Two Constitutional Theories for Invalidating Extortionate Exactions

Alan Romero
University of Wyoming, alan.romero@uwyo.edu

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol78/iss2/4
I. INTRODUCTION

A condition to a land-use permit is invalid if it is insufficiently related or proportionate to the negative effects that would justify denying the permit. Such conditions, or exactions, may be considered

---

1. In the land-use context, an "exaction" is generally considered to be a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) re-
extortionate because the government uses the threat of denial to extract some property interest from the owner, rather than simply trying to mitigate the negative public effects of the proposed land use.

The Supreme Court has tried twice to identify a constitutional theory for invalidating extortionate exactions. Although both opinions were mostly right, neither opinion clearly expressed the essential constitutional objection to extortionate exactions. To make things worse, many have misunderstood the Court's theories, thereby creating even more confusion about when an exaction is invalid.

The Court first considered unrelated exactions in Nollan v. California Coastal Commission. Although people have disagreed about what Justice Scalia's majority opinion meant to say, I believe the opinion's constitutional theory was essentially right. The Court's main theory was that proposing an unrelated condition to a land-use permit changes the purpose of the land-use regulation that would have justified outright denial of the permit. The regulation is no longer imposed to further legitimate public planning interests, but instead is imposed to create leverage with which the government can extract property from the property owner. A land-use restriction imposed for such a purpose does not "substantially advance legitimate state interests," and therefore is a taking that requires just compensation under the Fifth Amendment.

requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid in lieu of compliance with dedication or improvement provisions; and (4) requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area.


In other contexts, however, "exaction" generally connotes a wrongful condition to a governmental action. Black's Law Dictionary, for example, defines "exaction" as "[t]he wrongful act of an officer or other person in compelling payment of a fee or reward for his services, under color of his official authority, where no payment is due." Black's Law Dictionary 500 (5th ed. 1979). As one court pointed out, "[t]he distinction between extortion and exaction, then, is a fine one. Extortion involves a case in which the person illegally obtains more than is due, when something is initially due him; exaction involves obtaining something of value when there was nothing due him in the first instance." Hometowne Builders, Inc. v. Atlantic Nat'l Bank, 477 F. Supp. 717, 721 n.3 (E.D. Va. 1979). In this sense, "extortionate exaction" would be a strange term. Imposing a land-use condition might be extortion, such as imposing a disproportional condition, or it might be exaction, such as imposing an unrelated condition, but it couldn't be both.

Many courts and commentators did not see it quite this way, however. Probably in part to put an end to the confusion, the Supreme Court in *Dolan v. City of Tigard*\(^3\) tried to inconspicuously substitute a new constitutional theory while reaffirming the relation or nexus requirement of *Nollan*. The Court's new theory—presented as if the Court were simply recounting the theory in *Nollan*—was that the unrelated exaction is an unconstitutional condition. That is, the unrelated (or disproportionate) exaction, rather than the land-use regulation that the government offers to relax in exchange, is unconstitutional because it requires a property owner to give up a constitutional right—the right to compensation for taken property—in order to receive a governmental benefit—the requested land-use permit.

The Court's unconstitutional conditions theory is probably right, but the Court's earlier theory from *Nollan*, or at least my version of it, is more right. The *Nollan* theory better explains why we object to extortionate exactions, and better prevents extortionate exactions. Although *Nollan* could have relied on substantive due process rather than the Takings Clause, either version of the theory works. An unrelated or disproportionate exaction reveals that the government's only purpose for applying a particular land-use restriction to a particular property is to obtain some property interest from the owner, rather than to harmonize public and private interests by mitigating the negative effects of the requested land use. Such a purpose is illegitimate. The land-use restriction, not the exaction, therefore takes property without compensation or deprives the owner of substantive due process.

Part II of this article recounts the *Nollan* and *Dolan* theories for invalidating extortionate exactions. Part III explains and defends both the takings and substantive due process versions of the theory. Part IV then discusses the implications of this theory and its advantages over the unconstitutional conditions theory.

### II. THE SUPREME COURT'S OPINIONS ON EXTORTIONATE EXACTIONS

#### A. *Nollan v. California Coastal Commission*

*Nollan v. California Coastal Commission* was the first Supreme Court case to consider exactions. In *Nollan*, the Nollans had applied for a coastal development permit to demolish a bungalow and build a larger house on a beachfront lot. The California Coastal Commission granted the permit on the condition that the Nollans give the public an easement to pass along the beach behind the house.\(^4\) After a California court remanded the matter to the Coastal Commission, the

---

Coastal Commission reaffirmed the exaction based on factual findings that a larger house on the lot would increase private use of the beach and create a visual and psychological barrier that would prevent the public from recognizing and accessing the public beach from the street on the other side of the houses.\(^5\)

In the Supreme Court's majority opinion, Justice Scalia reasoned that the greater power to deny a land-use permit includes the lesser power to condition the permit in a way that will mitigate the negative effects of the requested land use.\(^6\) Thus, if the Coastal Commission could constitutionally deny a permit to build a bigger house because it would impair the public's view of the ocean behind the house, then the Coastal Commission could constitutionally grant the permit on the condition that the owners give the public some viewing spot or otherwise surrender some property interest to mitigate the effect on the ocean view.\(^7\)

Although the greater does not always include the lesser, this conclusion was certainly right. Of course, the government cannot demand mitigation for every private land use that imposes public costs. If the government has no right to prohibit a certain land use without compensation, the government cannot conditionally prohibit the land use by imposing an exaction either.\(^8\) But if the government could prohibit a land use without taking property, then the government surely can permit the land use on the condition that the owner mitigate the public costs somehow, rather than denying permission altogether.\(^9\) Harmonizing public and private interests in such a way is the essence of land-use planning.

But even though the Court's conclusion is right, the greater-includes-the-lesser argument is unnecessary to justify exactions. The Court could have simply observed that such an exaction does not deny substantive due process or take property from an owner. An exaction itself will almost never deny substantive due process because it will almost always be a rational way to pursue some public purpose.\(^10\)

\(^5\) See id. at 828-29.
\(^6\) See id. at 836-37.
\(^7\) See id. at 836.
\(^8\) See James L. Huffman, Dolan v. City of Tigard: Another Step in the Right Direction, 25 Envtl. L. 143, 150-51 (1995). For example, if underlying state law would not allow a state to prohibit building any permanent habitable structures on beachfront property without providing just compensation, the state also could not conditionally forbid building any permanent habitable structures regardless of the condition. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-31 (1992).
\(^9\) Nollan merely assumed that the Coastal Commission could have denied the permit outright. See Nollan, 483 U.S. at 835-36.
\(^10\) See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").
That may be easier to see by supposing that the Coastal Commission had simply required the Nollans to convey a lateral easement, without any connection to a development permit. In that case, the Nollans could not argue that the taking of an easement denies substantive due process, because obtaining the easement is clearly a rational way to pursue a legitimate public interest in use of the beach. Requiring the Nollans to voluntarily convey the easement in order to obtain a permit, rather than just taking the easement, does not make irrational the Coastal Commission's determination to pursue the public interest by obtaining lateral easements.

Of course, if the Coastal Commission had just taken the easement, the Nollans would have had a claim for just compensation even though they wouldn't have had a claim for denial of substantive due process. An exaction, on the other hand, is not a taking. If the owner surrenders a property right to the government, the owner does so voluntarily. The owner instead can choose to do without the requested land-use permit. In Nollan, for example, the Nollans did not have to give up a lateral easement. They could instead have decided not to build a bigger house on their land. The government's incentive to voluntarily convey the property does not make the conveyance an involuntary taking.

Justice Scalia's justification of related exactions therefore may indicate that he was anticipating an unconstitutional conditions argument. Even though exactions themselves do not take property or deny substantive due process, they may be considered unconstitutional conditions because they require the owner to give up a constitutional right to just compensation in exchange for a governmental benefit, a land-use permit. Of course, this was the theory that Dolan adopted to invalidate unrelated or disproportionate conditions. But even a related and proportionate exaction requires the surrender of a right to just compensation in exchange for a governmental benefit. So even though Justice Scalia's greater-includes-the-lesser argument is not necessary to defend related exactions against substantive due process or takings challenges, it is necessary to defend them against an unconstitutional conditions challenge.

But even if Justice Scalia meant to defend related exactions against an unconstitutional conditions challenge, he did not proceed to

11. Cf. Meredith v. Talbot County, 560 A.2d 599, 604 (Md. Ct. Spec. App. 1989) (holding that county did not take developer's property without just compensation, because developer voluntarily agreed to restrict the use of part of the property, reasoning that "[t]he fact that the decision was made in the face of likely adverse governmental action is of no consequence").


13. See infra Part II.B.
invalidate unrelated exactions as unconstitutional conditions. He did not say that an unrelated exaction was unconstitutional because it required the owner to give up the right to just compensation in exchange for a governmental benefit. Instead, Justice Scalia reasoned that imposing an unrelated exaction makes illegitimate the purpose for applying an otherwise legitimate land-use regulation. When an unrelated exaction is imposed, the only purpose for enforcing the land-use regulation is to extract a property interest from the owner without paying for it:

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State’s police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.  

The land-use regulation forbidding building a three-bedroom house without a coastal development permit ordinarily would have undoubtedly been within the government’s power. But when the Coastal Commission offered to allow the house in exchange for an unrelated property interest—the lateral easement along the beach—the Coastal Commission’s purpose for restricting the building of a house could no longer be the legitimate concerns that would have justified denying the permit. The larger house would still have all the negative effects that the Coastal Commission identified, but the Coastal Commission would accept them if it could extract a lateral easement from the Nollans. At that point, the purpose of the restriction on building the house must not have been to avoid the negative effect on visual and psychological access to the beach from the street, but instead simply to give the Coastal Commission leverage to get an easement without paying for it.

The land-use regulation forbidding building a larger house without a permit therefore was a taking because it did not “substantially advance legitimate state interests.” The Court did not try to define what interests are legitimate, but held that a land-use regulation

which is applied only to extract some unrelated property interest from
the owner is undoubtedly illegitimate:

Whatever may be the outer limits of "legitimate state interests" in the takings
and land-use context, this is not one of them. In short, unless the permit con-
dition serves the same governmental purpose as the development ban, the
building restriction is not a valid regulation of land use but "an out-and-out
plan of extortion." 16

I’ve described Nollan in a way that more clearly identifies the es-
sential constitutional theory as I see it. Unfortunately, the majority
opinion is not so direct. In fact, parts of the opinion suggest that this
might not have been the Court’s theory after all. For example, the
Court’s analysis begins by observing that directly requiring the ease-
ment would have been a taking, then asks “whether requiring it to be
conveyed as a condition for issuing a land-use permit alters the out-
come.” 17 As I explain more fully below, the Nollan theory as I’ve de-
scribed it does not depend at all on whether the exaction would be a
taking if imposed directly. 18 Furthermore, immediately before the
passage quoted above, the Court talks about circumstances in which
the permit condition would be constitutional, 19 even though my ver-
sion of the Nollan theory holds that the underlying land-use restric-
tion, not the exaction, is the unconstitutional act. Even so, the critical
paragraph in Nollan says the constitutional problem is that the “con-
dition” changes the purpose of the “building restriction” so that the
building restriction is no longer for a legitimate purpose. 20

In any event, for my purposes it doesn’t really matter whether the
Court understood its opinion as I’ve described it. The important thing
is that the Nollan opinion at least supports the theory I’ve described,
and expresses the essential part of the theory. I’ll refer to this version
of the theory as the restated Nollan theory, both to acknowledge the
uncertainty about the Court’s real theory and to avoid suggesting that
I’m the first to think of it.

B. Dolan v. City of Tigard

Probably in part due to this uncertainty about Nollan’s constitu-
tional theory, many courts misunderstood Nollan and often avoided
its effects by narrowly interpreting it. 21 Some observers saw the hints

16. Nollan, 483 U.S. at 837 (citations omitted).
17. Id. at 834.
18. See infra Part IV.A.
19. See Nollan, 483 U.S. at 836. Some commentators have assumed or argued that
the Court found the condition, rather than the application of the underlying land-
use restriction, to be a taking. See, e.g., Huffenus, supra note 1, at 39, 54.
20. See Nollan, 483 U.S. at 837.
21. See Richard A. Epstein, Introduction: The Harms and Benefits of Nollan and Do-
lan, 15 N. Ill. U. L. Rev. 477, 492 (1995) ("One of the reasons for Dolan was the
hostile response in the lower courts to Nollan. Everywhere you looked the state
of unconstitutional conditions theory in *Nollan* and interpreted it as
an unconstitutional conditions case even though *Nollan* did not
express its conclusion in those terms.22 When the Court decided *Dolan v. City of Tigard* about seven years after *Nollan*, the Court apparently
thought the constitutional theory was too murky and needed to be
clarified.23

Rather than acknowledging the confusion and defending the *Nollan*
three, however, Chief Justice Rehnquist’s majority opinion in *Dolan v. City of Tigard* casually reinterprets *Nollan* as an
unconstitutional conditions case rather than a takings case:

> In *Nollan* ... we held that governmental authority to exact such a condition
was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of “unconstitutional conditions,” the government may not re-
quire a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.24

Justice Scalia did not object enough to write a separate opinion, so maybe he really did mean to follow an unconstitutional conditions the-
ory in *Nollan*, and the *Dolan* majority did not think they were chang-
ing anything. Or maybe after further reflection they just thought the unconstitutional conditions theory would work better.

Whatever the reason, *Dolan* clearly abandons any takings theory
in favor of an unconstitutional conditions theory. *Dolan* accepts with-
out discussion *Nollan*’s greater-includes-the-lesser argument justifying exactions that serve the same purpose as denial of the permit.25

But according to *Dolan*, when the exaction is unrelated, the exaction
rather than the underlying land-use restriction is unconstitutional.
Imposing an unrelated condition is unconstitutional because it conditions a governmental benefit—a land-use permit—on the surrender of a constitutional right—the right to just compensation for taken prop-
erty. The same is true, added *Dolan*, if the exaction is not “roughly proportional” to the negative impact of the requested land use.26

---

22. See Epstein, *supra* note 12, at 61 (“Justice Scalia, writing for the majority, in-
voked (in all but name) the doctrine of unconstitutional conditions to hold that this particular bargain between the state and two of its citizens was impermissi-
ble because the condition imposed—surrender of the easement—was ‘unrelated’
to the legitimate interest used by the state to justify its actions—preserving the
view.”).

about *Nollan*).


25. See *supra* notes 6-9 and accompanying text.

So, in *Dolan*, an exaction requiring a dedication of land for a public greenbelt could not be justified by increased flooding risk, since a private greenbelt would serve the same purpose.\(^\text{27}\) Furthermore, the city could not justify an exaction for a pedestrian and bike path based on increased traffic from a store expansion, because the city had not shown that the expansion would create increased traffic roughly proportional to any decrease in traffic resulting from the pathway exaction.\(^\text{28}\)

*Dolan* still did not end the confusion over the essential constitutional theory, however. Despite the Court’s clear declaration of its theory, some have interpreted *Dolan* as holding that an unrelated or disproportional exaction is a taking rather than an unconstitutional condition.\(^\text{29}\) *Dolan* did talk about the Takings Clause, of course, because the premise of the unconstitutional conditions theory is that one has to surrender some particular constitutional right in order to obtain a discretionary governmental benefit. In this case, that right was the right to just compensation. The Court therefore necessarily observed that the Takings Clause applies to states by the Fourteenth Amendment.\(^\text{30}\) The Court also necessarily discussed whether the exacted property interests, if taken directly, would be takings requiring just compensation.\(^\text{31}\) If they would not be takings when imposed directly, then the owner would not be surrendering any constitutional right if she chose to comply with the condition. But the Court never said that an exaction itself may be a taking even though the owner is not compelled to surrender her property to the government.\(^\text{32}\)

---

27. See id. at 393 ("The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").
28. See id. at 395 ("The city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement.").
29. See Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 Den. U. L. Rev. 893, 893, 904-08 (1995) (arguing that *Dolan* did not actually rely on unconstitutional conditions theory); Terri L. Lindfors, Note, *Property—Regulatory Takings and the Expansion of Burdens on Common Citizens*, 24 Wm. Mitchell L. Rev. 255, 271 (1998) ("In *Dolan*, the Supreme Court also held that a taking occurred where the state conditioned the issuance of a building permit on the landowner's agreement to establish a pedestrian and bike path on a portion of her property."); L.K.S. Rath, Note, *Dolan* v. Tigard: A Further Step Toward Full Recognition of Property Owner Rights, 8 Tul. Envt'l. L.J. 337, 349 (1994) ("*Dolan* takes this trend further, holding that even where the land use regulation serves a legitimate public purpose and meets the essential nexus test of *Nollan*, it may still be a taking if the required exactions are not proportional to the impact of the proposed development.").
31. See id. at 383-85.
32. An exaction itself could be a taking only if it left the owner with no alternative that would not involve a taking. That is, it could be a taking only if the denial of
proportionality between the exaction and the potential impact of the proposed land use simply shows that the condition really was a "lesser" regulation included within the "greater" regulatory power to deny the permit altogether. As Nollan had explained, if a condition is just a way to mitigate negative effects of a land use without denying it altogether, then imposing the condition is an inherent part of the power to deny. But otherwise it is a separate regulatory condition, which, as Dolan held, may be an unconstitutional condition if it requires surrendering the right to just compensation.

III. IN DEFENSE OF THE RESTATED NOLLAN THEORY

Despite some criticism of Dolan's unconstitutional conditions theory, the theory does prevent at least some extortionate exactions as long as the law accepts the unconstitutional conditions doctrine at all. It's not a wrong theory to support the nexus and proportionality requirements, it just isn't as good as the alternative theory. The unconstitutional conditions theory invalidates exactions because of what the property owner gives up rather than how the city uses its power. That is, the owner is coerced into surrendering a constitutional right to compensation in order to obtain a governmental benefit. But extortionate exactions are offensive not because of what the city demands from the property owner, but because the city uses its land-use regulation power as leverage to fulfill those demands. Extorting value from property owners seems wrong regardless of what type of value the city extorts. The restated Nollan theory identifies the essential constitutional objection to unrelated or disproportionate conditions.


34. Many have questioned and criticized the unconstitutional conditions theory generally, see, e.g., Laitos, supra note 29, at 893-94, so the restated Nollan theory may be superior simply because it is based on at least slightly less debatable principles. However, in this article I will not discuss whether the unconstitutional conditions theory is valid generally. I assume that it is a legitimate constitutional doctrine.
A. Land-Use Restrictions Are Uncompensated Takings or Deny Substantive Due Process If They Do Not Substantially Advance Legitimate State Interests

The essential constitutional objection is that a government imposing unrelated or disproportionate conditions is not using its regulatory power to substantially advance legitimate public interests in land-use planning. A land-use restriction that does not substantially advance such interests is an uncompensated taking, or a denial of substantive due process.

By my account, this was the theory for invalidating unrelated exactions in *Nollan*, except that *Nollan* relied only on the takings version of the theory. Both the Takings Clause and the Due Process Clause work, as I'll explain in the next subpart. But for now assume that both clauses may be violated by a land-use regulation that does not substantially advance legitimate state interests. The Supreme Court has said as much. In *Nectow v. City of Cambridge*, the Court held that the application of a zoning law to a particular property violated the Due Process Clause of the Fourteenth Amendment because it did not "bear a substantial relation to the public health, safety, morals, or general welfare." Similarly, in *Agins v. City of Tiburon*, the Court held that "[t]he application of a general zoning law to particular property" may be a taking for basically the same reason: if the application "does not substantially advance legitimate state interests."

Ordinarily the government has wide discretion in applying land-use regulations. In *Nollan*, the Coastal Commission could have simply denied the land-use permit in order to preserve visual access to the beach, as the Court assumed. Similarly, the City of Tigard ordinarily could have constitutionally denied a permit to pave a parking lot because of flooding concerns or to build a bigger store because of traffic concerns. A court will generally defer to the permitting authority's judgment about what land uses to allow, as long as the court can perceive some rational basis for the decision.

A related and proportionate exaction does not change the character of the government's ordinarily permissible actions. For example, a city might deny a permit to expand a business because of resulting traffic congestion, but decide that the congestion will not be so great as to require denial if the owner will dedicate property for a road expansion that will keep traffic congestion at an acceptable level. The exaction actually confirms the legitimate purpose of the conditional denial: the city will deny the permit if it creates too much congestion, but will

35. 277 U.S. 183 (1928).
36. *Id.* at 188.
38. *Id.* at 260.
allow the permit if the owner agrees to fulfill a condition that can reduce the congestion. A related and proportionate exaction thus is an accommodation of private property interests, intended to allow the owner to use her property consistent with planning goals. As I explained above, a related and proportionate exaction is also clearly within the government's power to impose.\textsuperscript{40} It does not take any property from the owner, because the owner may reject the condition and go without the permit. Any dedication of property is voluntary. And it does not violate substantive due process because the government surely has a rational reason to acquire the property interest.

But an unrelated exaction does not just reduce or eliminate the negative effects of the owner's proposed use. Such an exaction thus reveals the government's true purpose for conditionally denying the land-use permit. Although the government might have denied the permit for some rational and legitimate reason, it didn't. Instead, the government told the owner that it would accept the negative effects of the requested land use as long as the owner would convey some property interest to the government. For example, in \textit{Nollan} the Coastal Commission presumably could have denied the permit to preserve the view of the ocean. But the Coastal Commission didn't. Instead, the Coastal Commission would allow the view to be impaired as long as the Nollans would give the public a lateral easement along the beach. If the Nollans were to reject the condition, the Coastal Commission's own actions would clearly reveal that its reason for denying the permit would not be because a bigger house would impair the view, but because the Nollans would not give them a lateral easement. Once the condition was imposed, the only remaining reason why the permit did not immediately issue was that the Nollans had not given the Coastal Commission a lateral easement.

Even though some might say that imposing an exaction is an approval of the permit, subject to conditions, a conditional approval is also a conditional denial. The reality is that when a government imposes a condition, it has at that moment applied a land-use regulation to prevent the owner from using her property in some way. If the condition is unrelated, then the government has forbidden the owner to use her property as requested unless and until she surrenders some property interest to the government. If the owner does not fulfill the condition, then the denial will be permanent. But either a conditional or a permanent denial is invalid from the start if the government restricts property use for an illegitimate reason.

While a court ordinarily will accept any possible rational reason for a regulation, in order to avoid intruding into and second-guessing the government's deliberations, the government's own actions tell the

\textsuperscript{40} See supra Part II.A.
court exactly what the reason for the denial is. That reason—a property owner's refusal to convey property to the government—is not a legitimate state interest justifying a land-use regulation. A government authority may restrict land uses for many legitimate reasons concerning public welfare, and probably in most cases it could justify either granting or denying a permit. But the government may not restrict someone's use of her land simply because she won't give the government some property interest that the government would like to have.

Nollan's analogy to a free speech restriction also illustrates this theory. Again, Justice Scalia wrote that when an exaction is unrelated,

the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.41

In this example, the restriction on speech would be constitutional by itself. But when the government offers to waive the restriction in exchange for cash, the government reveals that its purpose for the restriction is really to make money. The condition thus "alters the purpose" of the speech restriction to one which "is inadequate to sustain the ban."42 The speech restriction itself therefore becomes invalid because the only reason the restriction is enforced against any particular person is that the person will not give the government $100.43

Although the analysis is a little more complex, the same theory applies to disproportionate conditions. A disproportionate condition might eliminate the negative public effects of the requested land use, but it also gives the government some significant additional advantage that it otherwise would have to acquire by purchase or condemnation. The government in effect declares that it denies the land-use

41. Nollan, 483 U.S. at 837.
42. Id.
43. This speech restriction example is another indication that Justice Scalia might not have clearly resolved the constitutional theory in his own mind. He first declares that the ban on shouting fire becomes invalid because the purpose of the ban is inadequate to sustain the ban. This clearly expresses the substantive due process or takings theory I've described. But then in the very next sentence Justice Scalia suggests that the condition, rather than the underlying ban, would not "pass constitutional muster." Id. Maybe Justice Scalia was just not being precise, but the last quoted sentence nonetheless supports those who perceive Nollan as an unconstitutional conditions case, since that would be the only theory to invalidate the condition rather than the underlying regulation.
permit unless and until the owner gives the extra value to the government, even though the permit would not have any negative effects once the owner gave up a proportionate concession. The government thus is not simply harmonizing public and private interests. Presuming that the owner would convey a proportionate interest to mitigate the negative impact of her development, the government nonetheless prospectively denies the permit if the owner will not convey something more. Again, the government's own actions reveal its true, illegitimate reason for applying the land-use regulation to the owner's property.

Of course, judging causal relationships or determining the extent of a land use's impact on planning interests can be difficult. A government may intend to reduce the actual negative impact of a requested land use, only to discover that the owner or a court thinks the government has gone too far. That is why the condition only needs to have some "nexus," rather than being directly related, and why it only needs to be "roughly" proportional, rather than directly proportional. Those requirements should be applied in light of this purpose: to determine when a government has not legitimately exercised its regulatory power to harmonize conflicting goals, but instead to extort value from property owners. It may be hard to judge sometimes whether a condition is just imprecise or whether it actually extorts something extra from the owner. But when a condition does demand something extra, the government's decision goes beyond just advancing the legitimate state interest in mitigating negative effects of a requested land use.

It might seem that as long as the exacted property furthers legitimate state interests, the government is indeed using its police power properly. But the purpose or benefit of the extorted value does not change the nature of the regulatory action that allowed the government to obtain that value. If a condition is unrelated or disproportionate, the government has made the decision to grant or deny a permit not because of the permit's own effect on planning goals but because of what the government might acquire by threatening to deny the permit. The government thus intended its permit requirement in that particular case, as well as its prospective, contingent denial of a permit, to create exchange value, not to advance planning interests. Such an unconstitutional land-use action does not become constitutional just because the government uses the resulting leverage or exchange value to acquire interests that further land-use planning goals rather than entirely different public interests. If the government simply threatened to falsely accuse and imprison someone unless she surrendered some property interest to the government, the government's legitimate need for and use of the property would not make the threat of imprisonment legitimate. Regardless of what the government ex-
tracts from the owner, the government made its planning decision to conditionally deny the permit for an impermissible reason: because the owner would not surrender some property that the government wanted.

B. Substantive Due Process or Takings

This reasoning works whether the underlying regulation is invalidated for taking property without just compensation or for denying substantive due process. The essential point is simply that when an unrelated or disproportionate exaction is imposed, the underlying regulation is enforced for an illegitimate reason.

1. Takings

The Supreme Court's decisions clearly support the theory that a land-use regulation is a taking, not just a deprivation of due process, if it does not substantially advance legitimate state interests. Early zoning opinions, however, did not say that such land-use regulations are takings. Instead, the Court at first simply applied the substantive due process requirement that a land-use regulation, like any other governmental regulation, must be "reasonably necessary" to accomplish some legitimate governmental purpose.44 A couple of years after the Court first approved zoning generally in Village of Euclid v. Amblcr Realty Co.,45 the Court in Nectow v. City of Cambridge46 held that the application of a zoning law to a particular property violated the Due Process Clause of the Fourteenth Amendment. The Court explained that

[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.47

The lower court had found that the particular restriction would not further the public welfare at all because the strip of land was useless for residential purposes and was bordered by commercial uses. Although the Court stressed that ordinarily it would not substitute its judgment of the public welfare for the judgment of the zoning authorities, the Court held that since the lower court had found that the restriction would not serve any public purpose at all in this case, the restriction violated the Due Process Clause.48

44. See, e.g., Lawton v. Steele, 152 U.S. 133, 137 (1894).
45. 272 U.S. 365 (1926).
46. 277 U.S. 183 (1928).
47. Id. at 185.
48. See id. at 188-89.
Since Nectow, however, the Court has clearly said that a land-use restriction that does not substantially further such public interests is a taking, regardless of whether it also denies substantive due process. This evolution may have begun by mistake, with two decisions that apparently misunderstood Nectow. In Penn Central Transportation Co. v. New York City, the Court cited only Nectow in support of its brief observation that "a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose." Then in Agins v. City of Tiburon the Court again cited only Nectow in support of its statement that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." This time the Court's statement was not just a passing dictum, however. The Court went on to hold that the zoning regulation was not a taking because it substantially advanced a legitimate state interest in protecting residents from the "ill effects of urbanization."

In Nollan the Court reaffirmed this takings principle and for the first time expressly distinguished it from due process requirements. Justice Brennan argued in dissent that the Takings Clause does not create a separate standard for determining "whether an exercise of the police power is legitimate." Although he acknowledged that cases like Agins expressed the standard differently, he maintained that those cases still expressed a single standard for testing the legitimacy of actions under the police power. The majority disagreed, however, and insisted that the Takings Clause does create a separate standard, and that standard is not identical to the due process standard.

This disagreement involves two separate issues. First is whether a land-use regulation that does not substantially advance legitimate state interests is just a deprivation of substantive due process or whether it is also a taking. Second is whether the standards are different: whether a land-use regulation might be rational enough to

51. Id. at 127.
53. Id. at 260.
54. Id. at 261.
55. See id. at 843 n.1.
56. See id. at 843-44 n.1.
57. See id. at 834 n.3.
satisfy substantive due process, yet still be a taking because it does not "substantially advance legitimate state interests."

As for the first issue, the Nollan majority was right to recognize an independent takings standard. Even though the Court may have mistakenly extracted the takings standard from due process cases, without justifying an independent takings standard, a land-use regulation that denies substantive due process may also be a taking for the same reason. Any land-use restriction takes from a land owner some right she otherwise would have in her property. Despite the accepted breadth of the police power, the government does not own the "lesser" property rights that the government's zoning laws can take from an owner without compensation. The police power under which Euclid justified zoning simply overrides property rights protected by the Due Process Clause; it does not extinguish them or give them to the government. If the government does not choose to exercise its police power to constitutionally restrict a certain property right, the property owner, not the government, continues to have that right and may assert it against others. For example, if the government does not use its police power to prevent paving a parking lot, then the property owner retains the right to pave her parking lot to the extent the common law allows.

Therefore, a land-use restriction that is not within the police power, because irrational and unconnected to any legitimate public need, does not change the owner's property rights. If the restriction is enforced, it is simply an arbitrary taking of some property right that still belongs to the land owner, even though the government could take away that right without compensation if it did so for some rational reason. At least as long as the regulation satisfies other criteria defining a taking, a regulation that ordinarily would be an uncompensable restriction on land use is a compensable taking if it does not substantially advance a legitimate state interest.

However, this observation is pointless if the "substantial advancement" standard is identical to the substantive due process standard. A regulation can be a taking only if it is for "public use." The Court has held that any regulation satisfying substantive due process is for a "public use" under the Takings Clause. Therefore, if the takings and due process standards are the same, then any regulation that does not substantially advance a legitimate state interest is also not for a pub-

59. See Epstein, supra note 12, at 60 ("Yet even this broad construction of the police power does not give the state ordinary ownership rights over the property that it may restrict or regulate.").

60. See id. at 59 ("The police power addresses the set of justifications that the state must put forward in order to override any of the substantive protections of the Constitution.").

61. U.S. Const. amend. V.

lic use, and cannot be a taking at all. It is simply invalid under the Due Process Clause.

There is reason to think that the police power standards for overriding the Takings Clause should be different from those overriding the Due Process Clause, or in other words, that a regulation might provide substantive due process yet require just compensation because it does not "substantially advance legitimate interests." This might have been why the majority preferred the takings theory in Nollan, since a takings theory seemed to more easily justify what seemed like closer "scrutiny" of the connection between means and ends than the Due Process Clause generally allows.

A couple of Supreme Court cases before Nollan hinted that the standards were identical. In Connolly v. Pension Benefit Guaranty Corp., the Court said that "it would be surprising indeed" if Congress had taken the assets of employers in cases where the Court had held that the congressional actions did not violate the Due Process Clause. Earlier, in Goldblatt v. Town of Hempstead, the Court seemed to assume that a land-use action that did not deny due process would also not unconstitutionally take property by regulating without substantially advancing a legitimate state interest. But the majority in Nollan concluded "that assumption is inconsistent with the formulations of our later cases" and that the Takings Clause does indeed create an independent and different standard.

The main reason the verbally similar standards might differ in effect is that the Takings Clause and the Due Process Clause protect different interests. Substantive due process essentially imposes an absolute limitation on governmental power. The government can never arbitrarily or irrationally take some action that deprives a citizen of life, liberty, or property. Substantive due process therefore only tries to identify governmental actions that are so arbitrary and unconnected to any legitimate public purpose that they are beyond the government's power. The Takings Clause, on the other hand, does not absolutely limit governmental power to take actions affecting property. Rather, it determines whether a governmental action is the sort of restriction that all citizens must accept as part of living in an ordered society, or whether it uniquely burdens a certain citizen so that society should share the cost by having government provide compensation. Since all takings must satisfy substantive due process in or-

63. 475 U.S. 211 (1986).
64. Id. at 223.
66. See id. at 596.
68. See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) ("One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by
der to be for "public use," the just compensation requirement of the Takings Clause divides permissible governmental intrusions on property into two subsets: those that require compensation and those that do not.

As the substantial advancement standard indicates, a regulatory burden may be unique because of the reason for the burden rather than the extent of the burden. That is, if a regulation does not advance certain interests—referred to vaguely as "legitimate state interests"—then it may unfairly burden some owners even though in the due process context we would not consider the purpose for the regulation to be "illegitimate." In other words, "legitimate state interests" may be only a subset of the governmental purposes that satisfy substantive due process, which include broadly "the public health, safety, morals, or general welfare."69 If so, the takings standard would consider some permissible land-use regulations to be takings because they do not further the "legitimate" purposes that override the just compensation requirement, even though they do further some public purpose that satisfies the substantive due process requirement. In that way the takings standard would be higher than the due process standard, because courts would look at a narrower range of interests that a regulation may advance without requiring compensation.

Defining that narrower range of interests might be so difficult, however, that courts have to accept any purpose that would ordinarily justify an exercise of the police power. The Supreme Court has not tried to define what interests are legitimate under the takings standard. In fact, Nollan suggests that legitimate state interests might include all permissible purposes for governmental action. The majority observed:

Our 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. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements.70

Besides referring to the broad range of such purposes, the opinion cites Euclid, among other cases, which considered a due process challenge but not a takings challenge.71 This further suggests that any permissible purpose for governmental action is also a legitimate state interest.

On the other hand, the purpose of the Takings Clause might help define a subset of public purposes that are "legitimate." Since the
Takings Clause tries to identify regulations that unfairly burden individuals, legitimate state interests might include only those that by their nature do not create unique, inequitable burdens for particular individuals. The government may legitimately impose unique burdens on individuals when those burdens mitigate public harms or costs that the individual has caused.\textsuperscript{72} The government also may impose burdens that are not unique at all. That is, the government may legitimately pursue regulatory purposes that are inherently reciprocal, in which all are subject to a comprehensive scheme and the regulation of each person inherently benefits the others who are regulated.\textsuperscript{73} Zoning laws, for example, generally further planning interests that restrict all property. They cannot impose identical limitations on every parcel of land, of course. Industry must be allowed in some areas, but not in others. But even though only some areas are subject to particular limitations, all property is generally subject to the same governmental activity: deciding what land uses are best suited for what areas in light of public safety, health, economic welfare, and other concerns. If a particular land-use restriction is part of a comprehensive and reciprocal effort to coordinate land uses for the collective good, then it substantially advances a legitimate interest even though not every other property owner is subject to the restriction. Every other property owner is still subject to land-use regulation generally.\textsuperscript{74} On the other hand, if a land-use restriction does not further those general planning purposes, then the restriction is not reciprocated and applies uniquely to the property owner. In that case, the public should share the burden imposed on the owner by sharing the loss or expense, since the public has not already shared the burden by subjecting themselves to reciprocal burdens, and since the owner did not create the burden.

This principle is still vague, however, and may not solve the problem of defining legitimate interests. For example, a taxation scheme would have to be considered legitimate, yet the taxation of one person does not inherently benefit another taxed person. The taxation benefits another only if the government chooses to spend the money in a

\textsuperscript{72} See Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) ("Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.").

\textsuperscript{73} See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (justifying and distinguishing a land-use restriction that "secured an average reciprocity of advantage").

\textsuperscript{74} See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 133-36 (1978) (declaring that landmark preservation law, like zoning laws generally, did not unfairly burden landmark owner because owner enjoyed reciprocal benefits along with the rest of the public, even though many owners were not subject to landmark restrictions).
way that benefits the other. One might say, then, that any actually reciprocal regulatory purpose, rather than any inherently reciprocal purpose, is legitimate. But that definition could include all sorts of apparently illegitimate purposes. Even openly extortionate regulations would satisfy this standard as long as the government applied the regulations to everyone, then used the profits from its extortion for public purposes. So even though theoretically a narrower range of interests may justify regulation without compensation, defining that range may be hopeless.

The different purposes of the Takings Clause and the Due Process Clause also suggest, although perhaps more weakly, that courts should examine more closely whether a regulation actually furthers the legitimate purpose: in other words, that a regulation might be a "rational" means to achieve a legitimate purpose, yet not "substantially advance" the purpose. Nollan argued that the standards are different simply because of the different words used, overlooking that the substantial advancement language originated in due process cases. Dolan argued by analogy to other constitutional rights, concluding that "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." This is probably the best explanation. There may not be any reason why courts should examine official actions for uncompensated takings any more closely than they examine official actions for violations of other constitutional rights. But once the Takings Clause standard is clearly differentiated and separated from the Due Process Clause standard, there does not seem to be any reason why courts should examine official actions less closely either. The substantive due process standard is uniquely deferential because it defines the outer limits of permissible governmental power and requires a court to second-guess whether a regulation was a reasonable way to try to achieve some public purpose. But requiring the government to compensate an individual for the costs of regulation is less drastic and does not actually declare limits on the government's power to act. The Takings Clause therefore does not require the same caution and deference. Instead, the right to compensation might be considered like any other constitutional right, and therefore involve the same type of examination.

Even if the substantial advancement standard is discrete and different from the substantive due process standard, the takings version of the restated Nollan theory may invalidate the underlying regulation only when the regulation interferes with the property enough to

75. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987).
76. See supra text accompanying notes 44-54.
be a taking on its own. This is not true if a complete deprivation of a
discrete property right is always a taking, however minor compared to
the value of all the owner’s property rights, as some have suggested.  
The Court’s few cases stating the substantial advancement principle
have not suggested that a land-use regulation that does not substanc-
tially advance legitimate state interests is a taking only if the regula-
tion also deprives the owner of some threshold degree of the entire
property’s value. On the other hand, it hasn’t elaborated much on the
principle at all. In general, the Takings Clause
does not divide a single parcel into discrete segments and attempt to deter-
mine whether rights in a particular segment have been entirely abrogated. In
deciding whether a particular governmental action has effected a taking, this
Court focuses rather both on the character of the action and on the nature and
extent of the interference with rights in the parcel as a whole.  

Sometimes, however, a regulation may be a taking even when it
doesn’t substantially impair the “parcel as a whole,” such as when the
regulation is essentially a “permanent physical occupation of prop-
erty.” Similarly, a regulation that does not substantially advance a
legitimate state interest might always be considered a taking, regard-
less of its effect on the whole, because the reason for viewing the par-
cel as a whole is to avoid invalidating reasonable restrictions on
property that are justified by the police power. If a police power justi-
fication for a land-use regulation does not override the protections of
the Takings Clause, then the restriction should be a taking regardless
of its effect on the whole.

But if the whole parcel approach were followed in this context,
even a completely arbitrary land-use regulation would not be a taking
if it did not substantially impair the value of the property and was not
the sort of “physical invasion” that may be a taking regardless of a
relatively small impact. The arbitrary regulation would still deny
substantive due process, however. For example, suppose a city zoning
ordinance imposed certain aesthetic standards, like allowing only cer-
tain building materials or colors. The city offers to waive those stan-
dards if the owner will convey a public easement or some other
unrelated property interest. Even when enforced for an illegitimate
reason, so that the police power does not override the protections of
the Takings Clause, the zoning ordinance still might not interfere

---

78. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (ac-
knowledging that Court has not clearly decided what property interest a loss of
value should be measured against); Richard A. Epstein, Takings: Private Prop-
erty and the Power of Eminent Domain ch. 5 (1985) (arguing that any unjusti-
fied restriction on property is a taking); Margaret Jane Radin, The Liberal
Conception of Property: Cross Currents in the Jurisprudence of Takings, 88
Colum. L. Rev. 1667, 1678 (1988) (identifying Supreme Court’s trend towards
severing property rights in determining whether a taking has occurred).
with the owner's property enough to be considered a taking. But the application of the ordinance would deny substantive due process because the city's actions clearly reveal that the city's only reason for enforcing the ordinance was illegitimate.

2. Substantive Due Process

Such qualifications and complexities may make the substantive due process version of the restated Nollan theory preferable. The substantive due process version could invalidate an exaction whenever the takings version would, while avoiding debate about whether there is an independent takings standard and whether the land-use regulation is a taking only if it also reaches a certain threshold of interference with property.\(^8\)

Although it is theoretically sound, the problem with the substantive due process theory is that it relies on substantive due process. The contemporary reluctance to rely on substantive due process—if not outright repudiation of the doctrine\(^2\)—may explain why Nollan tried to use the Takings Clause instead. But substantive due process works fine, and can even justify what seems like higher "scrutiny" in evaluating the connection between means and ends.

Ordinarily, of course, substantive due process involves only minimal scrutiny of governmental action to determine whether it could conceivably be a rational way to achieve some valid public purpose.\(^3\) Courts do not want to repeat what they perceive to be earlier mistakes in which they second-guessed the wisdom of governmental action in hindsight and held that certain possibly well intentioned actions were

81. See Bickerstaff Clay Prods. Co. v. Harris County, 89 F.3d 1481, 1490 n.16 (11th Cir. 1996) (suggesting that an arbitrary or irrational regulation is not a taking if it does not make the property worthless, but that the regulation nevertheless may deny substantive due process).


83. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional."); Jacobs, Wisconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1119 (10th Cir. 1991) ("Absent invidious discrimination, the presence of a suspect class, or infringement of a fundamental interest, courts have limited their review of quasi-legislative or quasi-judicial zoning decisions in the face of a substantive due process challenge to determining whether the decision was 'arbitrary and capricious.'"); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 938 (Tex. 1998) ("A generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose.").
not reasonable means of achieving some public purpose. So courts generally assume that political accountability and other protections ensure that the government must have had some rational reason for taking action, and should be allowed to exercise its judgment in pursuing public objectives. A court will invalidate governmental action under substantive due process only when it can see no way the government could have thought that its action was a rational way to achieve some valid public purpose.

But that is in the ordinary case. In the ordinary case, the mere fact that the government took action is reason enough to defer to its judgment about how to pursue the public interest. When the government imposes an exaction, however, courts do not have the same reason to defer to the government's judgment. The mere form of the government's action creates legitimate judicial concern that the action is unreasonable. For example, in the ordinary case the government might restrict development of houses along a public beach as in Nollan. When an owner asks for a permit to build a bigger house, the government might deny the permit because of certain public interests. If the owner complains, a court should defer to the government's judgment about the public interest and how to further that interest. But in the exaction situation, the government establishes a regulatory restriction, then offers to waive the restriction if the owner will give the government some property interest. A court no longer has the assurance that the government itself has judged that the regulation is in the public interest, because the government has not actually enforced the regulation. In fact, the government has offered to waive it. So one of the primary reasons for deferring in the ordinary case—the fact that the government itself has made a judgment to take some action—does not support deferring in the exactions case. Not only that, but there is a special risk that the government has chosen to enforce or relax the regulation not because of the consequences of the regulation itself, but in order to get the interest it has requested from the owner. In the ordinary case, on the other hand, there is no reason to think that the ultimate choice to enforce or relax the regulation is based on anything

85. See, e.g., id. at 477 (holding that Congress “had absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary”).
86. This analysis may vary depending on whether the government's action is considered to be judicial or legislative in nature. See, e.g., Jacobs, 927 F.2d at 1120 n.7 (“If the application process is determined to be quasi-judicial, courts require that the articulated basis for the decision have a rational relationship to a legitimate state interest. If the process is characterized as quasi-legislative, however, the court need only find a rational reason upon which the decision could have been based.” (citations omitted)).
other than the benefits and harms of the regulation itself. *Nollan* cites this reason for more intrusive examination of governmental actions, although relying on the "substantial" advancement standard:

> We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.87

For this reason, courts may reasonably examine more closely whether an exaction is imposed as a rational way to achieve a valid public purpose. One could call this "heightened" scrutiny, but really it's just different scrutiny. A "level" of "scrutiny" really doesn't mean much except in the context of what one is scrutinizing. I'm not suggesting that courts reviewing exactions should be more willing to second-guess the wisdom of regulatory actions generally. I'm just suggesting that an exaction itself indicates a possible illegitimate reason for the government's conditional enforcement of the regulation. A court therefore must determine whether that possible illegitimate reason was the government's actual reason. In other words, usually a court would just look at the conceivable rational reasons, or the articulated reasons, for enforcing a land-use regulation. In the exactions case the court does not look any more closely than usual at whether the regulation is a rational way to achieve a public purpose. For example, the court does not examine any more closely whether preventing larger houses on beachfront property is a rational way to pursue a public interest in visual access to a public beach. But the character of an exaction raises a specific question which thus requires a more specific, and thus apparently more intrusive, examination to determine whether the government conditionally enforced the regulation for the illegitimate reason suggested by the exaction—to extract some property interest from the owner. The substantive due process version of the restated *Nollan* theory therefore would not require a court to find "rough proportionality" between some public interest and the purpose for a land-use regulation in the ordinary case. But when the regulation is conditionally waived in order to get some property interest from the owner, the court should look for a nexus and rough proportionality to determine whether the illegitimate reason suggested by the exaction is truly the government's reason for its action.

Some might say that even an extortionate exaction does not deny substantive due process because property owners have no property right to land-use permits. Some courts have held that when a property owner does not have a right to receive a building permit, then depriving the owner of that permit is not a deprivation of property at

all, let alone a deprivation without due process. Regardless of whether this reasoning is valid in procedural due process cases, it does not make sense in the exactions context. The theoretical justification for zoning laws accepts that property owners have a property interest in using their property as they choose. If owners simply had no property right to use their property without the government's permission, Euclid would have been a very different opinion. The Supreme Court would have simply said that one has no such property right, so a city does not deprive owners of substantive due process when it imposes zoning laws, regardless of whether they further any legitimate public purpose. But the Supreme Court instead approved zoning laws because the articulated public interests underlying such a use of the police power outweigh the individual's right to use his or her property. At the same time, however, the Court acknowledged that when zoning laws "come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable" and thus in violation of the Fourteenth Amendment's Due Process Clause. This is the point of Nectow, which followed shortly after Euclid. The Court in Nectow held that the application of a zoning law to prevent commercial use of certain property violated the Due Process Clause because the application of the zoning law did not "bear a substantial relation to the public health, safety, morals, or general welfare." The Court did not question whether the owner had a property right to use its property for commercial purposes, because a land-use restraint that does not have such a "substantial relation" to legitimate state interests invariably deprives the owner of property rights. The legal foundation of land-use regulation thus recognizes that a regulation deprives an owner of property without substantive due process whenever the regulation does not further a legitimate state interest.

88. See, e.g., Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1374 (11th Cir. 1993) ("First, it must be determined whether there has been a deprivation of a federal constitutionally protected interest, and secondly, whether the deprivation, if any, is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation." (quoting Rymar v. Douglas County, 764 F.2d 796, 801 (11th Cir. 1985))); Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989) (holding that property owners did not have a property interest in temporary certificate of occupancy).


90. Id.

IV. THE CONSEQUENCES OF THE THEORY

A. The Exacted Interest Need Not Be a Taking

One consequence of the restated Nollan theory would be that property owners can avoid extortionate exactions regardless of whether the exacted interest would be a taking if imposed independently.

Nollan and Dolan both seem to say that an exaction may be avoided only if directly taking the exacted interest would have been an uncompensated taking of private property. Nollan begins its analysis by declaring that taking a lateral easement would be a compensable taking, then questioning whether “requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome.”92 Dolan similarly observes at the beginning of its analysis that requiring dedication of land along the creek would ordinarily be a taking.93 Dolan’s unconstitutional conditions theory, of course, requires that the exaction would be a taking on its own, because otherwise the government would not be asking the owner to give up a constitutional right to just compensation in exchange for a permit.94 Some courts since Dolan have therefore suggested that even unrelated or disproportionate exactions are constitutional if directly taking the exacted property would not be a taking.95

The restated Nollan theory, on the other hand, invalidates unrelated or disproportionate exactions regardless of whether directly taking the exacted interest would be a compensable taking. Maybe Justice Scalia observed that requiring the lateral easement would be a taking because he was actually thinking about unconstitutional conditions. But otherwise, his observation was formally irrelevant. My version of the theory invalidates the underlying land-use regulation because conditionally enforcing the regulation only if the owner won’t surrender a property interest makes extorting the owner’s property the only purpose of applying the regulation. Any unrelated or disproportionate exaction, whether it would be a taking or not, thus indicates the government’s illegitimate purpose for applying the regulation.

92. Nollan, 483 U.S. at 834.
94. See id. at 385 (“The government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”).
95. See Garneau v. City of Seattle, 147 F.3d 802, 812 (9th Cir. 1998) (reasoning that Nollan and Dolan would apply to a per tenant cash fee only if the fee would be a taking if directly imposed); Ehrlich v. City of Culver City, 911 P.2d 429, 439 (Cal. 1996) (declaring that the “heightened scrutiny” of Nollan and Dolan apply only when the condition would be an uncompensated taking of private property).
This may be the most important difference between the unconstitutional conditions theory and the restated Nollan theory. A governmental action may be extortionate regardless of whether the government could acquire the extorted thing by legitimate means instead. The abuse of regulatory power is the real objection to extortionate exactions. Applying a regulation only to extort value from the property owner, rather than on good faith consideration of its merits in the particular case, abuses the regulatory power.

Of course, invalidating a permit condition may seem pointless if the government can directly take the required interest anyway. The government would just have to formally separate the two actions, deciding the permit application and separately taking the desired interest from the owner. But there may be situations in which the government would not directly take the desired interest, even though it could constitutionally.

For instance, political realities or concerns may prevent direct action. Say a county planning board was tempted to use conditions to determine governmental policy outside the usual boundaries of its authority. The planning board was dissatisfied with the performance of a law enforcement officer whose employment was at will. So when that officer asked for a land-use permit, the planning board decided to conditionally grant the permit if the officer would resign from his job. The county could have directly and summarily fired the officer without violating the officer's constitutional rights, so the planning board's condition was not an unconstitutional condition. But the planning board itself could not ordinarily fire the officer, because the county sheriff has the authority to make such decisions. Of course, this example is extreme because the statutory grant of power to the planning board would surely prevent such an abuse anyway. But even if a statute did not properly limit the planning board's activities, such a condition would clearly abuse the power to regulate land uses even though the condition did not require the surrender of a constitutional right, and even if firing the officer was in the public's legitimate interest.

A planning commission might abuse its power for less unusual reasons as well. For example, suppose that a city council's zoning regulations specify certain limitations on the size and number of commercial signs. Assuming that the planning commission had general authority to impose exactions in granting development permits, the commission might be tempted to usurp the city council's legislative role. If the commission felt that the city council should have restricted signs even further, the commission might use exactions to require owners of com-

mercial property to voluntarily limit the size and number of signs beyond what the statute required.

Besides usurping power from other government bodies, a planning commission also might improperly use exactions to avoid public accountability for or resistance to its actions. Rather than passing some controversial amendment to the zoning code, a planning commission might try to minimize the controversy by applying a new de facto standard to any new development as a condition, no matter how unrelated. Not only could such a strategy defuse public resistance, it might also avoid procedural requirements such as holding public hearings. The restated Nollan theory would prevent such abuses of the regulatory power.

B. Cash Fees Must Be Proportional and Related

Another important implication of the restated Nollan theory is that even cash impact fees must be roughly proportional to the public impact of any land use that is conditioned upon payment of such fees.

Governments have used two types of cash fees: impact fees and fees in lieu of property dedications. The latter type of fee gives a landowner the choice between dedicating a specified amount of land or paying the market value of that land. The land or the cash may be used for parks, schools, and other public improvements theoretically required by the proposed land use. Impact fees do not give the owner the choice of dedicating land, but otherwise serve the same purposes.97

When cash fees are not significantly greater than the public costs created by a proposed land use, fees certainly are constitutional under any theory. However, some have suggested that Nollan and Dolan would not invalidate even a disproportionately large cash fee, emphasizing the Supreme Court’s observations that the exactions in those cases involved physical intrusions. They therefore maintain that Nollan and Dolan apply only to exactions of real property.98


98. See Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991) (suggesting that Nollan does not apply to payment of fees designated to offset housing problems associated with new development); McCarthy v. City of Leawood, 894 F.2d 836, 845 (Kan. 1995) (questioning application of Dolan to impact fees); Robert H. Freilich, The Supreme Court and State and Local Government: Small Change for a Changing Court, 26 Urb. Law. 623, 689 (1994) (“[T]he most likely conclusion is that Dolan only applies to dedications of land . . . .”); Robert H. Freilich & David W. Bushek, Thou Shalt Not Take Title Without Ade-
These courts and commentators are probably right under Dolan’s unconstitutional conditions theory. Although the Supreme Court has not yet clearly resolved the issue, “taking” cash by imposing a fee probably cannot be a taking requiring just compensation. In Eastern Enterprises v. Apfel,99 Justice O’Connor and three other justices held that imposition of liability for coal miners’ lifetime health benefits was a taking without just compensation.100 Justice Kennedy concurred in the result, but expressly disagreed that imposing financial liability could be a taking when it does not “operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest.”101 Justice Breyer and three other dissenting justices agreed with Justice Kennedy that the Takings Clause does not apply to taking cash by imposing financial liability, although it may apply to taking cash from a specifically identified fund or account.102 A majority therefore apparently would hold that imposing a cash fee, rather than taking cash from some specific fund or account, could never be a taking, but must be analyzed under substantive due process and other constitutional doctrines. If so, granting a land-use permit on the condition that the owner pay a cash fee would never be an unconstitutional condition requiring surrender of a constitutional right to just compensation.

The restated Nollan theory, on the other hand, clearly invalidates unrelated or disproportionately large cash fees. That is simply because it doesn’t matter what unrelated or disproportional concession the government seeks to obtain in return for a land-use permit. If the government applies a permit requirement only for the purpose of extracting something unrelated or disproportional to the concerns that would justify denial, the government’s application of the permit requirement does not advance any legitimate purpose, but merely generates income.

---

100. See id. at 2149-53.
101. Id. at 2154.
102. See id. at 2161-63. The Court had earlier expressed doubt that a fee could be a taking because, “[u]nlike real or personal property, money is fungible.” United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989). But the Court had held that taking interest on specific interpleader funds was a taking without compensation. See Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163-65 (1980).
A cash fee clearly could be disproportional to the public costs created by a land use. In some circumstances a cash fee might be unrelated as well. Generally a government could easily establish a nexus between a cash impact fee and a land-use restriction, since cash can be used to mitigate any public burdens that may result from a land use. Still, an impact fee would be unrelated if the cash were not at least generally used to mitigate the public burdens created by the development. Since cash is fungible, it shouldn't matter whether the cash is specifically put into an account to offset public costs arising from the land use. But if the government does not actually offset those public costs, whether from specifically allocated funds or general funds, then even a cash impact fee would not have a nexus to the public burdens that would justify denial of the permit. Instead, those public burdens would have just been used as an excuse to raise cash for other purposes.

C. The Government Cannot Constitutionally Reverse the Exaction Process

The restated Nollan theory also prevents another extortionate strategy that the unconstitutional conditions theory probably allows. Since the unconstitutional conditions theory applies only when a city directly conditions permit approval on surrender of a property interest, the city might instead reverse the process, condemning the desired property interest and offering the permit as just compensation. As one article suggests, a city could condemn the property and offer the owner either the permit the owner seeks or the fair market value of the condemned property in cash.\textsuperscript{103} The owner will presumably choose the permit as long as the city makes sure that the condemned property is worth significantly less than the permit is worth to the owner. In that case, the city has not put conditions on any governmental benefit, yet the effect is the same: knowing the greater value of the permit to the owner, the city uses the permit requirement to get more than compensation for public costs resulting from the permit.\textsuperscript{104}

For example, assume that a business owner requests a permit to develop her property in a way that will be worth $25,000 in increased revenues and such. However, the permit will only cost the city $5000 in extra water, sewer, police, transportation, and other costs. The proportionality and nexus requirements are supposed to prevent the city

\begin{footnotesize}
\begin{itemize}
\item[104.] See id. at 1817-18 (concluding that by this strategy, the Coastal Commission in Nollan “would have succeeded in obtaining precisely what it sought and was denied by the Court in Nollan: an easement in exchange for a development permit”).
\end{itemize}
\end{footnotesize}
from using the threat of denial to acquire property interests other than those that will somehow reduce or eliminate the city's costs, without resulting in a significant profit for the city. A significant profit would make the exaction disproportional, and merely offsetting the public costs with a $5000 profit from some unrelated property would have no nexus or "essential relationship" to the costs created by the requested development.

Nevertheless, assume the city wants an easement over the owner's property. The fair market value of the easement is $15,000. The city wants the easement for legitimate planning reasons, but those planning concerns are unrelated to the concerns that could justify denying the permit. The city therefore knows that it cannot condition the permit on granting an easement or it will have imposed an unconstitutional condition on the permit. So instead the city condemns the easement and offers as compensation either $15,000 in cash or the desired permit. The owner knows, of course, that if she chooses the cash the city is not about to turn around and grant the permit as well. Since the permit is worth more than $15,000 to the owner, she takes the permit as compensation.

In this example, the city may not have imposed an unconstitutional condition on the permit. First, the city might say it hasn't imposed any condition on the permit at all. The city could still grant the permit; it is simply giving the owner the choice of compensation for the condemned property. This argument is unconvincing, however. The city at least implied that the owner could receive the permit only if she accepted it as compensation for the condemned easement. Otherwise the owner would have little reason to accept the deal if she could receive cash compensation and still receive the permit as well. Practically, the city has implicitly conditioned the permit on accepting it as just compensation for the condemned easement.

However, this condition may not be unconstitutional because it may not require the owner to surrender a constitutional right. The owner does not have to surrender her right to compensation in order to receive the permit, since the permit is the compensation.\(^{105}\) Of course, the owner does have to give up cash compensation for the condemned property in order to receive the government benefit. If cash compensation were a constitutional right, then simply offering the permit in exchange for waiver of that right would be unconstitutional.\(^{106}\) Some state constitutions do create a right to cash compen-

---

105. See id. at 1853.
106. Kendall and Ryan disagree. Although they acknowledge the weakness of their argument, they argue that the government may require giving up a constitutional right to cash compensation in exchange for a permit because the government has a legitimate reason for requiring the surrender of that right. That reason, they say, is that the government cannot afford to provide both cash com-
sation for condemned property, but the United States Constitution probably does not. In most cases, then, the city could thus achieve its extortionate goal without imposing an unconstitutional condition.

The restated Nollan theory, on the other hand, would invalidate this extortionate scheme. In essence, this compensation scheme would take from the owner the very value that the government then offers as compensation. So while the offer to compensate for taken property with a permit might not be a taking, requiring the permit in the first place is a taking.

Requiring the permit—in other words, the application of land-use restrictions in the particular circumstances—is a taking because the government requires it for some reason other than substantially advancing legitimate state interests. The government offers the permit only if the owner will accept it as compensation for taken property. If the owner will not accept it as compensation, the government necessarily implies, the government will deny the permit. So the only actual reason for the government's decision to grant or deny the permit is the owner's decision whether to accept the permit as compensation for some other property right the government has condemned. If the owner accepts it as compensation, the government will grant the permit, but if the owner won't accept it as compensation, the government will deny it. This is essentially the same illegitimate purpose that makes the underlying land-use restriction invalid in the ordinary exaction situation. For example, in the Nollan situation suppose the Coastal Commission condemns the lateral easement then offers either the building permit or some cash amount that it figures is substantially less valuable to the owner than the building permit. The Com-

pensation and the development permit, which will cause the government to incur additional costs. See id. at 1854-57. As Nollan suggests, a condition may require the surrender of a constitutional right in exchange for a government benefit if surrendering the constitutional right will serve the same basic purpose as denial of the benefit would serve. In other words, the condition must somehow mitigate the negative effects of granting the benefit. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987). In Nollan, for example, a condition would have to mitigate the impairment of visual access in order to be constitutional. An owner's acceptance of nonmonetary compensation rather than cash compensation would not mitigate the impairment of visual access at all, nor would it mitigate other negative effects of proposed development. The only way in which it might have that effect, and therefore have an essential nexus, is if the government then used the cash saved to ameliorate the negative effects of the permit that it granted as compensation. But that would be as if the Coastal Commission in Nollan had tried to justify its exaction on the theory that it could sell the lateral easement and use the cash proceeds to acquire a viewing spot from the road or otherwise improve visual access. The Court's opinion clearly enough indicates that the condition must of its own nature have some mitigating effect, serving the same purpose as denial of the permit.

107. See Kendall & Ryan, supra note 103, at 837-43.
108. See supra pp. 358-59.
mission necessarily implies that it will grant the permit only if the Nollans accept it as compensation for the easement. The Commission would thus apply the land-use restriction not to advance any legitimate state interest, but to create cash value to use as just compensation. In both cases the government's only reason for its permit decision is to create exchange value, whether for a "voluntary" exchange in the actual case or for an exchange by condemnation in the hypothetical case. The government may use the exchange value in order to acquire something that has legitimate public value, but that doesn't make the permit decision legitimate any more than it would make more typical forms of extortion legitimate.\(^{109}\)

Some might say that this incorrectly assumes the government will deny the permit if the owner doesn't accept it as compensation. In most cases, after all, the government may easily justify going either way on a permit application. This is the same objection that I discussed above in defending the general theory,\(^{110}\) but in this situation refuting the objection requires a little more explanation. In the ordinary situation, the government plainly declares that it will issue the permit only if the owner surrenders the specified property interest. The government's reason for deciding which way to go, even if either way were defensible, is clearly the owner's decision whether to surrender the property. If the government tries to use the permit as compensation, however, the government does not have to declare so openly that it will deny the permit if the owner does not accept it as compensation. Of course, the owner would not accept the deal if the owner thought that she could refuse and the government would still make a fair decision on the merits of the permit application without any connection to the condemned property. So in order for the strategy to work, the government has to at least imply that the owner will get the permit only if she accepts it as compensation for the condemned property. Furthermore, the permit would have no actual compensatory value if the owner would have received the permit anyway. If the government thus decides to grant or deny a permit on the basis of the owner's willingness to accept it as compensation for condemned property, rather than on some judgment about the effect of the prospective land use on the public interest, the government has applied the permit requirement in a way that does not advance a legitimate state interest.

Some might argue that merely avoiding the risk of denial is valuable compensation, which the owner may accept as sufficient. But while avoiding risk may be valuable, the government can use it as compensation only if it can legitimately create the risk in the first place. For example, the government could not compensate someone by

---

110. See supra p. 359.
creating then removing a risk that it will falsely accuse a property owner of a crime. The owner might choose to avoid the risk rather than taking some alternative cash offer, but that doesn't legitimate the value of avoiding the risk. The value of avoiding risk itself therefore cannot independently justify the government's action. The permit's value can justly compensate only if the government could legitimately deny the permit if the owner turned down the exchange offer, but still could legitimately grant the permit as compensation.

But the government can't legitimately do that. Again, the government's condition makes it clear that the government's decision to grant in the one case, but deny in the other case, is based on the owner's decision whether to accept the permit as compensation for condemned property. In short, the only reason for the decision is whether the permit can create cash value with which the government can acquire property by eminent domain. Such a purpose is not a legitimate state interest.

Therefore, the value of the permit, even if accepted by the owner as compensation, has been taken from the owner in the first place. The permit has value only because the government applied a permit requirement in a way that did not substantially advance a legitimate state interest. The permit requirement itself therefore is a taking—or a denial of substantive due process—as applied in the particular case.

The result is that, if a city tried such a scheme, the owner could accept the cash compensation for the condemned property, then either invalidate as an uncompensated taking the land-use restriction that the permit would have relaxed, or recover compensation for that taking. The compensation would be equal to the value of the prospective land use forbidden without the permit. So in effect the government would either have to grant the permit or pay compensation for denying the permit.

However, the restated Nollan theory does still allow a similar strategy that is not extortionate. That is, when an owner requests a building permit, the government can impose a cash impact fee but offer to accept some property interest instead of the cash. If the property interest is worth less to the owner than the cash, the owner would probably convey the property interest voluntarily. Such an exaction would not be extortionate as long as the cash fee is roughly proportional to the public burdens created by the proposed land use and the government does actually mitigate the public burdens, establishing a nexus between the cash exaction and the public burdens. In that case the property interest conveyed in place of cash would not have to be related to the public burdens, because the government is simply accepting the property as an alternative to cash. The government's

111. See supra Part IV.B.
willingness to accept cash rather than the property indicates that the government is indeed imposing the condition only to mitigate the costs of the proposed land use, since it will not necessarily receive the property and since the cash impact fee is roughly proportional to those public costs.

This is not a weakness in the restated *Nollan* theory, because such a strategy is not extortionate. The government would not extract from the owner some extra value beyond just the value necessary to roughly offset the public costs of the proposed land use. The objection to offering cash or a permit as just compensation is that it allows the government to receive some value beyond the public costs—to instead capture some or all of the extra value of the permit to the owner. But if the government asks for no more than an amount of cash roughly proportional to the public costs, then it doesn’t matter whether the owner pays that directly or by giving the city some property interest that it would otherwise have to buy with cash that will now be available to pay those public costs. The cash amount is an upper limit to the amount the owner may be forced to pay, and that amount is justified by the public costs of the proposed land use.

D. Requiring an “Individualized Determination” Makes Sense

The restated *Nollan* theory also better justifies the Supreme Court’s apparent requirement that a governmental entity must make sufficient individualized factual findings on the record before imposing an exaction. Although *Dolan* does not directly say so, *Dolan* suggests that the government cannot justify an exaction by gathering evidence after the owner challenges it. For example, rather than just stating an evidentiary standard that a court must find satisfied at trial, *Dolan* says that “the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”

Similarly, the Court says that “the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.” These comments suggest that it is not enough for a city to prove the required relationship and proportionality at trial—the city must actually make its own factual findings meeting this standard at the time it makes the decision to impose the exaction.

The unconstitutional conditions theory of *Dolan* should not require such an individualized determination by the government. The Court’s theory for invalidating unrelated or disproportionate exactions is that

---

113. *Id.* at 395-96.
the government conditions a land-use permit on the surrender of the right to just compensation for taken property. This analysis should be entirely objective. If the government did impose such a condition, it doesn’t matter whether the government meant to do so. Likewise, a proportional and related exaction is not an unconstitutional condition simply because the government did not make sufficient factual findings to establish its proportionality and relationship before imposing the exaction. An unconstitutional condition exists because of the objective connection between benefit and right, not because of the government’s apparent intent or because of any procedural deficiency. Among other possible reasons, one reason that the analysis should be entirely objective is that an unconstitutional condition is wrongful because of the predicament in which it puts the citizen, not because of any wrongful intent or procedure by the government.

Likewise, a taking is also generally an objective fact about the character and extent of a government intrusion on property. The government’s intentions and procedures do not determine whether a particular action is a taking. However, the restated *Nollan* theory helps explain and justify requiring governments themselves to make individualized findings before imposing exactions. According to this theory, a court must decide whether the underlying land-use restriction was applied to substantially advance a legitimate state interest, either because of substantive due process or the Takings Clause. This requires the court to consider the relationship of the government’s action to public purposes, rather than just the character or degree of imposition on property rights.

Although substantial advancement is an objective fact as well, courts may reasonably defer to the judgment of local governments because of the well-recognized risks of judging the wisdom of regulation in hindsight. If the government reasonably thought that the exaction was a sensible way to mitigate the negative effects of a proposed land use, the court should not invalidate the exaction simply because it seems to the court in hindsight that the government was wrong. This, of course, is the basic reason for deferential substantive due process review.

*Dolan*’s requirement of individualized fact-finding by the government makes more sense from this perspective. Courts are trying to determine whether a government imposed an exaction merely to extract some property right from the owner without paying for it, or whether the government imposed the exaction because it reasonably believed that doing so would ameliorate public costs of the proposed land use. If the government makes findings demonstrating the required relationship and rough proportionality, a court may properly conclude that the government’s exaction did substantially advance a legitimate state interest, without second-guessing the government’s
findings. But otherwise the court may fairly conclude that the government opportunistically imposed the exaction to extort some property right from the owner.

V. CONCLUSION

The restated Nollan theory prevents at least three types of extortionate acts that other theories may allow: exacting something unrelated or disproportional when directly taking it would not be a compensable taking, imposing unrelated or disproportionate cash impact fees, and compensating for takings with land-use permits. Just as important, however, is that the theory avoids the logical gaps, inconsistencies, and weaknesses in alternative explanations for the Court’s nexus and proportionality requirements. The restated Nollan theory invalidates unrelated and disproportionate exactions for the common-sense reason that the government thereby misuses its regulatory power by conditionally enforcing a land-use regulation merely because the owner will not surrender some property interest, rather than because enforcement will further the public purposes that justify land-use planning. Acceptance of this theory therefore could both more fully prevent extortionate exactions and help clarify and simplify an unclear and complex area of the law.