Fordham Law Review

Volume 63 | Issue 5 Article 22

1995

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Christopher J. St. Jeanos

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Cover Page Footnote

I would like to thank Professor William Treanor for his assistance and encouragement in writing this Note.

DOLAN V. TIGARD AND THE ROUGH PROPORTIONALITY TEST: ROUGHLY SPEAKING, WHY ISN'T A NEXUS ENOUGH?

*CHRISTOPHER J. ST. JEANOS**

> The protection of private property in the Fifth Amendment . . . provides that it shall not be taken . . . without compensation. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.[1]

INTRODUCTION

A development exaction is a form of land-use regulation by which a municipality conditions the granting of a development permit[2] on the landowner's return of something of value to the community.[3] Initially, municipalities conditioned the grant of permits to develop upon the agreement to build sidewalks and streets within the proposed development.[4] Towns soon realized the effectiveness of exactions as a land-use tool and began to require developers to agree to off-site conditions before granting permits to build.[5] The use of the development exaction eventually led to municipalities accomplishing public service goals without the burden of paying for them.[6]

As might be expected, because development exactions restrict a landowner's ability to develop land and often may result in demands for title,[7] they have generated a significant amount of litigation.[8] Developers claim that exactions force them to surrender their land with-

* I would like to thank Professor William Treanor for his assistance and encouragement in writing this Note.

1. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 405 (1922).

2. The Supreme Court held the use of the police power in the form of zoning, including the issuance of permits, constitutional in 1926. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

3. See Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, Law & Contemp. Probs., Winter 1987, at 69, 70.

4. *Id.* at 70.

5. *See id.* (describing use of in-lieu fees to build parks and schools outside of the subdivision).

6. *Id.* at 71-72; *see also* Dolan v. City of Tigard, 114 S. Ct. 2309, 2313-15 (1994) (describing Tigard's use of exaction scheme as method of acquiring land for greenway and bicycle path); Nollan v. California Coastal Comm'n, 483 U.S. 825, 827-29 (1987) (describing commission's use of exaction scheme to acquire land across private property for lateral easement connecting two public beaches).

7. *See Dolan*, 114 S. Ct. at 2314 (explaining City of Tigard ordinance that required dedication of land to the city whenever a permit to develop was requested).

8. *See* John D. Johnston, Jr., *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 Cornell L.Q. 871, 873 (1967) (stating that it is not surprising that landowners have vigorously challenged exaction schemes).

out just compensation and thus violate their Fifth Amendment rights as landowners.[9] Landowners have even claimed that exaction schemes are no more than "out and out plan[s] of extortion."[10]

Claims concerning the constitutionality of development exactions first reached the Supreme Court in 1987. In *Nollan v. California Coastal Commission*,[11] the Court adopted heightened scrutiny[12] as the proper standard of review to be applied in development exactions cases. As part of that heightened scrutiny, the Court developed what is essentially a two-pronged test to determine when an exaction qualifies as an invalid use of the police power thus requiring the government to compensate the landowner for taking her property. Under the first prong of the test, a court must determine whether the exaction would withstand a takings analysis if it were enacted as an independent regulation.[13] If it would not be a taking then the exaction is a valid use of the police power and compensation is not required.[14] If the regulation would be a taking if enacted independently, it may still withstand a takings review when demanded in return for a development permit. Under the second prong of the *Nollan* test, the municipality must demonstrate an "essential nexus"[15] between a harm

9. *Id.* The Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

10. J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981).

11. 483 U.S. 825 (1987).

12. *Id.* at 837.

The Court has used three standards of review in determining the constitutionality of various legislative actions:

The lowest standard is rational basis. An appellate court reviewing a legislative act under this standard will not second guess the decision if any rational basis can be found for the particular statute. Black's Law Dictionary 1262 (6th ed. 1990).

The highest level of review is strict scrutiny. When using this standard of review a court requires the government to prove: 1) that there be a compelling government interest at stake that should take precedence over an individual right; 2) a close link between the policy in question and protection of that compelling interest; and 3) there is no less intrusive way the government can protect that compelling interest. Walter F. Murphy et al., American Constitutional Interpretation 689 (1986).

Heightened scrutiny falls somewhere between these two standards. The exact level of scrutiny required under this standard, however, is not constant and varies depending on the situation under review.

13. *See Nollan* 483 U.S. at 830-31 (explaining that had California simply required the easement without attaching it to the request for a permit, it would have been a taking). An independent regulation is one that is not attached to the request for a permit to develop. By classifying and separating independent regulations from exactions schemes, the Court is inferring that their treatment should differ. *Id.*

14. *See id.* at 834 ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.' " (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980))).

15. *Id.* at 837. In describing the rationale for the requirement of an "essential nexus," the *Nollan* Court stated:

> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. . . . [T]he Commission's assumed power to forbid con-

identified with the proposed development and the required exaction.[16] Absent an "essential nexus," a development exaction is not a valid use of the municipality's police power and requires compensation.[17]

Though it supplied the threshold test, the *Nollan* Court failed to specify how closely an exaction and harm must be related to withstand constitutional scrutiny.[18] The Supreme Court granted certiorari in *Dolan v. City of Tigard*[19] to address this issue and clarify the level of heightened scrutiny required.

Mrs. Dolan owns a 1.67 acre plot of land in the City of Tigard, on which she operates a retail electric and plumbing supply store.[20] Her land borders Fanno Creek.[21] Fanno Creek is the drainage system for excess storm-water runoff from Tigard. Mrs. Dolan applied for a permit to enlarge her store to approximately twice its previous size.[22] She also wished to increase the amount of paved parking on her premises.[23] Mrs. Dolan's proposed expansion met all applicable zoning restrictions.[24] The City of Tigard, however, refused to issue a permit for the expansion unless she yielded to two conditions: 1) she had to dedicate that portion of her land that lies within the 100 year floodplain of Fanno Creek as a greenway to the city; and 2) she had to dedicate a fifteen-foot strip of land adjacent to the floodplain for the construction of a pedestrian and bicycle pathway.[25]

These dedications were demanded pursuant to a local plan adopted to meet the requirements of Oregon's land-use planning statutes.[26] The plan required dedication of open land to, among other things, facilitate the building of a pedestrian and bicycle pathway, and improve the drainage capacity of Fanno Creek.[27] The case wound its way through the Oregon legal system and the conditions imposed on Mrs. Dolan were finally found constitutional by the Supreme Court of

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> struction of the house in order to protect the public[ ] . . . must surely include the power to condition construction upon some concession by the owner . . . .

Id. at 836.

16. *Id.* at 837.

17. *Id.*

18. *See id.* The *Nollan* Court determined that heightened scrutiny is the proper level of review in development exaction cases. The Court adopted the "nexus" test as a threshold test to determine when an exaction will survive heightened scrutiny. Under the specific facts of *Nollan*, however, even the lowest level of heightened scrutiny was not satisfied. *Id.* at 838. The Court in *Nollan* did not explain, therefore, exactly how "heightened" the scrutiny in development exactions must be.

19. 114 S. Ct. 2309 (1994).

20. *Id.* at 2313.

21. *Id.*

22. *Id.*

23. *Id.* at 2313-14.

24. *Id.* at 2314.

25. *Id.*

26. *Id.*

27. *Id.* at 2313.

Oregon.[28] Mrs. Dolan petitioned for and was granted certiorari by the United States Supreme Court. In response to Mrs. Dolan's takings challenge the Court created a standard termed the "rough proportionality" test.[29] For a development exaction to withstand the scrutiny of a reviewing court under the current standard, a municipality must prove not only that an exaction has a "nexus" with a harm created by the proposed development, but also that the exaction is "roughly proportional" to that harm.[30] As stated by the Supreme Court, the "rough proportionality" test requires a municipality to "make some sort of individualized determination that the [exaction] is related both in nature and extent to the impact of the proposed development."[31]

As a result of the *Nollan* and *Dolan* cases, a municipality must be able to justify using its land-use power to demand exactions by showing that the exaction required is related to a harm caused by the development. The rationale for the relationships required, and the tests employed by the Court as part of heightened scrutiny, can be represented in what may be termed a "mirror image" model. The model consists of three parts representing the three requirements that an exaction must satisfy to be a valid exercise of the police power under the current standard.

The first part of the model illustrates the truism that an image in a mirror can only exist as the reflection of an object. By analogy, a legitimate use of the police power (the reflection in the mirror) exists only when a harm (the object creating the reflection) exists and must be alleviated. If no identifiable harms related to development exist, no basis for a legitimate use of the municipality's land-use powers exists either.[32] This first part of the model is the easiest for municipalities to satisfy because almost all development can be shown to create at least one negative externality.[33]

The second part of the "mirror image" model posits that each reflection or image in a mirror is attached to the object it represents. Therefore, once the object is removed, the reflection cannot remain in the mirror. That is, the reflection cannot be created and then exist independently of the object that created it. This part of the model is representative of the second test in exaction cases, the required demonstration of a "nexus." The "nexus" test requires a municipality to show a connection between the use of the police power (the reflection in the mirror) and the harm caused by development (the object in the

28. Dolan v. City of Tigard, 854 P.2d 437 (Or. 1993).
29. *Dolan*, 114 S. Ct. at 2319.
30. *Id.* at 2319-20.
31. *Id.*
32. *See supra* notes 11-17 and accompanying text.
33. *See* Jesse Dukeminier & James Krier, Property 49-53 (3d ed. 1993) (explaining that negative externalities are the negative effects of a person's actions when that person makes a decision about how to use resources without taking full account of the effects that decision will have on others).

mirror), and prevents any exercise of the police power independent of the recognized harm.[34]

The third part of the "mirror image" model reflects the notion that an image in a mirror must necessarily be the same size as the object it reflects.[35] By analogy, when a state uses its police power to require an exaction (or reflection in the mirror), that exaction must be proportional to the harm (or object) that gives rise to its need. Neither of the first two requirements placed on a municipality demanding an exaction address this part of the model. Hence, some further test is required to scrutinize exactions and prevent demands for exactions that are two, ten, or even fifty times greater than what is necessary to alleviate corresponding harms. This final requirement is met by the "rough proportionality" test adopted by the United States Supreme Court in *Dolan*.

The "mirror image" model demonstrates how and why an exaction must be related in three ways to some harm caused by the development for the exaction to withstand constitutional scrutiny. While the "mirror image" model is not meant to offer conclusive proof as to the constitutional necessity of the "rough proportionality" test, it is helpful in demonstrating how exactions should be reviewed and limited by the courts. The model also demonstrates that the concerns raised and accepted as a basis for heightened scrutiny by courts and legal commentators can only be adequately addressed if all three parts of the model are followed.

The *Dolan* Court added an important new step to the method of review that a court must use in development exactions cases. The Court, however, failed to clarify the specific requirements of the "rough proportionality" test or to explain the constitutional necessity of it. This Note suggests answers to both of these questions and more fully reviews the third part of the "mirror image" model. Part I analyzes relevant state court decisions and the *Dolan* decision to determine the exact requirements of the "rough proportionality" test. Part II focuses on the necessity of heightened scrutiny in development exaction cases and demonstrates why a showing of a nexus is not enough to guard against the dangers that development exactions pose. Part III advances two additional arguments in favor of the "rough proportionality" test. The part argues that a broad reading of the Takings Clause requires exactions to be related to the harm of development in degree as well as purpose and that rough proportionality prevents the problem of "backing in." This Note concludes that the Court's decision in *Dolan* was correct because there is ample evidence to demonstrate the constitutional necessity of the "rough proportionality" test.

34. *See supra* notes 11-17 and accompanying text.

35. For this part of the model, it is assumed that the mirror in question is a standard flat mirror and does not distort the reflection in any way.

I. WHAT DOES "ROUGH PROPORTIONALITY" MEAN?

Before discussing the constitutional propriety of the "rough proportionality" test, it is necessary to determine the test's precise requirements and the extent of the burden it places on a municipality. While *Dolan* offers some guidance in addressing these issues, it does not articulate precisely what level of scrutiny is required by "rough proportionality." This part considers one of the state court standards discussed in *Dolan* and reviews the application of the "rough proportionality" test to the facts of that case to elucidate a clearer definition of rough proportionality.

A. *Review of State Court Cases Cited in* Dolan

To determine the level of scrutiny required by the test, the state standards examined by the Court in developing "rough proportionality" must be reviewed.[36] Virtually every state court, when faced with a challenge related to development exactions, has required some sort of relationship between the exaction and a harm identified with the proposed development.[37] The primary difference among the various state court standards is the level of scrutiny given to reasons advanced by a municipality in support of an exaction.[38] The standards employed by the state courts can be grouped into three basic categories: judicial deference (the lowest standard),[39] the "specifically and

36. Dolan v. City of Tigard, 114 S. Ct. 2309, 2318-20 (1994). Because no federal case was on point, and claims challenging the constitutionality of development exactions are generally tried at the state court level, the Court decided to rely upon state court decisions for guidance. *Id.* at 2318.

37. *See, e.g.*, Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204 (N.H. 1977) (finding that landowners can only be forced to pay for improvements that bear a rational nexus to a burden created by the proposed development); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673, 676 (N.Y. 1966) (stating that for condition to be upheld development must create a need for municipal expenditures); Ayres v. City Council, 207 P.2d 1, 8 (Cal. 1949) (holding that a condition precedent to a building permit must be reasonably related to a need created by that development); *see generally* Nicholas V. Morosoff, Note, *" 'Take' My Beach, Please!":* Nollan v. California Coastal Commission *and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823, 864-70 (1989) (analyzing the level of review employed in state court exactions cases).

38. *Compare* Divan Builders v. Planning Bd., 334 A.2d 30, 41 (N.J. 1975) (stating that a subdivider should "be required to pay his appropriate and only his appropriate share" of the burdens a development places on society) *with* Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (holding that "a reasonable relationship between the approval of the subdivision and the municipality's need for land is required") *and* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673, 675 (N.Y. 1966) (explaining that underlying zoning plan of town is sufficient to justify exaction).

39. *See, e.g.*, *Jenad*, 218 N.E.2d at 675 (deferring to village law as a sufficient basis for demanding an exaction); Billings Properties v. Yellowstone County, 394 P.2d 182, 185 (Mont. 1964) (stating that an act of the legislature is presumed to be valid).

uniquely attributable" test (the highest standard),[40] and the "reasonable relationship" test (the intermediate standard).[41]

1. The Judicial Deference Test

Many states require only generalized statements regarding the connection between the negative externalities of a proposed development and a required exaction. To refute a takings claim in these jurisdictions, a municipality need only state that the exaction does or could alleviate the harm of the proposed development.[42] This standard leaves little room for judicial review of exactions and places a heavy burden on the landowner to prove that the municipality's reasons for the exaction are meritless.

In one application of the judicial deference standard,[43] the Supreme Court of Montana upheld a statutory requirement that land must be dedicated to the public for park and playground purposes as a condition precedent to approval of a subdivision plat.[44] The court stated the rule that applied in these cases: "An act of the legislature is presumed to be valid . . . [and] every intendment is in favor of upholding its constitutionality."[45] The court also stated that enactments of the legislature must be upheld if any rational basis exists for them[46] and that any required nexus would be supplied by the underlying zoning plan of the municipality.[47] This case demonstrates that in jurisdictions following the deference standard, exactions will almost always survive judicial review.

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40. *See, e.g.*, *Divan*, 334 A.2d at 37-38 (stating that a developer can be required to pay for a burden placed on society but only in proportion to that burden); Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 801 (Ill. 1961) (same).

41. *See, e.g.*, City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984) (stating that use of police power to take land must be reviewed under a fact-sensitive test of reasonableness); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 448 (Wis. 1965) (explaining that a required dedication of land is constitutional if the evidence reasonably establishes that the municipality will need more land for public services as a result of the development).

42. *See Jenad*, 218 N.E.2d at 676 (adopting a rule that if a subdivision creates the need for an exaction it is not unreasonable to charge the subdivider with providing one).

43. Billings Properties v. Yellowstone County, 394 P.2d 182, 185 (Mont. 1964).

44. *Id.* at 184-87. A subdivision plat is defined as "[a] map of a . . . subdivision showing the location and boundaries of individual parcels of land subdivided into lots." Black's Law Dictionary 1151 (6th ed. 1990). By applying for a subdivision plat a landowner is asking the town to rezone her land, usually from being zoned for one residence into being zoned for multiple residences.

45. *Billings*, 394 P.2d at 185 (citing Gas Products Co. v. Rankin, 207 P. 993, 999 (1922)).

46. *See id.* (stating that a use of the permit power will only be condemned when its invalidity is proven beyond a reasonable doubt).

47. *See id.* at 189 (holding that zoning plan of municipality is sufficient to prove that the town is in fact alleviating a harm identified with development).

2. The "Specifically and Uniquely Attributable" Test

Several state courts require a precise correlation between the requested exaction and the harms that would result from development. In jurisdictions following this standard, the exaction must be found necessary to alleviate a harm that will be caused specifically by the proposed development and is not attributable to development in general.[48] The "specifically and uniquely attributable" test is the strictest standard used by courts to review a municipality's regulation of land use through its police power.

In *Pioneer Trust and Savings Bank v. Village of Mount Prospect*,[49] the Supreme Court of Illinois applied the "specifically and uniquely attributable" test. The court struck down as unconstitutional a municipal zoning ordinance requiring a flat-percentage dedication of land in return for permission to subdivide a plot.[50] The court stated that a developer of a subdivision may be required to assume only those costs that are " 'specifically and uniquely attributable' to his activity and which would otherwise be cast upon the public."[51] The court further emphasized that an application for a subdivision plat should not afford a municipality a "point of control"[52] from which it can solve all foreseeable problems facing the municipality.[53] Thus, the municipality is limited to requiring only those exactions that are unquestionably necessary to alleviate a harm caused by allowing development to proceed.

3. The "Reasonable Relationship" Test

Many state courts take an intermediate position in assessing the constitutionality of development exactions. In jurisdictions following this standard, the exaction must be shown to bear some "reasonable relationship" to the negative externalities that will be created by the proposed development. Courts will not defer to unfounded assertions offered by a municipality to demonstrate why the exaction is necessary to offset the harm. Rather, some showing is required to demon-

48. *See* J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 15 (N.H. 1981) (stating that "[i]f traffic now is greater than before because of the subdivision, then the [landowner] can be required to contribute an [exaction]" as long as it is proportional to the actual harm caused by the subdivision); Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961) ("[I]f the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the [required exaction] is permissible.").

49. 176 N.E.2d 799 (Ill. 1961).

50. *Id.* at 802-03.

51. *Id.* at 801 (quoting Rosen v. Village of Downers Grove, 167 N.E.2d 230, 233-34 (Ill. 1960)).

52. *Id.* The idea of using a harm identified with development as a "point of control" is an interesting concept. The court is attempting to guard against the use of a single harm identified with development as a basis to legitimize the unbridled use of the police power by the municipality. *See infra* note 194 and part III.B for related discussions.

53. *Pioneer Trust*, 176 N.E.2d at 801.

strate that the exaction is in fact reasonably necessary to offset an identifiable harm that will result from permission to develop.[54]

In *Simpson v. City of North Platte*,[55] the Supreme Court of Nebraska struck down a North Platte ordinance,[56] which required dedication of land to a land bank every time a landowner applied for a permit to develop.[57] The municipality planned to use the land in the land bank to widen streets in the future.[58] The court stated that to withstand judicial scrutiny, the nexus between the exaction and harm must be rational.[59] The court further explained that " '[the nexus] must be substantial, demonstrably clear . . . [and i]t must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future [create a need for the exaction].' "[60] The primary concern of the Nebraska Supreme Court was to ensure that the required exaction was indeed intended to alleviate the harm of the proposed development and was not simply a method used to avoid paying compensation when the municipality exercised its power of eminent domain.[61]

The Nebraska court's interpretation of the intermediate level of review is only one of many. The tests employed by courts adopting the "reasonable relationship" standard vary somewhat as to their specific requirements.[62] The intermediate standard encompasses the entire range of review between rational basis[63] and strict scrutiny.[64] All of the state courts, however, at least require the municipality to demonstrate an actual need for the exaction rather than allowing the municipality to refer to the legitimacy of a town zoning ordinance as a basis for demanding an exaction.[65] All of these jurisdictions also stop short of requiring a demonstration that the need for the exaction is "specifi-

54. *See* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex. 1984) (stating that the court must consider whether there is a "reasonable connection" between harm and exaction when making its determination); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 447 (Wis. 1965) (holding that a required dedication of land in exchange for a permit should be upheld as a valid exercise of the police power if evidence reasonably establishes that municipality will need additional land for parks, schools, playgrounds, etc.).

55. 292 N.W.2d 297 (Neb. 1980).

56. *Id.* at 301.

57. *Id.* at 299-300.

58. *Id.*

59. *Id.* at 301.

60. *Id.* (quoting 181 Inc. v. Salem County Planning Bd., 336 A.2d 501, 506 (N.J Super. Ct. App. Div. 1975)).

61. *Id.*

62. *Compare* Ayres v. City Council, 207 P.2d 1, 8 (Cal. 1949) (holding that a condition precedent to a building permit must be reasonably related to a need created by that development) *with* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 447 (Wis. 1965) (finding that a standard of review just shy of strict scrutiny is proper).

63. *See supra* note 12.

64. *See supra* note 12.

65. *See supra* note 41.

cally and uniquely attributable" to some harm identified with development.[66]

B. *The Meaning of "Rough Proportionality" as Stated in* Dolan

In *Dolan*, the Court adopted the intermediate level of review employed by state courts as the standard that most closely approximates the "federal constitutional norm."[67] Apart from denoting a level of review between simple deference and strict scrutiny, however, the varying state applications of the intermediate standard relied on by the *Dolan* Court fail to explain exactly what the test requires. The Court similarly failed to explain the specific requirements of its newly adopted standard. The *Dolan* Court merely identified the test as one of "rough proportionality"[68] and offered the rather general statement: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related . . . to the impact of the proposed development."[69] While the Court's description of the test offers some guidance, the question remains: What must be shown to demonstrate that an exaction is roughly proportional to the harm?

C. Dolan *Decoded: A Realistic Interpretation of "Rough Proportionality"*

The "rough proportionality" test is best interpreted to require a showing of linear proportionality[70] between the exaction and the negative externality caused by the development. The only relaxation of this requirement stems from the Court's realization that due to the nature of the harms caused by development[71] and the difficulty involved in estimating the true value of an exaction,[72] demanding a precise proportionality between the two places an insurmountable burden on municipalities. This interpretation of the "rough proportionality" test finds support in a case the Court cited as representative

66. *See, e.g.*, *Jordan*, 137 N.W.2d at 447 (adopting scaled down version of "specifically and uniquely attributable" test) (citing Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 801 (Ill. 1961)); Collis v. City of Bloomington, 246 N.W.2d 19, 23 (Minn. 1976) (adopting same standard as *Jordan* court).

67. 114 S. Ct. at 2319.

68. *Id.*

69. *Id.* at 2319-20.

70. Linear proportionality means a showing that two intrinsic values are equal in size. For a discussion of how the need for linear proportionality fits into the scheme of the judicial review of development exactions, see *supra* pp. 1886-87.

71. Very often the harm to society can be something as abstract as increased congestion or decreased sunlight. Placing an exact monetary value on these intangible harms is extremely difficult.

72. For example, determining the precise value of an exaction of a strip of land 460 feet long by 15 feet wide (similar to the one in *Dolan*, 114 S. Ct. at 2314) is an extremely difficult task, due to the limited market for such an unusual parcel of land.

of the intermediate standard and also through an examination of the application of the test to the facts of *Dolan*.

1. *Jordan v. Village of Menomonee Falls* and the Intermediate Standard

The United States Supreme Court cited *Jordan v. Village of Menomonee Falls*[73] as representative of the intermediate standard.[74] The *Jordan* court applied a level of intermediate review that leaned more closely towards strict scrutiny. In *Jordan*, the Supreme Court of Wisconsin stated: "We deem [the 'specifically and uniquely attributable' test] to be an acceptable yardstick to be applied, provided the words 'specifically and uniquely attributable to [the developer's] activity' are not so restrictively applied as to cast an unreasonable burden of proof upon the municipality . . . ."[75]

The *Jordan* court's description of the reasonable relationship test offers the greatest insight into exactly what level of review is required under the "rough proportionality" test. According to the court in *Jordan*, municipalities must show that any exaction required is necessary, both in extent and degree, to offset a harm identified with the proposed development.[76] The court adopted a standard less demanding than the "specifically and uniquely attributable" requirement because it feared that too exacting a showing would prevent certain valid land-use regulations from being passed.[77] The court did not wish to inhibit the municipality's ability to regulate land use in a valid manner simply because the expense and difficulty of demonstrating a precise link between exaction and harm was too great an obstacle to overcome.[78] By requiring heightened scrutiny, the *Jordan* court intended to eliminate only those exactions that demanded more than was necessary due to legislative whim or caprice.[79]

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73. 137 N.W.2d 442 (Wis. 1965).

74. Dolan v. City of Tigard, 114 S. Ct. 2309, 2319 (1994).

75. *Jordan*, 137 N.W.2d at 447.

76. *See id.* at 448. The court stated:

> We conclude that a required dedication of land for school, park or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks and playgrounds as a result of approval of the subdivision.

Id.

This straightforward statement describes exactly what is required under the current standard of review—an exaction can be demanded only in response to an actual harm and only in proportion to that harm.

77. *Id.* at 447.

78. *Id.*

79. *See id.* at 447-48 (describing possible situations that would meet the Wisconsin Supreme Court's standard of review and represent legitimate uses of the permit power).

The United States Supreme Court rejected the "specifically and uniquely attributable" test based on the same concerns.[80] It stated that this standard would pose too great a burden on the municipality and would be inconsistent with the Court's recognition of the importance of the police power.[81] Instead the Court adopted a scaled-down version of the "specifically and uniquely attributable" test like the one adopted by the *Jordan* court. The Court termed the standard the "rough proportionality" test.[82]

The Court stated that the exaction and the harm must be shown to be proportional.[83] That is, the level of exaction must be necessary in degree to alleviate the level of harm associated with development. The Court, however, emphasized that proportionality does not have to be shown with mathematical precision.[84] Rather, the intrinsic values of the harm and exaction must be demonstrated as roughly equivalent to one another. This rough showing serves the dual purpose of preventing legislative caprice while allowing a municipality to regulate land use validly.

2. Application of the "Rough Proportionality" Test in *Dolan*

Further support for interpreting the "rough proportionality" test to require a showing of linear proportionality, but without a dollar-for-dollar link, can be garnered from the Court's application of the test to the facts of *Dolan*.[85] The Court's first application of the test, which resulted in a finding that a private greenway was not sufficiently related to any harm that the expansion of Mrs. Dolan's store would cause,[86] was actually not a true application of the "rough proportionality" test. The Court determined that the greenway had no relation to alleviating the excess water runoff, the harm identified with the development.[87] This in fact was an example of an application of the

80. Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994).

81. *Id.* at 2319 ("We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.").

82. *Id.*

83. *Id.* at 2319-20.

84. *Id.* at 2319.

85. *See supra* text accompanying notes 20-28.

86. Dolan v. City of Tigard, 114 S. Ct. 2309, 2320-22 (1994). The *Dolan* Court stated:

> But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.
>
> . . . It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek . . . .

Id. at 2320.

87. *Id.*

"nexus" test[88] and therefore was an invalid use of the police power under *Nollan*.

The *Dolan* Court also assessed the validity of the bicycle path exaction, and in doing so, properly applied the "rough proportionality" test. The lower court had determined that the findings by LUBA[89] were sufficient to demonstrate that the bicycle path *could* have the effect of lessening traffic congestion.[90] The *Dolan* Court, in applying the "rough proportionality" test, disagreed with the lower court and held that mere assertions[91] and LUBA's use of hypothetical figures were insufficient to demonstrate that the exaction was roughly proportional to a harm identified with allowing Mrs. Dolan's development to go forward.[92] While the Court stopped short of stating that only a showing of an exact correspondence between exaction and harm would suffice, it nevertheless required the municipality to demonstrate that the bicycle path exaction would actually reduce the amount of traffic the development created.[93] The exaction and harm thus needed to be linked in a direct way, and this link needed to be proven by more than self-serving conclusory statements.

3. Requirements of the "Rough Proportionality" Test

The "rough proportionality" test requires two showings. First, a municipality must demonstrate that the harm it identifies as giving rise to the need for an exaction is *actually* created by the development in question. The municipality may not simply offer conclusory statements that the type of development in question generally results in such harms. Second, the exaction required must be shown to be necessary to alleviate no more than the identified harm.

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88. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-37 (1987). The "nexus" test requires that the exaction alleviate the same harm that the requirement of a permit was meant to guard against in the first place. In *Dolan*, denying the permit altogether would have the effect of minimizing the danger of flooding. *See Dolan*, 114 S. Ct at 2320. The same result also could have been achieved by increasing the size of the floodplain running along Mrs. Dolan's property and requiring her to set aside some of her property for that purpose. A greenway system that would allow public access on Mrs. Dolan's land, however, is not necessary to minimize the risk of flooding. It is the dedication of title to the land in this case, rather than the regulation of its use, that resulted in the lack of a nexus. Therefore, because there was no nexus, the "rough proportionality" test was not necessary.

89. LUBA is Oregon's Land Use Board of Appeals—the first place a landowner may challenge a decision of an Oregon town planning board. Dolan v. City of Tigard, 114 S. Ct. 2309, 2315 (1994).

90. Dolan v. City of Tigard, 854 P.2d 437, 443 (Or. 1993).

91. *See Dolan*, 114 S. Ct. at 2321-22. Justice Peterson of the Supreme Court of Oregon explained that "[t]he findings of fact that the bicycle pathway system 'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand." *Dolan*, 854 P.2d at 447 (Peterson, J., dissenting).

92. *Dolan*, 114 S. Ct. at 2321-22.

93. *Id.*

The "rough proportionality" test is more closely aligned with a "strict-scrutiny"[94] standard than with a judicial deference or "rational-basis"[95] standard. Put simply, the Court requires that the landowner must only compensate the public for the harms that the landowner creates. The Court decided that exactions in excess of such compensation would run afoul of the Takings Clause of the Fifth Amendment.[96] The "rough proportionality" test demands a tight fit between the harm and exaction and is tempered only by the Court's understanding of the difficulties inherent in estimating the value of the harm attributable to one landowner in a municipality of thousands.

II. "ROUGH PROPORTIONALITY" IS A NECESSARY PART OF HEIGHTENED SCRUTINY FOR DEVELOPMENT EXACTIONS

Three major arguments that weigh in favor of heightened scrutiny for development exactions also demonstrate the constitutional necessity of the "rough proportionality" test. First, some form of close scrutiny is required to ensure that municipalities are not achieving their eminent domain goals through the abuse of their police powers. Second, because of the concerns for simple fairness that underlie the Takings Clause, heightened scrutiny is required. Third, heightened scrutiny ensures that municipalities do not overreach or abuse their monopoly of power over land use. This part reviews these arguments and demonstrates how they support the constitutional necessity of the "rough proportionality" test.

A. *Police Power v. The Power of Eminent Domain*

For decades courts have struggled to define the reach of the police power.[97] Generally, the police power is understood to encompass anything that affects the public's safety, health, and morals.[98] It also

94. *See supra* note 12.

95. *See supra* note 12.

96. *Dolan*, 114 S. Ct. at 2319-20; *see infra* parts II.B, III.A (describing underlying purpose of Fifth Amendment and limitations it places on use of permit power to take land); *see also* D. Benjamin Barros, *Defining "Property" in the Just Compensation Clause*, 63 Fordham L. Rev. 1853, 1859 (1995) (arguing that the purpose of Just Compensation Clause is to guard individuals against majority tyranny).

97. *See* Berman v. Parker, 348 U.S. 26, 32 (1954). Concerning the definition and scope of the police power, the Court stated:

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . .
>
> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

Id.

98. Lawton v. Steele, 152 U.S. 133, 136 (1894).

includes the power to abate activity that is regarded as a public nuisance.[99] Beyond this cursory definition, however, the line between situations that call for police power actions and those that require compensation under eminent domain is difficult to discern. Proponents of heightened scrutiny for development exactions argue that courts must ensure that municipalities do not cross this line when they invoke their permit power.

Courts are often faced with challenges to the use of the police power to enact and enforce zoning laws.[100] Zoning laws, first declared constitutional by the Supreme Court in 1926,[101] are very rarely found to go beyond the limits of the state's legitimate use of its police power.[102] The courts, however, are more skeptical of a municipality's use of its permit power to physically take land, rather than to simply regulate its use.[103] The level of scrutiny proposed by courts and commentators when the permit power is used to take land is more exacting and demanding than the level of scrutiny previously given to exercises of a municipality's use of the police power.[104]

The Supreme Court's decision in *Nollan* illustrates that a higher level of scrutiny should be used by courts reviewing cases involving the use of the police power to physically take land. Speaking for the Court, Justice Scalia stated that the permit power may be used only when it " 'substantially advance[s] legitimate state interests.'"[105] When the reason for the initial use of the permit power is removed, the constitutional propriety of its use disappears and its purpose is converted into something else.[106] For example, if the initial purpose behind using the municipality's power was to achieve some public benefit as opposed to alleviating a harm, then the power exercised

99. *Id.*

100. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2312 (1994) (challenging City of Tigard's use of zoning plan to demand exactions); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (challenging validity of a Los Angeles ordinance prohibiting the operation of brick yards); Mugler v. Kansas, 123 U.S. 623, 653 (1887) (challenging validity of a Kansas statute prohibiting operation of brewery).

101. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

102. *See* Morosoff, *supra* note 37, at 861 (stating that courts frequently defer to municipal judgment in deciding challenges to zoning plans).

103. *See Dolan*, 114 S. Ct. at 2316 (stating that different standard applies when decision by town requires owner to deed portion of land to town and does not simply regulate land use); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (holding that where actual physical invasion of private property results there is a taking regardless of whether the action achieves an important public benefit).

104. *See Dolan*, 114 S. Ct. at 2316-20 (finding that in cases where land is taken under the permit power, the standard of review to be followed is heightened scrutiny).

105. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

106. *Id.* at 837; *see supra* pp. 1886-87.

would more closely resemble that of eminent domain.[107] Thus, the Fifth Amendment would require that the landowner be compensated.

The enormous power of the state to control land use without having to compensate landowners must not be used for "ends wholly alien to the reasons for having local governments issue permits in the first place: to prevent activities that are harmful to neighbors."[108] The exaction demanded from a developer must be connected in some way with a harm identified with development of the property.[109] In the absence of such a connection, the municipality is essentially "trying to obtain an easement through gimmickry, which convert[s] a valid regulation of land use into 'an out-and-out plan of extortion.' "[110] The absence of a nexus between the exaction and some harm, therefore, leaves the municipality with no "constitutional mooring[ ]"[111] for the use of its permit power.

Opponents of the heightened scrutiny of development exactions argue that the determination of whether this connection exists is properly left to the municipality.[112] They claim that the courts are in no position to determine whether a town is abating a harm or seizing property for some public purpose.[113] They argue that the standard of review used in exaction cases should be no different than the standard used in any other case in which the court determines whether or not a legitimate state objective is being advanced.[114]

The courts, however, need not always defer to legislative pronouncements in regard to the validity of uses of the police power.[115]

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107. *See Nollan*, 483 U.S. at 837 ("The purpose then becomes . . . the obtaining of an easement . . . but without payment of compensation.").

108. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 11-12, *Dolan* (No. 93-518) [hereinafter Institute for Justice Brief].

109. *See supra* notes 11-17 and accompanying text.

110. Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994) (quoting J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).

111. *Id.* (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987)).

112. *See id.* at 2329-30 (Stevens, J., dissenting) ("One can only hope [that the Court's opinion today does] . . . not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era."); Berman v. Parker, 348 U.S. 26, 32 (1954). The Court stated:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating . . . or the states legislating concerning local affairs.

Id. (citations omitted).

113. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 843 n.1 (1987) (stating that debatable questions as to reasonableness of exactions are not for the courts but for the legislature to determine).

114. *See id.* at 848 (Brennan, J., dissenting) ("The State's exercise of its police power for [exactions purposes] deserves no less deference than any other measure designed to further the welfare of state citizens.").

115. Lawton v. Steele, 152 U.S. 133, 137 (1894).

In one of the earliest challenges to the use of the police power,[116] the Supreme Court stated that a municipality's determination as to what is a proper exercise of the police power is not final or conclusive but is always subject to review by the courts.[117] This is especially true when a municipality uses its permit power in a way that places the municipality in danger of violating the Fifth Amendment.[118]

Courts are charged with the duty to ensure that the police power is not used to achieve what should rightfully be accomplished through eminent domain and just compensation.[119] Courts need to be, and are, concerned with the problem of "taking by subterfuge."[120] Simple deference to a legislative pronouncement that a plan is indeed a legitimate use of the police power, when that legislative body stands to profit from the plan, will do little to protect a landowner's Fifth Amendment rights.[121] Heightened scrutiny is thus a result of the judiciary's insistence that the purported reasons for an exaction are sufficiently clear and credible to counteract any suspicion of impropriety.[122] The dangers to private citizens' Fifth Amendment rights are so grave in exaction schemes that only through heightened scrutiny can courts maintain constitutional guarantees while allowing proper exactions to proceed.[123]

The test established by the Supreme Court in *Nollan* was the first step toward establishing a proper level of heightened scrutiny to be used in development exactions cases. The test requires showing a nexus between the exaction required in exchange for permission to develop and the harm to be occasioned by permitting development to go forward.[124] Under the "nexus" test, a municipality's exercise of its police power is warranted only when this nexus is demonstrated.[125] While the "nexus" test is sufficient to guard against certain dangers posed by development exactions, the "rough proportionality" test prevents a municipality from using its police powers unconstitutionally in a second way. A municipality may be able to demonstrate that an

116. *Id.* at 133.
117. *Id.* at 137.
118. *See supra* note 103 (giving examples of cases applying different standard of review in cases involving the use of the permit power to take land).
119. *See* U.S. Const. Amend. V ("[N]or shall private property be taken for public use, without just compensation.").
120. Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1612 (1988) [hereinafter *Takings*].
121. *See* Institute for Justice Brief, *supra* note 108, at 22 ("[N]o court should accept the naked assertions of the City . . . . The City has every incentive to overstate the public benefit and understate the private costs.").
122. *Takings*, *supra* note 120, at 1612.
123. *See* Morosoff, *supra* note 37, at 861-63 (stating that the use of heightened scrutiny "is the only way courts can protect landowners from overbearing municipal exactions plans" and "ferret[ ] out those municipal exactions schemes, and only those schemes, that are rightly eradicated").
124. *See supra* notes 11-17 and accompanying text.
125. *See supra* notes 11-17 and accompanying text.

exaction alleviates the harm against which the initial prohibition of development was meant to guard. A municipality, however, can still demand far more than it needs to alleviate that harm. For example, the *Nollan* Court stated that an exaction for a viewing site on Mr. Nollan's land would have satisfied the "nexus" requirement.[126] With no further review of the exaction, however, the municipality quite possibly could have demanded ten or twenty percent of Mr. Nollan's land to accomplish this. The municipality would be able to alleviate the suggested harm and satisfy the "nexus" test, but still use its police power as a means of extortion to take land unnecessary to alleviate a harm with no corresponding requirement of compensation.[127]

Once a nexus is shown, however, if courts require the municipality to demonstrate that it is taking only the minimum amount necessary to alleviate the harm, then the use of exaction schemes as a method of bypassing the compensation requirement can be curtailed. The "rough proportionality" test enables courts to stop abuses of the police power that result not only from a lack of a causal nexus, but also from a relationship in degree. Using the "rough proportionality" test, courts can effectively distinguish between valid uses of the police power and uses that more closely resemble the power of eminent domain, which requires compensation under the Fifth Amendment.

B. *Simple Fairness and Reasonableness*

The second major argument offered in support of the heightened scrutiny of development exactions is based on the notion that the state's vast powers must be constrained by limits of reason and fairness.[128] The Just Compensation Clause requires that the police power, one of the state's most invasive powers, be used in a reasonable manner because if it is not, it can lead to serious infringements of the private rights of citizens.[129] The argument posits that municipalities will not always act to uphold the requirement of reasonableness if

126. Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987).

127. The Court in *Nollan* stated that a viewing spot on Mr. Nollan's land would have had a sufficient nexus with the harm identified with allowing development to go forward, namely, impeded visual access to the ocean. *Id.* at 836. If the Commission still wished to accomplish its true goal of obtaining a lateral beachfront easement across Mr. Nollan's land, however, they could have demanded a viewing spot five feet wide and running the entire width of the property. Therefore, the Commission would have been able to accomplish its initial and improper goal despite the nexus requirement. While this example may be a bit extreme, it nevertheless illustrates how a nexus requirement alone may be insufficient to guard against abuses of the permit power.

128. *See* Institute for Justice Brief, *supra* note 108, at 3 ("A power so vast cannot be exercised with impunity, but must be subject to constraints of fair dealing."); *see also Takings*, *supra* note 120, at 1611-12 (arguing that the Supreme Court is concerned with a state using its police power to improperly take property through a transparent "subterfuge").

129. *See* Institute for Justice Brief, *supra* note 108, at 16-21 (arguing that if not used reasonably the permit power can lead to excessive and abusive forms of regulation).

their exaction schemes are given no more than deference by a reviewing court.[130] This argument stems from fears similar to those underlying the previous argument—judicial deference to exactions schemes is insufficient to uphold the requirement of reasonableness and thus protect the Fifth Amendment right against uncompensated takings.

The fundamental concern of the Takings Clause is "simple fairness."[131] Simple fairness dictates that landowners must not be subject to exactions that are wholly unrelated to the burdens and inconveniences that their conduct imposes on others.[132] This fundamental concept has become an oft-stated maxim in takings literature.[133] A court's deference to superficial findings by the same municipal body that proposed the exaction does little to ensure that a municipality wields its vast powers fairly.[134] Courts must carefully scrutinize the reasons offered by municipalities to justify the use of the permit power to take land, so that state power is used properly and landowners are treated fairly.[135]

Advocates of heightened scrutiny also use the Takings Clause as a constitutional basis for the heightened scrutiny of exactions in a second way. The Fifth Amendment requires that a state's absolute power

130. *See id.* at 17 (explaining that only through heightened scrutiny can abuses of the police power by a state be curbed).

131. *Id.* at 4. *See generally* William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 710-12 (1985) (explaining that Madison, the author of the Takings Clause, meant it to have broad moral implications and believed it necessary to ensure that property was never taken without indemnifying the owner).

132. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see* Institute for Justice Brief, *supra* note 108, at 17 ("Only by tying the level of the exaction to the harm caused by the private project . . . can these public abuses be curbed.").

133. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1171-72 (1967) (arguing that the only true test for determining whether compensation is required is fairness); E.F. Roberts, *Mining with Mr. Justice Holmes*, 39 Vand. L. Rev. 287, 293 (1986) ("The point is one of fairness: why shouldn't the public sometimes bear the costs of progress when only one or two owners of property are about to be sacrificed for the common good?").

134. *See* Institute for Justice Brief, *supra* note 108, at 22 (arguing that the city cannot be trusted to delimit the use of its permit power when it has every incentive to abuse it).

135. Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987). The Court stated:

> We are inclined to be particularly careful about [what constitutes a legitimate state objective] 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 [of the exaction] is avoidance of the compensation requirement, rather than the stated police-power objective.

Id.

See Institute for Justice Brief, *supra* note 108, at 17. Professor Epstein states: "The persistence and the power of government monopoly thus demand great scrutiny over the exercise of government powers . . . ." *Id.*

to take property must be restrained by a requirement to pay for it.[136] When a municipality uses its power to take private property, the public must bear the cost of that taking. The compensation requirement forces society to compare the value of the property taken against what they are being required to pay for it. This cost/benefit analysis is referred to as the "critical compromise."[137] The "critical compromise" ensures that property is taken only when society views the taking as worth the cost.[138]

If courts do not use heightened scrutiny, municipalities will simply create reasons to justify taking private property without paying for it. Society will no longer be forced to consider the cost of public service projects because the landowner, and not society, will bear the cost. The result is a complete undermining of the "critical compromise" inherent in the Takings Clause. This safeguard is such an important limit on the use of the state's vast powers over land use that courts must use some form of heightened scrutiny to ensure that the "compromise" is upheld.[139]

The "nexus" test helps maintain the "compromise" by assuring that exactions required by a municipality are related to some identifiable harm that will be caused by allowing development to go forward.[140] In this way, courts ensure that landowners are treated fairly by not being forced to pay to alleviate harms for which they are not responsible. But the "nexus" test only guarantees that landowners are treated fairly by ensuring that no exaction is demanded unless the landowner causes a harm. How is a court to ensure that landowners are still treated fairly in cases where the harm created by development is identified and linked to an exaction, thereby satisfying the nexus requirement? Under the "nexus" test alone, municipalities can undermine the concern for simple fairness inherent in the Takings Clause by taking more than is necessary from a landowner to alleviate the harm identified with letting development proceed. The only limit placed on the size of an exaction demanded by a municipality is the landowner's

136. *See Takings*, *supra* note 120, at 1611-12 (explaining that heightened scrutiny is the Court's method of ensuring that an exaction scheme is not a covert attempt to take land without having to pay compensation).

137. Institute for Justice Brief, *supra* note 108, at 5. Professor Epstein states:

> [A]gressive use of the state's monopoly power allows the state to undermine the critical compromise implicit in the state's eminent domain power. Under our constitutional regime, the state is allowed to force a taking so as to prevent private parties from holding out in ways that frustrate the assembly of land for useful public projects. But by the same token, the state must pay compensation to demonstrate that the public really believes that the project it undertakes is worth the private sacrifice it imposes.

Id.

138. *Id.*

139. *Id.* at 5-6, 21-29.

140. *See supra* notes 15-17 and accompanying text.

expected profit from developing the land.[141] The landowner will not be treated fairly in all cases, because the required exaction may be disproportionate to the harm she creates by developing her land.

The Just Compensation Clause dictates that the harm created by a developer, and not her expected profit, must act as the limit to the amount that a municipality can demand from the landowner under the guise of the police power.[142] The "rough proportionality" test enables courts to uphold this requirement. Once a nexus is found, municipalities must further demonstrate that the exaction demands no more than is necessary to alleviate the harm caused by development. Requiring a municipality to make this second showing protects landowners not only from being forced to alleviate harms for which they are not responsible, but also from being forced to share the profits they can realize from developing their land with the entire municipality.[143] If the concern for simple fairness as a basis for heightened scrutiny is to be adequately addressed, the "rough proportionality" test is a necessary second step in the scrutiny of development exactions.

Additionally, the "rough proportionality" test allows the "critical compromise" inherent in the Fifth Amendment to be upheld. As was evidenced in the *Dolan* case, the City of Tigard was able to demand enough property to build a greenway and bicycle path and still satisfy the requirements of the "nexus" test.[144] If the "rough proportionality" test had not led to this exaction scheme being struck down, the citizens of Tigard would have received the public projects for free. They would never have been forced to weigh the value of the greenway and bicycle path to society against the cost of obtaining the land for those projects, because it would be Mrs. Dolan who was bearing the cost. Thus, only through the dual requirements of a "nexus" and "rough proportionality" can the "critical compromise" be upheld.

C. *Prevention of Overreaching and Abuse*

Advocates of heightened scrutiny argue that rigorous judicial review guards against overreaching and the abuse of government power.[145] The tension between the protection of private property and

141. *See infra* note 161 (providing example of method of a town using an exaction scheme to make a profit).

142. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987) (arguing that for an exaction to be valid it must serve to alleviate the same harm that the permit requirement was meant to guard against in the first place); Institute for Justice Brief, *supra* note 108, at 21-22 (arguing that exaction must always be linked to some harm of a type that the municipality is entitled to prevent).

143. *See* Institute for Justice Brief, *supra* note 108, at 18 (explaining that the system of exactions can cause unfair distributional outcomes and force private parties to share their personal gains with the public).

144. Dolan v. City of Tigard, 114 S. Ct. 2309, 2320-21 (1994).

145. *See, e.g.*, Institute for Justice Brief, *supra* note 108, at 16-21 (arguing that government power can lead to abuse and excessive regulation if left unchecked by the courts).

the government's preference for improving the public condition without the burden of paying for it has led to a constant tug of war between the use of eminent domain and the police power.[146] The latest and most dangerous example of this conflict is the bundling of permits with exactions.

One former Supreme Court Justice has stated: "In a free government all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."[147] The bundling of permits and exactions, if left unchecked, could lead to the government possessing exactly this sort of power.[148] Only by tying the level of the exaction to the harm caused by the private project can these abuses be curbed.[149] If exactions are given as much deference as zoning plans,[150] municipalities will acquire an effective tool enabling them to expand the limits of their police power. Exactions could be used to solve all types of problems unrelated to the development at issue.[151] Municipalities could pass overly restrictive zoning plans banning all types of development and then back off from those plans only when they are granted exactions from developers.[152] If schemes such as these are given little or no scrutiny by the

146. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2312 (1994) (claiming that exaction demanded represented use of municipality's power of eminent domain rather than police power); Nollan v. California Coastal Comm'n, 483 U.S. 825, 830 (1987) (same); Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980). In relation to the struggle between the police power and eminent domain, the Nebraska Supreme Court stated:

> The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.

Id.

147. Joseph Story, Commentary on the Constitution of the United States 670 (1833).

148. Institute for Justice Brief, *supra* note 108, at 16-21.

149. *Id.* at 17.

150. William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 182-86 (1985); Charles Siemon, *Who Bears the Cost?*, Law & Contemp. Probs., Winter 1987, at 115, 123-26. Professor Siemon argues that restraint on the part of courts has led to the "impotenc[e] of judicial review" in the land use context. *Id.* at 126.

151. *See* Institute for Justice Brief, *supra* note 108, at 20 (explaining that "bundling permits and exactions together create[s] dangerous incentives for public officials to disregard the private costs of public projects").

152. *Id.* at 20; *see Takings*, *supra* note 120, at 1611. Professor Michelman explains:

> Let us imagine that California enacts a law simply declaring that no owner of privately held beachfront shall forbid or impede lateral public passage along a five-foot wide path bounded on the seaward side by mean high tide. The *Nollan* Court's first premise was that under the per se doctrine of *Loretto*, this, in effect, direct regulatory impressment of public easements on all privately held California littoral *has* to be a taking. Now imagine that the legislature, anticipating this response, enacts instead a law barring all private

courts, municipalities will have a huge incentive to overreach and abuse their monopoly of power over land use.[153]

Law and economics advocates offer a counter-argument. Economists argue that the swap of an exaction for a permit to develop is an efficient transfer.[154] Each party has something to trade, and society as a whole is better off when the trade occurs.[155] These economists argue that exactions will never rise to the level of extortion, because developers are free to travel to other municipalities to build.[156] The "competition" among municipalities for the best development projects will keep municipalities honest and restrict their ability to use the exaction as a tool of abuse.[157] Thus, these economists argue, courts have no business giving judicial review reminiscent of the "*Lochner*-era"[158] to what are essentially business regulations and inhibiting efficient transfers by second guessing municipalities.

In reality, permit-for-exaction bargaining may not lead to the net societal gain economists envision, and in fact, through abuses, may discourage development and result in a net loss.[159] Judicial deference to exactions schemes permits too great an incentive for municipalities to overreach when using their permit power. Although developers looking for sites can ostensibly choose with which towns they bargain,

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owners of California beachfront land from access to any public water supply or other utility service, except on condition of the owner's having dedicated a public easement of lateral passage across privately held dry sand.

Id. Professor Michelman's hypothetical demonstrates how when left unchecked, a municipality may be free to pass overly restrictive laws and back off from them only when the municipality gets something it wants in return.

153. Institute for Justice Brief, *supra* note 108, at 20-21; Morosoff, *supra* note 37, at 858-63.

154. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473, 544 (1991) (arguing that exactions represent rational decisions by municipalities attempting to maximize the benefits their citizens will receive in return for harms they must endure); Fischel, *supra* note 150, at 179-84 (presenting an economic analysis that allegedly demonstrates that municipalities should be free to sell their land-use approval to developers to increase the social benefits as well as the benefit to individual owners).

155. Been, *supra* note 154, at 544; Fischel, *supra* note 150, at 179-84.

156. *See* Been, *supra* note 154, at 509 ("The community must compete with other jurisdictions if it wants to encourage development because a developer dissatisfied with a community's exactions policy can take the project to another jurisdiction that offers better terms.").

157. *See id.* at 506-11. Professor Been refers to the constraint on municipalities as the "theory of competitive federalism." *Id.* at 506-07.

158. "*Lochner*-era" judicial intervention refers to the historic case of Lochner v. New York, 198 U.S. 45 (1905), and its progeny, which represented a period of extreme judicial activism. The Court, acting as sort of a superlegislative body, relied on the Due Process Clause of the Fourteenth Amendment to strike down approximately 200 economic regulations from 1905 until 1934. Geoffrey R. Stone, et al, Constitutional Law 802 (2d ed. 1991).

159. *See* William A. Fischel, *Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent L. Rev. 865, 883-86 (1991) (discussing certain hidden costs involved in so-called efficient exaction-for-permit transfers and how they affect society).

landowners whose property is stuck in one municipality cannot.[160] Thus, the theory of competition as a protection of private rights, at least for many landowners, is a myth. Landowners trapped in a municipality will invariably opt to develop their land to the extent that their expected profits from developing still exceed the cost of the exaction.[161] Landowners will be forced to bear burdens representative not of the harm they create by developing but only of what a municipality can demand without causing the landowner to forego developing.[162] Therefore, while it may not be the province of the courts to second guess valid business decisions made by municipalities,[163] it is always proper for courts to protect the rights of individual citizens and ensure that the specific guarantees of the Constitution are upheld.

Heightened scrutiny allows courts to locate those zoning schemes that are rightly eradicated, while not affecting legitimate zoning plans.[164] Courts are severely ill equipped to determine the validity of zoning plans and therefore give great deference to the findings of the legislatures that enacted them.[165] When a court sees a potential for abuse stemming from a zoning plan, however, it must come up with a

160. *See* Institute for Justice Brief, *supra* note 108, at 16. Professor Epstein explains: "The government which has the permit power over real estate knows full well that the owner of this property cannot exit the jurisdiction by picking up her land and moving it somewhere else." *Id.*

161. This statement reflects what any rational person would do. Faced with the option of making "nothing" or "something," the decision to take the "something" will inevitably win out. To demonstrate this example of rational economic behavior in the exaction context, consider the following hypothetical: X owns a one-acre plot of land. The acre of land, if sold in its entirety, is worth $10,000. X wishes to subdivide the land into four 100ft. x 100ft. plots and sell the plots separately to buyers wishing to build homes. Separately, each plot is worth $5000. If X is allowed to subdivide his land for separate homes and sell the plots, they are collectively worth $20,000 to him, or twice what they were worth if sold as a one-acre lot. There is, however, one problem that X has to overcome—X needs a permit from the Town before he can subdivide his land. The Town, realizing the profit X stands to make and quite aware of its right to deny X's request for a permit, enters into negotiations with X. It stands to reason that X will go ahead with his plan if an exaction is demanded that is worth somewhere between $0 and $9999, because even with that cost X still stands to make a profit. If the Town demands an exaction that costs X more than $10,000 (X's expected profit), however, then X will not go ahead with the plan. Realizing that X will make a rational decision the Town decides to demand an exaction of some value less than $10,000 in exchange for the permit to build. Because X cannot remove his land from the Town he cannot choose the Town Board with which he would like to deal. Thus, he will be stuck with accepting the Town's offer because the reduced profit he will gain from accepting the deal ($10,000 less the cost of the exaction) is still greater than not accepting the deal at all.

162. *See* example *supra* note 161. *See* Institute for Justice Brief, *supra* note 108, at 25 (stating that an exaction "must be tied to the harm caused, and not to the [landowner's] anticipated profit from an expanded business").

163. *See generally* Stone, *supra* note 158, at 796-804 (discussing the vices of the Supreme Court's decision in *Lochner*).

164. *Takings*, *supra* note 120, at 1611-12; Morosoff, *supra* note 37, at 860-63.

165. 1 Robert M. Anderson, American Law of Zoning § 3.14 (3d ed. 1986); Morosoff, *supra* note 37, at 860.

test that will force municipalities to make a clear and convincing demonstration that use of their permit power is necessary.[166] Heightened scrutiny allows courts to protect landowners from overreaching without delving into areas in which they have little or no expertise.[167]

The tests the United States Court adopts as part of heightened scrutiny, however, must be designed so that courts can protect the basic rights of individual landowners while still allowing a municipality to control land use—a necessary function in modern day society properly left to municipalities.[168] By requiring a municipality to demonstrate that an exaction required is roughly proportional to the harm created, a municipality is unable to "profit"[169] by demanding exactions worth more than the cost required to alleviate the harm associated with development. Therefore, the police power is limited in a necessary way, but a municipality's ability to use it to regulate land in a valid manner is unaffected. The "rough proportionality" test removes a municipality's incentive to overregulate to exact profits and provides courts with the tool necessary to satisfy the public and themselves that overreaching uses of the police power are ferreted out and prohibited.

III. Additional Arguments as to the Constitutional Necessity of "Rough Proportionality"

Two additional arguments add credence to the view that the rough proportionality test is necessary despite the existence of a nexus. While both of these arguments touch on concepts formerly raised by courts or commentators,[170] neither has been carefully drawn out and discussed.

166. *See Takings*, *supra* note 120, at 1611-12 (explaining that the Court's use of heightened scrutiny in *Nollan* was due to an "insistence on being satisfied that the claimed nexus was sufficiently apparent and credible to counteract suspicion of taking by subterfuge"); Morosoff, *supra* note 37, at 861 ("In reality, the rational-nexus test is the only way courts can protect landowners from overbearing municipal exactions plans.").

167. Morosoff, *supra* note 37, at 862-63.

168. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (reasserting the power of state and local governments to engage in land-use planning).

169. A recurring concern expressed by proponents of heightened scrutiny of development exactions is that exaction schemes must not be used as a means of extracting a profit from landowners. *See, e.g.*, Institute for Justice Brief, *supra* note 108, at 25; *see supra* note 161. If a municipality is able to demand more than is necessary to return the public to the status quo that existed before harms were imposed on them by development, the municipality is able to profit. That is, if the municipality demands $10,000 to alleviate a harm worth $5000, the municipality has profited by $5000. Profit is not now and never has been a valid reason or result of using the police power. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987) (stating permit power is properly used to protect public but loses its constitutional propriety if it is used for something else).

170. *See supra* parts II.B, II.A.

A. *A Broad Reading of the Text of the Takings Clause*

Initially, the notion of just compensation for the public taking of private property was not a part of the ideology upon which our government was founded.[171] Our forefathers believed that the "state's proper role consisted in large part of fostering virtue [and] of making the individual unselfishly devote himself to the common good."[172] Moreover, people had a general faith in the legislature to do the right thing.[173] The legislator possessed relatively little individual power and people saw him as largely immune from the temptation to abuse the authority to regulate land use.[174] These two beliefs made just compensation unnecessary, because landowners, certain that their land would be taken only when absolutely necessary for the public good, were willing to make the sacrifice.[175]

These beliefs did not withstand the test of time. The adoption of takings clauses at the state level evidenced the growing rejection of traditional republican ideology, a decline of faith in legislatures, and a new concern for property rights.[176] This trend culminated in the adoption of the Fifth Amendment's Taking Clause, requiring just compensation when private property is taken for a public purpose.[177]

Madison, the author of the Takings Clause, intended for it have narrow legal consequences.[178] While the clause was meant to apply only to actual physical seizures of land by the government[179] it also was intended on a higher and more ideological level "to have broad moral implications as a statement of national commitment to the preservation of property rights."[180] Madison hoped that the Fifth Amendment would symbolize the importance of private property rights in our system of government and indicate the Nation's intent to honor them.[181]

While the original purpose of the Takings Clause was to compensate landowners when their land was seized for public purposes, cer-

171. *See* Treanor, *supra* note 131, at 695-701.

172. *Id.* at 699.

173. *See id.* at 699-701 (discussing republican ideology and faith in legislatures).

174. *Id.* at 701.

175. Benjamin Franklin, Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania, *in* 10 The Writings of Benjamin Franklin 54, 59 (A. Smythe ed. 1907). Franklin stated: "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society . . . [its return to society is] to be considered . . . the Return of an obligation previously received, or the Payment of a just Debt." *Id.*

176. Treanor, *supra* note 131, at 701.

177. *See id.* at 708-13. (discussing Madison's views on the need for a compensation clause in the Bill of Rights).

178. *See* Speech Proposing the Bill of Rights (June 8, 1789), *in* 12 James Madison, The Papers of James Madison 197, 207 (1979). Madison's original version of the Takings Clause differed from the version Congress eventually sent to the states for ratification and read: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Id.* at 201.

179. Treanor, *supra* note 131, at 711.

180. *Id.* at 708.

181. *Id.*

tain more important and far reaching goals underlie it.[182] The clause is meant to elevate the possession of private property to the level of a liberty interest.[183] The United States Supreme Court has stated that "[i]ndividual freedom finds tangible expression in property rights."[184] The underlying purpose of the Takings Clause, therefore, is to protect the liberty interest in private property against government interference.[185] The Just Compensation Clause is the only clause in the United States Constitution that specifically requires the government to pay damages when it infringes upon an individual's constitutional rights. As with the entire Bill of Rights, the Fifth Amendment and the Takings Clause are meant to provide the ultimate protection of an individual right against the tyranny and will of the majority.

The underlying goals of the Takings Clause are so important because "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."[186] In *Euclid v. Ambler*, the Supreme Court relied on this concept to find that zoning, a use of the police power not previously envisioned, was nevertheless constitutional.[187] This concept must not only be applied in favor of municipalities, enabling them to use their ability to regulate the use of land in new and changing, but must also be viewed as a limiting concept. Therefore, as the presence and effect of zoning expands, regulating something as fundamental as the right to build, the reach of the Takings Clause must also be reinterpreted so that its underlying purpose is still realized.

Relying on the underlying purpose of the Fifth Amendment thus requires that the Takings Clause be interpreted to require that land taken for anything except the abatement of a harm must be considered a use of the state's eminent domain power and require compensation. The "nexus" test alone is not sufficient to enforce this requirement. To truly protect the Fifth Amendment's commitment to property rights, a municipality using its police power to take land must show not only that the land is necessary to alleviate a harm but that no more than necessary is taken. Once again, the "rough proportionality" test is the tool required by the courts to enable them to effectuate Fifth Amendment guarantees.

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182. *See supra* part II.B.

183. *See* Barros, *supra* note 96, at 1859 (arguing that courts should "interpret the Just Compensation Clause in a manner that maximizes individual liberty").

184. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 505 (1993).

185. *See* Barros, *supra* note 96, at 1857 (arguing that "the moral implication of the clause is clearly that it is wrong to promote the good of the majority to the detriment of the minority").

186. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

187. *Id.* at 387-88.

B. *The Problem of "Backing In"*

The "rough proportionality" test is necessary to prevent municipalities from creating the same dangers to individual rights that were present when no nexus was required.[188] By simply backing an exaction into a suitable harm, a municipality can satisfy the requirements of the "nexus" test but still use its police power in an underhanded or unconstitutional manner to avoid the need for compensation when land is seized for eminent domain goals.

An example of this technique will help show what is meant by "backing in." Using facts similar to those in the *Dolan* case,[189] assume that a town board decides to build a bicycle path to enhance the quality of life in the town. The path would connect two parks and run along a river. While the municipality already owns some of the land needed for the path, several points along the proposed route are undeveloped and privately owned. Assuming that the bicycle path is found to represent a suitable public purpose,[190] use of eminent domain power appears warranted and proper. To acquire the land and complete the bike path, the municipality should seize the land and compensate the owners. But the municipality does not wish to exhaust its already overburdened treasury and instead decides on an alternate plan. The town, knowing that the landowners will eventually wish to develop their valuable waterfront property, decides to wait to acquire the land until the owners request permits to develop. When the permits are requested, the town requires exactions of property adjacent to the river in return for the permits. Following this plan of action, the town is confident that it can acquire most of the privately owned lots without having to pay any compensation.

The municipality is aware that for its plan to work and withstand any *Nollan*-style takings challenge,[191] it must demonstrate a nexus between the required exaction (the land for the bike path) and some harm occasioned by the development. The town steps back and views

188. For a discussion of the main reasons offered to demonstrate the necessity of heightened scrutiny in development exaction cases, and the dangers that exaction schemes pose to individual citizen's rights, see *supra* part II.

189. For the facts of the *Dolan* case see *supra* text accompanying notes 20-28.

190. *See* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 205, 209 (1978). Professor Berger states:

> The precise meaning of the "public use" requirement has varied over time and according to the type of taking involved. The conventional statement of the historical case development holds that there are two basic opposing views of the meaning of "public use": (1) that the term means advantage or benefit to the public (the so-called broad view); and (2) that it means actual use or right to use of the condemned property by the public (the so-called narrow view).

Id. at 205 (footnote omitted).

191. Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987); *see Takings*, *supra* note 120, at 1611-12 (giving example of a municipality devising a method of taking land and avoiding paying compensation despite the nexus requirement).

the development in the abstract to ascertain the possible negative externalities that will be caused by development. The town then picks the harm most closely linked to the required exaction and uses that harm to demonstrate a nexus.[192] Using the police power to take land by backing a project into a suitable and available harm to satisfy the "nexus" requirement, the town can first decide what public service project it wishes to achieve, then avoid compensating landowners for their contributions to the project. By "backing in," the town withstands the heightened scrutiny of the courts, but nevertheless creates the same dangers that heightened scrutiny was meant to prevent.[193]

The identification of a harm that a proposed exaction will alleviate establishes a nexus, but this nexus cannot function as an "anchor"[194] to legitimize the use of police power to seize land for some unrelated public service goal. The problem of "backing in" is magnified by the fact that in today's society, most of the harms resulting from development are not "common law nuisances,"[195] but simply inconsistent uses of land termed harms by the legislature.[196] Therefore, it is easy for a municipality to create overbroad zoning laws and increase the harms associated with development. Such overbroad regulations create numerous harms to which any exaction can be linked to establish a nexus. Thus, the process of establishing a nexus and defeating a takings challenge is accomplished without difficulty.

The "rough proportionality" test alleviates this problem. Municipalities are no longer able to use a single harm associated with devel-

192. The facts of the *Dolan* case offer a good example of this technique. *See supra* text accompanying notes 20-28. The City of Tigard first decided that it wanted a greenway system and a bicycle path. Then, as permits were requested, Tigard identified harms that might be caused by the proposed developments and, working backwards, used these harms to justify exactions for their pre-determined public projects. *Id.*

193. *See supra* part II for a discussion of the dangers that development exactions pose.

194. The term "anchor" here refers to what has also been called a "point of control." *See supra* note 52. The basic idea behind this term is that a municipality must not be able to use a harm identified with development as a hook to pull itself within the realm of the police power. The identification of a single harm can not open the door to unlimited use of the permit power, but rather must only be used as a measure of how far a municipality must go to return things to the status quo.

195. Though there is no official definition of "common-law nuisance," it has generally come to be identified with the Latin phrase "sic utere tuo ut alienum non laedes," which, roughly translated, means that a person may not use their property in such a way that it injures others. Black's Law Dictionary 1380 (6th ed. 1990). Essentially, common law nuisances are those things that have historically been regarded as harmful to society such as the noise and odor of cattle grazing. Spur Industries v. Del E. Webb Development Co., 494 P.2d 700, 708 (Ariz. 1972).

196. Over the past several decades, especially since the advent and proliferation of zoning as a means of land-use control, what is considered a nuisance has changed from the "sic utere" type to legislatively determined inconsistent uses of land. *See generally* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 2 (1960) (discussing nuisances that represent no more than inconsistent uses of land).

opment as their "ace-in-the-hole" to demand a share of the developer's profits. Once a nexus is established, the "rough proportionality" test ensures that a municipality will only be able to demand enough to alleviate the harm. Thus, if excess water runoff due to an increase in impervious surface is the harm identified with development, the municipality will be limited to demanding an exaction great enough only to alleviate the specific amount of water runoff. The municipality will not be able to decide first that it would like a greenway and bicycle path and then use the problem of excess water runoff to legitimize its use of the police power to take the property it needs for these projects.

The "rough proportionality" test is necessary to remove the ability to "back in" and to ensure that state power is not abused. By requiring municipalities to demonstrate that exactions eliminate only the harm created by the development and nothing more, municipalities will not be able to use the "backing in" method to defeat valid takings challenges.

CONCLUSION

The bundling of permits with development exactions creates several grave dangers to the protection of private property that the Fifth Amendment is meant to guarantee. To ensure that exactions are not used as a means of taking land without compensating owners, courts need to carefully scrutinize exactions and ensure that they are demanded only to alleviate some harm associated with the development. The "nexus" test represents the first necessary step in heightened scrutiny, but it is not enough. Municipalities must not only show that exactions are necessary in purpose but also in degree. To ensure that municipalities correctly apply their vast powers over land use and that the guarantees of the Fifth Amendment are upheld, a showing of "rough proportionality" between harm and exaction must also be made.