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Dolan v. City of Tigard: Constitutional Rights as Public Goods

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DOLAN V. CITY OF TIGARD: CONSTITUTIONAL RIGHTS AS PUBLIC GOODS

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When may the government require that citizens waive their constitutional rights in order to obtain benefits the government has no obligation to provide them? The answer, given by the so-called "doctrine" of unconstitutional conditions, is that sometimes the government may condition discretionary benefits on the waiver of rights, and sometimes it may not. The Supreme Court has never offered a satisfactory rationale for this doctrine, or why it "roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others."[1]

The unconstitutional conditions doctrine directs courts not to enforce certain contracts that waive constitutional rights. Perhaps it is only natural, therefore, that the dominant tradition in seeking to justify the doctrine focuses on possible defects in the bargaining process. The assumption is that contracts waiving constitutional rights should not be enforced because no genuine consent was given to this contract in the first place. There are, however, several serious problems with the consent theory of unconstitutional conditions.

The most commonly cited reason for finding a lack of consent is that the waiver of rights was "coerced" by the government.[2] As others have observed, however, application of the concept of coercion in this context is problematic.[3] To note just one difficulty,[4] the ordinary understanding of what constitutes government coercion refers to the imposition of some sanction (imprisonment, fine, or forfeiture) for doing X, with the consequence that the individual is left with a less attractive set of options after the government announces the sanction than existed before.[5] This, however, does not describe what is at

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1. RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 9 (1993).

2. For a review of authorities that rely on some version of the coercion argument, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428-50 (1989).

3. For a sustained critique, see *id.* at 1450-56.

4. There is, in addition, a difficult conceptual problem in distinguishing between government coercion ("threats") and legitimate preliminaries to formation of a consensual agreement ("offers"). Attaching one label or another requires the identification of an appropriate "baseline," and it turns out this is contestable. The seminal account here is Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

5. For a comprehensive analysis of the concept of coercion in the private and international law contexts, see ALAN WERTHEIMER, COERCION (1987). Wertheimer concludes that "coercion" in these contexts requires the posing of a choice in which one option is wrongful or illegal. *Id.* at

issue in the typical unconstitutional conditions case. Rather, in the typical case the government has offered a discretionary benefit (i.e., a benefit that the government is not legally obligated to provide) in return for a waiver of rights. The government intervention creates a set of options that is more, rather than less, attractive (at least relative to the status quo ante with no possibility of obtaining the benefit). In terms of doctrines of contract formation, therefore, the unconstitutional conditions doctrine does not concern the problem of coercion—at least as conventionally understood.[6]

A variant on the coercion theme is the idea that the unconstitutional conditions doctrine can be explained by the government's exercise of monopoly powers.[7] If the government is the sole supplier of a particular kind of benefit, then it is in a position to dictate the terms for acquiring the benefit, including a waiver of rights that might not be consented to in a competitive market. Again, however, this notion cannot account for the full range of the doctrine. Perhaps the largest single category of decisions striking down waivers of rights concerns conditions attached to government employment.[8] It is usually not plausible, however, to say that the government wields monopoly power in the employment market.[9]

A further problem is that one would predict, based on the consent theory, that the harder the choice put by the government to an individual, the more likely it would be that the doctrine would apply. Thus, the more important the constitutional right to an individual's well being, and the more vital the discretionary benefit to basic subsistence and survival, the more likely it would be that courts would find no consent to the waiver. But in fact, these patterns are not observed.[10] When we examine the full run of decided cases, we discover a fairly robust version of the doctrine in connection with First Amendment rights[11] and certain separation of powers controversies;[12] a much weaker version prevails with respect to reproductive rights[13] and criminal procedural rights.[14] It would be difficult, however, to argue that the first types of rights

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170-75, 202-21. Whatever its merits in the private law context, however, this analysis does not appear to carry over to the public law arena, where, for example, we refer to government "coercion" in imposing imprisonment or fines for breaking the law. The government here is said to be acting coercively, but it is not posing a wrongful or illegal choice. Robert Nozick's classic analysis of coercion, as the posing of any choice that necessarily leaves the individual worse off than they were before, would appear to capture more accurately what is meant by coercion, at least when we speak of government acting coercively. *See* Robert Nozick, *Coercion, in* SIDNEY MORGENBESSER ET AL., PHILOSOPHY, SCIENCE, AND METHOD (1969).

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

7. Epstein, *supra* note 6; Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUDIES 3 (1983).

8. *See* Perry v. Sinderman, 408 U.S. 593, 597 (1972) (collecting cases).

9. Williams, *supra* note 7.

10. For the same reason, one cannot explain the doctrine based on a straightforward balancing of the individual interests versus the governmental interests. *Cf.* Peter Westen, *Credible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 748-49 (1981) (adopting the balancing hypothesis).

11. *See infra* text accompanying note 33.

12. *See infra* text accompanying notes 66-69.

13. *See infra* text accompanying notes 79-82.

14. *See infra* text accompanying note 95.

are systematically more important to individuals than are the second. Moreover, Lynn Baker, in the most comprehensive study of waivers of rights in the context of public assistance programs, has concluded that "the seriousness or intrusiveness of the burden that the condition imposes on the potential beneficiary does not seem persuasively to distinguish the permitted from the prohibited conditions."[15] All this suggests that the doctrine may have less to do with lack of consent than with some kind of unstated hierarchy of rights grounded in other concerns.

A final anomaly with the consent theory is that the cases applying the doctrine sometimes require that there be a nexus between the waiver of the right and some governmental interest arising out of the program creating the benefits that the government offers in return for the waiver.[16] Again, however, this makes little sense if the doctrine is grounded in concerns about consent. The government can act coercively or monopolistically just as easily when it has an interest related to the rights waived as when there is no nexus between government interests and waived rights. The nexus requirement, therefore, again suggests that the doctrine is more concerned with the nature and value of the right, and the government's rationale for requiring the citizen to give it up, than it is with problems of consent.

The Supreme Court's recent decision in *Dolan v. City of Tigard*[17] offers a propitious occasion to reconsider some of the puzzles surrounding the unconstitutional conditions doctrine. In *Dolan*, the Court expressly extended the unconstitutional conditions doctrine to the Takings Clause; in particular, to attempts by local zoning authorities to avoid the just compensation requirement by conditioning the grant of a discretionary building permit on the donation of property to the government. Because this practice is common in many jurisdictions,[18] the decision will have important practical implications for land use regulation. But perhaps of greater significance for present purposes, *Dolan* offers some important clues about the underlying rationale for the unconstitutional conditions doctrine. Not that Chief Justice Rehnquist's opinion for the majority is especially helpful in this regard: the opinion studiously avoids any theorizing about the doctrine. Instead, the clues must be gathered from scattered comments in the decision and from the silence of the majority opinion about certain matters ordinarily thought to be relevant in unconstitutional conditions cases. Once these clues are teased out, however, they may help us resolve some of the puzzles associated with the doctrine.

In Part I, I will briefly discuss the *Dolan* decision, concentrating on its implications for the anomalies mentioned above: the apparent irrelevance of coercion and monopoly in many of the unconstitutional conditions cases, the

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15. Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1201 (1990).

16. *See, e.g.*, United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1015-18 (1995); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

17. 114 S. Ct. 2309 (1994).

18. *See* ALAN A. ALTSHULER & JOSE A. GOMEZ-IBAÑEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 36 (1993) (reporting survey evidence that nine out of ten local communities use some form of exactions).

importance of an implicit hierarchy of rights, and the function and significance of the nexus requirement.

In Part II, I will offer a theory of the unconstitutional conditions doctrine that, while not exactly new,[19] has so far lacked an enthusiastic proponent. This is the idea that some constitutional rights are not just private entitlements but also have aspects of public goods. In other words, the exercise of the right not only produces a private benefit for the rights-holder, but also generates positive externalities that benefit third parties or society more generally.

The theory posits that when constitutional rights are perceived by courts as having a large public goods dimension, courts will be reluctant to enforce contracts in which individuals waive the exercise of the right in exchange for some discretionary benefit. This is because the individual valuation of the right will fail to take into account the positive externalities generated by exercise of the right, and thus routine enforcement of such waivers—especially on a mass scale as when conditions are attached to entitlements programs or all forms of government employment—could result in a suboptimal supply of these external benefits. The unconstitutional conditions doctrine solves this problem (somewhat crudely to be sure) by conferring a windfall—the rights holder gets to keep both the discretionary benefit and the constitutional right. I will argue that this theory avoids the major anomalies associated with the consent theory, and also accounts for some of the broad patterns we can perceive in the case law.

In Part III, I will apply the proposed theory to the situation presented in the *Dolan* case. At first, the Takings Clause would seem like a very implausible candidate for a right thought to have a large public goods component. The Clause is usually justified in terms of the protection of purely private rights: it reflects considerations of fairness to isolated individuals who have had the misfortune of having their property taken for the public good. However, when local governments impose exactions in the form of donations of specific assets like land, this may encourage a misallocation of resources. The private cost of the exaction to the developer may be less than the value of the benefits that the developer receives in return from the government. If the government can acquire property without paying for it, however, it may engage in excess acquisitions of property, and/or may devote the property to inefficient uses. Forcing the government to pay just compensation for the land it acquires creates an incentive for public officials to consider the opportunity costs of devoting the land to particular uses. I will argue that the *Dolan* case, including its new "rough proportionality" standard of review, can be justified under the public goods approach.

I. THE *DOLAN* DECISION

Dolan involved a challenge under the Takings Clause to what are called "exactions"—quid pro quo arrangements whereby a local zoning authority requires that a developer transfer money or tangible assets to the government

19. *See infra* note 70.

in return for permission to develop land.[20] Florence Dolan owned a plumbing and electrical supply store in downtown Tigard, Oregon, a suburb of Portland. The west side of the property abutted Fanno Creek. Dolan applied to the city for permission to build a larger store closer to the creek, and to pave over what had been a gravel parking lot. The city responded that it would permit this development only if Dolan agreed to transfer to the city a permanent easement in a strip of land running along the creek, equal in area to about 10% of the total lot size, to be maintained thereafter by the city as a "greenway."

The city cited two reasons in support of its desire to acquire this greenway. First, the proposed development would generate additional water runoff into Fanno Creek, which was subject to periodic flooding, and the greenway was part of a comprehensive flood control plan designed to remove all development from the creek's 100-year floodplain. Second, the proposed development would generate additional customers for the store and hence traffic in Tigard; the greenway would also serve as the site of a pedestrian/bicycle path designed to alleviate congestion in the downtown area.

Dolan challenged the proposed exaction as an unconstitutional taking of her property. In assessing this contention, the Court acknowledged that prior decisions gave local governments broad authority to engage in zoning and land use regulation.[21] The Court implied that if the city had allowed Dolan to retain title to the property but merely required by regulation that she maintain the portion of the parcel along the creek as a private greenway, the only question would be whether this regulation was reasonably related to a legitimate government interest.[22] The case fell outside this rule, however, because the city had requested Dolan to deed a permanent easement in the property to the city.[23] Ordinarily, an attempt by the city to compel the transfer of a permanent interest in land would trigger the Takings Clause of the Fifth Amendment: the city would have to exercise its power of eminent domain and pay Dolan just compensation for the value of the land taken.[24] Dolan claimed that the city was seeking to evade this rule by making her voluntarily convey the property free of charge in return for the building permit.[25]

The Court agreed that the proposed exaction was governed by the unconstitutional conditions doctrine:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is

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20. *See generally* ALTSHULER & GOMEZ-IBAÑEZ, *supra* note 18; Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 478-83 (1991); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

21. *Dolan*, 114 S. Ct. at 2316.

22. *Id.*

23. *Id.*

24. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-32 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

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

> taken for a public use—in exchange for a discretionary benefit where the property sought has little or no relationship to the benefit.[26]

This statement, supported by the citation of two First Amendment cases,[27] is the sum total of the Court's discussion of the elements of the unconstitutional conditions doctrine.[28]

Note, first of all, what the Court does *not* say. There is no suggestion that the doctrine turns on any finding of coercion by the government. Nor did the Court make any attempt to suggest that the proposed deal—10% of Dolan's land in exchange for a building permit—was coerced. Indeed, any such a suggestion in the context of the facts presented would be hard to justify. The government was proposing a straightforward commercial proposition: Dolan was being asked to compare the value of 90% of her land with an enlarged store and paved parking lot to the value of 100% of the land with the existing improvements. Both options can be easily translated into dollar figures, and there was nothing in the facts to suggest that Dolan viewed the property as anything other than a commercial venture for profit.

Moreover, Dolan was apparently earning a positive return on the property in its current use;[29] thus, it would be hard to maintain that she had no practical choice but to accept the government's terms. At least at the level of rhetorical justification, therefore, the *Dolan* decision must be counted against the proposition that government coercion is the key to understanding the unconstitutional conditions doctrine.

Nor is there any discussion in the opinion of the city's status as a monopoly supplier of development rights. One could argue that because Dolan's property is immovable, and because the city has exclusive authority to permit development of that property, the city is in a position to extract a higher price from Dolan (i.e., to extract a higher share of the value added by her proposed development) than would be true if there were a competitive market in development rights.[30] Arguably, therefore, the city had forced Dolan into accepting a deal on terms she would not have agreed to if the city did not possess this power. In theory, one could rely on this monopoly power over development

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26. *Id.*

27. *Id.* (citing Perry v. Sindermann, 408 U.S. 593 (1972) and Pickering v. Board of Educ., 391 U.S. 563 (1968)).

28. This result was clearly foreshadowed in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), where the Court invalidated an exaction under the Takings Clause on the ground that there was no nexus between the property interest that the government wanted to acquire by donation and any cited police power justification implicated by the new construction for which the owner sought a building permit. *Nollan*, however, made no mention of the unconstitutional conditions doctrine as such, perhaps because cases decided before *Nollan* had implicitly rejected the application of the doctrine under the Takings Clause. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (noting that government could condition access to benefit of pesticide registration on forfeiture of property right to trade secrets).

29. *Dolan*, 114 S. Ct. at 2316 n.6.

30. The same is not necessarily true of developers, assuming they negotiate a package of exactions *before* they acquire property or construct fixed improvements. *See* Been, *supra* note 20. Dolan, however, was seeking to improve land she already owned and hence, was vulnerable to the city's efforts to extract economic rents. *See* Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 844-53 (1992).

rights to construct an argument in favor of constitutional limitations on exactions.[31] But, as in the case of the coercion thesis, no hint of such an argument appears in the Court's opinion.

Another interesting aspect of the decision is the byplay between the Chief Justice and Justice Stevens, writing in dissent, over whether the unconstitutional conditions doctrine should apply at all to claims arising under the Takings Clause. Justice Stevens directly attacked this aspect of the majority's decision. He noted that the unconstitutional conditions doctrine has "long suffered from notoriously inconsistent application" and "has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question."[32]

Justice Stevens further observed that the doctrine has been applied most frequently in First Amendment contexts,[33] implying, if not quite endorsing, the conclusion that it should not be extended beyond that context. Moreover, even if the doctrine were extended to takings issues, he maintained this was no reason why the standard of review should be the same as would apply "if the city had insisted on a surrender of Dolan's First Amendment rights in exchange for a building permit."[34] Justice Stevens worried that the Court's decision, and its insistence on closely examining the degree of nexus between the waiver of private property rights and asserted government interests, might "signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era."[35]

The Chief Justice responded to this critique somewhat obliquely. He tackled the suggestion that this was a revival of *Lochner*-style substantive due process in a footnote. The Takings Clause, he observed, has long been held to apply to the states under the Fourteenth Amendment.[36] This response, however, failed to meet Justice Stevens' point, which was not that the Court lacked a foundation in the text of the Constitution for its conclusion that Dolan's rights were implicated, but that the style of review mandated by the decision was functionally very similar to, and would operate in the same general area as, *Lochner*-style review.

Later in the opinion, however, the Chief Justice took up more directly the challenge that a deferential standard of review should apply because "the city's conditional demands for part of petitioner's property was 'a species of business regulation.'"[37] The Chief Justice responded that "simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the grounds that it violates a provision of the

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31. *Cf.* Thomas W. Merrill, *Constitutional Limits on Physician Price Controls*, 21 HASTINGS CONST. L.Q. 635, 639-51 (1994) (arguing that price controls should be subject to scrutiny under the Takings Clause when the controlled activity has no access to a non-price controlled market).

32. *Dolan*, 114 S. Ct. at 2328 n.12 (Stevens, J., dissenting).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 2316 n.5.

37. *Id.* at 2320.

Bill of Rights."[38] After citing cases holding that business establishments are protected by the Fourth Amendment and the First Amendment, he concluded: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[39]

With this response, the Chief Justice acknowledged, at least implicitly, that the Court was in effect promoting the Takings Clause from the status of a second class constitutional right (a "poor relation") to a first class right. Restated, the argument appears to be as follows: (1) first class constitutional rights (like the First and Fourth Amendments) enjoy the protections associated with the unconstitutional conditions doctrine; (2) the Takings Clause is as much a part of the Bill of Rights as are the First and Fourth Amendments; and (3) the Takings Clause, therefore, should also enjoy the protections associated with the unconstitutional conditions doctrine.

Even as restated, however, the argument contains an important ambiguity. Specifically, it is unclear whether all provisions of the Bill of Rights (including, for example, the Second and Seventh Amendments) are entitled to equal status for purposes of the unconstitutional conditions doctrine, or, more narrowly, whether it is only the Takings Clause that must be elevated to a condition of parity with these other rights. Either reading is problematic,[40] but the Court's opinion runs out of intellectual gas at this point and offers no further illumination of this important question.

By far the most extensive discussion in *Dolan*, however, concerned the nexus or germaneness requirement sometimes associated with the unconstitutional conditions doctrine. Recall that the Court's general statement of the doctrine in *Dolan* expressly incorporates this element: "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government *where the property sought has little or no relationship to the benefit.*"[41] In stressing this aspect of the doctrine, the Court was building upon its prior encounter with exactions in *Nollan v. California Coastal Commission*,[42] decided in 1987. Although *Nollan* did not expressly frame its analysis in terms of the unconstitutional conditions doctrine, the Court held that there must be an "essential nexus" between an exaction and the projected impact of the development in order to avoid a taking.[43] *Dolan* elaborated upon the nexus discussion contained in *Nollan*, not only by expressly linking the nexus requirement to the unconstitutional condi-

38. *Id.*
39. *Id.*
40. The second reading (that just the Takings Clause is being promoted) is unsettling, for it suggests that the Court can pick and choose among constitutional rights, elevating and demoting rights according to the preferences of a majority of the justices. But the first reading (all rights are created equal) is also unsatisfactory, for it is manifestly inconsistent with the Court's past practice in this area, which has been to treat different rights differently for unconstitutional conditions purposes.
41. *Dolan*, 114 S. Ct. at 2317 (emphasis added).
42. 483 U.S. 825 (1987).
43. *Nollan*, 483 U.S. at 839.

tions doctrine, but also by clarifying the degree of "fit" between the exaction and the proposed development necessary to avoid the conclusion that the exaction is unconstitutional.[44]

In *Nollan*, the Court had held only that there must be *some* nexus between an exaction and an identified social cost of a proposed development. The Court concluded that California could not require a property owner to donate a lateral easement of access across beachfront property in order to obtain a permit to build a larger house, because any problems created by building a larger house were unrelated to the "solution" of providing free lateral access along the beachfront.[45]

Significantly, in *Dolan*, the Court acknowledged that *Nollan*'s requirement of an "essential nexus" *was* satisfied by the city's proposed exaction. The prevention of flooding along Fanno Creek was a legitimate public purpose, and Dolan's building and parking lot plans would increase the amount of storm water runoff into the creek.[46] Similarly, the proposed development would increase traffic in the downtown area, and a bicycle/pedestrian path was an appropriate means for trying to alleviate downtown congestion.[47] Thus, the Chief Justice acknowledged that the exaction proposed by the city could not be characterized as an attempt "to obtain an easement through gimmickry."[48]

But this was only the beginning of the nexus inquiry. As the Court explained, not only must there be *some* nexus, there must be *enough* nexus.[49] To formulate a standard for how much is enough, the Court did a brief survey of state court decisions regarding exactions. Like Goldilocks and the porridge, the Court found some state court statements too "lax," others too "exacting," and concluded that the middle position, the "reasonable relationship" test, was just right.[50] But even here the Court decided not to adopt this formulation "as such, partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment."[51]

To make clear that it regarded the required standard of fit to be more demanding than that of mere rationality, the Court coined a new term—"rough proportionality"—to describe what was required. The Court indicated that the

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

45. *Nollan*, 483 U.S. at 838-39. As the Court stated, "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838.

46. *Dolan*, 114 S. Ct. at 2318.

47. *Id.*

48. *Id.* at 2317.

49. *Id.* at 2318 ("The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development.").

50. *Id.* at 2319. The Chief Justice has on other occasions used the conventionalist technique of surveying state court decisions in order to establish a median or consensus view about the content of federal constitutional rights. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 270-77 (1990) (surveying state court decisions to show broad diversity of opinion about contours of possible constitutional right of incompetent persons to refuse unwanted medical treatment).

51. *Dolan*, 114 S. Ct. at 2319.

burden of proof would be on the zoning authority to establish rough proportionality. It further stated that although no "precise mathematical calculation is required," nevertheless "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."[52]

Even these verbal formulations would hardly seem to compel a judgment in favor of Dolan. Nevertheless, perhaps to underscore that it meant business, the Court did not remand to the Oregon courts for application of the new rough proportionality test.[53] Instead, the Court itself applied the test to the city's stated justifications, and found them wanting based on the existing record. The flood control rationale failed, according to the Court, because the city did not explain why dedication of a permanent easement to the city, as opposed to merely a regulatory requirement that Dolan preserve the area as a private greenway, was necessary.[54] In addition, the traffic control rationale was rejected because no effort had been made to quantify how much motor vehicle traffic would increase because of the proposed development.[55]

As applied by the Court, therefore, the new rough proportionality standard appears to incorporate elements of both less restrictive means analysis and cost-benefit analysis. Less restrictive means analysis is implied by the conclusion that an exaction should be avoided when a land use regulation will do. And cost-benefit analysis is implied by the requirement that the city "quantify" the costs associated with increased traffic attributable to Dolan's development, and to further show they are commensurate in some fashion with the proposed exaction.

The question left unanswered by the Court's discussion of the required degree of nexus is why it was necessary to go beyond the bare essential nexus requirement of *Nollan*. The Court's concession that the *Nollan* requirement was satisfied, and hence that the city's exaction was not "gimmickry," suggests that a bare nexus requirement may be sufficient if the object is to smoke out cases where the exaction is a pretext to evade the just compensation requirement. Justice Stevens in dissent argued that this was indeed the proper purpose of any nexus requirement.[56] By going further and indicating that exactions must also be both necessary to achievement of a government purpose and cost justified, the Court intimated that the nexus test serves an additional purpose. But it failed to state what that purpose might be.

Judged by conventional standards of judicial craftsmanship, Chief Justice Rehnquist's opinion in *Dolan* would have to be deemed a rather mediocre effort. His failure to provide a theoretical foundation for the unconstitutional conditions doctrine is, of course, both understandable and forgivable—no one

52. *Id.*

53. Typically when the Court formulates a new standard of review, it remands to the lower courts for initial application of that standard to the facts presented. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118 (1995) (remanding to lower courts for initial application of "strict scrutiny" to federal minority set aside program).

54. *Dolan*, 114 S. Ct. at 2321.

55. *Id.* at 2321-22.

56. *Id.* at 2325 (Stevens, J., dissenting).

else has done this either. More troubling, however, were his failures to supply a cogent explanation for why it was appropriate to extend the doctrine to the Takings Clause, and why it was necessary to go beyond a mere requirement of essential nexus and demand a showing of rough proportionality between a waiver of rights and stated government purposes. Precedent required neither of these innovations, and the discussion of each element has the quality of an *ipse dixit*. This is not to say the Chief Justice was wrong to take these steps. But to attempt to determine whether he was right or wrong, we will have to attempt to reconstruct the analysis from the ground up.

II. CONSTITUTIONAL RIGHTS AS PUBLIC GOODS

Our constitutional culture has a strong liberal individualist bent, and we tend to think of constitutional rights as valuable entitlements belonging to individuals.[57] From this perspective, a doctrine that prohibits individuals from trading their rights for other, more highly valued benefits seems strange, if not perverse. If rights belong to individuals, why shouldn't we allow individuals to determine how much those rights are worth? Indeed, a doctrine that forbids individuals to sell their constitutional rights smacks of paternalism, and seems to deny the moral autonomy of the individual.[58]

One possible reason for not enforcing contracts waiving individual rights, of course, is concern about whether individuals have truly consented to such a waiver. This perspective leads to concerns about coercion and government monopoly. It may well be that any government action that is coercive in the ordinary sense—i.e., any government action that poses a choice that leaves the individual worse off than they were before the government intervened—should give rise to the same constitutional scrutiny as a criminal prohibition. But as suggested earlier, most of the cases striking down government action under the unconstitutional conditions doctrine do not involve coercion in this ordinary sense. If we expand the idea of coercion to include government monopoly, then a larger fraction of the doctrine can be accounted for.[59] This, however,

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57. *See generally* MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

58. Snepp v. United States, 444 U.S. 507 (1980) seems to evoke this kind of response. Frank Snepp was a former CIA employee who refused to submit a book about the agency for pre-publication review, as required by an agreement he had signed as a condition of employment. He argued that the pre-publication review requirement was void as an unconstitutional condition violating his First Amendment rights. The Court summarily rejected this claim. *Id.* at 509 n.3. And indeed, if we assume that what is at stake is Snepp's individual First Amendment right to freedom of expression, it seems intuitively correct to say that he made a deliberate choice to waive this right in return for what he must have regarded as the greater benefit of employment with the CIA, and should have to live with his bargain. *See* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309. Easterbrook observed:

> So long as [Snepp] enters into the agreement without fraud or coercion, he has made a judgment that he is better off with the agreement (and all its restraints) than without; he can hardly complain that his rights have been reduced. He has simply decided to exercise them in a particular way.

Id. at 345.

59. Even so, the cases are far from uniform in their treatment of the "unequal bargaining power" posed by the fact that one party to the agreement—the government—has monopoly pow-

still leaves out a large segment of the decisions, such as those involving government employment[60] and conditions on public speech attached to government grants.[61]

A. *The Public Goods Model*

An alternative approach to explaining the doctrine would focus not on lack of consent but rather on effects on third parties. This approach would in effect start by questioning the premise that constitutional rights are purely individual, and would instead view them as having broader public interest ramifications. In economic terms, some constitutional rights are not simply private goods, but also have aspects of public goods. That is to say, the exercise of some constitutional rights produces external benefits—benefits that redound to the advantage of third parties—and that cannot be confined to the individual who exercises the right.

The classic example of a right having a public goods dimension is free speech. As Professor Dan Farber has explained in an important article,[62] information is a public good: once information has been supplied to one person, it is difficult to exclude others from taking full advantage of it. Thus, the market economy will tend to supply inadequate amounts of information.[63] For similar reasons, the democratic political process will tend to overregulate information: it will be difficult to organize the consumers of information to fight proposed regulations limiting its dissemination because of the tendency of individual consumers to free ride on the efforts of others.[64] Farber suggests that many aspects of the law of free speech, such as the obligation to provide public forums for speech, the distinction between political speech and commercial speech, and restrictions on libel actions that might "chill" the producers of information, can be explained on the understanding that the production of information is a public good that must be, in effect, subsidized by the government if it is to be produced in adequate quantities.[65]

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ers. *Compare* United States v. Mezzanatto, 115 S. Ct. 797, 805-06 (1995) ("gross disparity" in bargaining power between government and individual does not justify invalidating waivers procured as part of plea bargaining process) *with* Webster v. Reproductive Health Servs., 492 U.S. 490, 510 n.8 (1989) (suggesting that a ban on state funding of abortions might be unconstitutional "if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded").

60. *See, e.g.*, Perry v. Sinderman, 408 U.S. 593, 597 (1972).

61. *See, e.g.*, FCC v. League of Women Voters, 466 U.S. 364 (1984).

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

63. *Id.* at 558-59.

64. *Id.* at 560.

65. *Id.* at 558-62. The Court's recent decision in United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995) is strikingly consistent with this analysis. The Court invalidated a ban on receipt of honoraria by government officials below grade GS-16 for making an appearance or speech or writing an article. The Court noted that the ban "deters an enormous quantity of speech before it is uttered," *id.* at 1013 n.11, and therefore "imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *Id.* at 1015. The Court observed:

> Federal employees who write for publication in their spare time have made significant contributions to the marketplace of ideas. They include literary giants like Nathaniel

The right of free speech, however, is not the only constitutional right that can be seen as having public good aspects. Separations of powers provisions, for example, can similarly be seen not only as protecting specific institutional actors, but also as serving broader public purposes in promoting public deliberation and protecting the system of checks and balances. This may explain why the Court has generally held that separation of powers provisions of the Constitution, ranging from the Appointments Clause,[66] to the Presidential veto,[67] to the terms and limits on the jurisdiction of federal courts,[68] cannot be waived by individual beneficiaries of these constitutional limitations.[69]

Consideration of the external benefits associated with the exercise of certain constitutional rights may not be necessary where these rights are raised as a defense to a criminal prosecution. The strong incentive of the individual to avoid criminal sanctions may be enough to insure an adequate supply of both the private and public benefits associated with the exercise of the right. But the same cannot be said with confidence where the government seeks to purchase a waiver of constitutional rights by ex ante agreement. Here, the individual decision whether to waive the right will be based solely on a comparison of the expected private value of the exercise of the right, compared to the expected private value of the discretionary benefits offered by the government. Any public or external benefits associated with the exercise of the right will be ignored.

Moreover, individuals are likely to be unmoved by the thought that their waiver of rights will reduce by a small amount the overall production of the public good associated with exercise of the right. Here, as in the case of other public goods, individuals will be tempted to free ride on the efforts of others. The cumulative effect of individual decisions in response to a government offer to waive rights in return for benefits will therefore be a suboptimal supply of the external benefits associated with the exercise of those rights.[70]

Hawthorne and Herman Melville, who were employed by the Customs Service; Walt Whitman, who worked for the Departments of Justice and Interior; and Bret Harte, an employee of the mint.

Id. at 1012.

66. *See* Freytag v. Commissioner, 501 U.S. 868, 880 (1991) (neither a private party nor the Executive can waive the restrictions of the Appointments Clause).

67. *See* Metropolitan Washington Airports Auth. v. Citizens For Abatement of Aircraft Noise, Inc., 501 U.S. 252, 270-71 (1991) (Congress may not condition disposal of federal property on provision that permits an end run on presidential veto).

68. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1978) (structural protections of Article III not subject to waiver).

69. *See* United States v. Helstoski, 442 U.S. 477, 490-94 (1979) (assuming arguendo that speech or debate clause privilege can be waived either by an individual member of Congress or Congress as a body, but finding no waiver under a strict standard of proof). The Court has not been totally consistent in maintaining that separation of powers provisions cannot be waived. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57 (1982) (plurality opinion) (dictum) (government may condition receipt of discretionary benefits on waiver of right to adjudicate disputes with the government over those benefits in an Article III court).

70. The connection between the public good aspect of rights and the unconstitutional conditions doctrine has been directly anticipated by Professor Farber, writing about waivers of free speech rights by public employees:

> Why should the [government] employee not be allowed to contract away his speech rights freely? The answer, again, is that speech about government is a public good. In

The idea that certain contracts are void, not because of lack of consent, but because of external effects on third parties, is not unknown to the common law. The usual example involves negative external effects, as in the case of a contract for murder.[71] Nevertheless, we also find examples of promises that are not enforced in order to assure the provision of what might be characterized as positive externalities. Consider in this light the common law rule against restraints on alienation.[72] In the paradigmatic case, A devises or donates property to B, subject to the condition that B may not sell it. B is usually quite happy to accept the property on these terms, because the private value to B of obtaining the property with the restraint is greater than not getting the property at all. But the arrangement deprives society of the external benefits that flow from allowing the property to be transferred to its highest and best use. The solution is strikingly similar to the unconstitutional conditions doctrine: the gift to B is upheld, but B's waiver of the right to alienate the property is deemed void as contrary to public policy.[73] In both cases, the law confers a windfall on the recipient of the largesse. And in both cases, the justification is the same—the waiver of rights is invalidated in order to preserve the external benefits associated with the exercise of the right, which would be lost if we relied solely on the individual's private valuation of the right.

B. *Avoiding the Anomalies of the Consent Theory*

The theory of rights as public goods avoids the anomalous features of the consent theory mentioned at the beginning of this article. Specifically, the public goods approach can explain: (1) why certain agreements waiving rights

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other words, the foregone book royalties of a government employee do not accurately measure the social value of the publication; government employees will sign waivers relinquishing speech rights even when the cost to society is greater than the contractual incentive to the employees. Thus, employees should not be allowed to contract away their speech rights, particularly if the employees' speech concerns matters of public significance.

Farber, *supra* note 62, at 574-75. Other commentators have also anticipated the public goods argument, but for one reason or another, have not endorsed it as the basis for a general theory of unconstitutional conditions. *See, e.g.*, Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175, 177, 183 n.16 (1989) (listing "six major approaches" to the problem of unconstitutional conditions, not including the public goods theory, but mentioning it as a possibility in a footnote); Albert J. Rosenthal, *Conditional Federal Spending as a Regulatory Device*, 26 SAN DIEGO L. REV. 277, 283-84 (1989) (mentioning the theory in passing); Sullivan, *supra* note 2, at 1482-83, 1487-88.

Richard Epstein clearly anticipates the public goods model, especially in his discussion of "collective action problems" as a circumstance warranting interference with individual waivers of rights. EPSTEIN, *supra* note 1, at 79. Epstein, however, does not limit his analysis to collective action situations, but also discusses government monopoly and the imposition of external costs on third parties as circumstances warranting invocation of the doctrine. *See generally id.* at 50-74. The final version of his argument appears to rest on identifying as "coercive" any government action that yields deviations from a normative baseline of governmental action that seeks both to make everyone better off, while also preserving, pro rata, the preexisting shares of wealth. *Id.* at 98-103. Epstein's theory thus partakes of elements of both the public goods theory and the consent theory.

71. *See* 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS 5 (1990) (contract to commit crime void as against public policy).

72. *See* RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 4.1 (1983).

73. *Id.*

should not be enforced, even in the absence of any evidence of coercion or government monopoly; (2) why some rights are more likely to be protected by the unconstitutional conditions doctrine than other rights; and (3) why the degree of nexus between the rights waived and the government benefits extended in return for the waiver of rights is relevant in determining whether the waiver is permissible.

Consider first why some agreements waiving rights should not be enforced no matter how confident we are that consent to the waiver was freely given. Imagine the following hypothetical. The government adopts a program to purchase from individuals their right to vote. To implement the program, the government installs a combination voting booth/ATM machine in every polling place. When an individual enters the booth, he or she can either mark a ballot and put it in a slot where it will be tabulated as part of the vote, or can insert the ballot in another slot where it will be shredded and, in return, the machine will dispense a new $10 bill. The procedure is completely anonymous, so no official or snooping neighbor can witness which choice is made.

It would be extremely difficult to argue that the choice offered by the government in this example is coercive in any literal or metaphoric sense. The choice entails no threat of force or retribution, and is not of the form that necessarily makes the individual worse off whichever option is taken. Ten dollars is not such a large sum of money that most people would be unable to resist the temptation to take the money. And the government has no monopoly on the provision of $10 bills in return for services; one can obtain cash income from a whole host of private and public sources.

Nevertheless, I am confident the courts would not hesitate to strike down the proposed scheme as an unconstitutional condition. The reason, I submit, is that the right to vote has a very large public goods component. Indeed, the individual benefit associated with exercise of the right to vote is probably quite small.[74] But the collective value of having large numbers of people go to the polls and cast ballots is very large: this is how we organize governments and try to insure that it reflects as closely as possible public sentiment. Given that the private value attached to the right is probably small, it is plausible to imagine that a large percentage of the electorate would agree to take the $10 rather than cast their vote.[75] Moreover, even if all community leaders denounced the program as an attempt to subvert democracy, and urged people to cast their ballots rather than shred them, each individual voter would be strongly tempted to take the $10 rather than cast a vote, on the assumption that enough other voters would cast their ballots to insure a fair election. In

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74. The chance that any particular vote will change the outcome of an election is infinitesimally small, and so the primary benefit from voting is apparently the gratification derived from participation in civic affairs. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 24 (1991) (likening the importance of individual votes to "about the same as being run over by a car in the process of going to or from the polls").

75. This is confirmed by evidence that poll taxes, when they were legal, did in fact discourage significant numbers of persons from voting. *See* Orley Ashenfelter & Stanley Kelley, Jr., *Determinants of Participation in Presidential Elections*, 18 J. LAW & ECON. 695 (1975). *Cf.* EPSTEIN, *supra* note 1, at 172 ("Voting rights . . . may be of little value to any given individual, who would surrender them gladly for a right to do business on public highways.").

effect, each individual's decision would be rational from an individual perspective, but collectively the program would undermine the representativeness and, hence, the legitimacy of the electoral system.

Although this example may seem far fetched, it vividly illustrates why we would want an unconstitutional conditions doctrine even in a world where there are no problems with bargaining breakdown. The right to vote may lie at the extreme edge of those rights that have a high public value and a small private benefit, but free speech rights and separation of powers based rights may not be far behind, and the same analysis applies to those rights as well. For example, a particular President might agree to waive his right to appoint officers of the United States or to veto future congressional legislation in a particular area in return for Congress's adoption of a bill he favors. He might execute such a waiver freely and without reservation, and indeed without any regret or concern at all. He might even be happy to be rid of the appointments power and the veto power. But such waivers would be disregarded by the courts in the interest of preserving our constitutional system of government.[76]

In addition, the public goods model can also explain why some constitutional rights are protected by a more robust version of the unconstitutional conditions doctrine than are other rights. The explanation here is simply that the level of public benefits associated with the exercise of a right differs with different constitutional rights, or, to put it more accurately, that the judicial *perception* of the level of public benefits varies from right to right.[77] The higher the perceived quantum of public value, the more vigorously courts will apply the unconstitutional conditions doctrine.

This also accounts for the apparent paradox that the value of the right to the individual is not closely correlated to the vigor with which courts will enforce the unconstitutional conditions doctrines. Most individuals probably attach little private value to separations of powers provisions, such as whether their case is heard by an Article III or an Article I judge, or whether the judge was properly appointed under the Appointments Clause. Yet these rights are given robust protection under the unconstitutional conditions doctrine. On the other hand, the right to trial by jury may be valued very highly by individuals

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76. *See supra* text accompanying notes 66-69. On the invocation of the unconstitutional conditions doctrine by the Office of Legal Counsel to resist congressional encroachments on presidential authority through appropriations riders, see John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 312 (1993).

77. Because of this feature, this section of the article leans more in the direction of a positive or descriptive analysis (explaining what courts do) rather than normative analysis (prescribing what they ought to do). As I have described the public goods theory in this section, a constitutional right eligible for protection under the unconstitutional conditions doctrine is any right that the judiciary, at any particular moment in time, *perceives* as conferring external benefits on society through its exercise. The set of rights that fits this description will vary from judge to judge, and will change over time. In Part III, I depart from this purely descriptive stance, and ask, in the narrow context of the Takings Clause, whether there is a plausible normative basis for regarding the right to just compensation as having public good aspects. Outside the context of the Takings Clause, however, I do not in this article offer any general theory for identifying what rights should, as a normative matter, qualify for the protections of the unconstitutional conditions doctrine.

accused of a crime. Yet this right is freely waived all the time though plea bargaining, without a second thought being given to the unconstitutional conditions doctrine.[78] The explanation in both cases resides not in the individual valuation of the right, but in the judicial perception of the public benefits associated with exercise and protection of the right.

Consider in this connection the abortion funding cases,[79] which have been regarded by most commentators as unjustified departures from the unconstitutional conditions doctrine.[80] In *Roe v. Wade*,[81] the Court recognized a woman's right to abortion, grounded in the right to privacy identified as part of the "liberty" protected by the Fourteenth Amendment. But in the abortion funding cases, the Court ruled that it was permissible for the government to pay the medical expenses of poor women who agree to carry their pregnancies to term, while declining to pay the medical expenses of women who decide to have an abortion. In effect, poor women receive a government benefit (funding for medical expenses) only if they agree not to exercise the right recognized in *Roe* to obtain an abortion.

Most commentators have denounced the abortion funding cases as a product of judicial insensitivity to the importance of the rights at stake for poor women.[82] But it is also possible that the judiciary views the right to abortion, which after all is grounded in the "right to privacy," as a uniquely *private* right whose primary significance is to the individual exercising the right. This is not to say that one cannot imagine arguments about possible external benefits flowing from decisions to have abortions: benefits in the form of population control, reduced numbers of single parent families, and so forth. But given the widespread perception that abortion also imposes large external costs (certainly to the fetus, which the Court has acknowledged the states have a compelling interest in protecting), the external benefits and external costs of abortion might be perceived as largely cancelling each other out, or as at best debatable.

The conclusion would then be that there is no justification for interfering judicially with government efforts to influence individual decisions regarding abortion by conditioning payment of medical expenses on a waiver of abortion rights. A decision either to have the abortion or take the money and not have an abortion can be presumed to reflect an accurate individual balancing of the competing private interests at stake, the incidence of which are largely internal to the individual making the choice.

Other, less controversial distinctions regarding the waivability of rights can also be explained in terms of the model. In the law of jurisdiction, for example, the Supreme Court has long distinguished between limits on personal

78. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

79. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977).

80. *See, e.g.*, Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993); Sullivan, *supra* note 2.

81. 410 U.S. 113 (1973).

82. *See* Baker, *supra* note 15, at 1228-29 (collecting authorities).

jurisdiction and subject matter jurisdiction. The former are regarded as "an individual right" being grounded in concerns of fairness and convenience to litigants, and can "be waived."[83] The latter involve limits designed to preserve the structure and integrity of the federal court system. Because of the importance to the judicial system of preserving this structure—in other words, because preservation of this structure is regarded as a public good—limits on subject matter jurisdiction cannot be waived by parties.[84]

Finally, the public goods model can also help account for the focus on nexus in the unconstitutional conditions cases. The nexus requirement performs two functions in cases where rights have a high public goods component. First and most obviously, the requirement can be seen as limiting the scope of waivers in order to minimize the impact on the production of external benefits associated with the exercise of a right. The requirement functions in this sense like the less restrictive alternatives doctrine of constitutional law. Consider in this regard the distinction in public employment cases between general waivers of the right to speak freely on any subject and waivers that deal solely with issues having a nexus to the employment relationship.[85] If the government could condition employment on a blanket waiver of speech rights, this would eliminate a large percentage of the population from the pool of potential suppliers of valuable information. Requiring a nexus between the waiver and some legitimate governmental interest arising out of the employment relationship vastly reduces the scope of the permissible waiver, and, hence, prevents the government from suppressing a significant source of information valuable to the public.

Second and more subtly, the nexus requirement can be explained as a device for singling out instances where external benefits associated with the exercise of the right are likely to be offset by external costs. Under the public goods model, the unconstitutional conditions doctrine applies in general only to rights that produce external benefits. The nexus requirement can be seen as a device for identifying a subset of these cases where exercise of the right is also associated with a police power concern, i.e., where the exercise of the right also produces external costs. The nexus requirement therefore provides, in effect, that when the external benefits are offset, at least to a substantial degree, by external costs, we permit a waiver to take place after all.

This idea can be expressed by formula. The key variable, the public goods value of the exercise of a constitutional right (PGV_{cr}), is a function of the magnitude of the external benefits associated with the exercise of a constitutional right (EB_{cr}), minus any external costs associated with exercise of the right (EC_{cr}). Thus:

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83. Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964); *see also* FED. R. CIV. P. 12(h)(1) (defense of lack of jurisdiction over the person waived if not asserted in proper fashion).

84. *See* FED. R. CIV. P. 12(h)(3).

85. *Compare* Rankin v. McPherson, 483 U.S. 378 (1987) (public employee may not be disciplined for speech on matters of public concern) *with* Connick v. Myers, 461 U.S. 138 (1983) (public employee could be dismissed for distributing questionnaire to fellow employees about office policy).

$PGV_{cr} = EB_{cr} - EC_{cr}$.

The higher PGV_{cr}, the more vigorously courts will enforce the unconstitutional conditions doctrine. The nexus requirement, designed to identify cases where high external costs negate external benefits, thus assists in fine tuning the outcomes of the cases so that they more closely approximate the size of PGV_{cr}.[86]

The Court's recent decision in *United States v. National Treasury Employees Union*[87] provides an illustration of this analysis. At issue was a statute that banned all federal government employees below grade GS-16 from receiving honoraria for making a speech or writing an article on any subject. The Court struck down this broad ban as an impermissible burden on the free speech rights of these employees, employing an analysis consistent with the public goods model proposed here. The Court also indicated that it would uphold a more narrowly drawn ban that prohibited the receipt of honoraria, but "if and only if a nexus exists between the author's employment and either the subject matter of the expression or the identity of the payor."[88] A ban with such a nexus requirement would single out speech where a "corrupt bargain or even an appearance of impropriety appears likely."[89]

In terms of the analysis proposed here, the narrower ban hypothesized by the Court would apply to speech having significant external costs—costs which are sufficiently great so as to offset or nullify any external benefits that would be generated by permitting such speech. When the statute is not limited by such a nexus requirement, $EB_{cr} - EC_{cr}$ is high, primarily because the speech covered by the ban—and hence the EB_{cr} lost to the public—is high. Hence, PGV_{cr} is also presumably high, and the government's demand for a waiver of rights as a condition of employment should be struck down. With the nexus limitation added, however, $EB_{cr} - EC_{cr}$ is much lower, because EB_{cr} is now confined to the area where EC_{cr} is also likely to be high. Thus PGV_{cr} is much smaller, justifying a government program than requires a waiver of rights as a condition of employment.

C. *Other Explanatory Payoffs*

In addition to accounting for the main puzzles associated with the consent theory, the public goods model can also explain other aspects of the unconsti-

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86. One could perhaps go further and posit a class of cases where EC_{cr} exceeds EB_{cr}, making PGV_{cr} negative. In such cases, courts would presumably adopt rules designed to encourage or even impute waivers of constitutional rights, rather than adopting ordinary rules of contract formation (where $PGV_{cr} = 10$) or striking waivers down (where $PGV_{cr} > 10$). William Stuntz has offered an analysis of waivers of rights in the criminal procedure context that is consistent with this prediction. *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989). These rights exist primarily to protect the innocent, but when invoked by the guilty, there is a very high EC_{cr}—the guilty go free. The "solution" adopted by the courts, according to Stuntz, is to recognize a broad version of the right, but then to bend the rules *in favor* of finding that the right has been waived when invoked by someone who is obviously guilty.

87. 115 S. Ct. 1003 (1995).

88. *National Treasury*, 115 S. Ct. at 1016.

89. *Id.* at 1017.

tutional conditions doctrine. One promising line of inquiry here concerns the distinction, urged by commentators[90] and adopted in some decisions,[91] between government "subsidies" of rights and "penalties" on the exercise of rights. Like the distinction between threats and offers, this distinction has been regarded as problematic because of the difficulty in identifying an appropriate "baseline" for distinguishing between subsidies and penalties. But if we start with the public goods model, the distinction may become, at least in principle, less troublesome. The general point is that, where a right has a large public goods component, the government should encourage the exercise of the right.[92] Thus, a program adopted by the government that "subsidizes" the exercise of such a right, i.e., is likely to increase the incidence of the exercise of the right, should be upheld. But a program adopted by the government that "penalizes" the exercise of such a right, i.e., is likely to diminish the incidence of the exercise of the right, should be struck down.

Whether a condition attached to a program will likely increase or diminish the incidence of exercise of a right will be highly dependent on context. A program that subsidizes the arts, subject to a contractual condition that grant recipients not offend "general standards of decency,"[93] could either increase the flow of valuable works of art or decrease it. It would increase the flow if Congress would not have enacted the subsidy unless the decency condition was attached. But it would decrease the flow if Congress would have enacted the subsidy in any event, whether or not it has the power to attach the proviso. Needless to say, courts will have to exercise rather finely tuned instincts about political realities in order to differentiate between the two situations. It is not too fanciful to suggest, however, that just this sort of differentiation may account for the meandering course of recent decisions about the constitutionality of conditions attached to grants for the production of speech plausibly identified as providing public goods.[94]

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90. *See, e.g.*, Kreimer, *supra* note 4.

91. *See* Rust v. Sullivan, 500 U.S. 173, 197-98 (1991); Regan v. Taxation with Representation, 461 U.S. 540, 544-46 (1983).

92. *See* Farber, *supra* note 62.

93. *See* 20 U.S.C. § 954(d) (Supp. V 1993) (requiring that the National Endowment for the Arts ensure that all works of art funded by the agency comport with "general standards of decency and respect for the diverse beliefs and values of the American Public"). For a thoughtful discussion of the constitutional problems presented by government subsidies of speech and a review of the literature, see Martin H. Redish & Daryl Kessler, Government Subsidies and Free Expression: An Analytical Model (unpublished manuscript).

94. I will run through some of the major funding cases very briefly in terms of this analysis. Rust v. Sullivan, 500 U.S. 173 (1991), holds that family planning clinics receiving federal grants can be prohibited from providing advice about abortions. Under the public goods model, this outcome would be justified, provided the Court concluded that Congress would not have appropriated any funds for such counseling services absent the ability to insulate the program from the abortion controversy.

FCC v. League of Women Voters, 468 U.S. 364 (1984), holds that Congress cannot condition grants to public broadcasting stations on an agreement not to broadcast editorials. This outcome would be justified under the model, provided the Court concluded that Congress would continue to fund public broadcasting even if the ban on editorials was struck down.

Regan v. Taxation with Representation, 461 U.S. 540 (1983), holds that Congress can condition tax-exempt status for nonprofit organizations on their agreement to forego substantial lobbying activity. This holding would be justified under the model, provided the Court believed

The public goods model would also predict that waivers of rights will be viewed more critically as the number of persons subject to the condition increases. The more sweeping the coverage of the waiver in terms of persons affected, the greater the collective impact on the provision of public goods associated with exercise of the right. This may explain, in part, why waivers of rights are viewed so tolerantly in the criminal justice context.[95] Such waivers are negotiated by police or prosecutors and individual criminal defendants, and a waiver by one defendant is seldom binding on another.

In contrast, in the public employment and public benefits context, waivers are often sought on a wholesale, rather than a retail, level. One would expect such waivers to be scrutinized more closely, and to be struck down more often even if voluntarily agreed to. The Court's recent decision in *United States v. National Treasury Employees Union*[96] is consistent with this prediction. The Court in that case stressed the fact that the ban on honoraria affected nearly 1.7 million federal employees, thus affecting "massive numbers" of potential speakers.[97] The broad sweep of the ban therefore appropriately increased the government's burden of justification. However, the pre-employment contract in *Snepp v. United States*,[98] which apparently applied only to employees of the CIA and required only preclearance by the agency of future publications, had a far narrower impact on the generation of valuable information, and received a much more favorable reception from the Court.[99]

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that Congress might deny or cut back on tax-exempt status for charitable organizations if these organizations could use their tax exempt status to underwrite lobbying activities.

Obviously, the Court did not expressly undertake the posited inquiry in any of these cases. But the outcomes seem at least plausible when viewed from this perspective.

The public goods model may also suggest that courts should generally give great deference to decisions by administrators over which competing applicants should be given limited available subsidies for speech-related activities. If we assume that administrators always seek to expand their budgets, *see* WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971), then administrators will generally exercise their discretion in such a way as to expand, rather than jeopardize, the total pool of funding available to subsidize speech. Thus, if an administrator decides not to fund "indecent" art (or Nazi art or art that portrays women in servile roles), this will generally reflect an informed judgment that takes into account the impact on future budgetary decisions by Congress.

95. *See generally* United States v. Mezzanatto, 115 S. Ct. 797, 801 (1995) (adopting general presumption that constitutional and statutory rights of criminal defendants are waivable).

96. 115 S. Ct. 1003 (1995).

97. *National Treasury*, 115 S. Ct. at 1013.

98. 444 U.S. 507 (1980).

99. A final explanatory payoff of the public goods theory is that it can explain why waivers of rights might be scrutinized more closely in areas where the government acts as monopolist, as where conditions are attached to the use of public highways. Monopolies are a problem only because transaction costs prevent the customers of the monopolist from banding together to pay the monopolist to release an onerous or unwanted condition. More careful scrutiny of conditions attached to the receipt of services from a government monopolist therefore helps secure a collective or public good among numerous customers of the monopolist, just as in other cases conditions should be scrutinized more carefully because of their effect on the public benefits supplied to third parties to the transaction. (I am indebted to Richard Epstein for this point).

III. THE THEORY APPLIED TO *DOLAN*

Can the public goods theory explain or justify the Court's decision in *Dolan*? The key question from the public goods perspective is whether invocation of the constitutional right to just compensation for takings of property generates external benefits for third parties, such that permitting unrestricted waivers of the right, in return for other discretionary government benefits, could result in a suboptimal supply of a public good. From the vantage of most of the traditional justifications for the Takings Clause, it seems odd or implausible that the exercise of the right to just compensation would generate these kind of public benefits.

The Supreme Court's most often-repeated justification for the Takings Clause characterizes the right in quintessentially individual terms. The Court has said that the purpose of the Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[100] The idea seems to be that the Clause prohibits "spot" redistribution: government measures that disproportionately burden one or a very small number of individuals when other persons similarly situated are not subject to equivalent burdens. This kind of redistribution is prohibited, the Court's statement further suggests, because it is unfair or unjust to the small group of individuals involved.

However appealing as a general statement of purpose, it is difficult to see why a prohibition against spot redistribution, grounded in concerns of justice and fairness to individuals, should not be waivable. Florence Dolan, for example, could have avoided any uncompensated transfer of property to the government simply by withdrawing her request for a building permit. Her choice was between (1) no redistribution (relative to the status quo ante), and (2) waiver of the right to just compensation in return for a discretionary building permit. Someone in Dolan's position will choose option (2) over option (1) only if it makes them *better off* relative to the status quo ante. This would seem to render any discussion of adverse redistribution (the evil the Court says the Clause is designed to prevent) moot.

Commentators have suggested several possible third party effects that the Takings Clause may also protect. Perhaps the best known third party argument is contained in Frank Michelman's discussion of "demoralization costs."[101] Michelman defined those costs as the "disutilities which accrue to losers *and their sympathizers* specifically from the realization that no compensation is offered"[102] for a taking. Thus, Michelman saw uncompensated takings as im-

100. Armstrong v. United States, 364 U.S. 40, 49 (1960). This statement has taken on the quality of a canonical recitation in recent decisions, *Dolan* being no exception. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); Pennell v. City of San Jose, 485 U.S. 1, 9 (1988); Bowen v. Gilliard, 483 U.S. 587, 608 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987); First Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 318-19 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1986); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123 (1978).

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

102. *Id.*

posing disutilities not only on the owner of the property, but also on third party "sympathizers" who were distressed by the injustice of the uncompensated taking, or by the thought that they too might become victims of future uncompensated takings.

Whatever the merits of this argument in other contexts,[103] it too would seem not to justify a rule forbidding waivers of the right to just compensation in return for government benefits. Once the element of voluntary waiver is introduced, third party sympathizers should realize that the owner will waive the right to compensation only if the owner concludes he or she is better off by doing so. Similarly, third party sympathizers should realize that, in any analogous proceeding involving them in the future, they too will be allowed to choose whether or not to waive the right to compensation in return for potentially greater benefits. Since the sympathizers should perceive no situation in which a property owner is made worse off because of an exaction, no demoralization should result.

A very different argument for third party effects has been advanced by Richard Epstein, who sees the Takings Clause as a prophylaxis against rent seeking.[104] In simplified outline, Epstein's argument is as follows. The purpose of the compensation requirement is to insure that, when the government embarks on forced exchanges of property (in order to overcome various collective action problems), it does not thereby change the preexisting distribution of wealth. If the government could change the pattern of wealth distribution, this would give rise to rent seeking behavior, as various factional interests vied for transfers of wealth from other factional interests. The resulting struggle over control of this government power would waste resources, leaving everyone worse off. Thus, Epstein posits, in effect, that the right to compensation confers external benefits on third parties in the form of reduced incentives for rent seeking and, hence, leaves a larger social pie to be divided among all.

The anti-rent seeking theory offers a valid argument for applying the unconstitutional conditions doctrine to the Takings Clause—but only in a world that has already embraced Epstein's substantive theory of the Takings Clause. In such a world, any abrogation of the compensation requirement, even through voluntary waiver by the owner of the property taken, would open a breach in the barrier against rent seeking. As these breaches multiplied, the incentives to engage in rent seeking would multiply, and soon we would see a general loss of social wealth that could be said to pose a general harm to third parties.

For better or worse, however, we do not have a Constitution that forbids all redistribution of wealth through forced exchanges, and will not have such a

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103. Michelman's reliance on demoralization costs has been criticized on the ground that individuals could insure against uncompensated takings, or, alternatively, that once the practice of uncompensated takings became established and known, the risk would be fully discounted in future property values. *See* Louis Kaplow, *Economic Analysis of Legal Transistions*, 99 HARV. L. REV. 509 (1986).

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

Constitution in the foreseeable future. Indeed, the Takings Clause already contains so many loopholes (from the perspective of Epstein's ideal Constitution) that massive rent seeking will occur whether or not we go the extra step and forbid waivers of the right of just compensation in return for other discretionary government benefits. That being the case, the desire to curb rent seeking cannot supply a valid explanation for prohibiting waivers of the Takings Clause.

An example may help clarify the point. As long as the power to tax and spend is regarded as being beyond the purview of the Takings Clause (as it is),[105] applying the unconstitutional conditions doctrine to exactions will not eliminate incentives for rent seeking. The government can always tax away gains associated with development of property and transfer the benefits to a favored faction or activity. The possibility of this happening will provide a stimulus to rent seeking behavior. In the context of the *Dolan* case, the government can require an owner to pay cash as a condition of obtaining a discretionary building permit; the payment of cash can be called a "tax" or "impact fee"; and because taxes and user fees are deemed to fall outside the purview of the Takings Clause, the predicate for applying the unconstitutional conditions doctrine will collapse. From the perspective of Epstein's anti-rent seeking theory, therefore, *Dolan* simply transfers rent seeking activity from exactions of real property to exactions of cash. It is doubtful that such a shift would meaningfully reduce the total volume of rent seeking behavior associated with real estate development.[106]

There is, however, yet another argument for third party effects that I think does work as a justification for applying the unconstitutional conditions doctrine to the Takings Clause. This is based on what Judge Posner calls the "straightforward economic explanation for the requirement of just compensation,"[107] or what other commentators have called the argument from "fiscal illusion."[108] Simply put, the idea is that the government should be forced to pay for resources it takes, rather than being allowed to seize resources without paying, in order to "prevent[] the government from overusing the taking power."[109]

Of course, as the rent seeking literature suggests, the government does not always acquire and dispose of resources in the most efficient fashion. But it stands to reason that if the government could acquire land or fuel for the mo-

105. *See* United States v. Sperry Corp., 493 U.S. 52, 59-64 (1989); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (dictum). *Cf.* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (statute appropriating interest on interpleader fund held to be a taking where the state charged a separate user fee to cover its costs of operating the fund).

106. It might help a little if local governments are deterred from adopting crude exactions of cash payments by state constitutional provisions requiring uniformity in taxation. Acting in tandem with *Dolan*'s crimp on the taking of tangible property, this might result in some decline in the overall use of exactions.

107. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 51 (3d ed. 1986).

108. *See* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 620-22 (1984); Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q. J. ECON. 71, 88-90 (1984); *see also* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62-67 (1964) (offering a similar theory).

109. POSNER, *supra* note 107, at 51.

tor pool or paper clips without paying for these things, the government would acquire more land, fuel, or paper clips than if it had to pay for them. It also stands to reason that the government would very likely acquire an inefficiently large stockpile of land, fuel, or paper clips if these things could be had for free.

The fiscal illusion argument suggests that exercise of the rights protected by the Takings Clause supplies a public good in the form of incentives for a more efficient overall allocation of resources. Without the compensation requirement, the government would acquire inefficiently large stockpiles of land, fuel, and paper clips—resources that could be put to better use in other applications. If the government has to pay fair market value for these resources, perfect efficiency may not result, but scarce and valuable resources will be deployed in a more efficient fashion overall—hence there will be more wealth in society for all to enjoy—than will be the case without a compensation requirement. The fiscal illusion argument also suggests why courts might want to prohibit at least some waivers of the right to just compensation.[110] A simple numerical example keyed to the facts of *Dolan* helps make the point. Suppose the fair market value of the strip of Dolan's land the government wants to acquire for a greenway is $1,500. Suppose further that the increase in the fair market value of the remaining 90% of the land, if the proposed development takes place, is (net of costs) $2,000. Obviously, on these supposed facts, Ms. Dolan would agree to waive her right to compensation for the greenway strip—she is $500 better off.

Assume further, however, that the only purpose of the greenway is to build a bicycle path, and that the net social benefits to the public of the bicycle path are only $100. If the government goes ahead with the project, it will be using a parcel of land with a fair market value of $1,500 for a use that generates only $100 in social benefits. Indeed, the fact that the government has acquired the greenway free of charge makes it more rather than less likely that it would go forward with such a project. The fiscal illusion argument therefore suggests that the Court was justified in subjecting the use of exactions to the unconstitutional conditions doctrine, in order to preserve the function of the Takings Clause in promoting a more efficient pattern of government procurement decisions.[111]

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110. Epstein expressly recognizes the force of the fiscal illusion argument in this context. *See* EPSTEIN, *supra* note 1, at 182-83; *see also* Brief of the Institute for Justice as Amicus Curiae at 18-19, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (making a similar point with a numerical example analogous to the one in the text).

111. Vicki Been, in a provocative article, has argued there is no need for a constitutional rule limiting the use of exactions because competition among local jurisdictions to attract developers will force the adoption of efficient exaction practices. Been, *supra* note 20. Been's argument fails on the facts of *Dolan*, however, because the developer (Florence Dolan) already owned the property subject to the exaction, and was in no position to pull up her land and move to another jurisdiction. Land is an immovable asset, and the local jurisdiction has the power to exact all the economic rents that the owner of the land (or the owner of any other immovable asset like streets that have already been laid out or buildings that have already been built) can obtain from development. *See* EPSTEIN, *supra* note 1, at 184-87; Sterk, *supra* note 30, at 844-53.

Notice, interestingly, that the fiscal illusion argument would not support applying the unconstitutional conditions argument to exactions that take the form of cash payments. Cash is a perfectly fungible asset, and it is unlikely that government officials will ignore the opportunity costs of devoting cash to any particular public project. To revert to the example, suppose that instead of demanding 10% of Dolan's land (having a fair market value of $1,500), the city demands $1,500 in cash (denominated an "impact fee"). Dolan will still accept the deal, since she is $500 better off. But it is unlikely that the city officials will turn around and spend the $1,500 on acquiring a bicycle path that has net social benefits of $100. Even assuming purely self-interested behavior by city officials, they can obtain greater benefits (if only in terms of public satisfaction and maximizing their chances of reelection) by using the money for another project with a higher social payoff. Thus, the fiscal illusion theory confirms the result that should obtain under existing Takings Clause doctrine, which treats taxes and fees as outside the purview of the Clause, and, hence, as not triggering the unconstitutional conditions doctrine when an exaction takes the form of a tax or a fee.

The fiscal illusion argument also supplies a justification for the nexus requirement of *Nollan*, as well as for the "rough proportionality" test of *Dolan*, with its elements of less restrictive alternatives analysis and quantitative cost-benefit analysis. The fiscal illusion theory suggests that property acquired through waiver of the right to compensation is uniquely susceptible to misallocation by the government. As a protection against this danger, it makes sense to ask whether the government's interests could be satisfied by less restrictive exactions or regulations.

For example, in *Dolan*, the city of Tigard sought a permanent easement in Dolan's land and asserted, in part, that the reason for doing so was to preserve the area as a greenway to help prevent periodic flooding. As the Court pointed out, however, this objective could also be satisfied by an open spaces regulation that simply required Dolan to preserve the area as a private greenway.[112] The permanent easement sought by the city went beyond the stated justification of flood control, and effected a transfer of an additional interest in land: the "ability to exclude others."[113] In effect, the permanent easement transferred not only control over development of the land, but also control over "recreational" use of the greenway from Dolan to the city.[114]

The Court suggested that this additional transfer of rights could entail a significant loss in value. As the Court seemed to recognize, the problem was not so much that Dolan might want to rent out access to the greenway for higher valued recreational uses than those selected by the city (although this is a possibility); of greater concern is the possibility that public recreational use of the greenway might reduce the value of the residual property retained by Dolan.[115] By insisting that the government exact only the least restrictive

112. *Dolan*, 114 S. Ct. at 2320.
113. *Id.*
114. *Id.* at 2320-21.
115. *Id.* at 2321.

fraction of the bundle of rights it needs to realize its objectives, the Court's rough proportionality rule therefore helps minimize the potential for government mandated inefficiency in the use of property.

The cost-benefit aspect of the rough proportionality test can also be justified as a response to fiscal illusion, provided the cost-benefit inquiry is focussed properly. The proper comparison is not between the external costs of the development and the external benefits flowing from the proposed exaction. Rather, it is between the *reduction* in external costs of the development flowing from the exaction and the opportunity costs of the proposed exaction—the fair market value of the exaction in its highest and best use. Recall that under the public goods theory, the public goods value of exercise of the right is a function of the external benefits produced through exercise of the right minus any external costs associated with exercise of the right ($PGV_{cr} = EB_{cr} - EC_{cr}$). The fiscal illusion argument suggests that the external benefits from demanding the payment of just compensation are preserving an efficient allocation of resources. This is best approximated by the opportunity costs of the property subject to exaction—its fair market value. The external costs from demanding just compensation are the loss of any public benefits that would flow from the government's proposed use of the property obtained through the exaction.

The *Dolan* case again provides an illustration. The city's demand for a permanent easement was justified in part by its proposal to use the greenway for a pedestrian/bicycle path, which would help alleviate traffic congestion in downtown Tigard. The Court refused to credit this justification, because "on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."[116] As written, this is potentially misleading, since it seems to suggest that the key variable to be quantified is the "additional number of vehicle and bicycle trips generated by" Dolan's proposed development. But what is truly relevant is not quantifying the external costs of the proposed development; it is quantifying the expected *reduction* in these costs generated by the proposed exaction. And the critical comparison is not between the external costs of the proposed development and the reduction in external costs generated by the exaction, but rather, it is between the reduction in external costs generated by the exaction and the foregone opportunity costs of the exaction.

Some numbers may help clarify the point. Suppose, as before, that the fair market value of the strip of Dolan's land that the government wants to acquire for a greenway is $1,500, and that the social benefits of the exaction in terms of reduced vehicle trips is $100. Suppose further that the city does a study and determines that the external costs of the development, in terms of additional vehicle trips, is $75. It would make no sense to compare the external costs of the development ($75) to the benefits of the exaction ($100), and approve the exaction on the ground that the benefits exceed the costs by $25. Even though

116. *Id.*

the exaction saves $25 in vehicle miles, it creates a $1,400 social *loss* by tying up property worth $1,500 in a use that generates only $100 of benefits.

Conversely, even if the external costs of the development *exceed* the benefits of the exaction, we might still want the exaction to go forward. Suppose the development is projected to generate $500 in external costs in the form of additional vehicle miles, and the exaction (as before) will produce benefits of only $100 in terms of reduced vehicle miles. Assume now, however, that the fair market value of the greenway for any other purpose besides a pedestrian/bicycle path is not $1,500 but only $50. On these assumptions, the exaction makes sense from a fiscal illusion/cost-benefit perspective, since the social benefits of the exaction exceed the social costs ($100 > $50). Again, we see that the correct comparison is not between the costs of the development and the benefits of the exaction, but between the reduction in the costs of development associated with the exaction and the opportunity costs of the exaction. Nothing in Justice Rehnquist's opinion is, strictly speaking, inconsistent with this understanding, but his language may point lower courts in the wrong direction.[117]

In sum, the public goods theory is capable of justifying *Dolan*'s extension of the unconstitutional conditions doctrine to the Takings Clause, once we introduce the idea of fiscal illusion as a rationale for the Clause. The theory can even explain the Court's decision to adopt the rough proportionality standard of review, with its elements of less restrictive alternatives analysis and cost-benefit analysis.

Still, some large questions remain. The discussion in this Part of the article may only demonstrate that virtually any constitutional right can plausibly be described as generating external benefits, such that the unconstitutional conditions doctrine arguably should apply to waivers of that right.[118] The possibility of making such a demonstration is therefore only a necessary condition of applying the unconstitutional conditions doctrine to waivers of a right, not a sufficient condition. In particular, two further questions of institutional choice would have to be confronted before deciding that the Takings Clause is an appropriate subject for the unconstitutional conditions doctrine. One concerns judicial competence. Courts may be able to figure out in a roughly satisfactory way which waivers of speech rights by public employees should be permitted and which should be struck down. But will they be equally adept in overseeing cost-benefit analyses designed to identify land use exactions that satisfy the nexus requirement of the unconstitutional conditions doctrine? A second question concerns the allocation of scarce judicial resources. Even if courts can develop satisfactory guidelines for monitoring land use

117. Justice Souter's dissenting opinion explicitly suggests that the required comparison is between the costs of the development and the benefits of the exaction. *See id.* at 2331 (Souter, J., dissenting).

118. The waiver of jury trial rights through plea bargaining, for example, could be criticized as denying the public the external benefits of public trials, such as the provision of additional information about the circumstances surrounding the commission of the crime and the arrest of the defendant, etc. *Cf.* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (criticizing settlement of litigation on the ground that it vitiates the "public values" associated with public trials).

exactions, do we want them spending their time on this task as opposed to other pressing issues like speech rights and race relations?

I do not have the space or time to consider these questions in this article, even if I had ready answers. The point is that one would have to tackle these questions before developing a complete normative defense of the decision in *Dolan*. I have suggested the possibility that *Dolan* can be justified on a public goods theory of the unconstitutional conditions doctrine. But further questions of comparative institutional choice would have to be confronted and resolved in favor of judicial intervention before deciding to act on such a justification.[119]

CONCLUSION

As this symposium confirms, there are two general schools of thought about the unconstitutional conditions doctrine. One, which can be called the essentialist school, believes the doctrine partakes of a common logic that spans each of the various areas of constitutional law in which it applies.[120] The other, which can be called the nominalist school, believes the doctrine has no common core of meaning, and can be understood only in conjunction with the different values and traditions associated with different provisions of the Constitution.[121]

The public goods theory explored in this article suggests that both approaches are correct. With the essentialists, the public goods approach posits that it is possible to describe the unconstitutional conditions problem in all areas of law using a single vocabulary of analysis. The vocabulary employed by the public goods theory is different from that urged by the Court and by other commentators. Nevertheless, it shares the assumption that a unitary approach is both possible and desirable—if only as a means of promoting clarity as to what factors are important in deciding whether to permit waivers of any particular constitutional rights.

With the nominalists, however, the public goods theory also posits that one cannot understand or apply the unconstitutional conditions doctrine without comprehending the judicial attitude toward each individual constitutional right. The key variable under the public goods approach is the judicial *perception* that the exercise of a particular right confers external benefits on third parties or, more colloquially, promotes the "public interest."[122] It should come as no great shock to learn that each generation of justices has a different set of values and attitudes about what kinds of rights have aspects of public goods. For *Lochner*-era justices, the right of out-of-state corporations to gain

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119. For an excellent discussion of the necessity of making these types of comparative institutional choice judgments in any normative analysis of law, see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

120. This is the approach of Seth Kreimer, Kathleen Sullivan, Richard Epstein, Lynn Baker, and Jane Rutherford.

121. This is the approach of Cass Sunstein, Bill Marshall, and Fred Schauer.

122. *See supra* note 77 and accompanying text.

access to courts and highways was of paramount importance.[123] For the Warren Court, the First Amendment surged to the fore.[124] Lo and behold, we now find that the Rehnquist Court believes the Takings Clause warrants protection under the unconstitutional conditions doctrine. Thus, within the framework of a common vocabulary of analysis, the public goods approach supports a basic nominalism of results: one cannot know which rights will be favored under the unconstitutional conditions doctrine without knowing the justices and their attitudes about the right in question.

Whether this way of looking at the unconstitutional conditions doctrine is an improvement over more conventional approaches, I leave for others to judge. Certainly, in my opinion, it goes further to rationalize the outcome in the *Dolan* case than does any competing theory. It also seems to account for more features of the general doctrine than does its principal rival, the consent theory, which has dominated thinking about the doctrine for a long time—as long as everyone has been saying that it is all very puzzling.

123. For a review of the case law of this era, see EPSTEIN, *supra* note 1.
124. *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958).