



The Remnants of Exaction Takings

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ABSTRACT

*This article explores the ability of local governments to impose discretionary permit conditions, or "exactions," to offset the burdens that new development places upon existing infrastructure and the environment. Over fifteen years ago, in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, a deeply divided U.S. Supreme Court ruled that the Takings Clause of the Fifth Amendment significantly restricts this governmental authority, for the clause requires the judiciary to apply a more stringent level of scrutiny in reviewing permit conditions than is accorded outright permit denials. These "regulatory takings" decisions provide land use regulators with incentives to circumvent the more stringent standard for permit conditions by under-regulating, over-regulating, or engaging in unwelcome conduct associated with a repeat-player theory. However, dicta in the Court's recent unanimous opinion in *Lingle v. Chevron U.S.A., Inc.* could be interpreted as limiting the application of the stringent scrutiny established in *Nollan* and *Dolan* to a small subset of exactions. This article seeks to provide some normative basis for understanding why the Court issued a unanimous, albeit veiled, declaration in an exactions takings arena that previously had been complicated by contentious policy disputes.*

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INTRODUCTION

The original Euclidean model that either sanctioned or banned certain uses according to static zoning maps has been replaced by a variety of flexible planning tools. Today, local government's ability to exact concessions from property owners in exchange for the conferral of discretionary development permits generally is recognized as a permissible exercise of modern land use authority. While these "exactions" commonly operate quite reasonably to offset infrastructural burdens emanating from new development, such a discretionary power inevitably is subject to exploitation. Defining the appropriate degree of this discretion and identifying the institutional entities that should control it is the subject of great scholarly debate.

From the emergence of exactions in the 1960s, the marketplace of municipal competition for homeowners and businesses, the electoral process, local regulatory codes, and state statutory and constitutional law have all operated as *de facto* controls on the imposition of exactions.¹ In *Nollan v. California Coastal Commission*² in 1987, and its inseparable rhyming partner, *Dolan v. City of Tigard*³ in 1994, the U.S. Supreme Court declared that the federal Constitution's Fifth Amendment Takings Clause also places limits upon the government's authority to condition land use permits.

For the better part of two decades, *Nollan* and *Dolan* effectively have required lower courts to apply a stringent level of judicial scrutiny when reviewing permit conditions.⁴ However, the courts apply a deferential level of scrutiny when reviewing permit denials.⁵ This anomaly has created a strange set of

¹ See, e.g., Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729 (2007) [hereinafter Fenster, *Constitutional Shadow*].

² *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

³ *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Most jurists, scholars, and journalists assert that "Nollan" and "Dolan" rhyme. See, e.g., Douglas W. Kmiec, *Clarifying the Supreme Court's Taking Cases—An Irreverent but Otherwise Unassailable Draft Opinion in Dolan v. City of Tigard*, 71 DENV. U. L. REV. 325, 331 (1994); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1001 (1997); Michael M. Berger, *Justice in Rhyme: Will 'Dolan' Go Far to Explain 'Nollan'?*, L.A. DAILY J., Jan. 12, 1994. However, Chief Justice Rehnquist may have begged to differ. At oral argument, the Chief Justice introduced "Nollan" with a pronunciation resembling a short "o," as in the word "doll." See Recording of Oral Argument, The Oyez Project, http://www.oyez.org/cases/1980-1989/1986/1986_86_133 (follow "Nollan v. California Coastal Commission – Oral Argument" hyperlink) (last visited Mar. 7, 2010).

⁴ "Exactions" and "permit conditions" will be used interchangeably herein.

⁵ See, e.g., David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1246 n.10 (1997).

incentives for government officials reviewing permit applications, as the difference in standards can lead to under-regulation, over-regulation, and repeat-player concerns.⁶ However, fairly cryptic dicta in the Supreme Court's unanimous 2005 opinion in *Lingle v. Chevron U.S.A., Inc.*⁷ could be interpreted to provide some guidance on this apparent inconsistency.

The five-four decisions in *Nollan* and *Dolan* provide thrilling political theater, evidencing the stark differences in the sitting Justices' perceptions of government authority to manage private land uses. For instance, the *Nollan* majority depicted the government as masters of "out-and-out extortion;"⁸ the dissent suggested it is the private property owners "who are the interlopers" on longstanding "public" rights.⁹ Perhaps not surprisingly, commentators have categorized both opinions—like several others in the muddied field of Supreme Court regulatory takings jurisprudence—as results-oriented rather than theoretically cogent.¹⁰

Compared to the flair of *Nollan* and *Dolan*, the *Lingle* dicta is dry, technical, and devoid of pronouncements on policy, such that the complete rationale for this dicta thus far has proven elusive. However, its influence on the body of regulatory takings law ultimately may be quite significant. This dicta may foretell a considerable narrowing of the application of *Nollan* and *Dolan*, whereby their scrutiny is confined to those conditions requiring physical occupation of private property.

This article explores the allocative inefficiencies and theoretical inconsistencies in applying *Nollan* and *Dolan* to a broad set of permitting scenarios, as well as the existence of alternative local controls that restrain government overreaching in the permit condition context. These theories may work in concert to provide some normative basis for understanding why the *Lingle* Court issued a unanimous, albeit veiled, declaration in an exactions takings arena that previously had been complicated by contentious policy disputes.

⁶ See *infra* notes 112-14 and accompanying text.

⁷ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

⁸ *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

⁹ *Id.* at 846 (Brennan, J., dissenting).

¹⁰ See, e.g., Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); Michael B. Kent Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence after Lingle v. Chevron*, 16 N.Y.U. ENVTL. L.J. 63 (2008); Floyd B. Olson, *The Enigma of Regulatory Takings*, 20 WM. MITCHELL L. REV. 433 (1994).

I. THE CONSTITUTIONALIZATION OF DEVELOPMENT PERMIT EXACTIONS

In theory, land use exactions oblige property owners to internalize the expected external burdens from their proposed intensified use of their land in accord with a discretionarily issued government permit.¹¹ In what several scholars have referred to as “the end of the ‘free ride’” of the 1950s, local governments seeking to avoid a slew of outright application denials trended toward seeking contributions from permit recipients to cover infrastructural impacts resulting from new development.¹² Common infrastructural impacts included increased roadway usage, sewage treatment, growth in school populations, and parkland degradation.¹³ Contributions accounting for these impacts provided municipalities with an alternative method to pay for capital facilities necessary to accommodate growth and its associated externalities in the face of fervent voter opposition to new and increased taxation.¹⁴ In short, such contributions assured that new residents pre-paid the costs of development.

This shift to buyer-financed infrastructure led to contentions of inequity, inefficiency, and ineffectiveness in light of the piecemeal ad hoc decision-making process of local land use permitting.¹⁵ In response, state courts and

¹¹ See generally Been, *supra* note 1; Daniel A. Crane, *A Poor Relation? Regulatory Takings after Dolan v. City of Tigard*, 63 U. CHI. L. REV. 199 (1996); Fenster, *Constitutional Shadow*, *supra* note 1; Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004) [hereinafter Fenster, *Takings Formalism*]; Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182 (2004); Deborah Rhoads, *Developer Exactions and Public Decision Making in the United States and England*, 11 ARIZ. J. INT’L & COMP. L. 469 (1994); Nick Rosenberg, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641 (2003).

¹² See DANIEL P. SELMI, ET AL., *LAND USE REGULATION* 149 (3d ed. 2008).

¹³ See, e.g., Thomas W. Ledman, *Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation*, 45 FLA. L. REV. 835 (1993). The imposition of these types of permit conditions ordinarily are of little contention when existing property owners have paid for these infrastructural improvements, as the new developers otherwise would be undeserving freeriders. However, to the extent these infrastructure improvements have been paid for by bonding, future residents likely will pay off those bonds through their taxes, such that circumstances could arise where exacting additional monies may result in overcharging.

¹⁴ See EXACTIONS, IMPACT FEES, AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA xxxiii (Robert H. Freilich & David W. Bushek eds., 1995).

¹⁵ See, e.g., Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839, 841-46 (1983) (“critics object most to the piecemeal changes in local land regulations: the all-pervasive ‘variance,’ the ‘conditional use permit,’ or the small-scale ‘rezoning’ ordinance”); DUKEMINIER, ET AL., *PROPERTY* 1042 (6th ed. 2006) (“for local communities, enacting regulations is like printing money, because the legal restrictions can be relaxed in exchange for goods and services”); Fenster, *Constitutional Shadow*, *supra* note 1, at 736-40 (explaining how exacting the “true cost” of development without burdening the existing community is not practical in light of imperfect information and political realities). Professor

other institutions sought varying methods of assuring fairness in the imposition of contributions as measured against the predicted project impacts.¹⁶ However, beginning with *Nollan* in 1987 and continuing with *Dolan* seven years later, the U.S. Supreme Court entered the exaction arena by extending its (at times) obscure regulatory takings jurisprudence. The court declared that the federal Takings Clause placed limits on the deference afforded to governments' imposition of certain development conditions. *Nollan* and *Dolan* call for a more stringent standard of review than most, if not all, state courts previously employed in the permit condition context.¹⁷

A. *A Précis on the Rise of Exaction Takings*

Few scholars interpret historical evidence to support the contention that the Framers of the U.S. Constitution envisioned the Takings Clause¹⁸ to restrict any government action beyond physical invasions. Thus, regulations on the use of private property that the state enacted and enforced in the interest of public health, safety, and welfare originally were not subject to takings review.¹⁹ However, in 1922 the U.S. Supreme Court held that a regulation that goes "too far" such that the economic burden is the functional equivalent of a physical

Fenster also suggests that even "perfect" infrastructural exactions do not reflect the full cost of new development because they do not consider socioeconomic needs related to housing and employment opportunities. Fenster, *Constitutional Shadow*, *supra* note 1, at 737.

¹⁶ Compare *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 611-12 (Fla. Dist. Ct. App. 1983) (creating a deferential dual "rational nexus" test) and *Associated Home Builders v. City of Walnut Creek*, 484 P.2d 606, 615 (Cal. 1971) (requiring only a "reasonable" connection between permit conditions and anticipated project impacts), with *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 801 (Ill. 1961) (demanding need for infrastructure-related condition be "specifically and uniquely attributable" to the project's estimated impacts) and *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 15 (N.H. 1981) (adopting "uniquely attributable" test).

¹⁷ For a discussion of the various state approaches as compared to *Dolan's* "rough proportionality" test, see *infra* notes 98-111 and accompanying text.

¹⁸ "[N]or shall private property be taken for public use, without just compensation." See U.S. CONST. amend. V.

¹⁹ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028, n.15 (agreeing that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all" and relying on the "historical compact recorded in the Takings Clause that has become part of our constitutional culture"); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1289-93 (1996) ("The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking."); Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1122 (1997); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause*, 94 YALE L.J. 694, 708-16 (1985) ("Madison intended the clause to have narrow legal consequences: It was to apply only to the federal government and only to physical takings.").

appropriation is a taking.²⁰ It would be more than fifty years before the Court set forth a test to analyze just when a regulation has gone “too far.” The Supreme Court’s first attempt came in the 1978 case of *Penn Central Transportation Co. v. New York City*.²¹

In *Penn Central*, the Court rejected a takings claim based on the designation of a railroad terminal as a historic landmark. The Court set forth a multi-factor balancing test for analyzing regulatory takings. This test focuses on the economic impact of the regulation on the property owner, the degree to which the regulation interferes with the owner’s reasonable, “investment-backed expectations,” and the “character” of the regulation.²² While these factors seemingly focused on whether the burdens imposed on private property owners through valid governmental action should instead be imposed upon the public as a whole, the court also suggested in dicta that substantive review of a regulation might be appropriate in takings analyses.²³

Two years later, in *Agins v. City of Tiburon*,²⁴ the Court drew on *Penn Central*’s dicta to declare that a land use regulation restricting development density did not constitute a taking.²⁵ The Court held that the regulation at issue “substantially advanced” the legitimate state interest of discouraging “premature and unnecessary conversion of open-space to urban uses.”²⁶ The *Agins* Court asserted that its “substantially advance” test derived from three prior momentous land use cases involving not takings, but substantive due process challenges.²⁷ These due process cases included *Village of Euclid v. Ambler Realty Co.*,²⁸

²⁰ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

²¹ *Penn Cent. Transport. Co. v. New York City*, 438 U.S. 104 (1978).

²² See *id.* at 124 (citations omitted) (“In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.”). As some scholars have noted, while the assertion that the listed factors have “particular significance” suggests that other factors could be germane, the U.S. Supreme Court has not explicitly expanded the list. See, e.g., John D. Echeverria, *Making Sense of Penn Central*, 23 *UCLA J. ENVTL. L. & POL’Y* 171, 171 n.4 (2005).

²³ *Penn Central*, 438 U.S. at 127 (“[I]t is, of course, implicit . . . that a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose . . .”).

²⁴ *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

²⁵ See *id.* at 260–62.

²⁶ *Id.* at 261.

²⁷ *Id.* at 261–62.

²⁸ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (rejecting substantive due process challenge to a municipal zoning ordinance because the ordinance was not “clearly arbitrary and unreasonable” and bore a “substantial relation for the public health, safety, morals, or general welfare”).

Nectow v. City of Cambridge,²⁹ and *Goldblatt v. Town of Hempstead*.³⁰

The Court did not rely explicitly on *Agins* when it later established two narrow categories where government action amounts to a *per se* unconstitutional taking.³¹ In *Lucas v. South Carolina Coastal Commission*³² and *Loretto v. Teleprompter Manhattan CATV Corp.*,³³ respectively, the Court held that a regulation that results in the loss of all economic value or in a physical occupation of property eliminates the need for any balancing analysis under *Penn Central*. However, the *Agins* “substantially advance” test did serve as the foundation for the Court’s opinions in the development permit condition cases of *Nollan* and *Dolan*.³⁴ That the Court unanimously abandoned the *Agins* test in the 2005 case of *Lingle*, yet at the same time preserved some role for *Nollan* and *Dolan*, precipitates a review and an analysis of the theoretical considerations underlying the Court’s exaction takings decisions.

Many U.S. Supreme Court regulatory takings opinions, from the very first in 1922, reflect personal conjecture on relationships between public and private actors and contain ruminations of how society should be organized.³⁵ In both *Nollan* and *Dolan*, a conservative majority of the Court seemingly transformed a normative value supporting private property rights protections into utilitarian takings tests seeking to counteract what it viewed as extortionate government practices.³⁶ For the majorities in *Nollan* and *Dolan*, the regulatory takings

²⁹ *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (striking down the application of a zoning ordinance on substantive due process grounds because the application did not “bear a substantial relation to the public, health, safety, morals or general welfare”).

³⁰ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (declaring that plaintiff had not met his burden of proving that an ordinance limiting the depth of excavations was unreasonable).

³¹ See *Lucas v. S. Carolina Coastal Comm’n*, 505 U.S. 1003, 1030 (1992) (“When ... a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (“when the ‘character of the governmental action’ is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”) (internal citations omitted).

³² 505 U.S. 1003 (1992).

³³ 458 U.S. 419 (1982).

³⁴ For a discussion of *Agins* foundational service in *Nollan* and *Dolan*, see *infra* notes 46-111 and accompanying text.

³⁵ See, e.g., Gregory S. Alexander, *Takings Narratives, and Power*, 88 COLUM. L. REV. 1752, 1772 (1988) (“Political vision has driven takings methodology.”).

³⁶ *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, C.J., writing for the majority, joined by O’Connor, Scalia, Kennedy, & Thomas, JJ.); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (Scalia, J., writing for the majority, joined by Rehnquist, C.J., & White, Powell, and O’Connor, JJ.). One scholar has suggested that institutional limitations, primarily precedent from the forty years following the *Lochner* era, have forced the more recently conservative U.S. Supreme

doctrine became a corrective device to balance against incentives for abuse of state permitting power.

Within this normative vision lies an inherent tension for proponents of strong private property rights. On one hand, the movement seeks strong judicial protections of property rights in light of its perception of municipal and state legislatures as unheeding to their concerns.³⁷ On the other, it also respects the democratic process and thus opposes the conception of judicial management of local prerogatives.³⁸ This tension is evident on the other side of the policy spectrum as well. More liberal-leaning jurists and scholars tend to find little merit in most takings challenges, though they have at times selectively favored national objectives that require superseding state and local policy decisions.³⁹

In regulatory takings cases, "oppositional" issues plague jurists of all policy-driven persuasions.⁴⁰ These conflicting broader questions, which frequently arise in a variety of substantive fields, lead to conclusions that may be contrary to a given jurist's instinctive tendency.⁴¹ As noted above, federalism and varying perspectives on trust in governmental motives serve as the primary oppositional issues in the takings debate.⁴²

Court to adopt categorical rules in narrow areas "that allows distinctions between those laws not previously adjudicated and similar laws previously upheld." See Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 595 (1998). Professor McUsic contends that "although Court opinions suggest its discomfort with discretionary decision-making, the Court decisions require more of it . . . for example . . . in *Nollan* the Court decision required the California Coastal Commission to abandon its rule requiring an easement as a condition for each beach building permit, and in its stead adopt a system which (sic) devised a condition for each permit based on the particulars of the building proposed." *Id.* at 657 n.304.

³⁷ See, e.g., Peter A. Buchsbaum, *Should Land Use be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Park*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 471, 471-72 (Thomas E. Roberts ed., 2002).

³⁸ See, e.g., Lazarus, *supra* note 19, at 1124 ("[C]onservatives, apparently enjoying a convenient bout of temporary amnesia, enthusiastically turn to the courts to champion their vision of wise social and economic policy [in takings cases]."); GREGORY L. SCHNEIDER, THE CONSERVATIVE CENTURY: FROM REACTION TO REVOLUTION 159 (2009) ("Conservatives have long seen the judicial activism of the Supreme Court as a major problem . . .").

³⁹ See Lazarus, *supra* note 19, at 1123-24.

⁴⁰ *Id.*

⁴¹ *Id.* at 1121.

⁴² *Id.* at 1124-25. Convenient arguments on the Framers' original intent in drafting the Takings Clause also permeate the takings debate. Compare Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1635 (1988), with Hart, *supra* note 19, at 1289-93 (1996). The more conservative members of the Court read an expansive regulatory takings doctrine into the Fifth Amendment that is dissimilar to the same members' condemnation of such expansion in other areas of law. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances."). Professor Lazarus posits that votes

On the current U.S. Supreme Court, Justice Scalia is cited most often as the guardian of private property rights.⁴³ However, his interpretation of the Takings Clause generally bears no evidence of the aforementioned tension associated with property rights advocates. His positions have been quite difficult to interpret as exercises in judicial restraint, as evidenced in the *Nollan* decision.⁴⁴

B. Qualitative Nature

In *Nollan*, the California Coastal Commission conditioned a private oceanfront landowner's redevelopment permit upon the provision of a public transit corridor along the water.⁴⁵ With this corridor, the Commission purportedly sought to offset the proposed project's impact on the public's view of the water.⁴⁶ Justice Scalia's opinion for the five-Justice majority described

based on one or another "oppositional" issue are "not necessarily the product of illogic or inconsistency; instead they may reflect potential accommodation and the seeds of future compromise between what long have remained opposing, irreconcilable views." Lazarus, *supra* note 19, at 1131. He suggests that the briefs and oral argument made before the Court demonstrate that "the most effective way to obtain a Justice's vote is to use one of the crosscutting issues as leverage to support his or her view of the merits of the regulatory takings claim." *Id.* at 1130. Professor Lazarus continues, "[S]cholars and practitioners seeking to proffer a workable test for regulatory takings analysis are mistaken if they focus on the property rights issue in isolation." *Id.* at 1131.

⁴³ As one scholar has aptly stated, "Property owners have no greater ally [than Justice Scalia] on the Court." *Id.* at 1118.

⁴⁴ See *Lucas v. S. Carolina Coastal Comm'n*, 505 U.S. 1003, 1028 n.15 (1992) (admitting that the founding fathers did not necessarily envision regulatory takings under the Fifth Amendment, yet assigning to the court the task of making policy judgments about which threats are serious enough to justify a public response and which are not). Notably, the policy judgment made by the *Lucas* majority proved wrong. In 2008, only a publicly funded artificial beach nourishment project could save the luxury condominiums and homes of the private golf and tennis subdivision, in which the lots at issue in *Lucas* sit, from erosion and rising seas. See Wild Dunes Resort, Beach Restoration, <http://www.wilddunes.com/beach-nourishment.php> (last visited Mar. 7, 2010). In a video describing the beach replenishment project, a Wild Dunes employee asserted that through storms and erosion, "we even lost part of our eighteenth hole," but through cooperation with the state and the city, they will even be able to "turn the eighteenth hole back into a par 5." *Id.* Another video, which includes similar assertions, is also available at Wild Dunes Resort, Golf, <http://www.wilddunes.com/south-carolina-golf-courses.php> (last visited Mar. 7, 2010). See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 229-30 (1990) (criticizing readings of the Takings Clause as permitting judicial override of legislative judgment).

⁴⁵ See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827-28 (1987).

⁴⁶ *Id.* Takings law generally rests on the principle that a prospector is not entitled to compensation for simply moving to an area with development prohibitions and then filing a takings claim based on the inability to develop the property because the prohibition on development is presumed included in the purchase price. See, e.g., *Dana*, *supra* note 1, at 1263-65. However, the *Nollan* majority makes no mention of the fact that the *Nollan*'s purchased property in an area with an existing comprehensive government policy of requiring all similarly situated owners to facilitate the exercise of public trust rights by conferring a public walking corridor along the water's edge as a condition to development. See *id.* (surveying academic literature on the role of the Takings Clause as security to otherwise risk-averse investors' fears regarding regulatory regime change). The

“the condition for abridgement of property rights through the police power as a ‘substantial advanc[ing]’ of a legitimate state interest.”⁴⁷ Following this reference to *Agins*’ “substantially advance” test,⁴⁸ he continued by stating that the Court is “inclined to be particularly careful about the adjective [‘substantial’] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.”⁴⁹

The *Nollan* majority saw regulating agencies as monopolistic opportunists that manipulate defenseless private property owners. The court concluded that a public foot access easement did not bear an “essential nexus,” or qualitative connection, to the visual access impacts of the proposed development, thereby imposing a more stringent level of scrutiny than courts traditionally employed when assessing land use actions.⁵⁰ Indeed, the majority opinion termed one of the government’s justifications for the walking easement condition a “made-up purpose.”⁵¹ As one scholar has suggested, this reflected the view that the Commission’s rationale served as a “trick” to achieve an objective—a continuous public walking corridor along the water’s edge—without paying for it.⁵²

That the perspective of the *Nollan* majority has been attributed to a faction

majority also did not focus upon the fact that the requested public access corridor lay seaward of a tall existing seawall on the *Nollan*’s property, which likely would have made it difficult for the *Nollans* even to see from their upland property any members of the public that chose to traverse the corridor in light of the fact that the seawall was “located very near to the mean high water line.” *Nollan*, 483 U.S. at 851 (Brennan, J., dissenting) (internal citations omitted). Justice Brennan noted that, even “[w]hen the beach is at its largest, the seawall is about 10 feet from the mean high-tide mark; during the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall.” *Id.*

⁴⁷ *Nollan*, 483 U.S. at 841.

⁴⁸ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (asserting that a land use regulation restricting development density did not constitute a taking because it “substantially advanced” the state interest of discouraging “premature and unnecessary conversion of open-space to urban uses”) (internal citation omitted).

⁴⁹ *Id.* Professor Lazarus notes that the questions at oral argument centered on individual autonomy to construct a secure home on residential property, concerns that appeal to both liberal and conservative-minded jurists and scholars, as opposed to the values in progressive redistributive state programs. See Lazarus, *supra* note 19, at 1125–26.

⁵⁰ Some scholars have referred to the standard of scrutiny under the “essential nexus” test as a form of strict scrutiny. See, e.g., Alexander, *supra* note 10, at 1766. For a discussion of whether the test enunciated in *Dolan* also bears markings of strict scrutiny, see *infra* notes 89–111 and accompanying text.

⁵¹ *Nollan*, 483 U.S. at 839 n.6.

⁵² See Alexander, *supra* note 10, at 1764.

known as the “Property Rights Movement”⁵³ may be misleading. Justice Brennan’s dissent also aims to protect property rights, albeit of a different kind. Justice Brennan asserted that strong property rights come only with reciprocal respect for fellow landowners.⁵⁴ He expressed confidence that the government ordinarily acts in good faith and needs flexibility to prevent the types of externalities forced on the public by developers.⁵⁵ Justice Brennan praised the expertise and reasonability of the Commission, and asserted it is the “private landowners who threaten the disruption of settled public expectations.”⁵⁶

The majority perceived the case from the vision of a public-choice theorist. They read the Constitution as supporting a market-based philosophy that regulators, like any private actor, make decisions based solely on political self-

⁵³ See, e.g., Joseph L. Sax, *Why America Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513, 513 (2005); David Helvarg, *Legal Assault on the Environment: “Property Rights” Movement*, NATION, Jan. 30, 1995, vol. 260, Issue 4, at 126; STEVEN J. EAGLE, CATO INSTITUTE, THE BIRTH OF THE PROPERTY RIGHTS MOVEMENT, NO. 404 (2001), <http://www.cato.org/pubs/pas/pa404.pdf>.

⁵⁴ *Nollan*, 483 U.S. at 847 (Brennan, J., dissenting, joined by Marshall, J.) (“The public’s expectation of access considerably antedates any private development on the coast”). See also Carol M. Rose, *Property as the Keystone Right*, 71 NOTRE DAME L. REV. 329, 365 (1996).

⁵⁵ *Nollan*, 483 U.S. at 848 (Brennan, J., dissenting) (contending that the majority’s insistence on a precise fit between development impacts and condition costs will “hamper[] the [government’s] ability to fulfill its public trust mandate”). But see *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) (asserting that the government abused its power).

⁵⁶ *Nollan*, 483 U.S. at 845 (Brennan, J., dissenting). Dissenting in another takings case decided in the same year as *Nollan*, Justice Stevens echoed Justice Brennan’s *Nollan* narrative in remarking on the value of having “important governmental decisions . . . made in an orderly, fully informed way . . . [in a] democratic government.” See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 339 (1987) (Stevens, J., dissenting) (suggesting temporary burden on citizens due to delay in permitting process is worth having an organized, democratic land use system). In a dissent in *Nollan*, separate from that of Justice Brennan’s, Justice Stevens criticized Justice Brennan’s joining the majority in *First English*, stating,

I write today to identify the severe tension between [the decision in *First English*] and the view expressed by Justice Brennan’s dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. I like the hat that Justice Brennan has donned today better than the one he wore in *San Diego* [where Justice Brennan dissented, suggesting the government may be liable to compensate property owners for temporary takings], and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a shortsighted one. Like Justice Brennan, I hope that a ‘broader vision ultimately prevails.’ *Nollan*, 483 U.S. at 867 (Stevens, J., dissenting, joined by Blackmun, J.) (citations omitted).

centeredness.⁵⁷ These Justices determined that allaying the powers of governmental regulators required developing takings jurisprudence in an instrumental way. This required abandoning *ad hoc* tests in favor of a set of formalistic rules, of which the “essential nexus” test is arguably one. Such formalism has proven to be the chosen course for those U.S. Supreme Court Justices concerned with run-away government agencies.⁵⁸

This approach stood in stark contrast to Justice Brennan’s dissent. Justice Brennan adhered to the normative interest in the common good and assumed the government most often is sincere in acting for that purpose.⁵⁹ This brand prefers a pragmatic model to inflexible formulaic rules.

Recognizing that the descriptions in the majority and dissent in cases like *Nollan* may not be a recitation of the facts at hand calls for an alternative explanation. As foreshadowed above, the opinions may be viewed best as an announcement of broader perspectives on social structure. Examining the cases in this light exposes the difficulties in splicing some clarity from the decision’s midst moving forward. It can lead to a simultaneously humbling, frustrating, cynical, and polarizing outlook on takings jurisprudence in legal scholarship that seeks to reconcile these competing perspectives.⁶⁰ Some legal scholars even have suggested that such reconciliation may be futile.⁶¹

However, policy-driven, formalistic interpretation of factual circumstances

⁵⁷ See Lazarus, *supra* note 19, at 1101 (highlighting difficulties in maintaining a stable majority in regulatory takings cases).

⁵⁸ See, e.g., *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992) (formulating *per se* rule for government restriction on property use that results in the loss of all economic value); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (permitting compensation for time period regulation is in effect, even if the government terminates the regulation immediately upon a takings finding); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (declaring *per se* takings rule for government actions that result in physical occupations). See also *Ehrlich v. Culver City*, 911 P.2d 429, 438 (Cal. 1996) (plurality) (finding that the city was engaged in “regulatory leveraging” with respect to a permit condition requiring the payment of a recreation fee, declaring the condition a “veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations”).

⁵⁹ See Alexander, *supra* note 10, at 1771 (“republicans like Stevens and Brennan view government regulators as saints, while public-choice theorists like Rehnquist and Scalia regard them as villains”). But see Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 347–51 (1988) (suggesting public-choice theorists are not villainous but rather act as dominant interest groups hoping to facilitate re-election efforts).

⁶⁰ See, e.g., Alexander, *supra* note 10, at 1754 (“Recognizing that the descriptions are only narratives exposes the contestability of every public conversation about basic visions of the appropriate political ordering of our society.”). For examples of the polarization in the academic debate over the takings clause, compare, e.g., Richard A. Epstein, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (contending that the Takings Clause renders zoning and other land use controls as constitutionally suspect), with Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279, 292 (1986) (criticizing Epstein’s view as too simplistic).

⁶¹ See Lazarus, *supra* note 19, at 1107.

can lead to dead ends at times. As discussed below, this may be evident in *Lingle*, where the Court's hand arguably was forced some twenty-two years after *Nollan*.⁶² However, just seven years after *Nollan*, *Dolan* did not represent such an end. Rather, it served as the next logical step for a Court that perceived the government as empowered and a threat to its vision of social order.

C. Quantitative Extent

The political visions evinced in *Dolan*⁶³ are more tempered than in *Nollan*, though still discernible. Florence Dolan owned a 1.67-acre parcel and sought a permit to double the size of her creek-front, 9,700 square foot hardware store, install an additional complementary structure, and expand and pave the store's parking lot.⁶⁴ One side of the lot fronted the City of Tigard's main street; the other side lay within the 100-year floodplain.⁶⁵

In accord with its municipal development code, the city granted the permit conditioned on two dedications of land.⁶⁶ The first involved the conveyance of a small strip of property within the 100-year floodplain.⁶⁷ The second dedication encompassed an additional fifteen-foot corridor landward of the 100-year floodplain.⁶⁸ The city asserted the dedicated floodplain would serve as a permeable area to allay drainage concerns.⁶⁹ The dedicated upland would operate to offset the traffic impacts associated with the new development.⁷⁰

A neighboring developer reportedly had made a similar dedication of land along the creek. Dolan, however, sought a variance.⁷¹ The City's variance procedures allowed applicants to recommend alternative measures that would mitigate the development's anticipated impacts.⁷² However, Dolan did not recommend any such measures.⁷³

⁶² For a discussion of this possibility, see *infra* notes 194-212 and accompanying text.

⁶³ See *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) ("Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city's goals . . . are laudable, but there are outer limits on how this may be done.").

⁶⁴ See *id.* at 379.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 382.

⁷⁰ *Id.*

⁷¹ *Id.* at 380.

⁷² *Id.* at 380-81.

⁷³ *Id.* at 381.

The local land use board denied Dolan's variance request.⁷⁴ The board found it a reasonable assumption that the floodplain dedication would address the projected increases in storm water flow resulting from increased impervious cover.⁷⁵ It also found that the dedication for the bicycle path "could offset some of the . . . traffic congestion" resulting from additional customers and employees.⁷⁶ The local land use board of appeals, the Oregon Court of Appeals, and the Oregon Supreme Court, subsequently affirmed the variance denial and rejected Dolan's takings claim.⁷⁷ However, in 1994, the U.S. Supreme Court reversed and remanded.⁷⁸

Chief Justice Rehnquist's decision for the majority called it "axiomatic" that increasing a development's footprint will increase flooding.⁷⁹ Further, he stated "we have no doubt" that a larger retail facility on the property will increase traffic on the streets.⁸⁰ Thus, the Court had no concern that the conditions at issue in *Dolan* met *Nollan's* "essential nexus" test.⁸¹ Nevertheless, the court also declared that the city must make "some sort of individualized determination."⁸² This new step involved assessing whether the cost to Dolan from allowing public "trampling along [their] floodplain" and an adjacent path is "roughly proportionate" to the benefits the conditions will provide in mitigating the impacts associated with the new development.⁸³

Did the *Dolan* court rely upon its 1980 opinion in *Agins*? As stated above, a regulation amounts to a taking under the *Agins* test if it does not "substantially advance a legitimate state interest."⁸⁴ The court's opinion in *Nollan* appeared to rely heavily on *Agins*.⁸⁵ Indeed, *Nollan* made only a fleeting, implicit reference to the doctrine of unconstitutional conditions.⁸⁶ However, this implicit reference

⁷⁴ *Id.*

⁷⁵ *Id.* at 382.

⁷⁶ *Id.* at 381-82 (citing city's calculation that the increased size of the retail store would add 435 car trips to the area per day).

⁷⁷ *Id.* at 382-83.

⁷⁸ *Id.* at 396.

⁷⁹ *Id.* at 392.

⁸⁰ *Id.* at 395.

⁸¹ *Id.* at 397 ("The Court recognizes as an initial matter that the city's conditions satisfy the 'essential nexus' requirement . . . because they serve the legitimate interests in minimizing floods and traffic congestions.").

⁸² *Id.* at 391.

⁸³ *Id.* at 391-93, 395.

⁸⁴ *See supra* notes 24-30 and accompanying text (describing the *Agins* test).

⁸⁵ *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (declaring that an ordinance limiting development to single family houses and density restrictions allowing plaintiffs to construct a maximum of five houses on their five acre tract substantially advanced the legitimate state interest of protecting against the ill effects of urbanization and thus did not constitute a taking).

⁸⁶ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("The evident constitutional

to the unconstitutional conditions doctrine became an explicit, albeit terse, one in *Dolan*.

The *Dolan* majority grounded its holding in

the well-settled doctrine of ‘unconstitutional conditions,’ [whereby] 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.⁸⁷

Still, *Dolan* referenced a standard akin to the *Agins* “substantial advancement” test, stating, “[A] use restriction may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial government purpose.”⁸⁸

The *Dolan* court departed from the general rule applicable to zoning and other use restrictions that the burden properly rests on the party challenging the regulation to prove that it arbitrarily restricts a property right.⁸⁹ Instead, the Court declared that the government bears the burden “to justify the required dedication.”⁹⁰ The Court asserted that the city had not met this burden because it failed to demonstrate (1) why a private conservation restriction, as opposed to

propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.”).

⁸⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (citations omitted). In other words, the unconstitutional conditions doctrine states that even where the government is not constitutionally required to grant a particular privilege or benefit, once it offers that privilege or benefit, it may not condition it upon the recipient’s yield of a constitutional right. See, e.g., *Been*, *supra* note 1, at 473–74; Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988). The doctrine runs counter to a “greater-includes-the-less” argument, which suggests that, for example, because the government has authority to prohibit gambling, it necessarily must have the power to restrict gambling advertising. See *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 345–47 (1986).

⁸⁸ *Dolan*, 512 U.S. at 388.

⁸⁹ See *id.* at 405 (Stevens, J., dissenting) (“The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan.”).

⁹⁰ *Id.* at 391, n.8 (“Justice Stevens’ dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.”).

a public dedication, could not control flooding threats,⁹¹ and (2) that the public pedestrian and bicycle path “will, or is likely to,” (as opposed to “could,”) address the projected traffic congestion.⁹²

A dissent authored by Justice Stevens countered that, given the proposed use of the property as a store, “it seems more likely that potential customers ‘trampling along petitioner’s floodplain’ . . . are more valuable than a useless parcel of vacant land.”⁹³ Further, he stated, “Everyone agrees that the bike path ‘could’ offset some of the increased traffic flow that the larger store will generate.”⁹⁴ Justice Stevens continued, “If the Court proposes to have the federal judiciary micro-manage state decisions of this kind . . . property owners have surely found a new friend.”⁹⁵

As an alternative to the majority’s “rough proportionality” test, Justice Stevens proposed that the Court concentrate on the qualitative nature of the exaction, as required by *Nollan*.⁹⁶ He suggested that the judiciary “venture beyond considerations of a condition’s nature or germaneness only if the developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development’s adverse effects that it manifests motives other than land use regulation on the part of the city.”⁹⁷

The papers of Justice Harold Blackmun (“Blackmun Papers”)—made public in 2004—suggest that *Dolan*’s heightened scrutiny of land use exactions, and

⁹¹ In addition, the majority wanted the city to produce more data to show the flood control capacity needed to accommodate the increased runoff from the new construction and how it related to the extent of the floodplain requested to be dedicated. However, the city already had a master drainage plan showing the effects of additional impervious coverage in the area of Dolan’s proposed commercial development. *Id.* at 378. In effect, the Court suggested that if there is an alternative that can accomplish flood control without requiring a physical dedication of property, such a dedication cannot be sought. Justice Stevens’ dissent suggested that the heightened review engaged in by the majority harkened back to the strict substantive due process analysis of the early 1900s. *Id.* at 406 (Stevens, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905)). *Lochner*, which struck down a state law restricting the number of hours that a baker could work each week to 60, is attributed with igniting a string of judicial decisions invalidating federal and state legislation as violative of substantive due process until the establishment of the modern deferential test in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding constitutionality of state minimum wage legislation).

⁹² *Dolan*, 512 U.S. at 395–96 (quoting *Dolan v. City of Tigard*, 854 P.2d 437, 447 (Or. 1993) (Peterson, C.J., dissenting)) (emphasis added). Justice Stevens declared this distinction as a mere “play on words.” *Id.* at 404 (Stevens, J. dissenting). As the city already had made thorough findings relating to increased traffic congestion, the Court apparently desired an estimate of how many car trips use of the bicycle path would avoid.

⁹³ *Id.* at 404 (Stevens, J., dissenting).

⁹⁴ *Id.* at 404-05.

⁹⁵ *Id.* at 405.

⁹⁶ *Id.* at 403.

⁹⁷ *Id.* (emphasis added).

the corresponding requirement that the government make "some sort of individualized determination,"⁹⁸ was almost not to be.⁹⁹ In *Dolan*, Chief Justice Rehnquist cites to the varied state approaches used to determine the sufficiency of condition justifications.¹⁰⁰ The Blackmun Papers suggest that the Chief Justice's initial draft favored pure adoption of the "reasonable relationship" standard favored by many states.¹⁰¹ This standard is a derivative of tests espoused in state courts in Minnesota,¹⁰² Nebraska,¹⁰³ Texas,¹⁰⁴ Utah,¹⁰⁵ and Wisconsin,¹⁰⁶ where the burden rests on the plaintiff to show lack of such a relationship.¹⁰⁷ However, a post-conference letter from Justice Scalia to his brethren convinced the Chief Justice to include the more demanding "rough proportionality" standard,¹⁰⁸ so as not to "'risk watering . . . down' the 'substantially advance' language of *Agins*."¹⁰⁹ Chief Justice Rehnquist

⁹⁸ See *Dolan*, 512 U.S. at 391.

⁹⁹ 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, 807 (2006) (offering a meticulous analysis of the Blackmun Papers in the context of property rights issues).

¹⁰⁰ See *Dolan*, 512 U.S. at 390-91.

¹⁰¹ See Lazarus, *supra*, note 99, at 807 ("While the state courts were divided concerning whether the condition must satisfy a 'reasonable relationship' or a more demanding 'substantial relationship' test to pass constitutional scrutiny, Rehnquist [in his initial draft] decided to adopt the 'reasonable relationship' approach while concluding that the City had not met its burden under that standard under the facts of this case.").

¹⁰² See *Dolan*, 512 U.S. at 390-91 (citing *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976)).

¹⁰³ *Id.* (citing *Simpson v. City of N. Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

¹⁰⁴ *Id.* (citing *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex. 1984)).

¹⁰⁵ *Id.* (citing *Call v. City of West Jordan*, 606 P.2d 217, 220 (Utah 1979)).

¹⁰⁶ *Id.* (citing *Jordan v. Vill. of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965)).

¹⁰⁷ See, e.g., *Jordan*, 137 N.W.2d at 447-48. See also *Wald Corp. v. Metro. Dade County*, 338 So. 2d 863, 866-67 (Fla. Dist. Ct. App. 1976).

¹⁰⁸ See, e.g., *Wald Corp.*, 338 So. 2d at 866 (describing "reasonable relationship" test as placing a heavy burden on the property owner). *But see* *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist.*, 62 P.3d 404 (Or. Ct. App. 2003) (pondering the meaning of the "reasonable relationship" test and suggesting it amounts to the same standards as *Dolan*'s "rough proportionality" test).

¹⁰⁹ See Lazarus, *supra* note 99, at 807 (citing Letter from Justice Antonin Scalia to Chief Justice William H. Rehnquist, *Dolan*, No. 93-518 (May 13, 1994)). A responsive letter from Justice David Souter favored a far lesser standard, whereby the government would need to show only that "the burden is not grossly disproportionate to the burden being added by the private party as well as to the benefit being conferred on the private party." See Lazarus, *supra*, note 99, at 808 (citing Letter from Justice David H. Souter to Chief Justice William H. Rehnquist, *Dolan*, No. 93-518 (May 17, 1994)). Though originally voting in conference in favor of Mrs. Dolan, Justice Souter ultimately wrote his own dissent. See *Dolan*, 512 U.S. at 411-14 (Souter, J., dissenting). Professor Lazarus suggests this about-face by Justice Souter stemmed from his frustration with the Chief Justice's acquiescence to Justice Scalia's demands. See Lazarus, *supra* note 99, at 808. While the Chief Justice's opinion still likens the "rough proportionality" test to the "reasonable relationship" test, the two tests cannot be

presumably coalesced, for the opinion adopted the “rough proportionality” test that ultimately placed the burden of proof on the regulating agency.¹¹⁰ To the extent this test sought to avoid undermining the scrutiny of *Agins*’ “substantially advance” analysis, the court was forced, in the words of Justice Scalia, to “eat crow” fifteen years later in *Lingle*.¹¹¹

II. *LINGLE V. CHEVRON U.S.A., INC.*: NARROWING THE CONFINES OF EXACTION TAKINGS SCRUTINY

The U.S. Supreme Court ultimately rejected *Agins*’ “substantially advance” inquiry as an appropriate takings test in *Lingle*.¹¹² In essence, the Court repudiated the test *Nollan* and *Dolan* ostensibly had relied upon. This Part explains that while *Lingle* was not a permit condition case *per se*, the Court, in dicta, attempted to provide some clarification on the remaining relevance and import of *Nollan* and *Dolan*.

A. Repudiating the “Substantially Advance” Test

Lingle concerned Chevron’s challenge to a Hawaii statute limiting the rent oil companies could charge to the operators of company-owned service stations.¹¹³ The State of Hawaii asserted that:

the primary purpose of the rent cap imposed by Act 237 is to avert the harm to Hawaii’s consumers that will occur if

equated in light of this revelation in the Blackmun Papers any more than they can be equated substantively. As several scholars have noted, unlike *Dolan*’s test, the “reasonable relationship” test applied in the noted states accounted for benefits, not just burdens, to the property owner from the permit conditions. See, e.g., Suzanna Glover-Ettrich, *A Newly-Minted Hurdle for City Planners: Dolan v. City of Tigard*, 28 CREIGHTON L. REV. 559, 586 (1995); Julian R. Kossow, *Dolan v. City of Tigard, Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENVTL. L.J. 215, 231 (1995) (suggesting than a direct correlation between benefits and burdens explicitly is not required) (citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987)). Indeed, even the “specifically and uniquely attributable” test that the Chief Justice explicitly rejected as too demanding does not impose the rigor of the “rough proportionality” test: of the five state cases cited by the majority as employing the “specifically and uniquely attributable” test, none are analogous in placing the burden of proof on the government. See Kossow, *supra* note 109, at n. 86 (contending that two of the state cases cited as applying the “specifically and uniquely attributable” test “offer no real support” for “rough proportionality,” and the three others contradict *Dolan*’s shifting the burden of proof to the government).

¹¹⁰ See *Dolan*, 512 U.S. at 391.

¹¹¹ At oral argument, Justice Scalia suggested the court was going to have to “eat crow” in rejecting the twenty-five year-old *Agins* test. See Transcript of Oral Argument at 21, *Lingle*, 544 U.S. 528 (No. 04-163).

¹¹² See *Lingle*, 544 U.S. at 543.

¹¹³ *Lingle*, 544 U.S. at 533.

Chevron and other oil companies raise their rents and squeeze lessee-dealers out of the retail market for gasoline, leaving that market dominated by the handful of oil companies serving the State.¹¹⁴

Conceding that it maintained a return on its investment under the Hawaii statute, Chevron contended that the statute nevertheless constituted a taking solely because it did not substantially advance a legitimate state interest.¹¹⁵ In effect, Chevron asserted that Hawaii's scheme would not accomplish the stated goal of preventing concentration in the market that would lead to higher prices for consumers.¹¹⁶ Chevron based this contention on the assumption that the service station operators could retain the savings for themselves, instead of passing them on to the public.¹¹⁷

The district court ruled for Chevron in holding that the statute did not substantially advance a legitimate state interest and therefore amounted to an unconstitutional taking.¹¹⁸ That court based its decision on expert testimony that the oil companies simply would offset lost rents by raising wholesale fuel prices and leaseholders would reap a premium reflecting the value of their rent reduction when transferring the property to new lessees.¹¹⁹ The Ninth Circuit Court of Appeals affirmed, not only supporting, but expanding the type of heightened means-ends analysis evident in *Agins*.¹²⁰

On review, the U.S. Supreme Court reconsidered the "substantially advance" test as applicable to a takings analysis.¹²¹ The Court explained that the test enunciated in *Agins* originated in cases involving substantive due process analyses, not takings. *Lingle* acknowledged that the citation to these substantive due process cases in *Agins* was understandable in 1980.¹²² The Court grounded this assertion on the lack of Supreme Court precedent on the Takings Clause

¹¹⁴ Reply Brief for Petitioners at 9–10, *Lingle*, 544 U.S. 528 (2005) (No. 04-163). Hawaii's size and remote locale plague its ability to participate in a competitive atmosphere for gasoline and other goods.

¹¹⁵ *Lingle*, 544 U.S. at 533–34.

¹¹⁶ *See id.* at 534–35.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 849 (9th Cir. 2004), *rev'd sub nom. Lingle*, 544 U.S. 528 (2005) ("application of the 'substantially advances' test is appropriate where a rent control ordinance creates the possibility that an incumbent lessee will be able to capture the value of the decreased rent in the form of a premium.").

¹²¹ *Lingle*, 544 U.S. at 540–45.

¹²² *See id.* at 537.

since Justice Holmes' enigmatic, "storied but cryptic"¹²³ opinion in *Pennsylvania Coal v. Mahon*¹²⁴ in 1922. As explained in Part I above, *Pennsylvania Coal* plainly asserted that a regulation that "goes too far" will constitute a taking.¹²⁵

The *Lingle* court explained that the "substantially advance" test focuses exclusively on the rationality and effectiveness of the government's exercise of its police power.¹²⁶ The Court concluded that assessing the legitimacy and value of government action is not an appropriate inquiry for claims alleging a violation of the Takings Clause.¹²⁷ Rather, the Court suggested that the "substantially advance" test resembles a stringent application of the Court's ordinarily deferential substantive due process analyses.¹²⁸ The Court stated that the *Agins* test does not address the "magnitude or character of the burden" that a particular regulation inflicts on the private bundle of property rights, nor does it address the distribution of the regulatory burden.¹²⁹ Together, the Court stated that these elements, which emanate from the court's 1978 decision in *Penn Central*, serve "as the principal guidelines for resolving [traditional] regulatory takings

¹²³ *Id.*

¹²⁴ *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹²⁵ *Lingle*, 544 U.S. at 537-41. The United States' brief in *Agins*, which intertwined the substantive due process standard of *Euclid* and the takings standard of *Penn Central*, may bear partial responsibility for the confusion over the "substantially advance" inquiry. See Brief for the United States as Amicus Curiae in support of the Petitioners at 29-30, *Lingle*, 544 U.S. 528 (2005) (No. 04-163) (admitting error in *Agins* brief).

¹²⁶ See *Lingle*, 544 U.S. at 544-45.

¹²⁷ *Id.* Since regulatory takings, or "inverse condemnations," are a derivative of the government's condemnation power, and "[i]t would make no sense in a condemnation case . . . to suggest that the government should be excused from its obligation to pay for a school site because the school will serve a vital educational need," it makes equally little sense to suggest that the government's regulatory takings liability always fluctuates with the legitimacy and value of a regulation. See Echeverria, *supra* note 22, at 206. Professor Echeverria suggests, however, that the public value of government action maintains some relevance after *Lingle* in that broadly applicable regulations imparting community-wide reciprocal benefits should weigh against takings claims. *Id.* at 207.

¹²⁸ See *Lingle*, 544 U.S. at 542, 544-45. The Court explained that an imprudent regulation can result in little physical or economic impact on a property owner, while an entirely astute regulation can result in severe impacts. *Id.* at 543. Several lower courts had utilized the "substantially advance" test to find compensable takings. See, e.g., *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004) (declaring unconstitutional a law that required landlords to provide successor tenants with the same rental price as predecessor tenants); *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002) (declaring unconstitutional a zoning law that restricted use of the property to single-family residential development); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994) (declaring unconstitutional a zoning ordinance that prevented an oil company from obtaining a special use permit for a convenience store).

¹²⁹ *Id.* at 539, 542-44.

claims.”¹³⁰

Justice O’Connor’s opinion for a unanimous Court asserts that the “basic justification” for allowing regulatory takings claims under the Takings Clause is to determine solely whether the regulation is “so onerous that its effect is tantamount to a direct appropriation or ouster.”¹³¹ In *Lingle*, Chevron sought a

¹³⁰ *Id.* (suggesting that substantive review is “a task for which courts are not well suited”). *Lingle*’s characterization of the “substantially advance” test as a “means-end” inquiry, as espoused by the State of Hawaii, had been suggested by a small number of scholars for nearly two decades prior to *Lingle*. See, e.g., John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way out of a Doctrinal Confusion*, 17 VT. L. REV. 695 (1993); Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don’t*, 12 U. PUGET SOUND L. REV. 339, 351-52 (1989); Glen E. Summers, Comment, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837 (1993). Despite the U.S. Supreme Court’s explicit language on this point in *Lingle*, some scholars suggest that *Lingle* merely prohibits use of the precise phrase “substantially advances.” See David Callies & Christopher Goodin, *The Status of Nollan v. California Coastal Commission and Dolan v. City of Tigard after Lingle v. Chevron U.S.A., Inc.*, 40 J. MARSHALL L. REV. 539, 565 (2007) at 569 (“one could narrowly construe the *Lingle* decision to apply only to the precise language of *Agins*’s (sic) first prong”); Alan Romero, *Ends and Means in Takings Law after Lingle v. Chevron*, 23 J. LAND USE & ENVTL. LAW 333, 361 (2008). Commentators espousing this view suggest that some analysis of the means and ends of regulatory acts survives *Lingle* to dictate the fairness in distribution of regulatory burdens under the guise of the “character of the government action” prong of *Penn Central*. See Callies & Goodin, *supra*, at 555, 569-70 (contending that, even post-*Lingle*, an exaction for a valid public purpose that does not effectively accomplish that purpose is a taking); R.S. Radford, *Just a Flesh Wound? The Impact of Lingle v. Chevron on Regulatory Takings Law*, 38 URB. LAW. 437, 442-44 (2006) (suggesting that the Supreme Court identified the substantial advancement standard as one addressing the causal relationship between the proposed private land use and the governmental objective sought to be achieved in *Nollan*, rather than one addressing the means chosen by the government to meet a public end); Larry Salzman, *Twenty Five Years of the Substantial Advancement Doctrine Applied to Regulatory Takings: From Agins to Lingle v. Chevron*, 35 ENVTL. L. REP. 10481 (2005); Dale A. Whitman, *Deconstructing Lingle: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573 (2007). But see Echeverria, *supra* note 22, at 203-08 (suggesting that *Penn Central*’s “character” prong has been narrowed by *Lingle* such that it focuses only upon whether a regulatory scheme results in a temporary physical occupation, impairs the right to devise property, singles out one or a few landowners or contrarily generates expansive reciprocal benefits, and is harm-preventing or benefit-conferring because “while it will sometimes make sense to require those who benefit from regulation to redistribute the gains [e.g., historic preservation] to those burdened by the regulations, it will generally make less sense to require those protected from harm [e.g., flooding] to pay those who have been restrained from harming others and the community”). See also D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 349-56 (2005) (contending that *Lingle* subdues any remaining function for *Penn Central*’s “character” prong).

¹³¹ *Lingle*, 544 U.S. at 537. As many commentators have noted, a large portion of lower court decisions that cited to the *Agins* “substantially advance” test as an appropriate inquiry in a takings suit involved rent control ordinances, where property owners alleged that such ordinances create the possibility that the lessee will be able to secure the value of the decreased rent by charging a premium for the benefit of living in a rent-controlled development. See, e.g., Daniel A. Jacobs,

remedy of invalidation, as opposed to compensation.¹³² The court explained that the former sounds in due process, for assessing the validity of a regulatory act necessarily must come prior to assessing whether a valid regulation effects a taking.¹³³

Lingle thus eliminates “substantial advancement” takings claims, relegating challenges to the merits of governmental action to the judiciary’s substantive due process jurisprudence.¹³⁴ With respect to the appropriate standard of review

Indigestion from Eating Crow: The Impact of Lingle v. Chevron U.S.A., Inc. on the Future of Regulatory Takings Doctrine, 38 URB. LAW. 451, 478–79, 481 (2006); Radford, *supra* note 130, at 437. The Supreme Court has ruled that a mobile home park rent control scheme did not amount to a permanent physical invasion of the park owner’s property under the *per se* doctrine set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). See *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). While Justice O’Connor’s majority opinion in *Yee* suggested that the ordinance might not advance “the objective it is supposed to,” the Court declined to consider the merits of the claim under the “substantially advance” test because the question had not been presented upon the litigant’s petition for certiorari. See *id.* at 533–35. The *Lingle* decision lists a host of other Supreme Court opinions that “merely assumed . . . [the] validity [of the ‘substantially advance’ test] when referring to it in dicta.” *Lingle*, 544 U.S. at 546 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1016 (1992); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985)).

¹³² See *Lingle*, 544 U.S. at 544.

¹³³ *Id.* at 543 (“The owner of a property subject to a regulation that effectively serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an ineffective regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless ‘takes’ private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.”). Florida state courts recognized this distinction well before the U.S. Supreme Court’s opinion in *Lingle*. See, e.g., *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 57 (Fla. 1994); *City of Pompano Beach v. Yardarm Rest., Inc.*, 641 So. 2d 1377, 1384 (Fla. Dist. Ct. App. 1994); *Dep’t of Transp. v. Weisenfeld*, 617 So. 2d 1071, 1074 (Fla. Dist. Ct. App. 1993). But see *Romero, supra* note 130, at 334–36 (contending that *Lingle* did not consider all possible meanings of the substantially advance test and that means-ends analysis remains relevant in takings jurisprudence because government acts that violate substantive due process but nevertheless are imposed for some period are compensable under the Takings Clause). Professor *Romero* contends that “[t]he Court’s rejection of the substantial advancement test should not be taken as rejection of such considerations of means and ends in takings law,” arguing that *Lingle* merely prevents a lack of effectiveness of a government act from serving as the sole reason for finding takings liability. *Id.* at 360.

¹³⁴ Of course, takings must be for a “public use” in accord with the text of the Fifth Amendment, though the court’s “public use” inquiries are narrow. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005) (deferring to government decision to condemn isolated non-blighted properties in a larger distressed area for an economic revitalization project). The differences between the Takings Clause’s public use requirement and the traditional substantive due process inquiry of whether a government action is rationally related to advance a legitimate state interest provide fodder for an interesting academic discussion. For purposes herein, suffice it to say that the refuted “substantial advancement” language of *Agins* is markedly stricter than the substantive due process rational basis

for such a due process-type challenge under the Takings Clause, Justice Ginsburg suggested at oral argument in *Lingle* that “there are so many things that [any skillful lawyer] could dress up as being a taking [and thus warrant heightened scrutiny, were the Court to retain the “substantial advancement” test].”¹³⁵ Seemingly interpreting Justice Ginsburg’s statement to its logical conclusion, one scholar asserted that *Lingle* “affirms the passive virtue of [substantive] deference” to the state’s exercise of its police powers.¹³⁶

B. *Insightful Dicta*

It appeared that both *Nollan* and *Dolan* required application of the very analysis rejected in *Lingle*—that exactions that do not “substantially advance a legitimate state interest” may amount to a taking.¹³⁷ Indeed, *Nollan* stated that the government’s access corridor condition “utterly failed to further the end advanced as the justification for the prohibition.”¹³⁸ Likewise, *Dolan* asserted, “A land use regulation does not effect a taking if it ‘substantially advances

review.

¹³⁵ Transcript of Oral Argument at 41, *Lingle*, 544 U.S. 528 (No. 04-163). See also *Lingle*, 544 U.S. at 543 (“If a government action is found to be impermissible - for instance because it . . . is so arbitrary as to violate due process - that is the end of the inquiry. No amount of compensation can authorize such action.”). It seems obvious from the majority’s opinion that due process queries will be subject to the traditional deferential standard associated with such claims, where a regulation will be declared unconstitutional only when it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, and general welfare.” See *Lingle*, 544 U.S. at 541 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). However, Justice Kennedy’s concurrence makes conflicting statements on the appropriate standard of review in a due process challenge. He stated that a court must determine whether a regulation “represents one of the rare instances in which even such a permissive standard has been violated,” *Lingle*, 544 U.S. at 549 (Kennedy, J., concurring). However, some scholars have suggested that Kennedy’s citation only to his opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in judgment and dissenting in part), suggests he would resort to a higher form of scrutiny than the current due process rational basis test. See, e.g., Callies & Goodin, *supra* note 130, at 566; Sarah B. Nelson, *Case Comment: Lingle v. Chevron U.S.A., Inc.*, 30 HARV. ENVTL. L. REV. 281 (2006). Two of these commentators have made the rather confusing assertion that states “are free to readopt the [*Agins*] test . . . as part of their state regulatory takings jurisprudence,” despite stating that the *Agins* test “does not remotely provide an adequate takings framework.” See Callies & Goodin, *supra* note 130, at 564–66.

¹³⁶ See Fenster, *Constitutional Shadows*, *supra* note 1, at 732. “[T]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established.” See *Lingle*, 544 U.S. at 545.

¹³⁷ See, e.g., McUsic, *supra* note 36, at 641–42 (“[I]n *Nollan* and *Dolan*, the Court used the requirement that a regulation substantially advance a legitimate state interest to require the government to establish an essential nexus between the means and ends of the regulation, and that the regulation proportionately counteract a harm caused by the owner’s project.”); Daniel Pollak, *Regulatory Takings: The Supreme Court Tries to Prune Agins Without Stepping on Nollan and Dolan*, 33 ECOLOGY L.Q. 925, 929–30 (2007).

¹³⁸ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

legitimate state interests' and does not 'deny an owner economically viable use of his land.'"¹³⁹ However, the *Lingle* Court took great effort in attempting to explain that the *Nollan* and *Dolan* tests survive the repudiation of the *Agins* test.¹⁴⁰ *Lingle* suggested the court's exaction decisions are not a product of *Agins* but rather of the aforementioned unconstitutional conditions doctrine.¹⁴¹

Under the doctrine of unconstitutional conditions, the government may not grant a benefit on the basis that the beneficiary must surrender a constitutional right, even if the conferral of the benefit is discretionary.¹⁴² In discussing the unconstitutional conditions doctrine, the *Lingle* dicta focused on the physical

¹³⁹ *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). There was no claim in *Nollan* or *Dolan* that the development condition at issue denied the property owner all economically viable use of her land.

¹⁴⁰ See *Lingle*, 544 U.S. at 545–48.

¹⁴¹ *Id.* (suggesting that, if not explaining how, the *Nollan* and *Dolan* tests are “worlds apart” from the *Agins* test’s delving into whether a regulation serves to advance a legitimate state interest). Any distinction between *Nollan* and *Dolan* on one hand and *Agins* on that other suggesting that the latter assesses whether “some” state interest is substantially advanced while the former two assess only whether the “same” interest is substantially advanced is debatable, as both require scrutinizing the means and ends of a legislative decision beyond the traditional deference afforded to legislative acts under longstanding substantive due process jurisprudence. While *Nollan* did not explicitly reference the unconstitutional conditions doctrine, *Dolan* later referred to it as a supportive, “well-settled” body of law, leading one scholar to refer to the description as an “absurd statement...when constitutional scholars agree only that [the unconstitutional conditions doctrine] is as much of a mess as the regulatory takings doctrine.” Fenster, *Constitutional Shadow*, *supra* note 1, at 755. Another commentator has contended that, unlike *Dolan*, *Nollan* had little to do with the unconstitutional conditions doctrine but rather was purely a clarification and re-affirmance of the *Agins* “substantially advance” test. See Romero, *supra* note 130, at 343 (“The Court in *Lingle* did not address the possibility that a regulation might be for public use under the Takings Clause and might not be so arbitrary and irrational that it denied substantive due process and yet still required compensation under a substantial advancement standard that was different from those broader, more deferential constitutional requirements.”). Professor Romero continued, “The building restriction’s purpose is changed by the unrelated condition into a purpose that is not a legitimate state interest. The constitutional violation in the *Nollan* opinion, then, is the failure to advance a legitimate state interest.” *Id.* at 387.

¹⁴² See, e.g., Been, *supra* note 1; Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 42 (2000) (“[T]he unconstitutional conditions doctrine operates to block some subset of possible bargains between an individual and the government”); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U.L. REV. 859, 859 (1995) (“The unconstitutional conditions doctrine directs courts not to enforce certain contracts that waive constitutional rights.”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). See also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (“[A] teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”); *Doyle v. Cont’l Ins. Co.*, 94 U.S. 535, 538 (1877). While a complete analysis of the modern application of the unconstitutional conditions doctrine to real property disputes is beyond the scope of this article, the doctrine is in some ways as “arguably incoherent” today as Justice Stevens found it in *Dolan* fifteen years ago. See *Dolan*, 512 U.S. at 409 (Stevens, J., dissenting).

nature of the walking corridor and bicycle pathway in *Nollan* and *Dolan*. The court stated that *Nollan* and *Dolan* involved “government demands that a landowner dedicate an easement allowing public access.”¹⁴³ It explained how these two exaction cases “began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking.”¹⁴⁴

In addition, the Court nearly quoted its 1999 opinion in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*¹⁴⁵ to “emphasiz[e] that we have not extended [the *Dolan*] standard beyond the special context of such exactions.”¹⁴⁶ However, the cited *Del Monte Dunes* passage did not include the word “such.” Parsing the *Lingle* citation to its logical conclusion, the insertion of the word “such” in referring to the particular types of permit conditions at issue in *Nollan* and *Dolan* may be instructive. Indeed, it could be read as a rejection of *Nollan* and *Dolan*’s inquiry into the government’s purpose and wisdom for all but this narrow set of exactions involving public, physical invasions.

This analysis of the *Lingle* dicta forecasts where prospective “essential nexus” and “rough proportionality” review may focus moving forward. Exaction takings may arise exclusively where discretionary permit conditions requiring physical occupation of private property go beyond the appropriate nature and scope of mitigating the projected impacts of the allowed development.¹⁴⁷ The next Part explores why a unanimous Court might have made this declaration in an otherwise contentious body of takings jurisprudence.

III. EFFICIENT ALLOCATION, INSTITUTIONAL CONTROLS, AND THEORETICAL INCONSISTENCIES

As evident in the discussion of *Nollan* and *Dolan* above, policy perspectives differ markedly on the degree of discretion that should be afforded to regulators. These differing perspectives are rooted in the confidence, or lack thereof, in the myriad entities that limit and channel that discretion. But in light of the heightened possibility of an unconstitutional takings declaration under *Nollan* and *Dolan*, a risk-averse local government has an incentive to circumvent the more stringent scrutiny of permit conditions.¹⁴⁸

Such circumvention often may come at the displeasure of developers, private

¹⁴³ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005).

¹⁴⁴ *Id.*

¹⁴⁵ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

¹⁴⁶ *Lingle*, 544 U.S. at 547 (internal quotations omitted) (emphasis added).

¹⁴⁷ *See id.* at 545–48.

¹⁴⁸ *See generally* Dana, *supra* note 1.

landowners, and the public alike. In some instances, a municipality might over-regulate by issuing outright denials. In others, it might under-regulate by granting permits without any conditions at all. The former increases the likelihood of rejecting projects that will result in societal improvements. The latter interferes with the public's expectations by forcing it to bear the cost of subsidizing the externalities of new development.

Stringent scrutiny of permit conditions also could encourage development agreements with only repeat developers. These developers are less likely to challenge conditions that might not fit the narrow mold of *Nollan* and *Dolan* at the risk of irritating the regulators to whom they surely will apply again.¹⁴⁹ Thus, not only could a general pattern of under-regulation or over-regulation result in the denial of socially valuable development, but it could create an entry barrier for all but the large, locally connected few.¹⁵⁰

Arguably limiting *Nollan* and *Dolan* to conditions mandating actual public occupation of private spaces, the *Lingle* dicta could be interpreted to serve as a partial antidote to these anomalous results. However, such dicta is short on policy-based pronouncements. *Lingle* certainly clarified components of takings

¹⁴⁹ *Id.* at 1294–98.

¹⁵⁰ *Id.* at 1297–1300. While majoritarian local politics could result in overregulation that does not maximize the overall community's welfare, one scholar has asserted that there is no reason to suspect that overregulation via development conditions will be any more attractive than overregulation through development permit denials, which, as referenced above, are not subject to *Nollan* and *Dolan*'s heightened standards of review. *Id.* at 1271. Professor Dana gives an example of a majoritarian sect assessing the gains (in land value) of prohibiting development versus the maximum gain possible via development conditions: if the aggregate housing value would be \$200,000 if the development were prohibited and the developer would proceed with the project despite an impact fee costing her greater than \$200,000, the political majority would be better off permitting conditional development. *Id.* Additionally, the public choice theory painting the regulator as a sly strategist seeking to extort from developers, as set forth by the majorities in *Nollan* and *Dolan*, can be turned on its head to pose the arguably equally likely threat of under-regulation resulting from the influence of small, politically powerful interest groups. See, e.g., Alexander, *supra* note 10, at 1771 (suggesting Scalia's opinion in *Nollan* reflects "a profound sense of cynicism about the motives of governmental actors, an outlook that many commentators associate with public-choice theory"). But as one scholar noted, "There are documented accounts of developers bribing local officials, but apparently no such accounts exist of bribery by the opponents of new development." Dana, *supra* note 1, at 1273. See also Fenster, *Takings Formalism*, *supra* note 11, at 648–53 (suggesting that formulaic approaches to exactions ignores the fact that landowners have recourse in petitioning the legislature and at the ballot box, and end up unnecessarily assisting wealthy, politically powerful developers when only individual small plot owners need protections from extortionate practices); Fenster, *Constitutional Shadow*, *supra* note 1, at 746. The discussion of public choice theory herein is admittedly simplified. For a more detailed look at the variety of variables associated with corrective political action, see Vicki Been, *The Perils of Paradoxes—Comment on William A. Fischel, 'Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?'*, 67 CHI.-KENT L. REV. 913, 919 (1991).

jurisprudence that previously had been considered perplexing.¹⁵¹ Still, the *Lingle* Court's reasons for preserving *Nollan* and *Dolan*'s constitutionalization of exactions in some form despite the reliance of these two prior decisions on the rejected *Agins* test are not altogether apparent.¹⁵²

The *Lingle* dicta's seeming insistence on a more deferential standard for judicial review of most development permit conditions conceivably could be grounded in several theories. This Part analyzes three of these theories. The first addresses inefficiencies in broad application of *Nollan* and *Dolan* and the ability of state statutory law and local ordinances to restrain exploitative exaction impositions.¹⁵³ The second centers on the functions of local institutional controls such as municipal competition and voting.¹⁵⁴ The third theory surrounds inherent conceptual inconsistencies in applying *Nollan* and *Dolan* beyond permit conditions requiring real property dedications in light of the Supreme Court's reverence for what is known as the "parcel as a whole" rule.¹⁵⁵

¹⁵¹ See, e.g., D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 356 (2005) ("hopeless mess"); Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RESOURCES & ENVTL. L.J. 1 (2006) ("constitutional quagmire"); Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 2 (2003) ("famously incoherent"); Echeverria, *supra* note 22, at 172 ("confused field of law"); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2169–70 (2002) ("the lawyer's equivalent of the physicist's hunt for the quark"); Kent, *supra* note 11, at 64 (describing the regulatory takings doctrine as bearing a "general absence of predictability, coherence, or confidence"); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) ("muddle").

¹⁵² Compare *Nollan*, 483 U.S. at 837 n.5 ("One would expect that a regime in which . . . leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions."), with *Lingle*, 544 U.S. at 545–48.

¹⁵³ See, e.g., Dana, *supra* note 1.

¹⁵⁴ See, e.g., Been, "Exit," *supra* note 1.

¹⁵⁵ Commentators have offered versions of the first two theories in pre-*Lingle* critiques of the *Nollan* and *Dolan* model. See, e.g., Dana, *supra* note 1; Been, "Exit," *supra* note 1. In addition to the three theories discussed in this Part, there are a variety of other perspectives on the prudence of discretionary land use practices. For example, some courts simply have asserted that regulatory restrictions represent "the price of living in a modern enlightened and progressive community." See *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 518 (Cal. Ct. App. 1963). See also *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (declaring that property owners must "bear the . . . burden [of regulation] to secure 'the advantage of . . . doing business in a civilized community'" (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (Brandeis, J., dissenting))). It also is conceivable that heightened scrutiny of a wide range of permit condition options prevents implementing land use policies that promote ingenuity and adaptation to modern day crises. See Joseph L. Sax, *The Unfinished Agenda of Environmental Law*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 1, 7 (2008). For example, relatively new science indicates that traditional stream diversions in Mississippi for

A. *Inefficiencies in the Exaction Takings Construct*

Exaction takings jurisprudence exists only upon the foundational requirement that the government bears the ability to deny a given development permit in total. As referenced above, permit denials are subject to a deferential standard of scrutiny arising from the court's substantive due process jurisprudence, where challengers prevail only when they prove that the government acted arbitrarily or capriciously. Such limited judicial scrutiny of development application denials matched with *Nollan* and *Dolan*'s heightened scrutiny of granted permits with conditions can diminish the efficiency and effectiveness of land use regulation.¹⁵⁶ This section contends that *Lingle*'s implicit narrowing of *Nollan* and *Dolan*'s application may have served as recognition of these detrimental impacts.

If one begins with the theory that development should proceed only where projects result in an efficient allocation of societal resources, *Nollan* and *Dolan* operate to limit the range of available permit conditions. As stated throughout, such conditions are confined to those bearing an "essential nexus" and "rough proportionality" to the project's impacts on the community. These tests may produce greater efficiency in development markets where prospective projects are expected to create aggregate social benefits.¹⁵⁷ However, the same tests also may result in compensation requirements for conditions that are allocatively efficient when social burdens are at stake.¹⁵⁸ Further, they may fail to compensate developers for other allocatively inefficient conditions.¹⁵⁹

One commentator uses a hypothetical subdivision to emphasize the point.¹⁶⁰ Assume a project will create negative social costs of \$50,000 but those costs are exceeded by the development's prospective social benefits of \$150,000 (for a net social benefit of \$100,000). *Nollan* and *Dolan* nonetheless would permit a

agriculture and industrial uses are destroying aquatic ecosystems. See generally Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L. J. 315 (2009). Conditioning diversion permits, or amending the state's instream flow statutes, to require more water to remain in the streams likely would not constitute a taking, even though it might mean a reduction in a traditional economic use, because there is no property right to destroy fisheries. If Mississippi law required more water to stay in its streams, businesses reliant upon prior diversions would be inclined to pursue new technologies and more efficient practices to offset those costs. *Id.*

¹⁵⁶ See, e.g., Dana, *supra* note 1, at 1274–86. The option of applying heightened scrutiny to development prohibitions, as well as to development conditions, is foreclosed by a deeply ingrained democratic culture that even strong property rights proponents agree should not be intruded upon by judicial policing of local land use decisions. *Id.* at 1300–01.

¹⁵⁷ *Id.* at 1249.

¹⁵⁸ *Id.* at 1248.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1276–78.

development condition without the provision of compensation.¹⁶¹ This results because the *Nollan* and *Dolan* tests review only the gain achieved by the condition in relation to the negative societal impact, and not the prospective societal benefits.¹⁶²

On the other hand, assume the project will create a net social burden of \$100,000. A development condition costing the developer \$60,000 to reduce that social burden to \$60,000 likely would be deemed unconstitutional under *Dolan*'s "rough proportionality" standard. The condition imposition is allocatively efficient (\$60,000 social cost, \$60,000 cost to the developer). However, *Dolan* measures the \$60,000 cost to the developer against only the \$40,000 reduction in the social cost resulting from the condition.¹⁶³ The *Dolan* test does not demand that local governments compare the social costs of the impact—in that case, the increased likelihood of flooding and the hundreds of car trips that the hardware store expansion would generate—with the cost to the landowner of the required conditions.¹⁶⁴

In addition, some social burdens resulting from development may be difficult to mitigate without substantial expenditures on methods of unpredictable success (e.g., re-creating habitat for an endangered turtle). Other burdens may be difficult or even impossible to mitigate (e.g., the sunlight lost on neighbors due to the construction of a tall building, the alteration of a historic doorway, etc.). From an efficiency perspective, conditions on new development need only require internalization of the dollar-equivalent of the social cost.¹⁶⁵

Nevertheless, alternative conditions seeking to offset these social costs are unlikely to withstand *Nollan* and *Dolan*'s formalistic tests. There may not have

¹⁶¹ *Id.*

¹⁶² *Id.* at 1279.

¹⁶³ *Id.* at 1279–80 (asserting that the only surefire way to meet *Dolan*'s test and ensure allocative efficiency in this hypothetical would be to "devise a remarkably effective new mitigation plan," where a \$40,000 development condition somehow produces \$60,000 in social burden offset such that the condition is equal to the total social cost imposed by the conditional development). Even a \$45,000 condition that reduced the social burden from \$100,000 to zero would not meet *Dolan*'s strictures if the condition reduced social costs associated with the development by \$40,000 and reduced social costs not associated with the development by \$60,000, because *Dolan* only measures the \$45,000 condition cost against the \$40,000 in reduced social costs that were directly caused by the development. *Id.* at 1284–85 (suggesting that a condition requiring the installation of a bus line to reduce traffic congestion resulting from new development might also encourage existing residents to use the bus, accounting for the additional reduction in social costs).

¹⁶⁴ *Id.* at 1284, n.149.

¹⁶⁵ *Id.* at 1282–86; Been, "Exit," *supra* note 1, at 544, n.333 ("It is no less rational for a community to decide that it will accept an unrelated benefit to make up for the harm than it would be for the community to accept a related benefit; indeed, if the related benefit would be valued less by the public than the substitute unrelated benefit, it would be irrational for the city to reject the substitute.").

been any options for the California Coastal Commission to force the Nollans to internalize the net social cost of the blocked view resulting from the installation of a large home under the “essential nexus” standard. Prospects include height or width restrictions.¹⁶⁶ Noting another possibility, Justice Scalia suggested that public viewing platforms on the Nollan’s upland property might meet the “essential nexus” test.¹⁶⁷ However, these conditions might not relieve the cost to the public of seeing a large row of homes interspersed with narrow segments of water and beach. This sight could result in the feeling of needing to move on to a more welcoming place to exercise public trust rights to enjoy the ocean and its shores.

Even assuming the viewing platforms would relieve the social costs associated with the development, this issue is not necessarily resolved. It is unlikely that, if most homeowners were forced to choose, they would prefer such a public platform on their upland property over a north-south transit easement along the oceanfront. However, the formalistic majority opinion in *Nollan* asserted that only the former could bear a sufficient nexus to the viewshed harm created by the proposed development to pass constitutional muster.¹⁶⁸

The rigidity of the *Nollan* “essential nexus” test prohibited California from bestowing a discretionary development authorization in exchange for a non-“nexus” beach access way. This is the case even where said access way is more efficient. The access way often may be publicly-favored, for it would likely facilitate greater public use (including that of the Nollans) of a public trust resource than any viewing platform could.¹⁶⁹ This lends support to the claim that such stringent scrutiny may result in a lower net level of societal welfare in some circumstances. Such an efficiency analysis may have prompted at least some Justices to agree to the *Lingle* dicta’s narrowing of *Nollan* and *Dolan*’s reach.

¹⁶⁶ See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 (1987).

¹⁶⁷ *Id.* (“[S]o long as the Commission could have exercised its police power . . . to forbid construction of the house altogether . . . [a] condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.”).

¹⁶⁸ See *Nollan*, 483 U.S. at 836.

¹⁶⁹ Even assuming, as the majority found, that the beach accessway did not offset the harm posed by the new development, some scholars have pondered why it matters. The new development still imposes a public harm, and it seems the accessway condition is a rational substitute for that public imposition that might have been difficult or expensive to counter directly. See Been, *supra* note 1, at 544. Whether those damages are spent by the public on a good related to the development prohibition or on some other public good seems irrelevant in some sense, though it conceivably could result in overregulation due to interest group clamor for the “proceeds” of the damages. *Id.* at 489–92.

This efficiency analysis requires recognizing that local governments must make several determinations to assess the efficiency of conditions. These include anticipating and measuring the external social costs and benefits of the proposed development and offsetting the two to arrive at a net external societal cost or benefit.¹⁷⁰ Further, it requires calculating and weighing the developer's cost of implementing a condition to determine whether it is equivalent to the net social costs resulting from the development.¹⁷¹ These costs and benefits are difficult to assess, and often will not be precisely quantifiable.¹⁷²

Some scholars suggest it is these inherent difficulties that lead to improper development conditions because erudite regulators might convince benign developers into bearing greater responsibility for societal impacts than actually will occur as a result of development.¹⁷³ However, others contend that the judiciary is not in any better position than local regulators, and arguably in a 'worse one, to gauge and appreciate a given community's welfare.¹⁷⁴ Even if overregulation is conceivable in those localities dominated by majoritarian politics,¹⁷⁵ developers have at their disposal the ability to petition their state legislators to counteract any apparent regulatory ill-treatment.¹⁷⁶

¹⁷⁰ Dana, *supra* note 1, at 1266.

¹⁷¹ *Id.*

¹⁷² See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 411 (1994) (Stevens, J., dissenting) (“[I]n our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms.”); Jack Estill et al., *Taxing Development: The Law and Economics of Traffic Impact Fees*, 16 B.U. PUB. INT. L.J. 1 (2006) (suggesting the marginal cost of traffic impacts from development is difficult to measure despite new technologies).

¹⁷³ See THOMAS P. SNYDER ET AL., *PAYING FOR THE GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE* 78 (1986) (suggesting developers often depend upon regulators to dictate what infrastructure they must provide); Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103 (2001) (suggesting, based on empirical evidence, that local governments often demand permit conditions that do not fully account for development externalities). *But see* ALAN A. ALTSHULER ET AL., *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXTRACTIONS* 58 (1993) (contending that developers often are more adept at negotiating than local officials).

¹⁷⁴ See Dana, *supra* note 1, at 1268–69.

¹⁷⁵ *But see* Been, *The Perils of Paradoxes*, *supra* note 150, at 920 (suggesting that “there is room for debate about whether all or even most local governments” are dominated by majoritarian politics).

¹⁷⁶ Development permit conditions come in a variety of forms, from on-site requirements and off-site dedications to monetary “impact fees.” See, e.g., Dana, *supra* note 1, at 1250–51. Some states have imposed statutory limitations on the circumstances where, and the types of, development conditions that can be considered. See COLO. REV. STAT. ANN. § 29-20-203(1) (LexisNexis 2009) (extending *Nollan* and *Dolan* to fees as well as land, but limiting their applicability to individualized exactions); UTAH CODE ANN. § 17-27a-506 (LexisNexis 2005) (same); GA. CODE ANN. § 36-71-8 (LexisNexis 2003) (prohibiting imposition of exactions for purpose of improving currently offered

B. The Competitive Marketplace

Nollan and Dolan's "special application" of the unconstitutional conditions doctrine derives from concerns of coercive governments attaching excessive requirements to conferred benefits.¹⁷⁷ While some suggest that statutory restrictions on regulatory discretion control such coercive practices, they also may prevent local regulators from accounting for inimitable qualities of development projects and preferences unique to their communities.¹⁷⁸ In addition, there is considerable support for the position that government conduct is adequately constrained by the state's resemblance to a private actor in competing for opportunities to regulate.¹⁷⁹ This section suggests that

infrastructure); NEV. REV. STAT. ANN. 278B.280 (LexisNexis 2002) (same); N.M. STAT. ANN. 5-8-3(D), 5-8-13 (LexisNexis 2009) (requiring waiver of legislatively imposed impact fee for affordable housing and economic development if the development is expected to increase sales tax revenues). See also Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation, in EXACTIONS, IMPACT FEES, AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA* 60, 61-77 (Robert H. Freilich & David W. Bushek eds., 1995). In other states, regulators are channeled by guidance documents. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

¹⁷⁷ See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (internal quotations omitted) (suggesting exactions may be "an out-and-out plan of extortion"). See also *Collis v. City of Bloomington*, 246 N.W.2d 19, 26 (Minn. 1976) (declaring that exactions may constitute "grand theft").

¹⁷⁸ See Dana, *supra* note 1, at 1301 ("strict statutory requirements may force regulators to treat unlike situations alike"). Unique geographic, demographic, social, economic, and political complexities are deepened in the modern day of rapid population rise, natural resource exploitation, and abuses that are resulting in a changing landscape amidst a warming globe, particularly in urban areas. See Been, *The Perils of Paradoxes*, *supra* note 150, at 919-20 (remarking on local governments' abilities to take into account unique community circumstances and preferences). Professor Fenster has suggested that the U.S. Supreme Court's formulaic nature of the exactions decisions limits the ability of governments and landowners alike to negotiate permit conditions that are more favorable to both parties, leading to disappointment for both proponents of vigorous land use regulation and those favoring strong property rights protections. See Fenster, *Takings Formalism*, *supra* note 11, at 617 ("Bargaining over individualized exactions offers a means to develop site- and dispute-specific terms of compromise."). See also Fennell, *supra* note 142, at 24-34 (suggesting that a landowner who wants to build a gas station on residentially zoned property might build a \$400,000 town pool requested by the agency before rezoning, but the *Nollan* and *Dolan* formulas largely prevent such bargaining to "offset" the development's environmental impacts, though both the town and its inhabitants might prefer such a solution). But see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-80 (1989) (contending that categorical rules ensure fairness by limiting the discretion of judicial and administrative bodies); Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 492 (1995) (suggesting formulaic takings rules protect private property rights from the intrusiveness and indeterminacy of local governments).

¹⁷⁹ See Been, "Exit," *supra* note 1, at 476-78 (finding irony in position of law and economics scholars traditionally distrustful of government interference with market forces, given their lack of support for the market forces that can protect property owners from unjustly burdensome exactions);

acknowledgement of such controls also may have served as a partial impetus to confine the *Nollan* and *Dolan* tests to a small sub-set of permitting scenarios.

Prospective homeowners and business entrepreneurs have the option to select another locality if they are discontented or frustrated by local government permit conditions. Such "exit options" may render heightened judicial scrutiny of exactions unnecessary, and, at times, imprudent.¹⁸⁰ Several scholars have analogized the government's role in competing for residents and commerce to the government's role as an employer.¹⁸¹ Further, the U.S. Supreme Court held on more than one occasion that the unconstitutional conditions doctrine is of limited necessity where the government is contending with private industry for the same potential employees.¹⁸²

Even the strongest proponents of private property rights have admitted the same.¹⁸³ However, they suggest that exit options in the land use context are ineffective due to the immobility that follows once a developer invests labor and capital at a particular location.¹⁸⁴ Presumably, the argument follows, individual homeowners are even more geographically limited and thus unable to exit at will.

One critic of the exit option theory, Professor of Economics William Fischel, argues that inefficient regulatory transfers need not be regarded as takings.¹⁸⁵ This is because the inefficiencies are spread across a wide swath of the community that has other institutional controls at their disposal.¹⁸⁶ On the other

Fenster, *Constitutional Shadow*, *supra* note 1, at 758-774.

¹⁸⁰ See Been, *supra* note 1, at 476. *But see* William A. Fischel, *Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865, 897-98 (1991) (suggesting that while discrimination against outsiders rarely exist at the state or federal level, it may exist at the local level, where those in charge of land use regulation may seek to impose burdens on property owners who are unrepresented in the electoral process). *See also* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 130 (1992); Saul Levmore, *Takings, Torts and Special Interests*, 77 VA. L. REV. 1333 (1991).

¹⁸¹ *See, e.g.*, Been, *supra* note 1, at 477.

¹⁸² *See, e.g.*, *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 809 (1985) (asserting that limitations on speech may be justified in the interest of "avoiding the appearance of political favoritism"); *Sneppe v. United States*, 444 U.S. 507 (1980) (upholding state conditioning employment involved in national security upon waiver of First Amendment free speech rights); *Greer v. Spock*, 424 U.S. 828, 839 (1976) (upholding policy aimed at assuring that official military activities remain "wholly free of entanglement with partisan political campaigns of any kind"); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding statute prohibiting certain federal employees from participating in political campaigns).

¹⁸³ *See, e.g.*, Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 68 (1988).

¹⁸⁴ *See, e.g.*, RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 184-85 (1993); Fischel, *supra* note 180, at 891.

¹⁸⁵ Fischel, *supra* note 180, at 866-70.

¹⁸⁶ *Id.* ("My perspective is that of an economist and social observer who regards judges as only a

hand, he asserts that efficient regulations, which are responsive to majoritarian politics, are more likely to result in takings because they emanate from unfair government action impacting a select few.¹⁸⁷ Professor Fischel is adamant that he is not suggesting inefficient regulations are more desirable than efficient ones.¹⁸⁸ Rather, he contends they can be remedied by political and market-based processes in a way that the burdens imposed on a minority segment of a community associated with highly efficient regulations cannot.¹⁸⁹

Professor Fischel's assertion that takings inquiries should concentrate on a property owner's ability to protect oneself draws broad scholarly support, though the method of doing so is the subject of dispute.¹⁹⁰ Some suggest that an exit options serve this function well, and thus can stand as an appropriate proxy for when the takings clause should be invoked.¹⁹¹ Comprehensive empirical data thus far is unavailable, likely due to the difficulty of accurate compilation. Theoretically, though, while a locality conceivably could take advantage of a grounded developer, such conduct could chill the likelihood of further developer interest in that area.¹⁹² The extent to which exaction costs fall disproportionately on landowners and consumers, as opposed to developers, could alter the application of this theory, though in many situations, developers, landowners and consumers will share in these costs.¹⁹³

part, but a still necessary part, of the enterprise of protecting individuals from the excesses of the state. . . . [E]conomic inefficiency provides a means by which judges can identify a class of controversies in which fairness considerations demand that they, rather than political and economic processes, have to act to ensure fairness.”)

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 867.

¹⁸⁹ *Id.* In espousing this theory, Professor Fischel focused on rent-control, citing several inefficiencies with the practice: low rates of return will discourage investment in rental housing; landlords will have little incentive for common area and other maintenance upkeep; landlords will exit the rental market altogether; and tenants “are apt to remain in their units longer than [they] otherwise [would] in order to have the advantage of low rents.” *Id.* at 866, 872, 875, 887–905. While Professor Fischel asserts that these inefficiencies are broadly distributed and thus will be remedied in the political process, that rent controls continue to persist nationwide suggests there are variables that have not been taken into account in this model. See Been, *supra* note 150, at 920.

¹⁹⁰ See, e.g., *id.*

¹⁹¹ See *id.* at 921 (suggesting pure application of economic theory to contend that highly efficient regulations breed viable takings claims fails to account for the “differences that specific markets might make to the comparative efficiency of a regulation”).

¹⁹² See Dana, *supra* note 1, at 1271 n.129.

¹⁹³ See Been, “Exit,” *supra* note 1, at 541–42 (suggesting that developers will seek to negotiate for the least costly exactions since landowners and consumers set the elasticity, or price fluctuation sensitivity, of land supply). Professor Been thus asserts, “Even though the landowner has an immobile asset, then, she will be protected against municipal overcharging through the bargaining of the developer.” *Id.* at 542 (describing the developer’s bargaining power as providing “indirect protection” for landowners).

C. Inherent Inconsistencies of Stringent Exactions Scrutiny Beyond Real Property Dedications

Given the collaboration inherent in authoring a unanimous decision, the *Lingle* opinion surely accommodated competing views, particularly in light of the sharp disagreements in prior regulatory takings cases. It is possible that Justice Scalia's "quiet"¹⁹⁴ addition of his signature to the Court's opinion in *Lingle* may not have reflected a departure from the property rights principles he has supported at least since *Nollan* in 1987. With some exception, the same may be true for those other Justices that sided with the majorities in *Nollan* and *Dolan* and remained on the court for *Lingle*.¹⁹⁵ Rather, the *Lingle* dicta may have served as recognition of the imbedded inconsistencies of *Agins*' reach in the permit condition context.¹⁹⁶

Flowing from these inconsistencies, this section suggests that the *Lingle* dicta grasped the limited options for preserving any logical role for the exactions decisions that these Justices had strenuously supported in the past.¹⁹⁷ As discussed in Part II above, *Lingle* ended *Agins*' support for a due process query that allowed means-ends review in takings cases.¹⁹⁸ However, it did find an enclave for preserving the substance-like review of *Nollan* and *Dolan* in certain narrow, yet not explicitly defined, land use permitting contexts.¹⁹⁹ This section

¹⁹⁴ See Nelson, *supra* note 135, at 288.

¹⁹⁵ This group included Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas.

¹⁹⁶ *Lingle* explicitly billed itself as a doctrinal claritor. Justice O'Connor's opinion opened, "On occasion, a would-be doctrinal rule or test [here, the "substantially advance" test] finds its way into our case law through simply repetition of a phrase – however fortuitously coined." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531 (2005). One law student pondered whether the preservation of *Nollan* and *Dolan* in *Lingle* was a "force[d]...distinction." See, e.g., Nelson, *supra* note 135, at 290.

¹⁹⁷ As Justice Blackmun's Papers shed extraordinary light on the compilation of the takings law opinions of the 1970s, 80s and early 90s, so too might the various Justices' conference notes shed light on the unanimity in *Lingle*. While Justice Blackmun had asked that his Supreme Court papers be released on the five-year anniversary of his death, the late Chief Justice Rehnquist's requested that his U.S. Supreme Court case files and related materials for the terms 1975–2005 remain closed during the lifetime of any member of the Supreme Court with whom he served. See Hoover Institution, Stanford University, *Rehnquist Papers: Finding Aid for Materials from 1947 to 1974 Available to Researchers on November 17, 2008*, Nov. 12, 2008, <http://www.hoover.org/hila/announcements/news/34359614.html>.

¹⁹⁸ For a further discussion of *Lingle*'s separation of the takings and due process clauses, see *supra* notes 116-38 and accompanying text.

¹⁹⁹ For a further discussion of *Lingle*'s preservation of some role for the *Agins* test in exaction cases, see *supra* notes 137-47 and accompanying text. Admittedly, if doctrinal coherence were the only objective in litigation of constitutional issues, the *Agins* test might never have arisen. See John D. Echeverria, *Lingle, Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 ENVTL. L. REP. 10577, 10581 (2005). Professor Echeverria suggests that both proponents of property rights and those of strong land use authority "may . . . have found something to like" about *Agins*' fusion of the

suggests that rejection of *Agins*' "substantially advance" test has implications for *Nollan* and *Dolan* in light of the Court's relatively recent "admonition that in regulatory takings cases [the judiciary] must focus on 'the parcel as a whole.'"²⁰⁰ Conceptually, this "parcel as a whole" rule requires linking *Nollan* and *Dolan* to a narrow sub-set of conditions that, if imposed in isolation, would amount to *per se* physical occupation takings.

Before *Nollan* and *Dolan* can apply, the imposed condition must constitute a taking outside the permit condition context. This threshold easily could be met under the heightened means-ends review of takings claims under the *Agins* test. Indeed, even a condition that not only was "rationally related to" but "advanced" a legitimate state interest could be considered a taking and subject to a *Nollan* and *Dolan* analysis if it did not do so "substantially." But rejection of *Agins* as a takings test leaves only three remaining takings tests that conceivably could trigger the *Nollan* and *Dolan* inquiries. This section contends that two of these three tests present inherent, prohibitory application hurdles in the exaction context. Therefore, only the *per se* physical occupation test of *Loretto v. Teleprompter Manhattan CATV Corp.*²⁰¹ could logically serve as the underlying foundation for *Lingle*'s preservation of *Nollan* and *Dolan* analyses.

Theoretically, if the demand of a permit condition does not amount to a *per se* taking under *Loretto*, any condition would have to constitute a taking under one of the other two takings standards in isolation (i.e., absent its place as a requirement attached to a discretionary permit) before *Nollan* and *Dolan* could apply. Before reaching *Nollan* and *Dolan*, the condition either would have to (1) effect a complete economic wipe-out in accord with *Lucas v. South Carolina Coastal Commission*,²⁰² or (2) weigh in favor of a taking upon application of the balancing test assessing the economic impact and landowner's investment-backed expectations as set forth in *Penn Central Transp. Co. v. New York*

takings and substantive due process clauses. *Id.* This is conceivable: the former might have seen *Agins*' inclusion of substantive due process language in the takings jurisprudence as an avenue to exact more stringent scrutiny of economic legislation not available under a true substantive due process challenge since the *Lochner* era; the latter just the opposite – *Agins*' reference to due process might suggest that the Takings Clause involves no higher standard than rational basis review. Professor Echeverria suggests that the government's victory in *Agins* must have left government lawyers "hardly...dissatisfied with the somewhat confusing but ultimately seemingly helpful comingling of doctrines" in the decision. *See id.* In addition to the permitting context, scholarly debate continues on the issue of whether the "character of the government action" prong of the *Penn Central* analysis incorporates consideration of the government act's substantial advancement of a public purpose, as well as the importance of that purpose. *See supra* note 130.

²⁰⁰ *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) (quoting *Penn Central Transp. Co.*, 438 U.S. at 130-31). *See also Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

²⁰¹ 458 U.S. 419 (1982).

²⁰² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

City.²⁰³

However, applying these tests to conditions of discretionary permits intrinsically is confounded when the conditions do not involve physical appropriations. This is because *Penn Central* and *Lucas* address “economic” as opposed to “physical” challenges under the Takings Clause. In order to establish such an “economic” taking, a claimant must demonstrate that she has been denied all or substantially all economically viable use of her property.²⁰⁴ While in physical appropriation cases the pre- and post-permit uses of the property are irrelevant to a regulatory takings analysis, in all other instances the reviewing court looks not solely at the economic burden on the portion of the regulated property, but rather on the underlying property interest.²⁰⁵ The claimant’s economic expectations are primary in applying this construct.²⁰⁶

As the *Penn Central* Court explained, “[t]akings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”²⁰⁷ Instead, in determining whether a particular government action has effected a taking, “this Court focuses rather both on the character of the action and on the nature . . . of the interference with rights in the parcel as a whole.”²⁰⁸ The success of a regulatory takings claim thus depends on the court’s determination of the whole unit of property at issue, which is expressed as the de-nominator in a ratio of the value of regulated property over the value of the pre-, or un-, regulated property.²⁰⁹ Thus, under a *Lucas* or *Penn Central* analysis, the courts must consider the allegedly burdened property in its entirety. This includes both the current uses of the property if the permit is denied and the potential permitted (including conditionally permitted) uses.

Hypothetically, presume this analysis results in a finding that the government action renders the property valueless such that it amounts to a categorical *Lucas* taking, or is otherwise found to be a taking under the *Penn Central* balancing

²⁰³ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). For a discussion of the *Penn Central* factors, see *infra* note 22 and accompanying text. See also *infra* note 30.

²⁰⁴ See *Lucas*, 505 U.S. at 1030–31.

²⁰⁵ See *Tahoe-Sierra Pres. Council*, 535 U.S. at 331.

²⁰⁶ See, e.g., *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005).

²⁰⁷ *Penn Central*, 438 U.S. at 130–31.

²⁰⁸ *Id.*

²⁰⁹ See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987). See also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (“To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.”); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331 (2002) (“defining the property interest taken in terms of the very regulation being challenged is circular”).

test. Even a condition directly related in both nature and extent to the impacts of the development, which would easily comport with the *Nollan* and *Dolan* requirements, does not undo that finding. This is because that very condition necessarily is considered as part of the original analysis of the parcel as a whole.²¹⁰ Therefore, applying the more stringent level of scrutiny of *Nollan* and *Dolan* to a non-possessory condition imposed in conjunction with a permit may be notionally untenable after *Lingle*'s rejection of the substantially advance inquiry.²¹¹ It appears that any other result would repudiate all uses of the *Penn Central* balancing test, undermining the unanimous affirmance in *Lingle* of *Penn Central*'s pivotal role in takings analyses.²¹²

²¹⁰ See Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 600-01 (2009). As one commentator explained, the converse is also true: if a regulation that does not result in a physical invasion does not impose a taking on a "whole" parcel, in accord with the proper analysis considering the remaining uses if the permit were denied, the predicate for a *Nollan* and *Dolan* analysis is not met because there is no proof the condition violates the constitution in the first place. *Id.* at 600-01 (2009).

²¹¹ Among the type of non-possessory permit condition scenarios relevant to the continued viability and scope of the *Nollan* and *Dolan* tests, the U.S. Supreme Court has not shown interest in explicitly reviewing the distinction between fee-based conditions and real property dedications. See *City of Olympia v. Drebeck*, 126 P.3d 802, 803 (Wash. 2006), *cert. denied*, *Drebeck v. City of Olympia*, 549 U.S. 988 (2006). Other questions regarding *Nollan* and *Dolan* remain outstanding. For example, in light of Justice O'Connor's retirement in 2006, only one Justice who has voted to review whether heightened scrutiny is applicable to legislatively, as opposed to adjudicatively-imposed, exactions remains on the Court. See *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., O'Connor, J., dissenting from denial of certiorari). In 2009, the Court unanimously denied certification in a case seeking clarity on this distinction. See *McClung v. City of Sumner*, 545 F.3d 803 (9th Cir. 2008), *cert. denied*, *McClung v. City of Sumner*, 129 S. Ct. 2765 (2009). For another example, three sitting Justices expressed a desire to grant certiorari in a 2000 case where a California court did not apply the *Nollan* and *Dolan* tests to the refusal of an exaction that resulted in an outright permit denial. See *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., Kennedy, J., & Thomas, J., dissenting from denial of certiorari). Thus, questions surrounding refused or withdrawn conditions, at issue in a case currently before the Florida Supreme Court, may have a greater likelihood of being decided definitely in the near future. See *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. Dist. Ct. App. 2009) (*cert. granted* September 16, 2009, http://www.floridasupremecourt.org/clerk/review_granted/oralargument/2009/9/09-713oa.pdf). The three Justices dissenting from the denial of certiorari in *Lambert*, namely Justices Scalia, Kennedy, and Thomas, likely will remain on the court for the considerable future, and three Justices who decided not to review *Lambert*, namely Chief Justice Rehnquist and Justices O'Connor and Souter, no longer serve.

²¹² See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) ("The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.").

IV. CONCLUSION

The U.S. Supreme Court's exaction takings jurisprudence has created an anomaly where lower courts must apply a more stringent level of scrutiny when reviewing land use permit conditions than they accord outright permit denials. This anomaly generates a strange set of incentives for government officials to under-regulate, over-regulate, or engage in selective permitting for particular repeat developers in an effort to circumvent the more stringent standard. However, this article asserts that dicta in the U.S. Supreme Court's 2005 opinion in *Lingle v. Chevron, Inc.*, for which the complete rationale has been elusive to date, could be interpreted as an attempt to address these possibilities for circumvention.

Of course, it is necessary to assure private property owners are not subject to oppressive permit conditions. Indeed, the *Nollan* and *Dolan* majorities stated this very goal in espousing the "essential nexus" and "rough proportionality" tests. Therefore, the unanimous *Lingle* dicta must be grounded on some accepted inadequacy or inconsistency in widely applying the *Nollan* and *Dolan* tests to accomplish this goal. This article has analyzed several non-exclusive theories on which the *Lingle* dicta could be based.

First, the *Lingle* dicta may serve as an acknowledgement of the allocative inefficiencies in applying *Nollan* and *Dolan* to a broad set of permitting scenarios. Second, it may represent a recognition that sufficient alternative controls against coercive exactions exist, such as municipal competition and the ability of voters to hold local officials politically accountable. Third, *Lingle's* suggestion that the *Nollan* and *Dolan* tests are only appropriate in a finite array of circumstances could be due to a revelation associated with the Supreme Court's recent, convincing support for the "parcel as a whole" rule.

Nonetheless, in the nearly five years since *Lingle*, some lower courts have disregarded this reading of *Lingle's* dicta and continued to apply *Nollan* and *Dolan* to a broad set of permit conditions.²¹³ Such an approach perpetuates the possibilities for regulator circumvention that flow from applying a standard of scrutiny to permit conditions that is inconsistent with that for permit denials. Admittedly, this disregard is not altogether surprising, for with sublime ambiguity, Oliver Wendell Holmes famously said, "the life of the law has not been logic."²¹⁴ Simply furnishing a description of the words in the Supreme

²¹³ See, e.g., *St. Johns River Water Mgmt. Dist.*, 5 So. 3d 8 (Fla. Dist. Ct. App. 2009) (applying *Nollan* and *Dolan* to proposed conditions requiring the placement of a conservation restriction on wetlands, in-kind offsite mitigation, and the payment of mitigation fees, even where such conditions were never ultimately imposed).

²¹⁴ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

Court's opinions can simplify their prospective evolution, and for this reason the import of *Lingle* may not be unraveled for decades.

Further, it is not simply in the reported lower court decisions where these issues are relevant. Land use decisions are being made by government officials in every corner of the United States on a daily basis. Thus, the search to find a workable takings test to protect private property rights while allowing local governments the necessary flexibility in conditioning permits to protect the economy, the environment and the public health in our modern, democratic, civilized society will continue. May the analysis herein serve a meaningful role in that endeavor.
