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Reexamining the doctrine of unconstitutional conditions



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Tomorrow, I will be speaking at the annual [LSI Regulatory Takings conference](#) about the doctrine of unconstitutional conditions. This doctrine holds that the government cannot condition the provision of a discretionary benefit (e.g., a permit, license, grant, contract, etc.) upon a requirement that a person give up a constitutionally protected right. And it was this doctrine that provided the basis for the “essential nexus” and “rough proportionality” regulatory takings tests of [Nollan v. California Coastal Commission \(1987\)](#) and [Dolan v. City of Tigard \(1994\)](#), which strictly limit the government’s authority to condition permit approvals upon the dedication of private property to the public. I posit in my presentation that a better understanding of the doctrine of unconstitutional conditions holds the key to resolving many of the current controversies concerning *Nollan* and *Dolan*.

The modern unconstitutional conditions doctrine, which protects against compelled waiver of individual rights and liberties, looks very different from the doctrine adopted in the mid-19th century. The first wave of unconstitutional conditions cases responded to the rise of protectionist laws that imposed a variety of conditions on foreign companies seeking permission to do business in the state, such as waiving the right to have disputes heard by the federal courts and granting the state the right to tax out-of-state income and property.

The U.S. Supreme Court, however, did not intend for the doctrine to be so constrained. Throughout the Progressive Era,

during which time the scale and scope of government regulations grew dramatically, the Court repeatedly signaled that a condition that sought a waiver of any of the privileges or individual rights secured by the U.S. Constitution will likely violate the doctrine. And by the 1920s, the Court applied the doctrine to invalidate a state regulation that required a company to waive rights protected by the Equal Protection and Takings Clauses of the U.S. Constitution, holding:

[T]he power of the state [...] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

[Frost & Frost Trucking Co. v. Railroad Comm'n \(1926\)](#) .

Since then, the doctrine of unconstitutional conditions has passed in and out of vogue, often reappearing in a flurry of decisions to curtail disturbing government forays into private affairs. For example, in the '40s to '50s, the doctrine was applied to invalidate state laws conditioning benefits (such as tax exemptions and government jobs) on the applicant taking a loyalty oath. In the '60s and '70s, the doctrine struck down laws conditioning access to unemployment benefits and other social benefit programs upon the waiver of religious freedoms, free speech, the right to travel, and other individual rights. And in the '80s and '90s, the doctrine invalidated government attempts to use the land use permit process to take private property without paying in the cases *Nollan* and *Dolan*.

Both *Nollan* and *Dolan* involved development conditions that required the landowner to dedicate property to the public – conditions that, if they had been imposed directly, would require payment of just compensation. In *Nollan*, the California Coastal Commission required the Nollans, owners of beach-front property, to dedicate an easement over a strip of their private beach as a condition of obtaining a permit to rebuild their home. The Commission justified the dedication on the grounds that “the new house would increase blockage of the view of the ocean, thus contributing to the development of ‘a “wall” of residential structures’ that would prevent the public ‘psychologically . . . from realizing a stretch of coastline exists

nearby that they have every right to visit,” and would “increase private use of the shorefront.” The Nollans refused to accept the condition and brought a federal taking claim against the Commission in state court, arguing that the condition constituted a taking because it bore no connection to the impact of their proposed remodel. This Court agreed, holding that the easement condition lacked an “essential nexus” to the alleged public problem.

In *Dolan*, the City of Tigard imposed conditions on Florence Dolan’s permit to expand her plumbing and electrical supply store that required her to dedicate some of her land for flood-control and traffic improvements. Dolan refused the conditions and sued the city in state court, alleging that the development conditions effected an unlawful taking and should be enjoined. This Court held that the City established a connection between both conditions and the impact of Dolan’s proposed expansion under *Nollan*, but nevertheless held that the traffic-improvement condition was unconstitutional. Even when an “essential nexus” exists, the Court explained, there still must be a “degree of connection between the exactions and the projected impact of the proposed development.” There must be rough proportionality—i.e., “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” The *Dolan* Court held that the city had not demonstrated that the traffic-improvement condition was roughly proportional to the impact of Dolan’s expansion and invalidated the permit condition. Both *Nollan* and *Dolan* rejected the notion that merely showing a public benefit from the exaction is enough to satisfy the constitution. Instead, both decisions relied on a fact-specific analysis relating to the question whether the development condition was sufficiently related to the proposed development to justify the government’s exaction of a property interest.

Although simple in concept, the Court’s application of the unconstitutional conditions doctrine in *Nollan* and *Dolan* continues to befuddle – particularly where courts, scholars, and government attorneys search for ways to limit to doctrine’s application. Some argue that the doctrine is narrowly limited to those conditions that exact a dedication of real property – all other property dedications are okay. Others argue that the doctrine only protects against adjudicative demands, rather than legislative demands. Still, others insist that the doctrine only applies where the benefit has been granted subject to the unconstitutional condition, not in circumstances where the government refuses to grant the benefit because the person objected to the condition. These, and other, arguments share one thing in common: they rely on a very narrow and cramped reading of *Nollan* and *Dolan* that divorces the nexus and proportionality tests from the doctrine of unconstitutional conditions. And, while the distinctions that critics and opponents have seized upon may provide a handy way to distinguish the facts from case to case, they do nothing to protect against the type of government coercion that the doctrine of unconstitutional conditions was intended to bring an end to, and should be held irrelevant.

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