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CAUSATION AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE: WHY THE CITY OF TIGARD'S EXACTION WAS A TAKING

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In *Dolan v. City of Tigard*,[1] the Supreme Court concluded that it was an uncompensated and therefore unconstitutional taking for the city of Tigard to require a landowner, Ms. Dolan, to dedicate a portion of her property in a floodplain as a public greenway as a condition for a building permit allowing expansion of her commercial property.[2] The city required that Ms. Dolan waive her Fifth Amendment constitutional guarantee of just compensation for the private property dedicated to the city. This waiver had to occur for Ms. Dolan to obtain a benefit (the building permit) that the city had no obligation to provide her.

This requirement, said the *Dolan* majority, implicated the doctrine of unconstitutional conditions. According to the Court, it is "well-settled" under the doctrine that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government."[3]

The Court is twice wrong. First, the *Dolan* case does not ground its analysis in the unconstitutional conditions doctrine. Its central focus is whether the exactions demanded by the city's permit conditions bear a required relationship to the projected impact of Ms. Dolan's proposed new commercial development.[4] This inquiry involves causation: does the exaction relate to the harm "caused" by the new development? Causation is a critical element inherent in the Takings Clause;[5] however, it does not necessarily entail application of the unconstitutional conditions doctrine.

Second, the Court is wrong when it categorizes the unconstitutional conditions doctrine as being "well-settled." It is a doctrine that has been inconsistently applied over time, varying with the nature of the right the government

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1. 114 S. Ct. 2309 (1994).

2. Another condition imposed by the city was that she dedicate a portion of her property adjacent to the floodplain as a bicycle/pedestrian pathway. This article will not consider this second condition, although the underlying analysis is the same for both.

3. *Dolan*, 114 S. Ct. at 2317.

4. *Id.* at 2318.

5. *See* U.S. CONST. amend. V.

wants the private party to waive.[6] *Dolan* is grossly misleading when it flatly states that "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government."[7] Only in certain cases, where particular constitutional rights are at stake, does the Court's statement ring true.

Professor Thomas Merrill's article addresses these two difficulties with the *Dolan* case and the unconstitutional conditions doctrine. He concurs that the doctrine, as currently understood, is so unclear and muddled that its explanatory power is worthless when used to consider waivers of constitutional rights in exchange for discretionary governmental benefits.[8] Rather than giving up on the doctrine, however, Merrill sees in *Dolan* some important scattered clues about its underlying rationale. From these slim pickings he constructs a theory of the unconstitutional conditions doctrine that is based on the assumption that the doctrine has primary applicability in one situation: when the private exercise of a constitutional right (that would have to be waived in order to receive the discretionary government benefit) generates positive externalities benefitting third parties, making it a "public good."[9]

As a public good, the right is valuable to persons outside the government/right-holder relationship, while it is simultaneously undervalued by the right-holder.[10] As a result of this latter consequence, when the right-holder is considering whether to waive the right, the right-holder will fail to take into account the positive externalities produced by the exercise of the right.[11] Under Merrill's theory, the unconstitutional conditions doctrine is a direct response to this tendency of private parties. By making the condition—the waiver of the right—unconstitutional, courts protect the "public goods" component of the exercise of the right.

Merrill's argument is a major contribution to a theoretical understanding of the unconstitutional conditions doctrine. He makes an impressive case that the presence or absence of external benefits associated with the exercise of a constitutional right will explain why courts have vigorously enforced the doctrine in some situations, while ignoring it in others. Merrill convincingly demonstrates that property rights protected by the Fifth Amendment are a category of rights for which the unconstitutional conditions doctrine is particularly relevant. When the exercise of property rights is at stake, Merrill shows that there are external benefits associated with the *non*-waiver of the right to just

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6. *See Dolan*, 114 S. Ct. at 2327 n.12 (Stevens, J., dissenting); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 620 (1990). As Professor Thomas Merrill points out, there is a "fairly robust version of the doctrine in connection with First Amendment rights and certain separation of powers controversies; a much weaker version prevails with respect to reproductive rights and criminal procedural rights." Thomas W. Merrill, Dolan v. City of Tigard: *Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 860-61 (1995).

7. *Dolan*, 114 S. Ct. at 2317.

8. Merrill, *supra* note 6, at 859.

9. *Id.* at 862, 870.

10. *Id.* at 870, 875.

11. *Id.* at 871.

compensation when property is threatened with a "taking" by the government. Since the Takings Clause, and its just compensation requirement, supply a pubic good in situations where government is pressuring property owners, Merrill argues that the Court was correct in *Dolan*. When it prohibited Ms. Dolan from having to waive the right to compensation in order to receive her building permit from the city of Tigard, the Court was protecting a valuable public good.

This article considers Professor Merrill's "public goods" model as an explanation for the Court's Fifth Amendment defense of private property rights in the *Dolan* case. Part I first summarizes Merrill's thesis. Part I then suggests that the notion of public goods does far more than provide a coherent rationale for many unconstitutional conditions cases where property is *not* involved. When the police power is exercised to affect property uses, the public goods idea is an explanation for why private property should be relatively free of regulation, more so than simply a justification for why just compensation should be paid when regulations take property. In other words, in a private property case, the public goods model is better suited to explaining why there should be more vigorous constitutional protection of the private exercise of property rights *before* just compensation is required, when the property owner is facing the prospect of excessive government regulation.

Part I further suggests that the real positive externality brought about by the Takings Clause is not primarily the external benefit produced by the just compensation requirement. According to Merrill, this is the benefit that flows from making government pay for property it takes, as opposed to simply permitting government to acquire property without any payment.[12] Part I argues that the main public good that emerges from the Takings Clause is the positive market consequence that results when government is deterred by the Takings Clause, and private parties use and develop property free from unreasonable government interference.

Part II offers an explanation for the Court's decision in *Dolan* that is different from Merrill's read on the case. If the unconstitutional conditions doctrine is implicated at all in *Dolan*, it is not Merrill's public goods model that the Court uses, but rather it is the government "coercion" theory that undergirds the majority opinion. This theory holds that a private party agreement with the government to waive constitutional rights should not be acceptable when there is no legitimate consent by the private party.[13] To the extent the doctrine has applicability in *Dolan*, it is Ms. Dolan's inability to give voluntary consent to the waiver of the Fifth Amendment right that is most troublesome to the Court, and not some protection of public goods inherent in just compensation.

But the *Dolan* case is not, in fact, an unconstitutional conditions case. It is a takings case. And as a takings case, its importance lies in the Court's explicit adoption of an element of takings analysis first articulated by Justice Scalia

12. *See id.* at 882-83.
13. Sullivan, *supra* note 6, at 1450-56.

in his dissent in *Pennell v. City of San Jose*:[14] causation. Justice Scalia argued that there may be a taking if a land use restriction imposes a public burden on a private party who did not cause the burden.[15] This is what the city of Tigard tried to do with Ms. Dolan when it demanded that she give property to the city in exchange for a building permit, even though there was no evidence that her expanded use of her property under the building permit would cause the degree of harm necessitating the dedication. It is the absence of the necessary causative connection between dedication requirements and her proposed use of her property that explains why the Supreme Court concluded the city had violated the Takings Clause.

The city of Tigard did not necessarily violate the unconstitutional conditions doctrine. Its error was to act inconsistently with the central purpose of the Takings Clause. As one Supreme Court case declared, the Takings Clause is intended "to bar the government [the city of Tigard] from forcing some people alone [Ms. Dolan] to bear public burdens [the dedication] which, in all fairness and justice, should be borne by the public [the taxpayers of Tigard] as a whole."[16]

I. PUBLIC GOODS AND POSITIVE EXTERNALITIES INHERENT IN BOTH THE RIGHT TO JUST COMPENSATION AND THE PRIVATE EXERCISE OF PROPERTY RIGHTS

A. *Unconstitutional Conditions and the Merrill Public Goods Model*

One of the great difficulties with the unconstitutional conditions doctrine is that it is inconsistent with one basic tenet of a free market society: Individuals should be able to enter into arrangements with others where they trade their rights, to receive in return, some valuable benefit. The unconstitutional conditions doctrine prevents this exchange by invalidating some transactions involving the relinquishment of constitutional rights in exchange for a discretionary governmental benefit. For example, in the case of Ms. Dolan, she had to give up her right of just compensation for dedicating land to the city in exchange for a building permit. Professor Merrill takes issue with the two most commonly cited grounds for not enforcing such agreements, which in turn have become rationales for explaining the unconstitutional conditions doctrine.

First, it has been argued that agreements which call for an individual to waive a constitutional right should not stand because the individual waiver must somehow have been coerced, thereby making the consent involuntary.[17] Merrill believes this rationale is problematic because when an individual waives a constitutional right, it is because that individual believes the government's discretionary benefit obtained in exchange for the waiver will be

14. 485 U.S. 1 (1988) (Scalia, J., dissenting).
15. *Pennell*, 485 U.S. at 20-22.
16. Armstrong v. United States, 364 U.S. 40, 49 (1960).
17. *See generally* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993); *see also* Sullivan, *supra* note 6, at 1428-50.

more valuable than the right that is given up.[18] Otherwise, the individual would never release the right. This is not coercion; this is precisely why individuals enter into contracts, which is to be better off after the exchange than before.

Second, the unconstitutional conditions doctrine also has been justified as a response to the unequal bargaining power held by the government when it alone is able to supply the benefit sought by the private individual. If government is the only supplier of a particular benefit, then its monopoly position prevents individuals from seeking alternative offers in a normally competitive market. As a result, the government is in a position to dictate the terms for acquiring the benefit, which may include requiring the individual to give up a right otherwise available under the Constitution.[19]

Merrill, however, does not believe this "government monopoly" theory is a satisfactory explanation. This is in part because (1) the government does not always wield monopoly power with respect to the benefit sought (e.g., in the employment market),[20] and (2) gross disparity in bargaining power, even between the government and a private party, should not necessarily justify invalidating waivers of constitutional rights procured in exchange for the granting of a nondiscretionary benefit.[21]

Professor Merrill's alternative explanation for the unconstitutional conditions doctrine is based on the assumption that some constitutional rights are, when exercised by private parties, public goods.[22] A public good is an economist's term for the consequence that follows when a private party's action benefits not only the private party, but also third parties. Merrill theorizes that some constitutional rights are like public goods because the exercise of that right by private parties advantages the right-holder *and* generates positive externalities that benefit parties who are not directly involved with a party's exercise of the right. For example, the First Amendment right of free speech may be considered a public good, since its exercise by even one person will eventually supply information to other persons, who will benefit thereby.[23]

When a constitutional right is a public good, any external benefits associated with the exercise of the right will tend to be overlooked by the individual right-holder. The individual owning the right will not be interested in the public benefits that are incidentally supplied if the right is exercised. Such external benefits are usually irrelevant to the right-holder, who will only be concerned about whether the exercise of the right will be of benefit to that

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18. *See* Merrill, *supra* note 6, at 859-60.

19. *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1, 8 (1988).

20. Merrill, *supra* note 6, at 860.

21. *Id.* at 869-70 n.59; *see also* United States v. Mezzanatto, 115 S. Ct. 797, 805-06 (1995) ("gross disparity" in bargaining power between government and individual does not justify invalidating waivers procured as part of plea bargaining process).

22. Merrill, *supra* note 6, at 870-72.

23. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558-60 (1991).

right-holder. As a result, if the right-holder believes that the costs of waiving a constitutional right are outweighed by the advantages of receiving a nondiscretionary governmental benefit in return, the right-holder will waive the right, even if the public is made worse off by the non-exercise of the right.

Professor Merrill argues that the unconstitutional conditions doctrine is a direct response to this tendency on the part of private parties to undervalue the exercise of some constitutional rights. The doctrine prevents the individual waiver of the right, even when the right-holder is better off, if the waiver could result in a suboptimal supply of the external, third-party benefits that would follow if the right were exercised.[24]

Professor Merrill goes on to make a persuasive case that the public goods theory helps to explain why courts vigorously apply the unconstitutional conditions doctrine with respect to some rights, but not to others. The reason for this varying application is due to a judicial perception that the level of public benefits differs from right to right. When a right has an obvious public goods dimension (e.g., the right to free speech), the doctrine will be enforced and waivers of the right voided. When the right is thought to provide fewer public benefits (e.g., the right to trial by jury), the doctrine will be less vigorously enforced, regardless of how highly valued the right is to the individual.[25]

When Merrill's theory is applied to the *Dolan* case, the question is whether the Fifth Amendment right to just compensation for takings of private property has a public goods component. This would be so if unrestricted private party waivers of the right, in return for a discretionary government benefit (e.g., a building permit), could result in a suboptimal supply of some public benefit. Concern about this negative consequence would then explain the *Dolan* result, which found the city of Tigard's condition (Ms. Dolan's dedication of land without just compensation) to be unconstitutional. The task for Professor Merrill is identifying the public benefit realized by the just compensation requirement.

He rejects as unsuitable to his public goods model an array of theories that take into account third-party effects. Among the arguments he discards are: (1) the idea that government action should not disproportionately burden some individuals with no compensation;[26] (2) the fear that demoralization costs will be incurred when private parties witness other private parties who are not offered compensation for the taking of their property;[27] and (3) the need to prevent uncompensated takings that, in effect, change the preexisting pattern of wealth distribution and give rise to rent seeking behavior.[28]

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24. *See* Merrill, *supra* note 6, at 871. Professor Merrill acknowledges that while other commentators have recognized the public goods argument, they have not accepted it as a general theory of unconstitutional conditions. *Id.* at 871-72 n.70.

25. *Id.* at 874-75.

26. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

27. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

28. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 306-24 (1985); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561 (1986).

There is, however, a third-party effect that he does accept as a justification for applying the unconstitutional conditions doctrine to the Takings Clause—the argument from "fiscal illusion."[29] This argument assumes that if government seizes property without paying, it will overuse its taking power and acquire more property than it needs (or is economically efficient to have under government control). This will lead to the fiscal illusion that the government is saving taxpayer dollars that it otherwise would have to spend to compensate private property owners, when, in fact, the government will have acquired excessively large stockpiles of property, which could have been deployed in a more efficient way if the property had remained in private hands. The public good that comes from the right of just compensation is the more efficient allocation of resources and property that will occur if government has to pay for private property, which will tend to keep property in private hands until it is worth the market price to government officials. Conversely, if private property is acquired through waiver of the right to compensation, this property will become susceptible to misallocation by the new government owners.

Professor Merrill posits that application of the unconstitutional conditions doctrine simultaneously helps ensure that resources are put to the best uses through normal market forces and prevents the threat of possible government misallocation of resources.[30] The doctrine accomplishes these dual goods by imposing limits on when waivers of the just compensation right will be acceptable. Merrill sees the *Dolan* case as establishing one such limit—after *Dolan*, government exactions demanding waivers of the right to just compensation must bear a required relationship, or nexus, to the projected impact of the property use that will be permitted after the property owner receives the government benefit.[31]

B. *Public Goods and the Exercise of Private Property Rights*

Professor Merrill's public goods model certainly advances our understanding of the unconstitutional conditions doctrine. His model serves as a more satisfactory explanation of how and why the doctrine has been used by courts than many of the competing theories that have been advanced by commentators.[32] However, a public goods rationale for when the Takings Clause is applicable to property development exactions may simultaneously explain not enough and too much.

This section of Part I considers why his argument does not go far enough. The thesis advanced below is that Merrill's public goods theory should be

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29. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 51 (3d ed. 1986); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 620-22 (1984).

30. Merrill, *supra* note 6, at 883.

31. *Id.*

32. See, for example, the theories described in Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989); Lynn A. Baker, *The Price of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); Epstein, *supra* note 19; Sullivan, *supra* note 6.

extended beyond the unconstitutional conditions doctrine to act as a check on all police power exercises, even those not utilizing exactions, that interfere with the development of private property rights. Part II considers how his theory goes too far, particularly with respect to the *Dolan* case. *Dolan* is best understood not as an unconstitutional conditions case employing a public goods theory, but as a takings case, the significance of which lies in its explicit adoption of causation as a critical factor when exactions are imposed in private uses of property.

1. Positive Externalities Associated with Private Property Use

Professor Merrill correctly points out that when a private action becomes a public good, four consequences follow.[33] While he discusses these effects in the context of the constitutional right to just compensation, the same effects are present *before* just compensation is awarded, when private parties use and develop property largely free from government interference.

The first characteristic of a public good is that a private party's behavior will have a positive effect on third parties. In the case of property owned by a private party, sales or transfers of that property to others may not only beneficially affect the seller and the purchaser, but may also positively impact on others. For example, the new owner might use the property in such a way that permits consumers to enjoy a necessary commodity (e.g., an oil and gas lessee in a lease relationship with the lessor-owner develops an energy resource that is available to third parties to heat homes or drive cars). Even when there is no conveyance, the development of property by an owner has repercussions beyond the owner when the use makes the property productive, not static. For example, water in a river owned by a party who never uses the water may be far less valuable than water in a river diverted by the owner in order to transform a desert into a city.

Second, the democratic political process will tend to overregulate private property uses. Overregulation of private property may occur for two reasons. The political process wishes to curb any social costs or negative externalities associated with the property use. For example, if wildlife is valued by a society, uses of property that adversely affect wildlife will be perceived as a cost, and these uses of property may be restricted. If such regulation becomes overly zealous, however, it becomes difficult to organize those who benefit from the adverse use to fight the regulations. This is because those beneficiaries will assume that the property owner will do battle with the government, and they will be able to prevail on the owner's effort, rather than mounting their own attack.

Third, if property use does create a public good and the property owner contemplates a challenge to the overregulation of the property, that owner will ignore any external benefits associated with the use of the property. This is because property owners are generally individuals who seek to maximize their *own* interest. If an owner's use of property will have private value, it is only

33. Merrill, *supra* note 6, at 870-72.

that private value that will be weighed against the costs of resisting regulations of property. It will be irrelevant to the decision that there may be other, more public values present if the property is freed from regulatory restrictions.

Fourth, property owners adversely affected by regulation may choose not to resist regulatory restrictions in court. This will occur quite often whenever the cost of such a challenge exceeds the benefits of using the property freely. Such benefits will not include the public goods component of the property use because such external benefits will be ignored by property owners concerned only with their own interests. The cumulative effect of individual decisions by property owners not to resist overregulation will be a suboptimal supply of the external benefits associated with the exercise of property rights.

The law has not been insensitive to these four realities of private property. One legal response, which Professor Merrill correctly cites, is the common law rule against restraints on alienation.[34] This rule is intended to prevent third parties from being deprived of the external benefits that flow from allowing property to be transferred to its highest and best use.[35] The constitutional law response was the Takings Clause of the Fifth Amendment. Although its text suggests that the Takings Clause was designed to ensure that government paid owners for private property it took, its more important role is to threaten the just compensation sanction, and thereby discourage unnecessary regulation of private uses of property.

The regulatory takings doctrine can thus be seen as preserving the external benefits for third parties that result from reducing regulation of private property. When regulatory excesses are deterred by the credible threat of a vigorously enforced Takings Clause, the public benefits of private uses of property are maximized. When regulation of property is unchecked, which occurs if Takings Clause challenges do not succeed, and excessive use of the police power is thereby not deterred, the result is a suboptimal supply of a public good—the third party benefits associated with property made productive by private enterprise.

2. The Role of the Takings Clause in Protecting the Public Goods Component of the Property Use

When the relevant public good is the private exercise of property rights, and not, as Professor Merrill suggests, the governmental payment of just compensation to private parties after their property has been taken, then the three justifications for the Takings Clause discounted under Merrill's public goods model appear more persuasive.[36]

The first of these justifications, cited prominently in the *Dolan* opinion, prevents the government from disproportionately burdening one party or a very small number of individuals, when others are not subject to equivalent

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34. *Id.* at 872.

35. Many 19th Century statutes similarly sought to protect private property rights from regulations that did not serve the goal of economic growth. *See* JAMES W. HURST, LAW AND THE CONDITIONS OF FREEDOM: IN THE NINETEENTH-CENTURY UNITED STATES 7 (1956).

36. *See supra* notes 26-28 and accompanying text.

burdens.[37] This rationale assumes that when the action of one party (e.g., the owner of private property) generates positive benefits enjoyed by third parties (e.g., those who benefit from the productive use of property), it is wrong, if not stupid, to saddle the generator of the public good with a regulatory burden. It is preferable instead to share the cost of the regulation with others (including those who benefit from the public good). Under this rationale, Ms. Dolan should not have to bear the entire burden of providing, free of charge, a public greenway to recreational visitors trampling along the city of Tigard's floodplain.

A second justification for the Takings Clause is that it reduces what Professor Frank Michelman calls the "demoralization costs" which arise from the realization that no compensation is offered for a taking.[38] Michelman is commenting on the effect that excessive regulation of property has on other property owners who witness, but not directly experience, the regulatory impact. When property owner A (Ms. Dolan's neighbor) sees that property owner B (Ms. Dolan) cannot develop B's property because of regulatory hurdles (an exaction requirement), A may be less inclined to develop A's property (A will be "demoralized"). This means that third parties will be denied the public goods component not just of B's property, but also of A's.

A third justification for the Takings Clause is to prevent the government from changing the preexisting distribution of wealth.[39] Governmental action can bring about this result if it forces or authorizes exchanges of property between property owners without compensating the losers for their loss. For example, if a county authorizes a surface owner to build a subdivision above a subsurface owner's underground coal estate, thereby preventing the subsurface owner from removing the coal, the county will have taken from the subsurface owner and given to the surface owner. Since the subsurface owner's use of the coal would have benefitted third parties (e.g., consumers of electricity, where the electricity is generated at coal-fired power plants), government action that causes the coal to remain in the ground will have caused an undersupply of a public good. The Takings Clause is intended both to discourage such government-caused exchanges and, if the exchange does occur, to compensate those whose property has been sacrificed in order to benefit others.

The public goods model thus works well to describe how and why the Takings Clause operates to encourage productive uses of private property—for example, by discouraging the government from employing its police powers to overregulate such uses. The public good at stake is the positive externality associated with private land and property use. However, it is not, as Professor Merrill suggests, the public benefit that follows from preventing the government from acquiring (without compensation) an inefficiently large quantity of private property.

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37. Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994).
38. *See* Michelman, *supra* note 27, at 1214.
39. *See* EPSTEIN, *supra* note 28.

II. UNCONSTITUTIONAL CONDITIONS AND CAUSATION IN THE *DOLAN* CASE

If Professor Merrill's public goods model is a persuasive explanation for why private property uses should be constitutionally protected from overregulation, does his model also explain why the Court decided that the city of Tigard's exactions were a taking? The initial section of Part II argues that, to the extent the *Dolan* case involved the unconstitutional conditions doctrine at all, it was the individual coercion/government monopoly theory that caused the Court to activate the doctrine and not Merrill's public goods theory. The second section of Part II suggests that the *Dolan* case is not an unconstitutional conditions case at all, but rather a case addressing the causation component of the Takings Clause.

A. *Unconstitutional Conditions and the* Dolan *Case*

Professor Merrill's public goods model is based on the premise that the two most commonly used justifications for the unconstitutional conditions doctrine are unsound. These are, first, the coercion theory (i.e., waivers of constitutional rights should not be enforced because the waiver was coerced),[40] and second, the government monopoly theory (i.e., since the government is the sole supplier of the discretionary benefit sought, and since the private party cannot proceed with its plans without this benefit, the private party's waiver is not voluntary).[41]

Both of these theories assume that the unconstitutional conditions doctrine is appropriate when the waiver of the constitutional right is not consensual. Contrary to what Merrill assumes, however, coercion, government monopoly, and lack of genuine consent serve as important justifications for the takings holding in *Dolan*. They also underlie the earlier Supreme Court case involving exactions—*Nollan v. California Coastal Commission*.[42] That the unconstitutional conditions doctrine has any relevance at all to these cases is due to the Court's belief that in both *Nollan* and *Dolan* there was no true consent due to defects in the private party/government bargaining process.

In *Nollan*, the Court considered whether a permit condition exacted by a government agency was a taking. The Court implicitly relied on the unconstitutional conditions doctrine when it found that a land dedication exaction was unconstitutional because the private party would have had to give up the right to just compensation in order to receive the permit.[43] The unconstitutional conditions doctrine was enforced in *Nollan* when the Court realized that the condition, which the Court characterized as "the yielding of a property interest" by the private party, "cannot be regarded as [a] voluntary 'exchange.'"[44] Since the permit-for-a-right exchange was involuntary, and since the government had a monopoly on the supply of permits, there was no real consent to

40. *See* Merrill, *supra* note 6, at 859-60, 869-70.
41. *Id.*
42. 483 U.S. 825 (1987).
43. *Nollan*, 483 U.S. at 831, 842.
44. *Id.* at 834 n.2.

the waiver of the right. The Court later underscored the coercion element when it called the exaction condition "not a valid regulation of land use but 'an out-and-out plan of extortion.'"[45]

Similarly, in *Dolan*, the Court viewed the conditions imposed on Ms. Dolan as "not simply a limitation on the use [of the property], but a *requirement* that she deed portions of the property to the city."[46] The city is not merely negotiating with her as part of a voluntary exchange of her rights for a government permit; the city's offer is seen as "exactions *demanded* by [its] permit conditions."[47] That Ms. Dolan is being coerced is also suggested by the Court's choice of language when it describes the position she is put in by the city: "[T]he city has forced her to chose between the building permit and her right under the Fifth Amendment. . . ."[48] If she waives this constitutional right, her "right to exclude would not be regulated, it would be eviscerated."[49]

Such statements in *Nollan* and *Dolan* demonstrate that in these important property rights cases, the Court is not interested in Professor Merrill's public goods model. Rather, it is concerned with the degree of leverage and power the relevant government actor has over the private property owner. This power becomes coercive because (1) only the government can supply the permit that is necessary for the intended private property use, and (2) the private party is faced with a choice of evils—either the constitutional right is relinquished or the property cannot be developed as planned. It is this aspect of the exactions in *Nollan* and *Dolan* that was most troublesome to the Court, because it meant that any waiver could not be truly consensual.

B. *Causation: Why the City of Tigard's Exaction Was a Taking*

Although the *Dolan* Court (and to a certain extent the *Nollan* Court) is concerned with the coercive dimensions of the government's actions, the ultimate takings holding is not based on the fact that the condition, Ms. Dolan's waiver, was coerced by the government. Nor does the Court in *Dolan* attempt to ground its analysis in the unconstitutional conditions doctrine. There is only one sentence in the opinion that even mentions the doctrine.[50] The case focuses on the Takings Clause and whether the city's exaction has caused a taking of Ms. Dolan's property. What makes *Dolan* an important decision is not that it advances our understanding of the unconstitutional conditions doctrine, but that it contributes enormously to our understanding of how the Takings Clause operates.

The central argument in the *Dolan* case was that the city had not identified any special burdens that would be caused by Ms. Dolan's expansion of her commercial property, and that would therefore justify the particular dedica-

45. *Id.* at 837.
46. *Dolan*, 114 S. Ct. at 2316 (emphasis added).
47. *Id.* at 2318 (emphasis added).
48. *Id.* at 2317.
49. *Id.* at 2321.
50. *Id.* at 2317.

tions required from her but not the general public.[51] The *Dolan* Court agreed, and engrafted on the Takings Clause a requirement that there be a reasonable and sufficient relation between the government condition and the harm the development would cause. The *Dolan* rule, which should now be a component of takings analysis (but not necessarily the unconstitutional conditions doctrine) is simply this: "The city [the government actor] must make some sort of individualized determination that the required dedication [the condition] is related both in nature and extent to the impact [caused by] the proposed [private party] development."[52]

The essence of this *Dolan* rule is that there must be a "cause and effect" relationship between the social evil that the exaction or regulation seeks to remedy and the property use that is either (1) subject to an exaction requirement, or (2) restricted by a regulation. If this causative link is absent, as it was in *Dolan*, the government action may be an unconstitutional taking.

There is a good reason for adding a causation requirement to the Takings Clause. In one frequently cited case, *Armstrong v. United States*,[53] the Court opined that the primary purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[54] This principle prevents the government from disproportionately burdening or picking on one person or a small number of individuals when other persons similarly situated are not subject to similar burdens. This principle has been repeated in several recent Supreme Court takings cases, including *Dolan*. Indeed, so often is it recited by the Court that Professor Merrill correctly notes it has "taken on the quality of a canonical recitation."[55]

The *Armstrong* anti-discrimination principle helps courts determine if a government action (either a condition or a restriction) is a taking. On the one hand, if an owner's use of property is the cause of a social problem, then government action conditioning or restricting that owner's use of the property will be linked to eradicating the problem, and it cannot be said that the property owner has been unfairly singled out. In such a situation, apart from a denial of all economic use,[56] or a physical occupation,[57] there is no certain protection afforded by the Takings Clause. But if the condition or restriction is imposed on a property owner who has not caused the problem that the government action is designed to correct, then the owner is being singled out and the Takings Clause might be violated.

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51. *Id.* The other half of Ms. Dolan's argument was that the city had not identified special benefits conferred on her that would justify the exaction.

52. *Id.* at 2319-20.

53. 364 U.S. 40 (1960).

54. *Armstrong*, 364 U.S. at 49. The *Armstrong* rationale is intended to skewer the assumption (sometimes known as the Robin Hood approach) that property owners can be made to bear disproportionate costs because of their wealth. *See* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 152 (1995).

55. *See Dolan*, 114 S. Ct. at 2316; Merrill, *supra* note 6, at 880 n.100.

56. Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992).

57. Loretto v. Teleprompter Manhattan CATV Corp., 448 U.S. 419 (1982).

The *Dolan* case is an example of how the Takings Clause becomes implicated when there is no demonstrable causative connection between a government action that has taken the form of a condition and the harm produced by the use of private property. The harm that would be caused by the proposed expansion of Ms. Dolan's commercial property was the resulting increase in the amount of impervious surface, that in turn would increase the quantity and rate of storm water flow from her property onto a floodplain. Given this harm, the Court said that the city could require her to not build in the floodplain, because if she had, it might have enhanced the prospects of flooding in the city.

But the city demanded more: "[I]t not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along [a river] for its greenway system."[58] The Court reasoned that, while Ms. Dolan's proposed expansion would cause more water to run off her property than before, it would not cause a need for the city to acquire her property, free of charge, along the river. If she kept her property in the floodplain in a natural state (which she intended to do), then the city's legitimate interest in reducing flooding would be accomplished. But, if she had to dedicate this property to the city, the city would have gained ownership of a free recreational pathway for its greenway system. She was being "singled out" to bear the burden of providing private land for a public floodplain easement when she had not caused the city's need for acquisition of the easement. This was a taking.

This causation rationale behind a takings holding had been previously offered by Justice Scalia in his dissenting opinion *Pennell v. City of San Jose*.[59] The *Pennell* case involved a police power restriction on property, not a condition. A city rent control ordinance permitted officials to deny landlords otherwise reasonable rent increases when the increase would pose an economic hardship to certain poor tenants. The majority opinion dismissed the landlords' takings challenge as premature. Justice Scalia did not believe the claim to be premature and addressed the merits.

He argued that the hardship provisions had worked a taking because there was no "cause and effect" relationship between the property use subject to the regulation (rent control imposed on landlords who rented their property to tenants) and the social evil the regulation sought to remedy (renters too poor to afford even reasonably priced housing).[60]

According to Justice Scalia, the rent control law was a taking because it had singled out for a special burden a particular class of property owners, landlords, who happened to rent to a "hardship" tenant. The tenant's hardship

58. *Dolan*, 114 S. Ct. at 2320.

59. 485 U.S. 1 (1988).

60. *Pennell*, 485 U.S. at 21-22 (Scalia, J., dissenting) ("But *that* problem [poor renters] is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes. . . ."); *see also* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1653 (1988) ("In a variation of the harm . . . inquiry familiar to land-use practitioners confronting subdivision exactions, Justice Scalia [in *Pennell*] writes that the taking question must be answered in relation to whether the singled-out landowner has *caused* the particular social harm.").

had not been caused by the landlords. That hardship had been caused by the tenant, or society at large. The social problem of poor tenants should therefore be addressed by the public at large through welfare payments or public housing, but not through a rent control law that denied landlords a reasonable rent increase.

Similarly, since a need for additional public greenway along the river in the city of Tigard had not been caused by Ms. Dolan's desire to expand her commercial property,[61] she should not be singled out to bear the burden of dedicating her land to the city so that it could have additional open space for its greenway system within the floodplain. If the city wanted the land owned by Ms. Dolan in the floodplain, it would have to pay her for that land, not "take" it through an exaction.

The *Dolan* opinion and Justice Scalia's dissent in *Pennell* are not the only examples of courts using causation as a determinative factor in takings cases. Several state courts, particularly in Washington and Oregon, have relied on a causation test when considering facts similar to the *Dolan* case.[62] The issue in these cases (as in *Dolan*) was whether conditions imposed by government agencies on property owners in exchange for a government benefit worked an unconstitutional taking.

These conditions have taken the form of requirements for private dedications of land, construction of improvements, and the payment of fees. When these state courts concluded that the proposed property use would not cause the problem that the condition was meant to remedy, there was a taking.[63] Conversely, when the property use would have a negative impact that the condition would ameliorate, there was no taking.[64] In both situations, the presence or absence of causation determined whether there was a taking.[65]

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61. There was no evidence that Ms. Dolan's proposed development had encroached on existing greenway space. *See Dolan*, 114 S. Ct. at 2321. Had that been the case, the city could have required her to provide some alternative greenway space, because then she would have caused the reduction in greenway area.

62. *See infra* notes 63-64 and accompanying text.

63. *See, e.g.*, The Luxembourg Group, Inc. v. Snohomish County, 887 P.2d 446, 448 (Wash. Ct. App. 1995) (a "dedication requirement [that] would not remedy any problem caused by the . . . subdivision . . . requiring [the subdivider] to dedicate property . . . amounts to an unconstitutional taking"); Castle Homes & Dev. v. Brier City, 882 P.2d 1172, 1178 (Wash. Ct. App. 1994) (holding a fee exaction invalid when the city did not show that the fee would pay for improvements necessary "as a direct result of the proposed development").

64. Home Builders Ass'n v. City of Scottsdale, 902 P.2d 1347, 1350 (Ariz. Ct. App. 1995) (no taking when fees are "directly necessitated by the needs created by the new development"); J.C. Reeves Corp. v. Clarksman County, 887 P.2d 360, 365 (Or. Ct. App. 1994) (construction of improvements); Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (development fee).

65. The causation issue can also work to deny a property owner just compensation if the court concludes that any harm suffered by the property owner has not been caused by government action. *See, e.g.*, Powell v. Powell, 877 F. Supp. 628, 631 (M.D. Ga. 1995) (finding no taking when government was only an indirect cause of the reduction in the amount of retired pay that an individual could retain after his divorce); Customer Co. v. City of Sacramento, 895 P.2d 900, 911 (Cal. 1995) (finding no taking when government did not cause an armed felon attempting to avoid capture to enter a property owner's store); Department of Transp. v. Hewett Profess'l, 895 P.2d 755, 763 (Or. 1995) (finding no taking when a private party, not the government, demolished a building).

What is exhibited in *Dolan*, in Scalia's dissent in *Pennell*, and in these state cases is not a manifestation of Professor Merrill's public goods-positive externalities model for unconstitutional conditions. Rather, these opinions demand that government exactions, which take the form of conditions for government benefits, must be designed to internalize only the negative externalities generated by property owners. When a negative externality is created, the harmful effects of property use will be borne by members of society who are "external" to the producer of the harm. For example, a subdivider who does not construct for a subdivision a sewage treatment facility may harm homeowners who live downstream of the subdivision. Such externalities are internalized by requiring their producer, the property owner, to pay for them.

However, if the exaction does more, and requires the property owner to correct a general social cost not caused by the owner's anticipated property use (as was the case with Ms. Dolan and the city of Tigard's problem with flooding), the exaction works as a taking. It is a taking because the exaction will then have violated the *Armstrong* anti-discrimination principle that underlies the Takings Clause.[66]

Thus, *Dolan* is not an unconstitutional conditions case exemplifying the public goods model, but a takings case requiring that conditions on property use internalize only the negative impacts caused by the owner's new use of the property.

III. CONCLUSION

Professor Merrill's thesis is a major contribution to the general unconstitutional conditions doctrine. It does not, however, fully explain either the *Dolan* decision, or the larger issue of why some exactions imposed on property owners seeking permission to develop property become takings. In these property rights cases, the proper question is not whether the unconstitutional conditions doctrine should be enforced, but whether the condition internalizes a negative externality caused by the property owner's proposed land use. If the problem addressed by the condition is not a societal cost caused by the new property use, then the condition is not internalizing an externality produced by the property owner. Instead, it is forcing the property owner to bear the sole burden of correcting a problem not attributable to the owner. If causation is absent, then the *Armstrong* anti-discrimination principle is violated, and the condition becomes an unconstitutional taking.

On the other hand, if a court finds that the government action was the proximate cause of the property owner's injury, particularly if the injury is in the nature of a physical invasion, then it is more likely that a taking exists. *See, e.g.*, State v. Doyle, 735 P.2d 733, 738 (Alaska 1987) (inverse condemnation when property diminished in value because of state's action); Hoover v. Pierce County, 903 P.2d 464, 468 (Wash. Ct. App. 1995) (county's actions caused taking when county construction funneled water onto private property).

66. *See supra* notes 53-57 and accompanying text.