UIC Law Review

Volume 21 | Issue 3 Article 9

Spring 1988

Nollan v. California Coastal Commission: Unprecedented Intrusion upon a State's Judgment of the Proper Means to Be Applied in Land Use Regulation, 21 J. Marshall L. Rev. 641 (1988)

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NOLLAN v. CALIFORNIA COASTAL COMMISSION:* UNPRECEDENTED INTRUSION UPON A STATE'S JUDGMENT OF THE PROPER MEANS TO BE APPLIED IN LAND USE REGULATION

The Taking Clause of the fifth amendment guarantees that private property shall not be taken for public use without just compensation.[1] Traditionally, the United States Supreme Court has interpreted the fifth amendment to require judicial deference to local government decisions concerning land use. Recently, however, the Supreme Court charted a new course in its Taking Clause jurisprudence. In *Nollan v. California Coastal Commission*,[2] the Court addressed the issue of whether a state could lawfully substitute an exaction of an access easement[3] for a denial of a coastal building

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* 107 S. Ct. 3141 (1987).

1. U.S. CONST. amend. V. The fifth amendment does not directly apply to the eminent domain power of the states, by its own force, but is made obligatory on the states through the fourteenth amendment and the incorporation doctrine developed in relevant United States Supreme Court rulings. *See* San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 623 n.1 (1981); Gideon v. Wainwright, 372 U.S. 335, 342 (1963); *see also* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980); Chicago, B & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

Seventeen days before the *Nollan* decision, the Supreme Court extended the just compensation clause, holding that the fifth amendment requires the government to pay for private property that it takes even for a temporary period. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987). The *First English* Court held that once a taking is established at trial, the government is liable for all interim damages occurring between the commencement of the taking and the date on which the government amends or revokes the regulation. *Id.* at 2388 (adopting the reasoning of the dissent in *San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting)).

2. 107 S. Ct. 3141 (1987).

3. Exaction occurs when a developer receives the "privilege" of developing the land and realizes an economic benefit following governmental approval, while the government receives an amount of land or money from the developer to provide certain public services that the project's existence requires. *See* Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 325, 170 Cal. Rptr. 685, 689 (1981); Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 635, 484 P.2d 606, 615, *appeal dismissed*, 404 U.S. 878 (1971). Generally, exactions include such contributions as dedications of land for streets, parks, or similar basic facilities, or equipment needed for the functioning of a town or organization. Delaney, Gordon & Hess, *The Needs-Nexus Analysis; A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW AND CONTEMP. PROBS. 139, 140 (1987).

Dedication is considered an unusual method of passing title to land. Volpe v. Marina Parks, Inc., 101 R.I. 80, 220 A.2d 525 (1966). Generally, dedication is the setting aside of land for a public use. Palmetto v. Katsch, 86 Fla. 506, 98 So. 352 (1923). Dedication may be expressed orally, by declaration, by deed or note; or it may

permit, as a means of advancing the state's interest in preserving visual beach access for the public.[4] The five-member majority held that for a building permit condition to be classified as a valid land use regulation rather than a taking,[5] it must serve the legitimate public purpose that the state seeks to achieve.[6]

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be implied where an owner manifests his acquiescence in its use by the public. Conoway v. Yolo Water & Power Co., 204 Cal. 125, 126, 266 P. 944, 946 (1928).

Exaction also includes the developer's payment of fees rather than his physical dedications of land. *See* Delaney, Gordon & Hess, *supra*, at 140. The developer may be required to construct affordable housing and other public facilities in addition to his project. *Id.* at 140-41.

Local governments have developed exactions as a means of insuring payment for necessary physical improvements for new subdivisions. *Id.* at 141-42. Several forms of exactions have evolved. *Id.* These can be categorized as: (1) in-kind contributions within the project; (2) in-kind contributions outside but near the project; (3) money payments in place of in-kind contributions; and (4) impact fees to pay for extra-developmental cost of growth. *Id.*

Linkage is the most controversial aspect of exactions and also provides the most viable basis for a legal challenge of impact fees. Linkage is imposed at the certificate of occupancy stage on large scale mixed use or non-residential developments to promote social programs or policies. *Id.* at 140. Linkage may require a developer to pay for or construct low and moderate income housing for persons who will theoretically come to the city because of the new construction. *Id.*

4. The Supreme Court has defined a state's police power as that power which is inherently reserved to the states and that subjects individual rights to reasonable regulation for the good of the general public. *See Trent Meredith*, 114 Cal. App. 3d at 326, 170 Cal. Rptr. at 689. In contrast, the power of eminent domain is the power of a state to take private property for a public use without the owner's consent, provided that the state pays the owner just compensation. Ellis v. Ohio Turnpike Comm'n, 352 U.S. 806 (1956). Eminent domain requires the government entity to assert in court its authority to condemn property. Agins v. Tiburon, 447 U.S. 255, 258 n.1 (1980).

Generally, a regulatory body may, in the interests of the general welfare, require a dedication of property as a condition of permitting land development. Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 172, 212 Cal. Rptr. 578, 593 (1985). In conditioning the grant of development permits, the government is acting under its police power because neither a court proceeding nor payment of money exists, as required by the eminent domain power. *Id.* at 164, 212 Cal. Rptr. at 594; *see also Agins*, 447 U.S. at 262 (when state attaches conditions to development permit approval, it relies on the exercise of its police power); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (government may execute laws or programs that adversely affect recognized economic values); Berman v. Parker, 348 U.S. 26, 32 (1954) (land use regulation does not constitute a taking if it substantially advances legitimate state interests and does not deny owner an economically viable use of his land.

5. The specific condition challenged in *Nollan* provided:

> Prior to the transmittal of a permit, the applicant shall record . . . in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject property in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end.

CALIFORNIA COASTAL COMMISSION, STAFF REPORT ON APPLICATION NO. 4-82-90, (June 23, 1983), *reprinted in* Jurisdictional Statement app. E, at E-26, Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (No. 86-133) [hereinafter "STAFF REPORT"].

6. *Nollan*, 107 S. Ct. at 3147-48. Relying on precedent, the Court reasoned that a land use regulation did not constitute a taking if it substantially advanced legitimate state interests and did not deny an owner an economically viable use of his land. *See Agins*, 447 U.S. at 260 (no taking occurs if the land use regulation substantially advances a legitimate government interest and does not deny an owner econom-

In *Nollan*, the plaintiff held a lease with an option to buy shorefront property located between two public beaches.[7] He decided to exercise the option and he purchased the property.[8] The option to purchase, however, was conditioned on the plaintiff's promise to demolish and replace an existing bungalow on the property.[9] California law required Nollan to obtain a Coastal Development Permit before he could begin replacement construction.[10] The

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ically viable use of his land); *Penn Central*, 438 U.S. at 127 (no taking where restrictions imposed are substantially related to the promotion of the general welfare and permit reasonable beneficial use of the site).

The *Nollan* majority agreed with the New Hampshire Supreme Court's analysis that a requirement of extensive off-site road work for subdivision approval was invalid where the public at large, as well as prospective subdivision residents, would benefit from the road work. *Nollan*, 107 S. Ct. at 3148 (citing J.E.D. Assoc., Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). *Cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982) (any permanent physical invasion is a taking).

Justice Scalia, speaking for the majority, described the state's effort to obtain the exaction of the easement without compensating Nollan with exceptionally harsh language:

> Whatever may be the outer limits of legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same government purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

Nollan, 107 S. Ct. at 3148 (quoting *J.E.D. Assoc.*, 121 N.H. at 584, 432 A.2d at 14). See *supra* note 3 for an explanation of "exaction."

7. The Nollan family leased the property for approximately 40 years and used the 504 square foot bungalow situated on the lot for weekends, vacations and subletting. Brief of Appellants at 3, Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (No. 86-133). Faria County Park, an oceanside public park with a public beach and recreation area, lies one-quarter of a mile north and the Cove public beach area lies 1,800 feet south of the Nollan property. *Nollan*, 107 S. Ct. at 3143. An eight foot high concrete seawall separates the beach portion of the Nollan property from the rest of their lot. *Id.*

8. *Nollan*, 107 S. Ct. at 3143.

9. *Id.* The Court has never required compensation to an owner for a property interest where the consequences were a product of his own neglect. Texaco v. Short, 454 U.S. 516, 530 (1982). *Accord* United States v. Locke, 471 U.S. 84, 107-08 (1985). Nollan allowed the bungalow to fall into disrepair so that he could no longer sublet it. *Nollan*, 107 S. Ct. at 3143. Through his own neglect, Nollan had no choice but to rebuild the structure to obtain some economic benefit from the property.

10. Since its inception in 1972, the Commission has been charged with the public duty to control coastal development. Section 30600(a) of the Coastal Act provides that "any person wishing to undertake development in the coastal zone shall obtain a coastal development permit as well as any other permit required by a state, regional or local authority." CAL. PUB. RES. CODE § 30600(a) (West 1986). The Code defines development as construction, reconstruction, demolition, or alteration of the size of any structure. *Id.* § 30106. Replacement construction that is more than 10% larger than a former structure on the parcel is classified as new construction. *Id.* § 30212.

Nollan proposed to demolish the existing 521 square foot residence and construct a 1,674 square foot two-story, single family residence. STAFF REPORT, *supra* note 5, at E-27. The Commission determined that the demolition and reconstruction would increase the size by more than 300%. *Id.* at E-37. In accordance with § 30212 of the Code, the Commission lawfully required Nollan to obtain a permit before starting the project. *Id.*

California Coastal Commission imposed a condition on the permit in the form of a deed acknowledgment, recognizing a permanent easement for the public that would provide lateral access across the beach portion of the Nollan property.[11] Prior to the Nollan permit application, all previous possessors and owners had allowed the public to pass along the shoreline of the property.[12]

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11. *Nollan*, 107 S. Ct. at 3148. The citizens of California have ardently protected their coastline. The California Constitution mandates care and preservation of the coast by its citizens and agencies. The Coastal Commission's findings are illustrative of the enormous value to California of her coast.

The Commission specifically found that California's 1,000 mile coastline is one of her most precious and intensely used resources. STAFF REPORT, *supra* note 5, at E-45. Three-quarters of the state's population lives within an hour's drive of the Pacific Ocean. *Id.* Hundreds of thousands of frustrated vacationers are turned away each year from the coastal facilities because the coastal recreational facilities are insufficient. *Id.* The Commission further noted that hundreds of miles of publicly owned tidelands have already been walled off from the public by various private developments along the coast, including high-rises, clubs and residential development. *Id.* The Commission justified its findings by referencing its previous reports, such as: CALIFORNIA DEPARTMENT OF OCEAN AND NAVIGATION DEVELOPMENT, COMPREHENSIVE OCEAN AREA PLAN AND SUPPLEMENT (1971); CALIFORNIA DEPARTMENT OF FISH AND GAME, FISH AND WILDLIFE IN THE MARINE AND COASTAL ZONE (1971); CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, CALIFORNIA COASTLINE PRESERVATION AND RECREATION PLAN (1971).

Under the California Constitution, the Coastal Commission should have been able to lawfully require the condition on beachfront property construction that was at issue in *Nollan*:

> No individual . . . possessing the frontage or tidal lands of . . . navigable water in this State, shall be permitted to exclude the right of way to such water wherever it is required for any public purpose . . . . [T]he Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

CAL. CONST. art. X, § 4. To carry out the mandate of § 4, the California legislature enacted several access statutes as part of the Coastal Act of 1976. *See Grupe*, 166 Cal. App. 3d at 159, 212 Cal. Rptr. at 584. For a history of the coastal statutes, see Comment, *Public Access and the California Coastal Commission: A Question of Overreaching*, 21 SANTA CLARA L. REV. 395 n.1 (1981). This broad access power, mandated by California's legislature and charged to the Commission for implementation, is set out in the 1976 Act, §§ 30210-30214, under the heading "Public Access." Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 160, 212 Cal. Rptr. 578, 584 (1985). In 1978, the Act was amended to provide:

> In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

CAL. PUB. RES. CODE § 30210 (West 1986). Essentially, § 30211 provides that development shall not interfere with the public's right of access to the sea. *Id.* § 30211. *See Grupe*, 166 Cal. App. 3d at 160, 212 Cal. Rptr. at 584. Importantly, § 30212 empowers the Coastal Commission to exact access dedications as a condition of approval for new development projects along the coast. CAL. PUB. RES. CODE § 30212 (West 1986). This section was amended in 1983: "Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where . . . (2) adequate access exists nearby . . . ." *Id.* § 30212(a).

12. STAFF REPORT, *supra* note 5, at E-47.

Nollan objected to the condition and sought a court order to invalidate the access condition as a prerequisite for obtaining a building permit.[13] He argued that there was no evidence that the reconstruction project would have a direct adverse impact on public access to the beach.[14] The trial court agreed and remanded the case to the Commission for a full evidentiary hearing.[15]

Following a public hearing, the Commission confirmed that the Nollan project would adversely impact public access rights.[16] Specifically, the Commission determined that the proposed construction would contribute to the development of a "wall" of residential structures, psychologically preventing the public from realizing its right to visit a stretch of nearby coastline.[17] Second, the Commission ruled that a new house would increase private use of the shorefront and would burden the public's ability to walk along the beach.[18] Based on these findings, the Commission again refused to issue the permit without the easement condition.[19]

Nollan returned to court, complaining that the condition vio-

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13. *Nollan*, 107 S. Ct. at 3143.
14. *Id.*
15. *Id.*
16. *Id.* at 3143-44.
17. *Id.*
18. *Id.* The Commission found the lateral access restriction on the Nollan parcel consistent with protection of fragile coastal resources as required under § 30212(a) of the Coastal Act. STAFF REPORT, *supra* note 5, at E-46. The Commission further found inadequate public access in the Faria beachfront tract. *Id.*
19. *Nollan*, 107 S. Ct. at 3144. The Commission recognized that Nollan's proposed development would increase both obstruction of the view and private use of the shorefront. STAFF REPORT, *supra* note 5, at E-45. This impact would burden the public's ability to traverse to and along the shorefront. *Id.* The Commission concluded that a public access benefit provision was necessary to mitigate the burden on public access within the Faria beachfront tract, pursuant to the public access policies contained in Chapter 3 of the Coastal Act. *Id.* See *supra* note 10 for the exact language of the Act.

The Commission noted that all previous owners had given the public permission to travel along the shoreline within the entire tract. STAFF REPORT, *supra* note, 5, at E-47. In several other permit actions along the same shoreline, the Commission required owners to record deed restrictions for lateral access, limited to pass and repass along the entire shoreline, as a condition for permit approval. *Id.* The Commission reasoned the public does not know the exact locations of existing deed restricted areas. *Id.* Further, the public expected lateral access in the project vicinity; thus, if the Nollan permit did not provide a similar provision of access, the deed restrictions already in place become less effective. *Id.*

The Commission noted the requirement for an opportunity of access to and along the coast was necessary only if the new development imposed a burden on existing access opportunity. *Id.* The Commission reasoned that the Nollan condition was part of a comprehensive program to provide continuous public access along Faria Beach as the lots underwent development or redevelopment. *Id.* at E-48. The Commission concluded that adequate public access did not exist nearby. *Id.* Therefore, the deed restriction was offered to allow the public pass and repass rights, and was consistent with both past Commission action and with the site's ability to provide such access. *Id.*

lated his rights under the Taking Clause of the fifth amendment.[20] The trial court agreed and ordered the Commission to issue the construction permit without the condition.[21] The Commission appealed to the California Court of Appeals.[22] That court reversed, finding that the Nollan project, together with other coastal construction along the same beach, had a cumulative adverse impact on public beach access.[23] The appellate court stated that the indirect relationship between the exaction of the easement[24] and the state's legitimate purpose was sufficient to conclude that no taking had occurred.[25] Nollan appealed to the United States Supreme Court, asserting a violation of his fifth amendment rights.[26]

The United States Supreme Court reversed the California Court of Appeals.[27] The Supreme Court noted that it had not yet clarified the relationship required between the ends and the means in Taking

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20. *Nollan*, 107 S. Ct. at 3144.

21. *Id.*

22. *Id.*

23. The *Nollan* appellate court relied on Grupe v. California Coastal Comm'n., 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985), and held that only an indirect relationship needs to exist between an exaction and a need to which the project contributes. *Nollan*, 107 S. Ct. at 3144. The facts in *Grupe* are analogous to *Nollan*. The landowner in *Grupe* owned one of six remaining undeveloped beachfront lots in a group of twenty-nine adjacent lots in Santa Cruz County. *Grupe*, 166 Cal. App. 3d at 155, 212 Cal. Rptr. at 581. The twenty-nine lots were located between two beaches open to public use. *Id.* The landowner applied for a permit to build a large single family residence to be located behind a cement seawall on his lot. *Id.* The Commission approved the permit, subject to a public access easement between the mean high tide and the cement wall. *Id.*

The *Grupe* court held the access condition was related to a need for public access to which Grupe's project contributed, although the single dwelling had not created the need for access. *Id.* at 180, 212 Cal. Rptr. at 590. The court reasoned the project was one more "brick in the wall," separating the people of California from the state's tidelands. *Id.* at 167, 212 Cal. Rptr. at 589. The *Grupe* court also held that the exaction did not constitute a taking because, although it caused a diminution in the value of the property, it did not deprive Grupe of all reasonable use of his property. *Id.* at 177, 212 Cal. Rptr. at 597.

The appellate court in *Nollan* correctly noted that the difference between *Grupe* and *Nollan* was negligible. Nollan v. California Coastal Comm'n, 177 Cal. App. 3d 719, 724, 223 Cal. Rptr. 28, 31 (1986). The only difference was that *Grupe* concerned new construction, where *Nollan* was a demolition and reconstruction project. Because § 30212 of the Public Resource Code classified all reconstruction which exceeded the former structure by 10% as new construction, and the overall size of the Nollan project exceeded the former structure by more than 300%, it was classified as new construction. The appellate court in *Nollan* also relied on Remminga v. California Coastal Comm'n, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985) (dedication need not be limited to the needs of or burdens created by the single project).

24. For a discussion on exaction and dedication, see *supra* note 3.

25. *Nollan*, 177 Cal. App. 3d at 723, 223 Cal. Rptr. at 31.

26. *Nollan*, 107 S. Ct. at 3145. For a discussion of application of the Taking Clause as applied to the states, see *supra* note 1. Nollan claimed the restriction imposed on his property was not a legitimate use of California's police power. For a discussion regarding the difference between police power and eminent domain, see *supra* note 4 and accompanying text.

27. *Nollan*, 107 S. Ct. at 3150.

Clause analysis.[28] The Court then determined that the issue was whether an exaction,[29] requiring a non-compensable easement across the Nollan beachfront in return for the lifting of a development ban, constituted a compensable taking.[30] In discarding the appellate court's indirect nexus theory,[31] the Court stated that the appropriate nexus is where the regulation that was substituted for the development ban directly serves the government's announced purpose.[32] The Supreme Court reasoned that the access easement in *Nollan* did not directly relate to the purpose of visual beach access and, therefore, it could not be upheld under the Commission's police power.[33]

The Court presumed, in its analysis, that the visual beach access interest of the state was legitimate.[34] Because the Commission had demonstrated a legitimate state interest, the Court determined that the Commission could lawfully obtain an easement by paying for it under its power of eminent domain;[35] or the Commission could simply deny the permit application.[36] The Court then questioned whether the easement condition could substitute for the develop-

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28. *Id.* at 3146-47.

29. *Id.* at 3146-47. For discussion on exaction, see *supra* note 3 and accompanying text.

30. *Id.* at 3147.

31. The Court usually refrains from specifying criteria in determining whether a regulation is a valid exercise of the inherent state police power. *See generally* Hawaii Housing Authority v. Midkiff, 487 U.S. 229 (1984); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1983), Agins v. Tiburon 447 U.S. 255 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Goldblatt v. Hempstead, 369 U.S. 594 (1961); Gorieb v. Fox, 274 U.S. 603 (1927); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Almost a century ago, the Court framed the rule that the state may interfere with the ownership of private property through its police power whenever the public interests demand it. Lawton v. Steele, 152 U.S. 133, 137 (1894). The only requirement is the appearance that the state is acting on behalf of the public interest and that the means are reasonably necessary for the accomplishment of that purpose. *Id.* The Court has commented on more than one occasion that the question of reasonableness is a subject for debate in the legislatures, and not the courts. *See Goldblatt*, 369 U.S. at 595; Sproles v. Binford, 286 U.S. 374, 389 (1931); Standard Oil Co. v. Marysville, 279 U.S. 582, 586 (1929); Zahn v. Board of Public Works, 274 U.S. 325, 328 (1927); Price v. Illinois, 238 U.S. 446, 452-53 (1914). The Court has held itself to a supervisory role and has not, under the guise of protecting private interest, arbitrarily interfered with a legislature's ability to impact private rights unless the legislature's action is arbitrary and unreasonable. *Lawton*, 152 U.S. at 137. The Court's holdings indicate that the Court does not set the guidelines. The legislatures shall not be abusive and offensive to the mandates of the Constitution requiring compensation for the taking of private property. For further discussion and history of land use regulation, see *infra* note 44.

32. *Nollan*, 107 S. Ct. at 3148.

33. *Id.* at 3149.

34. The Court framed the legitimate state interests advanced by the Commission as protecting the public's ability to see the beach, assisting the public to overcome the "psychological barrier" of using the beach caused by the shorefront development, and preventing congestion on the public beaches. *Id.* at 3149.

35. *Id.* at 3147-48. See *supra* note 4 for a discussion on eminent domain.

36. *Nollan*, 107 S. Ct. at 3147-48.

ment ban.[37] The Court concluded that the substitution would be proper if the easement condition would directly advance the public's ability to see the beach.[38]

The Court interpreted the Commission's goal of beach access as protecting visual beach access, and inserted this view of the *Nollan* facts into the newly announced direct nexus test.[39] The Court concluded that there was no direct, or even rational, relationship between the public's ability to see the beach and the securing of an easement for the public to walk along the beach.[40] This insufficient nexus allowed the Court to find that the permit condition was an improper land use regulation.[41] The Court concluded that the Commission still had a right to the easement under its power of eminent domain, but it had to pay for this right.[42]

The *Nollan* Court unjustifiably stepped out of its traditional role in reviewing Taking Clause cases. The Court incorrectly presupposed the facts and conclusions in *Nollan*, and, based on these presuppositions, incorrectly held that the Commission's action amounted to a taking. Additionally, the Court established a new test in evaluating taking cases, imposing a rigid nexus standard between the ends and the means in land use regulation. This new test will prove ineffective and unworkable.

The Court's first error was in its intrusion into the judgment of the Commission, which was acting under the California legislature's mandate[43] to preserve public coastal access. The Court had previously adopted a narrow role in determining whether a state was exercising its police power for a legitimate public purpose.[44] The legis-

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37. *Id.* at 3148. The Court noted that the Nollan house itself, or the house viewed cumulatively in conjunction with other developments, could impose a burden on the public interest. *Id.*

38. *Id.* at 3149.

39. *Id.*

40. *Id.*

41. *Id.* The Court acknowledged, however, that if the restriction served the same legitimate purpose as the development ban, the Commission's assumed power to forbid construction of the house "must surely" include the power to require some concession by the owner, including a concession of property rights. *Id.* at 3147.

42. *Id.* at 3150.

43. For a discussion on California's mandate on coastal preservation, see *supra* note 11.

44. Regulatory laws began in the United States around the turn of the century. Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926). The *Euclid* Court reviewed the constitutionality of a zoning ordinance, rezoning property from commercial to residential, reducing the economic value of the plaintiff's property by one-third. *Id.* at 384. In *Euclid*, the Court recognized that development problems constantly require additional restrictions in the use and occupation of private property. *Id.* at 387. If conditions remained eternally the same, there would be no need for building regulations. *Id.* Our evolving society, however, is complex and building restrictions must be sustained. *Id.*

The *Euclid* Court compared building regulations to traffic regulations and ex-

lature determined what public purposes the police power should serve and, if the courts confirmed that this purpose was legitimate, the legislature's decision on the means by which the state was to implement the purpose was final.[45] Prior to *Nollan*, a mere rational relationship test was used to validate the nexus between the ends and the means. If a rational relationship was shown, the Court upheld the regulation as long as the regulation met the standards of justice and fairness.[46]

As recently as 1984, the Court again stated that courts should not substitute a judicial opinion for the legislature's judgment unless

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plained that before the advent of the automobile, courts would have condemned traffic regulations as fatally arbitrary and unreasonable. *Id.* The Court stressed that imposition of the later traffic regulations was consistent with the meaning of constitutional guarantees, which never vary. *Id.* The application of the regulation must expand or contract to meet the new and different conditions that are constantly challenging our changing society. *Id.* According to *Euclid*, it would be impossible to require an inflexible application of constitutional guarantees in a changing world. *Id.* Instead, courts should give a degree of elasticity to the application of constitutional principles, in light of the evolution of society, and then decide each case on its own facts. *Id.* at 397. It is impossible to absolutely determine the line that separates the legitimate from the illegitimate assumption of police power. *Id.* at 387. The Court concluded that residential zoning restrictions were within the valid exercise of Ohio's police power. *Id.* at 397. *Accord* Hawaii Housing Authority v. Midkiff, 487 U.S. 229 (1984); Gorieb v. Fox, 274 U.S. 603 (1927). For discussion on the Court's traditional role in takings litigation, see *supra* note 31.

45. Berman v. Parker, 348 U.S. 26, 32 (1954). The role of the judiciary in determining whether the state is exercising its police power for a public purpose has been defined as an extremely narrow one. *Id.* Obvious examples of the traditional application of the police power are public safety, public health, morality, peace and quiet, and law and order. *Id.* These examples do not delimit the scope of police power, but are merely illustrative. *Id.* The legislature is the main guardian of public needs, rather than the judiciary. *Id.* Once the legislature has defined a legitimate purpose, it alone determines the means through which the legitimate purpose will be attached. *Id.* at 33. *Nollan* changed this proper mandate and imposed the Court's untrained judgment of the means to be applied.

46. The state may interfere wherever the public interest demands it. *See* Lawton v. Steele, 152 U.S. 133, 136-37 (1894). The legislature is vested with great discretion to determine public interests and the measures necessary to protect those interests. *Id.* The state may interpose its authority on behalf of the public where the interests of the general public require such interference and when the means "are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Id.* at 137.

The legislature, however, may not arbitrarily interfere with private rights or impose unusual and unnecessary restrictions under the guise of protecting the public interest. *Id.* The judicial role was supervisory to assure that the legislature was not acting in an arbitrary or unreasonable manner. *See id* at 137.

The *Lawton* Court upheld the destruction of fish nets to preserve certain fisheries within the state's jurisdiction from extinction. *Id.* at 143. The state contended that the prohibition of fishing with nets was an effective way to prevent the fisheries from becoming extinct. *Id.* at 134. The state was effectively able to accomplish its legitimate public purpose by destroying the nets. *Id.* at 139. The *Lawton* court emphasized the importance of flexibility within the state's solution to best meet the public purpose. *See id.* at 141. In *Nollan*, however, the Court has deprived the state of the flexibility necessary to provide the most beneficial growth program designed to meet the needs of the public, with the least imposition upon the private landowner.

the regulatory purpose was palpably without a reasonable foundation.[47] Further, the Court has stated that it is the purpose of the regulation, rather than its mechanics, that must pass scrutiny.[48] Before *Nollan*, the Court gave state legislatures wide discretion in determining the means to accomplish a public purpose.[49]

Although the Court has commented that state law may not, without limitation, redefine property rights through land use regulation,[50] it has confined its decisions to whether the purpose was legitimate and the means were reasonable.[51] Before *Nollan*, the Court had generally refrained from initiating rigid rules that simply are not applicable to the accomplishment of responsible land development, and, instead evaluated each case on its own merits.[52] Unfortu-

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47. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984). The Court has made clear that its role in reviewing a legislature's judgment of what constitutes a public use is extremely narrow:

> "[A]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of the decision, a practice which has proved impracticable in other fields."

Id. at 241. The question is not whether the provision will accomplish its objectives, it is whether the legislature "*rationally could have believed*" that it would have promoted its objective. *Id.* at 242. (emphasis in original). The Court stated that in taking claims, where the legislature's purpose is legitimate and its means are rational, judicial deference is required because legislatures are in a better position to assess what public purposes should be advanced. *Id.* at 244.

48. *Id.* at 244.

49. *See, e.g. Lawton*, 152 U.S. at 133, 140. For a discussion on the issue and the holding in *Lawton*, see *supra* note 46.

50. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982)(quoting Webb's Fabulous Pharmacies, Inc., v. Beckwith, 449 U.S. 155, 164 (1980)) (state may not transform private property into public property without compensation).

51. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning law will be upheld unless clearly arbitrary and unreasonable, and without substantial relation to the public health, safety, morals, or general welfare); *Lawton*, 152 U.S. at 139 (legislature had power to prohibit fishing with nets and to destroy the nets without compensation, as it was a reasonable and necessary means to prevent depletion of the fish supply).

52. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), is the leading case in taking review. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978). In *Pennsylvania Coal*, the Court implied that all property is held subject to a future exercise of a state's police power. *Id.* at 413. A court must review the facts of the particular situation to determine whether a taking has occurred. *Id.*

Justice Holmes' often quoted statement, "If regulation goes too far it will be recognized as a taking," intuitively identified the problem that has besieged taking analysis. *Id.* at 415. The problem, of course, is how far is too far. Justice Holmes categorized the problem as one of degree and, therefore, as incapable of being disposed of by generalizations. *Id.* at 416.

The Supreme Court set out factors for courts to consider in deciding whether a particular governmental action has effected a taking. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130 (1978). These factors are: (1) the character of the governmental action; (2) the economic impact of the regulation; and, (3) the nature and extent to which the regulation interferes with investment-backed expectations. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980). Courts should resolve taking questions through *ad hoc*, factual inquiries as to each of these elements. Kaiser

nately, the rigid constitutional restraints formulated in *Nollan* will not afford a fair and reasonable analysis in each regulatory scheme.

Undoubtedly, governmental agencies have overreached their police power in certain situations. In one case, for example, coastal landowners added rock below a seawall to protect their homes from high waves. They were later notified that the repairs required a permit, which the Commission would only issue if the landowners granted a lateral access easement.[53] The condition was held invalid due to insufficient evidence that the seawall improvement adversely affected public access to or across the beach.[54] The *Nollan* Court attempted to shortcut a solution for this type of governmental abuse by formulating an unwarranted test that will not solve the problem.[55] The Court should have limited its review to whether the imposition of the access condition on the permit was reasonable and rationally related to California's legitimate public purpose of preserving public beach access.

The second error in the Court's analysis was in its presupposition of facts and conclusions.[56] The Court's analysis conspicuously omitted an important set of facts. The facts were that previous landowners had permitted the public to use the Nollan shorefront for lateral passage.[57] Nollan knew about the access easement require-

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Aetna v. United States, 444 U.S. 164, 175 (1979). In *Penn Central*, the Court applied these factors and found that the New York law, which imposed certain building restrictions forbidding architectural alterations or improvements on the Grand Central terminal because it was a historical landmark, did not interfere with the present uses of the terminal. *Penn Central*, 438 U.S. at 136. No taking had occurred because the restrictions imposed were substantially related to the promotion of the general welfare and reasonable use was permitted. *Id.* at 138.

53. Pacific Legal Found. v. California Coastal Comm'n, 33 Cal. 3d 158, 188 Cal. Rptr. 104, 107, 655 P.2d 306, 309 (1982).

54. *Id.* at 164, 188 Cal. Rptr. at 107, 655 P.2d at 309. An extreme example of governmental abuse of its police power lies in the case of Robert and Caroline Bailey. Tabor, *The California Coastal Commission and Regulatory Takings*, 17 PAC. L.J. 863, 864 (1986). During the winter of 1978, high winds, causing unusually high tides, threatened to undermine and erode the sand from under the Bailey house. *Id.* Bailey employed a contractor to place rocks directly in front of the house. *Id.* Bailey was informed that installing the rocks without a coastal development permit was illegal. *Id.* He was told, after five months of administrative procedures, that the permit would issue only upon a public access easement condition. *Id.* The constitutional proscription against taking private property for public use without just compensation is triggered by this type of administrative abuse. *Id.*

55. Justice Holmes warned, "[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416. The *Nollan* Court should have followed this warning and not shortcut the solution for governmental overreaching. Courts should follow the *ad hoc* analysis in every situation to assure justice and fairness when state actions cause economic injury. *See Penn Central*, 438 U.S. at 124.

56. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3143 (1987).

57. STAFF REPORT, *supra* note 5, at E-47.

ment before he submitted his permit application,[58] and was aware that the Commission had similarly conditioned most of the other lots along the same beach.[59] These facts show that the public, rather than Nollan, had a pre-existing right to a portion of the Nollan beach property because of its prior consistent use.[60] The Court, however, erroneously ignored these facts in its discussion. Instead, the Court discussed only carefully selected facts of its own choosing so that it could determine that the Commission was unfairly imposing on Nollan's property rights.[61] Had the Court properly considered all of the facts, it would have concluded that Nollan was singling himself out for a monetary windfall.[62]

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58. *See* Brief for Appellee at 30, Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

59. *See Nollan*, 107 S. Ct. at 3159 (Brennan, J., dissenting). Nollan was aware that stringent regulation of development along the California coast had been in place since at least 1976, when the California Coastal Act was enacted into law. *Id.* The specific deed restriction that Nollan had challenged had been imposed since 1979 on all 43 of the shoreline new development projects in the Faria Family Beach tract. *Id.* At the time of the Nollan permit application, the deed restriction was authorized by law and was reasonably related to the objective of ensuring public access. *Id.*

60. *Nollan*, 107 S. Ct. at 3159 (Brennan, J., dissenting).

61. *Id.* at 3155 n.4.

62. Brief for Appellee at 30, *Nollan*, 107 S. Ct. 3141 (1987) (No. 86-133). The *Nollan* facts are analogous to those in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). The Monsanto Company was aware that the Environmental Protection Agency (EPA) was authorized to use and disclose any data received from a patent registration applicant. *Id.* at 1006. Monsanto submitted certain requisite data despite the disclosure provision in the statute. *Id.* The EPA used and disclosed the data in a manner that was authorized by law at the time of the submission. *Id.* at 1006-07. The *Monsanto* Court stated that Monsanto was aware of the conditions under which the data was submitted, and that the conditions were rationally related to a legitimate government interest. *Id.* at 1007. Monsanto's voluntary submission of the data was exchanged for the economic advantages of a patent registration, and therefore no taking occurred. *Id.* Similarly, Nollan submitted an application for reconstruction when he was aware of the access easement requirement. The *Nollan* Court, therefore, should have held that no taking had occurred. *See also* Corn Products Refining Co. v. Eddy, 249 U.S. 427, 431-32 (1919) (court must hold manufacturer's right to maintain secrecy as to his compounds and processes subject to the state's exercise of its police power, in promoting fair dealing by requiring the manufacturer to fairly identify the nature of the product).

Nollan was on notice that the Commission would approve new developments only if provisions were made for lateral beach access. *Nollan*, 107 S. Ct. at 3159 (Brennan, J., dissenting). By requesting a new development permit, Nollan had no reasonable expectation that he would receive the permit application without the easement. *Id.* He had no investment-backed expectation and, therefore, no taking occurred. *See Monsanto*, 467 U.S. at 1005. A reasonable investment-backed expectation is more than a mere unilateral expectation of an abstract need. *Id. See* Webb's Fabulous Pharmacies Inc., v. Beckwith, 449 U.S. 155, 161 (1980).

The majority noted that if Nollan were singled out to bear the burden of California's attempt to remedy the visual access problems, the state's actions might violate the Taking Clause and Equal Protection Clause. *Nollan*, 107 S. Ct. at 3147 n.4. The Court restated that one of the principal purposes of the Taking Clause is to bar the government from forcing some people to bear alone public burdens that in all fairness and justice the public as a whole should bear. *Id. See also* San Diego Gas & Elec. Co., v. San Diego, 450 U.S. 621, 656 (1981); Penn Central Transp. Co. v. New York City,

The Court's analysis of the nature of the easement illustrates its erroneous use of a presupposed conclusion. The Court defined the easement as a permanent physical invasion, disagreeing with the Commission's definition of the easement as a use regulation.[63] The Court correctly stated that the right to exclude is one of the essential sticks in the bundle of rights commonly referred to as property.[64] The Court also properly asserted that a permanent physical occupation of private property amounts to a taking,[65] regardless of the economic impact on the owner or the great public benefit.[66] The Court, however, incorrectly suggested that because Nollan's loss of his right to exclude destroyed a single strand in the bundle of property rights, it was automatically elevated to a permanent physical invasion. This conclusion, unsupported by its precedent, allowed the Court to find that if the condition was allowed, Nollan would have to relinquish his right to exclude. This relinquishment would be tantamount to a permanent physical invasion and, therefore, is a taking. This bootstrap argument was erroneous. The Court should have followed its prior holdings, which cautioned that the destruction of one property right did not necessarily preclude a finding other than a taking.[67]

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438 U.S. 104, 123 (1978); Armstrong v. United States, 364 U.S. 40, 49 (1960).

It is difficult to perceive how Nollan would have been singled out to bear the entire burden of public access to the beach for California. Coastal landowners have uniformly been required to submit their property to lateral beach easements, at the public's command, for years. STAFF REPORT, *supra* note 5, at E-28. The Court was incorrect in letting the public bear Nollan's share of California's burden of protecting public beach access.

The fairness of the land restriction on the Nollan property lies in protecting the public from the actions of Nollan. Brief for Appellee at 29, *Nollan*, 107 S. Ct. 3141 (1987). Nollan was aware of the Commission's obligation to require him to acknowledge a lateral easement across his beachfront property as a condition of development approval long before he purchased the lot and built the house. Striking the access condition resulted in an absolute monetary windfall to Nollan and a detriment to the public. *Id.* at 30.

63. *Nollan*, 107 S. Ct. at 3145.

64. *Monsanto*, 467 U.S. at 1011; *see* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

65. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982). The Court had previously recognized that not every assertion of physical invasion is determinative of a taking. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980). Prior to *Nollan*, the Court had distinguished between an exclusive, permanent use of property and a temporary, shifting use. *Loretto*, 458 U.S. at 428. When an ordinary traveler passes and repasses along the streets, his use and occupation of the property are temporary and shifting. *Id.* One moment the space is occupied and the next moment the spaced is abandoned. *Id.* at 429. A more permanent occupation acts as a disposition of the property, as if it had destroyed that amount of ground. *Id.* That space is wholly lost concerning its actual use. *Id. See* St. Louis v. Western Union Tel. Co., 148 U.S. 92, 98-99, 101-02 (1893). The Court incorrectly held that the public's right to pass and repass along the Nollan shoreline was a permanent physical occupation of the Nollan property.

66. *Loretto*, 458 U.S. at 434.

67. Andrus v. Allard, 444 U.S. 51, 65-66 (1979). The government does not sim-

Finally, although the Court presumptively formulated the direct nexus test to alleviate confusion in land use regulation, this test will not solve the problem.[68] First, the entire test depends on an inter-

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ply take a single strand from the bundle of property rights where a permanent physical occupation of the property occurs; it chops through the bundles taking a slice of every strand. *Loretto*, 458 U.S. at 435. *Cf. Andrus*, 44 U.S. at 66. Deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking. *Loretto*, 458 U.S. at 436. Therefore, *Nollan* incorrectly held that the loss of the right to exclude was tantamount to a permanent physical invasion and thus a taking.

68. *Nollan*, 107 S. Ct. at 3148. The Court's many holdings reveal the difficulty of trying to delineate between destructions of property by lawful governmental actions that require compensation, and consequential destructions of property that are not compensable. Armstrong v. United States, 364 U.S. 40, 48 (1960). Courts have attempted to balance constitutionally guaranteed private rights with the needs of the community. *Id.* If the landowner directly benefited from the dedication, compensation was denied. Note, *Forced Dedications in California*, 20 HASTINGS L.J. 735, 744 (1969). For discussion of dedication, see *supra* note 3. One case indicated that it would take the city 100 years to buy all the land it needed to meet the growing needs of the community, due to lack of public funds. Southern Pacific Co. v. Los Angeles, 242 Cal. App. 2d, 38, 48, 51 Cal. Rptr. 197, 203 (1966). Similarly, if the Commission is required to compensate the private landowners along California's coastline for access privileges, its funds will quickly be depleted, and there will be no more protection of beach access for the public.

Dedication without compensation was sometimes necessary and socially desirable. Note, *supra*, at 744. If the landowner created the need for the government to acquire the property and he received an economic benefit from the consequent government program, it appeared exceptionally fair and eminently justifiable to take the property without compensation. *Id.* On the other hand, it was difficult to justify the holding that a forced dedication was a valid exercise of police power. There are serious constitutional, as well as conceptual, difficulties in holding that an actual physical acquisition of land is not a taking. *Id.* at 745.

The Court has generally been unable to develop any set formula for determining when justice and fairness are outweighed by economic injuries caused by public action requiring a compensable taking. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004 (1984); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central v. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *accord* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 295 (1981).

Government regulation, by definition, involves the adjustment of private rights for the public good. *Monsanto*, 467 U.S. at 1004. Often this adjustment curtails some potential for the use or economic exploitation of private property, but to require compensation in all such circumstances would effectively compel the government to regulate by purchase. *Id.* "Government hardly could go on if to some extent values incident to property could now be diminished without paying for every such change in the general law." Andrus v. Allard, 444 U.S. 51, 65 (1979); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The Taking Clause, therefore, preserves governmental power to regulate, subject only to the dictates of justice and fairness. *Andrus*, 444 U.S. at 65; *see* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

Compensation was required only for a governmental taking of property and not for losses occasioned by mere regulation. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). This imprecise rule is of little help in deciding any given case. *Id.* The predominant characteristics of this area of law are confusion and incompatible results. *Id.* Only in a few specific instances has it become predictable that the compensation clause of the fifth amendment will or will not be held applicable. *Id.* The Court has not yet discovered the principle upon which it can rationalize the cases. *Id.* Commentators have identified the pattern of Supreme Court opinions in taking cases as a crazy-quilt that is uniformly unsatisfactory. *Id.*

The courts have developed two basic approaches to distinguish takings from po-

pretation of the facts of each case. *Nollan* demonstrates the problem with this analysis by viewing the facts, first as the Court narrowly interpreted them, and also under a broader, more proper interpretation.

Under the Court's narrow view, the Commission had to show that the Nollan project burdened coastal visibility and added a psychological impression that no nearby public beach existed, and that the easement condition on the Nollan permit would alleviate the obstacles that the project imposed.[69] The Court inartfully reasoned that the requirement allowing the public to walk laterally along Nollan's property would apply to people who were already on the beach, therefore, neither a need for visual access nor a psychological barrier could have existed.[70] This narrow factual reading allowed the Court to conclude that the condition and the stated public purpose were not related.[71]

Under a broader interpretation of the facts, the Commission would have had to show that the Nollan project burdened a pre-existing public right-of-way along the coastline and that the access easement would preserve that pre-existing public right in the least intrusive manner to Nollan.[72] Using this broader interpretation, the

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lice power regulations. *Id.* The earlier theory drew on traditional legal concepts for its rules and used standards such as an appropriation of a proprietary interest, a physical invasion giving rise to a prescriptive easement, and a nuisance concept to establish a taking. *Id.* The second approach was developed in the first quarter of this century, when a proliferation of landowner claims responded to expanded governmental regulation. *Id.* The Court proposed a balancing test between public need and private loss for application on a pragmatic, case-by-case basis. *Id.*

69. *Nollan*, 107 S. Ct. at 3148.

70. *Id.* See *infra* note 73 for further discussion on the Court's presumptions of the *Nollan* facts.

71. *Nollan*, 107 S. Ct. at 3148.

72. *Id.* at 3154 (Brennan, J., dissenting). When a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, that expectation cannot be disrupted unless the government pays for the property and uses it for a public purpose. *Id.* In *Nollan*, the private landowner threatened the disruption of settled public expectations of use. *Id.* The state merely sought to protect public access expectations from Nollan's interference. *Id.*

Deeds often include right-of-way easements, reserving to the government valuable minerals, together with roads and privileges reasonably necessary to explore, produce, and transport any of the reserved minerals off the property. Foster v. United States, 607 F.2d 943 (1979). Also, farmers or ranchers have been granted a right-of-way across land for the conveyance of water by long term, continuous use of the conveyance. This right has been characterized as a claim of right vested by Congress. 132 CONG. REC. S.15,806-07 (daily ed. Oct. 9, 1986) (remarks of Senator Wallop on H.R. 2921, the Ditch Right of Way bill amending section 501 of the Federal Land Policy and Management Act, 43 U.S.C. § 1762 (1982)).

In determining when a protectable land interest exists, an important distinction must be made between those situations where a party actually possesses an interest in the land, and those situations where a party is merely seeking to secure an interest in the future. *See* Laitos & Westfall, *Government Interference With Private Interests In Public Resources*, 11 HARV. ENVTL. L. REV. 1, 36 (1987). In *Nollan*, the public had a protectable interest and Mr. Nollan did not. The Court was incorrect in failing

Court would have found, even under its strict nexus test, that the condition was directly related to the state's purpose and that the Commission was legitimately using its police power.[73]

The second problem with the Court's new test lies in its failure to add any predictability in the outcome of taking analysis. The interpretation of the facts was the critical factor in the *Nollan* case, not the nexus relationship. Indeed, application of an indirect nexus rather than the strict, direct nexus relationship, would have produced the same outcome in this case. Because *Nollan* is a typical taking case, an interpretation of the facts, rather than the Court's new nexus standard, will control the outcome. Thus, the Court's new nexus standard is rhetoric that merely adds to the confusion in taking cases.[74]

In sum, the *Nollan* case will create panic for government planners and developers. Environmental preservation has historically depended on the expert land planner's adaptability to the specific problem with which he is confronted. Flexibility in creating solutions balancing private growth and public needs has been the cornerstone of responsible development. The *Nollan* decision, creating an unworkably rigid rule, will hamper creative solutions to the multitude of problems that arise in land development.[75] The *Nollan* Court has ventured into areas that it cared not to tread upon in the past. In so doing, the Court has only created more confusion in the taking area. Because the heart of the Court's test is a fact-based analysis, rather than the direct nexus test, the outcome in future taking cases remains unpredictable.

Mary M. Cizerle

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to secure for the public its right to the Nollan beach area.

73. The Court incorrectly assumed the only burden with which the Commission was concerned was blockage of visual access to the beach. *Nollan*, 107 S. Ct. at 3155 (Brennan, J., dissenting). The Commission specifically stated in its report that the Nollan project would present an increase in view blockage and in private use of the shorefront; this impact would burden the public's ability to traverse to and along the shorefront. *Id.* Although the record is replete with references to the threat to public access along the coastline resulting from private build-out developments along the beach, the *Nollan* Court completely ignored the reality of infringing private landowners. *Id.*

74. *See generally* Sax, *Property Rights in the Supreme Court: Nollan No Bombshell*, 3 CAL. WATERFRONT AGE 6 (1987), *reprinted in* LAND USE INSTITUTE, ALI-ABA 1156, 1158 (August 1987).

75. *Nollan*, 107 S. Ct. at 3163 (Blackmun, J., dissenting).