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Commercial Builders of Northern California v. City of Sacramento: Commerce Creates Poverty

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COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA V. CITY OF SACRAMENTO: COMMERCE CREATES POVERTY

I. INTRODUCTION

Commerce creates poverty, at least under the reasoning of the majority in *Commercial Builders of Northern California v. City of Sacramento*.[1] While the actual, as opposed to legal, truth of that proposition should be subject to debate, the immediate effect of *Commercial Builders* is that legislatures in the Ninth Circuit can force real estate developers to choose between two onerous options.[2] First, a developer seeking permission to build can pay the government an exaction designed to fund essentially limitless arrays of income redistribution programs alleged to have been necessitated by the developer's commercial activity. Alternatively, a developer can refuse to pay for the social programs, effectively abandoning plans for his property as economically unjustifiable for lack of a simple, yet essential, building permit.[3]

Part II of this comment presents an overview of the most salient points of the majority and dissenting opinions. Part III outlines the relevant constitutional context for this case. Part IV analyzes the *Commercial Builders* decision in light of applicable precedent. Part V considers the societal implications of the decision. Unlike contemporary works which deconstruct legal texts to

1. 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

2. *See* Stephen Chapman, *A City Pays For Social Programs By Fleecing Developers*, CHI. TRIB., Oct. 13, 1991, Perspective Section, at 3.

3. *See* Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926) (striking down on equal protection grounds statute conditioning a privilege, as opposed to a right, to use public highways upon the relinquishment of the right to receive just compensation for takings) Commenting on the effect of the statute, the *Frost* Court noted that "the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Id. See also* discussion *infra* part III.D.

uncover systemic bias and oppression,[4] this comment advances a classic *stare decisis* theme, i.e., because the *Commercial Builders* court did not properly construe and apply relevant decisional law, the case was wrongly decided.

The majority opinion in *Commercial Builders* is flawed on several bases. At the outset, the court demonstrated a fundamental misunderstanding of Fifth Amendment property rights by applying the privilege-based principles of the unconstitutional conditions doctrine to rights-based takings analysis.[5] The court then misconstrued the relevant test under which the constitutionality of the ordinance was to be measured by failing to differentiate two of the test's main prongs.[6] This analytical fusion, coupled with the court's purported application of an undefined centrist standard,[7] its disregard of the leading decision's calls for heightened scrutiny,[8] and its stubborn reliance on renegade precedent,[9] engendered an improper application of rational basis scrutiny to the ordinance in direct contravention of Supreme Court precedent.[10] Moreover, on the given facts, the *Commercial Builders* court should have struck down Sacramento's ordinance for failing even the weak rational basis test.[11]

The *Commercial Builders* decision opened the door to increased legislative interference with individual rights in property supposedly protected by the Fifth Amendment's Takings Clause.[12] Since the Supreme Court has denied certiorari,[13] *Commercial Builders* will serve to weaken the property rights of individuals for years to come.

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4. *See, e.g.*, Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 (1987) (arguing that legal reasoning itself serves to legitimate systems of oppression).

5. *See* discussion *infra* part IV.A.

6. *See* discussion *infra* part IV.B.

7. *See* discussion *infra* part IV.B.1.

8. *See* discussion *infra* part IV.B.2.

9. *See* discussion *infra* part IV.B.3.

10. *See* discussion *infra* part IV.B.

11. *See* discussion *infra* part IV.C.

12. *See* discussion *infra* part V.

13. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

II. OVERVIEW OF THE DECISION

A. Majority Opinion: Schroeder

The *Commercial Builders* decision arose after the City of Sacramento (the "City") enacted the Housing Trust Fund Ordinance (the "Ordinance") which conditioned the granting of permits for non-residential development on the payment of exactions to fund low-rent housing projects.[14] Commercial Builders of Northern California (the "Builders") challenged the Ordinance, arguing that it constituted a taking requiring just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.[15]

Finding that the City had shown the nexus required under *Nollan v. California Coastal Commission*[16] "between nonresidential development and the demand for low-income housing," the district court for the Eastern District of California granted the City summary judgment.[17] The Builders appealed.[18] The Ninth Circuit Court of Appeals affirmed the decision below on three principal bases.[19]

First, the Ninth Circuit concluded there was a rational relationship between the exaction and the cost of the low-rent housing projects.[20] While building permit conditions not supporting their articulated purposes, such as conditioning the vacation of platted streets on the dedication of geothermal wells to a municipality, would violate the Takings Clause of the Fifth Amendment, the court determined that the Ordinance did not impose such a condition.[21]

The applicable test, which the court likened to the test for subdivision exactions, determines whether the conditions placed on development are reasonably related to legitimate public purposes.[22] Two factors militated in favor of the finding of a reasonable relationship in *Commercial Builders*: a formal study establishing the

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14. *Id.* at 872-74.

15. *Id.* at 873.

16. 483 U.S. 825 (1987).

17. *See Commercial Builders*, 941 F.2d at 873.

18. *Commercial Builders*, 941 F.2d at 872.

19. *Commercial Builders* was a 2-1 decision. This comment will focus primarily on the majority opinion, with references *passim* to the most salient points of the dissent.

20. *Commercial Builders*, 941 F.2d at 874.

21. *Id.* at 873-74; *see*, Parks v. Watson, 716 F.2d 646, 653 (9th Cir. 1983) (geothermal well dedication).

22. *Commercial Builders*, 941 F.2d at 874.

likelihood that non-residential development would create a need for housing projects to shelter the low-income workers attracted to the development, and the modest size of the exaction assessed against developers in relation to the estimated cost of the housing projects.[23]

Second, the court rejected the contention that *Nollan* required a more direct relationship between development and the problems created by development.[24] The Builders had argued that the *Nollan* test required that an ordinance's conditions need not merely be ones the government "might rationally have decided" to use for an articulated purpose, but that the conditions "substantially advance" that purpose.[25] This argument failed to convince the court that *Nollan* required a higher level of scrutiny. The court stated that the *Nollan* Court did not rule on "how close a 'fit' between the condition and the burden is required" but merely employed a nationally consistent centrist approach to strike down an exaction ordinance which had failed to meet even the lowest standard of review.[26]

The court buttressed its view of the applicable level of scrutiny by referencing its recent reversal of a case which had struck down under *Nollan* principles a law requiring a developer to undertake off-site environmental mitigation measures. The lower court had erroneously interpreted *Nollan* as requiring "too close a nexus" between the law and its articulated purpose.[27] The proper interpretation of *Nollan*, according to the *Commercial Builders* court, was that exactions will not be upheld where there is no evidence of a connection between the development and the social ill the exaction is designed to alleviate. Under that formulation, Sacramento did not have to show that non-residential development was directly responsible for creating a need for housing projects.

In the third component of its majority opinion, the Court rejected the proposition that the Ordinance was a taking per se rather than a land use regulation "subject to a reasonableness analysis."[28] If the Ordinance were treated like a physical, or per se,

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23. *Id.*
24. *Id.* at 874-75.
25. *Id.* at 874.
26. *Id.*
27. *See id.* at 874 (citing Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991), *rev'g* 733 F. Supp. 1399 (D. Nev. 1990)).
28. *Id.* at 875-76.

taking the Court argued, just compensation would be required for every fee. Citing the lack of a requisite theoretical basis, the court declined to establish such a precedent. The *Commercial Builders* court's specific holding and the new law of the case, was that "[a] purely financial exaction . . . will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed."[29]

B. Dissent: Beezer

In a stinging dissent, Judge Beezer attacked the heart the majority opinion, the interpretation of the cause and effect relationship required under the Fifth Amendment between commercial development and housing needs.[30] Judge Beezer noted that, historically, exactions imposed on subdivision developers have been justified because they *directly* furthered a government interest in one of two ways.

First, an exaction designed to pay for public goods necessitated by development serves to alleviate a public burden created by private actors.[31] A second justification focuses on the equity of a developer ameliorating any harmful effects caused by the development.[32] The premise underlying both rationales is that private parties essentially forced costs on the community at large. When an exaction addresses a social effect actually caused by development, all parties bear responsibility for costs of their own making.[33]

Judge Beezer illustrated this point using a residential development scenario.[34] In the case of a subdivision, an exaction designed to fund newly demanded infrastructure ensures that the larger community is not saddled with the expense of streets, sewers or schools. These public goods benefit the developer by benefiting the residents of the subdivision. By paying the exaction, the developer pays the cost of the infrastructure and passes the cost on to his customers. Both the community and the development—the devel-

29. *Id.* at 876.

30. *Id.* (Beezer, J., dissenting).

31. *See generally* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5 (1987).

32. *Commercial Builders*, 941 F.2d at 877.

33. *See, e.g.*, Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App.), *cert. denied*, 440 So. 2d 352 (Fla. 1983) (fee imposed to fund county level park system).

34. *Commercial Builders*, 941 F.2d at 877.

oper and his customers—benefit. The community grows; the residents obtain needed infrastructure.[35]

However, Judge Beezer observed, exaction schemes that require no connection between a development and its allegedly attendant problems do not benefit the development.[36] In *Commercial Builders*, the Judge argued, the study commissioned by Sacramento to support an application of the Ordinance had demonstrated "at best a tenuous and theoretical connection between development and housing needs."[37] Judge Beezer noted that the study itself stated that its "nexus analysis does not make the case that building construction is responsible for growth."[38] The Takings Clause, though, "requires a cause-and-effect relationship" between development and related social costs.[39]

The Ordinance, opined Beezer, was simply "a transparent attempt to force commercial developers to underwrite social policy"[40] and "nothing more than a convenient way to fund a system of transfer payments."[41] He concluded by predicting that exactions imposed on development for the purpose of funding a wide array of income redistribution programs would be upheld under the aegis of *Commercial Builders*.[42]

III. CONSTITUTIONAL CONTEXT

A. The Takings Clause

The Fifth Amendment to the Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."[43] In *Commercial Builders*, the Builders argued

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35. *Id.* In this balanced scenario, the government neither seeks to levy a special tax on new development nor does it aim to subsidize private ventures with public funds.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 877.

40. *Id.* at 876.

41. *Id.* at 877.

42. Some examples include child-care and health care delivery systems. *Id.* at 878.

43. U.S. CONST. amend. V. The Takings Clause, including its just compensation requirement, applies to the states through the Fourteenth Amendment. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 159 (1980); Chicago, B. & Q. R. v. Chicago, 166 U.S. 226, 239 (1897); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11 (4th ed. 1991). A state cannot escape the Takings Clause's just compensation requirement by taking property for private, rather than for public use. Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896).

that the private property taken was the money demanded by the City to pay for the public good of low-rent housing projects.[44] Permissible public uses are legion.[45] The Takings Clause was not designed "to limit . . . governmental interference with property rights . . . , but rather to secure compensation [when] otherwise proper interference amount[s] to a taking."[46] Accordingly, the Builders did not attack the lawfulness of the City's demand for private property; they simply challenged the Ordinance as failing to accord just compensation. The means Sacramento used to fund housing projects were central to the case, and the end of increasing low-rent housing projects, essentially peripheral.[47]

The prototypical takings case involves an element of physical invasion. Governmental actions effecting permanent physical occupations of property are regarded as the most extreme form of taking—takings per se.[48] For example, a city ordinance forcing apartment owners to allow the installation of cable television receivers on their buildings was held to be per se taking.[49] The main issue in the per se context is the amount of compensation to be accorded. It is understandable then, that the Builders tried to convince the *Commercial Builders* court the Ordinance was closely analogous to a per se taking because it required a transfer of money.

Since the Takings Clause requires just compensation for government taking of property, and since money is simply liquid property, the Ordinance's mandated transfer of property requires

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44. *Commercial Builders*, 941 F.2d at 875.

45. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) (concluding that legislatures are permitted to define public use expansively); John J. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Takings Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1036 (1975) (public use limitation of Fifth and Fourteenth Amendments is defined broadly).

46. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 689 (1897) ("The constitutional guarantee of just compensation is not a limitation on the power to take, but only a condition of its exercise."); *see generally* Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988) (analysis of *First English* and *Nollan* by the attorney who represented the petitioners in *First English*).

47. *See* Nollan v. California Coastal Comm'n, 483 U.S., 825, 834-35 (1987) ("[A] broad range of governmental purposes" qualify as legitimate state interests in the exaction context.).

48. *See, e.g.*, Loretto v. Teleprompter Manhattan C.A.T.V. Corp., 458 U.S. 419, 438 n.16 (1982) (noting that permanent physical occupation is taking per se).

49. *Id.* (finding municipal ordinance forcing property owner to "allow" installation of a cable television receiver "no bigger than a breadbox" on property as taking requiring just—not nominal—compensation).

just compensation under the Takings Clause. However, this syllogism failed the Builders. In the takings arena, government demands for money are not treated as physical appropriations of private property.[50] Unless money is physically taken by the government, it is not property for the purposes of the Takings Clause.[51] The imposition of an exaction is not considered to be an "invasion" of a bank account.

B. Regulatory Takings

The Builders, having failed to convince the Court that the Ordinance was a per se taking falling automatically under the Fifth Amendment, had to show that the Ordinance was a "regulatory" taking requiring just compensation. The basic operative premise in the regulatory takings area is that regulations or other government actions, by going "too far," can take private property without effecting a permanent physical occupation.[52] Where construction of a government dam caused flooding of private lands, a taking was said to have occurred.[53] Similarly, a statute went "too far" when it made coal mining commercially impracticable[54].

A regulation will be viewed as having gone "too far" if it fails to "substantially advance"[55] legitimate state interests,[56] de-

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50. *See, e.g.*, United States v. Sperry Corp., 110 S. Ct. 387, 395 n.9 (1989) ("It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible."); *Commercial Builders*, 941 F.2d at 875 (quoting *Sperry*). If the Supreme Court treated money as property for the purposes of the Takings Clause, the Sixteenth Amendment, which spawned the federal income tax, would be locked in serious, perhaps mortal, conflict with the Fifth Amendment.

51. *See, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (ruling that government seizure of interest on interpleader funds deposited with clerk of county court constituted a taking).

52. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Holmes, J.) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

53. Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166, 179-80 (1871).

54. *Pennsylvania Coal*, 260 U.S. 393.

55. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); *see also* Nectow v. Cambridge, 277 U.S. 183, 188 (1928) (ruling that zoning restrictions must bear a "substantial relation" to the goals informing the valid exercise of a state's police power, i.e., public health, safety, morals, or general welfare).

56. *See, e.g.*, Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986) (finding "character" of the governmental action a relevant factor in regulatory takings inquiries).

nies an owner, even temporarily,[57] 'economically viable use'[58] of his property[59] or interferes with his 'reasonable investment-backed profit[60] expectations.'[61] Although Sacramento's Ordinance reduced the present value of exploitable non-residential property by increasing the costs of its commercial use,[62] the Builders did not argue unreasonable value impairment. Instead, they concentrated on whether the impact of development warranted the imposition embodied in the Ordinance[63] and whether the Ordinance effectively advanced the state interest in mitigating the alleged impact.[64]

The Builders' omission of a challenge based on the Ordinance's interference with property value is probably due to the impotence of the "value" arguments. The Supreme Court's failure to fully develop the "economically viable use" or "reasonable investment-backed profit expectations" concepts is the main reason the value arguments are generally of little value to property owners.[65] Favoring pragmatism over principle,[66] the Court engages in regulatory takings inquiries on an essentially "ad hoc, factual basis."[67] In a historical context, this flexible approach has done little to change the jurisprudential landscape.

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57. *See, e.g.*, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (holding three-year moratorium on the issuance of building permits to be a taking).

58. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978).

59. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

60. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (referring to the reasonable, investment-backed, *profit* expectations factor).

61. *See, e.g.*, *Penn Cent. Transp.*, 438 U.S. 104 (1978) (providing the reasonable investment-backed expectations factor).

62. While the Builders can pass a portion of the exaction on to their customers, a portion of the exaction cannot be distributed. The amount of the non-allocable costs of the exaction depends on the level of competition in the market for non-residential development. If competition is intense, fewer costs can be passed on to the customer. If competition is weak, a commercial developer can pass on more costs by raising prices, until he raises prices too much and more efficient suppliers are attracted to the market in the long run resulting in stiffer competition. Assuming a competitive market for non-residential development in Sacramento, it is reasonable to conclude that the non-allocable costs of the Ordinance would adversely affect the profits the Builders would have enjoyed before imposition of the Ordinance.

63. *See infra* text accompanying note 81.

64. *See infra* text accompanying note 82.

65. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992) ("[The] uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.").

66. Or perhaps, pragmatism *as* a principle.

67. Berger, *supra* note 46, at 758-59; *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

Prior to the Court's incorporation of value impairment factors into regulatory takings jurisprudence, regulations causing value diminutions of up to 92.5% had escaped classification as takings. For example, a zoning ordinance prohibiting the construction of factories on certain land, thereby causing the value of the land to diminish by 75%, was not a taking.[68] Likewise, an ordinance prohibiting the operation of a long-established brickmaking facility, situated on land which the enacting municipality had just annexed, avoided classification as a taking despite reducing the property's value from $800,000 to $60,000.[69]

After the Court's recognition of value impairment as a relevant factor, regulations causing *even greater* value impairments were ruled to be mere regulations instead of regulatory takings. Since courts lack a definition of "economically viable use," they have relied on pre-"value impairment" cases to hold that regulations causing value diminutions of *up to 95%* do not deny an owner economically viable use of his property.[70] For example, a modified zoning ordinance invalidating a previously granted permit to build a high-rise apartment and reducing the property's value from $2,000,000 to $100,000 was held not to constitute a denial of economically viable use.[71] Reasonable, and thus non-compensable, use restrictions have also included total prohibitions on construction designed to preserve "open space" on private property.[72]

Additional examples of reasonable use restrictions include an ordinance forbidding the destruction of "landmark" properties such as Grand Central Station[73] and an outright denial of a permit to build on property classified as a wetland.[74] Adding to the ineffectiveness of the undefined "reasonable, investment-backed, profit expectations" concept, the Supreme Court categorized the "loss of future profits" as a "slender reed upon which to rest a takings

68. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384, 388 (1926) (value reduced from $10,000 to $2,500).

69. Hadacheck v. Sebastian, 239 U.S. 394, 405, 409-10 (1915).

70. *See* Berger, *supra* note 46, at 758, 762-63.

71. William C. Haas & Co. v. City & County of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979).

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

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

74. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) ("Only when a permit [to use property classified as a 'wetland'] is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.").

claim."[75] Understandably then, the Builders did not rest their takings claim on either a reasonable profit expectation or an economically viable use theory.

C. Exactions as Takings: *Nollan v. California Coastal Commission*

Nollan v. California Coastal Commission controls regulatory takings inquiries where the government conditions the use of property on the payment of an exaction.[76] An exaction can take the form of an "impact fee" to offset the negative social impact of development, as in *Commercial Builders*, or may consist of the transfer of an interest in real property as a pre-condition to such development. In *Nollan*, the California Coastal Commission, an instrumentality of the state, conditioned the issuance of a building permit on the grant of an easement to provide for public access across the beachfront portion of a private lot.[77]

The Commission argued that the Nollans' use of their property to construct a home would burden the state by creating a psychological barrier to physical and "visual" beach access.[78] The Commission contended that this severe burdening of state interests warranted a prohibition on construction. Therefore, if the state could prohibit construction, it could certainly condition construction on the Nollan's transfer of an easement to alleviate the burden caused by development. The Supreme Court of the United States agreed with this argument, but required the state to pay for the easement.[79]

Rejecting dissenting Justice Brennan's call for the application of rational basis scrutiny,[80] the *Nollan* Court synthesized three criteria in formulating a test to determine when development exactions metamorphose from regulations into takings requiring just

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75. Andrus v. Allard, 444 U.S. 51, 66 (1979) (involving a statute prohibiting the sale but not the possession of federally-protected bird feathers).

76. 483 U.S. 825 (1987).

77. *Id.* at 827-28.

78. *Id.* at 835.

79. *Id.* at 835-36.

80. *Id.* at 836 n.3. The Court noted that Goldblatt v. Hempstead, 369 U.S. 590 (1962), appeared to assume that mere rational basis scrutiny was applicable to takings challenges, but that such an assumption was incorrect. The correct standard of review is stricter. Thus, exactions that are merely regulations the government "could rationally have decided . . . might achieve the State's objective" will not pass muster. *Id.* (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981).

compensation. First, the "proportionality" prong of the test requires that a development condition, such as the conditional grant of a building permit, be reasonably related to the burden created by development.[81] The proportionality prong gauges the degree of negative social impact required to warrant the imposition of an exaction on development.

Next, the "utility" prong of the *Nollan* test requires that any imposed development condition "substantially advance" a legitimate police power purpose.[82] The utility prong measures the effectiveness of the exaction in accomplishing its stated purpose of mitigating the impact of development. Finally, the "interference" prong of the *Nollan* test prohibits development conditions such as outright refusals to issue a building permit from "interfer[ing] so drastically with the . . . use of [the] property [as] to constitute a taking."[83] The interference prong serves as a societal acknowledgment that exclusive use is a fundamental attribute of property ownership.

In relation to the interference prong of the test, the *Nollan* Court recognized that while the outright denial of a building permit would be permissible if construction "substantially impeded" valid state purposes, such a denial could rise to the level of a taking, thus requiring the payment of just compensation.[84] In connection with the utility prong of the test, the Court took the view that a "broad range of governmental purposes," including California's goal of overcoming the psychological barriers to beach access, could be construed as legitimate.[85]

With respect to the proportionality prong of the test, the *Nollan* Court did not explicitly decide how "close a 'fit'" was required between the permit condition and the burden created by private development because the condition at issue failed to meet

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81. *Id.* at 834 ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose." (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978)).

82. *Id.* ("[L]and-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests . . . ." (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

83. *Id.* at 835-36. Interference prohibited under *Nollan* may also take the form of preventing an owner from using his property in an economically viable manner. *See id.* at 834.

84. *Id.* at 833. Notwithstanding this theoretical avenue of litigation, the interference prong of the *Nollan* test alludes to the moribund "interference with reasonable profit expectations" and "economically viable use" criteria. *See* discussion *supra* part III.B.

85. *Id.* at 833.

"even the most untailored standards."[86] However, the Court inferentially outlined the contours of a suitable degree of 'fit.' The Court accepted, for "purposes of discussion only," that a condition "reasonably related"[87] to a burden created by private development would constitute a valid exercise of a state's police power if the condition imposed *advanced the same interests* as a prohibition.[88]

D. Takings and the Doctrine of Unconstitutional Conditions

The doctrine of unconstitutional conditions limits the government's ability to condition the receipt of government benefits upon the relinquishment of constitutional rights.[89] The essence of the doctrine is that the government may not accomplish indirectly what it is forbidden to accomplish directly.[90] Government actions which condition the receipt of benefits such as welfare payments,[91] the use of public highways,[92] or the vacation of public streets[93] upon the relinquishment of a constitutional right such as the right to receive just compensation for takings[94] or the right to free speech,[95] will be struck down as "unconstitutional condi-

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86. *Id.* 483 U.S. at 838.

87. *Id.* at 838-39; *see also* discussion *infra* part IV.B.1 (analyzing the two extremes of proportionality as they relate to reasonableness in the development exaction context).

88. The Court observed that a regulation that substitutes a condition for an otherwise lawful prohibition and then "utterly fails to further the end advanced as a justification for the prohibition" metamorphoses from a valid regulation into an "out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).

89. Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Frost Trucking v. Railroad Comm'n, 271 U.S. 583, 591 (1926); *see* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1422 (1989).

90. *See* Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 98 (1989).

91. *Shapiro*, 394 U.S. at 627 n.6.

92. *Frost*, 271 U.S. at 591 ("It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.").

93. *See* Parks v. Watson, 716 F.2d 646 (9th Cir. 1983).

94. *See* U.S. CONST. amend. V; *id.* amend. XIV; *Frost*, 271 U.S. at 589-90 (statute forcing private carrier to become public, and therefore regulated, carrier as a condition to using public highways effected a taking under the Due Process Clause of the Fourteenth Amendment); *Parks* at 650-52 ("[T]he City may not condition street vacation on Klamath waiving its fifth amendment right to just compensation for the geothermal wells.").

95. *See* U.S. CONST. amend. I; Perry v. Sinderman, 408 U.S. 593 (1972) (holding that public employer may not condition employment on employee relinquishing First Amendment right to freedom of expression).

tions"[96] unless the conditions imposed are rationally related to the benefits conferred.[97]

However, the "right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'"[98] Thus, the unconstitutional conditions doctrine is not germane to a case involving the *right* to use private property in the absence of a government benefit.[99] When the government conditions the exercise of an individual's right to build on his own property upon a transfer of wealth to offset the 'impact' of the project, the takings test formulated in *Nollan v. California Coastal Commission*[100] comes into play. *Commercial Builders* involved the imposition of a fee on the right to build. No government benefit was implicated. Thus, the Court's employment of *Nollan*'s rights-based takings analysis should have precluded the use of the privilege-based unconstitutional conditions doctrine.[101]

IV. ANALYSIS

A. Property *Privileges*?

Justice Scalia's opinion in *Nollan* underscores the proposition that an individual right recognized by the Constitution is not a government-created benefit.[102] The *Commercial Builders* court nonetheless treated the right to use private property, which informs the Takings Clause, as a government benefit to be given or taken away by legislative fiat. That approach is flawed.

The *Commercial Builders* case involved two rights, conditioning of a right to build upon the right to receive just compensation

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96. *See generally* Comment, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1600 (1960) (analyzing unconstitutional conditions doctrine); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 353 (1935) (same).

97. Governmental benefits subject to analysis under the doctrine of unconstitutional conditions also include unemployment benefits and permission to operate hydroelectric facilities in navigable waters controlled by Congress. *See* Sherbert v. Verner, 374 U.S. 398, 404-05 (1963) (unemployment benefits); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426-27 (1940) (hydroelectric power generation); Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651 (1927) (same).

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

99. *See generally* Sullivan, *supra* note 89 (discussing concept of 'germaneness' in relation to the doctrine of unconstitutional conditions).

100. 483 U.S. 825 (1987).

101. *But see* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (analyzing the decline of disparate treatment for rights and privileges).

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

for a taking of property. That transaction did not condition receipt of a government benefit on the relinquishment of a right. Therefore, the doctrine of unconstitutional conditions should have had no bearing on the case. The *Commercial Builders* court nonetheless brought the doctrine to bear, with damaging consequences to the individual right to acquire, use and dispose of property.

The Builders had attacked the means used to advance the City's interest in "expanding low-income housing," i.e., the conditioning of a building permit on the payment of a fee to pay for housing projects notwithstanding the lack of proportionality between the exaction and the impact of the development.[103] The *Commercial Builders* court countered with reference to *Parks v. Watson.*[104] In *Parks*, the Ninth Circuit Court of Appeals had held that a city ordinance conditioning the vacation of platted streets on the relinquishment of the Fifth Amendment right to receive just compensation for the compelled transfer of geothermal wells to the city was an unconstitutional condition because the transfer requirement "had no rational relationship to any purpose related to the vacation of the platted streets."[105]

The *Commercial Builders* Court neglected to mention that *Parks* involved the conditioning of a discretionary governmental benefit, permission to vacate public streets. *Commercial Builders*, on the other hand, addressed the issuance of a building permit, which the *Nollan* Court had stated could not possibly be construed as a governmental benefit.[106] If a building permit is not construed as a government benefit, the principles of the doctrine of unconstitutional conditions had no application in *Commercial Builders.* Through its tacit invocation of the unconstitutional conditions doctrine by reference to *Parks v. Watson*, the court implicitly equated the right to use private property with the possibility of receiving discretionary governmental benefits. However, the right to use private property is just that, a right. It is not a unilaterally-created benefit to be taken away upon mere notice and a hearing. The Takings Clause demands more.[107]

Government benefits, in contrast to individual rights, possess

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103. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 873 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

104. 716 F.2d 646 (9th Cir. 1983).

105. *Parks*, 716 F.2d at 653.

106. *Nollan*, 483 U.S. at 833 n.2; *see* discussion *supra* part III.D.

107. *See supra* note 43 and accompanying text.

the ephemeral nature of publicly-held property interests transferred, *vel non*, at will and upon political expediency, to individual citizens.[108] The quality of the *Commercial Builders* court's reliance on *Parks* supported an equation of individual rights with discretionary governmental benefits, seriously blurring the distinction between the two. The Fifth Amendment is hostile to such a relativistic perspective. The Takings Clause does not state that the government must pay for property *when it feels like it*, or that it may take property without compensation when wielding the numerically superior power of a majority. On the contrary, the Takings Clause is phrased in absolute prohibitory terms: "Nor shall private property be taken for public use, without just compensation."[109]

The Takings Clause has three component functions. It serves as a societal acknowledgment that private property exists; it absolutely prohibits uncompensated takings; and it provides a vehicle for the transformation of private property into public property through the payment of just compensation. Neutralization of these functions requires a distortion of the concept of the right to acquire, use and dispose of private property. By equating the Builders' right to use private property with the government benefit of vacating *public streets*, the *Commercial Builders* court contributed to just such a distortion.

B. Doctrinal (Con)fusion in *Nollan*-Land

Development exactions must satisfy the distinct proportionality, utility and interference prongs of the *Nollan* test in order to pass constitutional muster.[110] In *Commercial Builders*, the distinct concepts of utility and proportionality[111] should have been analyzed individually. They were not. The court instead treated proportionality and utility as a single analytical component. This treatmemt gave rise to a conflict. While proportionality, which is defined in terms of reasonableness,[112] may be said to call for intermediate scrutiny, it may also reasonably be regarded as implicating closer judicial review. Utility, however, is clearly defined along more de-

108. *See, e.g.*, sources cited *supra* note 97.

109. U.S. CONST. amend. V; *see also* sources cited *supra* note 43.

110. *See Nollan*, 483 U.S. at 834, 835-36; *supra* notes 80-83 and accompanying text.

111. The Builders probably did not place primary emphasis on litigating interference aspects of the ordinance. Regulatory takings which leave owners with at least 5% of the property value satisfy the interference prong. *See supra* text accompanying notes 65-75.

112. *See supra* text accompanying notes 81, 86-88.

manding lines and requires the application of a more rigorous standard,[113] namely, strict scrutiny.[114]

To "resolve" the conflict resulting from the fusion of proportionality and utility, the *Commercial Builders* court focused exclusively on proportionality as the engine of exaction review. To this end, the court interpreted an extremely heterogeneous body of precedent[115] as constituting a substantive consensus on the degree of proportionality required between an exaction condition and the negative impact of development.[116] The court considered the proposition that the determination of proportionality requires less than strict scrutiny to mean that *Nollan* permitted application of rational basis scrutiny to *every* aspect of Sacramento's ordinance.[117] The *Nollan* Court, however, had ruled that the utility attributes of exaction ordinances are subject to a much higher level of review.[118] Moreover, support exists for the use of strict scrutiny in conjunction with all components of the *Nollan* test, not just the utility prong.[119]

1. A Consensus of Contradiction

Proportionality under *Nollan* addresses the closeness of the

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113. *See supra* text accompanying notes 80, 82, 85.

114. *See, e.g.*, Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 n.76 (1989) (citing *Nollan* as evidence of the Supreme Court's greater willingness to rule against government under the Fifth Amendment's Takings Clause).

115. *See* discussion *infra* part IV.C.

116. *Commercial Builders*, 941 F.2d at 874 ("We noted in *Parks* that the analysis we applied was based on a consensus among the states that had considered the constitutionality of subdivision exaction regulations.").

117. *Id.* at 875 ("*Nollan* holds that where there is no evidence of a nexus between the development and the problem the exaction seeks to address, the exaction cannot be upheld.").

118. *Nollan*, 483 U.S. at 834 n.3 ("We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved . . . not that the State 'could rationally have decided' that the measure adopted might achieve the State's interest."). *See, e.g.*, Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1381 (1990) (discussing *Nollan* as requiring logical relationship between purpose and condition and as seriously inquiring into ends of regulation and means, requiring that regulation "substantially advance" a legitimate state interest).

119. *See, e.g., The Supreme Court, 1986 Term: Leading Cases, Constitutional Law—Takings: Land Use Regulation*, 101 HARV. L. REV. 240, 247, 249 (1987) (citing *Nollan* as "troubling" because its indication that future regulations will be subject to a higher level of scrutiny than that traditionally employed in "assessing claims of regulatory takings").

'fit' required between a development condition and the impact created by the targeted development.[120] A development condition is considered to be warranted under the proportionality prong if it is reasonably related to the impact of development.[121] The *Commercial Builders* court, relying on *Parks* and *Nollan*, posited the existence of a centrist "consensus among the states" concerning the meaning of what it termed a "*rational* relationship"[122] for the purposes of proportionality.[123]

Although the *Nollan* Court did cite a national range of decisions as illustrative of the approach to be taken with respect to reasonableness[124] in the context of the proportionality prong, these decisions vary widely in perspective and cannot reasonably be considered to constitute a substantive consensus at all. The proportionality decisions cited by the *Commercial Builders* and *Nollan* courts can be classified into two main categories, those decisions requiring a "direct" relationship between a development condition and the negative impact of development and those requiring an "indirect" relationship.

While the principles underlying the "direct" decisions are straightforward and easily applied, the "indirect" cases are notably uninformed by principles susceptible to coherent application.[125] The *Nollan* Court indicated a limit to the permissible level of indirectness by referring to a third category of decisions—the California state court decisions, which employ rational basis review[126] to require mere nominal proportionality—as entirely inapposite.[127]

Pioneer Trust & Savings Bank v. Village of Mount Prospect[128] represents the direct proportionality extreme of exaction jurisprudence. In *Pioneer Trust*, a municipality conditioned the approval of subdivision plans on the developer's transfer of land to the public for the purpose of building schools.[129] While acknowl-

120. *Nollan*, 483 U.S. at 838; *supra* text accompanying notes 81, 86-88.
121. *See supra* text accompanying notes 81, 87-88.
122. *See infra* text accompanying note 192.
123. *Commercial Builders*, 941 F.2d at 874 (emphasis added).
124. *Nollan*, 483 U.S. at 839-40.
125. *See infra* text accompanying notes 136-44.
126. *See infra* notes 148-50 and accompanying text.
127. *Nollan*, 483 U.S. at 839 ("Our conclusion . . . is consistent with the approach taken by every other court that has considered the question, *with the exception of the California state courts*." (emphasis added).)
128. 176 N.E.2d 799 (Ill. 1961).
129. *Id.* at 800, 802.

edging that the subdivision may have created the need for additional schools, the developer challenged the exaction ordinance as a taking without just compensation.[130] The Supreme Court of Illinois held that such exactions are reasonable if the burden placed on the developer is "specifically and uniquely attributable" to his activity.[131]

Associated Home Builders, Inc. v. City of Walnut Creek[132] represents the nominal proportionality extreme of exaction jurisprudence. In *Walnut Creek*, subdivision developers challenged a statute conditioning the approval of building plans upon the uncompensated transfer of land to the municipality as a taking without just compensation.[133] The Supreme Court of California, citing the "melancholy aspect[s] of . . . unprecedented population increase[s] . . . " and the consequent elimination of open spaces, held that a direct relationship between the ills sought to be alleviated by the exaction and the activities of the exactee was not required.[134] The *Walnut Creek* rule requires merely that the exaction bear some relationship to the needs created by the development.[135]

Parks v. Watson represents the "indirect" proportionality position.[136] The *Parks* court's opinion, upon which the *Commercial Builders* court relied,[137] rejected both the *Pioneer Trust* and *Walnut Creek* views, professing to follow a centrist position.[138] However, the *Parks* court, like the *Commercial Builders* court, simply asserted rather than developed a centrist position.[139] The principal case *Parks* relied on[140] for the existence of a middle standard, *Call v. City of West Jordan I*,[141] like *Pioneer Trust* and *Walnut Creek*, addressed the determination of the reasonableness of exaction statutes in relation to the Fifth Amendment's Takings Clause.

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130. *Id.* at 799-800, 802.
131. *Id.* at 802.
132. 94 Cal. Rptr. 630 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971).
133. *Id.* at 632.
134. *Id.* at 635.
135. *Id.* at 635, 636 n.6.
136. 716 F.2d 646, 653 (9th Cir. 1983); Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).
137. *Id.* at 873-74.
138. *Parks*, 716 F.2d at 653.
139. *Id.*
140. *Id.*
141. 606 P.2d 217, 220 (Utah 1979), *rev'd on other grounds and remanded*, Call v. City of W. Jordan II, 614 P.2d 1257 (Utah 1980).

The *Call I* court required an exaction to have "some reasonable relationship to the needs created by the development."[142]

The *Call I* court, far from developing a centrist position, improvidently supported *its* "reasonable relationship" requirement with decisions contradicting each other on the issue of proportionality. First, the *Call I* court construed the requirement of a reasonable relationship between exaction and social ill by citing decisions advancing *Pioneer Trust* direct proportionality.[143] Then, in the same paragraph, the court further supports the reasonableness standard by citing decisions advancing *Walnut Creek* nominal proportionality.[144] Incredibly, no choice is made between the two positions. The *Call I* court, like the *Parks* and *Commercial Builders* courts, made no attempt at synthesizing the divergent and incompatible positions.

Given this, the base of support for the *Commercial Builder* court's centrist state consensus concerning proportionality for purposes of exaction analysis is a chimera. Two disparate lines of thought concerning the degree of fit required between an exaction and the social ills created by development remain unresolved. The *Pioneer Trust* view requires the social ills sought to be alleviated by an exaction to be "specifically and uniquely attributable" or directly proportional to development. The *Walnut Creek* view maintains that the exaction need only bear "some relationship" or be

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142. *Call I*, 606 P.2d at 220. The *Call I* court's formulation appears to be an amalgamation of the nominal position's requirement that the condition bear "some" relationship to the problems created by development and the indirect position's requirement that such a relationship be "reasonable." *See supra* text accompanying notes 132-39.

143. *See Call I*, 606 P.2d at 220 n.6 (citing Aunt Hack Ridge Estates v. Planning Comm'n of Danbury, 230 A.2d 45, 47 (Conn. Super. Ct. 1967) (striking down exaction as an unconstitutional tax for failure to limit the use of monies collected to the direct benefit of targeted subdivision), *certifying questions to* Aunt Hack Ridge Estates v. Planning Comm'n of Danbury, 273 A.2d 880, 881, 84-85 (Conn. 1970) (application of exaction statute and attendant regulations was permissible exercise of police power provided the resulting exactions were "specifically and uniquely attributable" to the activities of development); and, Krughoff v. City of Naperville, 369 N.E.2d 892, 895 (Ill. 1977) (explicitly following the *Pioneer Trust* rule that exactions must be "specifically and uniquely attributable" to the exactee's activities)); *supra* text accompanying notes 128-31.

144. *See Call I*, 606 P.2d at 220 n.6 (citing Home Builders, Inc. v. Kansas City, 555 S.W.2d 832, 835 (Mo. 1977) (rejecting the *Pioneer Trust* "specifically and uniquely attributable" requirement as too restrictive, and permitting uncompensated transfers of land to the government upon the mere threat of a need for social goods created to some degree by development)); *Call I*, 606 P.2d at 220 n.7 (citing Associated Home Builders, Inc. v. City of Walnut Creek, 94 Cal. Rptr. 630 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971)); *supra* text accompanying notes 132-35.

nominally proportional to development.

The *Commercial Builders* court posited a centrist consensus, relying on *Parks*. The *Parks* court posited a centrist consensus, relying on *Call I*. The *Call I* court posited a centrist consensus, construing the reasonable relationship required between exactions and the impact of development as being informed by *both* the *Pioneer Trust* and *Walnut Creek* positions. The concurrent advancement of these unharmonized positions constitutes contradiction, not consensus.

The incoherent position demonstrated by the indirect proportionality decisions should not be viewed as a standard at all. Since the *Commercial Builders* court could not possibly have applied a standard that did not exist, its purported application of indirect proportionality is illogical. The experience of the various courts ruling on the constitutionality of exaction ordinances had led to the identification of two meaningful categories of proportionality, direct and nominal.[145] By explicitly rejecting direct proportionality and purporting to follow the indirect proportionality[146] non-standard, the *Commercial Builders* court could only have applied the one remaining standard, nominal proportionality, a concept rejected out of hand by the *Nollan* court.[147]

2. Rational Basis = Anything Goes[148]

The *Commercial Builders* court's reliance on the indirect proportionality non-standard and consequent dependence on nominal proportionality gave rise to an improper application of rational basis scrutiny to the ordinance. Under the rational basis standard,[149] exactions are "sustained . . . merely because there is

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145. *See supra* text accompanying notes 128-35.

146. *See supra* text accompanying notes 136-39.

147. *See supra* note 127 and text accompanying notes 124-27.

148. *See* Charles Siemon, *The Paradox of "In Accordance With a Comprehensive Plan" and Post Hoc Rationalizations: The Need For Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603, 605-06 (1987) (describing rational basis review as the 'anything goes' standard of judicial review); *Happy Birthday, Constitution, supra* note 46, at 753-54 (analyzing the deferential rational basis standard of review in the regulatory takings context).

149. *See* United States v. Carolene Prod., 304 U.S. 144, 152, 154 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators . . . . [W]here the legislative judgment is drawn into question, [the inquiry] must be restricted to the issue whether any state of

some reasonable basis for believing that [they] *might* be necessary."[150] Under the Court's negatively phrased formulation, exactions will be upheld unless "there is *no evidence* of a nexus between the development and the problem the exaction seeks to address . . . ."[151]

Further manifesting its fealty to the rational basis approach, the *Commercial Builders* court maintained that only conditions on development which lack "*any* rational relationship" to the activity targeted will be construed as not reasonably related to that activity and thus impermissible.[152] This view is partially correct yet wholly misleading. The court's advancement of such a minimalistic position as the complete approach to exaction questions is deficient because it merely describes the proportionality requirement through a rational basis lens. The *Nollan* court, however, had expressly rejected the use of rational basis scrutiny in any exaction analysis context.[153] The correct mode of analysis focuses on both proportionality and utility, and it examines the latter with a strict scrutiny eye.

While the proportionality prong determines whether an exaction is warranted, the utility prong measures an exaction's effectiveness in advancing its stated objectives, i.e., mitigating the impact of development.[154] A development condition is considered to be effective if it "substantially advance[s]" its stated objective.[155] The *Nollan* Court, in its exegesis of the utility requirement, had clearly rejected the use of rational basis scrutiny in determining the effectiveness of exaction ordinances.[156] The *Nollan* Court explained in detail how the utility component of its takings test re-

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facts either known or which could reasonably be assumed affords support for the legislation."); *see generally*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4 (4th ed. 1991).

150. *Happy Birthday, Constitution*, *supra* note 46, at 753 (emphasis added); *see also* Associated Home Builders, Inc. v. City of Walnut Creek, 94 Cal. Rptr. 630, 634 (Cal.) (upholding a subdivision exaction statute on the basis of, *inter alia*, future needs for recreation, potential population factors, and a general public need for recreational facilities caused by future subdivisions), *appeal dismissed*, 404 U.S. 878 (1971); *supra* text accompanying notes 132-35.

151. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 875 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992) (emphasis added).

152. *Id.* at 873 (emphasis added).

153. *Nollan*, 483 U.S. at 835 n.3; *supra* note 80 and accompanying text.

154. *See supra* notes 82-83 and accompanying text.

155. *Nollan*, 483 U.S. at 834; *supra* text accompanying note 82.

156. *Id.* at 834 n.3; *supra* note 80 and accompanying text.

quired a more direct[157] connection between an exaction and its stated objective.[158] Importantly, the Court dismissed the rational basis view that a regulation substantially advances a legitimate state interest when "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."[159]

Despite the Supreme Court's guidance,[160] the *Commercial Builders* court refused to subject the ordinance to anything other than the lowest level of review.[161] The Builders had argued that *Nollan*'s utility prong mandated the application of strict scrutiny.[162] The *Commercial Builders* Court rejected this argument, contending that exaction conditions "that the government might 'rationally have decided' to employ for a given legitimate purpose" are not in conflict with the principles of *Nollan.* [163]The court clearly failed to construe and apply *Nollan.* The court's subsequent application of rational basis scrutiny to a strict scrutiny scenario strikes at the heart of *Commercial Builders*'s validity.

3. *Goldblatt*: Reverse Alchemy

Since the *Commercial Builders* court did not ground its opinion in the heightened scrutiny precepts of the *Nollan* decision, it had to seek support further afield. To this end, the court manifested its determination to shield Sacramento's ordinance from strict scrutiny by premising its opinion on decisions relying on *Goldblatt v. Hempstead.*[164] This stance is deeply troubling because the *Nollan* court had roundly criticized *Goldblatt*'s entire approach to regulatory takings analysis. In explicating the requirement of a

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157. *See, e.g.*, Note, *Taking a Step Back: A Reconsideration of the Takings Test of* Nollan v. California Coastal Commission, 102 HARV. L. REV. 448, 450 (1988) (arguing that *Nollan* made way for the application of heightened scrutiny to regulations resulting in reduction of property value); *1986 Term, supra* note 119, at 248-49 (describing the *Nollan* Court as refusing to adopt a standard of minimum rationality and insisting that permit conditions "substantially advanc[e]" the conditions' purpose as evidence of the Court's articulation of heightened scrutiny for "regulations challenged under the Takings Clause").

158. *Nollan*, 483 U.S. at 834 n.3; *supra* note 80 and accompanying text.

159. *Nollan*, 483 U.S. at 834 n.3.

160. *See, e.g., 1986 Term, supra* note 119, at 245-46 (presenting *Nollan* as subjecting land use regulations to a "heightened standard of judicial review" and as signalling the Supreme Court's willingness to expand property rights under the Takings Clause).

161. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

162. *Id.* at 874.

163. *Id.*

164. 369 U.S. 590 (1962).

higher level of scrutiny in takings cases, the *Nollan* court stated "[t]here is no reason to believe [and] . . . some reason to disbelieve . . . that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical" and while "*Goldblatt v. Hempstead* d[id] appear to assume that the inquiries are the same, . . . that assumption is inconsistent with the formulations in our later cases."[165]

The *Goldblatt* case involved a challenge to the constitutionality of an exercise of police power in the form of a zoning ordinance. The ordinance prohibited activities on private land that had been taking place for several years.[166] The land owner challenged the prohibition as a taking without just compensation. The *Goldblatt* Court, employing rational basis scrutiny,[167] upheld the prohibition as presumptively valid in light of the *owner*'s failure to demonstrate its unreasonableness.[168] The *Nollan* court has clearly rejected the use of this type of scrutiny and its attendant allocation of burdens in takings challenges.[169] The *Commercial Builders* Court nonetheless categorized *Nollan* and lower court decisions as permitting essentially cursory[170] *Goldblatt*-type review of Sacramento's ordinance.[171]

One of these decisions is *Rogin v. Bensalem Township*,[172] upon which the *Commercial Builders* court relied for the proposition that exactions will be upheld when they are reasonably related to a legitimate public purpose.[173] In *Rogin*, a builder who had completed a substantial portion of a previously approved housing development challenged a subsequent zoning ordinance which prohibited him from completing the development as originally ap-

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165. *Nollan*, 483 U.S. at 834 n.3.

166. *Goldblatt*, 369 U.S. at 592.

167. *See supra* text accompanying notes 148-50.

168. *Goldblatt*, 369 U.S. at 596.

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

170. *See* Russell W. Galloway Jr., *Means-Ends Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV., 449, 452 (1988) (characterizing rationality review as so deferential it is named the "hands off" approach); *see also Happy Birthday, Constitution, supra* note 46, at 753-54.

171. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 874-75 ("[W]e are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance."), *cert. denied*, S. Ct. 1997 (1992).

172. 616 F.2d 680, 682 (3d Cir. 1980), *cert. denied sub nom.* Mark Garner Assoc. v. Bensalem Township, 450 U.S. 1029 (1981).

173. *Commercial Builders*, 941 F.2d at 874.

proved by the municipality.[174] In upholding the ordinance, the Court of Appeals for the Third Circuit relied on *Goldblatt* as illustrative of the Supreme Court's approach to takings questions.[175] However, the Supreme Court's singling out of the *Goldblatt* approach to takings inquiries as inappropriate[176] strikes at the validity of the *Commercial Builders* court's reliance on *Rogin*'s formulation.

Further, in expounding what amounted to a pure police power view of regulatory takings, the *Rogin* court focused on a state's power to enact exaction ordinances without regard to the justification for such state action. In essence, the police power used to further a multiplicity of government ends serves as its own justification. Under the *Rogin* formulation, any legitimate state interest[177] can justify the imposition of an exaction. This pure police power view, advanced by *Rogin* and echoed in *Commercial Builders*, does not question whether exaction ordinances are either warranted under the proportionality prong or effective under the utility prong of the *Nollan* test.[178]

The *Commercial Builders* court's reliance on *Maher v. City of New Orleans*[179] strikes a similarly dissonant chord.[180] In *Maher*, the Fifth Circuit Court of Appeals relied on *Goldblatt* for the proposition that a state's exercise of its police power to prohibit a use of property "adverse to the public weal" does not implicate the doctrine of eminent domain.[181] That position is incorrect. The *Nollan* Court noted that even proper exercises of the police power may constitute takings.[182] Under *Nollan*, the outright denial of a building permit, despite furthering a state interest by prohibiting

174. *Rogin*, 616 F.2d at 682.

175. *Rogin*, 616 F.2d at 690-92, 691 n.53.

176. *Nollan*, 483 U.S. at 834 n.3; *see also supra* text accompanying note 165; *Happy Birthday, Constitution, supra* note 46, at 753 n.96 (arguing that *Nollan* heightened the standard of review in exaction cases and that *Rogin* "would seem to violate the *Nollan* standard.").

177. Given the "broad range of governmental purposes" which qualify as legitimate state interests, "any legitimate state interest" really means *any* interest within the galactic scope of the vaguely defined police power. *See Nollan*, 483 U.S. at 834-35 (defining legitimate state interests broadly).

178. *See supra* text accompanying notes 82-85.

179. 516 F.2d 1051, *reh'g denied*, 521 F.2d 815 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

180. *Commercial Builders*, 941 F.2d at 874.

181. *Maher*, 516 F.2d at 1065.

182. *Nollan*, 483 U.S. at 835-36.

private activity that substantially impedes public purposes, may constitute an interference with private property, triggering the requirement of just compensation.[183]

In contrast, an exaction ordinance which furthers a legitimate public purpose will seldom be struck down as an uncompensated taking under the *Maher* formulation. Both the *Maher* and *Commercial Builders* decisions treat the use of private property as a potential noxious use for purposes of regulation pursuant to the police power. However, the Supreme Court's recent condemnation of the noxious use theory in regulatory takings analysis coupled with *Maher*'s reliance on *Goldblatt* further demonstrates the incorrectness of the *Commercial Builders* court's reliance on *Maher* and other cases relying on *Goldblatt*.[184]

The court's dependence on the *Goldblatt* principles was instrumental to its conclusion that the ordinance did not run afoul of the Takings Clause. But since the *Nollan* Court had clearly identified the *Goldblatt* approach to takings as aberrational, the *Commercial Builders* court's premise—and its conclusion—are quite ill-founded.

C. The Irrational Basis of Fictive Causality

Had the *Commercial Builders* court properly construed and applied the *Nollan* test, the ordinance's permit condition would certainly have been struck down under *Nollan*'s utility prong[185] for failing to "substantially advance" a legitimate government purpose. Evidence noted by dissenting Judge Beezer suggests that the Ordinance should not even have passed muster under the much weaker rational basis standard.[186] The court's failure to apply the proper level of scrutiny to the individual proportionality and utility aspects of the ordinance in *Commercial Builders* will force property holders in the future to bear the costs of the consequent irrationality.

Despite the stricter review demanded by *Nollan*, the *Commercial Builders* court opined that the ordinance was "not an unconstitutional taking" because it bore a "rational relationship" to the cost

183. *Id.* at 835-36; *see also supra* notes 83-84 and accompanying text.

184. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897 (1992) (rejecting the argument that noxious uses of property "may be proscribed by government regulation without the requirements of compensation").

185. *See supra* text accompanying notes 82-85.

186. Commercial Builders of N. Cal. v. City of Sacramento, .941 F.2d 872, 877 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

"closely associated" with the development.[187] While the *Nollan* Court did cite a range of decisions as supporting the requirement that a permit condition, *at the very least*, be reasonably related to its alleged purpose, this merely described a minimum—not a maximum—standard for proportionality analysis.[188]

The *Nollan* Court had specifically and emphatically rejected the use of rational basis scrutiny in the exaction context, then proceeded to define the nature of the reasonable relationship required in exaction cases in terms of proportionality.[189] The *Commercial Builders* court, however, did not regard *Nollan* as having given precedential content to reasonable relationship analysis,[190] preferring to treat the words "rational"[191] and "reasonable" as shibboleths for rational basis scrutiny, the approach explicitly rejected in *Nollan*.[192]

In the *Commercial Builders* court's view, the two factors supporting a rational relationship were a City-commissioned study that had "revealed" a likelihood that low-rent housing projects would "become necessary as a direct result" of the workers "associated with the . . . development," and the assessment of a "small portion of a conservative estimate" of the cost of the projects.[193] However, the *study itself* had reported "that its 'nexus' analysis does not make the case that building construction is responsible for growth."[194]

Under these facts, even if *Nollan* had not "materially changed the level of scrutiny" to be applied to exaction ordinances,[195] the very terms of the document upon which the *Commercial Builders* court premised its determination of the ordinance's rationality, and therefore constitutionality, were contradictory and thus irrational by

187. *Id.* at 874.

188. *See supra* text accompanying notes 86-88.

189. *See supra* text accompanying notes 80-81, 86-88.

190. *Commercial Builders*, 941 F.2d at 874.

191. *Cf.* Note, *supra* note 118, at 1381-82 (arguing that importing *Nollan*-type means-ends scrutiny into due process clause would give "analytical content" to the "now meaningless" 'rational relationship' test).

192. *Commercial Builders*, 941 F.2d at 874-75; *see supra* note 80 and accompanying text.

193. *Commercial Builders* at 874 (emphasis added). Even a "small portion" of a "conservative estimate" of a study, if that study is empirically suspect, as the dissent suggests, does not convert subjective opinion into objective fact. *See id.* at 877 (Beezer, J., dissenting).

194. *Id.* at 877 (Beezer, J., dissenting).

195. *Id.* at 874.

definition, failing even the government-deferential rational basis standard.[196]

Upholding the ordinance on the basis of such contradictory data was tantamount to a conclusion that the City "*ir*rationally could have decided" that the ordinance was related to its alleged purpose. Nonsense. The *Commercial Builders* court's ultra-lax standard of review invites revenue-hungry governments to observe the form of rationality by employing the "slick 'p.r.'"[197] technique of commissioning[198] nexus studies while ignoring substantive empirical components of those studies which undermine the finding of causal relationships among development, exactions and negative social impact.

The victim of the resulting fictive causality is the individual identified as the "cause" necessitating government action, e.g., the redistribution of money for low-rent housing projects, where that individual has neither control over the initiation of the system of transfer payments, nor control over future "needs" created by legislative fiat.

V. SOCIETAL IMPLICATIONS

While the *Commercial Builders* court's use of rational basis scrutiny[199] precluded substantive analysis of the ordinance's effectiveness[200] under the *Nollan* test's utility prong,[201] dissenting Judge Beezer's classification of the ordinance as "nothing more than a convenient way to fund a system of transfer payments"[202] suggests the issue of effectiveness was one on which reasonable minds could differ.

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196. *See supra* notes 148-50 and accompanying text.

197. *See Happy Birthday, Constitution, supra* note 46, at 753.

198. Keeping in mind that there are lies, damn lies, and statistics, the fact remains that rational purveyors of statistical studies have an incentive to satisfy their clients. If a client suggests a theory of causation, as the City did in *Commercial Builders*, the firm providing a causal study has an incentive to disregard alternate theories. *See Commercial Builders*, 941 F.2d at 873 (City of Sacramento commissioned Keyser-Marston Associates to study, *inter alia*, "the appropriateness of exacting fees in conjunction with [non-residential] development to pay for [low-income] housing"); Joyce Routson, *Jerry Keyser: He Turns Dreams Into 'Realty,'* S.F. BUS. J., Oct. 27, 1986, § 1, at 1 (noting principal of firm commissioned by City committed to making political deals to "make everybody happy"). Everybody, it seems, except the Builders.

199. *See* discussion *supra* part IV.B.

200. *See supra* text accompanying note 82.

201. *See supra* text accompanying notes 82-85.

202. *Commercial Builders*, 941 F.2d at 877 (Beezer, J., dissenting).

The dissent's alternative view of the Ordinance's effectiveness expands the analytical horizon, permitting the societal implications of the *Commercial Builders* decision to be determined inferentially. It is reasonable to conclude that elected representatives probably want to remain in office. It is also reasonable to conclude that elected representatives are generally sensitive to the desires of a majority of their constituents. Thus, it is hardly unreasonable to suspect that legislatures with the power to shift "burdens which in all fairness and justice, should be borne by the public as a whole"[203] onto the shoulders of politically insignificant individuals will generally do so.

The general nature of the political dynamic influencing the actions of legislatures, to whom the *Commercial Builders* court accorded virtually plenary power to dilute the property rights of individuals, may be reason enough to restrict legislative power in the takings area. However, the interests of precision compel the explication of at least five discrete incentives which could encourage legislatures to shift societal burdens from society as a whole to democratically disarmed individuals.

First, the legislature can gain the favor of a majority of citizens by providing public goods without raising taxes. Judge Beezer considered this type of motivation to be the main reason behind the ordinance.[204] Second, the legislature can arbitrarily expand its exaction power by simply expanding the list of welfare benefits it feels the majority of voters "need." The *Commercial Builders* court equated "need" with demand. It would profit legislatures to do the same. Third, the legislature's power to halt development by the imposition of onerous conditions encourages developers to influence the legislature financially.

Fourth, the legislature's discretion in exercising its exaction power encourages established property owners to influence the legislature to wield its power to exclude new entrants from a given market.[205] Fifth, the legislature can gain public favor by bringing its exaction power to bear upon rich developers, a perennially easy target. Thus, all potential development roads lead to the legislature

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

204. *Commercial Builders*, 941 F.2d at 877 (Beezer, J., dissenting); *see supra* text accompanying note 98.

205. *See* Mike McCarthy, *Housing Task Force Urges New Fees, Tax*, BUS. J. SACRAMENTO, July 11, 1988, § 1, at 1 ("[I]f [the study concludes that] development creates need for [social programs,] then [the] study [is] ridiculous on its face." (pre-*Commercial Builders* statement of Edward J. Connor, who argued for the Builders)).

because that is where the power to destroy or maintain wealth is exercised. The absence of counter-incentives to temper the legislature's exaction power exacerbates this *legiscentric* focus.

This is not to suggest that the conduct of legislators will *necessarily* be anything less than meretricious. The trusting *Commercial Builders* court regarded legislative wisdom with respect to the treatment of individuals as an article of faith. However, given the range of perverse incentives to which legislatures are exposed, further abuse of the exaction power resulting in the violation of the property rights of individuals is not only possible, it is likely. Indeed, the arbitrariness of this power is the soul of its despotism.

The *Commercial Builders* dissent succinctly identified the broad scope of this arbitrariness, warning that "new workers attracted by the new jobs associated with the new development surely will increase the demand for all manner of goods and services. If Sacramento has shown a sufficient causal connection in this case, we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services and health-care delivery systems."[206] The *Commercial Builders* decision encourages such developments.

Indeed, opening the box on linkage fees would vividly illustrate Tocqueville's concept of the profligacy of democracies.[207] Yet, the United States is not an absolute democracy, but a republic in which the Constitution is *supposed* to protect the rights of that smallest minority,[208] the individual, from infringement by the majority—a real danger 200 years ago, a real danger today. The Fifth Amendment's Takings Clause is *supposed* to preclude uncompensated seizures of property, including property in its most liquid form, money. The Takings Clause is a broken contract in the eyes of the Commercial Builders of Northern California. The Supreme Court had the opportunity to correct the grievous injustice resulting from the *Commercial Builders* decision, but it declined to do

206. *Commercial Builders*, 941 F.2d at 878 (Beezer, J., dissenting).

207. Tocqueville reasoned that governments representing those with the least property would be the least economical in voting themselves benefits. "As most of the voters then have no taxable [or takable] property, apparently all money spent in the interests of society can only profit and never harm them; and those who do have a little property easily find ways of imposing a tax [or enacting an ordinance] so that it will weigh only on the rich and bring nothing but profit to the poor, and that is something the like of which the rich cannot do when they are masters of the government." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 209-10 (J.P. Mayer ed. & George Lawrence trans., 1969).

208. AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 61 (1967).

so.[209] Thus, *Commercial Builders* stands and America's wealth-creatingresidents seem to be living in the wrong country.

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209. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).