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THE IMPLICATIONS OF LINGLE ON INCLUSIONARY ZONING AND OTHER LEGISLATIVE AND MONETARY EXACTIONS

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*398 I. Introduction

In 1987, the United States Supreme Court decided Nollan v. California Coastal Commission. It held for the first time that the Constitution prohibits the government from requiring that landowners dedicate property to a public purpose in order to obtain permission to develop their land unless there is a connection between the exaction and certain impacts caused by the development. [1] Seven years later, the Court decided Dolan v. City of Tigard, striking down a dedication requirement because the government had not shown it was “roughly proportional” to the proposed development's impact. [2] Since Dolan, the Supreme Court has consistently declined petitions for certiorari for new exactions ***399** cases [3] despite the uncertainty wrought by fifteen years of silence on this relatively young and undeveloped area of takings law. [4]

With only two Supreme Court exactions opinions, lower courts have struggled in applying the precedent, disagreeing over important issues that have arisen since 1994. [5] Questions of particular concern are whether Nollan and Dolan apply to legislative exactions [6] and monetary exactions. [7] This Article will ***400** focus on the former and the specific implications of Lingle v. Chevron's [8] reliance on the doctrine of unconstitutional conditions on that question.

Lingle itself was not an exactions case. It did not involve a condition imposed on development during the permit process, [9] but it went to great lengths in attempt to synthesize the entire arena of regulatory takings law. Lingle discussed Nollan and Dolan at length and to that extent is strong persuasive authority about how exactions case law should be interpreted and applied by lower courts. [10] In doing so, Lingle recharacterized exactions case law as a "special application of the doctrine of unconstitutional conditions." [11] That doctrine holds that "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 has little or no relationship to the property." [12]

That the entire Supreme Court views exactions as instantiations of the unconstitutional conditions doctrine strengthens the argument that legislatively imposed exactions must be reviewed under the same heightened scrutiny as their adjudicatively imposed counterparts. This is because the unconstitutional conditions doctrine does not distinguish, in theory or in practice, between conditions imposed by different branches of government. This Article further suggests that characterizing exactions as a "special application" of the doctrine recognizes that in the case of exactions, the government may impose an otherwise ***401** unconstitutional condition in cases for which it meets the requirements of Nollan and Dolan. [13]

This Article discusses inclusionary zoning as a concrete example of how the Lingle Court's pronouncement should be implemented in practice. For example, "inclusionary zoning" [14] laws by their very nature withhold development permits from landowners unless they dedicate some of their property to a public purpose for less than just compensation. More specifically, in exchange for a permit to build multiple housing units, a developer must sell or rent a certain number units to third parties at below market prices. [15] These ordinances illustrate the reason that the unconstitutional conditions doctrine does not distinguish between the types of government action at issue. Such a distinction would uphold an inclusionary housing condition when it is imposed by a legislative body and strike down the identical condition when it is imposed by planners in an ad hoc permitting process.

This Article will proceed in four sections. First, it will briefly discuss the pre-Lingle debate over the level of scrutiny that applies to legislatively imposed exactions. Second, it will discuss the effect of the Supreme Court's characterization of exactions as unconstitutional conditions. Third, it will use inclusionary zoning as an example of a legislatively imposed exaction scheme that must satisfy the requirements laid out in Nollan and Dolan to pass ***402** constitutional muster. Fourth and finally, it will provide a short survey of selected legal challenges to pre-Lingle exactions, and consider how Lingle might or might not have affected the outcomes.

II. Exactions and the Pre- Lingle Takings Landscape

The exactions debate is important because its resolution determines what level of scrutiny applies and, concomitantly, who bears the burden of justifying or opposing the exaction. The Takings Clause of the Fifth Amendment places limits on the control a government may exercise over private property. [16] In Pennsylvania Coal Co. v. Mahon, the Court found that regulations can take property if they go "too far." [17] Writing for the Court, Justice Holmes reasoned that a regulation can have "very nearly the same effect for constitutional purposes as appropriating or destroying [property]." [18] The Court has clearly stated the constitutional purpose behind the prohibition on regulatory takings: "[T]o bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [19] Unfortunately, the "too

far" formulation is deceptive in its meaningless simplicity. Various tests have been created, used, and discarded in attempts to define this "we know it when we see it" standard. [20] For example, Agins v. City of Tiburon enunciated a regulatory takings test that would attach to a regulation if it failed to "substantially advance legitimate state interests," [21] but Lingle eliminated that test from takings law. [22]

***403** The Supreme Court's reluctance to adopt bright-line rules to define the scope of regulatory takings has led to a legal regime dominated by alternative tests. Currently, courts must employ one of four different tests, depending on a particular case's circumstances. The Penn. Central test is the most deferential and balances three factors to determine whether a given regulation goes "too far," including the economic impact of the challenged regulation, the extent it interferes with the property owner's distinct investment-backed expectations, and the "character" of the regulation. [23] However, three alternatives to Penn. Central subject government actions to higher scrutiny. First, Loretto holds that physical invasions of property, no matter how small, are takings. [24] Second, Lucas taught that a "categorical" taking occurs when regulations eliminate all economically viable use of property. [25] Third, Nollan and Dolan explain that the government may not require a landowner to give up property in exchange for permission to use that property unless the government demonstrates that the "nexus" and "rough proportionality" standards have been met. [26]

In Nollan v. California Coastal Commission, the Supreme Court confronted the California Coastal Commission's "out-and-out plan of extortion." [27] The Commission had adopted the practice of requiring landowners to give up access to and along the beach in exchange for building permits. [28] The Commission had demanded that the Nollans dedicate approximately one-third of their property in order to be given a permit to replace a one-story bungalow with a two-story home. [29] The dedication would have given the public the right to cross back and forth along the dedicated property parallel to the ocean. The Commission justified the demand as a way of remedying the loss of ocean view of ***404** travelers along Highway 1, a loss the Commission characterized as a "psychological barrier." [30]

The Court was not persuaded. [31] Relying on a plethora of existing, non-California state precedents, the Court held that a condition of this nature can be imposed only if certain facts are present. First, the impact caused by the proposed development must be severe enough to justify a denial of the permit in the first place, a denial that would not itself rise to the level of a taking. [32] Second, a condition may instead be imposed so long as the exaction will actually serve to ameliorate the adverse impact which could have justified the denial of the permit in the first place. [33] Because forcing the Nollans to dedicate property parallel to the beach would do nothing to ameliorate the lost view of drivers along Highway 1, the exaction was seen to lack the required nexus. In other words, "constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." [34]

This standard was further refined in Dolan v. City of Tigard, where the owner of a hardware and plumbing store was told to dedicate and build a bicycle trail and give up land for public access in exchange for a permit to expand the business. [35] The justification for these demands was to ameliorate the impact of the expansion on traffic and flooding. The Supreme Court held that while there may be some nexus, "the [government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." [36] The requirements of a nexus described in Nollan and the need for the government agency to prove rough proportionality in Dolan has been described as calling for "heightened scrutiny" of exactions. [37]

***405** The Supreme Court has not addressed whether legislatively imposed exactions are subject to this heightened scrutiny. Lower courts must guess about whether the Supreme Court would include legislative activity within its definition of "exaction," and to do so they may begin by looking at the rationale supporting exactions law. In both Nollan and Dolan, the Court seemed to indicate that the rational for its exactions standards derived from the "substantially advance" takings standard of Agins.

Thus, in Nollan, the Court began its discussion by noting, "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." [38] And in Dolan, while the Court referred to the doctrine of unconstitutional conditions, [39] the Court grounded its analysis in the "substantially advance" prong after noting that Mrs. Dolan had not been deprived of economically viable use of her property. [40] Moreover, when the Dolan Court did distinguish legislative actions, it was referring to "essentially legislative determinations classifying entire areas of the city." [41] Thus, prior to Lingle, strong arguments could be made that legislatively imposed exactions are subject to heightened scrutiny because they achieve the same end that was deemed impermissible in Nolan and Dolan--they force owners to give up property in order to obtain a permit. [42] But advocates of a relaxed standard of review of legislative exactions suggest that footnote eight of Dolan conclusively allows local legislatures to require land use planning departments to exact property in every case without paying just compensation or satisfying the nexus and rough proportionality requirements of Nollan and Dolan. [43]

***406** Dolan's footnote eight cited Village of Euclid [44] for the proposition 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." [45] But that the footnote was a qualified sentence; it stated that "most" legislative zoning ordinances are subject to rational basis review, not "all," indicating that the note anticipated heightened scrutiny review for at least some types of generally applicable legislation. So the question arises: which types? A logical guess is that it intended to leave open the possibility of using heightened scrutiny for legislative schemes that impose the exact same kinds of exactions as the adjudicative ones.

Footnote eight also does not support rational basis review for legislation attacked on Fifth Amendment takings grounds. By citing Village of Euclid, the Court referred to the level of scrutiny appropriate for Fourteenth Amendment due process claims, not takings claims. [46] Finally, in Nollan and Dolan, the permit conditions at issue were imposed pursuant to statutory authority. [47]

***407 III. Lingle Further Supports Subjecting Legislatively Imposed Exactions to Heightened Scrutiny**

A. Lingle Provided a New Justification for Nollan and Dolan Under the Takings Clause: The Doctrine of Unconstitutional Conditions

Lingle added a further question about the relevance of Dolan's footnote eight. In Lingle, the entire Supreme Court rejected the "substantially advances" prong of Agins, finding that such a test reflected Due Process jurisprudence instead of Takings Clause doctrine. [48] With respect to exactions, the Court found that Nollan and Dolan derived not from the discredited "substantially advance" Takings Clause doctrine, but instead from the unconstitutional conditions doctrine. [49] As will be shown, that doctrine has never turned on the nature of government action at issue, nor has any of the unconstitutional conditions scholarship thought the distinction relevant.

Government bargains conditioned upon waiver of constitutional rights are hardly new. Such conditions are not even unique to land use regulations. The government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law. [50] The Supreme Court has scrutinized all of these conditions using the general rubric of the unconstitutional conditions doctrine. [51]

At first glance, the characterization hardly seems to clear up the legislative/adjudicative debate, because the unconstitutional conditions doctrine has been plagued by criticisms that it is inconsistently applied, theoretically unworkable, and unnecessary for constitutional review. [52] However, despite its detractors, the Supreme Court continues to invoke the doctrine to strike down both ad hoc and legislatively required conditions. As will be discussed, theoretical models of the doctrine also do not support a distinction between legislative or adjudicative conditions, even ***408** though there are many of such theories to choose from.

Without practical or theoretical support the argument that exactions are not subject to Nollan and Dolan, merely because they are legislatively required, is no longer tenable.

While it was quite possible to argue that inclusionary zoning does not and cannot achieve a legitimate state purpose, [53] and thus violates the Due Process Clause, Lingle instructs us to turn our attention to the doctrine of unconstitutional conditions. In Lingle, Chevron challenged a Hawaii statute that limited the rent that oil companies could charge to lease their company-owned gas stations. [54] Chevron argued that the statute was a taking because it did not substantially advance a legitimate state interest. [55] The Court rejected the argument, holding that the substantial advancement test is not a stand-alone takings inquiry, but a due process test. [56] The Court thoroughly explained the distinction between due process challenges and takings claims:
Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the ***409** regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking." First English Evangelical Lutheran Church, 482 U.S. 304, 315 (1987) (emphasis added). Conversely, if a government action is found to be impermissible-for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process-that is the end of the inquiry. No amount of compensation can authorize such action. [57]

Although Nollan and Dolan were takings cases previously viewed as extensions of the substantial advancement test, Lingle did not undercut their continued vitality. Instead, the Court distinguished Nollan's nexus test from the (now) due process substantial advancement test, because property regulations that violate due process fail to "substantially advance some legitimate state interest," whereas property regulations that violate the Takings Clause fail to "substantially advance the same interests that land-use authorities asserted would allow them to deny the permit altogether." [58]

Lingle further expressly reaffirmed the vitality of the exactions cases by putting these takings cases in the special category of unconstitutional conditions. Citing to Dolan v. City of Tigard, the unanimous Court wrote:
As the Court explained in Dolan, these cases involve a special application of the "doctrine of 'unconstitutional conditions"' which provides that "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 has little or no relationship to the property." [59] ***410** With the Court's new found emphasis on the doctrine of unconstitutional conditions as a justification for its takings-based exactions rules, it behooves us to examine more closely the nature of the doctrine of unconstitutional conditions.

B. While Theoretical Justifications for the Doctrine of Unconstitutional Conditions Do Not Adequately Explain Supreme Court Case Results, None of the Competing Theories Hold That the Doctrine Turns on Whether a Condition is Legislatively or Adjudicatively Imposed

The doctrine of unconstitutional conditions usually involves an exchange: the government gives a benefit to a person in exchange for something from the owner of which the government would not ordinarily be entitled. The lawfulness of the exchange is at the heart of the unconstitutional conditions doctrine. But to properly understand whether the exchange is lawful, it is important to understand the nature of the benefit and the condition being imposed.

Many commentators, however, do recognize the distinction between conditions placed upon the receipt of benefits and those placed upon the exercise of rights. [60] With respect to the doctrine of unconstitutional conditions, the analysis of "benefits" is pervasive. As Professor Sullivan explains, "[t]he doctrine of unconstitutional conditions holds that government may not grant a

benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." [61]

***411** But there is a continuum of the degree to which a "benefit" is indeed a benefit, and when it is a right. Welfare benefits are an example of a benefit that the government is under no legal obligation to provide at all. [62] Of course, once the decision to provide such benefits is made, certain legal constraints must be employed so that benefits are not denied for unfair reasons or through unfair procedures. The right to develop property, on the other hand, involves the exercise of a right--albeit a right subject to regulation in order to prevent certain types of negative externalities. Thus, in Nollan, the Nollans had a right to put their property to an economically viable use. That right may be regulated in order to prevent external harms to neighbors and the public. In that case, the California Coastal Commission claimed that it could prevent the Nollans from adding a second story to their home in order to prevent a "psychological barrier" that would prevent people traveling on Highway 1 from realizing the presence of the ocean. [63] Assuming for the sake of argument the legitimacy of this justification, [64] the Court found that the condition sought by the Commission, the dedication of a lateral access path, had no relation to the alleged harm, and therefore could not be justified. Thus, while there were more than benefits at issue in Nollan, the underlying leverage was on the exercise of a right, albeit a right subject to reasonable regulation.

Thus, when a court considers the theoretical justifications that have been put forth for the doctrine of unconstitutional conditions, it is important to bear in mind the nature of the "benefit" being sought from the government. The degree to which the "benefit" is a fundamental right, rather than an optional gift of the government, should influence the degree to which the government may condition the receipt of the benefit.

***412** 1. All academic theories, however imperfect, reject the conditioning of fundamental rights.

The doctrine of unconstitutional conditions is characterized by competing theoretical justifications, none of which is either universally accepted or in harmony with the case law. [65] For example, Professor Kathleen Sullivan has described several such theories (e.g. coercion, corruption, and "commodification"), rejecting all of them in favor of her own systematic theory, even while noting that her theory is not consistent with recent Supreme Court precedent. [66] Likewise, Professor Richard Epstein's theory, based in part on law and economics, suggests that a robust doctrine of unconstitutional conditions is "second best" to a correct and limited view of the police power. [67] "But," as noted by Mitchell Berman, "these efforts, and those by other distinguished scholars, have left most observers unpersuaded." [68] However, Berman continues: "Very possibly, the Supreme Court has come closer to grasping the essential logic of coercion in its takings decisions than anywhere else." [69]

Theoretical justifications for the doctrine of unconstitutional conditions may involve debate on the margins and on questions of precisely when the doctrine should be invoked. This debate and uncertainty, however, is largely irrelevant in a case such as the present one. There is no exception to the requirement that government pays just compensation when property is taken.

To the extent that the ability to use private property is a fundamental right, [70] the requirement that a landowner seeking to ***413** develop property give up land or money in order to subsidize housing for unrelated third parties is a problematic proposition.

2. The greater power includes the lesser power theory.

Sometimes the doctrine of unconstitutional conditions is characterized as the right to exercise a "lesser power." That is, rather than denying a permit such as in Nollan, the government may instead grant the permit with conditions. Thus, Professor Sullivan describes the doctrine this way:

> It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt. Consensus that the better view won, however, has not put an end to confusion about its application. [71]

But as Sullivan notes, not all jurists and scholars have accepted this rather facile view of the doctrine. [72] Professor Epstein, for example, suggests that a law and economics approach reveals that this "greater power/lesser power" distinction in fact "gives political actors a greater opportunity to extract economic rents." [73]

More importantly, this justification for imposing conditions must disappear when there is no "greater power" in the first place. Here, the government has no right to force an ordinary citizen to subsidize the housing of unrelated third parties and has no right to arbitrarily deny a building permit that will not cause external harms, such as decreasing the supply of affordable housing. A fortiori, the lesser power--here the power of conditioning the receipt of a building permit on the condition that third parties receive housing subsidies--cannot be justified under the doctrine.

***414** 3. Coercion theory.

Another justification for the unconstitutional conditions doctrine is that it reduces certain forms of "coercion" by the government. In other words, government cannot "coerce" people into agreeing to conditions to which it is not otherwise entitled. The theory suggests that people would rather not enter into a particular bargain with the government, but they feel compelled to do so in order to gain a benefit. Some believe, for example, that this theory explains the "out-and-out plan of extortion" rhetoric of the Court in Nollan. [74] But Professor Sullivan is less than satisfied with this explanation:

> Neither the Court nor the commentary, however, has developed satisfying theory of what is coercive about unconstitutional conditions. Conclusory labels often take the place of analysis--for example, conditioned benefits are frequently deemed 'penalties' when struck down and 'nonsubsidies' when upheld. [75]

Sullivan explicates at length why the coercion justification for the doctrine is inconsistent with both case law and theory, concluding:

> While unconstitutional conditions doctrine thus is hardly unique in deeming some offers of benefit coercive, the concept of coercion will depend just as inescapably on independent conceptions of utility, autonomy, fairness, or desert in the unconstitutional conditions context as in other contexts. Coercion is a judgment, not a state of being. [76]

Professor Epstein articulates this problem in the coercion theory by saying, "the greatest difficulty with the coercion question is to identify the appropriate baseline against which the possibly coercive effects of government action must be evaluated." [77]

***415** 4. Maximization of social utility.

Professor Epstein posits that a theory wherein only government conditions that maximize social utility can be justified under the doctrine. [78] Under this theory, a government bargain must be analyzed to determine whether it generates a net social utility. For example, when government condemns property for a highway and pays just compensation, there is net social utility: The government and the public gain a highway and its increased social and economic value, while the landowner receives compensation and enjoys the social utility provided by the highway. However, in an unconstitutional conditions case, the government may try to put the receiver of a benefit in a worse position than before--which may result in a net social loss. In

Nollan, for example, Epstein suggests that the Court's requirement of a nexus between the alleged public harm (the impact on the view) and the condition (the lateral easement), forces government to put some value on the two separate aspects of the bargain in order to prevent a net social loss. [79] In other words, if the value of the development is disproportionate to the value of the lateral easement, then the doctrine forces the government to make choices based on net social utility. It might not, therefore, require the lateral easement if that means the loss of the ability of development of beachfront lots. As noted, there is serious doubt over whether inclusionary zoning mandates achieve any social utility--rather than providing more affordable housing they may be responsible for limiting the supply of such housing. [80]

5. Government overreaching and other theories.

Other justifications for the doctrine of unconstitutional conditions abound. Professor Sullivan raises and, in turn, rejects theories of "germaneness," [81] "corruption," [82] and ***416** "commodification" (dealing with the supposed inalienability of certain rights) [83] before settling upon her own theory that concludes, "the doctrine guards against a characteristic form of government overreaching and thus serves a state-checking function." [84] And, more recently, Professor Berman raises and rejects all of these theories because none has garnered widespread academic support, and proceeds to posit his own theory that combines elements of each. [85] Notwithstanding his valiant attempt, this lack of settled understanding appears to be as true after Berman's attempt at a theory than it was before.

A hallmark of all of these academic treatments is that after positing a particular theory, they proceed to pick and choose amongst United States Supreme Court precedents, arguing that this case got it right, whereas that case got it wrong, or that this justice often gets it right and that justice rarely does, but most likely these justices are inconsistent. In other words, the utility of any of these grand unified theories is not particularly apparent in predicting real world outcomes. Thus, the central difficulty with all of these recent attempts at a grand unified theory for the doctrine of unconstitutional conditions is that the Court has refused to play along.

Academic uncertainty aside, it is clear that the Court in Lingle is untroubled by the assertion of the doctrine in the context of the Just Compensation and Takings Clauses. It is also notable that none of these various theoretical justifications for the doctrine of unconstitutional conditions is dependent upon the origin of the condition--whether it be from an administrative or legislative action. [86]

***417** Moreover, while the government certainly had some discretion in Nollan and Dolan to grant or deny the subject permits--depending on the degree and nature of the externalities caused by the development in those cases--that sort of discretion is lacking when it comes to questions of affordable housing and the development of new homes. That is because it is highly doubtful that a local government can ever prove that the externalities of new home construction include the exacerbation of a shortage of affordable housing.

IV. Inclusionary Zoning Violates the Doctrine of Unconstitutional Conditions

Inclusionary zoning is a concrete example of a legislatively imposed exaction for which there has been a large amount of debate over the appropriate level of scrutiny. [87] Explained generally, inclusionary zoning ordinances do not allow developers to build residential units unless they build a certain number of additional "inclusionary" units and sell them for below market prices. [88] For purposes of the constitutional debate, it is important ***418** to note that the ordinances require developers to transfer their property title to a third party. Under ordinary circumstances, if a governmental entity were to require a property owner to transfer title to a third party it would have to pay the property owner just compensation in accordance with the Fifth Amendment. [89] However, inclusionary zoning laws circumvent the constitutional compensation mandate by exchanging the owner's right to just compensation for a permit to develop property in the first place. Local government officials often aspire to provide cheap housing

to their electorate for obvious reasons, but their coffers cannot support massive land buying and homebuilding endeavors. As a result, local governments have a powerful incentive to circumvent the Fifth Amendment's compensation requirement.

Inclusionary zoning laws pit property owners and property rights advocates against local governments and affordable housing supporters. Property rights advocates object to inclusionary zoning laws because those laws make it illegal for owners to sell some of their residential units on the open market for full fair market value. [90] The ordinances effectively force property owners to ***419** transfer units to third parties at the government's behest without being justly compensated. [91] Affordable housing advocates support the laws because they are intended to relieve some people from having to pay high housing prices. [92] Many of the laws are designed to place not just low, but middle class residents into new units without having to pay new unit prices. [93] The prices actually ***420** charged are based on an intended occupant's household income, not the cost of development or the value of the home. [94]

Local governments support inclusionary zoning ordinances for obvious reasons: They allow government to meet its obligations to provide affordable housing without raising taxes. [95] Evidently recognizing that inclusionary zoning ordinances render development less financially feasible, governments sometimes reduce or waive other economically burdensome laws to induce developers to build inclusionary developments. For example, many jurisdictions allow greater density than is allowed by other applicable zoning laws for inclusionary projects. Increased density theoretically allows developers to build more market rate units than otherwise allowed by zoning laws and presumably offset the cost of the inclusionary units. [96] Some jurisdictions use other “perks,” such as expedited permit processing, or fee waivers for ***421** inclusionary units. [97] Local governments also appear to be aware that taking housing units for affordable housing without compensating the owners/builders might be unconstitutional, so inclusionary ordinances often provide for waiving the exactions if a developer can prove her compliance would be unconstitutional. [98]

It has been noted that inclusionary zoning ordinances contain the quintessential elements of an exaction, because they impose conditions on development during the permit process, and the conditions require developers to transfer titles to third parties with less than full and just compensation. [99] It follows that inclusionary zoning laws should be analyzed using the framework from Nollan and Dolan. [100] However, proponents of the laws have had some success arguing that because the property transfers are legislatively required, Nollan and Dolan do not apply based on footnote eight of Dolan. [101]

There was a time when developers did not need to worry about losing their property to laws like inclusionary zoning. Such laws were only concocted as hypothetical examples of clear constitutional violations or fictional speculations of what would happen if an unjust government ran wild. For example, Justice Sutherland wrote:

> Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to ***422** furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. [102]

While the quoted passage concerns price restrictions on food, Sutherland also felt the same way about government-imposed maximum price restrictions on housing. [103] Much to the chagrin of property rights advocates, but to the satisfaction of inclusionary zoning proponents, Sutherland's belief that “such a statute would be quickly exposed” has proven incorrect. Inclusionary zoning has allowed the government to determine individual housing needs and fix maximum prices since 1973; [104] two ordinances have even withstood a constitutional attack in a California appellate court. [105]

It would seem clear that the rationale used in Nollan and Dolan to invalidate exactions ought to apply to inclusionary zoning. Nevertheless, the argument remains that the government need not prove nexus and rough proportionality for affordable housing exactions. This argument has also had some mixed success in the courts.

A. For the Most Part, the Courts Have Not Yet Properly Applied the Doctrine of Unconstitutional Conditions to Inclusionary Zoning

1. City of Napa should have applied Nollan and Dolan to the inclusionary zoning law at issue and struck down the ordinance.

A California appellate court got it wrong in Home Builders Ass'n of Northern California v. City of Napa. [106] In the case, a home builders ***423** association brought a facial challenge against Napa's inclusionary zoning ordinance alleging that it took property without just compensation. [107] Napa's ordinance required dedication of units, land, or money to affordable housing purposes. [108] The plaintiffs argued this was unconstitutional unless the government carried its burden of proving that the affordable housing exactions had the requisite nexus and were roughly proportional to the harm caused by development. California's First District Court of Appeal initially held that the presence of a "waiver" provision, which permitted an appeal of an individual permit condition based on allegations of unconstitutionality, made the facial challenge unripe. It continued, however, with dicta distinguishing Nollan and Dolan as applying only to adjudicative decisions, not generally applicable zoning regulations. [109] The court continued by applying Agins' now defunct "substantially advance" test, and concluded that the City's policy deserved judicial deference and would be upheld in a ripe challenge. [110]

Both the City of Napa opinion and inclusionary zoning proponents rely on the formalistic argument that Nollan and Dolan only struck down the conditions at issue in each case, not the underlying statutes. So, the argument goes, inclusionary zoning legislation cannot be struck down either because it is also generally applicable. The argument, though, is a non sequitur because Nollan and Dolan did not involve facial challenges; the Nollans and Ms. Dolan did not ask the Court to strike down the statutes supporting the land use authority's actions. It is impossible, then, to state definitively that Nollan and Dolan do not apply to inclusionary zoning legislation, because they did not decide the issue.

In holding that Nollan and Dolan did not apply to Napa's ordinance, the City of Napa court deviated from a fundamental principle of regulatory takings law: to prohibit "Government from forcing some people alone to bear public burdens which, in all ***424** fairness and justice, should be borne by the public as a whole," [111] stated because unfair and unjust regulations have "very near the same effect for constitutional purposes as appropriating or destroying [property]." [112] The Supreme Court applied the principle to development permit conditions and formulated a test to safeguard property owners against conditions that are unrelated and disproportionate to proposed projects because such conditions force private parties to bear truly public burdens. Like Nollan and Dolan, the affordable housing exactions required by the statute in City of Napa were also intended to benefit the public at large and were equivalent to direct appropriations of property; the public purpose of Napa's inclusionary zoning ordinance was to increase the supply of housing affordable to poor members of the public and the inclusionary units required were equivalent to directly appropriating the property. By refusing to apply Nollan and Dolan, the City of Napa court misapplied Supreme Court exactions jurisprudence, at best, or at worst, ignored its supporting rationale. [113]

Aside from general takings principles, not applying Nollan and Dolan to inclusionary zoning legislation would lead to anomalous results; it would allow the government to exact even more property than it did in Nollan and Dolan, with fewer constitutional protections. The statutes underlying the government actions in Nollan and Dolan simply allowed the local land use authorities to impose unconstitutional conditions; they did not require it, as does inclusionary zoning. Inclusionary zoning legislation, then, is much more oppressive than the ad hoc decisions made in Nollan and Dolan because unconstitutional conditions are imposed in every case, not just when the planning board is in an especially collectivist mood. It makes little sense to allow challenges to specific exactions for failure to comply with constitutional safeguards, but prohibit challenges to the same type of exactions ***425** imposed generally that violate the exact same constitutional principles.

Having already discussed how City of Napa deviated from the fundamental principles of regulatory takings law and the even greater protections needed against mandatory exactions than discretionary ones, it is necessary to consider whether principles of judicial deference can nevertheless redeem the City of Napa decision. While legislative judgments generally deserve judicial deference, there are some instances in which deference is inappropriate and courts look at a statute not from the perspective of the legislature and its professed good intentions, but from the perspective of a right holder and the burden on his right. Nollan and Dolan show that the government's purpose in exacting conditions in exchange for permits is only material insofar as it can be used to deny a permit altogether. Property use is a protected right, so government exactions during the permit process ought not be accorded judicial deference. Considering, then, that the rationale behind Nollan and Dolan support their application to inclusionary zoning legislation, while principles of judicial deference do not undermine their application, it is appropriate to conclude that Nollan and Dolan should properly apply to inclusionary zoning legislation.

Though the appellate court held that Nollan and Dolan do not apply to inclusionary zoning, it assumed arguendo that they did. [114] Using Nollan, Napa's inclusionary zoning ordinance should have been found unconstitutional because it simply did not have a sufficient nexus: Denying residential development permits altogether would have done nothing to further the city's goal of providing more affordable housing. However, in its tenacious struggle to give even more credibility to inclusionary zoning laws than would basing its holding only on the assertion that Nollan and Dolan do not apply to legislation, the court continued with its dicta exegesis and found that the ordinance would fail even if it decided that Nollan and Dolan applied. [115]

***426** Its conclusion was based on a waiver provision in the ordinance, which allowed the city to waive its requirements if a developer proved that there was no "reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement." [116] The ordinance, said the court, could not be facially challenged because the waiver provision gave the city discretion to avoid applying it in an unconstitutional manner. [117] The home builders had argued, to the contrary, that if one assumes that Nollan and Dolan apply, the city's waiver provision did not satisfy their requirement to make individualized findings of nexus and rough proportionality because Napa placed its burden to comply with Nollan and Dolan on property owners. [118] If Nollan and Dolan apply, the "individualized determination" requirement of Dolan would not permit the city to impose exactions seriatim on property owners without making individualized findings of nexus and rough proportionality. [119] In Dolan, the Supreme Court carefully considered its decision to place the burden of proof on the government and a state appellate court must abide by that decision. [120]

2. City of San Diego reached the correct result when it applied Nollan and Dolan to inclusionary zoning legislation.

Reaching an outcome opposite to that of City of Napa, a San Diego trial court properly invalidated an inclusionary zoning ordinance in Building Industry Ass'n v. City of San Diego. [121] Similar to Napa's ordinance, San Diego's ordinance allowed the city to waive its inclusionary requirements, yet it did "not provide for the ***427** granting of a waiver solely because of an absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement." [122] In other words, the ordinance could not be applied consistently with the Constitution as interpreted by Nollan and Dolan. All of the reasons that undermine the City of Napa decision distinguishing inclusionary zoning legislation from earlier exactions cases support the City of San Diego decision. However, as a result of the decision, San Diego simply revised its waiver provision to allow the city to waive its inclusionary requirements if a developer can prove the housing exactions do not satisfy Nollan and Dolan. [123] The law is currently in force and is unconstitutional for the same reasons that City of Napa's waiver provision was insufficient to satisfy the individualized findings requirement of Dolan. [124]

3. Action Apartment Association and the impact of Lingle.

In Action Apartment Ass'n v. City of Santa Monica, a group of rental housing owners brought suit against Santa Monica's inclusionary zoning ordinance. [125] The owners had argued that the court did not need to follow the City of Napa dicta because that case had been decided before Lingle. With Lingle, the owners argued, the "substantially advance" justification for the United States Supreme Court's holdings in Nollan and Dolan had been replaced with a justification based on the doctrine of unconstitutional conditions. Because that doctrine made no distinctions between legislatively imposed conditions and those imposed through an adjudicative process, neither should the California courts. The court, however, in City of Napa disagreed, saying that Lingle's discussion of the doctrine was only dicta. [126]

*428 B. Unconstitutional Conditions Doctrine Applied to Inclusionary Zoning: Preferred Constitutional Rights Versus Privileges

So how do courts apply the doctrine to inclusionary zoning ordinances if none of the theories accurately predict Supreme Court decisions? While the theoretical justifications for the doctrine of unconstitutional conditions involve debate on precisely when the doctrine should be invoked, once the Supreme Court determines a particular right is a preferred right, it will invoke the doctrine to strike down conditions upon that right. [127] As Epstein noted, its invocation often turns on the baseline chosen to determine whether a condition is unconstitutional. The distinction between what is a right and what is merely a government benefit has, as the Sirens to Odysseus, beckoned the usual suspects to advocate that their subjective preferences as constitutionally preferred rights. [128]

The Court established in Nollan and Dolan the right to be free from development conditions unless the government pays for the property exacted or proves an exaction has a nexus to, and is roughly proportionate with, the harm caused by a development. An important point of similarity between the exactions in Nollan and Dolan and the permit conditions required by inclusionary zoning is that they all involve more than mere governmental benefits. As the Court pointed out in Nollan:

> [T]he right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a "governmental benefit." And thus the announcement that the application for ***429** (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange." [129]

The debate over to which rights the doctrine applies, however, is irrelevant to inclusionary zoning. Lingle explicitly characterized Nollan and Dolan as involving unconstitutional conditions. Because the ability to use private property is a fundamental right [130] subject to the doctrine of unconstitutional conditions, the requirement that a landowner seeking to develop property give up land or money in order to subsidize housing for unrelated third parties is a problematic proposition.

Because the Supreme Court has held that the doctrine of unconstitutional conditions applies to conditions on the right to develop property, and that doctrine has never distinguished between conditions imposed by a legislature or conditions imposed by an adjudicative agency, local governments may not exact affordable housing from developers without paying them just compensation or satisfying the nexus and rough proportionality standards of Nollan and Dolan. In other words, inclusionary zoning ordinances are facially unconstitutional.

V. A Survey of Pre-Lingle Monetary and Legislative Exactions in the Courts

What if, instead of demanding that the Nollans dedicate their beachfront property, the California Coastal Commission had demanded a sum of cash--just enough cash to pay the Nollans just compensation for the same strip of land the Commission had actually demanded? Would this demand of a monetary exaction be any different from a demand of an exaction of land?

We do know that money is property and that the government can violate the Takings Clause by taking cash just as much as it can violate the clause by taking land. [131]

***430** After Nollan and Dolan, it should be plain that government cannot condition the exercise of the right to put property to economically beneficial use upon the forced payment of land, money, or labor when those exactions are not closely related to impacts caused by the use of the underlying property. What remains subject to some debate is whether there is a distinction between exactions of land and money and whether there is a distinction between exactions imposed as part of an adjudicatory permit process and those enacted pursuant to a legislative process. In Ehrlich v. City of Culver, [132] for example, the California Supreme Court held that Nollan and Dolan applied heightened scrutiny to monetary exactions, but not to legislatively adopted exactions.

Legal scholars, however, have opined that legislative enactments restricting property rights deserve heightened scrutiny. For example, Professor Kmiec suggests that heightened scrutiny is appropriate for legislative enactments imposing public burdens on specific private uses. [133] Other scholars have noted the conflicts that exist among the lower federal and state courts, with some courts treating exactions very differently according to whether they are legislatively adopted or not, and whether the exaction is for money or land. [134]

The holdings of several states and the First Circuit confirm that generally applicable legislative enactments are subject to the standards established in Nollan and Dolan.

***431** • New York

Before Dolan was decided, but after Nollan, the New York Court of Appeals struck down a permit fee imposed on owners of single room occupancy hotels who wished to change the use of their property in Seawall Associates v. City of New York. [135] The fee was designed to subsidize New York City's low-income housing program and had been imposed by legislation and, as such, was uniformly applied. [136] The court focused on the lack of a nexus between the complex problem of low-income housing in New York City and the landowners' use of their property for other purposes, [137] stating that "[s]uch a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem." The same court also struck down legislatively enacted rent control ordinances as being violative of the Takings Clause in Manocherian v. Lenox Hill Hospital. [138] That decision relied upon Nollan and Dolan. [139] But in Bonnie Briar, a court stated that Dolan applies only to monetary exactions. [140] With the exception of Bonnie Briar, there is no reason to think that application of the doctrine of unconstitutional conditions should have changed any of the results.

• Ohio

In Home Builders Ass'n of Dayton v. City of Beavercreek, [141] the Supreme Court of Ohio, citing to Dolan, applied a "middle level of scrutiny" to legislatively adopted transportation impact fees imposed on subdivision approvals. The court reasoned that a test that looks at both the need for the transportation project and the fairness of imposing the cost on developers is a test that will ***432** adequately balance the interests of local governments with those of property owners. The first prong of the test decides whether the ordinance is an appropriate method to address the city's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction. [142]

The court upheld the fees in that case after noting that the trial court "reviewed volumes of evidence" and made the requisite factual findings regarding the necessity for the road projects and the impacts to be caused by subdivision development. [143] On these facts, the result would have been unchanged after Lingle.

• Oregon

Citing to state Supreme Court precedent, the Oregon Court of Appeals has held in J.C. Reeves Corp. v. Clackamas County, that "'the character of the [condition] remains the type that is subject to the analysis in Dolan' whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters." [144]

• Washington

In Sparks v. Douglas County, [145] the Washington Supreme Court applied Dolan to a legislatively adopted road dedication exaction. It upheld the exaction because there was evidence showing that the exaction was roughly proportional to the impacts of development. In Trimen Development Co. v. King County, [146] a developer had been given the choice of dedicating or reserving land for open space or paying a fee in lieu of such dedication. The court properly recognized the applicability of the Dolan test to these legislatively imposed fees. [147] The fees were upheld, incidentally, as the court found evidence to support the conclusion ***433** that the fees were "reasonably necessary as a direct result of Trimen's proposed development." [148]

• Illinois

The Illinois Supreme Court in Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page, applied Dolan to a legislatively enacted transportation district and impact fee enabling act. [149] Similarly, an Illinois appellate court agreed in Amoco Oil Co. v. Village of Schaumburg, [150] that

[a]lthough not binding as precedent, we find Justice Thomas' comments [in Parking Association of Georgia] particularly persuasive and consonant with the rationale underlying Dolan and similar cases. Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property. [151]

• First Circuit

In City of Portsmouth v. Schlesinger, [152] the court reviewed a low-income housing fee that had been imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. [153] While the challenge to the fee was saddled with a statute of limitations problem, the court noted that the facts were undisputed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." [154] If not for a statute of limitations problem, the court would have struck down the fee. [155]

***434** • New Jersey

The New Jersey Supreme Court has been particularly aggressive, not only in upholding inclusionary-zoning ordinances, but in actually mandating them. In Holmdel Builders Ass'n v. Township of Holmdel, [156] the New Jersey Supreme Court considered whether various municipal inclusionary zoning ordinances that required the payment of low-income housing fees were constitutional. With respect to a challenge under the Takings Clause, the court merely observed that "[a]s long as the measures promulgated are not confiscatory and do not result in an inadequate return of investment, there would be no constitutional injury." [157] The court noted that it had earlier held in Southern Burlington County NAACP v. Township of Mt. Laurel, [158] that "municipalities [must] use affirmative inclusionary-zoning measures, including mandatory set-asides, to redress affordable-housing needs." [159] Interestingly, the court in Mt. Laurel II barely addressed a Takings Clause argument, dismissing with a single sentence that "mandatory set-asides keyed to the construction of lower income housing, are constitutional and

within the zoning power of a municipality." [160] In Holmdel Builders the court ultimately concluded that "a residential developer could be required to set aside a percentage of units to be used for low- and moderate-income housing." [161] Since development fees perform an "identical function" they are permissible. [162] The difficulty with the court's analysis is that it completely ignored the then-applicable "substantially advance" test of Agins, the nexus requirement of Nollan, and the rough proportionality standard of Dolan. [163]

***435** • North Dakota

In determining whether a drainage requirement could be applied to property of Burlington-Northern Railroad in light of Dolan, the Supreme Court of North Dakota held that it could because the duty "in this case arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty under a constitutional reservation of police power over a corporation." [164] An argument could be made that after Lingle, this decision is in error because the doctrine of unconstitutional conditions does not support the legislative-adjudicative dichotomy.

• Minnesota

In Arcadia Development Corp. v. City of Bloomington, [165] a Minnesota appellate court upheld the imposition of a tenant-relocation fee imposed on owners of mobile home parks in exchange for permission to go out of the mobile home park business. The appellate court rejected application of Dolan to tenant relocation fees because the fee was legislatively imposed. It found that "[o]nce legitimate governmental interests are identified, courts simply require a nexus between the local legislation and the legitimate governmental purposes." [166] Furthermore, "[b]ecause this case involves a challenge to a citywide, legislative land-use regulation, Dolan's 'rough proportionality' test does not apply." [167] ***436** Once again, the vitality of this holding could be questioned in consideration of the doctrine of unconstitutional conditions.

• Arizona

In Home Builders Ass'n of Central Arizona v. City of Scottsdale, [168] the Arizona Supreme Court upheld the city's resource development fee that was imposed on land owners in order to build a new water supply infrastructure. The court found that Dolan did not affect the legality of the fee at issue and refused to apply heightened scrutiny because the fee was "legislatively" imposed: "Because the Scottsdale case involves a generally applicable legislative decision by the city, the court of appeals thought Dolan did not apply. We agree, though the question has not been settled by the Supreme Court." [169] And after the Court's decision in Lingle, the answer remains all the more unsettled.

• Utah

In B.A.M. Development, L.L.C. v. Salt Lake County [170] the court held that legislatively imposed exactions subject to analysis under Nollan and Dolan. The Court examined a road widening exaction and concluded that it was subject to Nollan and Dolan. Interestingly, in analyzing the Dolan test, the Court called for an analysis of monetary equivalents:

> The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction, along with any other costs required by the exaction. [171]

While the Court did not consider the specific impact of Lingle or the doctrine of unconstitutional conditions, it is logical to surmise that the Court employ a similar test if confronted by a purely monetary exaction.

***437** • The Ninth Circuit

The Ninth Circuit has most recently held that legislatively imposed exactions must be analyzed not under Nollan and Dollan, but instead under Penn. Central's balancing test. In McClung v. City of Sumner [172] the Court analyzed an exaction requirement whereby a landowner was required to upscale a water line as part of deal where the City would waive certain impact fees. While it did not focus on the monetary equivalency of the exaction, it did hold that if this were a monetary exaction, it would fall outside the considerations of Nollan and Dolan. [173] Moreover, the legislative nature of the exaction requirement took it out of Nollan and Dolan and put the exaction under the rubric of Pennsylvania Central Transportation Co. v. City of New York. [174] That the exactions in both Nollan and Dolan were both imposed in accordance with legislative schemes was not considered by the court; nor was the impact of Lingle and the doctrine of unconstitutional conditions.

VI. Conclusion

Because the Court in Lingle recast the justification for its Takings Clause holdings in Nollan and Dolan from reliance on the "substantially advance" prong of Agins to a specific application of the doctrine of unconstitutional conditions, it is important to consider how the parameters of that doctrine may affect the judicial review of development exactions. Not one of the Supreme Court cases applying the doctrine of unconstitutional conditions makes a distinction between legislatively imposed and adjudicatively determined conditions. Therefore, such a distinction should not be relevant to the review of development exactions. Similarly, all of the theoretical justifications for the doctrine look only to government imposed conditions, rather than conditions imposed by any particular branch of government. ***438** Giving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise government power and not the specific source of that power.

Inclusionary zoning exactions are particularly problematic because they impose substantial burdens on owners of property who wish to put property to productive use. Viewed in light of the doctrine of unconstitutional conditions, these exactions--which prevent landowners from selling units for their fair market value--violate the Takings Clause unless the government can prove first that the development of market rate housing creates a need for more subsidized housing, and that requiring developers to provide that housing is roughly proportional to any such impact. The fact that these requirements may be imposed legislatively should be irrelevant to this inquiry.

Footnotes

a1 Graham Owen, J.D., is currently an associate at Aguer Havelock Associates in Sacramento, California. James Burling is the Director of Litigation for the Pacific Legal Foundation in Sacramento, California.

1 483 U.S. 825, 836-37 (1987) (establishing "nexus" requirement for exactions).

2 512 U.S. 374, 385 (1994) (requiring that there not only be a nexus between the impact of a development project and a condition, but also "rough proportionality" between the two). See David L. Callies & Christopher T. Goodin, The Status of Nollan v. California Coastal Commission & Dolan v. City of Tigard after Lingle v. Chevron U.S.A., Inc., 40 J. Marshall L. Rev. 539, 548 (2007).

3 See, e.g., Lambert v. City and County of San Francisco, 529 U.S. 1045 (2000); Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E. 200 (Ga. 1994), cert. denied, 515 U.S. 1116 (1995) (Thomas & O'Connor, JJ., dissenting).

4 See, e.g., B.A.M. Dev., L.L.C. v. Salt Lake County, 196 P.3d 601, 604 (Utah 2008) (noting a trial court's "valiant effort to divine the application of Dolan's 'rough proportionality' test"); Jeffery G. Miller, Remedying Our Fragmented Governmental Structures to Deal with Our Nation-On-Edge Problems, 38 Envtl. L. Rep. 10187, 10190 n.27 (2008) (describing Supreme Court takings jurisprudence as "opaque").

5 The Court itself is aware of the problem, as it has said, "our regulatory takings jurisprudence cannot be characterized as unified." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005). This is, to say the least, an understatement.

6 Compare, e.g., B.A.M. Development, 196 P.3d at 604 (legislatively imposed exactions subject to analysis under Nollan and Dolan) with McClung v. City of Sumner, 545 F.3d 1219, 1225 (9th Cir. 2008) (legislative exactions analyzed under regulatory takings balancing of Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) and Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 902 P.2d 1347, 1351 (Ariz. Ct. App. 1995) (declining to apply Dolan to legislative exaction)). See also generally J. David Breemer, The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here, 59 Wash. & Lee L. Rev. 373 (2002) (reviewing cases that do not apply Nollan and Dolan to legislative and monetary exactions and arguing that the cases should apply to such exactions); Daniel J. Curtin, Jr. et al., Exactions Update: The State of Development Exactions After Lingle v. Chevron U.S.A., Inc., 38 Urb. Law. 641 (2006) (opining that state courts do not have to apply Nollan and Dolan to legislative and monetary exactions).

7 See Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 902 P.2d 1347, 1351 (Ariz. Ct. App. 1995). In finding Dolan applies to monetary exactions the court noted:
Courts have frequently applied a takings analysis to regulations that exact only money. See, e.g., Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir.1991) (applying a takings analysis to an ordinance conditioning building permits on payment of fee to offset burdens of providing low-income housing for workers at such developments), cert. denied, 504 U.S. 931, 112 S.Ct. 1997, 118 L.Ed.2d 593 (1992); Blue Jeans Equities W. v. City and County of San Francisco, 3 Cal. App. 4th 164 (1992) (applying a takings analysis to an ordinance conditioning building permit on payment of fee for traffic control programs). Also, the United States Supreme Court's remand of Ehrlich v. City of Culver City, 15 Cal. App. 4th 1737 (1993), indicates that the Supreme Court would apply a takings analysis to a purely monetary condition. Id. at 1351. But see Lauren Reznick, Note, The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron, 87 B.U. L. Rev. 725, 741 n.129 (arguing that San Remo Hotel L.P. v. City and County of San Francisco, 364 F.3d 1088, 1098 (9th Cir. 2004) and Comm. Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) "did not change the level of scrutiny to be applied to regulations that are not physical encroachments on land"). One court found the legislative nature of a fee removes it from a takings analysis. See Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) ("One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system.").

8 544 U.S. 528 (2005).

9 Lingle involved a price regulation scheme adopted by Hawaii to control the price for which gas stations could be rented. Id. at 532-33.

10 But see Action Apartment Ass'n v. City of Santa Monica, 166 Cal. App. 4th 456, 469-71 (2008) (not following the discussion of Nollan and Dolan contained in Lingle because it was not the holding of the case).

11 544 U.S. at 530.

12 Id. at 547 (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)). The California Supreme Court adopted this definition in Santa Monica Beach v. Superior Court, 19 Cal. 4th 962, 965 (1999).

13 For example, to satisfy the nexus and rough proportionality requirements laid out in Nollan and Dolan.

14 Some inclusionary zoning defenders suggest that subsidized housing conditions are not exactions per se, but are merely "zoning" ordinances that happen to require developers to sell their units at below market rates. Brief for the Respondents at *1, Home Builders Ass'n of N. Cal. v. City of Napa, No. A090437, 2000 WL 34019165 ("[I]mposing requirements which are no different from other zoning and land use regulations, such as minimum lot size and setback requirements."). Such semantic machinations are unconvincing. When landowners are forced to allow third parties the use of their property without the receipt of just compensation (i.e. sale for full fair market value) the condition is much more akin to the circumstances of Nollan and Dolanthan to a standard zoning ordinance. For this reason, the very term "inclusionary zoning" has something of an Orwellian twist to it. Nevertheless, because of that term's common use, this Article will not utilize more accurate phraseology such as "subsidized housing mandates."

15 Some inclusionary zoning laws allow property owners to pay a fee in lieu of physically transferring their property for less than just compensation. As a substitute for the unconstitutional exactions of land, such fees may also be impermissible. See, e.g., Ehrlich v.

City of Culver City, 12 Cal. 4th 854, 881 (Cal. 1986) (applying Dolan analysis to imposition of fees) and supra note 8 (discussion of monetary exactions and the Dolan standard).

16 The Fifth Amendment applies to the states through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 233-34 (1897).

17 Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

18 Id. at 414.

19 Armstrong v. United States, 364 U.S. 40, 49 (1960); see also Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) (stating that "regulatory takings jurisprudence ... share[s] a common touchstone ... [and] focuses directly upon the severity of the burden that government imposes upon private property rights"); Lingle, 544 U.S. at 542-43 (implying that regulatory takings tests must consider "how any regulatory burden is distributed among property owners," and then citing the quoted language from Armstrong).

20 Jacobellis v. Ohio, 378 U.S. 184, 188 (1964) (applying "I know it when I see it" standard to an interest that sometimes receives more respect than real property).

21 Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

22 Lingle, 544 U.S. at 544.

23 Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

24 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

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

26 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987); Dolan v. City of Tigard, 512 U.S. 371, 385 (1994).

27 483 U.S. at 829.

28 Id. at 828.

29 Id.

30 Id. at 838.

31 Id. at 837.

32 Id.

33 Id. at 836-37.

34 Id. at 837.

35 Dolan v. City of Tigard, 512 U.S. 371, 379-80 (1994).

36 Id. at 391.

37 See, e.g., Ehrlich v. City of Culver City, 12 Cal. 4th 864, 868 (Cal. 1996).

38 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).

39 512 U.S. at 385.

40 Id. at 385 n.6.

41 Id. at 385.

42 The rationale of Nollan and Dolan suggest that exactions should be defined as transfer of property during the permit process for reasons other than those related to the design or use regulation of the property itself. Of course, there is also debate over whether granting a permit itself or waiving other permit requirements suffices as just compensation, but that line of inquiry assumes a taking in the first place, a designation that proponents of legislatively imposed exactions deride.

43 See, e.g., Home Builders Ass'n of N. Cal. v. City of Napa, 90 Cal. App. 4th 188, 194 (Cal. Ct. App. 2001) (relying on Dolan's footnote eight, in dicta, to suggest Dolan does not apply to a legislatively imposed exaction).

44 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). Euclid upheld a zoning ordinance against a due process challenge. The ordinance at issue did not require an exaction, nor was it assailed on a takings theory.

45 Dolan, 512 U.S. at 391 n.8. The rationale of Nollan and Dolan suggest that exactions should be defined as transfer of property during the permit process for reasons other than those related to the design or use regulation of the property itself. The qualified passage quoted leaves room for such an interpretation.

46 The distinction between Takings Clause based and Due Process Clause based challenges is even stronger after Lingle because central to the Court's holding in Lingle was its careful cleavage of the standards used to challenge land use regulations based on due process grounds and the standards used to challenge such regulations based on takings theories. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005). With the due process analysis separated from the takings analysis, footnote eight's statement based on Village of Euclid can only stand for the proposition that typical Euclidian land use regulations that simply restrict a certain use of property will withstand due process challenges. “Typical” land use regulations, as will be shown, do not include inclusionary zoning ordinances, which are atypical because they regulate users, not uses, and because they demand the giving up of actual property that will in a manner that will provide no benefit to the development. This will be discussed in more detail later in the Article.

47 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 857-58 (1987) (Brennan, J., dissenting) (“The Coastal Commission Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty requires that approval of new coastline development be conditioned upon provisions ensuring lateral public access to the ocean.”); Dolan, 512 U.S. at 379 (“The City Planning Commission ... granted petitioner's permit application subject to conditions imposed by the city's CDC [Community Development Code].”).

48 Lingle, 544 U.S. at 540.

49 Id. at 547.

50 Richard Epstein, Bargaining With the State 9-10 (1993).

51 See id.

52 See Part III.B, infra.

53 Benjamin Powell & Edward Stringham, Do Affordable Housing Mandates Work? Evidence from Los Angeles County and Orange County, Reason Foundation Policy Report 21 (2004) (mandates are not working); see also Robert C. Ellickson, The Irony of “Inclusionary” Zoning, in Resolving the Housing Crisis, Government Policy, Decontrol, and the Public Interest 135, 175 (M. Bruce Johnson ed., 1998) (“Inclusionary zoning, as it is usually practices, is a wrong-headed idea that is likely to aggravate the ‘housing crisis' it has ostensibly been designed to resolve.”) (pointing out that inclusionary zoning laws actually produce fewer affordable housing units than would be produced under free-market conditions and raise housing market prices overall). See also Robert C. Ellickson, The Irony of “Inclusionary” Zoning, 54 S. Cal. L. Rev. 1167 (1981) (a slightly different, but more easily located version of the aforementioned book chapter). Despite Ellickson's exposing the clear inadequacies of inclusionary zoning policy, so-called affordable housing advocates may get more satisfaction (or political payoff) from being able to point to a concrete example of someone living in one inclusionary unit rather than from the intangible knowledge that lower housing prices across the board benefits an amorphous public. But see Andrew G. Dietrich, An Egalitarian Market: The Economics of Inclusionary Zoning Reclaimed, 24 Fordham Urb. L.J. 23, 28 (1996) (argues that Ellickson was “wrong as a matter of contemporary economic theory”). But see Benjamin Powell, “The Economics of Inclusionary Zoning Reclaimed”: How Effective Are Price Controls, 33 Fla. St. U. L. Rev. 471, 474 (Dietrich and others “make some fundamental economic errors and, thus, advocate misguided policy proposals”).

54 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 532 (2005).

55 Id. at 533-34.

56 Id. at 548.

57 Id. at 543.

58 Id. at 547 (emphasis in original).

59 Id. at 547-48 (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

60 Some commentators have argued for an erosion between the distinction between rights and benefits, but this approach is best confined to the extension of procedural due process. See, e.g., Charles Reich, The New Property, 73 Yale L.J. 733 (1964) (arguing for due process rights for welfare benefits, as later held in cases like Goldberg v. Kelly, 397 U.S. 254, 263 n.8 (1970)). Compare Rodney A. Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan. L. Rev. 69, 71 (1982) ("Each of the rationales [for the right-privilege distinction] has a basis in logic, experience, and fairness, and each draws on well-established traditions in constitutional adjudication.") and William W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1464 (1968) (concluding that "[a]ny per se constitutional distinction [between right and privilege] which would exclude governmental regulation of status in the public sector from constitutional review would, to steal a phrase from Mr. Justice Holmes, reflect neither logic nor experience in the law").

61 See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989).

62 Goldberg v. Kelly, 397 U.S. 254, 263 n.8 (1970).

63 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 (1987).

64 Epstein posits that such cost-free regulatory restrictions that would impose the costs of a social benefit (the view) entirely on the permit seeker exceed the scope of the police power. Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 63 (1988). This may not be the prevailing viewpoint today, but there must certainly be a point where the costs of a marginal social benefit cannot be justified, say, for example, if the Coastal Commission had placed restrictions on landowners based on impacts on the views from ocean-going vessels rather than Highway 1.

65 For those with an aversion to academic theory, the remainder of this section may be skipped after recognizing that the academics have provided the practitioners and the courts with no universal or practical theory of the doctrine of unconstitutional conditions.

66 See Sullivan, supra note 61.

67 See Epstein, supra note 64, at 28; see also Epstein, supra note 50.

68 Mitchell N. Berman, Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions, 90 Geo. L.J. 1, 5 (2001).

69 Id. at 89.

70 Proponents of the modern progressive regulatory state may differ. But see David Thomas, Why the Public Plundering of Private Property Rights is Still a Very Bad Idea, 41 Real Prop. Prob. & Tr. J. 25, 71 (2006) (traces the development of property law in Anglo-Saxon jurisprudence and concludes that with a proper respect for constitutional principles a "workable and healthy balance of private and public property rights could be achieved"); James S. Burling, The Theory of Property and Why it Matters, American Law Institute - American Bar Association Continuing Legal Education January 8-10, 2004 Eminent Domain and Land Valuation Litigation, SJ051 ALI-ABA 491; David A. Thomas, Is the Right to Private Property a Fundamental or an Economic Right?, American Law Institute - American Bar Association Continuing Legal Education January 4-6, 2007 Eminent Domain and Land Valuation Litigation, SM006 ALI-ABA 33.

71 Sullivan, supra note 61, at 1415.

72 Id. at passim.

73 Epstein, supra note 64, at 31; see also, Berman, supra note 68, at 111 (calling the greater power/lesser power rationale "concededly rather thin").

74 483 U.S. at 837.

75 Sullivan, supra note 61, at 1420.

76 Id. at 1450.

77 Epstein, supra note 64, at 13.

78 See generally Epstein, supra note 64.

79 Epstein, supra note 64, at 62-63.

80 See discussion at note 53.

81 The conditions in this case fail under the germaneness theory because there is no intrinsic condition between the right to just compensation and the right to challenge a governmental action.

82 It should be self-evident that if government can withhold the fundamental right of just compensation (or any other necessary right) in exchange for an agreement not to sue, then the government will obtain an unwarranted immunity for its bad acts.

83 A strong argument can be made for the case that these two bedrock rights (just compensation and petition) are too fundamental to be bargained away. Not only will the affected individuals lose, but all of society as well. The cliché that there is no price too high for freedom has some validity when one is confronted with forced bargains of fundamental rights.

84 Sullivan, supra note 61, at 1506.

85 Berman, supra note 68, at 3 ("Regrettably, more than a century of judicial and scholarly attention to the problem has produced few settled understandings.").

86 Supreme Court decisions on the doctrine that animate these academic discussions do not depend on whether the origin of the condition is legislative or adjudicatory. There have been, for example, numerous applications of the doctrine in the context of legislative acts. Some have struck down the legislative act in question. See F.C.C. v. League of Women Voters of Cal., 468 U.S. 364, 398-99 (1984) (Congress's anti-lobbying conditions on receipt of federal broadcasting subsidies struck down); Speiser v. Randall, 357 U.S. 513, 529 (1958) (entity "could not be required to execute the declaration [of nonadvocacy of overthrow of government by unlawful means] as a condition for obtaining a tax exemption"). Others have upheld the legislative acts. See, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540, 545-46 (1983) (doctrine of unconstitutional conditions not violated when Congress conditions tax-exempt status on prohibitions on lobbying). The trend continues with more recent cases. See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) (Solomon Amendment provisions conditioning funding on presence of military recruiters). In none of these cases was the legislative nature of the government action important.

87 See Brian R. Lerman, Note, Mandatory Inclusionary Zoning--The Answer to the Affordable Housing Problem, 33 B.C. Envtl. Aff. L. Rev. 383, 396-98 (2006) (concluding that inclusionary zoning is not subject to facial challenges, after a short and conclusory discussion); Mark Fenster, Takings Formalism & Regulatory Formulas: Exactions & the Consequences of Clarity, 92 Cal. L. Rev. 609, 612 (2004) (opposes Nollan & Dolan, generally, and uses confusion in the courts over their application to legislative exactions as a reason to overrule them); Breemer, supra note 6, at 393-99 (discussing exactions generally, and opining that distinguishing adjudicative exactions from legislatively mandated exactions is irrational).

88 Many jurisdictions also have similar requirements for commercial development, i.e., that commercial developers provide some number of low income residential units or pay a fee in lieu of providing the actual units. See, e.g., Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991). Also, some ordinances require developers of rental property to set aside a certain number of units for lower-income residents at below-market rents.

89 See, e.g., Kelo v. City of New London, 545 U.S. 469, 477-83 (2005) (requiring just compensation when the government transfers property from one party to another for a public purpose).

90 The number of restricted units per project varies from jurisdiction to jurisdiction. For a good compendium of ordinances, see Timothy S. Hollister, Allison M. McKeen, & Danielle G. McGrath, NAHB National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances 77-79 (2007), available at http://www.nahb.org/fileUpload_ details.aspx?

contentTypeID=3&contentID=91057&subContentID=13898.2. For example, Denver restricts ten percent of the units in each project, as does Chicago. See Denver, Colo., Rev. Mun. Code § 27-105 (2008), available at http:// www.municode.com/ resources/gateway.asp?pid=10257&sid=6); Chicago, Ill., Mun. Code §2-44-090 (2008), available at http:// www.amlegal.com/ nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago? f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il. One of the oldest programs in the nation, Montgomery County, Maryland, restricts 12.5 to fifteen percent of new units, depending on density. Montgomery, Md., County Code § 25-A5(c) (2009), available at http://www.amlegal.com/nxt/gateway.dll? f=templates&fn=default.htm&vid=amlegal:montgomeryco_md_mc. Sacramento, California, restricts fifteen percent of new units. Sacramento City, Cal., Code § 17.190.030 (2008). San Francisco restricts fifteen to twenty percent, depending on whether they are built on or off site. City and County of San Francisco, Cal., Municipal Code Planning Code § 315 (2008), available at http://www.municode.com/Resources/gateway.asp?pid=14139&sid=5. Boulder, Colorado restricts twenty percent of new housing, as does Marin County, California. Boulder, Colo., Revised Code ch. 9-13 (2008), available at http:// www.colocode.com/ boulder2/chapter9-13.htm.; Marin County, Cal., Code §22.22.020 (2008), available at http:// municipalcodes.lexisnexis.com/codes/ marincounty. Maui restricts forty to fifty percent of project units, depending on whether the market rate units sell for under or over $600,000. Maui, Haw., County Code § 2.96.040 (2008), available at http://municipalcodes.lexisnexis.com/codes/maui. Maui's inclusionary zoning ordinance is currently involved in litigation at the trial level. See Kamaole Pointe Development L.P. v. County of Maui, No. CV07-00447 (D. Haw.).

Inclusionary zoning ordinances do not apply to all residential developments, only those over a certain size. Different ordinances have different triggers. For example, projects larger than two one-units trigger Marin County's ordinance. Marin County, Cal., Code § 22.22.020. Boulder, Colorado, has a five-unit trigger, as does Contra Costa County, California. Boulder, Colo., Revised Code ch. 9-13; contra Costa County, Cal., Code § 822-4.402 (2008), available at http://municipalcodes.lexisnexis.com/codes/ccosta. Sacramento, California, has a ten-unit trigger, while Montgomery County, Maryland, is triggered at twenty units. Sacramento City, Cal., Code § 17.190.030 (2008); Montgomery County, Md., Code § 25-A5(c) (2008).

Some inclusionary zoning ordinances allow developers satisfy the housing requirements on site or off site, or pay a fee or dedicate land in lieu of providing the required units. See, e.g., City and County of San Francisco, Cal. Municipal Planning Code § 315.4-315.6 (2008); Denver, Colo., Revised Municipal Code § 27-106 (2008).

91 Some inclusionary zoning proponents argue that incentives provided by some ordinances, such as density bonuses, provide developers with just compensation. See, e.g., Montgomery County, Md., Code § 25A-5 (2008); Denver, Colo., Revised Municipal Code § 27-108 (2008). The proposition is questionable because just compensation is ordinarily defined as fair market value. But we need not even reach the issue of whether density bonuses and other mechanisms justly compensate a developer because compensation is irrelevant if Nollan and Dolan apply. Nollan and Dolan did not require the government to pay for the property it took as a condition for granting a permit. In those cases, the exactions were invalidated on remand.

92 California housing prices are among the highest in the nation, and about 170 jurisdictions in the state have adopted inclusionary zoning. Non-Profit Housing Association of Northern California, Affordable By Choice: Trends in California Inclusionary Zoning Programs 5 (2007), http:// www.nonprofithousing.org/AffordableByChoice/SampleIHReport.pdf.

93 Programs benefit households with incomes as high as 120% of the median area income. Marin County, Cal., Code § 22.22.095 (commercial inclusionary zoning for benefit of moderate income households). Moderate income households include those earning up to 120% of median income. See Marin Housing, Marin County FY 2008 CA Department HCD Median Household Income Schedule, http:// www.cityofsanrafael.org/Assets/Redevelopment/Marin+County+FY+2008+Median+Household+ Income+Schedule.pdf. In Napa County, California, residential inclusionary zoning benefits households earning up to 120% of the median income. Napa County, Cal., Code § 15.60.010 (moderate income defined as 120% of median income) (2008), available at http://www.co.napa.ca.us/ Code2000/_ DATA/TITLE15/Chapter_15_60__AFFORDABLE_HOUSING_/index.html. Id. § 15.60.170 (50% of affordable units for moderate income households).

94 The price a property owner must accept is usually around thirty-three percent of new occupant's household income, adjusted for time considerations based on obtaining a standard mortgage with payments equal to one-third the buyer's income. See, e.g., Napa County, Cal., Code § 15.60.170 (2008); Housing Authority of the City of Napa, 2008 Napa County Income Limits and Estimated Purchase Prices (2008), http:// 74.205.120.199/images/housing/documents/08inclmts-.pdf) (defines affordable as being thirty-three percent of monthly income).

95 See, e.g., Cal. Gov. Code § 65589.5(a) (2007) (legislature finds that expensive housing is a “critical problem”).

96 Economists strongly contend, however, that density bonuses do not compensate developers because other zoning laws that are not waived render the bonuses illusory. Tom Means, Edward Stringham, & Edward Lopez, Below-Market Housing Mandates as Takings: Measuring their Impact, Indep. Pol'y rep. 7 (2007). It also bears noting that inclusionary projects comprise almost all development in some jurisdictions, so in effect, the "bonus" density is the norm and not really a bonus at all. The resulting density must be consistent with the health, safety, and general welfare of a community, but calling it a "bonus" allows the government to say that it is compensating developers of inclusionary units without actually having to do so. One may also question the underlying assumption behind the density limits that the bonuses ameliorate: If the community can accommodate the higher density after the bonuses area applied, then perhaps the original density limitations were to low to begin with. If the community cannot accommodate the higher densities, then the bonuses are ill-advised.

97 Means, Stringham, and Lopez propose that none of the perks compensate developers for their costs. Id.

98 The County of Sacramento and the City of Santa Monica adopted such waiver provisions to head off facial challenges after litigation was filed. (Personal observations of authors who participated in the relevant litigation, as amicus or counsel of record respectively).

99 There are many types of inclusionary zoning laws. See, e.g., Hollister et. al, supra note 90. Many require developers to build on site units to transfer to third parties, some allow the units to be built off site, some allow developers to pay fees in lieu of transferring units to third parties. Whatever options they offer, inclusionary zoning ordinances all have the same basic purpose: to transfer property from the developer for the benefit of low income third parties.

100 That is, the dedication required must have a sufficient nexus to the alleged harm caused by development and it must be roughly proportional to that harm.

101 See Home Builders Ass'n of N. Cal. v. City of Napa, 90 Cal. App. 4th 188, 197 (Cal. Ct. App. 2001). But see Building Indus. Ass'n v. City of San Diego, No. GIC817064, 2006 WL 1666822 (Cal. Super. Ct. May 24, 2006). Both cases are discussed infra.

102 Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights 77 (1994) (quoting Adkins v. Children's Hospital, 261 U.S. 525, 558-59 (1923)).

103 Id.

104 Palo Alto, California, adopted the first inclusionary ordinance that year. See Benjamin Powel and Edward Stringham, Housing Supply and Affordability: Do Affordable Housing Mandates Work?, in Reason Foundation Policy Report 318, 3 (2004).

105 Home Builders Ass'n of N. Cal., 90 Cal. App. 4th at 188; Action Apartment Ass'n v. City of Santa Monica, 166 Cal. App. 4th 166 (2008).

106 Home Builders Ass'n of N. Cal., 90 Cal. App. 4th at 196-97 (rejecting the argument that Nollan and Dolan requirements of nexus and rough proportionality apply to legislation that requires exactions).

107 Id. at 188.

108 Id. at 192.

109 Id. at 194-96.

110 Id.

111 Armstrong v. United States, 364 U.S. 40, 49 (1960).

112 Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

113 See, Fenster, supra note 87, at 612-14 (noting that Justice Scalia has recently expressed concern "that state and lower federal courts are systematically ignoring or misapplying the Court's approach") (citing Lambert v. City and County of San Francisco, 529 U.S. 1045, 1045 (2000) (Scalia, J., dissenting) (denying cert. to 57 Cal. App. 4th 1172 (1997)).

114 The court did not state that it applied Nollan and Dolan for the sake of argument, but there is no other plausible reason that it would apply the cases since its holding rested on their inapplicability. Home Builders of N. Cal., 90 Cal. App. 4th at 195-96.

115 Id.

116 Id. at 192.

117 Id. at 194.

118 Id. at 194-95.

119 Id.

120 See Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994) (responding to Justice Stevens' dissenting criticism of the majority's placement of the burden on the government). The dissent criticized the majority for giving no presumption of constitutionality to the government for its implementation of "an admittedly valid comprehensive land use plan." In the case of inclusionary zoning, the case for placing the burden on the government is even stronger because inclusionary zoning plans are not "admittedly valid." Id. at 405.

121 Building Indus. Ass'n v. City of San Diego, No. GIC817064, 2006 WL 1666822 (Cal. Super. Ct. May 24, 2006).

122 Id. at *2.

123 San Diego, Cal., Mun. Code § 142.1304(e) (2006).

124 Dolan, 512 U.S. at 391 n.8.

125 Action Apartment Ass'n v. City of Santa Monica, 166 Cal. App. 4th. 456 (2008). cert denied 2009 WL 646218 (2009).

126 Id. at 470-71.

127 Some commentators have argued for an erosion between the distinction between rights and benefits, but this approach is best confined to the extension of procedural due process. See, e.g., Reich, supra note 60 at 785-86 (arguing for due process rights for welfare benefits, as later held in cases like Goldberg v. Kelly, 397 U.S. 254 (1970)). Cf. Smolla, supra note 60, at 69 (suggesting death of distinction exaggerated); Van Alstyne, supra note 60, at 1441-42 (arguing for rejection of distinction).

128 This would seem like an easy task: simply look at the United States Constitution. However, it is difficult to determine what rights the Court will find in the penumbra tomorrow, and even more difficult to determine whether those rights are preferred. Inclusionary zoning does not face the former problem because the right to be free from government takings of property without compensation is explicitly provided for in the text. A less obvious, but strong argument can be made that enumerated rights should always be viewed as preferred rights.

129 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987).

130 Proponents of the modern progressive regulatory state may differ. But see Thomas, supra note 70, at 70; Burling, supra note 70; Thomas, supra note 70.

131 Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 164 (1980) (money taken in violation of the Takings Clause); see also Brown v. Legal Foundation of Washington, 538 U.S. 216, 234-35 (2003) (interest on lawyers' trust accounts can be, in theory, taken).

132 12 Cal. 4th 854 (1996).

133 Douglas W. Kmiec, The "Substantial Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?, 22 Zoning & Plan. L. Rep. 97, 102-04 (1999).

134 See, e.g., JamesE. Holloway & DonaldC. Guy, A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities, 9 Dick. J. Envtl. L. & Pol'y 1, 8 n.12 (2000); Brett Christopher Gerry, Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission, 23 Harv. J. L. & Pub. Pol'y 233, 283 (1999) ("Even in the states, where a unified interpretation [of Nollan] might be expected to center around a leading state supreme court case, there are often multiple contradictory decisions; at the level of federal circuits, this inconsistency becomes chronic.").

135 542 N.E.2d 1059 (N.Y. 1989).

136 Id. at 1061-62.

137 Id. at 1069.

138 643 N.E.2d 479, 487 (N.Y. 1994), cert. denied, 514 U.S. 1109 (1995).

139 Manocherian, 643 N.E.2d at 487.

140 Bonnie Briar Syndicate v. Town of Mamaroneck, 721 N.E.2d 971, 975 (N.Y. 1999).

141 729 N.E.2d 349, 356 (Ohio 2000).

142 Id.

143 Id. at 358.

144 887 P.2d 360, 365 (Or. Ct. App. 1994) (citation omitted) (quoting Schultz v. City of Grants Pass, 884 P.2d 569, 573 (Or. 1994)).

145 904 P.2d 738, 745-46 (Wash. 1995).

146 877 P.2d 187 (Wash. 1994).

147 Id. at 194.

148 Id.

149 649 N.E.2d 384, 390 (Ill. 1995) (applying the even more exacting "specifically and uniquely attributable" rule in striking down part of the statute).

150 661 N.E.2d 380, 388-89 (Ill. App. Ct. 1995), cert. denied, 519 U.S. 976 (1996).

151 Id. at 390.

152 57 F.3d 12 (1st Cir. 1995).

153 Id. at 13.

154 Id. at 14.

155 Similarly, the Virginia Supreme Court found a legislatively enacted inclusionary zoning law to violate the Virginia Constitution's Takings Clause in Board of Supervisors of Fairfax County v. DeGroof Enterprises, 198 S.E.2d 600, 602 (Va. 1971).

156 583 A.2d 277 (N.J. 1990).

157 Id. at 293.

158 456 A.2d 390 (N.J. 1983) (Mt. Laurel II).

159 Holmdel Builders, 583 A.2d at 294 (citing Mt. Laurel II, 456 A.2d at 436).

160 456 A.2d at 448.

161 583 A.2d at 294.

162 Id.

163 Indeed, a few courts have even found that development fees are not subject to Nolan's nexus test or Dolan's rough proportionality standard. See, e.g., McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995). This is not only in conflict with the holdings from some of the states described elsewhere in this section and in note 7, supra, it is even in conflict with California. See Ehrlich

v. City of Culver, 12 Cal. 4th 864, 885 (1996), cert. denied, 519 U.S. 929 (1996) (finding that Dolan applies at least to individually applied fees). Furthermore, many of the state cases relied upon by the Dolan majority in formulating its "roughly proportional" test involved fees. As noted by Justice Stevens:

All but one of the cases involve challenges to provisions ... requiring developers to dedicate either a percentage of the entire parcel ... or an equivalent value in cash ... to help finance the construction of ... parks, and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment.

Dolan v. City of Tigard, 512 U.S. 374, 400 (1994) (Stevens, J., dissenting).

164 Se. Cass Water Res. Dist. v. Burlington N. R.R. Co., 527 N.W.2d 884, 896 (N.D. 1995).

165 552 N.W.2d 281 (Minn. Ct. App. 1996).

166 Id. at 287.

167 Id. at 286.

168 930 P.2d 993 (Ariz. 1997), cert. denied, 521 U.S. 1120 (1997).

169 Id. at 1000 (emphasis added).

170 196 P.3d 601 (Utah 2008).

171 Id. at 601.

172 548 F.3d 1219 (9th Cir. 2008).

173 Id. at 128 ("A monetary exaction differs from a land exaction [because] '[u]nlike real or personal property, money is fungible."'). This was, of course, the whole point of B.A.M. Development's monetary equivalency test in Utah.

174 438 U.S. at 124 (balancing of economic impact, invest-backed expectations, and the character of the regulation). Penn. Central is generally considered to be synonymous with the holding "developer loses."

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