Hard Bargains and Real Steals: Land Use Exactions Revisited

Lee Anne Fennell

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HARD BARGAINS AND REAL STEALS

INTRODUCTION

Landowners and governmental bodies, such as local zoning boards,\(^1\) often make deals in which the government eases land use restrictions in exchange for a concession by the landowner, termed an "exaction."\(^2\) Land use exactions are, of course, the subject of substantive judicial oversight\(^3\) and have received extensive scholarly attention.\(^4\) Under current law, a landowner may bargain away property concessions for permission to engage in otherwise forbidden land uses only when the government can show that the concession in question is closely connected and roughly proportional to development-specific negative externalities. Two U.S. Supreme Court opinions set forth the relevant bargaining limits: \textit{Nollan v. California Coastal Commission}\(^5\) requires an "essential nexus" between the property concession and the legitimate governmental purpose which originally justified banning the land use in question;\(^6\) and \textit{Dolan v. City of Tigard}\(^7\) adds a requirement of "rough proportionality" between the harms generated by the land use and the required property concession.\(^8\)

1. While much regulation of land use is local, land is also regulated for various purposes at the state, regional, and federal levels. See generally Fred Bosselman & David Callies, \textit{The Quiet Revolution in Land Use Control} (1972) (analyzing state and regional responses to land use issues); Robert H. Nelson, \textit{Federal Zoning: The New Era in Environmental Policy, in LAND RIGHTS: THE 1990s' PROPERTY RIGHTS REBELLION} 295 (Bruce Yandle ed., 1995) (discussing the increasing federal role in land use regulation).

2. William A. Fischel, \textit{Regulatory Takings} 341 (1995) [hereinafter \textit{Fischel, Regulatory Takings}] (noting that "developers in most communities pay various types of fees or provide goods in kind to get permission to do their projects," which are "collectively known as "exactions"); see Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, \textit{91 Colum. L. Rev.} 473, 478-83 (1991) (providing an overview of the history of exactions and descriptions of various types of exactions).

3. In this Article, I focus only on the limits imposed by the U.S. Supreme Court, which relate to the Takings Clause in the Federal Constitution. State law and constitutions may also place limits on exactions. See, e.g., Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 387 n.5 (Ill. App. Ct. 1995) (discussing test for development conditions formulated by the Illinois Supreme Court); Stewart E. Sterk, Nollan, \textit{Henry George, and Exactions}, \textit{88 Colum. L. Rev.} 1731, 1731 & n.4 (1988) [hereinafter \textit{Sterk, Nollan, Henry George, and Exactions}] (discussing and providing examples of state law doctrines limiting exactions). These state limits are not expressly addressed here, although much of my analysis may apply to them as well.


6. \textit{Id.} at 837.
8. \textit{Id.} at 391.
Taken in combination, these rules require the government to identify and quantify development-specific negative externalities when it seeks to obtain a concession of property from a landowner. However, the Court has not required the underlying land use regulations—the subject of such bargains—to exhibit a proportionate relationship to the harms they claim to prevent. Indeed, in City of Monterey v. Del Monte Dunes, the Court expressly disavowed any expansion of Dolan's rough proportionality test beyond the exactions context. This limitation is understandable; wholesale application of Dolan to regulatory takings jurisprudence would abruptly dismantle nearly seventy-five years of zoning law. Yet Dolan's proportionality rule, thus limited, represents a logical anomaly. Land use bargains are constrained by proportionality requirements, while land use decisions made by local governmental bodies are not.

The result is a conceptual disconnect that has become increasingly problematic in the years since Nollan and Dolan were decided. The current state of land use jurisprudence, which couples relatively open-ended regulatory power with tight restrictions on regulatory bargains, represents the worst of both worlds. It leaves landowners exposed to excessive land use regulation while constricting their ability to bargain for regulatory

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9. See infra Part I.A.1 (providing an overview of the current law); see also Jan G. Laitos, Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking, 72 DENV. U. L. REV. 893, 905 (1995) (noting that Dolan requires a relationship between the exaction and the harm caused by the development); infra note 122 (discussing the relationship between the nexus and proportionality requirements). Several unanswered questions about the scope of these decisions have divided lower courts. See Part I.A.1, infra (discussing these unresolved questions).

10. See City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702 (1999) (“Although in a general sense concerns for proportionality animate the Takings Clause, we have not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.”) (citations omitted); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (“The application of a zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”) (citations omitted).


12. See id. at 702-03 (stating that “the rough-proportionality test of Dolan is inapposite to a case such as this one”). However, the Court found proper a jury instruction that asked whether the denial of the development proposal was “reasonably related to a legitimate public purpose.” Id. at 706-08.

13. See generally Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (discussing justification for governmental zoning powers and explaining that zoning ordinances must be arbitrary and unreasonable before they can be declared unconstitutional).

14. The Supreme Court dodged an important manifestation of this disconnect when it denied certiorari in Parking Ass'n of Georgia v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), cert. denied, 515 U.S. 1116 (1995) (Thomas & O'Connor, JJ., dissenting). In that case, the Supreme Court of Georgia considered whether Dolan's “rough proportionality” standard applied to legislative “conditions” on development, as well as to conditions imposed through individual adjudicative negotiations. Id.
adjustments. Without meaningful constraints on the underlying land use regulations, limits on land use bargains cannot provide landowners with protection against overregulation. Instead, these bargaining limits add insult to injury by preventing mutually beneficial land use deals and generating vast inefficiencies that harm landowners and communities.  

I suggest scrapping the bargaining limits contained in Nollan and Dolan, while using a core insight from these decisions—the relevance of negative externalities to land use regulation—to formulate a more coherent alternative. In the course of my analysis, I examine the strategic bargaining dilemmas that initially triggered the Nollan/Dolan bargaining limits and suggest a new way of framing and resolving the unconstitutional conditions problems implicated by land use bargains.

The analysis proceeds in three parts. Part I questions current judicial limits on land use bargains. After briefly surveying the law, I contend that the Nollan and Dolan limits represent a logically incoherent but symbolically significant response to a governmental power that is perceived as unbounded and deeply threatening. To set the stage for a discussion of the conceptual and practical problems with these limits, I step back and ask why land use bargains are necessary at all—an inquiry that requires an examination of both the subject of land use bargains (the underlying collective property rights embodied in zoning) and the object of these bargains (the potential gains from trade). Considered against this backdrop, it is plain that the Nollan and Dolan limits actually shortchange landowners and can lead to very inefficient results.

15. The potential inefficiency of limits on land use bargains has not gone unnoticed. See generally David A. Dana, Land Use Regulation in an Age of Heightened Scrutiny, 75 N.C. L. Rev. 1243 (1997) (discussing ways in which nexus and proportionality rules can diminish allocative efficiency); William A. Fischel, The Economics of Land Use Exactions: A Property Rights Analysis, 50 Law & Contemp. Probs. 101, 104-06 (1987) [hereinafter Fischel, The Economics of Land Use Exactions] (discussing restraints on the alienation of land use entitlements and resulting inefficiencies); William A. Fischel, Introduction: Utilitarian Bargaining and Formalism in Takings, 88 Colum. L. Rev. 1581, 1583 (1988) [hereinafter Fischel, Introduction] ("Judicial rules that inhibit these exchanges [between landowners and communities], such as rules against contract zoning, are barriers to Pareto improvements—that is, voluntary exchanges that leave all parties—the community, the developer and ultimately the developer's customers—better off.");


17. Because my analysis focuses on the Nollan and Dolan bargaining limits as articulated by the Supreme Court, I assume (counterfactually) that there is perfect compliance with these limits. I fully recognize that developers and local governments often engage in transactions that violate the Nollan and Dolan standards. Such circumvention ameliorates certain problems I identify here while creating new and different ones. See infra note 109 (discussing circumvention). Widespread noncompliance with bargaining restrictions powerfully suggests that the restrictions are inconsistent with the interests of the parties. This inconsistency can be most plainly seen by focusing, as I do here, on how the limits would operate absent such circumvention. The fact that the negative impacts of a legal rule may be softened by real-world
Such inefficiency might be tolerable if the limits did an excellent job of protecting landowners from the threat of overregulation and subsequent "extortion." Yet my analysis demonstrates that the Nollan/Dolan limits cannot provide property owners with any meaningful protection against overregulation. If there are no enforceable external limits on the appropriate scope of land use regulation, the requirements of nexus and proportionality cannot provide a workable backstop. If such external limits do exist, the nexus and proportionality requirements become unnecessary and counterproductive. Finally, while nexus and proportionality arguably prevent underregulation in certain circumstances, they are poorly fitted to this task and should be replaced with more effective mechanisms.

Part II engages the strategic behavior concerns that animate the current bargaining limits, and lays the groundwork for developing a more coherent and effective solution. I begin with an exploration of the unconstitutional conditions doctrine as it applies to land use. I maintain that the doctrine should be regarded as an extension of the structural constraints found within the Constitution and should focus on what a particular governmental actor or entity is legally authorized to give and receive. Under this approach, the constitutionality of a given bargain depends on the governmental entity's ability or inability to legitimately participate in both the "giving" and "receiving" parts of the bargaining transaction. Additional strategic concerns may arise due to the government's market power—a factor that should be analyzed independently from its role as a promulgator of regulations. I next examine how an externality-based approach to land use regulation might, under certain assumptions, resolve constitutionally problematic behavior while permitting Pareto-efficient land use bargains.

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18. "Overregulation" is regulation in excess of the socially efficient point. See Been, supra note 2, at 491 n.93 (citing several reasons why governments overregulate); see also infra Part I.C.2 (discussing overregulation risks).

19. See Nollan v. Cal. Coastal Comm'n, 483 U.S. at 825, 837 (1987) (stating that a permit condition which does not bear an essential nexus to the governmental purpose justifying the development ban is "an out and out plan of extortion") (citation omitted).


21. A bargain is Pareto-efficient if it makes at least one party better off and makes no one worse off. See, e.g., David D. Haddock, Fred S. McChesney & Menahem Spiegel, An Ordinary Economic Rationale for Extraordinary Legal Sanctions, 78 CAL. L. REV. 1, 15 & n.42 (1990). The resulting distribution, in which at least one party is better off and nobody is worse off, is Pareto-superior to the pre-bargain allocation. See id. at 16 & n.43. Pareto-optimality is achieved when no further trades could make any party better off without making at least one party worse off. CHARLES J. GOETZ, CASES AND MATERIALS ON LAW AND ECONOMICS 248 (1984).
This discussion suggests possible mechanisms for separating ordinary, mutually beneficial "hard bargains" between a landowner and the community, from theft-like strategic manipulations or "real steals."

Part III proposes a new framework for land use entitlements which would allow unrestricted bargaining over land use. Significantly, my proposal leaves zoning law in place, while altering its character. The centerpiece of my approach is a mechanism that amounts to an in-kind "call option"—a species of liability rule that would permit landowners to engage in otherwise forbidden land uses by providing in-kind remediation of cognizable negative externalities. Although the idea of using liability rules to regulate land use is not new, my approach differs from standard liability rules in that it focuses on the in-kind remediation of externalities rather than the payment of monetary damages. This in-kind call option would

22. A number of scholarly proposals have been designed to foster market (or market-like) transactions in the land use field, some of which involve abolishing traditional zoning. See generally BERNARD H. SIEGAN, LAND USE WITHOUT ZONING (1972) [hereinafter SIEGAN, LAND USE WITHOUT ZONING] (proposing elimination of zoning and discussing land use alternatives); Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681 (1973) [hereinafter Ellickson, Alternatives to Zoning] (discussing liability rules and other alternatives to zoning); Douglas W. Kmiec, Deregulating Land Use: An Alternative Free Enterprise Development System, 130 U. PA. L. REV. 28 (1981) (discussing an alternative to zoning based on land use intensity ratings). Carol Rose has noted that many market-oriented proposals have had limited practical impact, "perhaps because they would require a forbidding array of changes in current land use regulatory practice." Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 CAL. L. REV. 837, 844 (1983) [hereinafter Rose, Planning and Dealing].

23. My proposed call option mechanism builds on insights in Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasian Trade, 104 YALE L.J. 1027, 1038-47 (1995), which builds, in turn, on Guido Calabresi and Douglas Melamed's pathbreaking article, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972). A call option is usually conceptualized as a type of liability rule. See id. at 1105-06 (discussing liability rules); Madeline Morris, The Structure of Entitlements, 78 CORNELL L. REV. 822, 852-54 (1993) (discussing "calls" as a form of liability rule). However, my call option arrangement could also be recast as an adjustment in the community's property rights. See Carol M. Rose, The Shadow of The Cathedral, 106 YALE L.J. 2175, 2178-79 (1997) [hereinafter Rose, The Shadow of The Cathedral] (noting that a liability rule equates to a "property right subject to an option"); see also infra notes 242-244 and accompanying text (discussing alternative conceptual formulations of the call option). Under my proposal, the landowner's "option" would extend only to land uses that are otherwise permissible under criminal law and non-negotiable public health and safety laws and regulations. For example, a landowner could maneuver around a zoning restriction specifying a particular lot size by using his call option, but he would hold no option to use his property to commit crimes.

24. See Ellickson, Alternatives to Zoning, supra note 22, at 738-48 (discussing liability rules for regulating land use); see also Ian Ayres & J.M. Balkin, Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond, 106 YALE L.J. 703, 717-20 (1996) (discussing Ellickson's proposal as an example of a "second-order liability rule").

25. In this respect, the call option resembles "performance zoning," which allows developers to engage in desired land uses by meeting certain objective performance standards. See LANE KENDIG ET AL., PERFORMANCE ZONING passim (1980); Frederick W. Acker, Note, Performance Zoning, 67 NOTRE DAME L. REV. 363, 364 (1991). Under my approach, the developer
place a ceiling on the permissible bargaining range while leaving landowners and governmental entities free to pursue more efficient alternatives without regard to the *Nollan/Dolan* limitations. The call option would itself be alienable as well, allowing communities to effectively buy veto rights with respect to development on a given parcel of land. This framework would provide a coherent mechanism for blocking unconstitutional takings without also blocking socially beneficial bargains.  

I. QUESTIONING JUDICIAL LIMITS ON LAND USE BARGAINS

My critique of the bargaining limits articulated in *Nollan* and *Dolan* requires some preliminary groundwork. Section A outlines the substance of the present judicial limits on land use bargains and considers the symbolic importance of those limits. Section B, which examines the nature of land use entitlements and the potential gains associated with land use bargains, sets the stage for my critique of the nexus and rough proportionality limits. It also lays the conceptual foundation for the rest of the Article. Section C contains the heart of my critique. It begins by noting the inefficiencies associated with blocked bargains, and then considers the ineptness of nexus and proportionality at confronting the twin problems of overregulation and underregulation.

A. THE SUBSTANCE AND SYMBOLISM OF JUDICIAL LIMITS

1. An Overview of Current Law

*Nollan v. California Coastal Commission* 27 and *Dolan v. City of Tigard* 28 articulate the basic judicial limits on land use bargains, and their facts and holdings can be stated with relative simplicity. In *Nollan*, a landowner sought to replace a dilapidated beach cottage with a larger home. 29 The California Coastal Commission attempted to condition its grant of the necessary

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26. My framework contemplates a number of procedural adjustments as well. See infra notes 264-273 and accompanying text.


building permit on the Nollans' dedication of a public easement across the portion of their beachfront property lying between the high tide line and the seawall. The Supreme Court struck down this condition on the ground that it did not bear an "essential nexus" to the cited harm associated with the larger house—a blocked view of the ocean. Justice Scalia, writing for the majority, suggested that the Nollans could have been required to provide a more closely linked land concession, such as a "viewing spot," but characterized the imposition of an unrelated condition as "an out-and-out plan of extortion."  

In Dolan, the city of Tigard attempted to condition the grant of a landowner's request to expand her plumbing store on the dedication of a portion of her land for storm drainage and the construction of a bike path. Although the Court found an "essential nexus" both between the drainage measures and the increased runoff associated with the development, and between the bike path and the increased congestion generated by the expansion, it found that the concessions had not been shown to be roughly proportionate to these harms. The decision placed the burden of proof squarely on the city to establish that the concessions in question would remediate, with some rough degree of precision, the negative externalities associated with the store's expansion.

An interesting feature of both decisions is their uneasy treatment of the underlying land use regulations. While the Court was plainly motivated by a fear of regulatory excess, the "nexus" and "rough proportionality" standards articulated in Nollan and Dolan arguably only apply to property exactions. Subsequent case law has struggled to determine whether these standards operate to more broadly limit land use regulations. It appears that Nollan has had very little practical impact outside of the bargaining context; courts have only rarely used its reasoning to invalidate land use regulation. Likewise, in

30. Id.
31. Id. at 837-42.
32. Id. at 836-37.
33. Dolan, 512 U.S. at 380. The condition required the dedication of the portion of Ms. Dolan's land lying within a one hundred-year floodplain for improvements to a storm drainage system, as well as a fifteen-foot strip of land lying adjacent to the floodplain for a bike path. Id.
34. Id. at 387,394-95.
35. Id. at 394-95; see id. at 405 (Stevens, J., dissenting) (noting the "novel burden of proof" imposed on the city).
36. In Nollan, the Court suggested that a stricter standard than rational basis review applies to land use regulations. Nollan, 483 U.S. at 834 n.3. However, the Court neither addressed whether the underlying development restriction in that case met the standard nor discussed the implications of the standard outside of the bargaining realm. See id. at 835 (assuming, without deciding, that legitimate governmental purposes underlay the development restriction).
City of Monterey v. Del Monte Dunes, the Court observed that it had "not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." The Court indicated that the rough-proportionality test is inapposite when the "landowner's challenge is based not on excessive exactions but on denial of development."

The Court left a further, though logically inextricable, question unanswered when it denied certiorari in Parking Ass'n of Georgia v. City of Atlanta: whether Dolan's requirement of rough proportionality applies when land use "conditions" are not selectively imposed on individual landowners, but are instead embedded in legislative enactments. As Richard Epstein has pointed out, any regulatory action other than a simple head tax can be thought of as conditioning some governmental benefit or burden on an individual's choice or action, making it possible to creatively recast any land use ordinance as an "exaction." For example, a setback requirement can be viewed as conditioning permission to build on leaving a certain swath of land unbuilt. Yet if all land use ordinances can be viewed as "exactions" subject to the Dolan rule, this would be inconsistent with the limitation of Dolan articulated in Del Monte Dunes. If the Court is to keep Dolan's proportionality principle from seeping—indeed, gushing—into the regulatory takings realm, it must maintain a logically vulnerable distinction.

38. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702 (1999). Although the Court split on many other issues in the case, it was unanimous in observing that Dolan is confined to the exactions context. Id.

39. Id. at 703.


41. See id. at 203 n.3 (rejecting application of Dolan proportionality test to legislative enactment). In Dolan, the Court noted that cases such as Agins v. City of Tiburon, 447 U.S. 255 (1980), involved "essentially legislative determinations classifying entire areas of the city" which were distinguishable from the "adjudicative decision" made on Ms. Dolan's permit application. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). Lower courts are in conflict as to the significance of this distinction. See, e.g., Parking Ass'n of Ga., 515 U.S. at 1117 (Thomas & O'Connor, JJ., dissenting from denial of certiorari); Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998) (noting that "the Supreme Court has left unsettled the question whether Dolan's rough proportionality test applies to legislative, as opposed to administrative exactions"); Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995) (citing with approval Justice Thomas's dissent in Parking Ass'n of Georgia and asserting that "a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property"); see also David L. Callies, Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing about It, 28 STETSON L. REV. 523, 572-74 (1999) (collecting cases); Dana, supra note 15, at 1261 n.91 (collecting court decisions applying nexus and rough proportionality review in contexts other than case-by-case decisionmaking); Inna Reznik, The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 252-57 (2000) (discussing confusion in the courts regarding the legislative/adjudicative distinction).

42. EPSTEIN, BARGAINING WITH THE STATE, supra note 20, at 11.
between legislative and adjudicative actions taken by local governmental bodies.\(^{43}\)

Additional uncertainties exist regarding the scope of the *Nollan/Dolan* test. *Nollan* and *Dolan* both involved actual concessions of land, and neither case spoke to the status of other kinds of concessions (such as cash payments or the provision of unrelated amenities). Much of *Nollan’s* reasoning, including the concern about “extortion,”\(^{44}\) would seem equally applicable to land use conditions of any kind. However, the *Nollan* Court also observed that special care was appropriate “where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.”\(^{45}\) Likewise, in *Dolan*, the Court observed that “the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.”\(^{46}\)

Drawing a distinction between concessions of land and other kinds of exactions would be consistent with the distinction drawn in regulatory takings jurisprudence between ordinary regulations and those governmental actions that involve actual physical occupation (however slight).\(^{47}\) The Tenth Circuit has used this reasoning to limit the reach of *Nollan/Dolan* to concessions of land.\(^{48}\) Analysis in a Ninth Circuit decision, *Garneau v. City of Seattle*,\(^{49}\) proceeds along similar lines. In *Garneau*, the court noted that the

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\(^{43}\) In theory, a broadly applicable legislative enactment might be thought to carry with it an intrinsic political check that an adjudicative decision would lack. However, where land use regulation is undertaken in piecemeal fashion by local governmental bodies, there is reason to question whether the legislative/adjudicative distinction is meaningful. See *Rose, Planning and Dealing*, supra note 22, at 846 (stating that “local land use decisions should not be classed as either ‘legislative’ or ‘judicial’; these rubrics are drawn from a separation-of-powers doctrine more appropriate to larger governmental units”).


\(^{45}\) *Nollan*, 483 U.S. at 841.

\(^{46}\) *Dolan*, 512 U.S. at 385. The Court’s statement in *Del Monte Dunes* that *Dolan* has not been extended beyond “land-use decisions conditioning approval on the dedication of property to public use,” *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999) (emphasis added), could be read as limiting the rough-proportionality analysis to land concessions. It is not yet clear how lower courts will interpret this language. The analysis will likely turn on whether the phrase “dedication of property” denotes only concessions of real estate, or whether it can be read more broadly to include the payment of fees.

\(^{47}\) *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (noting that permanent physical invasion is compensable “no matter how minute the intrusion” and explaining that any other regulation of property is deemed to constitute a taking if it “denies all economically beneficial or productive use of land”).

\(^{48}\) *See Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (“[W]e believe that *Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one’s physical property) through a conditional permitting procedure.”).

\(^{49}\) 147 F.3d 802 (9th Cir. 1998).
first step in *Nollan* involved determining whether the exaction taken on its own, rather than as part of a bargain, would constitute a taking. The court reasoned that if a fee would not constitute a taking when imposed outright, a bargain involving such a fee could not be viewed as a taking either. This logic seems to require that the contours of the bargaining limits match those of takings jurisprudence generally, no matter how nonsensical the latter may seem.

Other lower courts have demonstrated a willingness to review, and in appropriate cases invalidate, cash exactions on nexus and proportionality grounds. The status of development concessions involving the provision of unrelated public facilities and amenities not requiring a concession of the landowner's own land are similarly uncertain. However, it would seem that any court willing to apply *Nollan* and *Dolan* to cash exactions would also be willing to do so with respect to unrelated public facilities and amenities.

The conflicts among courts regarding the reach of *Nollan* and *Dolan* suggest larger conceptual inconsistencies. A decision like *Del Monte Dunes*, which recognizes a landowner's right to a jury trial under certain circumstances, raises the stakes for resolving these inconsistencies. The

50. *See generally id.* (involving a challenge to Seattle's Tenant Relocation Assistance Ordinance, which requires landlords to provide cash relocation assistance to tenants displaced as a result of redevelopment).

51. *Id.* at 812.

52. *See, e.g.*, *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996) (plurality opinion) (concluding that *Nollan* and *Dolan* "apply under the circumstances of this case, to the monetary exaction imposed by Culver City as a condition of approving plaintiff's [rezoning] request."); *Benchmark Land Co. v. City of Battle Ground*, 972 P.2d 944, 950 (Wash. Ct. App. 1999) (holding that *Nollan* and *Dolan* apply "where the City requires the developer as a condition of approval to incur substantial costs improving an adjoining street"). The dissent in *Garneau* argued that the applicability of *Dolan* to monetary exactions can be inferred from the U.S. Supreme Court's action in granting certiorari to summarily vacate and remand the prior decision in *Ehrlich* for further consideration in light of *Dolan*. *Garneau*, 147 F.3d at 815 & n.5 (O'Scannlain, J., concurring in part and dissenting in part) (citing *Ehrlich*, 512 U.S. at 1231). *See also Callies, supra note 41, at 568-72* (discussing case law on this point); Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 540-43 (1995) (noting split among commentators and courts on this question); Douglas W. Kmiec, *Inserting the Last Remaining Pieces Into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1036-37 & n.215 (1997) (discussing the "artificial distinction" drawn by some courts between dedications and monetary exactions, and citing cases that "lamely" denied heightened scrutiny to the latter); Nancy E. Stroud, *Note, A Review of Del Monte Dunes v. City of Monterey and Its Implications for Local Government Exactions*, 15 J. LAND USE & ENVTL. L. 195, 202-06 (1999) (discussing the split among courts on this point and possible implications of *Del Monte Dunes*).


54. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 722-23 (1999). The Court declined to engage in a "precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests." *Id.* at 722. Nevertheless, the possibility of presenting one's case to a jury on such land
confusion surrounding the scope of *Nollan* and *Dolan* is not surprising. As I will show, the limits articulated in these decisions make no sense within the bargaining context and are, in fact, harmful to landowners. Nexus and proportionality standards might be logically applied to land use regulation generally (although the results might be undesirable as a normative matter), but the Court is apparently unwilling to allow these rules to overrule decades of regulatory takings jurisprudence.

2. Fear and Loathing in Exactions Jurisprudence

The *Nollan*/*Dolan* rules are perhaps best understood as a highly visible symbolic protest against governmental excess. The decisions proved so psychologically gratifying for landowners that few property-rights advocates have been willing to look behind the decisions' anti-government rhetoric to consider their true impact on property rights and on the community. Though *Nollan* and *Dolan* do not overtly attack zoning, both decisions are plainly steeped in skepticism about the legitimacy of regulatory action in the land use arena. With zoning almost inalterably installed in the American legal landscape, angst about the associated regulatory encroachments into property rights had long been sublimated. The bargaining context provided an opportunity to voice the pent-up frustrations of the nation's landholders and to strike a strong moral victory against what was perceived as the virtually unstoppable regulatory power of government.

It is impossible to discuss these decisions meaningfully without considering their psychological and symbolic importance for landowners. As William Fischel has observed, the intangible aspects of a decision like *Nollan* create a curious blind spot about the practical effects of its legal rule:

\[\text{[P]ointing out that } \text{Nollan} \text{ might actually harm development interests does not go over well in prodevelopment circles. I thought initially that those I spoke with did not understand the logic of the argument, but later it dawned on me what the importance of Nollan was. Development-minded landowners had at last won their case in}\]

*use issues is likely to increase the volume of litigation. See David G. Savage, *Juries OK'd in Land Development Cases*, L.A. TIMES, May 25, 1999, at A25 (quoting John D. Echeverria, who predicts the case will "encourage more burdensome and costly litigation against local governments over land-use issues").*

55. I treat nexus and proportionality as a package here, though nexus might be thought to follow proportionality automatically in this context. It is difficult to imagine a regulation that is "proportionate" to the harm caused by a given land use, but which fails to address the harm or harms to which it is proportionate.

the U.S. Supreme Court.\textsuperscript{57}

Justice Scalia's assertion that the \textit{Nollan} exaction constituted "an out-and-out plan of extortion"\textsuperscript{58} resonated powerfully with many property owners. \textit{Nollan} tells a story of governmental coercion, trickery, and abuse of power.\textsuperscript{59} It is not surprising that multitudes of property owners cheered when the Court drew the line on government and stepped in to defend a beleaguered individual.

The majority opinion in \textit{Dolan} does not accuse the city of Tigard of extortion, yet the Court's insistence on detailed proof of the quantity of harm and remediation associated with a particular land use bargain is consistent with \textit{Nollan}'s view of government officials as opportunistic "villains."\textsuperscript{60} Putting the government to a mathematical accounting of its justification for offering a particular land use bargain suggests that government is not to be trusted. Governmental bodies are stealthy, greedy, and deceitful, \textit{Dolan} seems to say, and someone had better be minding the store.

Land use bargains provide a particularly propitious focus for popular fears of single-mindedly acquisitive and manipulative governmental bodies. As an initial matter, it is noteworthy that the term used to designate the landowner's concession in the land use bargain—"exaction"—is not just heavily loaded but is actually a synonym for "extortion."\textsuperscript{61} While some concessions of land or other benefits may be the result of inappropriate bargaining leverage,\textsuperscript{62} the choice of the word "exaction" as a generic term

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{57} Fischel, \textit{Regulatory Takings}, supra note 2, at 61-62 (internal cross-reference omitted); see Richard A. Epstein, \textit{The Harms and Benefits of Nollan and Dolan}, 15 N. Ill. U. L. Rev. 479, 481 (1995) (hereinafter Epstein, \textit{Harms and Benefits}) (noting that the \textit{Nollan} case "was born of defiance and frustration"); Fischel, \textit{Introduction}, supra note 15, at 1597 ("Nexus is one of those 'tokens' to which Michelman refers that reminds us that there is some line between private and public activity.") (footnote omitted); Frank Michelman, \textit{Takings}, 1987, 88 Colum. L. Rev. 1600, 1628 (1988) (suggesting that illogical doctrines in takings jurisdiction "can still make sense ideologically as tokens of the limitation of government").


\item\textsuperscript{59} Alexander, supra note 16, at 1764-67. This is not the only story that might emerge from a land dispute, of course. See id. at 1767-68 (discussing a counter-narrative in which private landowners are powerful and manipulative); David Mendell & Gary Washburn, \textit{Neighbors Win I Over Goliath}, CHI. TRIB., Mar. 10, 2000, at N1 (discussing community's zoning victory over "powerful, well-heeled development interest").

\item\textsuperscript{60} Alexander, supra note 16, at 1771.

\item\textsuperscript{61} See \textit{Black's Law Dictionary} 557 (6th ed. 1990) (defining "exaction" as "[t]he wrongful act of an officer or other person in compelling payment of a fee or reward for his services, under color of his official authority, where no payment is due" and directing readers to "[s]ee also Extortion"); Symposium, \textit{Exactions}, supra note 4, at 1 (quoting \textit{WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY} 431 (1986)).

\item\textsuperscript{62} See infra Part II.
\end{enumerate}
\end{footnotesize}
for all land use transactions amounts to a linguistic stacking of the deck. One does not ordinarily think of an "exaction" as something in which two parties mutually participate; rather, it connotes something done by one (powerful) party to another (powerless) party. The possibility that the landowner might get something valuable out of such a deal, or perhaps even participate in it voluntarily, is entirely ignored. The assumption that the power relationship is inherently one-sided and exploitative subtly influences judicial perceptions of the relevant legal issues. With a starting point like that, the judicial use of terms such as "extortion" to describe land use bargains seems unsurprising.

This linguistic treatment of regulatory bargains no doubt reflects a belief that the underlying land use regulation is unfair and coercive to start with, making it no "bargain" to have it lifted at any price in excess of zero. If cities can tighten zoning regulations with relative impunity, one might expect them to strategically overregulate land use to gain bargaining leverage. This is precisely what Justice Scalia suggests in Nollan. The same risk exists any time the party selling the right to violate rules is the same party making the rules. If the government can make rules costlessly, it can

63. The volume of existing scholarship and court opinions using this term has confounded my efforts to eliminate it from this Article without sacrificing clarity. If it is too late in the day to switch to a more neutral word, such as "concession" or "in-kind payment," it is at least necessary to consciously strip the inapt term "exaction" of its negative connotations. See Development Exactions, supra note 4, at 3-4 (explaining decision to continue use of the word "exactions" despite its negative connotations).

64. See Alexander, supra note 16, at 1753 ("Takings doctrine is shaped by striking pictures and powerful metaphors... about who holds power and how those who hold power use it.").

65. See, e.g., Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (providing an example of such language); William J. Jones Ins. Trust v. Fort Smith, 731 F. Supp. 912, 914 (W.D. Ark. 1990) (stating that without a showing of externalities relating to planned expansion, "the condition which the City attaches to building permits is simple extortion"); Outdoor Sys. v. City of Mesa, 819 P.2d 44,53 (Ariz. 1991) (Cameron, J., dissenting) ("To require the landowner to give up what he is legally permitted to have in order to obtain what he may already be entitled to, is bureaucratic extortion, if not judicial extortion."); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1070 (N.Y. 1989) ("Permitting the owners to avoid the illegal confiscation by paying a 'ransom' cannot make it lawful.").

66. See Fischel, Regulatory Takings, supra note 2, at 344-45 (arguing that the problem with the bargain invalidated in Nollan was that people did not view Nollan's proposed use—a larger house—as an illegitimate land use that should require special permission).

67. Zoning may lack a meaningful political check, as it often burdens those who are not yet residents of the community—for example, those planning to move into a new development. See generally Fischel, The Economics of Land Use Exactions, supra note 15, at 107 (noting that zoning may burden non-residents). It has also traditionally received a relatively low level of judicial review. See generally Agins v. City of Tiburon, 447 U.S. 255 (1980); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). However, this may be changing as the reasoning of cases like Nollan and Dolan seeps into the analysis of the underlying regulations, and as cases like Del Monte Dunes suggest a broader role for fact-finding in assessing regulatory action.

68. Nollan, 483 U.S. at 837 n.5.
sell violation rights to members of the populace for pure profit. The resulting potential for redistribution from landowners to government (and thence to the politically powerful members of the community) is obvious.

The rules formulated in Nollan and Dolan amount to an inarticulate cry of protest against such unchecked excesses.

Antipathy against government action is not always unjustified, and governmental bodies are plainly capable of strategic action. Moreover, outrage and demoralization may be legitimate touchstones in takings jurisprudence. Yet Nollan and Dolan, despite their symbolic force, fail to generate coherent or effective legal rules. In fact, their holdings leave landowners with less autonomy and with a diminished bundle of property rights. They exact a heavy price in inefficiency while utterly failing to deliver on their promise to landowners.

B. THE BENEFITS OF BARGAINS

Before I unpack the theoretical and practical shortcomings of the essential nexus and rough proportionality standards, I would like to step back and consider the need for land use bargains in the first place. This inquiry requires a close look at both the subject and the object of land use bargains.

1. The Subject of the Bargain: Property Entitlements in Zoning

In order to understand why land use bargains become necessary at all, and why limits on them can be costly, it is first necessary to examine the nature of the collective property rights created through zoning. Zoning splits property rights between the individual landowner and the local government by vesting a set of collective property rights in the community.

69. See Kayden, supra note 53, at 3 ("Faced with mounting social needs and continuing fiscal constraints, more and more cities 'mint' money through their zoning codes to finance a wide array of public amenities."). Creating and selling new rules is actually much more efficient than minting money would be, since the creation of additional rules channels dollars from landowners to the local government without diluting their value.

70. See Been, supra note 2, at 491 (discussing the potential for abuse if the government can sell violation rights).

71. See Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law, 80 HARV. L. REV. 1165, 1214-18 (1967) [hereinafter Michelman, Property, Utility, and Fairness] (discussing the "demoralization costs" associated with takings); id. at 1228 (discussing the physical invasion test by reference to the fact that "[t]he psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader").

72. ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 1, 15-18 (1977) (describing zoning as a collective property right). In this Article, I use the term "zoning" as shorthand for all forms of land use regulation.

73. For present purposes, "the community" can be thought of in simplistic terms as incorporating the preferences of everyone in the relevant area except for the individual landowner in question. Later, I will introduce the complications presented when the interests of
These collective property rights allow the community some degree of control over the landowner's use of her own land. While traditional notions of nuisance grant the community some power to limit land use, zoning shifts certain additional property rights from the landowner to the community. Thus, under current zoning law, the community's interest in maintaining a particular atmosphere or growth pattern is protected by a property rule. A landowner cannot simply choose to violate a land use regulation and pay for the damage caused, as she could under a liability rule, but instead must obtain permission from the community before proceeding with any nonconforming use. As long as the land use regulation furthers a legitimate government interest, the community can refuse to grant this permission.
Figure 1 illustrates the various ways in which entitlements in a piece of land might be divided between the owner of that piece of land and the community. The horizontal axis represents the restrictiveness of the regulations placed on the land. The possibilities range from the extreme of “no restriction” at the far left, to the opposite extreme, “no uses permitted,” at the far right. Each point on the axis corresponds to a possible way in which entitlements might be split between the landowner and the community. In each instance, it would be possible to draw a vertical line to represent the allocation of entitlements; the portion of the line falling in the white area would represent the entitlement in the land that is held collectively by the community, and the portion of the line falling in the gray area would represent the landowner’s remaining property rights in the land. In a world with no restrictions, the landowner has full rights to use the land in any imaginable way, while in a world where all uses are prohibited, the community holds full rights to the land.

Although it is possible to imagine infinitely fine degrees of restrictiveness along the horizontal axis and a correspondingly large number of vertical lines representing divisions of property rights, it is helpful to focus on a few benchmarks. The first dashed vertical line, labeled “nuisance law,” captures the intuition that, even under common law doctrines of nuisance, the landowner’s right to use her land as she likes is conditioned by a certain set of collectively held entitlements. Specifically, the community holds the rights with respect to what I have termed “noxious uses,” represented in Figure 1 by the area above the top dashed horizontal line. If nuisance law represented the only restraint on land use, the community would control the rights to “noxious uses,” while the landowner would retain the right to make any other use of her land she wished, whether “intensive” or “innocuous.”

76. The idea of graphically representing a “restriction index” is borrowed from William Fischel. Fischel, Zoning Reform, supra note 74, at 304 fig.1; FISCHEL, REGULATORY TAKINGS, supra note 2, at 343 fig.9.1. My graphical formulation suggests that regulation always operates to restrict the intensity of development. Anecdotal evidence suggests this is not always the case. For example, I observed one neighborhood zoning meeting in Chicago in which local business owners opposed a residential proposal because it would not help to generate additional traffic through the area—in other words, interested property owners sought to ban the use for being insufficiently intensive. Nevertheless, land use regulations typically operate with increasing force against increasingly intensive land uses, making Figure 1 a helpful approximation of reality.

77. See Fischel, Zoning Reform, supra note 74, at 311 (noting that nuisance law could be invoked to prevent certain land uses).

78. The terms “noxious,” “intensive,” and “innocuous” do not carry self-evident meanings, and reasonable minds may differ as to the quantity of uses falling into each of these categories. They are, however, convenient labels for purposes of illustration. This is obviously not the only possible way of dividing up the universe of land uses. See FISCHEL, REGULATORY TAKINGS, supra note 2, at 355 fig.9.2 (dividing the spectrum of possible land uses into categories labeled “subnormal,” “normal,” and “supernormal”).
The three dashed vertical lines labeled Z1, Z2, and Z3 represent possible divisions of entitlements under three different zoning regimes. These lines appear to the right of the line designated "nuisance law," reflecting the reality that zoning ordinances regulate a broader range of uses than would be prohibited by nuisance law. Under the zoning regime designated by Z2, the community holds the rights to all intensive uses as well as the rights to all noxious uses, while the landowner retains only the right to use his property for innocuous purposes. A looser regulatory scheme, Z1, preserves the landowner's rights with respect to some intensive uses. Under a harsher regulatory regime, Z3, the authority over some innocuous uses has been transferred from the landowner to the community. At some indeterminable point short of complete prohibition of all uses, the regulation would be deemed to have gone "too far," and, unless compensated, would be invalidated as an unconstitutional "taking."

2. The Object of the Bargain: Potential Gains from Trade

Because zoning law is usually based on the subjective views of a political majority about the desirability of various land uses, it is unlikely to provide the most efficient initial allocation of entitlements between the landowner and the community. For example, a community might choose the regulatory regime corresponding to Z3, even though a shift from Z3 to Z2 would generate gains for the landowner in excess of the losses to the community. Here, I am assuming that "the community" does not internalize the costs and benefits experienced by the individual landowner in

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79. Fischel, Zoning Reform, supra note 74, at 317-18. Although zoning is often rationalized by analogizing to nuisance law, "zoning provides the community with a far larger and more diverse bundle of entitlements than even the most generous definition of actionable nuisances." Id. at 318.

80. See Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."). Whether or not Z3 would be viewed as going "too far" would depend on the legitimacy of the state interests advanced to ban certain innocuous uses, and whether the remaining permissible uses were economically viable.

81. See Dana, supra note 15, at 1269 ("O[ver-regulation may benefit the dominant political majority even though it does not maximize the welfare of the community as a whole."). Of course, zoning regulations may not reflect the interests of a majority at all, but may instead be the result of "rent-seeking" by powerful interest groups. Rent-seeking occurs when parties try to convince the government to intervene in the market in ways that will allow those parties to attain above-market returns. See Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 224 n.6 (1986). When regulation is influenced in this manner, the initial allocation of property rights might be expected to diverge even further from the social optimum.
If the initial allocation of property rights were set at the social optimum (taking into account the preferences of everyone in the relevant community, including the individual landowner), land use bargains would be wholly unnecessary; there would be no mutually advantageous trades available. Where the initial allocation diverges from the optimum, Pareto improvements can be achieved through bargaining. Figure 2, adapted from Fischel, shows how this might work.

82. See supra note 73 (assuming initially that "the community" incorporates the preferences of everyone in the relevant area except for the individual landowner in question).

83. See Fischel, Zoning Reform, supra note 74, at 325 fig.2. My analysis in working through Figure 2 draws heavily on Fischel's work. However, my formulation differs in two important respects from the analysis employed by Fischel. First, I explicitly incorporate the intuition that in the absence of outside constraints or strategic motives, a community will always choose regulatory point A—the point at which no further marginal benefits can be derived from additional regulations. Second, my graph explicitly takes account of the fact that further regulations are possible beyond this point (an intuition to be developed further in Figure 3, infra), and that the community might continue regulating well into this costly regulatory range for purely strategic reasons.
In Figure 2, as in Figure 1, the horizontal axis represents a continuum of regulatory regimes, from least restrictive to most restrictive. Put differently, each point on the horizontal axis represents a different division of entitlements between the individual landowner and the community. The vertical axis represents benefits, measured in dollars. The downward sloping curve represents the marginal benefits to the community as the regulatory regime becomes increasingly restrictive. Significantly, the preferred regulatory point of the community will not necessarily correspond to the point that would maximize overall social utility, which would take the individual landowner’s utility into account as well. Indeed, the graphs and examples in this Article assume that the community’s preferred regulatory regime will be more restrictive than the socially optimal point.

In Figure 2, the community’s downward sloping marginal benefit curve captures the assumption that, up to a point, adding further land use restrictions generates additional benefits for the community (though at a decreasing rate). Beyond point A, further restrictions generate no additional marginal benefits for the community, and in fact generate marginal costs. The other curve, read from right to left, represents the decreasing marginal benefits which the landowner enjoys as restrictions are loosened. Because increased restrictiveness represents foregone marginal benefits for the landowner, the landowner’s curve, read from left to right, represents the landowner’s marginal opportunity costs.

Point B represents an efficient allocation of entitlements between the community and the landowner. At that point, the marginal cost of the regulations to the landowner precisely matches the marginal benefit to the community. The landowner would not be able to pay off the community to loosen the restrictions, nor would the community be able to pay the landowner to further restrict his activities. For example, imagine a neighborhood zoned for low-density residential housing. This zoning regime corresponds to point B with respect to a given parcel of land only if the

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84. Of course, benefits may be tangible or intangible, monetary or nonmonetary. They may include, for example, aesthetic or social value. For simplicity, however, I am assuming that the relevant benefits can be translated into dollar units.

85. See Fischel, Zoning Reform, supra note 74, at 304.

86. As is made explicit in Figure 3, at this point the community’s total benefits begin to decline as a result of regulation.

87. Fischel, Zoning Reform, supra note 74, at 325 fig.2. I have replaced Fischel’s slightly curving lines with straight lines for the sake of simplicity, and have extended the ends of the curves below the horizontal axis to illustrate that overly restrictive regulations will at some point prove costly for the community, and that the loosening of regulations will at some point prove costly to the landowner. The precise shape of the marginal cost and benefit curves is an empirical question that will vary from landowner to landowner and from community to community.

88. See id. at 305 (stating that there is a “maximum benefit assignment” where “[n]either party can bribe the other to accept more or fewer restrictions”).
marginal opportunity costs to the landowner from further restrictions (say, a two-acre minimum lot size) would be larger than the marginal gains to the community as a whole, and if loosening restrictions (to, say, allow small retail stores) would impose costs on the community that are larger than the benefits accruing to the landowner.

However, it is quite possible that the low-density residential zoning restriction is inefficiently restrictive with respect to a given parcel (or has become inefficient over time), and thus corresponds not to point B, but to point A. In fact, A is the point we would expect the community to select, in the absence of political anomalies or judicial constraints on regulation, and in the absence of strategic motives. Suppose this is the case, and that a landowner, Ambrose, would now like to construct a gas station on his property. Such construction would require a regulatory change that corresponds to a shift on the horizontal axis from point A to point B. This shift will increase the land's value to him by $800,000, while it will only decrease the benefits accruing to the community by $300,000. In other words, Ambrose incurs marginal costs from this regulation far in excess of the benefits enjoyed by the community, and he would benefit from a rollback to the point B regulatory regime far more than the rollback would cost the community.

The total area under the landowner's cost curve between points A and B (area X plus area Y in Figure 2) represents the benefits accruing to Ambrose as a result of the zoning change ($800,000). However, Ambrose must at least compensate the community for the losses it will incur as a result of the regulatory change, which is the amount represented by area Y ($300,000). Area X represents the surplus of $500,000 generated by the zoning change, which, in the absence of applicable constraints, is destined to be the subject of aggressive bargaining. 99 99 Unless the deal is blocked by law or abnormally high transaction costs, Ambrose and the community will probably reach some sort of agreement. Even if the community drives a very hard bargain and captures some of the surplus represented by X, as long as there is enough remaining to compensate Ambrose for his trouble, he can be expected to go through with the transaction. 99 The result is Pareto-efficient—the zoning change is made and the gas station is built.

As this example suggests, individual landowners would wish to purchase relevant portions of the collective property rights created through zoning whenever they stand to gain more from the exchange than the community stands to lose. Under such conditions, the land use "winner" can compensate the "losers" and still come out ahead. The need for such transactions is palpable, because the initial allocation of collective property rights under zoning is not generated by market forces and often bears little

89. See id. at 326 (discussing potential bargaining dynamics).
90. See id.
relationship to the actual and evolving demands of the population. Because information about true preferences is unavailable, even the most public-minded regulatory body would be unable to determine the optimum initial allocation of property rights. Where the purpose behind planning is to protect property values or serve the interests of politically powerful groups, rather than to provide the community with its desired mix of land uses, the initial allocation can be expected to diverge quite sharply from that which a market economy would generate.

Of course, collective land use rights created by zoning are not freely transferable. This limitation is usually explained by reference to the legal justifications for zoning. While traditional notions of nuisance offer some support for land use regulations, the far-reaching regulations found in zoning codes have, since Village of Euclid v. Amber Realty Co., been justified on police power grounds. In addition, local governments are deemed to have a legitimate interest in comprehensive land use planning, a rationale that has provided support for all manner of land use restrictions.

These "police power" and "planning" justifications are logically incompatible with the sale of zoning rights. Justice Scalia hinted at this incompatibility in Nollan by presenting a hypothetical involving the sale of the right to violate an unquestionably valid exercise of the police power—a

91. See id. at 316 (discussing incentives for communities and developers to misstate the costs associated with development, making the "establishment of an efficient degree of restriction . . . largely a matter of guesswork").

92. See NELSON, supra note 72, at 10-15 (noting that zoning originated as a means for protecting the property values of the affluent). Nelson analogizes the zoning of available land to governmentally-imposed automobile production quotas mandating highly unrealistic proportions of Rolls Royces and Cadillacs. Id. at 105. Critics of zoning have long noted that it interferes with the satisfaction of consumer demand. See generally SIEGAN, LAND USE WITHOUT ZONING, supra note 22 (proposing elimination of zoning to better match consumer demand).


94. 272 U.S. 365 (1926).

95. See id. at 387-88 (noting that "the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [police] power"); see also Udell v. Haas, 235 N.E.2d 897, 900 (N.Y. 1968) ("Zoning is not just an expansion of the common law of nuisance."), quoted in SIEGAN, LAND USE WITHOUT ZONING, supra note 22, at 1.

96. See NELSON, supra note 72, at 27 ("[N]uisance-law rationales for neighborhood zoning could not offer a good justification for community zoning, but the planning theory of zoning was able to fill the gap.").

97. See City of New York v. 17 Vista Assocs., 599 N.Y.S.2d 549, 552 (1993) ("It is not for any governmental agency, like Chaucer's Pardoner, to sell indulgences."); NELSON, supra note 72, at 84 (observing that the sale of zoning rights seems unsuitable "as an exercise of the police power" and unethical "as an instrument for the implementation of public land-use plans"); Fischel, Zoning Reform, supra note 74, at 327 ("Selling zoning, as long as this [police power] rationale persists, is analogous to selling health inspections to restaurants, elevator safety certification to apartment houses, and licenses to speed to automobile operators.").
ban on shouting "fire" in a crowded theater. Scalia was making a point about nexus, but the hypothetical carries an important subtext: if something is important enough to justify a ban on police power grounds, violation rights should not be for sale on the open market. Put another way, the fact that a community is willing to sell the right to violate a given regulation provides a strong indication that the regulation does not constitute a true exercise of the police power.

If zoning really constituted an exercise of the police power on the same order as a ban on shouting "fire" in a crowded theater, this objection might have some bite. However, zoning was designed to do something quite different—protect property values and neighborhood environments. The planning and police power justifications were largely ad hoc rationalizations concocted to achieve this goal. These fictions were remarkably palatable to the Village of Euclid Court, but they have left a bitter aftertaste. Land use regulations are quite different from traditional exercises of police power, and their character as property entitlements held by the community should be explicitly acknowledged.

In any event, zoning generates a desire for land use transactions without allowing those transactions to occur freely—a fundamentally unstable arrangement. Aside from the usual corrupt responses that this kind of impediment elicits, landowners and governmental entities have

99. See Kayden, supra note 53, at 7 (discussing criticism of "incentive zoning" as a form of "sanctioned bribery, abiding a private sector that can 'buy' its way out of legal restrictions").
100. See id. at 42 n.140 ("When government willingly allows an exception to the 'shout fire' ban, for a related or unrelated $100 contribution, it intrinsically demonstrates that the ban itself is not strictly necessary.").
101. See id. at 128 ("Although zoning was justified as a method of nuisance control and as an instrument for implementing public plans, both of these justifications were largely fictions that camouflaged zoning's actual purposes."); Sidney Brower, Good Neighborhoods: A Study of In-Town and Suburban Residential Environments 43 (1996) ("Arguments in favor of comprehensive planning in the early twentieth century were really arguments for social segregation.") (citations omitted).
102. See id. at 51 ("Creating collective property rights without also establishing an adequate mechanism for transfer of those rights when needed to allow for changes in land use has had very unhappy consequences for land development.").
103. See id. at 87 ("In many cases, sale of zoning rights has benefited not any neighborhood residents but corrupt local zoning administrators, who have succumbed to the enormous financial pressures for transitions in use that zoning inflexibility can provide."); SIEGAN, LAND USE WITHOUT ZONING, supra note 22, at 196 ("Zoning procedures are particularly susceptible to
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predictably attempted to formulate bargains that will allow them to share the surplus associated with a zoning change. One common approach is a form of barter, in which the landowner trades something (often a piece of her own land) for the right to use the balance of her land in a particular way. These are the types of transactions that received close judicial scrutiny in *Nollan* and *Dolan*. While more cumbersome than straightforward cash deals, such transactions would be expected to effect societal gains by moving development rights into the hands of those who value them most highly.

For example, perhaps Ambrose's community would be willing to permit the zoning change if Ambrose would agree to construct an indoor swimming pool on a portion of his land. Community members feel that the opportunity to take a healthy swim each day would more than compensate them for having to endure the fumes and traffic generated by the gas station. Ambrose will agree to the deal because he can install the pool on a portion of his land for $400,000 (counting the lost value of the land). While this "barter" deal may create less of a social surplus than the cash payment would (if, as is likely, the community values the pool less than it will cost Ambrose), it still leads to an efficient use of the land.

C. THE INCOHERENCE OF NEXUS AND PROPORTIONALITY

Fearful of the strategic possibilities associated with open-ended bargaining, the Supreme Court has strictly limited the content of land use bargains. Indeed, the swimming pool deal I just described would be blocked under *Nollan*, because the dedication of land for a swimming pool does not bear an essential nexus to the harms that would justify prohibiting the gas station in the first place. The encroachment on bargaining freedom associated with these judicial limits is not trivial. Rather, the limits on bargaining imposed by *Nollan* and *Dolan* can be expected to block a large category of mutually beneficial land use transactions. Nor is this

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106. Barter arrangements often embody such inefficiencies. Fischel, *Zoning Reform*, supra note 74, at 307 ("The range of tradable goods is limited and may be subject to indivisibilities, and the value of the gift to the community may be less than the cost to the donor.").


108. Indeed, the limits have spawned at least one law review article dedicated to outright circumvention. *See generally* Douglas T. Kendall & James E. Ryan, "*Paying* for the Change: Using Eminent Domain to Secure Exactions and Sidestep *Nollan* and *Dolan*," 81 Va. L. Rev. 1801 (1995). The Kendall/Ryan proposal involves taking land through eminent domain, and then offering the landowner a choice between cash compensation and a development permit. Id. at 1803. The authors admit that this approach is "not obviously constitutional." Id. at 1804.

109. This assumes that the bargaining limits have operative force. It is possible that, as a practical matter, developers and local governments will find ways around the legal rules. *See Dana*, supra note 15, at 1286-99 (discussing circumvention of nexus/rough proportionality review). For example, a developer may tolerate conditions that fail to meet the *Nollan/Dolan*
impediment to trade justified on the ground that it will prevent overregulation. While nexus and proportionality do too much by blocking advantageous bargains, they also do too little by failing to provide meaningful protection against government overreaching. Finally, nexus and proportionality are not well-tailored to attack the opposite problem—underregulation—which can leave certain segments of the population exposed to unremediated externalities.

1. Blocked and Inefficient Exchanges

To illustrate how the nexus and proportionality limits might block socially valuable exchanges (or, at best, make them less efficient), consider how conditions featuring nexus and proportionality would play out in Ambrose's situation. First, the community would need to formulate conditions that related to the harms that would justify rejecting Ambrose's proposal. For example, the community might require a fume-absorbing buffer of trees, a sound-absorbing wall, and street improvements to compensate for the increased traffic flow. Second, such conditions would need to be matched with rough precision to the magnitude of harm caused by the proposed development. Considered in this light, it might seem that conditions meeting the nexus and proportionality requirements would leave the community indifferent to the development. If the conditions only make up for the harms caused by the development, and if (as we will assume for the moment) the development itself generates no benefits for the community, the nexus and proportionality conditions leave the community no better off than it would be if it simply rejected the proposal. Under these assumptions, the community would have no incentive to approve the zoning change. Where imposing the conditions will also involve transaction costs for the community, such as the weighty burdens of proof imposed by *Dolan*, the community would clearly be better off to simply reject Ambrose's proposal at the outset.

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[106] See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (stating that the "city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development").

[110] I am assuming that the community could refuse to grant the zoning variance necessary for the project to go forward. This is the case under current law, see supra note 79, as long as the regulation upon which the refusal is based does not go so far as to amount to a "taking." It would be possible to formulate a system of land use that did not grant the community this veto power, of course. See infra note 239 (noting that community would not have veto power if its...
Interestingly, this is true whether the nexus and proportionality conditions would be cheap or expensive for the landowner to fulfill. A solution that involves remediating all negative externalities usually will be relatively expensive. However, let us assume, counterfactually, that it is tremendously cheap; it will cost Ambrose only $100,000. Because Ambrose stands to be made $800,000 better off by the zoning change, this would generate a surplus of $700,000 for him. However, if we assume that this remediation makes the community no better off than it would be without the development (i.e., that it perfectly remediates the $300,000 worth of harm the community would otherwise suffer as a result of the development), the community has no incentive to agree to the deal. If we further assume that it will cost the community $20,000 to prove proportionality, as it must do under Dolan, the resulting bargain would generate a $20,000 net loss for the community. Even though Ambrose has access to a large surplus and would be more than willing to share a portion of it with the community, the nexus and proportionality rules prevent it. The community would be irrational not to reject the proposal outright, as it has every legal right to do under current law. The result, of course, is shockingly inefficient.

It is possible, however, that our earlier assumption was incorrect and that the development would actually generate benefits for the community, whether in the form of an increased tax base or more convenient living conditions. An interesting and conceptually important feature of Dolan's brand of proportionality is that it does not require an offset for community benefits generated by the development itself. Were it not for the surplus generated for the community by the development itself, the nexus and proportionality requirements could be expected to operate in a manner virtually indistinguishable from an outright ban on all land use bargains. However, the fact that the community need not offset development harms with development benefits when assessing proportionality has devastating implications for the efficacy of the bargaining limits.

There are two interests were protected only by a liability rule).

112. See Ellickson, Alternatives to Zoning, supra note 22, at 689 ("It will rarely be efficient to eliminate all nuisance costs, since that action will ordinarily require unacceptable levels of prevention costs.").

113. See Dana, supra note 15, at 1277 ("Nothing in the Nollan or Dolan majority opinions (or the subsequent state court case law) indicates that a court may or should consider the anticipated positive externalities of a development project in determining ‘proportionality’ under the nexus/rough proportionality standard.").

114. In reality, it is possible that the conditions themselves might generate some small surplus for the community if "rough proportionality" were stretched to its outer limit. A community might also be induced to engage in a land use transaction by graft or other covert transfers of surplus. The key insight, however, is that some surplus must be forthcoming from some quarter to make land use transactions worthwhile for a community under a nexus and proportionality bargaining regime.

115. See infra Part I.C.2 (discussing overregulation).
distinct situations in which the nexus and proportionality conditions will actually be attractive to the community, both of which involve benefits to the community stemming from the development project. I will address the first of these, which occurs in connection with "good" or "legitimate" regulatory action (as opposed to strategically manipulative government action), in this section. I will discuss the second situation, which occurs in connection with shamelessly strategic and acquisitive governmental action, in the next section.

In the "good government" scenario, the community knows that the development will generate a small benefit for the community, but that benefit will be overshadowed by the harm caused by the development. To return to our example, imagine that Ambrose's gas station, which would cause $300,000 worth of harm to the community, would also generate $200,000 in benefits for the community (through, say, an improved quality of life). In this situation, the original zoning law banning the development is rational from the community's perspective, though inefficient from a societal standpoint given the gains Ambrose expects to realize from the development. If the community is allowed to impose nexus and proportionality conditions that will compensate it for the $300,000 worth of harm, it will be delighted to approve the project so that it can receive the $200,000 worth of benefits associated with the development. Even after the community pays for the $20,000 study to prove nexus and proportionality, it still ends up $180,000 ahead. In this situation, nexus and proportionality do not foreclose an advantageous trade. If the nexus and proportionality solution is relatively cheap, the parties will enjoy a large surplus as a result of the bargain.

Generally, however, the nexus and proportionality solution will be relatively expensive and will yield a much smaller surplus than would a bargain involving conditions selected by the parties (or an outright cash sale of zoning rights). The reason for this is simple: a community will typically place a much lower value on complete remediation of a given externality than it will cost the landowner to provide such complete remediation. The difference between the two valuations builds a "deadweight loss" into the transaction. To return to our example, imagine that the nexus and proportionality solution yields a surplus of $180,000 after the community pays for the $20,000 study to prove nexus and proportionality. The reason for this is simple: a community will typically place a much lower value on complete remediation of a given externality than it will cost the landowner to provide such complete remediation. The reason for this is simple: a community will typically place a much lower value on complete remediation of a given externality than it will cost the landowner to provide such complete remediation.

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116. See Dana, supra note 15, at 1277 (discussing the situation in which development generates "net negative externalities").

117. See supra note 112; see also Been, supra note 2, at 544 (noting that "the remedy for the harm may be more costly than the value of preventing the harm").

118. The term "deadweight loss" denotes a loss of surplus that could otherwise be enjoyed by one or both of the parties. It occurs when one party is forced to bear costs associated with a particular expenditure or activity that exceed the gains to the other party from that expenditure or activity. See Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315, 1326 (1993) ("[A]n individual's self-interested, opportunistic act will create a deadweight loss whenever the costs it inflicts on others exceed the individual's benefits from the act."); David A. Weisbach, Line Drawing, Doctrine, and Efficiency in the Tax Law, 84 CORNELL L. REV. 1627, 1650 (1999).
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proportionality remediation would, more realistically, be expensive. If it cost Ambrose $800,000 or more, he would no longer be interested in the deal and the transaction would not occur, even though the community would have been satisfied with a mere $300,000 to compensate it for its harms. In this situation, the deal-killing deadweight loss of $500,000 represents the difference between the cost of the remediation and its value to the community.

Let us assume instead that it would cost Ambrose $750,000, so that he would still be interested in the transaction. However, the community would not be benefited $750,000 by the remediation; instead, it would (at most) be compensated the $300,000 worth of harm it would otherwise experience as a result of the development. There would be an unavoidable deadweight loss of $450,000. If the community would receive $180,000 in other benefits from the gas station (after spending $20,000 to prove nexus and proportionality), the deal would go through. However, the parties would enjoy only a $230,000 surplus between them (Ambrose’s $50,000 plus the community’s $180,000) as a result of the zoning change. In contrast, the earlier community pool example generated at least a $400,000 surplus to be shared between the parties. The hypothetical cash sale generated a $500,000 surplus. These numbers are invented, of course, but they are not implausible. The conceptual problem has been cogently articulated by Jerold Kayden:

Interestingly, a ban on unrelated amenities interferes not only with the preferences of city mothers and fathers, but potentially with those of property owners as well. Given the choice between the ‘unrelated’ beach easement and the ‘related’ viewing spot, for example, the Nollans might very well have selected the beach easement. In the typical incentive zoning transaction, the developer’s choice between related and unrelated amenities would reduce to an economic calculus in which developers, in return for a bonus, would prefer to provide an inexpensive unrelated amenity rather than an expensive related one.119

Richard Epstein has suggested that nexus is valuable in that it “narrows the size of the bargaining range and hence reduces the state’s ability to extract concessions from individual owners.”120 The problem is that nexus,

(footnotes omitted)

119. See Fischel, The Economics of Land Use Exactions, supra note 15, at 105 (presenting a similar example).
120.  Kayden, supra note 53, at 47-48; see Cooter, supra note 25, at 299-301 (providing examples to demonstrate potential superiority of offsetting harms rather than mitigating them); Dana, supra note 15, at 1277-82 (providing examples that demonstrate the potential inefficiency of nexus and proportionality).
121.  Epstein, Bargaining with the State, supra note 20, at 183-84.
especially when combined with the additional requirement of proportionality, narrows the bargaining range far too much.\textsuperscript{122} If it simply placed an upper bound on the price of waiving the regulations, the parties would remain free to choose a more efficient alternative that did not manifest an essential nexus.\textsuperscript{123} As it is, the connected and proportional concession sets both the bargaining ceiling and the bargaining floor, interfering with the preferences that the bargaining parties might have for an unrelated concession that would generate a larger surplus. In many instances the nexus and proportionality requirements will either block a transaction entirely or make it needlessly inefficient.

The argument, of course, is that the greater good of protecting the landowner from possible extortion justifies the inefficiency.\textsuperscript{124} To return to Figure 2, the concern is not just that the community will capture part or all of area X, but that it will have moved its regulatory regime to point C in anticipation of the bargain, thereby potentially capturing all or part of area Z as well. Because the community does not gain any marginal benefits from shifting the regulatory regime from point A to point C (and in fact incurs costs), it would only make this move for the express purpose of gaining bargaining leverage for a future land use transaction.\textsuperscript{125} The nexus and

\textsuperscript{122} Nexux on its own might be rather broadly construed. For example, a development ban and a development condition might both serve a vague purpose such as "maintaining the neighborhood atmosphere." There might well be multiple concessions that would satisfy the essential nexus requirement, permitting at least a small bargaining range. However, \textsuperscript{123} Dolan's added requirement of rough proportionality eliminates such flexibility. This additional requirement refines and reinforces the essential nexus requirement by making it clear that conditions must not only serve the same purpose as the development ban, but must affirmatively remediate identifiable harms that lend themselves to careful quantification. The result is virtual elimination of any bargaining range.

\textsuperscript{124} One might argue that a rough proportionality requirement on its own, without a nexus requirement, would effectively provide such a cap. See Fischel, \textit{Regulatory Takings}, supra note 2, at 349 ("If the Court is willing to supervise the terms of trade for regulations with its new 'rough proportionality' rule, the old nexus doctrine is unnecessary even for that task."). Yet it is difficult to imagine meaningful monitoring of proportionality in the absence of nexus. Only when the asserted harm and the asserted cure are conceptually linked to each other is it realistically possible to assess their proportionality. The nexus requirement keeps the bargaining chips in a common metric so that they can be counted, while rough proportionality requires that the chips be tallied up with at least rough accuracy.

\textsuperscript{125} For this to be the case, the bargaining limits would have to reduce "the resource losses from destructive bargaining games." Epstein, \textit{Bargaining with the State}, supra note 20, at 188. This reduction must be by an amount greater than the efficiency losses from blocked bargains. See Fischel, \textit{The Economics of Land Use Exactions}, supra note 15, at 104-05 (illustrating this principle with an example of costs related to reducing congestion).

\textsuperscript{126} See Robert C. Ellickson, \textit{Suburban Growth Controls: An Economic and Legal Analysis}, 86 \textit{Yale L.J.} 385, 428 (1977) (hereinafter Ellickson, \textit{Suburban Growth Controls}) (describing a "typical scenario" in which a "suburb deliberately imposes excessive development standards" but "in fact has no interest in promoting the deadweight loss that would result if homeowners complied with these wasteful standards" and is imposing the standards only to gain "maximum leverage in the subsequent bargaining").
proportionality limits are supposed to curb the illegitimate overregulation that stems from such strategic impulses. But can they really do so? The analysis that follows strongly suggests a negative answer.

2. Overregulation

The foregoing discussion illustrates that the nexus and proportionality requirements do too much insofar as they block efficient bargains. Observed from another angle, however, the nexus and proportionality limits do far too little. Specifically, they cannot effectively protect landowners from overregulation or significantly deter strategic government behavior. To see why this is so, it is necessary to consider the second scenario in which a community will be willing to engage in a land use bargain featuring a nexus and proportionality condition.

In the “good government” example, the community was initially regulating land use in a straightforward manner. The harms associated with development ($300,000 in our example) outweighed the benefits to the community ($200,000), and the community needed to impose a condition of some sort in order to make the zoning change beneficial. It is possible to imagine a “bad government” scenario as well, in which the proposed development would generate $500,000 in benefits for the community while imposing only $300,000 in harm. In that situation, a ban on development is actually harmful for the community. The community would be better off lifting the ban, even in the absence of any developer concessions. The

126. See Been, supra note 2, at 491 (“Requiring a local government to spend exactions on projects that are germane to the harm the development causes limits the potential profit from overregulation and thereby helps to ensure the efficient level of regulation.”); see also Epstein, Bargaining with the State, supra note 20, at 183-84 (suggesting that nexus provides a useful, albeit “second-best,” constraint on governmental abuses). Epstein’s criticism of land use bargains is that they potentially “bundle” a socially efficient shift (the transfer of land use rights from the community to the landowner) with an inefficient shift (the transfer of an easement from the landowner to the community, even though it is worth more to the landowner than to the community). See generally Epstein, Harms and Benefits, supra note 57. His preferred solution would be to “unbundle” these components of the bargain and require the government to pay for any easement it acquires. Id. He does not, however, make the symmetrical suggestion that landowners be required to pay for the land use rights they wish to acquire, presumably because he believes the land use restrictions are illegitimate in the first place and would be lifted for free if they could not be used to leverage acquisition of the easement. See Epstein, Bargaining with the State, supra note 20, at 181, 183.

127. See Dana, supra note 15, at 1277 (discussing “development generating no net negative externalities”).

128. By “better off,” I do not mean merely financially better off, but truly better off in the community’s own view—counting whatever tangibles and intangibles the community itself finds relevant. Although I am using monetized costs and benefits for simplicity, I do not mean to suggest that a community is acting strategically any time it takes a land use action that fails to make it better off financially. See supra note 84 (contemplating nonmonetary benefits). Rather, I am talking here about truly strategic land use regulation, in which a community bans development that it would actually prefer, for the sole purpose of extracting concessions from
only reason that a community would impose such a ban would be to gain a strategic advantage that would enable it to extract benefits from the developer. Yet, even if land use bargains are constrained by nexus and proportionality, the government is clearly better off overregulating. If it does so, it can then impose a condition that will compensate it for the $300,000 in harms. It will then reap the full $500,000 in benefits from the development ($480,000 after proving nexus and proportionality), rather than the mere $200,000 it would net without the regulation. As the example indicates, nexus and proportionality requirements do not necessarily eliminate the community’s incentive to overregulate.129

This may not seem very insidious in our example, which involves a fairly intensive use of land (a gas station) and a fairly commonplace zoning restriction. But the same reasoning explains why nexus and proportionality will do little to curb even the most outlandish forms of overregulation imposed by a venal governmental entity. To show how the various bargaining problems might play out under less benign conditions, the next set of examples involves a governmental entity dedicated solely to the goal of redistributing goods and services from the politically powerless members of the community to those with more political clout. This government is shameless about inventing totally nonsensical rules purely for strategic purposes.

Our imaginary government is led by a manipulative ruler, Simon. Simon is allowed to make rules about what individuals may and may not do, but he is forbidden to take away anyone’s property outright. In order to do anything Simon forbids (or to avoid doing anything that Simon says to do), one must purchase the “violation rights” from Simon. Whenever Simon and his cronies want some extra money or other goods, they simply make up a rule that is very costly for people to follow, such as requiring that people hop on one foot whenever traveling on city sidewalks. Simon gets a little bit of tyrannical pleasure out of watching a few pedestrians hop about, but too many hopping pedestrians would definitely get on his nerves. His real motive is not to induce hopping but to induce payments from people who find it very costly to hop. If Simon’s rules are completely unreviewable, fully enforceable, and also fully alienable, Simon and his friends will be able to acquire as much property as they like, free of charge.130

129. See Dana, supra note 15, at 1277 (pointing out insufficiency of nexus and rough proportionality standards where development will generate no net negative externalities). Nexus and proportionality can reduce the size of the surplus that a community can extract as a result of its overregulation. Likewise, the requirement that a community prove nexus and proportionality can further shrink its expected surplus from a given land use deal. Nevertheless, these requirements are unlikely to curb the overregulation itself.

130. If Simon’s community is a democracy, the political process will automatically provide some limits. However, the political process would not stop rules targeted at politically powerless or unpopular groups, or rules that are automatically suspended at the request of the politically
One might think that the problem would disappear entirely if Simon were forbidden to sell violation rights to his rules. Indeed, if Simon finds a lot of hopping citizens unpleasant to behold, making the violation rights inalienable would be sufficient to deter him from passing the hopping rule in the first place. But if we change the hypothetical a little, so that the rule in question is one which benefits Simon (even a little), the analysis changes entirely. Imagine Simon mildly enjoys blue houses and decides to pass a law requiring all house exteriors to be painted blue. He would be happy if people bought the rights to keep their house some other color (his preference is only a mild one), but, other things being equal, he would rather have the houses painted blue. Interestingly, making the violation rights inalienable in this situation does not deter Simon from imposing his “blue house law.” After all, he gains a little bit from the rule. Assuming other people have stronger preferences about the colors of their own homes, the result is vastly inefficient.

Inalienable land use regulations would, therefore, appear to be a viable solution only in situations where the governmental body is solely motivated by strategic considerations. The reason for this becomes clear if one reviews Figure 2. In the absence of any restrictions on land use regulations, the community could be expected to keep adding restrictions until the marginal benefits of doing so reached zero—far past the point of efficient regulation. Thus, foreclosing governmental bodies from using regulations as bargaining chips does not prevent overregulation; indeed, it will not eliminate any regulations that generate benefits (however minimal) for the community.

It does not require an overly sanguine view of government to anticipate that most regulatory actions will generate at least some minimal benefits for the community. Indeed, some empirical evidence suggests that making regulations less freely alienable does not trigger a massive roll-back of regulatory measures. See Fischel, Regulatory Takings, supra note 2, at 346 (noting that the California Coastal Commission did not relax its regulations in the seven years following the Nollan decision). Fischel points out that most regulations “are adopted for a reason,” suggesting that “making the regulations inalienable via the unconstitutional conditions doctrine is not going to make the regulations go away.” Id. at 346-47.

powerful. For example, if few people ever walk anywhere in Simon’s community (or, alternatively, if dispensations are given away for free to the powerful elements of the community), the hopping rule might not be subject to a political check.

131. See Fischel, Regulatory Takings, supra note 2, at 346 (noting that the California Coastal Commission did not relax its regulations in the seven years following the Nollan decision). Fischel points out that most regulations “are adopted for a reason,” suggesting that “making the regulations inalienable via the unconstitutional conditions doctrine is not going to make the regulations go away.” Id. at 346-47.
As in the previous figures, the horizontal axis in Figure 3 represents the degree of restrictiveness of land use regulations. The community's utility curve represents the community's total benefits resulting from the restrictions. The curve indicates that regulations continue to generate benefits for the community (though at a decreasing rate) up to point A, which represents the community's preferred regulatory point. Beyond point A, additional restrictions no longer generate added benefits, and, in fact, entail opportunity costs. The landowner's utility curve reflects the intuition that land use regulations increase utility up to a point by providing reciprocal advantages for the landowner (by, for example, protecting her from negative externalities associated with nuisances). The landowner's benefits continue to increase to point L, her preferred regulatory regime, and then drop off at an increasing rate. At some point, the regulations are so restrictive as to deny the landowner all economically viable use of her land. This point corresponds to point T (for "taking") in the figure.

We could expect a ban on land use bargaining to deter the regulatory regime from moving to the right of A, but it would never move it to the left of A. Takings law already prohibits movement to the right of point T, so bargaining restrictions would yield results only for regulation falling in between these points. Significantly, A does not represent an efficient level of regulation. The efficient point of regulation occurs when the marginal benefits associated with regulation match the marginal opportunity costs for the landowner. In other words, the efficient point is the point at which the community's utility curve is rising at exactly the same rate as the landowner's utility curve is dropping. This will occur somewhere in the region between B and B'. At point A, the total benefits to the community have leveled off, so that the marginal benefits to the community are at zero; at the same time, the landowner's total benefits are dropping precipitously.

One might think, however, that stopping the government at point A is still better than nothing. How much can really be gained by drawing the line at A depends on the extent to which, as an empirical matter, governmental bodies are likely to enact regulations that would decrease overall utility for the community to attain bargaining power, and whether the related costs outweigh the inefficiencies of blocking land use bargains. If there is a problematically large category of purely strategic governmental regulation, however, nexus and proportionality will do little or nothing to address it. Indeed, nexus and proportionality requirements (unlike an outright ban on all bargains) may be unable to keep government regulation from moving to the right of point A.

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132. Because Figure 3 shows total benefits rather than marginal ones, it is difficult to pinpoint the spot where the marginal benefits of the landowner and the community are equivalent. Figure 2, which depicts marginal benefits, provides a clearer picture of the efficient point.
To sell violation rights under a nexus and proportionality bargaining regime requires, as a threshold matter, identification of some legitimate government interest which would be "substantially advanced" by a given rule.\textsuperscript{133} This need not detain an imaginative despot for long. Simon might, for example, justify his hopping rule by asserting that hopping improves cardiovascular health or makes pedestrians more visible to automobile drivers and thereby reduces accidents. Exacting payments for the privilege of not hopping makes sense, he might argue, since those who fail to hop impose higher health care costs on the rest of society. Suppose further that Simon met the nexus and proportionality requirement by decreeing that violation rights payments be calibrated to equal the additional expected public health burden, and earmarked for a health care fund.\textsuperscript{134}

If most or all citizens take the bargain (as we might expect, since compliance with the hopping rule is very costly), then Simon is not "punished" for his regulatory excesses by being forced to endure the sight of a hopping populace. While it is true that he will not get to use the money as he wishes, it is plausible that this nexus and proportionality exaction would generate some benefits for Simon. For example, Simon can spend the budget surplus generated by the health care savings on things that will benefit himself and his friends.

Critical to this outcome is the fact that Dolan's proportionality requirement does not incorporate an offset for the benefits generated for the community by a given development. In other words, under Dolan, a "proportional" solution need only be proportional to gross harms, not net harms, generated by the development.\textsuperscript{135} Dolan-like proportionality, applied in the context of our example, would require only that the violation proceeds be calibrated and applied to remediate costs associated with the higher accident rate. The vast cost savings for the community also generated by violation of the rule—avoidance of an annoying visual disturbance—would not be included in the calculus. This explains why a legally permissible nexus and proportionality exaction could be negotiated even where the rule from which it relieves an individual landowner would, if followed, be extremely costly for the rest of the community.

One might object that this example is just plain silly and that courts

\textsuperscript{133} See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834-35 (1987) (recognizing that no taking occurs where a regulation "substantially advances" a legitimate state interest).

\textsuperscript{134} This assumption is not completely implausible (even on these facts) and is in no way inconsistent with the fact that the hopping rule is, on balance, one that generates costs for the community. The costs associated with the visual disturbance caused by hopping may far outweigh the health benefits associated with hopping, but this does not eliminate the possibility that the rule does actually generate some health benefits.

\textsuperscript{135} See Dana, supra note 15, at 1277 (observing that the Nollan and Dolan decisions do not contemplate consideration of positive benefits generated by a development in assessing proportionality).
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would, in fact, strike down anything as ridiculous as Simon's hopping rule. This observation only reinforces my point. To the extent that limits on the underlying regulatory scheme can be enforced, problematic overregulation can be curtailed. To the extent no such limits exist, using nexus and proportionality to constrain subsequent bargains will do nothing to construct such limits. If the hopping rule were deemed to be a valid exercise of the state's regulatory power, a nexus and proportionality bargain to lift the rule would be logically unassailable—and fully as problematic as my example suggests.

The key insight is that the nexus and proportionality rule will not deter overregulation—even to the right of point A in Figure 3—if the exaction in question generates any benefits at all for the community. When people pay an exaction to get out of a strategically-enacted regulation lying to the right of point A, they are reducing costs for the community in two ways. First, they are keeping the socially costly rule from harming the community by buying their way out of it. Second, they are making payments to the community in some form or other, which may be expected to generate at least minimal benefits.

To take a somewhat less hypothetical example, imagine that banning all development on a given tract is costly for the community, and that the community would suffer gravely if it actually enforced this ban. Nevertheless, it is likely that the development will generate some identifiable externalities, such as increased traffic. The community would not be deterred from overregulating in this situation (assuming that exit threats are not credible), since it would never actually be forced to bear the cost of nondevelopment. Instead, the community would receive payments targeted at remediating the added traffic and would thus be better off than if it had never enacted the excessive regulation. It is difficult to imagine a circumstance in which this principle would not hold.

Consider the facts of Nollan itself. Let us assume that a community is trying to decide what sort of land use restrictions it will place on beachfront properties. Further assume that it knows there is a demand for expansion or rebuilding of beach cottages and that it will lose tax money if these cottages are not expanded or rebuilt. What regulatory regime should it adopt? One which freely allows cottages to be expanded and rebuilt, or one which forbids this unless a bargain can be struck that exhibits nexus and proportionality? If we assume that some of the community's voting citizens would enjoy a "viewing spot" (a solution that the Nollan Court suggested would pass constitutional muster), and if we further assume that there is no

136. A developer can make a credible "exit threat" if he would be able to exit the jurisdiction and develop elsewhere with relative ease. See generally Been, supra note 2 (discussing "exit"). To the extent exit threats are credible and place meaningful limits on regulation, such limits would exist independent of the nexus and proportionality requirements. See infra notes 195-197 and accompanying text (discussing exit); infra Part II.B (same).
way for the cottage owners to exit the jurisdiction, the community could be expected to impose a ban on development and then extract the concession in exchange for development rights. The community loses no tax money if people go ahead with their building plans, and it gains a free "viewing spot" in the process. If one deems such a ban on cottage expansion to constitute improper "overregulation"—a point that is open to debate—it would not be deterred by a nexus and proportionality rule.

Nexus and proportionality restrictions on bargaining do nothing to limit the scope of land use regulation or to confine it to the "legitimate" sphere (however defined). At best, they limit the amount of surplus that a governmental entity can extract from strategic regulation. The tremendous waste with which they accomplish even this modest task demands a search for a better alternative.

3. Underregulation

Nexus and proportionality have a further claim to legitimacy that is far more powerful, though often overlooked.\(^\text{137}\) By keeping bargains focused on the proportionate remediation of actual externalities, these requirements would seem to preclude deals that would make the bargaining parties—the controlling majority and the individual landowner—better off, while leaving an unrepresented segment of the community exposed to unremediated externalities. In other words, nexus and proportionality might be expected to combat underregulation—the phenomenon of selling violation rights too cheaply, in currency unsatisfactory to, or never received by, those who are impacted by the violation itself.

For example, imagine that Ambrose's gas station will impose fumes and noise on only a small, powerless subset of the population—those who live, say, within a block of the site. The majority interests within the community, who are not negatively affected by the development, might prefer to strike a bargain which would grant them valuable unrelated benefits (a community swimming pool, for example), rather than a bargain that would simply remediate the noise and fumes caused by the development. It is easy to see that this sort of bargain might fail to protect the interests of the nearby neighbors, who might not view the swimming pool as adequate compensation for the harms they must endure. Because a nexus and proportionality solution requires that the exaction relate directly and proportionally to the harms caused by the development, it would seem to do a better job of protecting the interests of those who are actually affected by the development.

Nexus and similar concepts indeed appear to have opened the door to

\(^{137}\) See Been, supra note 2, at 506 (concluding that nexus is not designed to address underregulation).
third-party suits. Third parties harmed by development might be able attack "sweetheart deals" between developments and local governmental bodies on the grounds that the concession lacks an essential nexus to the harm caused by the development. And although the Court has used the rough proportionality standard to prevent the government from requiring too much remediation of the landowner, it is theoretically possible that third parties might creatively wield the rule to attack bargains that involve too little remediation of externalities.

Yet, nexus and proportionality are blunt instruments for ensuring governmental fairness and protecting against underregulation. The limits do both too little and too much. They are markedly underinclusive rules, protecting minority interests against underregulation only when it arises as the result of a bargaining transaction. The rules provide no protection against underregulatory regimes that occur through legislation or simple government inaction. Even in the bargaining context, the government may nevertheless disadvantage third parties by deciding what externalities should count and what connections it will draw. The nexus and proportionality rules are also troublingly overinclusive. A large category of potentially efficient exchanges are simply blocked, without any evidence that they would fail to appropriately compensate the affected parties.

II. SEPARATING HARD BARGAINS FROM "REAL STEALS"

Land use bargains, even "hard bargains," plainly have the potential to yield Pareto-efficient outcomes. Blocking them through judicial limits on land use bargains is counterproductive on the one hand, and insufficient on the other. Neither overregulation nor underregulation provides a compelling justification for nexus and proportionality. Yet the risk of strategic and unfair governmental action remains and must be addressed in

138. See Fischel, REGULATORY Takings, supra note 2, at 349-50 (discussing potential of third-party intervention on Nollan grounds to interfere with deals between developers and regulatory bodies).

139. A bargain that requires the landowner to remediate only a small portion of the harm she causes might suggest that some additional consideration is flowing from the landowner to the decisionmakers in violation of the nexus requirement. Alternatively, it might suggest that the landowner is part of a newly-powerful interest group that has inordinate influence on decisionmaking. (If the powerful landowners controlled decisionmaking at the time the underlying land use restrictions were being considered, they presumably would have blocked the restrictions.)

140. Where legislative or regulatory outcomes are controlled by a majority, one might expect minority interests to receive too little protection from externalities. Where these outcomes are controlled by interest groups (powerful developers, for example), the potential for underregulation could be even greater.

141. See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 862 (1987) (Brennan, J., dissenting) ("[T]he Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development.").
some fashion. The challenge is to find a way of controlling these risks without needlessly blocking efficient land use transactions. To develop such an approach, we must find the boundary line between legitimate, mutually beneficial bargains and illegitimate uncompensated takings—"real steals." The first step is to examine in some depth the nature and workings of the strategic behavior problems that underlie judicial limits on land use bargains. This exploration begins with the unconstitutional conditions doctrine.

A. STRATEGIC BEHAVIOR AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

In Dolan, the Supreme Court invoked the unconstitutional conditions doctrine as a justification for invalidating land use bargains that fail to meet certain criteria.142 Although the Court characterized the doctrine as "well-settled,"143 the application of this notoriously disordered legal concept to land use bargains was neither obvious nor uncontroversial.144 In this section, I will sketch the central intuitions underlying the doctrine and consider whether and how the doctrine might justify limits on land use bargains.

In simplest terms, the unconstitutional conditions doctrine operates to block some subset of possible bargains between an individual and the government. The possibility for unconstitutional conditions arises whenever an individual is in a position to trade some right or privilege that implicates a constitutional protection for a discretionary government benefit (or for relief from a discretionary government burden).145 The doctrine is puzzling and problematic because it operates to invalidate what might otherwise appear to be consensual, mutually-beneficial exchanges.146 Various explanations for the doctrine have been offered, many of which are well-

143. Id.
144. See id. at 407 (Stevens, J., dissenting) ("This case inaugurates an even more recent judicial innovation than the regulatory takings doctrine: the application of the 'unconstitutional conditions' label to a mutually beneficial transaction between a property owner and a city."); Laitos, supra note 9, at 893-94 & n.6 (taking issue with the Dolan Court's characterization of the doctrine as "well-settled"). The unconstitutional conditions doctrine has never been applied with consistency. See Epstein, Bargaining with the State, supra note 20, at 9 (noting that the unconstitutional conditions doctrine "roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others"); Sullivan, supra note 20, at 1416 ("As applied . . . the doctrine of unconstitutional conditions is riven with inconsistencies.").
146. See Richard A. Epstein, Unconstitutional Conditions and Bargaining Breakdown, 26 San Diego L. Rev. 189, 190 (1989) [hereinafter Epstein, Unconstitutional Conditions] ("The initial query with unconstitutional conditions is disarmingly simple. Why have the doctrine at all? In the usual case, the state is in a position to offer or withhold some benefit to an individual; likewise, that person may accept or reject the benefit at will."); Sullivan, supra note 20, at 1477 ("[W]hy invalidate conditions that burdened parties are free to accept or reject, and why invalidate conditions on benefits that government is free to grant or withhold in the first place?").
reasoned and cogent, but none of which is fully convincing.\footnote{147}{Searches for a unifying theoretical explanation of the doctrine’s workings have been largely fruitless. See, e.g., Louis Michael Seidman & Mark V. Tushnet, Remnants of Belief: Contemporary Constitutional Issues 84 (1996) (“Because the problem is complex, it is little wonder that no one has satisfactorily resolved it. It is too bad, however, that so many people purport to have done so.”). Some scholars have suggested that the search, and perhaps the doctrine as well, should be abandoned altogether. See generally Frederick Schauer, Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency, 72 Deny. U. L. Rev. 989 (1995) (arguing that the unconstitutional conditions doctrine presents problems so difficult that a solution is unlikely to be found); 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 (1990) (arguing that the unconstitutional conditions doctrine should be abandoned).}

Much analysis of the unconstitutional conditions doctrine has focused on whether the government’s bargain would leave the individual better or worse off than she otherwise would be—in other words, whether it is a true “offer,” as opposed to a “threat.”\footnote{148}{See Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1304-01, 1352-59 (1984) (arguing that it is necessary to distinguish governmental “offers” from “threats”); Kenneth W. Simons, Offers, Threats, and Unconstitutional Conditions, 26 San Diego L. Rev. 289, 308-11 (1989) (discussing significance of the threat/offer distinction); see also Alan Wertheimer, Coercion 202-21 (1987) (analyzing coercive proposals by focusing on offers, threats, and baselines).}

This presents the most confounding aspect of the unconstitutional conditions doctrine: determining an appropriate baseline from which to assess governmental “offers.”\footnote{149}{See, e.g., Epstein, Bargaining with the State, supra note 20, at 25-38; Seidman & Tushnet, supra note 147, at 72-90; Kreimer, supra note 148, at 1351-78; Sunstein, supra note 147, at 602-04.}

The problem becomes apparent when one considers the prototypical example of a slave owner who beats his slave every day.\footnote{150}{This much-discussed example is Robert Nozick’s. See Simons, supra note 148, at 312 & n.74 (citing Robert Nozick, Coercion, in Philosophy, Science, and Method 410, 450 (S. Morgenbesser et al. eds., 1969)).}

When the slave owner “offers” to refrain from beating his slave on a certain day, in exchange for some action, does that proposal constitute an offer or a threat? The answer depends on what baseline one uses.\footnote{151}{See Nozick, supra note 150, at 450-51 (preferring a normative baseline); Simons, supra note 148, at 312-13 (discussing the determination of threats and offers).}

Focusing on whether a deal has the potential to make an individual better off may seem a logical way to attempt to “solve” the unconstitutional conditions doctrine, given the threshold puzzle that the doctrine presents: the apparent blockage of mutually-beneficial bargains. The conceptual problem disappears if one can show that a given bargain is not truly beneficial to the individual, but is instead the product of an illegitimate manipulation of a regulatory baseline. Such an analysis implies that constitutional protections are designed to protect some baseline level of individual well-being and to permit all bargains that represent upward departures from those baseline levels for an individual—a rather dubious
proposition. One reason for skepticism relates to the “public goods” aspects of constitutional rights.\textsuperscript{152} A focus on individual well-being ignores the society-wide benefits generated by constitutional protections.

It is more accurate and fruitful to think of the Constitution as placing structural constraints on the kinds of decisions officials and entities are permitted to make about individuals’ lives, and to view the unconstitutional conditions doctrine as an extension of these structural constraints.\textsuperscript{153} Applied to the bargaining setting, these structural constraints limit the sorts of things that a particular governmental entity can legitimately give and receive in trade. Significantly, individuals do not bargain with a monolithic “state” but rather with an individual governmental entity or actor which possesses a particular constitutional and political status. In the land use context, the entity in question, the zoning board, is (at least theoretically) controlled by a political majority.\textsuperscript{154} It thus becomes critical to understand the kinds of benefits that a majoritarian entity is empowered to dispense, as well as the kinds of goods that such an entity can legitimately receive in trade.\textsuperscript{155} This analysis suggests that the unconstitutional conditions doctrine is violated when the governmental entity receives something in trade that it

\textsuperscript{152} See generally Thomas W. Merrill, Dolan v. City of Tigard: Constitutional Rights as Public Goods, 72 DENV. U. L. REV. 859 (1995) (suggesting that the unconstitutional conditions doctrine can be understood as a response to the public goods aspects of constitutional rights).

\textsuperscript{153} “Structural” concerns have often been noted in the unconstitutional conditions context. See, for example, Been, supra note 2, at 497-98 & n.125 (discussing the “structural” version of the inalienability argument); Kreimer, supra note 148, at 1387-90 (discussing structural justifications for making certain rights non-waivable).

\textsuperscript{154} Public choice theory casts doubt on the ability of political entities to register the preferences of majorities accurately. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 12-37 (1991) (discussing public choice and its implications); Dana, supra note 15, at 1269-74 and sources cited therein (discussing political forces at work in development decisions). Nevertheless, local communities may be among the most “majoritarian” institutions known to government, presenting all of the risks that “majoritarianism” entails. See Fischel, Introduction, supra note 15, at 1582 (“Local governments are more prone to majoritarianism than other levels of government because they usually lack the electoral diversity that comes with large land area and large population and because, as derivative governments, they also lack the other constitutional checks on the will of the majority, such as bicameral legislatures and separation of powers.”); see also Fischel, Regulatory Takings, supra note 2, at 137 (observing that legislation by the national legislature should be given higher judicial deference). I will assume for the present discussion that a political majority controls land use decisions, while recognizing that this is something of an oversimplification.

\textsuperscript{155} In other contexts, notably criminal procedure, “the state” with whom one is bargaining is not a majoritarian entity, but rather a police officer or a prosecutor. It is possible that the lower degree of protection generally attending waivers of constitutional rights in the area of criminal procedure can be explained by the fact that majoritarian influences are generally more attenuated in that context. However, majoritarian risks are undeniably present in certain Fourth Amendment contexts, as where suspicionless searches are made prerequisites for benefits such as welfare, public housing, extracurricular public school activities, and public employment.
is constitutionally precluded from accepting, or when it gives something in trade which it has no power to give.\textsuperscript{156}

Considered in this light, the unconstitutional conditions doctrine encompasses three distinct types of wrongful governmental action: (1) receiving forbidden goods; (2) bargaining with currency illegitimately appropriated from the other party; and (3) bargaining with currency illegitimately appropriated from segments of the community that are not represented at the bargaining table. Each of these problems could be addressed through constitutional tools and doctrines existing independent of the unconstitutional conditions doctrine.\textsuperscript{157} However, the doctrine is worth preserving as a shorthand designation for the manifestations of these constitutional problems as they arise in the bargaining context.\textsuperscript{158} A doctrine which focuses attention on bargains \textit{qua} bargains serves the practical function of promoting vigilance against government malfeasance in a setting where it is especially likely to be implicated. It is important to note that the bargaining context merely offers a focal point for detecting otherwise illicit governmental conduct. Just as law enforcement personnel might watch for marked bills in an effort to catch a bank robber, monitoring governmental bargains may help to unmask instances of illegitimate conduct.

As this analogy suggests, the standards for determining whether the government has acted wrongfully must come from the substantive constitutional doctrines; the unconstitutional conditions doctrine cannot itself supply these standards. Instead, it merely provides a lens for monitoring the things that the government is attempting to receive and give. Identifying the constitutional rights and prerogatives over which a governmental entity may receive control and determining when governmental actions constitute "illegitimate appropriation," are context-specific tasks that throw the difficult analytic work back on the underlying substantive constitutional doctrines. These substantive doctrines may also implicate context-specific baseline problems, as the takings doctrine does in the land use context. Whether something is a "taking" depends critically on what property entitlement baseline one uses. Attempts to establish that baseline depend on other slippery standards, such as what constitutes a "nuisance" or an "externality." These problems are difficult ones, but they are not unique to the bargaining context.

I will consider each of these three bargaining risks in turn, with special attention to whether and how each might apply in the land use context.

\begin{itemize}
\item \textsuperscript{156} See Epstein, \textit{Bargaining with the State}, \textit{supra} note 20, at 4-5 (discussing problems with governmental "givings"); Sullivan, \textit{supra} note 20, at 1489 (focusing on problem of the government receiving relinquishment of certain rights).
\item \textsuperscript{157} See Sunstein, \textit{supra} note 147, at 620-21 (suggesting unconstitutional conditions doctrine should be abandoned in favor of context-specific inquiries into incursions on rights).
\item \textsuperscript{158} See id. at 605-06 (discussing a similar argument for preserving the unconstitutional conditions doctrine).
\end{itemize}
1. Receiving Forbidden Goods

The first constitutional problem in the bargaining context occurs when a governmental entity receives something that it is constitutionally disabled from receiving. Under the Constitution, there are a set of individual decisions which cannot be made by a majority vote. For example, a majority, no matter how large and well-meaning, cannot hold a binding vote to choose my religion, censor my speech, or confiscate my property without paying just compensation. It follows that a majoritarian entity is constitutionally disabled from receiving waivers of these kinds of rights or from gaining power over certain individual decisions that implicate constitutional protections. This remains true even though the majority can make binding, fully discretionary decisions about whether to give out or withhold all sorts of benefits.

Thus, one aspect of the unconstitutional conditions doctrine responds to the possibility that a majority-controlled entity might use its power over the discretionary dispensation of benefits to leverage the surrender of a right it is disabled from controlling directly.

An analogy to an impermissible private deal may help to clarify. If Bernice is legally prohibited from owning a certain thing, such as a gun (perhaps she is a convicted felon), she cannot engage in a bargain in which she receives the gun in exchange for something of her own, such as her stamp collection. Significantly, the bargain is illegitimate even though Bernice’s authority over the fate of her stamp collection is absolute and unquestioned.

This example illustrates the problem with the discredited “greater includes the lesser” argument, which maintains that the government’s ability to withhold a benefit completely necessarily allows the granting of that benefit on any conditions whatsoever. Just as certain individuals are forbidden to own certain kinds of chattels, certain governmental entities,

159. See Lucas v. Colo. Gen. Assembly, 377 U.S. 713, 736-37 (1964) (“A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials.”).

160. As the web of government benefits grows ever larger, and as people become increasingly dependent on those benefits, the line between withholding benefits and imposing burdens blurs. See Sunstein, supra note 147, at 601-04 (arguing that the distinction between subsidies and penalties is anachronistic in the post-Lochner era). See generally Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964) (discussing growth of various forms of government largess and its implications for individual rights).

161. The classic statement of the “greater includes the lesser” argument was made by Justice Holmes: “The petitionor may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). This view has been repeatedly and explicitly rejected by the Supreme Court, see, e.g., Bd. of County Comm’rs v. Umbehr, 518 U.S. 668, 674 (1996), although its spirit lingers on in some settings. See Been, supra note 2, at 474 n.7 (citing cases from the last 125 years which illustrate the “greater includes the lesser argument”).
such as political majorities, are forbidden to take control over certain constitutional prerogatives. The fact that the government retains power to dispense benefits at its discretion in no way weakens that structural constraint. Such an exchange should be invalidated by the same reasoning that invalidates Bernice's stamp-collection-for-gun exchange.

A similar intuition is expressed by theorists who view certain constitutional rights as "inalienable." Inalienability theories hold that individual rightholders should be precluded from selling or trading away their rights. Such theories often founder on the problem of individual autonomy and the apparent paternalism associated with preventing an individual from engaging in a sale or trade which she desires.

However, as Kathleen Sullivan notes, the real question underlying the unconstitutional conditions doctrine is not one of alienability generally, but whether the right in question "may be relinquished to government." The governmental entity's structural inability to receive control of the particular right provides a compelling constitutional justification for invalidating such bargains. This structural constraint interferes with one aspect of alienability (specifically, the rightholder's ability to transfer the right in question to the government), but it is not founded on a theorist's view of what people should be entitled to buy and sell. Rather, it is based on a constitutional view of what majorities should be permitted to control. It is only incidentally a constraint on the ability to sell a right; the real concern is with preventing the government from "buying up" the right. This structural constitutional constraint safeguards critical societal interests that might otherwise be compromised.

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162. See Been, supra note 2, at 496-97 (discussing inalienability theory of unconstitutional conditions); see generally Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849 (1987) (discussing the form of inalienability that forbids sale of rights).
163. See Sullivan, supra note 20, at 1479-80 (discussing inalienability theories).
164. See Epstein, Bargaining with the State, supra note 20, at 14-15 (discussing shortfalls of dignitary theories for restricting choice); Been, supra note 2, at 497 n.120 (noting that the inalienability theory is internally contradictory); Kreimer, supra note 148, at 1383-84 (discussing argument that making rights waivable enhances autonomy); Sullivan, supra note 20, at 1478, 1486-87 (discussing objections to inalienability theories); see also Radin, supra note 162, at 1898-1903 (discussing and rejecting such objections to inalienability).
165. Sullivan, supra note 20, at 1488-89.
166. See Kreimer, supra note 148, at 1391 (explaining that the government may be "prohibited from attempting to affect exercise of the right in question because of effects on the structure of society").
167. See Wyman v. James, 400 U.S. 309, 328 (1971) (Douglas, J., dissenting) ("[T]he central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution.").
168. See generally Epstein, Unconstitutional Conditions, supra note 146, at 197 (positing that while an individual might consent to waive First Amendment rights to gain access to a key benefit, such as use of the highways, "all people prefer to have a social order in which speech is not compromised, but protected"); Merrill, supra note 152 (discussing "public goods" aspects of constitutional rights).
The first inquiry under the unconstitutional conditions doctrine, then, is whether the governmental entity is permitted to receive a waiver of a given constitutional right or to accept control over a particular decision that implicates a constitutional right. Because this inquiry looks to the substance of constitutional protections, different constitutional rights are treated differently. Rights such as the freedom to exercise one's chosen religion occupy one end of the spectrum and generally cannot be made the subject of bargains with the government. Other constitutional rights are routinely ceded to the government. For example, an individual can waive Fourth Amendment protections by consenting to a search. Bargains involving the waiver of this right are considered permissible as long as they are made under circumstances that do not vitiate consent.

In the land use context, the takings clause contains the operative constitutional constraints. We do not normally think of the takings clause as waivable in any ordinary sense, yet it protects property rights that are usually alienable at will. Some analytic work is necessary to determine whether the takings clause potentially raises a "forbidden goods" problem. Our starting point is simple: the takings clause is plainly designed to act as a countermajoritarian check.

169. See Kreimer, supra note 148, at 1387-89 (discussing waivable and non-waivable rights); id. at 1391-93 (discussing problems associated with certain governmental requests for waivers).

170. See Sherbert v. Verner, 374 U.S. 398, 404 (1963) (stating that the government cannot force an individual to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand").

171. See Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) ("[A] search conducted pursuant to a valid consent is constitutionally permissible.").

172. See Wyma, 400 U.S. at 309 (holding that conditioning AFDC benefits on home visits does not violate Fourth Amendment). Other procedural protections can also be waived under appropriate circumstances. See McMann v. Richardson, 397 U.S. 759, 766 (1970) (involving waiver of right to trial); Miranda v. Arizona, 384 U.S. 436 (1966) (involving waiver of privilege against self-incrimination). Under my model, the validity of such waivers would depend on what the government actor is offering in exchange. In the search and seizure context, for example, if a police officer "offers" something back that she had no right to take away in the first place (such as the right to continue going on one's way), or something that is misappropriated from the public at large (such as a promise to give the person a chance to escape if incriminating evidence is found), the resulting bargain should be considered constitutionally invalid.

173. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). Other constitutional protections, such as the First Amendment, are also implicated in some land use bargains. In addition, equal protection and substantive due process may have a role to play in addressing unfair land use bargains. See Vill. of Willowbrook v. Olech, 528 U.S. 562, 562 (2000) (per curiam) (recognizing that an equal protection claim could be brought by a single homeowner, where a municipality conditioned connection of water service on what was alleged to be an "irrational and wholly arbitrary" easement demand); infra note 277 and accompanying text (discussing substantive due process).

simply decide that an individual landowner has "too much" land and vote to confiscate it—unless the taking is for public use and the majority pays just compensation. The takings clause therefore can be viewed as preserving a realm in which the market can function, free of majoritarian meddling. As much as a majority may wish to obtain land by using votes, the Constitution tells the majority that it must use dollars or some other acceptable form of "just compensation." Nevertheless, the majority may regulate land use as long as the regulation does not go "too far" and deprive the landowner of all "economically viable use" of the property. In Village of Euclid, the Court assumed as much in discussing the political autonomy of the Village of Euclid: "[Euclid's] governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines."

Thus, the takings clause can be thought of as drawing a wavering, semi-permeable line between the majority-controlled realm, and a market-controlled realm. One might think that the unconstitutional conditions


176. Just as there are certain realms in which money should have little or no influence, see generally MICHAEL WALZER, SPHERES OF JUSTICE (1983), the takings clause defines a realm in which votes (unaccompanied by money or other compensation) cannot hold sway.


178. See supra note 80 (discussing these standards).

179. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926). Later in the opinion, the Court approvingly quotes a Louisiana Supreme Court opinion deferring to political judgments on land use matters. See id. at 393 ("If [municipal land use ordinances] are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.") (quoting State v. New Orleans, 97 So. 440, 444 (La. 1923)).

180. The line is semi-permeable in two senses. First, the majority can always effect a transfer of land to itself by paying just compensation. Though money may change hands, the transaction nevertheless represents a legitimate incursion of the majority into an area normally controlled by market forces. The money with which just compensation is paid will be raised through some form of political action, such as the levying of a tax, making it questionable whether the true cost is internalized by the governmental entity. See Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345 passim (2000) (arguing that government does not internalize costs in the same manner as private firms). Moreover, the amount of compensation will not necessarily equal the price that the landowner would demand in a private transaction. See EPSTEIN, TAKINGS, supra note 177, at 183 (noting that the "real but subjective" value placed on land is left out of the market valuation formula). The line between majority-controlled and vote-controlled realms may also be permeated from
doctrine would prevent the majority from using its power over things on one side of that line (such as zoning) to leverage things on the other side of the line (such as concessions of land). However, land and other typical concessions (such as the payment of cash impact fees) are not only freely alienable goods, but goods the government can and does routinely receive from individuals. The takings clause does not prohibit property from being “given” to anyone, including the government, nor does it prohibit the government from receiving property in trade. Indeed, the clause contemplates that the government will receive land for public use when just compensation is paid, demonstrating that the majority is not disabled from receiving land in the context of certain kinds of “fair” trades. Thus, there is nothing unconstitutional, in general, about the government receiving land or other land use concessions in trade.

Moreover, the alienability of land is one of the things that gives it value; it constitutes one of the “sticks” in the landowner’s “bundle” of property rights. As Vicki Been points out, “[t]o argue that individuals cannot trade their property to the government at whatever price they choose is inconsistent with the deeply ingrained notion of property as including an almost absolute right of alienation.” Thus, the bargaining limits designed to protect a landowner from an extortionate taking could themselves be viewed as takings of a sort. The point is not merely academic. Although majorities cannot constitutionally use votes to obtain property, landowners may nevertheless wish to use their property to influence the decisions of the majority, effectively translating their property into votes or political outcomes. Because it is just as likely that any given land concession is the result of landowner opportunism rather than majoritarian overreaching, banning or severely constricting such bargains is problematic. Adopting a rule that effectively limits the ways in which property can be used is a poor way to protect property rights.

the other side. Unless land use bargains are banned, a landowner may try to use her money or property to influence decisions of the majority concerning land use.

181. See Been, supra note 2, at 497 (noting that the Fifth Amendment permits the government to obtain property by paying just compensation for it, and observing that landowners have broad latitude to agree to whatever price they deem acceptable and can even give away their land to the government).

182. The government might, however, be disabled from receiving land use concessions that implicate other constitutional protections, such as the right to free expression. See Bernard H. Siegan, Property and Freedom: The Constitution, the Courts, and Land-Use Regulation 162-64 (1997) (suggesting that free-speech questions were implicated by the “fee in lieu of art” exaction upheld in Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996)).


184. Been, supra note 2, at 497.

185. See Epstein, Bargaining with the State, supra note 20, at 194-95 (suggesting a market mechanism is superior to the political process in determining the course of land development).
This does not mean that judicial oversight in the land use bargaining arena is completely unnecessary or inappropriate. The discussion above rules out one sort of unconstitutional conditions problem, but two additional problems remain. Both problems are variants of the concern that a majoritarian entity might, in preparation for bargaining, overstep appropriate boundaries and obtain control over benefits which it has no right to dispense.

2. Bargaining with the Opponent’s Chips

One well-recognized threat associated with the unconstitutional conditions doctrine is that the state may manipulate the regulatory background to take advantage of the individual. Here, the problem is not that the government will be receiving something that it has no right to receive, but rather that the government will be offering something that already belongs, by all rights, to the other bargaining party. This problem can be illustrated by another private-action hypothetical. Imagine Bernice wants a very rare stamp that is currently in the possession of another collector, Cecil. Bernice, a professional thief, is having an unaccustomed amount of trouble stealing the stamp because Cecil keeps it sealed in a nested series of locked boxes inside a vault guarded by a pack of attack dogs. Bernice decides to kidnap Cecil’s (less well-guarded) baby daughter instead. Bernice then offers Cecil the return of his daughter in exchange for the rare stamp.

This bargain is illegitimate not because Bernice is disabled from receiving the rare stamp, but because she stole the “currency” with which she seeks to buy it. This is the same problem presented by the gunman’s threat, “your money or your life!” There, the gunman’s act of seizing control over your life in order to use it as a bargaining chip in the ensuing “bargaining session” is an impermissible act that renders any resulting exchange illegitimate.

In both of these hypothetical cases, the “theft” in question is apparent and undisputed. In land use, government overreaching is presumed to be commonplace, but it is difficult to pinpoint. The line between forbidden and permitted regulation is quite fuzzy, and the Court has done little to clarify it. Nevertheless, the risk that the government may be bargaining with stolen chips hovers in the background in Nollan, briefly taking shape in

186. See supra notes 148-151 and accompanying text (discussing setting of regulatory baseline from which to assess governmental offers).

187. Discussions of this threat are ubiquitous in the literature. See Kreimer, supra note 148, at 1354 & n.223 (describing the gunman threat example as “tattered by decades of use” but “still illuminating”).

188. See LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 138-39 (1996) (analyzing various forms of coercion, including the gunman’s threat, as offers to sell back what was wrongfully taken).
Justice Scalia’s reference to extortion. Commentators have raised similar concerns. Indeed, as Fischel has noted, the outrage associated with the development condition in Nollan would disappear entirely if the land use regulation in question were one that people generally would regard as reasonable. If, for example, the Nollans proposed building a drive-in movie theater that would actually block a massive expanse of beachfront, placing some beach access conditions on the development would seem appropriate (perhaps even inadequate) to compensate for the lost view.

One might argue that any regulation disproportionate to harm is fundamentally illegitimate and that it therefore constitutes an impermissible bargaining chip. Dolan’s requirement that exactions be roughly proportionate to the harms caused by the development in question seems to edge toward that conclusion. However, the Court has been unwilling to apply Dolan’s proportionality rule outside the context of exactions. This reluctance is understandable; a requirement of regulatory proportionality would unravel the land use planning and zoning laws of thousands of local governments. Nevertheless, the Court’s decisions place land use regulations that are unrelated to specific harms in an odd sort of limbo: they need not be lifted at all, but if they are to be lifted, they must be lifted for free.

Whether a land use restriction like the one in Nollan actually constitutes an illegitimate appropriation of bargaining power from the other party (as opposed to a garden-variety legitimate government regulation) is open to question. The answer will depend on normative judgments about where the line ought to be drawn between majority power and market power. I do not assert, as a normative matter, that regulations which fail to relate to precise harms are unconstitutional, or that the application of the regulations to the development proposals involved in Nollan and Dolan constituted theft-like appropriations. Indeed, my own view is to the contrary. My point is that the unconstitutional conditions doctrine only extends to certain types of bargaining problems, one of which involves the improper pre-bargaining appropriation of things belonging to the other bargaining party. To the extent this concern is encapsulated in the bargaining limits formulated in Nollan and Dolan, the inquiry must turn to whether those limits can stop

189. See Ellickson, Alternatives to Zoning, supra note 22, at 702 (“A more common, and legal, technique is to restrict most of the undeveloped land within the municipality, and then require developers to buy the development rights through some form of public contribution.”); Nicholas V. Morossoff, 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, 859 (1989) (“Municipalities can attempt to base their exactions schemes on development prohibitions that are excessive—i.e., prohibitions that are not constitutional exercises of the police power—and then proceed to sell development ‘permission’ back to the developer.”).

190. See FISCHEL, REGULATORY TAKINGS, supra note 2, at 345 (using example of a “large hotel, which truly would have blocked the view and stood out like the proverbial sore thumb”).

191. See City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702 (1999); supra notes 38-39 and accompanying text.
illegitimate overregulation.  

It is often assumed that limiting land use bargains involving stolen chips will help to prevent the initial theft. However, this effort is unlikely to be successful as long as the underlying regulatory action (the "theft") is immune from challenge. If I steal my neighbor's car because I would like to travel to California, the theft itself should be addressed. My neighbor's interests will not be adequately protected by a rule stipulating that I may only "trade" the car back for a plane, train, or bus ticket designed to achieve my original objective. Such a "nexus and proportionality" solution, operating alone, fails to address the truly important question: whether my objective of getting to California is one which my neighbor should have to bankroll. If there is no meaningful way to check the underlying regulatory rules, nexus and proportionality cannot provide a meaningful backstop. Moreover, nexus and proportionality are completely unnecessary if the underlying regulatory action is subject to meaningful scrutiny. In other words, if no bargaining chips can be stolen, the potential for unfair bargains based upon such sleight of hand is eliminated.

Thinking about the bargaining risks in this manner highlights a problem with using "exit" as an answer to coercive land use exactions. In the land use context, the local entities that impose regulations typically have a monopoly on land use regulation only within a limited geographic area. If municipalities compete with each other for residents and for development, and if individuals and businesses can select from a smorgasbord of competing regulatory regimes, this might appear to place a limit on governmental overreaching in the exactions context. This model has a great deal of power. Exit unquestionably offers an important check on

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192. The phrase "illegitimate overregulation" is not redundant. Regulation in excess of the socially optimal point is not necessarily illegitimate as a constitutional matter. Of course it is possible to advocate a constitutional standard that tracks the social optimum, effectively collapsing the inquiries. See Epstein, Bargaining with the State, supra note 20, at 90-103. If such a standard were enforced, land use bargains would be wholly unnecessary.

193. Id. at 183-84; Been, supra note 2, at 491; see Morosoff, supra note 189, at 861 ("While the rational-nexus test is admittedly not aimed directly at the true evil with which the courts are concerned, in the end it does eradicate that evil.").

194. See Fischel, Regulatory Takings, supra note 2, at 11 ("Takings law is about the fairness of initial entitlements. Supervising their exchange, as the exactions cases do, does little to cure the burden of the original regulation.").

195. Vicki Been's insightful work on "exit" in the exactions context, see generally Been, supra note 2, provides an excellent exploration of this topic. Been builds on Albert O. Hirschman's work discussing the response mechanisms of "exit" and "voice." See id. at 476 (citing Albert O. Hirschman, Exit, Voice, and Loyalty (1970)). See also infra Part II B (discussing exit as a response to monopoly power). For criticisms of Been's analysis and conclusions, see Epstein, Bargaining with the State, supra note 20, at 184-87; Stewart E. Sterk, Competition Among Municipalities as a Constraint on Land Use Exactions, 45 Vand. L. Rev. 831 (1992).

196. See Been, supra note 2, at 506-28 (building on Charles Tiebout's theory of local government competition).
certain kinds of bargaining power, despite some criticisms that have been raised. 197

Exit cannot, however, adequately resolve the bargaining problem presently under discussion. It fails because a premise of initial theft drives the unconstitutional conditions analysis. If the government essentially steals my right to build a house on my land and then offers to sell that right back to me, my ability to exit by going to another jurisdiction does not change the fact that the government’s theft has left me worse off than before. Something valuable has been stripped from my land, and I will not be able to sell it for as much as it was worth before that theft. Even if my land is identical to the land in the next county, and even if I have no particular sentimental attachment to my land and no particularly heavy costs associated with relocating, exiting will still leave me “out” the amount of the original theft. My ability to exit may limit the price the government may charge to sell me back my development rights, but it does not make me whole and is unlikely to deter the initial theft.

3. Appropriations from Third Parties

I have focused thus far on the risk that strategic governmental behavior might unfairly or unconstitutionally disadvantage the individual landowner involved in the bargaining process. Another concern is that deals might be made which advantage both the individual landowner and the majority, but which unfairly burden a group within the community. 198 In this case, the government improperly gives away something it has taken from a third party. For example, if Daphne offers Ethel fifty dollars for permission to shoot firearms in Ethel’s backyard (and further promises to aim away from her house), both parties may be quite contented with the deal. Fiona, whose backyard is adjacent to Ethel’s, may be less pleased. The problem with the bargain is that Ethel is acting without legal authority and to the detriment of her neighbor’s peace and safety in selling permission to discharge firearms

197. Specifically, “exit” offers a powerful antidote to the sort of undue market power which is deemed problematic whether held by private or public actors. See infra Part II.B (discussing exit).

198. I use the term “majority” here as shorthand for the dominant group within the political process, while acknowledging this may not always be an accurate designation. See supra note 154. The same (or heightened) risks exist when those in charge of the political apparatus do not represent the interests of a political majority. Graft presents a polar case: the bribed official and the landowner are made better off at the expense of the rest of the community. It is also possible that the political process takes into account all of the interests existing within the geographic boundaries of the political subdivision, but disadvantages an affected group that does not (or does not yet) reside within those boundaries. See Clayton P. Gillette, Expropriation and Institutional Design in State and Local Government Law, 80 VA. L. REV. 625, 629 (1994) (discussing “risk that local decisions will be made in a way that does not internalize adverse consequences”).
in her backyard.199

The analysis is similar in the land use context. For example, imagine that Gilroy wishes to operate a tannery on a parcel of land. Current zoning restrictions prohibit this use of the land because it will produce noxious waste. Gilroy and his community strike a deal in which the land use restriction is lifted. However, the condition placed on Gilroy does not involve remediating the waste; rather, the waste will be dumped into a nearby stream which empties into the land of a lone, friendless farmer. Gilroy purchases permission to engage in this pollution by agreeing to donate part of his land for a small county airport. The zoning board is aware that the waste will doubtless sicken the farmer's pigs, but nobody in the community really likes the farmer anyway. On the other hand, the rest of the community has been clamoring for a convenient airport which would otherwise have to be paid for through taxation.

The bargain is win-win from the standpoint of Gilroy and the dominant political elements of the community (assuming the airport is cheaper than the control and remediation of the noxious waste). However, it imposes serious externalities on the farmer. The problem with this deal is that permission to dump waste into the stream did not properly belong to the zoning board. Because the zoning board is bound by law to make appropriate use of land use regulations to protect the community from negative externalities, the grant of permission can be viewed as an *ultra vires* action.200 Significantly, opportunities for exit do little or nothing to control this problem. Gilroy will not want to exit; he is getting a very good deal and has no incentive to look elsewhere. The farmer might leave if conditions became intolerable, but this is unlikely to provide a realistic check on government action unless the farmer generates significant tax revenues for the community.

Though not denoted as such, a concern with such third-party impacts appeared in the Court's analysis in *Nollan*. This concern was most fully presented in a footnote to the opinion:

One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more

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199. Epstein makes a similar point when he observes that every governmental "giving" of benefits involves an antecedent "taking," which may or may not be legitimate. Epstein, *Bargaining with the State*, supra note 20, at 4.

200. Such action may be *ultra vires* in a quite literal, as well as metaphorical, sense. Local governments regulate land pursuant to state enabling legislation, and actions like the one described here might well violate the terms of that enabling legislation. See generally Froma M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DePaul L. REV. 635 (1990) (discussing *ultra vires* challenges to municipal subdivision exactions).
lenient (but nontradeable) development restrictions. Thus, the
importance of the purpose underlying the prohibition not only
does not justify the imposition of unrelated conditions for
eliminating the prohibition, but positively militates against the

The concern is not that consent to a given land use change will be sold
for an extortionately high price, but that it will (at least with respect to some
subset of the population) be sold too cheaply. The feared result is not
overregulation, but underregulation.\footnote{Nollan does not view the problem of
underregulation as implicating the unconstitutional conditions doctrine, and asserts that "none
of the 'solutions' that have been offered for the dangers posed by land use exactions, such as
Nollan's nexus test, makes sense as an effort to control underregulation." Id. at 505-06. The first
point is questionable, given the uncertain status, scope, and purpose of the unconstitutional
conditions doctrine. The second point seems incorrect as a functional matter. It is also
somewhat surprising given Been's discussion of the concern with underregulation expressed in
Nollan, id. at 504 & n.149, and her criticism of Fischel's failure to attend to the risk of
underregulation in his efficiency critique of Nollan, see id. at 544 n.332 (discussing Fischel's
article, The Economics of Land Use Exactions: A Property Rights Analysis, 50 LAW & CONTEMP. PROBS.
101, 104-05 (1987)).}

Justice Scalia's hypothetical involving the sale of the right to shout "fire" in a crowded theater makes a
similar point.\footnote{See Nollan, 483 U.S. at 837 (observing that although "requiring a $100 tax contribution
to shout fire is a lesser restriction on speech than an outright ban, it would not pass
constitutional muster").} The sale of the right to violate a valid and important public
safety regulation involves illegitimate governmental action which endangers
third parties who were apparently not represented at the bargaining table
(theatergoers who will be trampled as a result of the ensuing panic).

Interestingly, it is this third constitutional problem, and only this third
problem, that might actually justify judicial review of the substance of land
use bargains. The first unconstitutional conditions problem is simply
inapplicable to the land use context, and the second disappears if the
underlying land use regulations are subject to meaningful scrutiny.

\textbf{B. MONOPOLY POWER, PERSONALIZED EXTORTION, AND "EXIT"}

The bargaining problems detailed above are those which arise from the
unique status of government \textit{qua} government. If we view the
unconstitutional conditions doctrine as an extension of the structural
constraints placed on governmental entities by the Constitution, these three
bargaining risks comprise the universe of possible unconstitutional
conditions problems. In the land use context, these uniquely governmental
risks relate to the government's ability to promulgate and lift zoning
regulations. If these risks are successfully resolved (that is, the government is
kept from expropriating land use entitlements from either the landowner or other segments of the community), the government occupies a position analogous to that of a private party. Of course, the kinds of bargaining risks that exist in private party settings may remain problematic. Specifically, the government’s monopoly over a given area may provide it with considerable bargaining clout, even when the government’s rulemaking is limited to the legitimate sphere.

However, once the built-in distortions associated with the theft of development rights have been eliminated, opportunities for exit become meaningful and compelling. Anecdotal evidence suggests that developers can and do exit when the regulatory climate is too harsh.204 This does not mean that exit is always a completely costless or fully satisfactory solution. A primary objection to the exit solution is that land is unique, so that good substitutes are often unavailable.205 A related problem is raised when a particular governmental entity controls not just one isolated area, but virtually all similar land within a state or region.206 Yet another concern relates to the possibility that a local government may be able to engage in a form of personalized extortion based on an individual landowner’s preferences and access to exit.207 If exit is impossible or extremely costly for a particular individual and the governmental entity has some insight into that fact, the bargaining context provides an opportunity to exploit that weakness on an individualized basis.208

204. For example, see Wendy Kummerer, Developers Walk on Office Project, CHI. TRIB., Feb. 5, 2000, § 4, at 12 (describing how a developer abandoned a proposed project in Hanover Park after eighteen months of negotiations with the community; according to Director of Economic Development John Said, “‘[T]hey have just gone away.’”).

205. See Epstein, Bargaining with the State, supra note 20, at 186 (observing that after a developer exercises her right to exit, the new location will be generally “inferior to the first location, for otherwise the developer would have gone there first”).

206. Some land use regulation occurs at the regional, state, or federal level. See supra note 1. Where a land use regulation covers a broad geographic area, as the California Coastal Commission’s regulations did in Nollan, the possibilities for “exit” will be correspondingly constrained. See Epstein, Bargaining with the State, supra note 20, at 186.

207. The term “extortion” is a bit inapt here, since we are assuming that the government is not able to manipulate the regulatory background illegitimately. However, the phrase “personalized extortion” nicely captures the notion that the government’s market power can have troubling consequences.

208. See Epstein, Bargaining with the State, supra note 20, at 185; D.L. Bennett, Cherokee in the New Millennium; County Embracing Pay-as-you-Grow Policy, ATLANTA J. & CONST., Aug. 19, 1999, at 1JQ (discussing discrepancies in exactions imposed on different developers, prior to adoption of standardized impact fee schedule). This is one reason why land use conditions set through an “adjudicative” process are more troubling than those set through a legislative process. See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (drawing distinction between legislative determinations that affect large areas of a city, and adjudicative decisions regarding individual parcels). The legislative/adjudicative distinction has been the subject of some criticism, see Parking Ass’n of Ga. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), cert. denied, 515 U.S. 1116, 1117-18 (1995) (Thomas & O’Connor, JJ., dissenting), though it is possible that exactions imposed in individual situations are more likely to be invidious. See Sterk, Nollan,
Though these risks are not trivial, they are not sufficiently pressing to justify judicial intervention in the bargaining process. Analogies to private situations can be helpful in thinking through this issue. Epstein uses the prototypical “necessity” situation—a desperate ship seeking a dock in a storm—to illustrate coercive government monopoly power. Yet it is hard to imagine a landowner whose situation is even remotely analogous to that of a stranded seafarer facing a single dock in a storm. Instead, the landowner is much more like a customer who has invested a fair amount of time and money to shop in a pricey specialty boutique that offers a unique and much-desired product. There may be no perfect substitutes, and she may have incurred some sunk costs, but neither death nor financial ruin will befall her if she chooses not to accept the shopkeeper’s exorbitant price. Judicial intervention to limit the price of a shopkeeper’s goods in such a situation would be ridiculous. After all, there are other shops, even if they are not quite as nice and do not offer quite the same merchandise.

There is no need for a principle of law that entitles a landowner to buy her way out of otherwise legitimate land use regulations at a low, affordable price, just as there is no need for a principle of law that entitles an art collector to add an original Van Gogh to her collection at a low, affordable price. It is certainly not constitutionally required. Nevertheless, one should keep these additional, extra-constitutional bargaining risks in mind when considering policy alternatives.

C. BARGAINING IN AN EXTERNALITY-BASED REGULATORY REGIME

Now that we have surveyed the various types of risks associated with land use bargains, it is possible to begin developing a mechanism that can address them more effectively than can the nexus and proportionality solution. As should be apparent by now, such a solution must place meaningful limits on the permissible scope of regulation. It also must allow mutually beneficial bargains while protecting third parties from opportunistic deal-making. In
the discussion that follows, I show how bargaining limits could be eliminated in an externality-based regulatory regime.212

1. Constructing a World Without Bargaining Limits

I begin with several simplifying assumptions, which I will later relax.

Assumption #1: Land use regulations are limited to the prohibition of uses that generate cognizable and unremediated negative externalities.

Assumption #2: It is possible to determine costlessly and with perfect accuracy whether a given land use actually generates a cognizable and unremediated negative externality.

Assumption #3: Any land use regulation that exceeds the appropriate scope (as defined in Assumption #1) can be challenged costlessly and successfully.

Assumption #4: In making land use decisions, the local governmental body acts in the best interest of all affected community members (except the landowner in question).213

These assumptions have at least two interesting implications. First, strategic expansion of the regulatory background would be impossible under these conditions. Blatant overregulation of innocuous uses is foreclosed by Assumption #1. The strategic miscasting of innocuous or normal features as externalities (for example, asserting that a brick house generates aesthetic costs because it is not made of marble) is precluded by Assumption #2. Finally, strategic stretching of the regulatory envelope—engaging in overregulation that lies close enough to the core of legitimate regulation as to be unreviewable—is ruled out by Assumption #3. In such a world, problematic governmental leverage would be eliminated. This would, in turn, allay the concerns implicit in the unconstitutional conditions doctrine—the fear that the majority will use its power to manipulate background conditions to force concessions that are inconsistent with the Constitution's protections.

A second implication of these assumptions is also powerful: a property owner can overcome restrictions on land use if she is able to perfectly remediate the negative externalities associated with that use.214

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212. The regime I construct in this subsection is much like that proposed in Fischel, *The Economics of Land Use Exactions*, supra note 15, at 109 (proposing a solution which "limit[s] the community's initial entitlements to the cost of eliminating nuisance spillovers" and protects those entitlements with a property rule). This is an intermediate step to the solution I will ultimately propose in Part III, which leaves land use regulation intact but grants land owners an in-kind call option.

213. If all of the interests of all community members, including the landowner, were perfectly aggregated in determining land use policies, these policies would track the social optimum and no bargaining would be necessary.

214. This resembles a limited application of a Calabresian system of general deterrence, in which "all activities are permitted if they pay for their external costs." Ellickson, *Alternatives to*
becomes clear if one thinks of Assumption #1 as dividing the universe of possible land uses into two categories: those uses that can be regulated and those that cannot. The first category includes only those uses producing cognizable and unremediated negative externalities. Any landowner can move a specific land use into the second category by fully remediating the cognizable negative externalities generated by that use. Thus, a landowner entering the bargaining arena always holds a fall-back option that effectively constrains the bargaining range and the leverage of the governmental body. A requirement that the land use bargain exhibit nexus and proportionality would be superfluous and inefficient under these circumstances. If the landowner chooses to escape the regulations by remediating the externalities, the landowner's fix will necessarily exhibit nexus and proportionality. The landowner will automatically pursue this route, effectively purchasing relief from the land use regulation through the remediation of externalities, unless there is a Pareto-superior alternative.

It is important to recognize how this legal regime would differ from the current system. First, it would always allow the landowner the option of remediating the externality and thus escaping restrictions on land use. This replaces the property rule that currently protects zoning rights with a liability rule in which the collective entitlement to limit development "must be exchanged if the landowners pay for specified 'damages' to the community." Under my model, these specified "damages" must be paid in kind—in other words, the externalities must actually be remediated. It would also allow the landowner to choose the means of remediation, which

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215. Because the costs generated by normal or innocuous land uses (however defined) are not cognizable, the landowner is not faced with the impossible task of remediating all negative impacts associated with his land use. He need only remediating those negative impacts that are cognizable—the marginal impacts associated with using the land in an unusually intensive manner within a given context.


217. I recognize it will often be infeasible or prohibitively expensive to actually remediate externalities. See Been, *supra* note 2, at 544 (observing that "there may be no technologically feasible way to have both a high-rise and a sunny park"); Dana, *supra* note 15, at 1282-84 (discussing externalities that are impossible to mitigate). However, in-kind remediation remains a meaningful concept, if only because it sets the most logically cohesive benchmark from which to negotiate. If we assume the externalities are real, and properly cognizable, it is appropriate that the community be able to forbid any uses that generate them. See Fischel, *The Economics of Land Use Exactions*, supra note 15, at 110 (describing community's entitlement to elimination of a negative externality such as congestion). The community can legitimately set the price of consent to such externalities at any level it finds appropriate—and, as a practical matter, such payments will usually be far more attractive to the parties than the actual remediation of externalities would be.
can be expected to reduce the associated costs.\textsuperscript{218} As matters currently stand, the realm of legitimate land use regulation is not narrowly tailored to encompass only uses that generate negative externalities. The local government has no obligation under current law to lift a land use restriction when the landowner offers to remediate the externalities.

The "externality fix" would be only one possible outcome of the bargaining process. While the possibility that the landowner will retreat to the fall-back position of remediating externalities places important constraints on the bargaining process,\textsuperscript{219} the parties are free to pursue a mutually advantageous alternative that lacks the features of nexus and proportionality. The surplus generated by any such mutually advantageous exchange will, appropriately, be the subject of bargaining.\textsuperscript{220} Such bargaining does not seem problematic, because the landowner remains free to retreat to an externality fix or to exit the jurisdiction if the local government becomes too greedy.\textsuperscript{221}

An example illustrates how a land use bargain might play out in a stylized setting incorporating the foregoing assumptions. Imagine a small society whose members live together in very close proximity. One member of the society, Harriet, wishes to operate a car-crushing business which can be used to generate a great deal of wealth (the crushed cars are sent to a nearby steel mill for recycling). The problem is the heart-stopping sound of wrenching metal that accompanies the operation of the car-crushing machines. A relatively expensive "silencer" is available which would allow the crushers to operate silently. Assume that the gain to Harriet if she were able to use her crushers without restriction is $1 million, and further assume that a silencer costs $500,000. The silencer represents an externality fix that would allow Harriet to use her crushers with impunity. If her only choices are to purchase the silencer (at a cost of $500,000) or forgo crushing (at a cost of $1 million), she will purchase the silencer.

However, this may not be the most efficient outcome. It is quite possible that the community might be swayed by something that Harriet could provide at lower cost. For example, the community might prefer to restrict Harriet's hours of operation and accept some other benefit, such as a nature park, that would be more valuable to the community than the non-stop

\textsuperscript{218} See Ellickson, Alternatives to Zoning, supra note 22, at 688-89 ("Prevention costs will tend to be higher when either or both of the parties are compelled to undertake specific steps than when they are permitted to select voluntarily among available preventative measures.").

\textsuperscript{219} To the extent unequal bargaining power remains (as it might where there is no technologically feasible way to remediate the externalities), procedural adjustments can help to level the playing field. See supra Part II.B (discussing issues associated with monopoly power); infra text accompanying notes 249-258 (discussing procedural adjustments).

\textsuperscript{220} See supra text accompanying note 89 (providing an example of a surplus that will be subject to bargaining).

\textsuperscript{221} Because the prospect of theft of development rights has been removed under this model, a primary problem with exit is eliminated.
silence achievable through the silencer. If Harriet could provide the nature park and restrict her hours of operation at a cost of only $300,000, this would be a Pareto-superior solution. Blocking such a deal makes everyone worse off than necessary.

Note, however, that Harriet and the community would still have plenty to bargain over. The additional $200,000 surplus must be split between them in some fashion. The community might demand additional benefits (a parking lot or funding for a park ranger, for example) in an effort to capture some of this surplus. Harriet can counter by threatening to leave the jurisdiction (although the threat may lack credibility if the car-crushing equipment is extremely costly to move). She can also threaten simply to buy silencers. If the community doesn’t know precisely how much a silencer actually costs relative to the cost of the other benefits under negotiation, this could be a very credible threat. The community knows that if it gets too greedy, it may end up with tedious silence rather than the exciting new benefits it was hoping to receive.

By the same token, Harriet may not be able to accurately gauge how highly the community values various benefits (or how acutely it experiences certain costs). If she tries to keep the whole $200,000 surplus, the community may begin to downplay its love for nature and complain ever more vociferously about the noise of the car crushers. Harriet knows that insisting on a too-stingy deal could saddle her with having to bankroll the silencer after all. This type of bargaining does not seem any more troubling than a bargaining situation between two private parties. In short, it is a garden variety “hard bargain.”

It is carried out against a backdrop of carefully constrained regulation and is further cabined by the availability of the externality fix. Harriet’s use of her land for car crushing has been properly banned for producing an unremediated negative externality; Harriet is simply trying to purchase the consent of the community to her continued use of the land in a manner that produces an unremediated externality.

Within the confines of our carefully constructed and shamelessly counterfactual world, opening up the door to any and all land use bargains seems like a pretty good idea. Not only might it allow a community and a landowner to reach a more efficient result, it would also permit various local governments to provide very fine-tuned differential signals regarding their receptivity to development of various sorts. While some local governments might be unwilling to permit any intensive land use that failed to fully remediate all negative externalities, others might be willing to accept a deal

222. See Fischel, Zoning Reform, supra note 74, at 326 (suggesting that the developer is likely to be the more adroit negotiator and be able to capture most or all of the surplus generated by a sale of zoning).
which left some negative externalities unremediated.\textsuperscript{223} However, these unremediated externalities would necessarily be outweighed by the package of benefits offered by the developer or else the deal would not occur. The price at which this outweighing occurs depends on community preferences (which are shaped, in part, by the preexisting mix of uses). Thus, the price of consent to a given land use might vary among jurisdictions, but in no jurisdiction could it be priced higher than the landowner's cost of remediating all cognizable negative externalities.

2. A Dose of Reality

The foregoing model appears workable in the context of some rather artificial assumptions, each of which corresponds to a constellation of real-world worries. To examine these sticking points, I will consider the implications of removing each of these assumptions. Moreover, while each assumption is counterfactual and unrealistic in certain respects, various policy prescriptions could lead to a legal regime in which that assumption is more closely approximated. These will be explored at greater length in Part III.

Relaxing Assumption #1: Land use regulations are limited to the prohibition of uses that generate cognizable and unremediated negative externalities. In the real world, land use regulations are not narrowly tailored to address only unremediated negative externalities. There are at least two possible reasons for this. The first possibility is that excessive restrictions are imposed for purely strategic purposes. A second possibility is that the regulation generates utility for the community in some manner that is not directly related to the prevention of cognizable negative externalities.\textsuperscript{224} Because this second possibility exists, I do not assert that land use regulations must address unremediated negative externalities in order to be valid as a constitutional matter.\textsuperscript{225}

\textsuperscript{223} To use the terminology suggested by Robert Ellickson, "nuisance costs" would not be completely eliminated in such situations. See Ellickson, Alternatives to Zoning, supra note 22, at 688 (distinguishing "nuisance costs" resulting from externalities from "prevention costs" associated with remediating the nuisance costs).

\textsuperscript{224} Somewhat overinclusive line-drawing may also be necessary in the interest of limiting enforcement and administrative costs. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-89 (1926) (explaining that the "inclusion of a reasonable margin to insure effective enforcement" does not make a law invalid where "the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished").

\textsuperscript{225} Constitutionally limiting land use regulations to the remediation of negative externalities would be inconsistent with the general approach of the Supreme Court in the post-Lochner era. See Molly S. McUsic, The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation, 76 B.U. L. Rev. 605, 640 (1996) ("In post-Lochner-era cases, the Court explicitly rejected the notion that the Takings Clause permitted the government to regulate property for the good of the community only to the extent that the owner was harming the community."). McUsic notes, however, that a shift may be underway that would tighten the reins on property regulation. Id. While I do not attempt to determine the precise location of
In a completely open-ended regulatory regime, the difficulties would be those that existed under Simon's reign. Plainly, such an open-ended regime would be constitutionally problematic under anyone's interpretation. But could some other sharply defined and perfectly enforceable limit on land use regulations similarly eliminate the need for bargaining limits, assuming it were an appropriate limit under the Constitution? A neat feature of the externality-based system is its automatic generation of a bargaining cap—the price of full remediation of externalities. Even in the externality-based world, however, there may sometimes be no technologically feasible or reasonably affordable externality fix, and hence no true bargaining cap. To the extent the lack of a realistic bargaining cap seems less troubling in the externality-based regime, this is likely due to an underlying normative discomfort with land use regulations which are not tied to externalities (or a belief that the Constitution forbids such regulations in the first place).

Indeed, an externality-based system has much to recommend it on normative grounds. Yet one need not accept this particular line between the permissible and the impermissible in order for my analysis about bargaining limits to hold. Any strictly enforced limit that prohibited the problematic "theft" of development rights is equally effective at solving the unconstitutional conditions problem identified above. However, monopolistic bargaining power is likely to be more problematic when something other than an externality-based regime is in place. While it is true that a feasible externality fix would not always be available under an externality-based regime, such a fix would never be available under a regime that used some other criteria for differentiating legitimate from illegitimate land use regulations. To the extent "exit" is viewed as an imperfect control on such bargaining power, an externality-based system would be superior.

There are other good normative arguments for an externality-based system. Its provision of a bargaining cap, even where the cap is not a feasible alternative, can allay popular fears about government overreaching. The advantages of an externality-based regime become even clearer when Assumptions #3 and #4 are relaxed. Externality-based limits will be much easier to monitor and enforce. In addition, externality-based limits provide unrepresented elements of the community with a clear focus for challenging unfair land use bargains.

Relaxing Assumption #2: It is possible to determine costlessly and with perfect
accuracy whether a given land use actually generates a cognizable and unremediated negative externality. In the real world, it is not always clear what constitutes an externality. Moreover, it is not always clear when an externality has been sufficiently remediated. Because of this, strategic “externality-spotting” may create bargaining difficulties. For example, perhaps Harriet’s community does not really mind the sound of the car-crushing equipment. In fact, most members of the community mildly enjoy it. Nevertheless, community members profess intense hatred of the sound because they hope to obtain some of the surplus that Harriet will be able to generate. What they really want is not silence but something else, such as a nature park.

While strategic behavior based on idiosyncratic preferences (such as for excessive noise) would be all but impossible to eliminate, it is clear that the notion of externalities presupposes the setting of some meaningful baseline from which harms can be assessed. Without such a baseline, any private decision that fails to save the community money or to produce an optimal level of benefits for others could be characterized as producing externalities.\(^1\) Externalities might be fruitfully limited to costs generated by behavior that goes beyond the innocuous or “normal.”\(^2\) Normal behavior might be thought of as producing an “average reciprocity of disadvantage,” which would be highly inefficient and pointless to monitor.\(^3\) For example, walking and talking in conversational tones on city sidewalks generates some level of noise, inconvenience, distraction, and risk of collision, but people will, on average, be disadvantaged by this about as much as they disadvantage other people.\(^4\) To require people to remediate or pay damages to one another for all such normal activities would be an

\(^{1}\) See Dana, supra note 15, at 1266 (noting the need to determine which effects of development “are legitimately labeled externalized social costs or benefits”); Michelman, Property, Utility, and Fairness, supra note 71, at 1197 (using example of a ban on billboards to illustrate this difficulty: “Shall we construe this regulation as one which prevents the ‘harm’ of roadside blight and distraction, or as one securing the ‘benefits’ of safety and amenity?”). In our earlier example, Simon was able to frame an externality in the form of “higher” medical costs by measuring from an unfair baseline—a world in which all pedestrians hop.

\(^{2}\) See Fischel, Regulatory Takings, supra note 2, at 351-55 (arguing that the “normal behavior” standard should be used to assess land use regulations); Ellickson, Alternatives to Zoning, supra note 22, at 728-33 (discussing “unneighborliness” as a standard for land use liability). For example, the hopping rule discussed supra might be invalidated on the grounds that it prohibited normal behavior—walking on city sidewalks.

\(^{3}\) In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), the Court indicated that land use regulations that yielded an “average reciprocity of advantage” for those on whom they were imposed might be upheld as valid. See Richard Epstein, A Clear View of The Cathedral: The Dominance of Property Rules, 106 YALE L.J. 2091, 2103 (1997) (discussing a situation in which “[t]he benefits to each side from undertaking its preferred activities are the compensation that each side receives from bearing the small slights caused by others”).

\(^{4}\) Smoking, in contrast, is no longer considered normal in most settings. Nonsmokers are disadvantaged by smoking, but do not impose any reciprocal disadvantages on smokers. Because nonsmokers constitute a majority, the judgment to relegate smoking to the subnormal category is relatively straightforward.
administratively prohibitive and completely pointless wash. Deciding what is normal or innocuous in the land use context is not easy, however, and involves making normative judgments as to how land use entitlements should be split between the community and the landowner.

Particularly troublesome is the situation where the cited externality is not only illusory, but virtually impossible to remediate as well. Such a combination eliminates any realistic chance that the land use can be transformed into a permissible one by the landowner's unilateral action. This is a serious problem that requires establishing relevant baselines from which to assess claims of externalities. The question of what baseline is appropriate is an equity question that involves allocating entitlements between the landowner and the community. Though the issues are knotty ones, they should not paralyze efforts to improve land use law.\textsuperscript{233} Procedural adjustments for verifying claims of externalities and the adequacy of remediating efforts may help to address this problem.

\textit{Relaxing Assumption #3: Any land use regulation that exceeds the appropriate scope (as defined in Assumption #1) can be challenged costlessly and successfully.} In the real world, challenging land use regulations as excessive is likely to be an expensive and uncertain undertaking. In part, this is a function of the current, relatively open-ended governmental power to regulate land use. In a system based on cognizable negative externalities, challenging overreaching regulations would be easier because there would be a more meaningful benchmark for assessing when the regulation had gone "too far."

Nevertheless, it is worthwhile to look for mechanisms which would reduce the administrative costs associated with challenging governmental action. One such mechanism, discussed in detail in Part III, would be to protect land use regulations with only a liability rule, such that these regulations could be violated at the will of the landowner upon the provision of in-kind remediation of cognizable negative externalities. If this were the case, restrictions not justified by reference to cognizable negative externalities could stay on the books, but the landowner would own the right to engage in the prohibited use upon showing that no cognizable negative externalities would be thereby generated (or, alternatively, by showing that any cognizable negative externalities would be remediated). An efficient administrative system for assessing the impact of new development and considering whether the associated externalities have been remediated could therefore offer a reasonably effective (although necessarily imperfect) substitute for the costless challenge of underlying regulations.

\textit{Relaxing Assumption #4: In making land use decisions, the local governmental body acts in the best interest of all affected community members.} Additional complications arise if we begin to suspect that the community is

\textsuperscript{233} See \textit{Fischel, Regulatory Takings}, supra note 2, at 354.
differentially impacted by the externalities or the benefits, and that the political process is capable of producing a result that works to the disadvantage of a minority within the community.\textsuperscript{234} To return to our example, we might imagine that a small minority of the community lives excruciatingly close to the car-crushing plant, such that the noise causes intense discomfort, while the majority lives far enough away that the noise is scarcely noticeable.\textsuperscript{235} Such a possibility revisits the concern that government will bargain with land use rights appropriated from parties not represented at the bargaining table.\textsuperscript{226} For example, the majority might strike a deal with Harriet which gives the majority the nature park it desires while leaving a minority exposed to externalities. Though the minority may get some benefit from the nature park, the park would not be sufficient to buy its consent to the unbearable noise. Here, the minority's entitlement to be free of oppressive noise (or to receive compensation adequate to buy its consent to the noise) has been illegitimately appropriated by the majority for use in a bargaining transaction. Even though the land use outcome is efficient (Harriet can operate her car-crushing plant), the allocative results are inequitable.\textsuperscript{237}

Any mechanism for regulating land use bargains must guard against such possibilities. The requirement of nexus provides one such mechanism, but it comes at a high price in efficiency terms. A better alternative would be procedural and statutory protections to ensure that minority interests are heard before consummation of any land use bargain. Such protections should be coupled with judicial review to ensure that the bargaining outcome does not violate substantive due process.

\textsuperscript{234} It is not clear precisely how a zoning board or other governmental body generates land use outcomes, although some interesting procedural mechanisms apparently exist. See Ellickson, Alternatives to Zoning, supra note 22, at 709 n.112 (discussing "neighborhood voting" mechanisms contained in section five of the Standard State Zoning Enabling Act, which requires a three-quarters majority vote to approve a zoning change opposed by twenty percent of the landowners in a nearby neighborhood). It is also unclear what motivates zoning boards or what they attempt to maximize. See Siegan, Land Use Without Zoning, supra note 22, at 10 (suggesting that the governing board "may vote from what may be considered the 'highest' motive, the health, safety, and welfare of the 'people' as conceived by its members, or it may vote for the basest of reasons, the payment of graft" or for any of the "many other possibilities in between"); Sterk, Nollan, Henry George, and Exactions, supra note 3, at 1738-42 (presenting hypothetical models of public-spirited, treasury-maximizing, and politically-minded municipal officials).

\textsuperscript{235} Robert Ellickson's example of a grocery store in the Santa Monica mountains, which would generally benefit the community at the expense of certain near neighbors, raises the same set of concerns. Ellickson, Alternatives to Zoning, supra note 22, at 684-85.

\textsuperscript{226} See supra Part I.A.3 (discussing appropriation from third parties).

\textsuperscript{237} See Ellickson, Alternatives to Zoning, supra note 22, at 690 ("[A]n efficient policy may be an unfair one, particularly when the gains of the policy are not distributed to those injured by its imposition.").
III. A NEW FRAMEWORK FOR LAND USE BARGAINS

As the foregoing discussion suggests, an externality-based regulatory regime would foster efficiency-enhancing land use bargains and would eliminate the need for judicially-imposed limits on land use bargains. Yet it would be politically infeasible (not to mention highly unsettling) to simply repeal all zoning law and replace it with externality-based regulations. In this Part, I propose a possible alternative framework that would achieve the same advantages without dismantling zoning altogether. In Section A, I outline the centerpiece of this new framework—an in-kind call option that would allow landowners to move forward with a proposed use by remediating all cognizable negative externalities associated with it. Section B sketches how such a call option might work. In Section C, I discuss a variety of distributive considerations raised by this new framework.

A. INTRODUCING AN IN-KIND CALL OPTION

At the outset, it is worth stating with some specificity what an in-kind call option would mean. In most basic terms, a landowner would hold an option which would allow her to engage in a proposed land use by paying a specific in-kind price—the remediation of all cognizable negative externalities. The landowner thus holds a right to buy something (here, the community's entitlement to prevent development of a certain nature) at a specified price (the in-kind remediation of cognizable negative externalities), while the community has no right to veto the transaction. The arrangement is the equivalent of a "call option" in finance, with the "exercise price" set in kind rather than in cash. If a landowner can fix the externalities associated with the development, she can proceed with the development.

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238. The call option would only extend to the kind of land use regulations typified by zoning; it would not allow a landowner an "option" to violate other, non-negotiable regulations and laws (such as fire codes, health codes, and ordinary criminal and civil laws). Government should have reasonably broad discretion under the police power to designate any legitimate law or regulation as "non-negotiable" and thereby withdraw it from the realm of the landowner's "call option." This is true even when the law impacts in some way on land use—as, for example, fire codes do.

239. A party holding an interest protected by a property rule retains the power to veto any and all deals at her option, while a party whose interest is protected only by a liability rule lacks such veto power. Morris, supra note 23, at 853-54. Under current law, the community's interest in compliance with valid zoning regulations constitutes a property interest, in that it need not approve any noncompliant proposals.

240. See Ayres & Talley, supra note 23, at 1041 & n.49 (explaining that under a liability rule, a defendant holds a "call option" and can elect "to buy the entitlement for the damage amount"); Morris, supra note 23, at 852 (discussing "call" as a form of liability rule).

241. The call option is uniquely associated with a particular piece of land and runs with the land until it is exercised or sold to the local governing body. This feature distinguishes the call option from a system of transferable development rights ("TDRs"), in which the right to develop can be severed from a particular piece of property and transferred to a different piece
Granting landowners such an option can be thought of as transforming the community’s property entitlement in a particular regulatory regime (which allows it to forbid any and all uses that are incompatible with the zoning regulations) into an entitlement protected by a species of liability rule. Though I will refer to the in-kind call option as a liability rule, it should be noted that this categorization is not inevitable. Insofar as the call option grants landowners the unilateral power to move forward with projects which do not comply with the zoning regulations upon payment of a specified “price,” it indeed acts like a liability rule. Yet it might also be recast as an adjustment in the community’s property rights.

Under such a regulatory regime, the community would not hold a property right in a particular zoning regime (such that all noncompliant proposals can be vetoed), but would instead hold a diminished set of entitlements that would allow it to veto any project that generates cognizable unremediated negative externalities. Significantly, the “damages” which the landowner must pay are tied not to the harm suffered as a result of the development (as would be the case with an ordinary liability rule) but instead are tailored to safeguard the community’s entitlement to be free of cognizable unremediated externalities. Zoning is nominally left in place, but its character and coercive power is transformed. Where compliance with a particular land use regulation is inefficient, the landowner will hold an option to bypass it by remediating the relevant externalities (or demonstrating that no such externalities exist).

How might such a mechanism fit into the legal landscape? Given that the Constitution has not been interpreted to require an externality-based regulatory regime, and given the constraints of federalism, I believe that
the preferable path would be for states to modify their zoning enabling acts to incorporate the framework described here. However, federal courts would still have a role in enforcing the outer limits on land use regulation mandated by the takings clause, and a stricter standard than the one currently in use might well be appropriate for that task.

B. How the Call Option Would Work

While full practical details of the call option mechanism are beyond the scope of this Article, it is possible to sketch out the basic workings. Subsection 1 discusses the procedure for establishing the in-kind exercise price—the “externality fix.” Significantly, the landowner’s exercise of the in-kind call option is only one possible outcome of a bargaining session. In Subsection 2, I discuss the possibility that the community may wish to purchase the call option from the landowner so as to block development even with the externality fix. Subsection 3 explains how the call option operates as a “bargaining cap,” allowing the parties to choose more efficient alternatives that will generate a larger surplus for them. A fourth possible outcome is not treated separately, though it hovers in the background throughout any bargaining session—the possibility that the landowner will simply choose to walk away.

1. Setting the Exercise Price

My framework contemplates an initial colloquy between the landowner and the governmental body, in which the landowner presents the proposed land use, and the government responds by identifying the negative externalities that would be associated with that use. This closely resembles the first step of any negotiation for a zoning variance. To return to the car-crushing case, Harriet would present the zoning board with her proposed car-crushing facility, and the zoning board would respond by identifying various externalities. Here we will assume the only externality in question is “excessive noise.” Harriet could then formulate and propose an externality fix. Importantly, she would only need to demonstrate the ability to remediate the marginal increment of negative externality associated with the intensified development or use. In other words, she would only need to demonstrate that her “silencer” buffered the sound of the car-crushing equipment to a level consistent with the uses permitted under the existing zoning code; she need not eliminate all detectable noise. Allowing Harriet

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248. Of course, the bargaining limits articulated in Nollan and Dolan would need to be overruled as an initial matter, in order to clear the way for this proposed alternative.
to choose her own way to remediate the identified externalities is more efficient than forcing her to use a particular remediation strategy. This initial step—verifying the relevant externalities and assessing what would be sufficient to remediate them—might require some procedural refinements to ensure that game-playing does not confound efforts to arrive at a fair exercise price.249

Another procedural change would place certain burdens of proof on the landowner. Once the landowner has proposed a nonconforming use and has been informed by the governing body of the sorts of externalities associated with that use, the landowner should bear the burden of demonstrating precisely how she plans to remediate those externalities. The landowner should likewise bear the burden of providing detailed information about any other alternative plans. Because the landowner has no right to use her property in a manner that produces cognizable and unremediated externalities, and because she stands to benefit through a zoning change that will permit her to engage in the nonconforming use, it is appropriate that she should bear the burden of demonstrating exactly how she will go about the remediation in question. The community should not bear the cost of helping the landowner figure out how to avoid harming the community.

This procedural shift is consistent with the greater landowner autonomy and choice provided under my model. The situation is no longer one in which the government forces a landowner to give something up, but rather is one where a landowner voluntarily offers a self-selected proposal.

To return to our example, let us assume that the expensive silencer is the only viable solution. Harriet presents the zoning board with the plans for the car-crushing facility with silencer attached. This would set the stage for a bargaining session between the governmental body and the landowner. That bargaining session would have four possible outcomes: (1) the landowner proceeds with the externality fix;250 (2) the governmental body buys the...

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249. An important feature of most liability rules is the fact that the damage amount is determined by an independent entity and does not necessarily track the subjective valuation of the party who is protected by the liability rule. See Morris, supra note 23, at 854 n.82 ("The 'objective' price set by the collective (usually, by a court) may or may not equal the holder's subjective valuation of the in-kind component."); see also Ayres & Talley, supra note 23, at 1065-72 (discussing the advantages of "untailored" damages assessments). Given the fact that remediation of cognizable externalities is amenable to (more or less) objective determination, it is unclear whether it would be necessary to add a "neutral" administrative body to determine the adequacy of a proposed externality fix or whether the threat of judicial review would be sufficient to make the government act in good faith in approving or disapproving a particular externality fix. External standards might also be appropriate in certain situations, such as those that currently govern the cleanup and redevelopment of "brownfield" sites. See J. Linn Allen, Toxic Land Healthy for Developer, CHI. TRIB., Jan. 30, 2000, at C1, available at 2000 WL 3631755 (reporting that the EPA issues a "no further remediation" letter after a review of a developer's documentation indicates the cleanup meets the applicable standards).

250. Exercising the call option would transfer relevant pieces of the community's interests...
landowner's call option to prevent the development from occurring; (3) the landowner and the community agree on an alternative that the landowner can provide at lower cost than the externality fix; or (4) the landowner walks away.

2. Buying Up the Option: Paying Premiums to Avoid Development

When confronted with a proposed project, a governmental body might offer to buy the landowner's call option. This would allow the community to realize associational preferences and other intangible values unrelated to any cognizable negative externalities. If the community found the prospect of having a car-crushing plant in the area truly upsetting, even if the silencer eliminated all noise from the plant (and all other cognizable negative externalities were remediated as well), it could approach Harriet with an offer to pay her not to build the plant. Harriet would agree if the amount offered her exceeded the net amount she could expect to yield from her plant after implementing the externality fix. If Harriet accepted the deal, she would receive the agreed-upon compensation and the call option would be removed from the land. In other words, the community's interest in nondevelopment, formerly protected only by a liability rule, would henceforth be protected by a property rule. Further development would not be prohibited, but the community would hold full veto power and would consequently have a much-enhanced bargaining position.

Allowing governmental bodies to purchase call options introduces some potentially troubling strategic possibilities. Imagine a flurry of proposals for jails, mental institutions, and homeless shelters in the best neighborhoods, not because those neighborhoods made attractive sites, but because the most money could be extorted from their affluent and squeamish residents for not building. By purchasing the call option, the community transforms its interest in nondevelopment into a property rule, and prevents the same in nondevelopment to the landowner at the specified in-kind price. The landowner's share of property interests in the land would be expanded (a leftward move in Figure 1). I assume that the transferred portion of the interest would be protected by a property rule, such that the call option, once exercised, could not then be repurchased by the governmental body to end the land use in question. See Ayres & Talley, supra note 23, at 1041 n.50 (discussing the same assumption, while noting that a contrary rule permitting repurchase would be possible, and citing Ellickson, Alternatives to Zoning, supra note 22, at 736-48, for an example in which a factory's option to "pollute and pay" might be revoked).

251. Choices 2 and 3 correspond to the two "Coasean Bargains" identified by Ayres and Talley under a liability rule. See Ayres & Talley, supra note 23, at 1038, 1042 tbl.1. The utility or disutility that each party associates with the land use will be signalled by the alternatives each seeks to pursue; in this way, the call option serves an "information-forcing" function. Id. at 1100.

252. The community would, of course, be subject to applicable constitutional and statutory restrictions in seeking to realize associational preferences.

253. See Ayres & Talley, supra note 23, at 1044 (noting that parties who place a low value on the exercise of a call option "might feign a high valuation so that plaintiffs would bribe them not to exercise their option").
HARD BARGAINS AND REAL STEALS

or subsequent landowners from threatening an endless series of undesirable projects on the same stretch of land and receiving a continuous stream of compensation from the oversensitive community. Nevertheless, the risk that savvy developers might be able to engage in such bluffing even once seems unsettling.

There are several responses to this risk. First, the cost associated with documenting the feasibility of a site-specific externality fix (a cost borne by the developer under my model) should deter casual efforts at extortion. Second, all cognizable negative externalities would have to be ameliorated under any exercise of a call option, so the threatened project would only be objectionable on vague "not in my backyard" grounds. While perhaps people should have some power to exclude certain things that they find distasteful from their communities, it is appropriate that the exercise of this preference should come at a price. Third, assuming there is a "public use" involved (a low threshold under current law), the community could choose to acquire the land through its power of eminent domain. The community's ability to exercise its power of eminent domain and pay just compensation for the land itself places an upper limit on the price that a landowner can exact for a call option.

A community could also head off such concerns by simply acquiring undeveloped land and maintaining it as a buffer zone. Alternatively, a close-knit community that wished to prevent future development or to otherwise preserve the character of the community could agree to sell all of their call options at once, or could form a binding agreement to refrain from exercising them for some period. This would achieve much the same result as a private covenant among the landowners. Certain categories of home buyers might seek out communities that have sold their call options or have signed a binding agreement not to exercise them for some period. The


255. The amount of compensation should reflect the value of the land with the call option intact—that is, the amount the land would be worth to a landowner who has the power to engage in any given land use by remediating the cognizable negative externalities associated with that use.

256. This is a tactic that is frequently used by conservation groups to stop unwanted development. See, for example, Barbara Sherlock, Conservation Trust May Step in to Buy Batavia Land Slated for Development, CHI. TRIB., Jan. 30, 2000, at C5, available at 2000 WL 3631402 (reporting that the Trust for Public Land was considering the purchase of a fourteen-acre marsh area slated for retail development).

257. See Clayton P. Gillette, Courts, Covenants, and Communities, 61 U. CHI. L. REV. 1375, 1395 (1994) [hereinafter Gillette, Courts, Covenants, and Communities] (observing that for "those who desire more control than can be afforded by zoning or market mechanisms alone, covenants provide both a private means of rulemaking that reflects those desires and a stabilizing precommitment device against changing preferences.


popularity of housing developments featuring incredibly rigid land use restrictions indicates the value that might be associated with this feature.\textsuperscript{258} While further development would not be absolutely prohibited, the community would be in a much stronger bargaining position and would hold full veto power.\textsuperscript{259}

Another strategic risk is that the governmental body will try to buy up all call options in the community before anyone has any interest in more intensive development. Such a mass buy-up would, in effect, grant the community veto power over any land use that does not conform with existing land use restrictions.\textsuperscript{260} However, one would not expect landowners to sell their call options lightly; the call option significantly enhances the current and potential value of land, and has serious implications for its resale value. Land use deals would not be prohibited after the transfer of a call option, but the landowner's bargaining position would be seriously weakened. Other things being equal, developers could be expected to seek out parcels of land with call options intact and pay a premium for them.\textsuperscript{261}

3. Settling for Less: When an “Externality Fix” is Inefficient

As my examples suggest, there are many imaginable instances in which the remediation of all cognizable negative externalities will not be the efficient solution. An alternative will clearly be more efficient than the externality fix if it is both cheaper to the landowner and more valuable to the community.\textsuperscript{262} If there are several alternatives that meet this criteria, the

\textsuperscript{258} See id. at 1384-85 (discussing residential association covenants governing such matters as “kinds of pets that can be kept within the association, numbers of guests that can be accommodated, the erection of a satellite dish, the size of a mailbox, exterior colors, and the types of vehicles maintained on the premises”) (citations omitted); see also JOHN DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 85 (2d ed. 1969) (“If the controls exercised by public authorities over land-use in America seem excessively detailed and capricious, the controls happily adopted by private citizens are positively sadistic.”).

\textsuperscript{259} This assumes that a community group that sold its call options would continue to have controlling power with the local governmental body. Where such control is uncertain, a binding agreement to refrain from exercising call options for some time period might be a preferable approach.

\textsuperscript{260} This assumes that the underlying zoning regulations are constitutionally permissible and that the community is not exercising its veto power in a manner that otherwise violates the Constitution (or state or federal law). The content of a call option, and implications of retaining or selling it, will depend upon the operative constitutional limits on land use regulation.

\textsuperscript{261} I am assuming here that the call option, once sold, could not be repurchased by the landowner. However, this makes little practical difference. Even without the call option, a landowner can still try to convince the community not to exercise its veto power with respect to a proposed development by offering a very attractive deal. The amount of extra compensation required to overcome the community's veto power should be precisely equivalent to the amount she would have to pay to "repurchase" the call option if this were allowed.

\textsuperscript{262} A bargain that would leave one of the parties better off while leaving the other no worse off would also be Pareto-efficient, although the no-better-off party might refuse to
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parties could be expected to pursue the one generating the largest total surplus. Plainly, the landowner will not pursue an alternative which is more costly to her than the externality fix.\textsuperscript{263} One concern with this solution is that it will provide a back-door method for manipulative extortion of the sort decried in \textit{Nollan}. The fear that governmental bodies will engage in strategic externality-spotting remains significant, particularly where the governmental body is able to assess and exploit the bargaining position of an individual developer. There is a concern that the governmental body will complain about something it cares nothing about in order to extract something it really wants from a party that truly has no choice. Some relatively minor procedural adjustments can reduce this risk. One such adjustment would require that the landowner initiate any alternative proposal, and that the community vote on it as a take-it-or-leave-it proposition.\textsuperscript{264} If the deal is approved, the right to engage in the proposed project is purchased at the developer-proposed price.\textsuperscript{265} If the deal is rejected, the landowner must choose whether or not to exercise the call option or to simply walk away from the proposed project.\textsuperscript{266} As Ian Ayres and Eric Talley have pointed out, giving one participant "the power to make an all-or-nothing offer allocates a great amount of market power" to that party.\textsuperscript{267}

Overreaching might be redressed in certain limited circumstances by removing the more powerful party's "initiation power," but there is still a danger that the more powerful party could pressure the other party into initiating a given deal.\textsuperscript{268} This danger translates in the land use context to a governmental body's heavy-handed hints (or outright statements) about "what it would take" to get a particular deal approved. However, it would be possible to formulate a rule forbidding any direct statements to individual developers about the price of consent, other than the list of externalities which must be remediated.\textsuperscript{269} Under such a rule, individual project approval would never be expressly or implicitly conditioned on any particular concession. This offers a formal level of protection against "takings"; in a

\begin{itemize}
  \item \textsuperscript{263} See Ayres & Talley, \textit{supra} note 23, at 1043 (stating that "defendants will never consent to pay more than $50 for what they can take nonconsensually for $50").
  \item \textsuperscript{264} See id. at 1049-50 (discussing a "take-it-or-leave-it" bargaining interaction).
  \item \textsuperscript{265} See id. (describing bargaining move in which a defendant offers to purchase an entitlement from the plaintiff at a price chosen by the defendant).
  \item \textsuperscript{266} See id. at 1050 (discussing the alternatives remaining to a defendant holding a call option if her take-it-or-leave-it offer is rejected).
  \item \textsuperscript{267} Id. at 1049 n.74.
  \item \textsuperscript{268} Morris, \textit{supra} note 23, at 859-60 n.98.
  \item \textsuperscript{269} Though this would present obvious enforcement challenges, it should be no more difficult to implement and enforce than prohibitions on bribery and graft. The fact that the landowner would be in a position to inform on an overreaching governmental official should make such communications relatively rare.
\end{itemize}
meaningful sense, the landowner's concession becomes a “giving.” A landowner can offer any package deal she sees fit, including pieces of her own land, but such concessions are never forced, encouraged, or even invited by the government.

Prohibiting governmental bodies from initiating land use bargains could also be expected to improve the quality and quantity of public information available to landowners and developers. Unable to initiate personalized bargains based on the unique situations of individual landowners, governments would have an incentive to publicize information about the kinds of concessions it would view with favor, the kinds of development it hopes to attract, and the sorts of special concerns it has about growth. This would allow local governments to signal different degrees of receptiveness to development, and should be expected to foster a more efficient distribution of new development. It would eliminate inequitable treatment of different developers based upon the developer's financial situation and opportunities for exit.

To the extent the landowner has the opportunity to set the agenda by presenting her proposal first, the community would be expected to accept the offer if it generates net benefits for them. Indeed, individual members of the community who perceive that the package is in their best interest would likely pressure the governmental body to accept the offer as made. This grassroots pressure might never surface in the situation where the governmental body presents the terms of an offer to the landowner. Even

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270. For example, certain communities might be particularly receptive to solutions that would minimize overall development within a given area. The ability to enter into binding contracts not to exercise one's call option, see Gillette, Courts, Covenants, and Communities, supra note 257 and accompanying text, introduces the possibility of TDR-like alternatives to the externality fix. For example, a landowner proposing a development that would increase density on a particular block might be able to purchase the consent of the community more affordably by showing that all of the surrounding landowners on that block have contractually bound themselves not to exercise their call options. A community could publicly signal its receptivity to such arrangements and perhaps even facilitate such private side-arrangements (by, for example, maintaining a register of interested parties), as long as the choice whether to propose such a solution remained with the developer. Similarly, impact fees might be publicized as an acceptable alternative to fixing certain sorts of externalities, though the option to propose an alternative or to engage in an externality fix would remain with the developer.

271. Cf. Rose, Planning and Dealing, supra note 22, at 907-08 (suggesting that a system which "encourages communities to think ahead and publicize their intentions" can increase predictability and reduce unfairness).

272. Cf. Ellickson, Alternatives to Zoning, supra note 22, at 709 ("Although it may appear corrupt on the surface, an excellent way to handle conflicts is to encourage the landowner to distribute monetary payments to his neighbors to enlist their support for his project.").

273. If the governmental entity were fully aware of the preferences of the community and acted as a perfect proxy for those preferences, the community's reactions to proposals would not be expected to change outcomes. However, it seems probable that community preferences are not likely to be fully formulated, much less fully voiced, until after a focal point of some kind has been placed on the bargaining table.
if the landowner could counterpropose in that situation (as landowners can under current practice), the community's response to the counterproposal would be consciously or unconsciously conditioned by the earlier consideration of a more favorable alternative. Where the landowner presents the first proposal, the status quo and the externality fix provide the only relevant comparison points. Moreover, the community must accept or reject the proposal in an up-down vote. The risk of rejecting a landowner's proposal for purely strategic reasons is great. The landowner may exercise the call option and proceed with the project accompanied by an externality fix, or he may exit the jurisdiction altogether.

There is an additional concern with lower-cost alternatives to the externality fix. As discussed above, it is quite possible that the controlling interests in a community might reach an agreement with a landowner that is fully satisfactory to both of the bargaining parties but which imposes unremediated negative externalities on third parties—whether a minority within the community, or individuals outside the political subdivision. As a practical matter, such results are likely to be relatively rare because zoning boards tend to be quite responsive to the concerns of the surrounding community in making land use decisions. Appropriate notice and hearing procedures could flush out objections to a particular bargain before it is consummated and could forestall most problems. Likewise, state enabling legislation could explicitly build in the requirement that land use bargains take into account the interests of all affected parties.

Judicial review should be available as a backstop, however. Where a particular bargain constitutes inappropriate and unfair governmental action, it should be amenable to challenge as a substantive due process violation. By adjusting the amount of harm that must be demonstrated in order to raise such a challenge, the ability of third parties to block socially beneficial land use bargains would be minimized while still ensuring that minority interests are not disregarded in the bargaining process. In certain types of cases, other constitutional protections might apply. For example, if a

274. See Ellickson, Alternatives to Zoning, supra note 22, at 709 ("A landowner seeking a variance, conditional use permit, or zoning amendment is more likely to be successful if the affected neighbors are not opposed.").

275. See Rose, Planning and Dealing, supra note 22, at 894-96 (discussing the importance and limitations of notice and hearing in the context of piecemeal land use changes).

276. This would make local government action in violation of this principle subject to challenge as a matter of state law. See generally Powell, supra note 200 (discussing challenges to municipalities' statutory authority to impose exactions).

land use bargain had a disproportionate impact on a protected class, the Equal Protection Clause would come into play.

C. DISTRIBUTIVE CONSIDERATIONS

My framework would begin by granting all landowners a call option which would allow them to purchase any desired portion of the community's bundle of entitlements in the landowner's land in exchange for the remediation of cognizable negative externalities. This would downgrade the community's holding from a property right to an interest protected only by a liability rule, and it would effect a distributive shift from the community to the landowners. The magnitude of the shift would depend on the degree to which the property entitlements formerly held by the community contained restrictions on development that were not associated with preventing cognizable negative externalities. Simply adding a new mechanism, such as an in-kind call option, does not automatically resolve the troubling baseline issues that I have been discussing throughout the Article. Questions as to what should count as an "externality" and what should be deemed sufficient to "fix" that externality are not easy ones. Nuisance law provides one resource, though "nuisance" is not without analogous definitional problems. Moreover, it is not clear that nuisance is a concept inclusive enough to capture all of the relevant externalities. For example, a continuing concern for communities is that development "pay its own way." This expresses the intuition that externalities may take the form of marginal degradation of public services, excessive strains placed on public facilities, and other incremental harms and costs that are not unique to the new development but which must somehow be absorbed by the community as a result of the new development. Enjoying a premium public facility without paying one's fair share does not fit comfortably within traditional notions of nuisance. Also troublesome are matters of aesthetics, which are not always addressed by nuisance law.

278. See Epstein, Takings, supra note 177, at 112-21 (discussing antinuisance rationale for the police power); Douglas W. Kmiec, At Last, the Supreme Court Solves the Takings Puzzle, 19 Harv. J.L. & Pub. Pol'y 147, 154 (1995) ("[C]ommon law nuisance can govern the constitutional acceptability of land use regulation.").

279. See Fischel, Regulatory Takings, supra note 2, at 61 ("The 'nuisance exception' [to the takings clause] may be a sensible rule, but it begs the question of who is to decide what constitutes a nuisance."). But see Epstein, Takings, supra note 177, at 120 ("The nuisance language may be often misunderstood and misused, but the conception has no inherent weakness that makes misuse inescapable.").

280. See, for example, Altschuler & Gomez-Ibanez, supra note 4, at 77-96.

281. See Ellickson, Alternatives to Zoning, supra note 22, at 733 (citing Mathewson v. Primeau, 395 P.2d 183 (Wash. 1964), in which a neighbor's hogs were deemed an actionable nuisance due to their wafting odor, but piles of junk heaped on the neighbor's premises were not deemed actionable). Aesthetics may be the greatest source of concern in the land use context. See Rose, Planning and Dealing, supra note 22, at 910 (noting possibility that "the most serious spillovers or externalities of land use fall within the vague field of aesthetics: the way the area
Some restrictions, such as those typically associated with residential zoning, are generally thought of as preventing entrants from free-riding on an attractive neighborhood environment without providing reciprocal benefits for their neighbors. While part of the objection can be rephrased in terms of negative externalities imposed on existing homes (aesthetic blight, traffic congestion, increased burdens on public facilities), this does not always fully capture the harms associated with free-riding. Many zoning ordinances mandate a minimum lot size or even a minimum square footage, blocking entry not only of the "parasitical" apartment building that might impose observable negative impacts on the neighborhood, but also of the slightly more modest single-family home. Even if the smaller house is completely screened from view, and even if it imposes no special burdens on the community as a whole, there is still a free-rider problem. Because local government services are primarily financed through property taxes, it would be possible to free-ride on these services by buying a very inexpensive house (with accordingly low property taxes) in a community filled with much more expensive houses. Minimum lot sizes and density regulations were developed to rule out certain housing options, such as smaller properties or multi-family dwellings. This has the effect of keeping lower-income residents out of the "better" neighborhoods.

The ability of local governments to offer different mixes and levels of public services and facilities to their "customers" may well be compromised if newcomers cannot be prevented from free-riding in the manner just described. Of course, this line of reasoning assumes that individuals

282. See Nelson, supra note 72, at 10-15 (discussing zoning as a device to protect the property values of the well-off).

283. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) ("Very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.").

284. For example, see Cheryl Meyer, Small House Request Fails First Zoning Bid, Chi. Trib., Feb. 12, 2000, § 4, at 12 (reporting that the Lakewood zoning board unanimously rejected proposal to ease the requirement that homes contain a minimum of 2800 square feet, with at least 1800 square feet on the first level of a two-story home). Interestingly, one Chicago suburb is seeking to impose maximum square footage requirements to prevent developers from replacing demolished homes with new ones that will "unpleasantly dwarf their neighbors." Karen Mellen, Glencoe Studies Zoning Changes to Scale Back Tear downs, Chi. Trib., Apr. 27, 2000, § 2, at 3.

285. See Fischel, Regulatory Takings, supra note 2, at 260-61 (discussing how zoning responds to the risk that people would build inexpensive houses in upscale communities in order to obtain high-quality services without paying high taxes).

286. See Nelson, supra note 72, at 23 ("[A]dvantaged communities face a steady and high demand for entry from residents of less desirable communities" who could gain access in the absence of zoning "by occupying high-density housing and thereby economizing on land costs.").

287. See Bruce W. Hamilton, Zoning and Property Taxation in a System of Local Governments, 12 Urb. Stud. 205, 205 (1975) (contending that in the absence of zoning ordinances requiring
choose between different "baskets" of governmental services and facilities in the same way that one chooses breakfast from a menu—based on individual taste. Wealth differences make this model highly questionable. Good schools and safe neighborhoods are not idiosyncratic preferences peculiar to the well-off, and nobody really has "a taste" for crime-riddled neighborhoods and substandard schools.286

When neighborhoods are exclusive, they may also serve the expressive and status preferences of residents. The name of a neighborhood can immediately convey a sense of prosperity. The owner of an inexpensive house in such a neighborhood can be viewed as free-riding on the neighborhood's exclusive reputation and, in the process, eroding it. The smaller house's property value is also increased by its location in a "good" neighborhood, while the small house does not reciprocally add to the value of the neighboring properties. Put another way, the small home takes the place of what would otherwise be a larger, property value-enhancing home and arguably dilutes the value of the neighborhood. It is possible that this results in an actual decrease in property values, though this may or may not be the case in any given instance.289 Whether or not property values drop demonstrably, there is arguably an issue of associational preferences at stake. However, it seems doubtful that the government has any interest in subsidizing the satisfaction of such preferences.

It should also be noted that the concept of free-riding is a bit slippery in this context, since it is an expected and not aberrational feature of living in a civil society that benefits and burdens will not be allocated with mathematical precision. One of the functions of government is to provide certain kinds of public goods to everyone in society, including the poor. One might therefore accuse a wealthy community of free-riding when it fails to provide its fair share of these goods to the less well-off.290 Minimum lot sizes


289. See Ellickson, Alternatives to Zoning, supra note 22, at 767 ("Although homeowners may believe that construction of a nearby apartment building will depress property values, there is little evidence to support such fears.") (citing FHA valuation standards reported in Bernard H. Siegan, Non-Zoning in Houston, 13 J.L. & Econ. 71, 103, 106 (1970)).

290. This was the rationale in the controversial Mount Laurel decisions. See S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 483-91 (N.J. 1983) (Mount Laurel I) (formulating remedies to ensure communities provide a "fair share" of low and moderate income housing); S. Burlington County NAACP v. Township of Mount Laurel, 396 A.2d 713, 731-32 (N.J. 1975) (Mount Laurel I) (stating that a municipality "must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income"); see also Hills Dev. Co. v. Township of Bernards, 510 A.2d 621, 642-43 (N.J. 1986) (discussing the extent of the constitutional obligation to provide a fair share of lower income housing). For a discussion of the Mount Laurel cases and their impact, see...
and similar exclusionary devices may offer real advantages to some communities, but this does not mean that zoning law should be configured to allow the costless realization of those advantages.

A related difficulty involves the line between a use that generates no externality at all and one that generates an "unfixable" externality. For example, a proposed development that violates a height restriction may generate no negative externalities other than "excessive height." This can be viewed on the one hand as no cognizable externality at all, and on the other hand as an "unfixable" externality. Likewise, some structures are objectionable solely because they do not look like other, preferred structures (such as single-family homes). In such cases, the purported "externality" is the disutility associated with enduring the existence of a disfavored design in one's vicinity, not for any identifiable trouble it causes, but simply because it exists. A similar question is whether purely financial impacts, such as a drop in property values (or a failure to contribute reciprocally to the maintenance of high property values), should count as an externality. The assertion that a particular development will "alter the character" of an area is generally rooted in such financial concerns, as well as in concerns over aesthetics.

Drawing the line on externalities is an allocational choice that will determine the content and value of the call option held by the landowner, as well as the amount of power over development retained by the community. Because my approach allows adjustments in either direction through future transactions, under Coasean assumptions, the initial allocational choice will not impair efficient land use.

Nevertheless, the desire to achieve distributive equity and to minimize transaction costs urges some care in drawing this line. In my view, height and density limits seem to be a valid proxy for other kinds of cognizable externalities, such as reduced light and space, and increased congestion.

In contrast, purely financial externalities that are neither linked to identifiable spillovers such as noise, congestion, or traffic, nor to identifiable impacts on public services, should be deemed presumptively noncognizable. To recognize and require remediation for financial impacts associated with the development of an area unnecessarily entangles the state in the


291. See, for example, Tim Pareti, Palatine Rejects Town Home Plans, CHI. TRIB., Jan. 30, 2000, § 16, at 71, reporting that council members who rejected a town home proposal expressed concern that the roof lines did not sufficiently resemble single-family homes.

292. Cf. Fischel, The Economics of Land Use Exclusions, supra note 15, at 110-11 (stating that in order to fairly allocate initial land use entitlements, a determination must be made as to the types of development a community should be permitted to regulate).

293. See Ronald Coase, The Problem of Social Cost, 3 J. L. & ECON. 1, 15 (1960) (observing that where "market transactions are costless . . . a rearrangement of rights will always take place if it would lead to an increase in the value of production").
operation of private markets. Unaesthetic uses (at least those falling within some "normal" range of ugliness) and uses found objectionable solely on "status" grounds (i.e., for failing to be a single-family home) would seem to fall in the same category. Homeowners in pricey residential districts would not be left without an option, however. They could create a binding agreement to not exercise their own call options and could buy up a buffer of surrounding land to prevent encroaching development. Alternatively, the community could purchase the developer's call option (or the land itself) and preclude development.

To the extent the component unrelated to negative externalities (however defined) was very large or very valuable to the community, granting the call option could raise some equity concerns. Current property owners may have paid a premium to purchase land in a community with restrictive zoning, making this change in the legal rules arguably unfair. Yet each landowner would be receiving something quite valuable in compensation for this change: a call option to develop on her own property. Even if an individual landowner has no interest in exercising the call option herself, the option would run with the land and theoretically heighten its resale value. Moreover, given the frequency with which zoning designations change and variances are granted, a purchaser could not realistically expect to be fully insulated from all development for all time—and even less so to be fully insulated from development that generates no cognizable negative externalities. Though it is an empirical question worthy of further inquiry, it seems unlikely that granting landowners a call option of the sort discussed in this Article would seriously interfere with reasonable, investment-backed expectations or generate severe inequities.

In the long run, equity would appear to be enhanced by granting in-kind call options. These call options would open up more site choices to developers and the would-be residents and businesses they represent. By permitting land uses upon the remediation of externalities, the call option would weaken the ability to exclude merely for the sake of exclusion. It could, therefore, be expected to make inroads into exclusionary zoning practices of all types. Because it would allow any land use for which the government could not identify negative externalities, socioeconomic

294. Frederick Acker's performance zoning proposal draws similar lines between "harms" (such as fumes, noise, and traffic) and "nonharms" (such as "[u]nukative design" and "small lot size"). Acker, supra note 25, at 394.

295. Cf. Fischel, Zoning Reform, supra note 74, at 311-12 (noting potential equity concerns that would be associated with the abolition of zoning).

296. It would not, however, be eliminated, assuming that the governmental body would be permitted to purchase the call option from the landowner. See supra Part III.B.2 (discussing the government's ability to buy the landowner's call option).

297. See Ellickson, Alternatives to Zoning, supra note 22, at 703-05 (discussing exclusionary and discriminatory effects of zoning).
discrimination and other unfair exclusionary practices would no longer be able to hide behind a broad, impenetrable "planning" rationale. Forcing governmental bodies to articulate valid, legally cognizable reasons for blocking a particular land use provides a check on regulations that are actually based on impermissible factors.

Another equity consideration involves the relative treatment of earlier and later developers. While the in-kind call option would place an upper bound on the bargaining range, it would not completely eliminate this form of disparate treatment. This could occur either because new externalities are identified over time (such as the impacts on fragile ecosystems) or because a community becomes increasingly sensitive to externalities. At the early stages in a community's growth cycle, it may actively court developers and businesses, perhaps by granting special tax exemptions or unilaterally lifting land use restrictions. As a particular community gains a thriving economic base, it will understandably become less interested in further development and more sensitive to negative externalities. At some point, our hypothetical community will begin to demand either that externalities be remediated, or at least that some amenities be provided to help keep community life pleasant and livable. Later still, the community may become so antigrowth that it will attempt to purchase call options held by developers (or, alternatively, acquire buffer land zones using its power of eminent domain).

Some have argued that it is presumptively unfair to place conditions on land uses which were permitted without any such conditions at an earlier point in time. Ellickson has asserted that "growth controls unfairly prohibit owners of undeveloped property from duplicating the developments of earlier landowners" and improperly "increase the price of entry for people moving into an area." Yet it makes sense that there should be differential pricing for development over time and in different areas as communities reach critical mass. While Ellickson questions whether planners can ever determine the optimum size of a community, allowing fluctuation in prices for the transfer of the collectively-held property rights embodied in zoning should act as an aid to the "private migration

298. An additional possibility is that a new understanding of property could evolve over time as a result of moral insights. See T. Nicolaus Tideman, Takings, Moral Evolution, and Justice, 88 COLUM. L. REV. 1714, 1720 (1988) (analogizing new moral insights to technological insights; once chlorofluorocarbons were found to be harmful, "[w]e could not design a change that made no one worse off than he or she expected to be because what we expected, the continued costless emission of CFC's, turned out to be impossible.").

299. See EPSTEIN, BARGAINING WITH THE STATE, supra note 20, at 188-89 (contending that a test of consistency should be applied to exactions); Ellickson, Suburban Growth Controls, supra note 125, at 448-49 (pointing out that early arrivals contribute just as much to congestion as do late arrivals).

300. Ellickson, Alternatives to Zoning, supra note 22, at 768.

decisions" he applauds. Ellickson also argues that growth controls are unnecessary because "[i]f a particular area becomes too dense, its residents will perceive the disadvantages of this high density and tend to leave." Yet it is much more efficient for a community to send signals that will optimally encourage or discourage entry, rather than waiting for residents to react to overcrowded conditions by moving out.

Moreover, landowners would hold call options that they cannot be forced to sell, which means that no use is completely excluded from any community, except to the extent that a governmental entity chooses to exercise its power of eminent domain. Asking a landowner to bear her own share of the externalities associated with her development is equitable. The price at which consent will be granted to a given land use in the absence of an externality fix may, however, fluctuate. Conversely, some landowners may even be able to extract payments from local governments for agreeing not to exercise their call option. These fluctuations in price and resistance points are analogous to those one might encounter in private markets and present no cause for concern. It is both predictable and desirable that the preferences of a community towards development of various types would change over time. Far from being inequitable, such varying preferences allow local governments to signal their amenability to development and to help channel development in the most efficient directions.

CONCLUSION

Judicial limits on land use bargains stem from a well-meaning protective impulse and a healthy skepticism of government, but they ultimately fail to deliver on the promise of effectively curtailing overregulation or bettering the lot of landowners generally. The theoretical shortcomings and logical inconsistencies of the Nollan/Dolan approach become apparent when the strategic concerns expressed in those opinions are considered systematically. Efficient land use requires more flexibility and more coherence than these

302. See Ellickson, Alternatives to Zoning, supra note 22, at 769 (contending that public regulation is less likely than private decisionmaking to achieve optimal distribution).

303. Id.

304. Landowners retain veto power and cannot be forced to sell their call options. This assures them of the ability to develop if the externality fix is implemented.

305. The absurdity of arguing that the price of a given commodity should remain constant over time and across localities is apparent. Members of a society with a market economy understand that they may at times have to pay a higher price than their neighbors for an identical good, merely because of the vagaries of timing, supply, demand, and other market conditions. Here, the commodity in question—consent to development that generates negative externalities—fluctuates in response to various conditions and pressures. Although the government is involved in aggregating and registering community preferences, the shift is closely analogous to an ordinary market shift that would not trigger any special landowner protections. See Bruce A. Ackerman, Private Property and the Constitution 145-50 (1977) (observing that the takings clause is understood to restrain only reductions in property value that involve a significant degree of state involvement).
judicial bargaining limits can offer. A new mechanism is needed which can get to the heart of the strategic dilemma in a coherent manner.

A thorough understanding of the bargaining problems associated with land use transactions is critical to the development of such an alternative. Unconstitutional conditions implicating the takings clause arise when a governmental entity purports to bargain away a land use entitlement it has stolen, either from the landowner or from third parties. Preventing such theft by placing appropriate limits on land use regulation offers a more logical solution than curtailing what local governments may do with the proceeds. One way to draw the line on land use regulation is to require that regulations go no further than necessary to redress cognizable externalities. Indeed, the judicial limits on land use bargains have already created pressure in this direction, though the long history of zoning and land use planning presents a formidable obstacle.

The in-kind call option outlined in this Article would provide a shift to an externality-based regime without requiring a complete dismantling of current zoning law. The definitional issues associated with the notion of "cognizable externalities" are thorny indeed, but no more so than the kinds of inquiries the judiciary has already opened itself up to (such as whether regulation goes "too far"). While the call option alone would not resolve all land use bargaining problems, it would represent a substantial improvement over the current law, particularly when coupled with the procedural adjustments suggested here. Judicial review of land use bargains may still be necessary in some instances to protect the interests of those who are unrepresented in the bargaining transaction. However, scrapping the requirements of nexus and proportionality will put a great deal of control over land use back in the hands of landowners and communities.

This Article grapples with an issue that lies at the intersection of two of the most difficult and intractable problems known to law—the question of how society should allocate control over the use of property, and the unconstitutional conditions doctrine. Both problems (separately and in combination) have been so exhaustively analyzed that adding another article to the heap seems almost presumptuous. Yet the most intractable aspects of the matter remain unsolved, and the need for fresh perspectives and new ideas has become increasingly pressing in the years since Nollan and Dolan. This Article does not purport to offer a fully articulated practical solution. Nevertheless, I hope it will achieve the more modest goal of advancing the dialogue on this important topic.