

What We Have Here Is a Failure to Compensate: The Case for a Federal Damages Remedy in Koontz "Failed Exactions"

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WHAT WE HAVE HERE IS A FAILURE TO COMPENSATE: THE CASE FOR A FEDERAL DAMAGES REMEDY IN *KOONTZ* “FAILED EXACTIONS”¹

CHRISTOPHER M. KIESER*

ABSTRACT

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court held that an agency could not, consistent with the Takings Clause, condition a permit on a land exaction unless the exaction bears an “essential nexus” and “rough proportionality” to the harms the government seeks to mitigate. Then, in *Koontz v. St. Johns Water Management District*, 133 S. Ct. 2586 (2013), the Court extended *Nollan* and *Dolan* to exactions that were never completed because the property owner refused to acquiesce to the demand. Nevertheless, the Court held that such property owners suffer a “constitutionally cognizable injury” under the unconstitutional conditions doctrine because the government has significantly burdened their right not to have property taken without just compensation. Because the case arose under a Florida statute, the Court did not decide what the proper federal remedy would be in these “failed exaction” cases.

This Article argues that failed exaction plaintiffs should be entitled to actual damages under the federal civil rights statute, 42 U.S.C. § 1983. Because failed exactions do not involve a completed taking, the Just Compensation Clause is not the proper remedy. However, a recognized constitutional injury cannot go uncompensated. Limiting the remedy to invalidation of the offending condition suffers from two faults. First, it fails to provide property owners with adequate compensation. Second, it does not serve as a deterrent to agencies. An invalidation remedy standing alone gives permitting agencies a “do-over” and encourages them to use the permitting process to prevent development through the use of

¹ See *COOL HAND LUKE* (Jalem Productions 1967).

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unconstitutional conditions. On the contrary, a damages remedy is supported by Section 1983 and serves the twin aims of deterrence and compensation. Courts should hold that property owners bringing a failed exaction claim under *Koontz* are entitled to their actual economic damages.

Along with that federal damages remedy, this Article argues that these plaintiffs should be able to bring their claims directly in federal court. Because failed exaction plaintiffs have not suffered a taking, they cannot seek just compensation. Therefore, the ripeness rule for federal takings claims established in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 185 (1985), which generally requires property owners to seek just compensation in state court to “ripen” a takings claim, does not apply to failed exactions. Property owners suing under a *Koontz* theory should be able to assert their federal constitutional rights directly in federal court.

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INTRODUCTION

When a government entity conditions the receipt of a benefit on a person's agreement to give up a constitutional right, it violates the Constitution in the same way as if it had denied the right in the first instance.² This maxim, dubbed the unconstitutional conditions doctrine, "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."³ One such right that has been robustly protected by the unconstitutional conditions doctrine is the right not to have private property "taken for public use without just compensation."⁴ The Supreme Court's decisions in *Nollan v. California Coastal Commission*⁵ and *Dolan v. City of Tigard*⁶ established that a permitting agency may not demand unreasonable land exactions from property owners in exchange for approval of a development permit.⁷ Then, in *Koontz v. St. Johns River Water Management District*, the Court clarified that imposition of an unconstitutional condition violates the Constitution, even where the permitting agency demands money in return for a permit and the permit is ultimately denied.

While *Koontz* demonstrated that permitting agencies cannot easily evade the protections established by *Nollan* and *Dolan*, it left open the scope of the remedy available to plaintiffs who can establish that their permit application was denied because they refused to accede to an unconstitutional exaction.⁸ This Article argues that property owners should be entitled to invalidation of the offending condition as well as actual damages under 42 U.S.C. § 1983. Damages are necessary to compensate property owners for the injury suffered when they do not give in to an unconstitutional demand. They also serve to deter government agencies from imposing unconstitutional conditions by providing an incentive to negotiate fairly. Limiting the remedy to invalidation would not accomplish either of these objectives.

Furthermore, this Article will explain the need for a federal forum to adjudicate these Section 1983 claims and illustrate how *Koontz* further undermines the much-beleaguered ripeness doctrine of *Williamson County*

² *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (collecting cases).

³ *Id.*

⁴ U.S. CONST. amend. V.

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

⁶ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁷ *See Nollan*, 483 U.S. at 841; *see also Dolan*, 512 U.S. at 374.

⁸ *Koontz*, 133 S. Ct. at 2597.

Regional Planning Commission v. Hamilton Bank of Johnson City.⁹ Plaintiffs suing under *Koontz* may have suffered a constitutional injury from a so-called “failed exaction,”¹⁰ but they cannot allege that their property was actually taken, and therefore cannot seek a remedy under the Just Compensation Clause. If a federal remedy is available in such cases, it derives solely from Section 1983, and *Williamson County*’s reasoning and requirements are therefore inapplicable to these claims.

This Article will proceed in four parts. Part I will provide a general background of the unconstitutional conditions doctrine and explain how it applies to exactions and threatened exactions. Part II will introduce the question left open by the Court in *Koontz*—what federal remedy applies when a permit application is denied because of refusal to accept an unconstitutional condition? Part III will argue that mere invalidation of the condition is an insufficient remedy and that Section 1983 entitles these plaintiffs to receive damages. Part IV will argue that Section 1983 “failed exaction” claims should be exempt from the ripeness requirements of *Williamson County*. A short conclusion will sum up the arguments.

I. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

A. Formation

It was not always the case that the government lacked power to impose conditions on the exercise of constitutional rights. In fact, there is major tension between the unconstitutional conditions doctrine and the oft-repeated argument that a greater power necessarily includes a lesser one.¹¹ Justice Bradley is believed to be the first to use the term

⁹ See *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

¹⁰ See Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623, 631–34 (2012).

¹¹ The “greater-includes-the-lesser” argument—namely, the idea that if government has the power to entirely prohibit an activity, it necessarily may place any restriction on that activity—has strong intuitive appeal. Indeed, one commentator, explaining the tension between it and the unconstitutional conditions doctrine, noted that “each statement—‘no unconstitutional conditions’ and ‘the greater includes the lesser’—seems so self-evidently correct that it appears to follow, with mathematical certainty, that one’s conclusion is correct.” Brooks R. Funderberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 376–78 (1995). Even as the unconstitutional conditions doctrine has become widely accepted, the Supreme Court has not rejected the general premise that greater powers include lesser ones. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511 (1996) (“[W]e do not dispute the proposition that greater powers include lesser ones.”); see also *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478

“unconstitutional conditions”¹² in his dissent in the 1876 case of *Doyle v. Continental Insurance Company*.¹³ There, the majority upheld a Wisconsin statute that required the Secretary of State to revoke the business license of any out-of-state insurance company that exercised its right to remove a case from a Wisconsin state court to a federal court.¹⁴ The Court reasoned that because the plaintiff had no constitutional right to do business in Wisconsin, the State must necessarily have the power to place conditions on a business license.¹⁵ In response, Justice Bradley delivered a powerful rebuke of the “greater power includes the lesser” rule:

The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property.¹⁶

His concerns fell upon mostly deaf ears at first. In 1892, the Massachusetts Supreme Judicial Court rejected an individual’s claim that his rights were violated when he was fired from a local police force in retaliation for political acts.¹⁷ Justice Holmes, then Chief Justice of Massachusetts, observed that “[t]here are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract.”¹⁸ Under this theory, Holmes posited that an employee “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”¹⁹ This is the classic statement of the “greater power includes the lesser” doctrine;²⁰ because the local government does not have to employ

U.S. 328, 345–46 (1986) (“In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.”).

¹² Funderberg, *supra* note 11, at 388.

¹³ *Doyle v. Cont’l Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting).

¹⁴ *Id.* at 542 (majority opinion).

¹⁵ *Id.*

¹⁶ *Id.* at 543–44 (Bradley, J., dissenting).

¹⁷ *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

¹⁸ *Id.* at 517–18.

¹⁹ *Id.* at 517.

²⁰ See Funderberg, *supra* note 11, at 376–77.

a particular policeman at all, it may demand that someone give up his constitutional rights in exchange for the job.

The Court generally adhered to Justice Holmes' view during the first half of the twentieth century,²¹ but it eventually embraced Justice Bradley's position. In a series of cases, the Court established that governments may not condition public employment on a person's agreement not to exercise his freedom to speak on matters of public concern.²² Although most unconstitutional conditions cases arise under the First Amendment,²³ the Supreme Court and lower courts have applied the doctrine to prevent the government from compromising rights under the Fourth Amendment²⁴ and the Fifth Amendment's privilege against self-incrimination.²⁵ Thus, it is beyond dispute that the Supreme Court has "long since rejected" Justice Holmes' theory.²⁶ In the process, it has, as a practical matter, rejected the notion that the greater government power always includes the lesser.

B. Application to Land-Use Exactions

In *Nollan*, the California Coastal Commission granted the Nollans a permit to build a single-family home on their coastal property subject to a requirement that they dedicate a public-access easement.²⁷ The Nollans objected to the condition and a California trial court granted relief, but the California Court of Appeal reversed.²⁸ That court upheld the easement exaction on the ground that it was at least somewhat related to the need for coastal access.²⁹ It completed the constitutional analysis in a mere

²¹ *Connick v. Myers*, 461 U.S. 138, 143–44 (1983) (citing *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952)); *Garner v. Bd. of Pub. Works*, 341 U.S. 716 (1951); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947); *United States v. Wurzbach*, 280 U.S. 396 (1930); and *Ex parte Curtis*, 106 U.S. 371 (1882).

²² See *Connick*, 461 U.S. at 144–45; see also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

²³ See Jason Mazzone, *The Waiver Paradox*, 97 NW. U.L. REV. 801, 810 (2003).

²⁴ See *Lebron v. Sec'y*, 710 F.3d 1202, 1217–18 (11th Cir. 2013) (holding that government cannot condition receipt of benefits on waiver of Fourth Amendment rights); see also *United States v. Scott*, 450 F.3d 863, 866–68 (9th Cir. 2005) (explaining that waiver of Fourth Amendment rights cannot be a condition of pretrial release).

²⁵ See *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 679 (1996) (citing *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (holding that a threat of disqualification from public contracting for five years as a penalty for asserting the privilege was an unconstitutional condition)).

²⁶ *Umbehr*, 518 U.S. at 674.

²⁷ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

²⁸ *Id.* at 829–30.

²⁹ *Nollan v. Cal. Coastal Comm'n*, 177 Cal. App. 3d 719, 723 (1986). The California Court of Appeal found that the trial court erred in requiring the Commission to demonstrate

two pages and failed to cite any federal cases, much less the Supreme Court's unconstitutional conditions precedent.³⁰ The Nollans successfully petitioned the U.S. Supreme Court for certiorari after the California Supreme Court denied review.³¹

In the Supreme Court, the Coastal Commission argued that its exaction was constitutional so long as it was a legitimate exercise of the state's police power and did not qualify as a taking under the Court's then-existing takings tests.³² But the majority required more. First, the Court concluded that the Commission would have violated the Takings Clause had it simply demanded the easement outside of the permitting context.³³ However, the majority recognized that a state has the power to deny a development permit for any number of legitimate reasons.³⁴ Thus, the Court concluded that an exaction is unconstitutional unless it "serves the same legitimate police-power purpose as a refusal to issue the permit."³⁵ In the Nollans' case, the easement lacked any "nexus" to the Commission's stated purpose of protecting views of the beach.³⁶ Therefore, the Commission lacked the power to exact property that it would not be able to take in the abstract without providing compensation.³⁷

Although the Court did not explicitly invoke the unconstitutional conditions doctrine, it did address the Commission's argument that it

that the development would create "a direct burden on public access." *Id.* On the contrary, it followed its construction of the California Supreme Court's decision in *Associated Home Builders, Inc. v. City of Walnut Creek*, 484 P.2d 606 (Cal. 1971), and required "only an indirect relationship between an exaction and a need to which the project contributes." *Nollan*, 177 Cal. App. 3d at 723 (citing *Grupe v. Cal. Coastal Comm'n*, 166 Cal. App. 3d 148, 165 (1985)).

³⁰ See *Nollan*, 177 Cal. App. at 723.

³¹ *Nollan*, 483 U.S. at 831.

³² See Brief for Appellee at 14–15, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). First, the Commission would have had the Court determine whether the deed restriction was rationally related to a legitimate state interest. Brief for Appellee at 14 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). Second, the Commission argued that so long as the exaction satisfied rational basis review, it was constitutional if it did not contravene the Court's established takings jurisprudence, such as the balancing test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). See Brief for Appellee at 15.

³³ *Nollan*, 483 U.S. at 834.

³⁴ *Id.* at 835–36.

³⁵ *Id.* at 836.

³⁶ *Id.* at 838 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.")

³⁷ *Id.* at 841–42.

could demand the exaction as a condition so long as it had the power to deny the permit altogether.³⁸ The majority conceded that the “greater-includes-the-lessor” argument has significant force when the condition on permit approval serves the same interest as would an outright denial.³⁹ When the relationship breaks down, however, so does the constitutional justification for the condition. As the Court explained, while a state could constitutionally ban shouting “fire” in a crowded theater, it could not then grant exemptions to those willing to pay a tax of \$100, because the payment has no relationship to the harm caused by shouting “fire.”⁴⁰ Thus, even though the opinion did not explicitly rely upon the unconstitutional conditions doctrine, its rejection of a broad “greater-includes-the-lessor” rationale reveals *Nollan* to be the first unconstitutional conditions case to vindicate property rights.

Seven years later, the Court was called upon to define the precise scope of *Nollan*. This time, it left no doubt that it had applied the doctrine of unconstitutional conditions in *Nollan* and would do so again in *Dolan*.⁴¹ There, a small-business owner applied to the City for a permit to raze her original store, build a new one about twice the size, and pave a larger parking lot.⁴² The City Planning Commission told her that she could have the permit on two conditions: that she dedicate a portion of her property along a 100-year floodplain for improvement of a storm drainage system, and give up an additional 15-foot strip of land for a bicycle pathway.⁴³ Unsatisfied with the conditions, Mrs. Dolan took her appeal through the Oregon state courts and all the way to the U.S. Supreme Court.⁴⁴

The Supreme Court agreed with the City that, under *Nollan*, there was a nexus between the demanded exactions and the government’s

³⁸ See *id.* at 836.

³⁹ *Nollan*, 483 U.S. at 836.

⁴⁰ *Id.* at 837.

⁴¹ See *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require 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.” (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)); see also *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968); see also *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (describing *Nollan* and *Dolan* as “special application[s]” of the unconstitutional conditions doctrine).

⁴² *Dolan*, 512 U.S. at 377, 379.

⁴³ *Id.* at 380.

⁴⁴ *Id.* at 382–83.

interests in prevention of flooding and reduction of traffic congestion.⁴⁵ However, the Court found that the City had not undertaken any individualized assessment to determine whether the exaction was roughly proportional to the impact of the proposed development.⁴⁶ As a result, the required dedications could not withstand judicial scrutiny.⁴⁷ Simply put, after *Nollan* and *Dolan*, government “may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.”⁴⁸

After *Lingle v. Chevron U.S.A.*, where a unanimous Court described *Nollan* and *Dolan* as a “special application” of the unconstitutional conditions doctrine,⁴⁹ commentators agreed that the Court had created a new strand of unconstitutional conditions jurisprudence for land-use exactions, but they disagreed on the implications of that development.⁵⁰ Contrary to the expectations of many, however, transforming *Nollan* and *Dolan* into unconstitutional conditions cases has actually expanded their scope.⁵¹ In *Koontz*, the Court considered for the first time whether *Nollan*

⁴⁵ *Id.* at 387.

⁴⁶ *Id.* at 388 (“The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of petitioner’s proposed development.”); *Id.* at 391 (“We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”).

⁴⁷ *Id.* at 395–96.

⁴⁸ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

⁴⁹ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005).

⁵⁰ See Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 820 (2006) (“Even the care that the *Lingle* Court took to make clear that it was not disturbing either *Nollan* or *Dolan* will likely have just the opposite effect.”); James S. Burling, *Do Inclusionary Zoning Laws Violate Nollan, Dolan, and the Doctrine of Unconstitutional Conditions*, ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 83, 85 (2007) (“However, the Court in *Lingle* also made it very clear that *Nollan* and *Dolan* retained their full vitality, repeating the formula of these cases, but noting instead that they fell under the rubric of ‘unconstitutional conditions’ rather than ‘substantially advance’ takings.”); Daniel L. Siegal, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 588–612 (2009) (arguing that explicit reliance on unconstitutional conditions limits *Nollan* and *Dolan* to adjudicative exactions of real property).

⁵¹ See Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 ECOLOGY L.Q. 131, 142 (2014) (“[T]he Supreme Court’s decision in *Koontz* substantially expanded the scope of exactions analysis under the *Nollan/Dolan* framework.”); Israel Piedra, *Confusing Regulatory Takings with Regulatory Exactions: The Supreme Court Gets Lost in the Swamp*

and *Dolan* should apply where a property owner is denied a permit because he refused to accede to a demand that he pay for improvements elsewhere.⁵² Justice Alito, writing for the majority, explained that government agencies are still subject to the constraints of *Nollan* and *Dolan* when they deny permits for failure to pay a monetary exaction.⁵³ The Court reasoned that “[a] contrary rule . . . would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.”⁵⁴

The majority opinion was yet another example of the unconstitutional conditions rationale prevailing over the “greater-includes-the-lesser” argument. Justice Alito specifically rejected the water district’s argument that, because it has the power to outright deny any permit application, it may require the applicant to pay for unrelated mitigation as a condition of receiving the permit instead.⁵⁵ The Court held that “[e]ven if [the district] would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on [the property owner’s] forfeiture of his constitutional rights.”⁵⁶ *Koontz* thus represents another expansion in the protection of individual rights under the unconstitutional conditions doctrine as well as perhaps the final nail in the coffin for the “greater-includes-the-lesser” theory.

The majority’s application of *Nollan* and *Dolan* in *Koontz* illustrates how framing the case as a freestanding unconstitutional conditions violation broadened the scope of the exactions cases.⁵⁷ All nine justices agreed that the water district had taken no property from Mr. Koontz.⁵⁸ Yet the majority concluded that the unconstitutional conditions doctrine filled the gap left by the lack of an actual taking. Justice Alito explained

of *Koontz*, 41 B.C. ENVTL. AFF. L. REV. 555, 562 (2014) (“The Court’s conclusion in *Koontz* unwisely expanded the intended scope of *Nollan* and *Dolan*.”).

⁵² *Koontz*, 133 S. Ct. at 2592–94.

⁵³ *Id.* at 2591, 2595–96, 2598–2600.

⁵⁴ *Id.* at 2595.

⁵⁵ *Id.* at 2596.

⁵⁶ *Id.*

⁵⁷ See Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 407–09 (2014) (arguing that the *Koontz* Court concluded “the unconstitutional conditions doctrine and its broad anti-coercion principle could at once resolve and even transcend any formalist concerns about takings doctrine and the Fifth Amendment’s text”).

⁵⁸ *Koontz*, 133 S. Ct. at 2597 (“Where the permit is denied and the condition is never imposed, nothing has been taken.”); *id.* at 2603 (Kagan, J., dissenting) (“[W]hen the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken.”); Fenster, *supra* note 57, at 408.

that “[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”⁵⁹ As such, if Mr. Koontz could show that the water district’s demand exceeded the limits set by *Nollan* and *Dolan*, he would establish a “constitutionally cognizable injury.”⁶⁰ *Koontz* both significantly expanded the reach of *Nollan* and *Dolan*, and transformed how commentators viewed those cases.⁶¹ This Article argues that the change effected by *Koontz* opens the door to expanded damages remedies under the federal civil rights statute, 42 U.S.C. § 1983.

II. THE KOONTZ REMEDY QUESTION

While the *Koontz* decision was widely hailed as a great victory for property rights,⁶² it left one important question unresolved. Namely, what is the proper remedy for a property owner whose permit application is denied because he refused to accede to the government’s demands? The Court held only that *Nollan* and *Dolan* apply to permit denials and monetary exactions, but remanded the case to the Florida state courts to

⁵⁹ *Koontz*, 133 S. Ct. at 2596.

⁶⁰ *Id.*

⁶¹ Before *Koontz*, most commentators had viewed *Nollan* and *Dolan* primarily as takings cases with some unconstitutional conditions undertones. See, e.g., Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 633 n.116 (2004) (“I assume throughout this Article that *Nollan* and *Dolan* are better understood as takings cases analogous to unconstitutional conditions precedents, rather than as unconstitutional conditions cases with a takings overlay. The Court’s reasoning and analysis in *Nollan* and *Dolan* clearly viewed the challenged regulations as takings and applied the standard test for contemporary takings analysis, which asks whether the regulation ‘substantially advance[s] legitimate state interests.’” (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, IOWA L. REV. 1, 45 (2000–2001) (arguing that “the standards for determining whether the government has acted wrongfully must come from the substantive constitutional doctrines; the unconstitutional conditions doctrine cannot itself supply these standards”). But see Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U.L. REV. 859, 859–60, 866–67 (1994–1995) (“By far the most extensive discussion in *Dolan*, however, concerned the nexus or germaneness requirement sometimes associated with the unconstitutional conditions doctrine.”).

⁶² See, e.g., Lynda L. Butler, *The Resilience of Property*, 55 ARIZ. L. REV. 847, 888 (2013); Brian T. Hodges, *Koontz v. St. Johns River Water Management District and Its Implications for Takings Law*, 14 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 39 (2013); Ilya Somin, *Two Steps Forward for the “Poor Relation” of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2013 CATO SUP. CT. REV. 215, 226–41 (2012–2013).

determine the proper remedy under that State's law.⁶³ As Justice Alito explained, the Court "need not decide whether *federal* law authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause because petitioner brought his claim under *state* law."⁶⁴ Mr. Koontz's potential problem was that he brought his claim under a Florida statute authorizing recovery of damages for "an unreasonable exercise of the state's police power constituting a taking without just compensation."⁶⁵ But the Supreme Court could only decide whether the Florida Supreme Court was wrong in determining that *Nollan* and *Dolan* are inapplicable to permit denials and monetary exactions.⁶⁶ It had no power to determine the proper remedy under a state statute.⁶⁷

Justice Kagan disagreed with the majority on the remedy question. In her view, it was wrong to remand the case to the Florida courts because it was clear on the face of the statute that Mr. Koontz had no state-law remedy.⁶⁸ Although she recognized that the existence of a remedy under a state statute was a question "which we usually do well to leave to state courts," this time was different.⁶⁹ The statute so plainly applied only to actions constituting a taking that it could not possibly create a remedy for Mr. Koontz in a situation where all nine justices agreed no taking had occurred.⁷⁰ Thus, even assuming the majority was correct about the proper application of *Nollan* and *Dolan*, Justice Kagan and her dissenting colleagues would have affirmed the judgment in favor of the water district on that ground alone.⁷¹

On remand, the Florida District Court of Appeal once again held that Mr. Koontz was entitled to damages under the statute.⁷² Echoing Justice Kagan, Judge Griffin once again dissented. She argued that, because the Court unanimously agreed there had been no taking, "[i]f there

⁶³ See *Koontz*, 133 S. Ct. at 2597–98; see also Somin, *supra* note 62, at 240–41 ("A key point left unaddressed in *Koontz* is the question of what sort of remedy is available to landowners who successfully challenge conditions linked to permit denials.").

⁶⁴ *Koontz*, 133 S. Ct. at 2597.

⁶⁵ FLA. STAT. § 373.617(3).

⁶⁶ *Koontz*, 133 S. Ct. at 2603.

⁶⁷ See *id.* at 2597–98.

⁶⁸ *Id.* at 2612 (Kagan, J., dissenting).

⁶⁹ *Id.*

⁷⁰ *Id.* ("In what legal universe could a law authorizing damages only for a 'taking' also provide damages when (as all agree) no taking has occurred?").

⁷¹ *Id.* ("So I would, once more, affirm the Florida Supreme Court, not make it say again what it has already said—that Koontz is not entitled to money damages.").

⁷² *St. Johns River Water Mgmt. Dist. v. Koontz*, No. 5D06-1116, 2014 WL 1703942, at *1 (Fla. Dist. Ct. App. Apr. 30, 2014).

is to be a summary disposition of this case, in light of the United States Supreme Court's decision . . . , that disposition must be in favor of the [water district], not Koontz."⁷³ This was true because of the analytical difference between "exactions taking" cases like *Nollan* and *Dolan* and "failed exactions" like *Koontz*.⁷⁴ In the latter case, "the agency has committed a legal wrong that may be redressed in a variety of ways, including a damages remedy if authorized by state law."⁷⁵ That legal wrong is a freestanding unconstitutional conditions violation, which does not require an actual taking in order to be a "constitutionally cognizable injury."⁷⁶ But, in the view of the dissents (and quite possibly of the Florida Supreme Court), Mr. Koontz simply sued under the wrong statute for the wrong remedy.⁷⁷

Even if we assume that Justice Kagan and Judge Griffin are correct about the lack of a remedy under state law, that answer raises the question of whether property owners in Mr. Koontz's position may recover damages under federal law through 42 U.S.C. § 1983. As noted above, *Koontz* explicitly left open the question of any federal remedy because it was unnecessary to the outcome.⁷⁸ Scott Woodward has argued in a recent article that the *Nollan/Dolan/Koontz* standard "is really more of a prophylactic standard than a remedial standard" and thus the proper remedy is simply the invalidation of the offending condition.⁷⁹ He assumes that the only possible remedies for an unconstitutional conditions violation in

⁷³ *Id.* at *2 (Griffin, J., dissenting).

⁷⁴ *Id.* at *3.

⁷⁵ *Id.*

⁷⁶ *Koontz*, 133 S. Ct. at 2596 (majority opinion).

⁷⁷ *See id.* at 2597 (citing the water district's argument that Mr. Koontz "sued in the wrong court, for the wrong remedy, and at the wrong time."); *id.* at 2612 (Kagan, J., dissenting) ("[N]one of the Florida courts in this case suggested that the majority's hypothesized remedy actually exists; rather, the trial and appellate courts imposed a damages remedy on the mistaken theory that there had been a taking (although of exactly what neither was clear)."); *St. Johns Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (Fla. 2011) (noting that even if *Nollan/Dolan* applied, there would still be no claim *because* "nothing was ever taken from Mr. Koontz.") (emphasis added); *Koontz V*, 2014 WL 1703942, at *8 (Griffin, J., dissenting) ("Because there was no 'taking' compensable under the Fifth Amendment in this case, the question remains whether Koontz has a damages remedy under [the Florida statute].").

⁷⁸ *See Koontz*, 133 S. Ct. at 2595 ("where the permit is denied and the condition is never imposed, nothing has been taken."); *id.* at 2603 (Kagan, J., dissenting) ("[w]hen the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken.").

⁷⁹ Scott Woodward, *The Remedy for a "Nollan/Dolan Unconstitutional Conditions Violation"*, 38 VT. L. REV. 701, 703 (2014).

the exactions context are “just compensation” under the Fifth Amendment and invalidation.⁸⁰ However, Woodward neglects to consider the traditional remedy afforded plaintiffs who suffer federal constitutional violations: actual damages.⁸¹ In the next section of this Article, I argue that “failed exaction” plaintiffs should be treated the same as other federal civil rights plaintiffs, and the remedy under federal law should be invalidation *and* damages under Section 1983.

III. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE SHOULD PROVIDE A FEDERAL DAMAGES REMEDY FOR FAILED EXACTION PLAINTIFFS

When the Supreme Court indicated in *Koontz* that “the impermissible denial of a governmental benefit is a constitutionally cognizable injury,”⁸² it implicitly distinguished “failed exaction” cases from the “exaction takings” at issue in *Nollan* and *Dolan*.⁸³ While some commentators and courts believed the difference was simply that *Nollan* and *Dolan* were inapplicable to permit denials,⁸⁴ the *Koontz* majority rejected that view.⁸⁵ Instead, with respect to the application of the unconstitutional conditions doctrine, the relevant distinction between permit approvals and denials lies in the available remedies.⁸⁶ As the Court explained, “[w]hile the

⁸⁰ See *id.* at 708–09 (arguing that *Nollan* and *Dolan* “are more supportive of an invalidation remedy than a just compensation remedy”).

⁸¹ See, e.g., *Carey v. Piphus*, 435 U.S. 247, 254–57 (1978) (agreeing with plaintiffs that “the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights”); John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 84 nn.5–7 (1989) (collecting cases for the proposition that compensation and deterrence are the main purposes of Section 1983 liability).

⁸² *Koontz*, 133 S. Ct. at 2596.

⁸³ See Fenster, *supra* note 10, at 638–40 (“Failed exactions, in which agencies have issued no conditional approval, differ from *Nollan* and *Dolan*.”).

⁸⁴ See, e.g., *St. Johns Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011) (“[T]he *Nollan/Dolan* rule . . . is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner’s interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner’s interest in the real property subject to the dedication imposed.”); Fenster, *supra* note 10, at 646 (“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.”).

⁸⁵ *Koontz*, 133 S. Ct. at 2595–97, 2600.

⁸⁶ See *id.* at 2597 (explaining that the Fifth Amendment only mandates a particular remedy for takings, which would only occur if the permit was first accepted then found

unconstitutional conditions doctrine recognizes that [the permit denial] *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings.⁸⁷ But if *Nollan* and *Dolan* apply, yet the Fifth Amendment remedy does not, another remedy must be available. After all, the Court has long held “that every right, when withheld, must have a remedy, and every injury its proper redress.”⁸⁸

Prior commentators addressing the failed exactions issue, both before and after *Koontz*, have made the mistake of considering only the possibility of a Fifth Amendment just compensation remedy.⁸⁹ But, aside from the Just Compensation Clause, there are three possible remedies: invalidation of the condition (effectively sending the permit application back to the administrative process); an injunction directing the government to issue the permit without the offending condition;⁹⁰ and damages.⁹¹

to constitute an unconstitutionally extortionate demand, but which would not occur if the permit was originally denied on such grounds).

⁸⁷ *Id.*

⁸⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

⁸⁹ See Woodward, *supra* note 79, at 708 (contrasting the remedy of invalidation with payment of just compensation); Fenster, *supra* note 10, at 638 (“[I]f the property owner wins, how does the Fifth Amendment, which explicitly provides only one remedy, ‘just compensation,’ provide a suitable remedy for a condition that was never exacted and for a rejected development application that the government was authorized to reject?” (footnote omitted)). Others have simply mischaracterized the *Koontz* decision as holding that the denial of a permit for refusing to accede to an unconstitutional condition is a taking. See Catherine Contino, Note, *Monetary Exactions: Not Just Compensation? The Expansion of Nollan and Dolan in Koontz v. St. Johns River Water Management District*, 25 VILL. ENVTL. L.J. 465, 466–67 (2014).

⁹⁰ Neither injunctive remedy would be available if failed exactions were treated as the equivalent of unconstitutional takings. The Court has repeatedly said that just compensation, and not an injunction, is the proper remedy for a taking. See *Koontz*, 133 S. Ct. at 2597; *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 11 (1990); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (“Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.” (footnote omitted)).

⁹¹ Damages under Section 1983 are distinct from the just compensation remedy under the Fifth Amendment. The statute provides a cause of action in law or equity against any person, including local governments, for “the deprivation of any rights, privileges, or immunities secured by the Constitution and [federal] laws.” 42 U.S.C. § 1983 (2013). Just compensation is a remedy specifically available under the Fifth Amendment. See U.S. CONST. amend. V. Section 1983 even allows for the recovery of punitive damages, a remedy unrecognizable to the Just Compensation Clause. See *Smith v. Wade*, 461 U.S. 30, 35–36 (1983).

As will be demonstrated in the remainder of this section, the proper remedies for a *Koontz*-type unconstitutional conditions violation are both invalidation of the condition and economic damages under Section 1983.⁹²

A. *A Mandatory Injunction Cannot Be the Proper Remedy in Most Cases*

Out of the possible remedies, issuance of a mandatory injunction requiring the government to issue the desired permit without conditions is the easiest to reject. In *William J. (Jack) Jones Insurance Trust v. City of Fort Smith*,⁹³ the plaintiff sought a permit to build a convenience store adjacent to his already-operational gas station.⁹⁴ The City refused to grant the permit unless the plaintiff gave up an expanded right-of-way along the property to expand a street, which the plaintiff would not do.⁹⁵ District Judge Morris S. Arnold, now on the Eighth Circuit, concluded that the City had not met its burden under *Nollan* to show that the “plaintiff’s planned expansion of its business will create additional burdens on the present public right-of-way along” the street.⁹⁶ But the furthest-reaching portion of the opinion was the last sentence, which described the remedy for the *Nollan* violation: “an injunction will issue ordering the City to issue the requested permit unconditionally.”⁹⁷

Judge Arnold’s remedy was extraordinary. Going back to the formation of the unconstitutional conditions doctrine, it has always been recognized as a partial repudiation of the “greater-includes-the-lessor”

⁹² The Florida Legislature recently amended the law to clarify that a state law remedy exists for failed exactions. The relevant statute provides that, “[i]n addition to other remedies available in law or equity, a property owner may bring an action in a court of competent jurisdiction under this section to recover damages caused by a prohibited exaction.” Fla. Stat. § 70.45(2). Before bringing a claim, the affected property owner must file a notice explaining to the relevant agency why he believes the exaction is prohibited. *Id.* § 70.45(3). The government then must respond in writing with an explanation of why the particular exaction satisfies *Nollan* and *Dolan*. *Id.* § 70.45(3)(a). Should the dispute proceed to litigation, the statute places the burden on the government to prove that the exaction satisfies the nexus and rough proportionality requirements. *Id.* 70.45(4). Given the dispute over remedy that still exists in the ongoing *Koontz* litigation, it was sensible for the legislature to make this clarification. It should not be read as an admission that no such remedy existed before the statute was passed.

⁹³ *William J. Jones Ins. v. City of Fort Smith*, 731 F. Supp. 912 (W.D. Ark. 1990).

⁹⁴ *Id.* at 913.

⁹⁵ *Id.*

⁹⁶ *Id.* at 914.

⁹⁷ *Id.*

rationale.⁹⁸ As such, courts finding a condition unconstitutional cannot issue a mandatory injunction unless the permitting authority lacks the discretion to deny the permit after the condition is struck.⁹⁹ To do so would be to deny the existence of the greater power because of the agency's abuse of a lesser power.¹⁰⁰ The Court observed as much in *Koontz*, noting that "[e]ven if [the water district] would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on [Mr. Koontz's] forfeiture of his constitutional rights."¹⁰¹ In a failed exaction situation, the government's power to deny the permit outright is generally not at issue.¹⁰² Thus, it is usually not an appropriate remedy to order the issuance of an unconditional permit when the government may, through its legitimate power, deny the permit.¹⁰³

It is important to note that a permitting agency's power to deny a permit application for legitimate reasons does not mean that the denial will be without consequences. On the contrary, outright denial could give rise to takings liability if it leaves the property with no viable economic use.¹⁰⁴ In such cases, the government agency's proffered rationale is

⁹⁸ See *supra* Part I.A.

⁹⁹ See, e.g., *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 346 (1986).

¹⁰⁰ See *id.*

¹⁰¹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013) (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–37 (1987)); see also *City of Little Rock v. Goss*, 151 F.3d 861, 864 (8th Cir. 1998) (reversing an order directing a city to re-zone property because the city "has a legitimate interest in declining to rezone [the] property, and the city may pursue that interest by denying [the property owner's] rezoning application outright, as opposed to denying it because of [his] refusal to agree to an unconstitutional condition.").

¹⁰² See Fenster, *supra* note 10, at 623 ("The most significant legal question that failed exactions raise is whether *Nollan* and *Dolan's* intermediate scrutiny applies to them."); *id.* at 641 ("*Nollan* and *Dolan* presume that the government always has the option under its police power authority to reject the development application rather than approv[e] it with an exaction attached.").

¹⁰³ Of course, the permit denial may still be challenged and entirely invalidated under the Fourteenth Amendment's Due Process Clause. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548–49 (2005) (Kennedy, J., concurring); *Eastern Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("The case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process."); *Polenz v. Parrott*, 883 F.2d 551, 558 (7th Cir. 1989) (collecting Seventh Circuit cases for the proposition that landowners may challenge land use regulations as violations of due process). A denial may also constitute a regulatory taking under the *ad hoc Penn Central* balancing test. In such a case, the conclusion that a taking has occurred would be based on the denial's effect on the landowner's existing property interests, rather than on an exaction theory. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

¹⁰⁴ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–18 (1992).

irrelevant; the action is a “categorical” taking.¹⁰⁵ Even if courts lack the power to issue a mandatory injunction, permitting agencies will have to tread somewhat carefully to avoid takings liability, even if they do possess a substantial interest in denying the permit.

B. Mere Invalidation Is Not Enough

As noted above, some have suggested that the only federal remedy for a failed attempt to impose an unconstitutional condition should be invalidation of that condition.¹⁰⁶ Under this theory, once a condition is invalidated by a court, the permitting decision is remanded to the government agency, which has an opportunity to reconsider its decision and impose another condition.¹⁰⁷ Such a regime is beneficial to local planning boards—they will suffer little recourse for imposing conditions that turn out to be unconstitutional.¹⁰⁸ Woodward argues that this is a desirable result because a monetary remedy would “force the permitting authority to go forward with a decision that it might not want to make after being put on notice that the condition it has imposed is not permissible.”¹⁰⁹ But this overlooks the fact that the imposition of the condition, in and of itself, is a significant constitutional injury.¹¹⁰ The unconstitutional conditions doctrine should provide more protection against the violation of a constitutional right than would simple invalidation and remand.

¹⁰⁵ See *id.* at 1015. The Court emphasized that a government entity could violate the Takings Clause in two ways: “when land-use regulation ‘does not substantially advance legitimate state interests or denies an owner economically viable use of his land.’” *Id.* at 1016 (quoting *Agins*, 447 U.S. at 260) (emphasis added). Thus, a taking in the *Lucas* framework does not depend on a judicial evaluation of government interests, investment-backed expectations, or any other factors. If a permit denial deprives a property of all viable economic use, it will be declared a taking. *Id.*

¹⁰⁶ See generally Woodward, *supra* note 79.

¹⁰⁷ See *id.* at 740 (“Invalidation only zeroes out the offending condition, which can then be narrowed or otherwise tailored to be constitutional.”).

¹⁰⁸ See *id.* at 740 n.248 (“While equitable in nature, [invalidation] is not a severe remedy and is in fact more lenient towards a permitting authority than would be a compensation remedy.”).

¹⁰⁹ *Id.* at 740.

¹¹⁰ See *Koontz*, 133 S. Ct. at 2595 (“[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”); *id.* at 2596 (“As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.”).

Justice Brennan made the case against invalidation as the sole remedy in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*.¹¹¹ Having found a regulatory taking,¹¹² he addressed “whether a government entity may constitutionally deny payment of just compensation to the property owner and limit his remedy to mere invalidation of the regulation instead.”¹¹³ He correctly concluded that “[i]nvalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.”¹¹⁴ More importantly, “[i]nvalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity.”¹¹⁵ On the contrary, it permits the government to continue imposing such regulations.¹¹⁶ The worst that could happen to a permitting entity in that situation would be a court order telling it to go back and try again.¹¹⁷

This reasoning applies equally in the failed exactions context. In a world where invalidation of the condition was the only remedy for the imposition of an unconstitutional condition, permitting agencies would be empowered to prevent development indefinitely.¹¹⁸ In theory, the agency

¹¹¹ *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J., dissenting).

¹¹² To be sure, *San Diego Gas & Electric* was a pure regulatory takings case, not an unconstitutional conditions case. But Justice Brennan’s arguments concerning the weakness of the invalidation remedy in the takings context apply equally to failed exaction cases.

¹¹³ *San Diego Gas & Elec.*, 450 U.S. at 653 (Brennan, J., dissenting).

¹¹⁴ *Id.* at 655.

¹¹⁵ *Id.* at 655 n.22.

¹¹⁶ *See id.*

¹¹⁷ Indeed, California city attorneys were advised at a 1974 conference that “if all else fails, merely amend the regulation and start over again.” *Id.* A longer passage is quite instructive to show the weakness of a mere invalidation remedy.

If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don’t worry about it. All is not lost. One of the extra “goodies” contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura* appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.

San Diego Gas & Elec., 450 U.S. 655 n.22 (quoting James Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO MUN. L. REV. 175, 192–93 (1975)).

¹¹⁸ Consider the situation in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). There, the landowners first created a development plan in 1981 but had revised plans repeatedly rejected by the planning commission, preventing any development.

need not ever grant any permit.¹¹⁹ Rather, it could continue going through iterations of the administrative process for all eternity, imposing different conditions and having the courts strike each down as unconstitutional. In the meantime, the property owner is held in legal limbo, unable to make desired use of the property without a permit but also unable to claim complete victory in court even after winning on multiple conditions.¹²⁰ With the usual disparity in resources between individual property owners and government agencies, the latter will usually be able to win in property disputes simply by attrition.¹²¹

Mere invalidation of an unconstitutional condition is equivalent to granting the government a “do-over” for violating the property owner’s constitutional rights. Detering constitutional violations is one of the important purposes of Section 1983 liability.¹²² But an invalidation remedy would hardly deter anyone from committing the same or similar violations

See id. at 695–98. “After five years, five formal decisions, and 19 different site plans, [the property owners] decided the city would not permit development of the property under any circumstances.” *Id.* at 698. A jury eventually determined in 1994 that the planning commission’s actions had effected a taking, *id.* at 701, and the Supreme Court affirmed in 1999, *id.* at 723. Thus, it took 18 years to finally resolve the conflict between the property owners and the planning commission.

¹¹⁹ The ability to indefinitely hold up the permitting process by repeatedly amending conditions is distinct from a permitting agency’s legitimate power to deny a permit application. When it denies a permit, an agency must provide some reason for its decision, lest it be held an arbitrary exercise of power. Moreover, the landowner may at least challenge the denial as lacking a reasonable basis or as a taking under *Lucas* or *Penn Central*. When the agency holds the permit application in flux, the property owner has no remedy and never receives a final decision. *See, e.g., Lucas*, 505 U.S. at 1015–16; *Penn Central*, 438 U.S. at 124–35.

¹²⁰ *See* Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 111 n.167 (2012) (indicating that a problem with a pure invalidation remedy in regulatory takings is “that an actor could engage in a series of regulatory takings with impunity by simply dropping or amending a given regulation upon losing a challenge.”).

¹²¹ *See id.* at 113–14.

¹²² *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (“The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (“Respondent is correct in asserting that the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983.”); Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability under Section 1983*, 62 S. CAL. L. REV. 539, 548 (1989) (“Commentators generally agree that the Forty-Second Congress enacted section 1983 for at least four purposes: (1) to deter the Ku Klux Klan or others of like mind from violating the constitutional rights of innocent citizens; (2) to provide a federal remedy for any violations of constitutional rights; (3) to provide compensation to the victims of lawless state action; and (4) to reaffirm the underlying principles of the fourteenth amendment.”).

in the future.¹²³ This conclusion is not based on conjecture; the City Attorney quoted by Justice Brennan illustrates how local governments are willing to string out the permitting process so long as they suffer no consequences other than seeing the unconstitutional condition struck down.¹²⁴ Far from proper deterrence, invalidation and remand may actually encourage regulators to continue to impose unconstitutional conditions so long as it accomplishes their goal of limiting development.¹²⁵

On the other hand, if local land use boards were aware that they could be subject to damages for the threatened imposition of an unconstitutional condition, the deterrence value of an unconstitutional condition finding would skyrocket. Instead of proposing a condition first and then having a court decide whether it is constitutional under *Nollan* and *Dolan*, agencies would be encouraged to impose more legally defensible conditions on the use of private property. Just as a damages remedy in a Fourth Amendment excessive force case serves to encourage police not to overstep their bounds in confrontations with suspects, a damages remedy in the failed exactions context would encourage regulators to remain within the limits of the Constitution when imposing land-use exactions.

C. *Damages Remedies Are Common in Other Unconstitutional Conditions Contexts*

Woodward has suggested that “[i]n general, the remedy for an unconstitutional conditions violation is invalidation of the condition.”¹²⁶ Under that view, the protection against unconstitutional conditions “operates to remove barriers to obtaining important public benefits, but it does not guarantee their acquisition.”¹²⁷ While it is true that the unconstitutional conditions doctrine does not guarantee the receipt of government benefits, that recognition rules out only the mandatory injunction remedy.¹²⁸ It says nothing about whether a property owner—or any other unconstitutional conditions plaintiff—may recover compensatory damages as a result of the imposition of the condition.¹²⁹

For example, Woodward cites two of the Supreme Court’s most well-known unconstitutional conditions cases, *Perry v. Sindermann*¹³⁰

¹²³ *San Diego Gas & Elec.*, 450 U.S. at 655–56 n.22 (Brennan, J., dissenting).

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ Woodward, *supra* note 79, at 714.

¹²⁷ *Id.* at 715.

¹²⁸ *See supra* Part III.A.

¹²⁹ *See supra* Part III.B.

¹³⁰ *Perry v. Sindermann*, 408 U.S. 593 (1972).

and *Mount Healthy City School District Board of Education v. Doyle*.¹³¹ In *Perry*, a college professor sought damages and reinstatement after the college declined to renew his one-year employment contract when he engaged in a high-profile dispute with the Board of Regents.¹³² The district court granted summary judgment for the defendants, but the Fifth Circuit reversed and held that a factual dispute should have precluded judgment as a matter of law on the First Amendment claim.¹³³ The Supreme Court affirmed, holding that the professor's lack of tenure did not preclude his unconstitutional conditions claim.¹³⁴ However, the Court said nothing about the proper remedy; it merely agreed that the district court was wrong to dispose of the First Amendment claim on summary judgment.¹³⁵

In *Mount Healthy*, a teacher sued the board of education asserting that he was dismissed in retaliation for several controversial incidents, including a phone call he made to a local radio station.¹³⁶ The district court held that the teacher was entitled to reinstatement with back-pay, and the Sixth Circuit affirmed.¹³⁷ But the Supreme Court vacated the lower courts, holding that the district court should have determined "whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."¹³⁸ As a result, the Court had no occasion to consider the proper remedy. That was left to the district court on remand.

¹³¹ *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

¹³² *Perry*, 408 U.S. at 594–96; *Sindermann v. Perry*, 430 F.2d 939, 942 (5th Cir. 1970) ("He sought compensatory and punitive damages and attorneys fees, a declaratory judgment adjudicating that the Regents' action violated his constitutional rights and that he was entitled to a hearing under suggested procedural guidelines, and a mandatory injunction requiring his reinstatement for the 1969–70 college year at the same level of responsibility and function he had previously held.").

¹³³ *Sindermann*, 430 F.2d at 943.

¹³⁴ *Perry*, 408 U.S. at 597–98.

¹³⁵ *See id.* at 598 ("For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.").

¹³⁶ *Mt. Healthy*, 429 U.S. at 281–82.

¹³⁷ *Id.* at 276.

¹³⁸ *Id.* at 287. This is similar to the rule in garden-variety employment discrimination cases. There, if an employee can prove that an impermissible purpose was a "motivating factor" in an employment decision, the burden shifts to the employer to show by a preponderance of the evidence that it would have made the same decision anyway. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 266–67 (1989) (plurality opinion) (superseded by 42 U.S.C. §§ 2000e-2(m) (2012), 2000e-5(g)(2)(B)) (2012). If the employer succeeds, the employee is not entitled to damages or reinstatement. 42 U.S.C. § 2000e-5(g)(2)(B)(1) (2012).

Neither *Perry* nor *Mount Healthy* hold that unconstitutional conditions plaintiffs are entitled only to rescission of the condition.¹³⁹ There is no support for that proposition in other leading Supreme Court unconstitutional conditions cases, either. For example, in *Agency for International Development v. Alliance for Open Society International, Inc.*,¹⁴⁰ the plaintiffs sought a declaratory judgment invalidating a condition on federal funding requiring them to “not have a policy explicitly opposing prostitution and sex trafficking.”¹⁴¹ All the plaintiffs wanted in that case was a judicial declaration that the condition on their speech imposed by federal law was invalid—they never sought damages.¹⁴² The Court obliged, holding that the condition violated the First Amendment.¹⁴³ As a result, the plaintiffs could receive the federal money without altering their speech.¹⁴⁴ *Alliance for Open Society* illustrates that in many unconstitutional conditions cases, the plaintiff seeks only invalidation and that is quite enough to provide a proper remedy.¹⁴⁵

On the other hand, many federal cases have awarded plaintiffs damages remedies in unconstitutional conditions cases, casting serious doubt on the contention “that the remedy for an unconstitutional conditions violation is invalidation.”¹⁴⁶ The Seventh Circuit case of *Nekolny v. Painter*¹⁴⁷ is illustrative. There, three local government employees alleged they were dismissed from their jobs in retaliation for supporting their supervisor’s political opponent.¹⁴⁸ A jury agreed with them and awarded a total of \$69,000 in lost earnings, \$15,000 in punitive damages, and \$10,000 for emotional distress.¹⁴⁹ The Court of Appeals reversed only the emotional distress award, concluding that the evidence presented

¹³⁹ See *Perry*, 408 U.S. at 593; *Mt. Healthy*, 429 U.S. at 274.

¹⁴⁰ *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321 (2013).

¹⁴¹ *Id.* at 2324–25 (quoting 22 U.S.C. § 7631(f) (2012)).

¹⁴² See *id.* at 2332.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ In any case, it is quite difficult to establish actual damages linked to a speech-related condition outside the public-employment context. See Harvard Law Review Association, *Measure of Damages in Constitutional Torts*, 100 HARV. L. REV. 267, 275 (1986) (“[I]nterference with an individual’s rights to free speech, freedom from discrimination, or other constitutional protections is an injury for which presumed damages seem particularly appropriate, given the likelihood that an individual has suffered from the deprivation of such rights and will typically face difficulty in establishing the dollar value of dignitary injuries.”).

¹⁴⁶ Woodward, *supra* note 79, at 720–21.

¹⁴⁷ See *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981).

¹⁴⁸ *Id.* at 1165.

¹⁴⁹ *Id.* at 1166.

was “insufficient to constitute proof of compensable mental or emotional injury.”¹⁵⁰ Importantly, it left in place the punitive damages award.¹⁵¹ If invalidation of the condition were the only proper remedy for the imposition of the unconstitutional condition, the most the plaintiffs could have been entitled to was reinstatement and back-pay.¹⁵² Several other free speech cases confirm that more than mere equitable relief is available for unconstitutional conditions violations.¹⁵³

D. Failed Exactions Are Analogous to Arbitrary and Capricious Permit Denials, Where Courts Have Consistently Awarded Damages

While it is natural to compare the “failed exaction” cases to other unconstitutional conditions cases, a more helpful analogy is to those instances where courts have found the denial of a permit to be “so arbitrary or irrational as to violate due process.”¹⁵⁴ To be clear, this is not to say that *Nollan/Dolan* exactions cases are analytically indistinct from substantive due process permit denial challenges. They are not. Even after the Supreme Court jettisoned the “substantially advances a legitimate state interest” language from its takings jurisprudence in *Lingle*,¹⁵⁵ many courts and commentators have referred to *Nollan/Dolan* “heightened scrutiny,” as opposed to the rational basis review conducted in substantive due process cases.¹⁵⁶ The *Nollan/Dolan* test is not equivalent to rational

¹⁵⁰ *Id.* at 1172 (citing *Carey*, 435 U.S. at 264 n.20).

¹⁵¹ *Id.* at 1173.

¹⁵² Although it is a monetary award, back-pay is generally considered to be equitable in nature and is awarded along with injunctive relief in employment discrimination cases. See *Chauffers, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 571–72 (1990). It is therefore not technically an award of damages.

¹⁵³ See, e.g., *Wulf v. City of Wichita*, 883 F.2d 842, 874–75 (10th Cir. 1989) (plaintiff in public employee speech case could recover a maximum of \$50,000 for emotional distress); *Meyers v. City of Cincinnati*, 14 F.3d 1115 (6th Cir. 1994) (affirming award of \$25,000 for mental anguish, humiliation, and lost reputation in a free speech unconstitutional conditions case); *Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194, 199 (7th Cir. 1996) (affirming a damages award for termination in retaliation for speech and holding that “[w]hen a right of liberty or property that is protected by the due process clauses is infringed . . . the plaintiff can recover his full common law damages, including damages for emotional injury, loss of reputation, and other intangibles” (citations omitted) (emphasis deleted)).

¹⁵⁴ *Lingle*, 544 U.S. at 548 (Kennedy, J., concurring).

¹⁵⁵ See *id.* at 532 (majority opinion) (“This case requires us to decide whether the ‘substantially advances’ formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.”).

¹⁵⁶ See, e.g., *B.A.M. Dev., L.L.C. v. Salt Lake Cnty.*, 128 P.3d 1161, 1167 (Utah 2006) (granting review to address “whether the *Nollan/Dolan* heightened-scrutiny rough

basis review.¹⁵⁷ Nevertheless, for the purpose of determining the proper remedy, failed exactions are comparable to substantive due process cases. Both are examples of abuse of power by permitting agencies that ultimately lead to the denial of permit applications. Property owners suffer a similar injury in both cases.

In due process permitting cases, federal courts have recognized that plaintiffs are entitled to damages under Section 1983 for an arbitrary and capricious denial of a permit application. For example, in *Cunningham v. City of Overland*,¹⁵⁸ the Eighth Circuit stated that “applicants for building permits state substantive due process claims if they allege the governing authorities capriciously and arbitrarily impose an unconstitutional condition on the granting of a permit.”¹⁵⁹ In the event a plaintiff could establish such a claim, “both compensatory and punitive damages [would be] available upon proper proof.”¹⁶⁰ The court there upheld a jury verdict of \$125,000 in actual and punitive damages for the arbitrary and capricious denial of a license to do business.¹⁶¹ Similarly, in *Bateson v. Geisse*,¹⁶² the Ninth Circuit affirmed a finding of a substantive due process violation when the City of Billings arbitrarily refused to issue the plaintiff a building permit.¹⁶³ The court found that the City and individual council

proportionality test applies where an alleged taking results from a uniform land-use scheme rather than an ad hoc site-specific adjudicative decision”); *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (rejecting the plaintiffs’ invitation to apply *Nollan* and *Dolan* to a legislatively imposed exaction in part because “[t]o extend the *Nollan/Dolan* analysis here would subject any regulation governing development to *higher scrutiny* and raise the concern of judicial interference with the exercise of local government police powers.” (second emphasis added)); *Bldg. Indus. Ass’n v. Cnty. of Stanislaus*, 118 Cal. Rptr. 3d 467, 474 (Cal. Ct. App. 2010) (“Such a generally applicable requirement imposed as a condition of development is subject to a ‘reasonable relationship’ level of judicial scrutiny, as opposed to the heightened scrutiny applied to the imposition of land-use conditions in individual cases as outlined in [*Nollan* and *Dolan*].”); James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 407–17 (2009) (arguing that *Lingle* provides additional support to impose heightened scrutiny on legislative exactions); Lauren Reznick, Note, *The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron*, 87 B.U. L. REV. 725, 731 (2007) (“This two-part test [of *Nollan* and *Dolan*] has been characterized as a heightened scrutiny takings test.”).

¹⁵⁷ Reznick, *supra* note 156.

¹⁵⁸ *Cunningham v. City of Overland*, 804 F.2d 1066 (8th Cir. 1986).

¹⁵⁹ *Id.* at 1068.

¹⁶⁰ *Id.* at 1069 (citing *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986)).

¹⁶¹ *Cunningham*, 804 F.2d at 1067, 1070–71.

¹⁶² See *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988).

¹⁶³ *Id.* at 1303–04.

members were liable for damages.¹⁶⁴ And in *Marks v. City of Chesapeake*,¹⁶⁵ the Fourth Circuit upheld a nominal damages award for the arbitrary denial of a land-use permit.¹⁶⁶

Although property owners rarely prevail on challenges to land-use regulations under a substantive due process theory,¹⁶⁷ the few cases above illustrate that when they do, they are entitled to damages under federal law. To a property owner, there is little difference between an arbitrary denial of a permit application and denial because the owner refused to accede to an unconstitutional condition.¹⁶⁸ In both cases, the permitting agency has abused its powers by withholding a government benefit for an improper reason.¹⁶⁹ And in both cases, damages are the only remedy that suffices to compensate the property owner and deter future constitutional violations.¹⁷⁰

What is more, damages are much easier to ascertain in permit denial cases than for speech restrictions. Outside of the loss of employment

¹⁶⁴ *Id.* at 1306 (“[A]ppellants’ withholding of Bateson’s building permit violated Bateson’s substantive due process rights, took place pursuant to a municipal policy, and caused Bateson’s damages.”); see also *Williamson Cnty.*, 473 U.S. at 197 (“The remedy for a regulation that goes too far, under the due process theory, is not ‘just compensation,’ but invalidation of the regulation, and if authorized and appropriate, actual damages.”).

¹⁶⁵ See *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989).

¹⁶⁶ *Id.* at 311–13. The district court had awarded nominal damages because the plaintiff’s “evidence of damages was far too speculative.” *Id.* at 311 (internal quotation marks omitted).

¹⁶⁷ See Stewart M. Weiner, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467, 1467–68 (1996).

¹⁶⁸ The Eighth Circuit’s *Cunningham* opinion demonstrates this similarity, particularly when it refers to the arbitrary imposition of an unconstitutional condition on the granting of a permit in the context of a substantive due process claim. See *Cunningham*, 804 F.2d at 1068.

¹⁶⁹ The *Nollan/Dolan* doctrine identifies situations where the permitting agency has exceeded its authority by making an extortionate demand not sufficiently related in kind or scope to the effects of the proposed development. See *Koontz*, 133 S. Ct. at 2595.

¹⁷⁰ Property owners may prefer the issuance of a mandatory injunction in due process cases as well as failed exactions, but, as discussed above, such a remedy is not always possible. Suppose a property owner applied for a building permit and was denied for the simple reason that a majority of the members of the permitting agency did not like the color of the proposed house, even though the relevant code does not say that aesthetics can constitute a valid reason for denying a permit. Such a decision would be “arbitrary” or “irrational” under any definition of those words, and thus the permit denial would violate due process. But courts would have difficulty ordering the agency to issue the permit unless they were convinced that the agency could have no legitimate reason to deny it again. Thus, in many cases damages are the only way to adequately compensate a property owner after a permit denial.

and wages (both of which can be addressed through equitable remedies), it is difficult to calculate damages caused by imposing a condition on speech.¹⁷¹ Often, there may be no appreciable damages that cannot be awarded through back-pay.¹⁷² But in permit denial cases (whether they be failed exaction challenges under *Koontz* or substantive due process cases), there will nearly always be economic repercussions. The denial of a land-use permit could cause a property owner to be unable to start¹⁷³ or expand a business,¹⁷⁴ or simply require a landowner to give up real estate that has other productive uses.¹⁷⁵ Unlike in the speech context, equitable relief often provides little help to these property owners. Therefore, economic damages are the only way to satisfy Section 1983's primary purpose to compensate those who suffer a constitutional injury.¹⁷⁶

¹⁷¹ See Harvard Law Review Association, *supra* note 145, at 275.

¹⁷² See, e.g., *id.* at 282–83, 283 n.40.

¹⁷³ See *Goss*, 151 F.3d at 862 (denial of application to rezone property from residential to commercial).

¹⁷⁴ See *Bateson*, 857 F.2d at 1302 (denial of permit to builder who sought to build condominium development and convenience store on his newly acquired property).

¹⁷⁵ See *Koontz*, 133 S. Ct. at 2592–93.

¹⁷⁶ It can also be argued that property rights cases are fundamentally different from typical First Amendment unconstitutional conditions cases. For one, failed exaction cases involve the defense of the fundamental right to private property. See *Slaughter-House Cases*, 83 U.S. 36, 115 (1872) (Bradley, J., dissenting) (“Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. And of the last he says: ‘The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land.’”); Gregory Daniel Page, *Lucas v. South Carolina Coastal Council and Justice Scalia’s Primer on Property Rights: Advancing New Democratic Traditions by Defending the Tradition of Property*, 24 WM. & MARY ENVTL. L. & POL’Y REV. 161, 206 (2000) (“Repeatedly, the Framers justified private property as a fundamental right by referring to fundamental tradition.”). When a property owner sees his land-use permit application denied, he loses the right to use his property as he would like. As the *Nollan* Court recognized, “the right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’” *Nollan*, 483 U.S. at 845 n.2.

On the contrary, public employment and federal funding are plainly governmental benefits. See *Elrod v. Burns*, 427 U.S. 347, 360–61 (1976) (citing *Perry*, 408 U.S. 597). Therefore, even if it were true that courts had recognized invalidation as the sole remedy for unconstitutional conditions cases in the First Amendment context, it would not necessarily follow that the same should be true in property rights cases. Those claiming an entitlement to a government benefit are simply not on equal footing with those attempting to exercise a fundamental right. Cf. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting that while public education is not a constitutional right, “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation”); see also Lynn

E. Calculating Damages in Failed Exaction Cases

If damages are available for failed exactions, how should they be calculated? After all, not all demands are equal. Valuation in this context suffers from some of the same inherent difficulty as do breach of contract actions seeking damages in the form of lost profits.¹⁷⁷ Like future profits, the economic value of a permit that was never granted may be speculative.¹⁷⁸ However, valuation of land is not quite as difficult as determining how much money a yet-to-be-established business will make in its first year of operation. As such, a fair award of damages will be possible in many cases.

Real estate has a rental value that depends in part on the parcel's permitted use.¹⁷⁹ Existence of a particular zoning designation or permitted use may significantly alter a parcel's value.¹⁸⁰ Indeed, the *Koontz* majority stated that the "central concern" of *Nollan* and *Dolan* was to prevent government from imposing conditions that "diminish without justification the value of the property."¹⁸¹ Thus, it only makes sense that the proper measure of damages should be the value lost as a result of the imposition of the unconstitutional condition.¹⁸²

A. Baker, *The Prices of Rights: Toward of Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1247 (1990) (pointing out that conditional allocations of federal funding is a challenge to the role of the Court, as "the Court is not directly concerned with straightforward violations of constitutional rights as it is when faced with constitutional challenges not involving conditions on benefits") (emphasis omitted).

¹⁷⁷ See SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 64:10 (4th ed. 2015).

¹⁷⁸ See *Marks*, 883 F.2d at 309, 311 (upholding award of only nominal damages to property owner who was arbitrarily denied permit to operate a fortune-telling business on the property because of lack of evidence of actual damages); see also Daniel L. Siegal & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 521 (2010) (arguing that landowners have a difficult time proving actual damages for temporary regulatory takings when the land is not currently being used for anything).

¹⁷⁹ It is well established that zoning laws affect a parcel's rental value. See, e.g., James C. Ohls, et al., *The Effect of Zoning on Land Value*, 1 J. URB. ECON. 428, 430-32 (1974).

¹⁸⁰ See WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 65-66 (1985) (noting that restrictive zoning may benefit the owners of already-developed land while decreasing the value of undeveloped land).

¹⁸¹ *Koontz*, 133 S. Ct. at 2600. Of course, the property in *Koontz* itself would have been worth much more with a development permit than without one; so much so that the trial court awarded Mr. Koontz \$376,154. See *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 17 (Fla. Dist. Ct. App. 2009) (*Koontz IV*) (Griffin, J., dissenting).

¹⁸² This is perhaps the best reason why the remedy in the failed exactions case is different from cases like *Nollan* and *Dolan*, which involved conditional permit approvals. In the paradigmatic *Nollan/Dolan* case, the property owner receives the benefit of the permit

It is beyond the scope of this Article to delve into the exact calculation of damages in every failed exaction case. However, the Florida courts in *Koontz* applied a formula that would likely work in most cases. As dissenting Judge Griffin explained in *Koontz IV*, the trial court awarded damages equivalent to “the rental value of the property based on a valuation with the permit” less the value of the property without the permit.¹⁸³ Of course, the state court awarded damages under the theory that the permit denial effected a temporary taking of Mr. Koontz’s property.¹⁸⁴ Nonetheless, the court’s valuation illustrates that it is within the judicial competence to value property with and without a land-use permit. Courts should not shy away from awarding damages simply because there is no precise valuation method; if that were common practice, damages would be unavailable in many cases.¹⁸⁵

F. Conclusion

Whether property owners may successfully sue for damages when their permit is denied after a failed exaction will have a profound effect on land-use decisions. The availability of actual damages would presumably shape the actions of local governments more than has the *Koontz*

at the cost of an exaction. Thus, the property owner’s injury is the exaction itself, rather than the loss of the permit. The Court also distinguished the two, noting that “the Fifth Amendment mandates a particular remedy—just compensation—only for takings.” *Koontz*, 133 S. Ct. at 2597 (emphasis omitted). After *Koontz*, it appears fairly clear that the available remedy in *Nollan/Dolan* cases is just compensation for the exacted property.

¹⁸³ *Koontz IV*, 5 So. 3d at 17 (Griffin, J., dissenting).

¹⁸⁴ *See id.* at 10 (majority opinion) (“After hearing conflicting evidence, the trial court concluded that the District had effected a taking of Mr. Koontz’s property and awarded damages.”). Some courts have taken this view after *Koontz*. For example, a Montana trial court awarded damages under Section 1983 of \$542,772 to property owners who had their application for a development permit denied for failure to accede to an unconstitutional condition. *See also* *Hamlin Constr. & Dev. Co. v. Bd. of Cnty. Comm’rs*, No. BDV-2008-208, at 29 (Mont. D. Ct. Jan. 14, 2014). That court also found that the condition’s failure to comply with the *Nollan/Dolan* standard effected a taking. *Id.* at 27. The Florida court’s assessment of damages in a manner analogous to a temporary physical taking would certainly work in some failed exaction cases where specific losses resulting from the denial are clear and the offending regulations have been repealed. *See id.* at 28–29; *see also Koontz IV*, 8 So. 3d at 17 (Griffin, J., dissenting) (noting that the trial court awarded damages “from 1999, when the permit was denied, until the permit was issued in 2005”).

¹⁸⁵ *Cf. Comm’r of Internal Revenue v. Marshall*, 125 F.2d 943, 946 (2d Cir. 1942) (rejecting the argument that Congress would not have meant to impose a tax based on an estimate of value and noting that “‘market value’, for instance, in the case of city real estate, is often a mirage”).

opinion. Without damages, permitting authorities have little incentive to conform to the *Nollan/Dolan* standard now applicable to permit denials. As Woodward points out, “invalidation triggers time-out that allows the permitting authority to stop and think about what it should do next: exercise eminent domain power or attempt to modify the condition.”¹⁸⁶ This sort of slap on the wrist is unlikely to provoke governments to respect property rights the way the *Koontz* majority envisioned. The most it can accomplish is to compel further negotiation.

That is not enough to ensure that governmental agencies will do what is required by *Nollan*, *Dolan*, and *Koontz*. Section 1983, with its dual purposes of compensation and deterrence of constitutional violations, must provide a monetary remedy to those who are denied use and enjoyment of their property by an unconstitutional permit denial. Without a damages remedy, the right to be free from arbitrary and capricious permit denials masquerading as attempted exactions—declared by the *Koontz* majority to be of the utmost importance—will be rendered illusory.¹⁸⁷ It does property owners little good for the Supreme Court to declare that they have the right to be free from coercive exactions but allow them only an ineffective remedy. If that happens, the Takings Clause will again be “relegated to the status of a poor relation”¹⁸⁸ among the Bill of Rights.

IV. *KOONTZ* AND *WILLIAMSON COUNTY* RIPENESS—THE DOOR TO FEDERAL COURT IS AJAR

The fact that all nine justices agreed that no taking occurred under the facts in *Koontz* has broad significance outside of the question

¹⁸⁶ Woodward, *supra* note 79, at 740.

¹⁸⁷ In a similar fashion, it is now generally recognized that the Fourth Amendment right to be secure against unreasonable searches and seizures is illusory if not accompanied by exclusion of the evidence uncovered in the illegal search. *See, e.g.*, *Wolf v. Colorado*, 338 U.S. 25, 42–43 (1949) (Murphy, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (stating that “[w]ithout the [exclusionary] rule the assurance against unreasonable federal searches and seizures would be ‘a form of words’, valueless and undeserving of mention in a perpetual charter of inestimable human liberties.”). In the Fourth Amendment context, it is damages that are the inadequate remedy as compared to suppression of the evidence. *See Wolf*, 338 U.S. at 43 (“The appealing ring softens when we recall that in a trespass action the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar.”). Nominal damages in a Fourth Amendment case neither adequately compensate a defendant nor deter an officer. The same is true of an invalidation remedy in the failed exaction context.

¹⁸⁸ *Dolan*, 512 U.S. at 392.

of remedy. If properly applied, that finding should relieve failed exaction plaintiffs of any obligation to “ripen” their claims in state court. Even if we assume the correctness of the *Williamson County* rule as stated,¹⁸⁹ the origins of the rule show that it should not apply to non-takings claims, including freestanding unconstitutional conditions claims. Therefore, failed exaction plaintiffs should be able to bring their damages claims directly in federal court.

A. *Brief Overview of the Williamson County State Litigation Requirement*

In *Williamson County*, the Supreme Court created two barriers to litigating takings claims in federal court. First, before a property owner may bring a federal claim, the relevant government entity must have reached a “final decision” on the owner’s permit application.¹⁹⁰ Second—and, for present purposes, more importantly—a property owner cannot bring a federal claim until he has “[sought] compensation through the procedures the State has provided for doing so.”¹⁹¹ This has become the well-known requirement that plaintiffs bring an inverse condemnation suit in state court before a federal takings claim will be ripe.¹⁹²

By itself, the state-court litigation rule would be a significant inconvenience to takings plaintiffs, requiring them to go through two separate rounds of litigation in order to raise a federal claim.¹⁹³ But the situation in practice is much worse. Because of the interaction between traditional preclusion doctrines and the federal full-faith-and-credit statute,¹⁹⁴ *Williamson County* actually prevents federal courts from addressing the

¹⁸⁹ *Williamson County* ripeness is one of the most widely criticized doctrines in today’s law. See, e.g., *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 349–52 (2005) (Rehnquist, C.J., concurring in judgment); Michael M. Berger & Gideon Kanner, *Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671 (2004); J. David Breemer, *The Rebirth of Federal Takings Review? The Courts’ “Prudential” Answer to Williamson County’s Flawed State Litigation Ripeness Requirement*, 30 TOURO L. REV. 319 (2014); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199, 239 (1996). It is beyond the scope of this Article to discuss the correctness of the ripeness rule itself.

¹⁹⁰ *Williamson Cnty.*, 473 U.S. at 186.

¹⁹¹ *Id.* at 194.

¹⁹² See *id.* at 196 (referring to state inverse condemnation law as the proper way to seek compensation from the state).

¹⁹³ See *id.* at 173.

¹⁹⁴ 28 U.S.C. § 1738 (2012).

merits of takings claims at all.¹⁹⁵ The Court justified the state litigation requirement with reference to the text of the Just Compensation Clause.¹⁹⁶ Because the Constitution does not forbid takings, but only takings without just compensation—so the argument goes—there can be no violation of the Just Compensation Clause until the regulatory takings plaintiff has sought compensation by filing an inverse condemnation lawsuit.¹⁹⁷ Since the state court may resolve the takings claim in conjunction with the inverse condemnation suit, and re-litigation of that claim is barred by preclusion principles, takings plaintiffs are kept out of federal court. Whether or not the Supreme Court intended this result,¹⁹⁸ it has become well-established law.

B. The Rationale of Williamson County Is Inapplicable to Failed Exactions

The *Williamson County* Court viewed the property owner's cause of action "as stating a claim under the Just Compensation Clause."¹⁹⁹ This view pervaded the Court's analysis and explains why it created the state litigation requirement.²⁰⁰ Indeed, the majority in *San Remo* noted

¹⁹⁵ See *San Remo*, 545 U.S. at 342–45 (majority opinion); Berger & Kanner, *supra* note 189, at 687 ("The mechanism for keeping property owners out of federal court has been the combination of *Williamson County's* requirement of state court litigation with res judicata, collateral estoppel, the *Rooker-Feldman* doctrine, and full faith and credit." (footnote omitted)).

¹⁹⁶ *Williamson Cnty.*, 473 U.S. at 194–95.

¹⁹⁷ *Id.*

¹⁹⁸ Indeed, some courts and commentators believe that the Court did not intend to bar takings plaintiffs from federal court in *Williamson County*. See, e.g., *Dodd v. Hood River Cnty.*, 59 F.3d 852, 860–61 (9th Cir. 1995) (We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs"); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004) ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*."); J. David Breemer, *Ripeness Madness: The Expansion of Williamson County's Baseless "State Procedures" Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615, 625 (2009) ("Nothing in *Williamson County* suggests this was intended."); Berger & Kanner, *supra* note 189, at 688 (arguing that the language of *Williamson County* and the Court's knowledge of existing preclusion doctrines indicates that it did not intend to erect a bar to federal jurisdiction over takings claims).

¹⁹⁹ *Williamson Cnty.*, 473 U.S. at 186.

²⁰⁰ See *id.* at 194 n.13 ("[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action."); see also J. David Breemer, *Ripening Federal Property Rights Claims*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 50, 51 (2009) ("In *Williamson County*, the Supreme Court clearly

this distinction when it conceded that a property owner may raise claims that seek “relief distinct from the provision of ‘just compensation’” directly in federal court.²⁰¹ Despite this, some federal courts have expanded *Williamson County* ripeness far outside the realm of the Just Compensation Clause to encompass just about any property rights claim in federal court, including due process and equal protection claims.²⁰²

As some have already argued, this expansion is unwarranted.²⁰³ The state litigation requirement “only exists due to the ‘special nature of the Just Compensation Clause,’”²⁰⁴ and it is therefore inapplicable to claims that seek a different remedy. In fact, “*Williamson County* confirms this view because it declined to apply the state procedures rule to a due process claim that sought invalidation and Section 1983 damages rather than a Just Compensation Clause remedy.”²⁰⁵ No Supreme Court case has sanctioned the application of the state-litigation requirement beyond the specific confines of *Williamson County* and the Just Compensation Clause.²⁰⁶

If we accept the argument that the state litigation requirement does not apply to non-just compensation claims, it follows that it does not bar failed exaction claims. As noted, no property is ever taken in such cases. How, then, could a property owner ever do what *Williamson County* requires? After all, if a property owner has not suffered a taking, it would generally be futile to ask a state court for “just compensation,” as none would be available.²⁰⁷ Application of *Williamson County* to non-takings

derived the state litigation rule from the special nature of the ‘Just Compensation Clause’ of the Fifth Amendment.”); Max Kidalov & Richard H. Seamon, *The Missing Pieces in the Debate Over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1, 7 (1999) (“This exhaustion requirement, the Court explained, springs from the text of the Just Compensation Clause, which prohibits only uncompensated takings of private property for public use.”).

²⁰¹ *San Remo*, 545 U.S. at 345–46.

²⁰² See, e.g., *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996); *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 510, 516 (2d Cir. 2014).

²⁰³ See Breemer, *supra* note 198, at 650 (“A survey of the relevant federal circuit court decisions fails to reveal any plausible doctrinal or logical ground for applying the state procedures rule to due process and equal protection claims.”).

²⁰⁴ *Cnty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) (quoting *Williamson Cnty.*, 473 U.S. at 195 n.14).

²⁰⁵ Breemer, *supra* note 198, at 636 (citing *Williamson Cnty.*, 473 U.S. at 197).

²⁰⁶ See *id.*

²⁰⁷ See *Daniels v. Area Plan Comm’n of Allen Cnty.*, 306 F.3d 445, 456 (7th Cir. 2002) (“In *Williamson County*, the Supreme Court adopted a limited exception to its exhaustion requirement based on the futility of seeking state court relief.”).

claims simply makes no logical sense. It has the effect of imposing an exhaustion requirement on a class of federal civil rights plaintiffs without any basis in the Constitution or federal law.²⁰⁸ Instead, property owners in failed exaction cases should be permitted to seek damages directly in federal court under Section 1983.²⁰⁹

²⁰⁸ It is well established that Section 1983 plaintiffs generally do not have to exhaust state remedies before heading to federal district court. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 472–73 (1974); *Patsy v. Bd. of Regents*, 457 U.S. 496, 507 (1982). Several commentators have noted that *Williamson County* ripeness is inconsistent with this general principle. *See, e.g.*, Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U.J.L. & POL'Y 99, 103, 124–26 (2000) (“No other species of litigant seeking relief on federal constitutional grounds is subjected to this run-around.”); John F. Pries, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 726, 732 (2008) (arguing that *Williamson County* represents “a marked change from past practice” in its willingness to allow state law to essentially decide federal constitutional tort actions, and noting that “*Williamson County*’s conflict with Section 1983’s no-exhaustion principle is obvious and has been widely criticized.”). That inconsistency is even more pronounced outside of the special confines of the Just Compensation Clause.

²⁰⁹ It is true that even before *Williamson County*, federal courts sometimes abstained from deciding takings claims. They often did so for similar reasons as courts now find claims unripe under the state litigation requirement. For example, in *Muskegon Theatres, Inc. v. City of Muskegon*, 507 F.2d 199, 202 (6th Cir. 1974), the Sixth Circuit abstained from determining whether the City had taken the plaintiff’s leasehold, noting that “[i]n several reported opinions, courts have abstained from exercising their federal question jurisdiction in eminent domain contexts.” (footnote omitted). *See also* R.S. Radford & Jennifer F. Thompson, *The Accidental Abstention Doctrine: After Nearly 30 Years, the Case for Diverting Federal Takings Claims to State Court Under Williamson County Has Yet to Be Made*, 67 BAYLOR L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492595 [<http://perma.cc/7LMF-7FAH>] (detailing the use of abstention to dispose of pre-*Williamson County* federal takings claims in the Fourth and Ninth Circuits). *But see* *Ballard Fish & Oyster Co. v. Glaser Construction Co.*, 424 F.2d 473, 474–75 (4th Cir. 1970) (rejecting a defendant’s contention that the property owner should have been required to seek a remedy in the state courts by noting that federal constitutional plaintiffs are generally not required to exhaust state remedies to proceed in federal court).

It is beyond the scope of this Article to discuss the merits of federal courts using abstention doctrines to avoid failed exaction cases. The purpose of this Part is only to argue that federal courts should not use the *Williamson County* state litigation doctrine—which has “greatly relaxed the requirements for declining to exercise Article III jurisdiction”—as a vehicle to avoid these cases. Radford & Thompson, *supra* 209, at 49. That being said, Radford and Thompson persuasively contend that in the years after *Williamson County*, the Supreme Court has significantly limited the abstention doctrines used by the circuit courts to decline jurisdiction over land-use cases. *See id.* at 49–51 (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361–64 (1989); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728, 731 (1996)). *Quackenbush*, in particular, seems to hold that abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is inappropriate in an action for damages. *See* Radford & Thompson, *supra* 209, at 50.

CONCLUSION

The Court's decision in *Koontz* was a triumph for individual constitutional rights. For one, all nine justices recognized that a government entity violates the Constitution when it denies a land-use permit because the property owner refused to accept an unconstitutional condition.²¹⁰ Second, the Court accepted that demands to pay money, no less than exactions of real property, create "special vulnerability" for property owners going through the permitting process.²¹¹ Both of these developments mean that landowners will be less susceptible to bullying by local governments and more able to protect their constitutional property rights.²¹² But important questions remain, the resolution of which could determine whether *Koontz* fulfills its significant promise.

First, partly due to the procedural posture of the case, the Court declined to say what remedies might be available upon proof that a permit denial violated the *Koontz* principle. Of course, as the *Koontz* case shows, states may devise their own remedies to deal with unconstitutional conditions claims. But that ignores the fact that failed exactions plaintiffs have suffered an injury cognizable under the federal constitution. Where there is a federal right, there must be a federal remedy.

This Article posits no more than that the federal remedy should be consistent with the remedy in other cases brought under Section 1983: actual damages. Mere invalidation of the offending condition is simply not enough when the government holds the bargaining power and could easily replace the condition with another equally objectionable one the second time around. The dual purposes of Section 1983 are to compensate victims of constitutional torts and deter government agents from committing such violations in the future.²¹³ Standing alone, invalidation of the condition accomplishes neither of these goals. Without accompanying damages, the affected property owner receives nothing while permitting agency is free to impose further conditions. The result could be years of fighting over permit conditions without the ability to use the property.

In order to realize the promise of the *Koontz* decision and encourage regulators to make sure that exactions do not go beyond mitigating

²¹⁰ *Koontz*, 133 S. Ct. at 2595; *id.* at 2603 (Kagan, J., dissenting).

²¹¹ *Id.* at 2599, 2603 (majority opinion).

²¹² See Christina M. Martin, Nollan and Dolan and Koontz—*Oh My! The Exactions Trilogy Require Developers to Cover the Full Social Costs of Their Projects, But No More*, 51 WILLIAMETTE L. REV. 39, 69 (2014).

²¹³ *Robertson v. Wegmann*, 436 U.S. 584, 599 (1991) (Blackmun, J., dissenting).

the actual social costs of development,²¹⁴ federal courts should take the Supreme Court's invitation to develop a damages remedy in failed exaction cases. If the premise of this Article is correct, the federal courts will have more opportunities to hear these cases than traditional *Nollan* and *Dolan* claims because of the absence of the *Williamson County* bar. While some States may provide an adequate remedy in this situation, the dispute between the majority and dissent in the Florida Court of Appeals in *Koontz* reveals that it is not always so simple.²¹⁵ Even if it were, Section 1983 does not leave the guaranty of federal constitutional rights to the vagary of state statutes or enforcement by state courts. A federal damages remedy is necessary to preserve the vitality of *Koontz*.

²¹⁴ See Martin, *supra* note 212, at 41 (*Koontz* recognizes that "government may legitimately require landowners to carry their own weight, mitigating their development plans so that they do not impose costs on their neighbors.").

²¹⁵ Compare *Koontz IV*, 5 So. 3d at 10–12 (majority opinion), with *Koontz V*, 2014 WL 1703942, at *8 (Griffin, J., dissenting) ("Because there was no 'taking' compensable under the Fifth Amendment in this case, the question remains whether *Koontz* has a damages remedy under [the Florida statute].").