The first prong of the *Agins* test,[733] asking whether land use controls "substantially advance legitimate governmental interests," has now been erased from takings jurisprudence, after a quarter-century run. The proper concern of regulatory takings law, said *Lingle v. Chevron U.S.A. Inc.*,[734] is the magnitude, character, and distribution of the burdens that a regulation imposes on property rights. In "stark contrast," the "substantially advances" test addresses the means-end efficacy of a regulation, more in the nature of a due process inquiry.[735] As such, it is not a valid takings test.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. A two-part test has emerged. The first part debuted in *Nollan v. California Coastal Commission*,[736] and holds that in order not to be a taking, an exaction condition on a development permit approval (requiring, for example, that a portion of a tract to be subdivided be dedicated for public roads)[737] must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise the condition is "an out-and-out plan of extortion."[738] The second part of the exaction-takings test, announced in *Dolan v. City of Tigard*[739] specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by

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from existing flood hazards, the government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." United States v. Sponenbarger, 308 U.S. 256, 265 (1939).

[733] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[734] 544 U.S. 528 (2005).

[735] 544 U.S. at 542.

[736] 483 U.S. 825 (1987).

[737] *Nollan* also applies to exactions imposed as conditions precedent to permit approval. Koontz v. St. Johns River Water Management District, 570 U.S. ___, No. 11–1447 (2013). To the argument that nothing is "taken" when a permit is denied for failure to agree to a condition precedent, Justice Alito stated that what is at stake is not whether a taking has occurred, but whether the right not to have property taken without just compensation has been burdened impermissibly. Id. at 10. The Court does not discuss what remedies might be available to a plaintiff who refuses to accept excessively demanding conditions precedent and thereby is refused a permit.

[738] 483 U.S. at 837. Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in Pennell v. City of San Jose, 485 U.S. 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of" the social evil (*e.g.*, congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 485 U.S. at 20, 22.

[739] 512 U.S. 374 (1994).