused to reconsider the City's claim that the trial court should not have

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58. *Id.*

59. The exact lineup in *Koontz IV* was four votes in the majority, two with the concurrence, and one concurrence by a justice who did not join either opinion.

60. *Koontz IV*, No. SC09-713, slip op. at 22 (Polston, J., concurring) (citing FLA. STAT. § 373.617(2) (2002) (requiring initial administrative review of final agency action)).

61. See *Goss v. City of Little Rock (Goss II)*, 151 F.3d 861 (8th Cir. 1998).

62. *Id.* at 862.

63. *Goss I*, 90 F.3d 306, 307 (8th Cir. 1996).

64. *Id.* at 308–10.

65. *Goss II*, 151 F.3d at 862.

66. *Id.*

applied *Nollan* and *Dolan*—after all, the earlier appellate panel had ordered the trial court to apply the tests from those cases.<sup>67</sup> Instead, the panel in *Goss II* quickly affirmed the district court’s determination that a taking had occurred, holding that the condition was not roughly proportionate to the impact of the proposed zoning change.<sup>68</sup>

But faced with the problem of fashioning a remedy for the taking, the court reversed course. It overruled the district court’s order to rezone the property without the attached condition, concluding that the City had “a legitimate interest” in denying the rezoning application “outright.”<sup>69</sup> Therefore, the court held that the property owner was not entitled to compensation. “Little Rock was not legally required to rezone Goss’s property,” the court reasoned, and therefore could not be forced to pay the property owner compensation when the City was merely exercising its legitimate authority.<sup>70</sup> Despite disallowing a remedy, the court nevertheless awarded the property owner attorney’s fees.<sup>71</sup>

*Goss II* thus confronted the issue that the lower appellate court in *Koontz* simply ignored when it applied *Nollan* and *Dolan* to a failed exaction: how to award the Takings Clause’s remedy in a failed exaction case. Although it ultimately concluded that the City’s condition constituted a taking, the court was forced to concede that no remedy was available under the Fifth Amendment because no dedication actually occurred. The property owner suffered no damages that were cognizable under the Fifth Amendment. Thus, while a failed exaction apparently infringed upon a right, the Fifth Amendment provided no remedy. The owner could gain little more than “a purely Pyrrhic victory.”<sup>72</sup>

### C. William J. Jones Insurance Trust v. City of Fort Smith

Like in *Goss*, the U.S. district court in *Jones Insurance Trust* found that a failed exaction effected a taking.<sup>73</sup> The facts were quite simple: The property owner applied to the City of Fort Smith for permission to build a convenience store on the premises of a gasoline station that it already operated. City officials required the property owner to grant the City an expanded right-of-way along the relevant property to widen the adjoining

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67. *Id.* at 863 (holding that “the [City’s] argument that *Dolan* does not apply is foreclosed by our contrary decision in the previous appeal”).

68. *See id.*

69. *Id.* at 864 (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835–36 (1987)).

70. *Id.*

71. *Id.*

72. *Id.*

73. *William J. Jones Ins. Trust v. City of Fort Smith*, 731 F. Supp. 912 (W.D. Ark. 1990).

street. In response, the property owner filed suit under 42 U.S.C. § 1983 to enjoin the City from withholding permission until the property owner granted the condition.<sup>74</sup>

Displaying broad sympathy for the property owner—in no small part by including a wholly gratuitous footnote pointing readers to Richard Epstein’s “brilliantly sustained and intellectually unrelenting elaboration of the relationship between the Fifth Amendment and taxes” in his book *Takings*<sup>75</sup>—Judge Morris Arnold found that the condition, standing alone, constituted a taking.<sup>76</sup> Unlike the Eighth Circuit in *Goss II*, however, Judge Arnold incautiously offered the owner its requested remedy: an injunction “ordering the City to issue the requested permit unconditionally.”<sup>77</sup>

#### D. Lambert v. City & County of San Francisco

In *Lambert v. City & County of San Francisco*, proprietors of a San Francisco hotel containing both residential and tourist units sought to convert the remaining residential units into tourist accommodations. The property owners applied to the San Francisco Planning Commission for a conditional use permit.<sup>78</sup> Pursuant to local ordinance, such a permit was prohibited unless the property owner provided one-to-one replacement of the units or agreed to pay a portion of the replacement costs.<sup>79</sup> The City and property owners disagreed over the replacement costs for the unit conversion, and the fee the City required was beyond what the property owner was willing to pay.<sup>80</sup> When the property owners offered a figure significantly below the appraised cost, the City denied the permit.<sup>81</sup>

A two-judge majority of a California intermediate appellate court rejected the property owners’ argument that their claim warranted review under the intermediate scrutiny of *Nollan* and *Dolan*. The majority reasoned that because the Planning Commission rejected the owners’ conversion application under authority granted by San Francisco’s Planning Code rather than by attaching a monetary condition which the owners later rejected, the proper review was of the rejection itself, not the rejected

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74. *Id.* at 913.

75. *Id.* at 914 n.2.

76. *Id.* at 914.

77. *Id.*

78. *Lambert v. City & Cnty. of San Francisco*, 67 Cal. Rptr. 2d 562, 564 (Cal. Ct. App. 1997).

79. *Id.*

80. *Id.* at 569; see also *id.* at 569–71 (Strankman, J., dissenting) (discussing negotiations and disagreements over a mitigation fee in detail).

81. *Id.* at 569.

condition.<sup>82</sup> One member of the three-judge panel dissented, arguing that the Planning Commission sought to leverage its regulatory bargaining power with an extortionate demand for a monetary exaction.<sup>83</sup> The dissent stated that the Planning Commission should not be able to evade judicial scrutiny by hiding behind its authority to deny the owner a permit if she refuses to agree.<sup>84</sup> In his dissent from the denial of the property owners' petition for certiorari, Justice Scalia agreed with the *Lambert* dissent, dismissing the notion that a condition subsequent—a completed exaction attached to an approval—should be subject to a wholly different, stricter level of scrutiny than a condition precedent, to which a property owner must agree or else face denial.<sup>85</sup> Justice Scalia suggested an alternative approach:

When there is uncontested evidence of a demand for money or other property—and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish *either* (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met.<sup>86</sup>

As Justice Scalia conceded, however, whether or precisely how the exactions decisions applied in *Lambert*—or, by extension, other similar cases—was “far from clear.”<sup>87</sup> Moreover, he noted, it was unclear how and whether compensation could be due when “there is neither a taking nor a threatened taking.”<sup>88</sup>

### *E. Conclusion*

As demonstrated above, the case law on failed exactions is somewhat confused and scattered. Courts are occasionally willing to apply intermediate scrutiny to instances in which the government acted in an extortionate manner akin to that in *Nollan* and *Dolan*, but they face significant conceptual and remedial obstacles when they do. However, some courts blithely ignore such obstacles, as Judge Arnold did in *Jones*

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82. *Id.* at 569 (majority opinion).

83. *Id.* at 572 (Strankman, J., dissenting).

84. *Id.* at 572–73.

85. *Lambert v. City & Cnty. of San Francisco*, 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting from denial of certiorari).

86. *Id.* at 1047–48.

87. *Id.* at 1048.

88. *Id.*

*Insurance Trust*. When no property is taken, how does the Fifth Amendment's Takings Clause, which speaks of "private property . . . taken for public use,"<sup>89</sup> apply? If *Nollan* and *Dolan* do apply, what is the condition subject to their nexus and proportionality tests? And if the property owner wins, how does the Fifth Amendment, which explicitly provides only one remedy, "just compensation,"<sup>90</sup> provide a suitable remedy for a condition that was never exacted and for a rejected development application that the government was authorized to reject? Part IV considers these questions broadly in light of the text of the Constitution, the Supreme Court's interpretation of that text, and broader questions of administrative procedure and land use regulatory practices.

#### IV. THE INAPPLICABILITY OF THE TAKINGS CLAUSE TO FAILED EXACTIONS

##### A. *Nollan and Dolan Concerned Finalized Exactions*

What are the regulatory effects that fall within the constitutionally meaningful category of "exactions"? At a minimum, and perhaps at a maximum,<sup>91</sup> a catalog of the category's universe of regulatory acts must begin with *Nollan* and *Dolan*. As the Court characterized them in *Lingle*, *Nollan* and *Dolan* concerned "Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit."<sup>92</sup> In *Dolan*, the property owner challenged requirements that she grant public easements for a floodplain and bike path as conditions attached to her approved permit application by the City of Tigard's Planning Commission.<sup>93</sup> In *Nollan*, the

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89. U.S. CONST. amend. V.

90. *Id.*

91. *See Koontz IV*, No. SC09-713, slip op. at 18 (Fla. Nov. 3, 2011). ("[W]e are guided only by decisions in which the Supreme Court has expressly applied, or commented upon the scope of, exactions takings.")

92. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005).

93. *Dolan v. City of Tigard*, 512 U.S. 374, 379–80 (1994). The majority and concurrence in *Koontz III* asserted that *Dolan* was in fact a failed exactions case—indeed, both appear to indicate that their decisions turn on this point. *See Koontz III*, 5 So. 3d 8, 11 (Fla. Dist. Ct. App. 2009) (declaring that the question of *Nollan* and *Dolan*'s applicability to failed exactions "has already been answered in *Dolan* itself"); *id.* at 13–14 (Orfinger, J., concurring) (asserting that had *Dolan* not decided this issue, he would have agreed with the dissent that the property owner had lost nothing and could not state a takings claim). They base their claim on Justice Stevens's statement in his *Dolan* dissent that "no taking has yet occurred," as the owner had not yet begun the expanded use of her property and therefore had not yet been required to deed an easement to the government. *See Dolan*, 512 U.S. at 408 (Stevens, J., dissenting). But the *Dolan* majority's recitation of the facts clearly states that the government had

property owners challenged a condition attached to a building permit issued by the California Coastal Commission requiring them to grant an easement allowing the public to walk across their property.<sup>94</sup> In both cases, the property owners challenged the exactions attached to their applications to build. These conditions required the dedication of public easements and therefore forced the property owners to forfeit their right to exclude the public from their land and suffer a permanent occupation of their property. These conditions clearly would have required compensation under the *Loretto* test if imposed unilaterally and outside of the narrow context of exactions.<sup>95</sup>

If *Nollan* and *Dolan* present the archetypal sets of facts that trigger intermediate scrutiny, then we can draw two inferences about the type of conditions that constitute “exactions” in a federal constitutional sense. First, the condition must include a “taking” of property for which compensation would be due if the government imposed the requirement unilaterally—this must be true no matter how limited or broad the universe of conditions to which the two decisions apply. Second, *Nollan* and *Dolan* can only apply when the government agency officially requires the challenged condition in a *completed* regulatory process. The property owners in both cases knew precisely what was required of them by the final conditions attached to the approvals they received at the end of the application process. These triggering facts work together to form the basis for administrative and judicial review, allowing both processes to identify the taken property interests to which the nexus and rough proportionality tests apply.

Failed exactions, in which agencies have issued no conditional approval, differ from *Nollan* and *Dolan*. This distinction is both formal and procedural. On first glance, the formal distinction appears insignificant. In Justice Scalia’s terms, there is little functional difference between a condition precedent and a condition subsequent—in each, the government is conditioning issuance of an entitlement on an otherwise unconstitutional condition.<sup>96</sup> But the difference between the failed exaction (in which the

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“granted petitioner’s permit application subject to conditions imposed by the city’s [Community Development Code].” *Id.* at 379; *see also* *Dolan v. City of Tigard*, 854 P.2d 437, 439 (Or. 1993) (stating that the government “granted petitioner’s application, but required as conditions [the dedication of various easements]”).

94. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 828 (1987).

95. *See Dolan*, 512 U.S. at 385–86 (characterizing exactions as “a requirement that [the owner] deed portions of the property to the city,” for which she would otherwise be due just compensation); *Nollan*, 483 U.S. at 831 (“Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, . . . we have no doubt there would have been a taking.”).

96. *Lambert v. City & Cnty. of San Francisco*, 529 U.S. 1045, 1048 (2000).

government never finalizes the condition as required for an entitlement that it can deny) and the completed one (in which the government has identified and specified the conditions it will require) is crucial for constitutional purposes. Only when the agency has specified the exaction can a court know what property has or will be taken. Insofar as the Fifth Amendment's text requires *property* to be taken as a basis for just compensation (a point I will develop further below), *Nollan* and *Dolan* require the identification and finalization of a condition as a predicate to an exactions claim.

This seemingly insignificant but constitutionally meaningful formal requirement, which the *Koontz* majority recognized in refusing to expand *Nollan* and *Dolan*,<sup>97</sup> also has a procedural purpose. A property owner surely could not use failed negotiations or discussions over an exaction as a means to avoid the ripeness and administrative exhaustion requirements necessary for a takings claim.<sup>98</sup> This procedural point, which is related to the formal, substantive one, persuaded the concurrence in *Koontz* that it could not reach the property owner's constitutional challenge to a failed exaction.<sup>99</sup> Exhaustion and ripeness requirements help preserve judicial resources and give agencies the opportunity to build a record that can demonstrate compliance with *Nollan* and *Dolan*. An agency might defer its nexus and proportionality study until it has finalized its proposed mitigation. Following *Nollan* and *Dolan*, agencies know to prepare such findings when they officially issue a conditional permit. Forcing them to meet such requirements *before* permit issuance will either raise administrative costs or make negotiations and discussions over mitigation appear less attractive to agencies. These consequences are considered in more detail below. For now, note that the procedural distinction between failed and completed exactions is in fact quite significant. Moreover, this distinction illustrates why the Court would and should limit *Nollan* and *Dolan*'s intermediate scrutiny to final conditions, even if the dedications have not yet occurred.

### *B. Finalized Exactions and the Fifth Amendment Text*

The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."<sup>100</sup> Failed exactions do not culminate in "private property" being "taken for public use." Unlike in *Nollan* and *Dolan*, the state has not identified property to be taken in

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97. *Koontz IV*, No. SC09-713, slip op. at 19 (Fla., Nov. 3, 2011).

98. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985); see also *infra* Part IV.D.

99. *Koontz IV*, No. SC09-713, slip op. at 22 (Polston, J., concurring).

100. U.S. CONST. amend. V.

exchange for a permit approval. Instead, the property owners' application has been denied. Even when an agency's actions are unreasonable and result in extortionate demands or bad faith, no property has been taken. As a constitutional matter, the claim sounds in due process, not in the Takings Clause.

Because no property was taken, no "just compensation" can be awarded. It is well-established that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."<sup>101</sup> When a court considers whether the government has taken property, it must identify the property interest actually taken from the owner that the government will receive in exchange for its payment of just compensation. In an exactions case, if a court determines that the *Nollan* and *Dolan* tests have not been met, the exacted property is deemed taken and the government must pay compensation for the property interest exacted.<sup>102</sup> However, when the government first considers approving a conditional permit with an exaction but decides instead to deny the permit application without imposing a condition, there is no identifiable property interest for which the government could logically be required to pay compensation.

The logic and purpose behind the *Nollan* and *Dolan* tests command this conclusion. *Nollan* and *Dolan* rest on the premise that the government always has the option to restrict the use of property in order to protect the health and safety of the public rather than attempt to mitigate the effects of proposed development through an exaction. When the government chooses to deny a permit, courts apply the traditional, deferential regulatory takings doctrine; when the government chooses to approve with conditions, courts apply intermediate scrutiny. Thus, the heightened, but not *per se* or strict, takings standard of *Nollan* and *Dolan* reflects not only the fact that an exaction is more intrusive than mere regulation of property use, but also that the government could have rejected the development application rather than approving it with exactions. *Nollan* and *Dolan* presume that the government always has the option under its police power authority to reject the development application rather than approving it with an exaction attached. It logically follows that when the government has in fact decided

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101. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

102. *See, e.g., Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841–43 (1987) (holding that if government "wants an easement," and the forced dedication is deemed to be unconstitutional, government "must pay for it").

to act in a traditional regulatory mode in lieu of imposing an exaction, traditional regulatory takings analysis must apply.

Indeed, the logic of the Court's entire categorical approach to the Takings Clause requires that the government has in fact taken property for *Nollan* and *Dolan* to apply. *Lingle* explained that a regulatory taking must be "functionally equivalent" to confiscation.<sup>103</sup> In *Lucas*, the Court held that the "total" taking of the use and value of the property was "the equivalent of a physical appropriation."<sup>104</sup> Similarly, a permanent physical invasion "eviscerates the owner's right to exclude others . . . [which is] perhaps the most fundamental of all property interests."<sup>105</sup> And in *Nollan* and *Dolan*, the appropriation of an easement as part of the issuance of a development permit "would have been a *per se* physical taking" if the government had simply confiscated it.<sup>106</sup> *Lingle* made clear that the fundamental predicate required for the Takings Clause to apply is a government act that confiscates or approximates the confiscation of privately owned land. Offers, negotiations, or even threats to take land do not create a constitutionally mandated compensation requirement. As Judge Griffin stated in her dissent in *Koontz III*, "[i]t is not the *making* of an offer to which unconditional conditions are attached in violation of the limitations of *Nollan/Dolan* that gives rise to a taking; it is the receipt of some tangible benefit under such coercive circumstances that gives rise to the taking."<sup>107</sup>

In addition to specifying that the taking of property is a constitutionally permitted wrong, the Fifth Amendment also specifically identifies "just compensation" as the only remedy available to the property owner. This limitation is obvious in the eminent domain context when the state condemns or confiscates property, forcing the owner to transfer ownership of the property. The transfer of that property then becomes the basis for compensation. Under *Lingle's* "functional equivalence" logic, the Fifth Amendment's remedy must be identical for a regulatory taking. Furthermore, *Lingle's* rejection of due process logic within regulatory takings tests also requires courts to refuse to award the archetypal due process remedies of an invalidation of the challenged state action and an

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103. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

104. *Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003, 1017 (1992).

105. *Lingle*, 544 U.S. at 539.

106. *Id.* at 546.

107. *Koontz III*, 5 So. 3d 8, 20 (Fla. Dist. Ct. App. 2009) (Griffin, J., dissenting) (citing *Lingle*, 544 U.S. at 539-40); *see also Koontz IV*, No. SC09-713, slip op. at 8 (Fla. Nov. 3, 2011) ("[I]n what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?" (quoting *Koontz III*, 5 So. 3d at 20 (Griffin, J., dissenting))).

injunction against future similar action.<sup>108</sup> Put simply, compensation is the *only* remedy available for a prevailing plaintiff in a regulatory takings action.

Existing cases demonstrate that failed exactions require a remedy other than compensation. The Eighth Circuit recognized this in *Goss II* and awarded neither compensation nor invalidation. The court in *Jones Insurance Trust* and the intermediate appellate court in *Koontz III* provided inappropriate remedies. Each invalidated a valid exercise of regulatory authority, while the overturned decision in *Koontz III* also compensated the owner for the temporary taking of his property during the period when his permit application had been denied. This occurred even though the decision to reject the application was authorized by state law, and the court did not evaluate whether during that period the owner had lost all economically beneficial use of the property. Neither court could apply the appropriate, and only, remedy available under the Just Compensation Clause to a prevailing plaintiff in a regulatory takings case—clear evidence of the inappropriate nature of such a claim under the Fifth Amendment.

### C. Failed Exactions and the Negotiation Process

The land use process has come to depend increasingly on regulatory tools that allow for flexibility and bargaining between government entities and property owners.<sup>109</sup> Local land use regulation has accordingly stood in the vanguard of regulatory flexibility and negotiation, a trend that has gained some purchase at the federal level.<sup>110</sup> Flexibility in the local land use process can serve as a means to resolve disputes along two axes: first, by enabling regulator and regulated to find mutually agreeable terms; and

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108. *But see* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2607 (2010) (plurality opinion) (stating, in dictum, that there is “no reason why [compensation] would be the exclusive remedy for a judicial taking”). In a few outlying modern regulatory takings decisions, issued before *Lingle*'s clear statement that compensation is the only remedy available under the Just Compensation Clause, the Court has granted non-compensatory relief to prevailing plaintiffs. *See, e.g.*, *E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion) (affirming injunctive relief granted by the U.S. district court for a regulatory takings claim in a monetary takings case, as opposed to the U.S. Court of Federal Claims acting under Tucker Act jurisdiction, for suggesting that requiring compensation for a taking of money would be “an utterly pointless set of activities” (quoting *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997))); *Hodel v. Irving*, 481 U.S. 704, 716–18 (1987) (invalidating a federal statute on the ground that it effected a taking of private property without just compensation in violation of the Fifth Amendment).

109. *See generally* STEWART E. STERK & EDUARDO M. PEÑALVER, *LAND USE REGULATION* 31–51 (2011).

110. *See* Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570 (1994 & Supp. 2000). *See generally* JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 653–57 (2009) (summarizing literature on negotiated rulemaking in federal administrative processes).

second, by enabling a more responsive local regulatory process that not only can lead to more participatory and popular results but also can alleviate local voter antipathy towards new development and anxiety about its effects on home values.<sup>111</sup> The threat that failed negotiations can serve as the basis for a *Nollan* and *Dolan* challenge to an agency's preliminary and informal offers will have significant effects on the bargaining process. As Judge Griffin noted in her dissent in *Koontz III*, applying *Nollan* and *Dolan* to failed exactions will make negotiations "too risky for a governmental agency to make offers for conditional permit approvals or to offer a trade of benefits out of fear that the offer might be rejected and the condition later found to have lacked adequate nexus or proportionality."<sup>112</sup>

In this regard, property owners might ultimately be harmed. Wary government agencies might simply deny permits and face lower scrutiny under the *Penn Central* test rather than discuss mitigation measures as conditions for approval and face heightened scrutiny under *Nollan* and *Dolan*.<sup>113</sup> By inhibiting a government agency's willingness to bargain without inhibiting its authority to deny a property owner's application to develop, applying *Nollan* and *Dolan* to failed exactions would eliminate a valuable right from property owners—or at least an important opportunity to reach a preferred end<sup>114</sup>—while simultaneously removing a key regulatory tool and process for government agencies. This represents the worst possible result: government agencies cannot negotiate adequate, workable mitigation measures with property owners; property owners are more likely to be denied discretionary approvals from wary government agencies; and the entire regulatory process becomes more rigid and mechanical, resulting in a larger proportion of denials and fewer negotiated solutions to pressing environmental and planning conflicts.<sup>115</sup>

#### *D. Failed Exactions and the Administrative Review Process*

Property owners can also use any discussions or negotiations as a springboard for avoiding administrative appeals to permit denials. They

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111. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS 230–32 (2001); Fenster, *Takings Formalism*, *supra* note 10, at 668–78.

112. *Koontz III*, 5 So. 3d at 21 (Griffin, J., dissenting).

113. Cf. WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 348–49 (1995) (characterizing *Nollan* and *Dolan* as decisions which appear to offer property owners formal protections while harming their ability to bargain to their preferred result).

114. Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 50 (2000).

115. Fenster, *Takings Formalism*, *supra* note 10, at 652–67 (noting the variable but generally worse consequences of imposing formal rules on negotiation processes).

thereby bypass the long-settled means for local governments to review and reconsider decisions and to build a thorough administrative record for judicial review. These procedural hurdles stand especially tall in delaying litigants' entrance to federal court under the Supreme Court's 1985 decision in *Williamson County*, which requires a claimant to "seek compensation through the procedures the State has provided for doing so" in order to ripen a federal constitutional takings claim.<sup>116</sup> Under *Williamson County*, claimants must raise all of their state claims in state court before their federal takings claims are ripe for adjudication in federal court.<sup>117</sup> As the Court explained a year after *Williamson County*, "an essential prerequisite" to a regulatory takings claim "is a final and authoritative determination of the type and intensity of development legally permitted on the subject property."<sup>118</sup> *Williamson County* made clear that without such a determination, "it is impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed."<sup>119</sup>

States tend to follow this general logic in establishing their own ripeness doctrines.<sup>120</sup> This applies equally in takings challenges to exactions, where the Oregon Supreme Court has recently explained:

[A] requirement that a property owner take administrative steps prior to bringing judicial action permits the local government to determine the necessary effects of the regulations and whether, knowing those effects, it wishes to impose or enforce them. Just as a court benefits by requiring that local governments have the opportunity to assess fully the effects that use limitations have on property owners, so too does a court benefit from requiring that

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116. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

117. *See San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 337 (2005) (assuming *Williamson County* requires a "final state judgment" before a federal takings claim becomes ripe in federal court); *id.* at 348–49 (Rehnquist, J., concurring) (agreeing that *Williamson County* requires a claimant to seek compensation in state court before bringing a federal takings claim in federal court but questioning whether the decision was correct).

118. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). For a general discussion of ripeness and regulatory takings in federal courts, see Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

119. *Williamson Cnty.*, 473 U.S. at 189 n.11.

120. *See, e.g., Milagra Ridge Partners, Ltd. v. City of Pacifica*, 72 Cal. Rptr. 2d 394, 399–400 (Cal. Ct. App. 1998) (explaining that California has adopted the U.S. Supreme Court's approach to the ripeness doctrine); *Casey v. Mayor of Rockville*, 929 A.2d 74, 103–04 (Md. 2007) (explaining Maryland's ripeness doctrine with reference to U.S. Supreme Court precedents and explicitly adopting *Williamson County*'s approach to ripeness for regulatory takings claims in state court); *Hill-Grant Living Trust v. Kearsarge Lighting Precinct*, 986 A.2d 662, 669 (N.H. 2009); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998) (explaining the ripeness doctrine in the regulatory takings context with reference to U.S. Supreme Court precedent).

local governments have the opportunity to consider fully whether the conditions on development that it seeks to require are proportional to the impacts of development and whether to insist on imposing those conditions, given the assessment that it makes.<sup>121</sup>

As the concurrence in *Koontz IV* noted regarding Florida law, owners must use the required administrative review procedures to challenge the propriety of a permit denial, and then file their legal challenge in the district court of appeal or the trial court sitting in its appellate capacity over administrative adjudications.<sup>122</sup> Government agencies are thereby able to reconsider their regulatory decisions through an orderly administrative process that will produce a record that can in turn enable efficient and accurate judicial review. Allowing property owners to avoid these longstanding, orderly administrative and judicial procedures to challenge a permit denial can encourage property owners to seek judicial review of unripe claims with complex factual disputes that require extensive development at trial.

#### CONCLUSION

Failed exactions claims are non-cognizable under the Supreme Court's *Nollan* and *Dolan* tests, and the non-existent conditions that would form the basis of such claims cannot constitute property under the plain text of the Takings Clause. In some circumstances, a property owner might have viable claims under the U.S. Constitution or other authorities to challenge the government's regulatory acts. The permit denial that follows from failed negotiations can serve as the basis of a takings claim under the default *Penn Central* test, albeit one with little chance of winning.<sup>123</sup> Especially unfair treatment by the regulatory agency could serve as the basis for a substantive due process claim under the U.S. Constitution—again, one that might exist more in theory than in practice.<sup>124</sup> But federal law is not the only protection

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121. *W. Linn Corporate Park, L.L.C. v. City of W. Linn*, 240 P.3d 29, 38 (Or. 2010); *see also id.* at 39 (holding that “Oregon law requires the landowner to pursue available local administrative remedies . . . as a prerequisite to bringing that action in state court”).

122. *See Koontz IV*, No. SC09-713, slip op. at 22 (Fla. Nov. 3, 2011) (Polston, J., concurring) (citing FLA. STAT. § 373.617(2) (2002)); *Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153, 159 (Fla. 1982)).

123. *See supra* text accompanying notes 28–29 (describing *Penn Central* and its role in regulatory takings jurisprudence); *see also* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 544–76 (2009) (describing how *Penn Central*'s balancing test works after *Lingle*).

124. *See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2614–15 (2010) (Kennedy, J., concurring); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (“[T]he Due Process Clause is intended, in part, to protect the individual against ‘the exercise of power

to which property owners can turn. State courts can provide some relief to the extent that state constitutional law provides greater due process and property rights protection than federal constitutional law.<sup>125</sup> More promisingly, state and local governments can and do impose legal limitations on the use of exactions.<sup>126</sup> Further, political norms and the threat of political accountability can stop or soften regulatory hard-bargaining, especially when it unfairly overreaches.<sup>127</sup>

None of these solutions will provide absolute protection for a property owner who has been exploited by a state or local entity acting in bad faith. While it is unclear how frequently such bad-faith dealings occur, it is quite clear that property owners should have no recourse to the heightened scrutiny that *Nollan* and *Dolan* provide.

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without any reasonable justification in the service of a legitimate governmental objective.” (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998))). *But see Stop the Beach*, 130 S. Ct. at 2606 (plurality opinion) (denying the applicability of substantive due process to the regulation of property); J. Peter Byrne, *Due Process Claims After Lingle*, 34 *ECOLOGY L.Q.* 471, 472 (2007) (characterizing the likelihood of a property owner’s victory with a federal substantive due process claim as “virtually never”).

125. With respect to states’ substantive due process doctrines, see Byrne, *supra* note 124, at 480–91 (describing state courts’ roles in policing unfair land use regulation, and in developing more locally sensitive standards of review under state substantive due process doctrines). On state courts’ applications of distinct regulatory takings doctrines, see Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *YALE L. J.* 203, 261–70 (2004). Indeed, Florida itself has long adopted its own standards for the review of impact fees, although that test would not, after *Koontz IV*, be applicable to failed exactions. See *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 609–10 (Fla. Dist. Ct. App. 1983) (developing a due process-based dual-rational-nexus test that considers whether there was a reasonable connection between (1) the locality’s need for additional capital facilities and the new development and (2) the funds collected and the benefits accruing to the new development).

126. See Fenster, *Regulating Land Use in a Constitutional Shadow*, *supra* note 3, at 758–68.

127. *Id.*