Inserting The Last Remaining Pieces into the Takings Puzzle

Douglas W. Kmiec
I have previously opined that the Supreme Court has effectively solved the takings puzzle, and it has. Like 1000-piece puzzles in the game room of a large family, however, near the end, a few pieces are missing. In truth, the problem is not so much missing as ill-fitting pieces left over from other puzzles long ago forgotten and now deserving abandonment. The ill-fitting takings pieces are *Agins v. City of Tiburon*, and the "ad hockly"-edged *Penn Central Transportation Co. v. New York City.* These cases perpetuate an overly deferential standard of review and proof burdens that undermine the goal of fairly balancing the reciprocally defined concepts of property and police power. Worse, these decisions mask a virtually insurmountable presumption of constitutionality that has too often been a presumption in favor of exclusion, felt most disturbingly by the least affluent. Troubling also

* Professor of Constitutional Law, University of Notre Dame; Straus Distinguished Professor, Pepperdine University, 1995-1996. The author is grateful to Pepperdine law students Eric W. Hagen and Colleen Connor for their able research assistance.

is that the *Agins/Penn Central* presumption of the regulation's validity is a presumption against freedom of ownership, responsibly defined as encompassing both individual right and duty.\(^5\)

The effects of this presumption could not be understood while the takings puzzle remained unsolved because property scholarship and its sub-area of takings were traveling simply in contesting camps, lobbing aphorisms of libertarian autonomy against benign statist redistribution.\(^6\) Some of this still goes on, of course, but with more subtle and prudent insight, rather than simple partisanship, discerning property to be a device mixing "independence and cooperation" by which we form community.\(^7\)

What follows is a brief recapitulation of the Supreme Court's analytical resolution of the takings problem and a case-specific examination of some areas where out-of-date *Agins* and *Penn Central*-generated pieces do not fit into the carefully arranged precedential framework of *Lucas v. South Carolina Coastal Council*,\(^8\) *Nollan v. California Coastal Commission*,\(^9\) and *Dolan v. City of Tigard*.\(^10\)

---

5. As Richard Epstein wrote in response to the presumption of validity: The obvious rejoinder is to ask why the Court should ever 'indulge' an assumption that this average reciprocity of advantage normally will apply, in light of the enormous political pressures from both minority factions and determined majorities that so often lead legislatures astray. . . . [T]he average reciprocity of advantage in each case should be established by the evidence, rather than presumed as a matter of law.


7. See Carol M. Rose, *Property As the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 365 (1996). Professor Rose astutely observed: "But such heroic rhetoric rests on the quite mistaken notion that this most intensely social of institutions hinges on individualism alone, whereas in fact it thoroughly mixes independence and cooperation." Id. Somewhat understating the significance of her observations, Professor Rose found property to be not a keystone right, but an educative institution. *See id.* It is property's capacity to both connect and insulate us from community, however, that gives it this subtle educative, yet powerful, capacity. *See id.*


I. THE SOLUTION

The straightforward purpose of the Takings Clause is to avoid the disproportionate placement of public burdens upon a single property owner.¹¹

Yet, litigation over the clause has been difficult because it pits two indeterminate concepts—property and police power—against each other. Knowing where private rights end and public power begins is the essence of the quandary. Until recently, the difficulty revealed no sign of abating. Arguably, *Lochner v. New York*² blocked the path. *Lochner*, of course, is the talismanic name for the proposition that federal judges ought not legislate from the bench.³ Judicial restraint is a commendable principle born of separation of powers doctrine and, in the land-use context, of federalism. Yet, misplaced restraint in the face of government overreaching defeats constitutional purpose and is about as helpful as misplacing the explanatory picture on a puzzle box cover.

A. The Natural Law—Objective Reality of Property

The resolution of the takings puzzle depends upon realizing that the judicial protection of legitimate private property rights is not tantamount to inappropriate judicial theorizing about social policy. Why are these situations different? In *Lochner*, the majority had no objective standard by which to say that a legislative specification of the maximum number of hours to be worked by a baker was right or wrong.⁴ Reasonable minds

---

¹¹. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318-19 (1987) ("It is axiomatic that the Fifth Amendment's just compensation provision is 'designed 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.'" (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.").

¹². 198 U.S. 45 (1905).


¹⁴. See *Lochner*, 198 U.S. at 64 (summarizing the Court's holding).
could differ as to whether working more than sixty hours per week should be allowed, and the Court had no superior institutional resources or textual constitutional basis to say otherwise. In such case, what is right and wrong is mostly a matter of positive law. By contrast, in takings cases, what is right or wrong in terms of acceptable levels of regulation is governed more overtly by the objective, natural law basis of common law property rights.

American constitutional history declares Jeremy Bentham to be mistaken: property and law are not “born together,” and they do not die together either. Private property preexists govern-

15. It is not entirely the product of positive law because at some point labor arrangements can be so oppressive that they threaten the human nature of the laborer. Slavery is the obvious example.

16. Natural law assumes that “every person and every thing has been created with an inherent or intrinsic nature and that no human person or positive law can supersede this nature.” DOUGLAS W. KMIEC, THE ATTORNEY GENERAL’S LAWYER 29-30 (1992). Natural law is an ancient concept. For example, Cicero described it as “the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite.” MARCUS TULLIUS CICERO, LAWS—BOOK I, reprinted in THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 42, 44 (Clarence Morris ed., 1959). Natural law profoundly influenced this country’s founders. Chester Antieau observed that “it would be amazing if any Revolutionary leader of the Commonwealth could be found who did not subscribe to the doctrines of natural law and right.” Chester J. Antieau, Natural Rights and the Founding Fathers—The Virginians, 17 WASH. & LEE L. REV. 43, 43 (1960). More recently, Philip Hamburger has observed that early “Americans tended to take for granted that natural law had a foundation in the physical world and yet had moral implications.” Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 YALE L.J. 907, 923 (1993). At its philosophical essence, natural law assumes (1) that man is intelligent, (2) that reality exists, and (3) with his intelligence, man can apprehend reality and make decisions that advance his defined nature. A classic treatment on these aspects of natural law is JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 109-23 (1960). More modern expositions can be found in HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMEERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994) and STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION (1994). In addition, a readable and concise summary of natural law is CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT (1993).

The natural law of property has also been examined. See Douglas W. Kmiec, The Coherence of the Natural Law of Property, 26 VAL. U. L. REV. 367 (1991). For purposes of takings jurisprudence and the present Article, it is important to understand that property is a mixed natural and positive law concept, an insight derived from Blackstone. See id. at 370-71. Thus, part of what we characterize as a property right does not derive from legislative enactment, but part does.

17. But cf. JEREMY BENTHAM, THEORY OF LEGISLATION 111-13 (C.K. Ogden ed.,
ment and is protected not merely because this or that law may be in place, but because it advances the nature of the human person more effectively and directly than alternative forms of property distribution.18 Furthermore, insofar as human nature predates the origin of the American republic, the manifestation of that nature in private property has a claim to special solicitude.19 Madison made this point when he described a primary purpose of the newly formed government of the United States to be the protection or preservation of property.20 If all property rights originated with legislative enactment, Madison's statement would be nonsensical or at best tautological—the primary

18. Law students are generally familiar with the economic argument for private property based in utility, see Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967), but they are less familiar with the relationships that exist between property and person or property and community. An early observer of the natural law effect of property on the formation of community was Alexis de Tocqueville, who appreciated that the American fascination with trade (or property) helped to forge social and moral bonds and an attitude of service or meeting the needs of others. See 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 68 (Phillips Bradley ed., 1995); 2 DE TOCQUEVILLE, supra, at 115-24. Modern religious justification for private property is much to the same effect:

The appropriation of property is legitimate for guaranteeing the freedom and dignity of persons and for helping each of them to meet his basic needs and the needs of those in his charge. . . . The universal destination of goods remains primordial, even if the promotion of the common good requires respect for the right to private property and its exercise.

UNITED STATES CATHOLIC CONFERENCE, INC.—LIBRERIA EDITRICE VATICANA, CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2402-03 (1994); see also Margaret J. Radin, Property and Personhood, 34 STAN. L. REV. 957, 977-78 (1982) (discussing her conception of the special sanctity of the home premised upon the philosophy of G.W.F. Hegel).

19. See supra note 16 (stating that the protection of property rights as a natural law concept has played a central role in the history of the United States).

20. James Madison wrote: "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, Property, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983).
purpose of government would then be to protect or preserve whatever government determined to be its primary purpose.

To be sure, property is an admixture of natural and positive law. The natural law reality of property's common law manifestation, however, does supply the judiciary with an independent basis for evaluating the fairness of legislative enactment. The Court understood this early in this century, but regretfully wandered. For example, in *Village of Euclid v. Ambler Realty Co.*, the Court accepted, at the level of general theory, that police power regulation is to be linked to the prevention of harm, defined in terms of common law nuisance principles. The Court would give local legislatures a level of latitude in interpreting what is and is not harmful, but the Court reassuringly and wisely said that it would not forsake its role of determining where regulation as applied to particular parcels exceeded flexible, yet still perceptible, limits on government power. Immediately after *Euclid*, the Court kept its word, but perhaps frightened or confused by *Lochner* and by a president threatening to remake the Court in his own image, the Justices abandoned this duty of limiting government encroachment for a half-century.

During that extended period, establishing a regulatory taking was precluded effectively by the skewed deference of the rational basis standard or the insuperable difficulty of proving that regulation deprives property of all value. Prior to recent case developments in the Supreme Court, a regulatory taking would be found largely where regulation could not be conceived as bearing

---

22. *See id.* at 394-95. Professor Rose has observed correctly that modern property law doctrine is largely, though not exclusively, "bottom-up." Rose, *supra* note 7, at 338. *[N]uisance law defines the boundaries of property by reference to the 'reasonable' practices of ordinary people. Even a subject as formalistic as local zoning very largely reflects the ways that property owners actually use their land. Indeed, it is arguable that top-down regimes themselves only derive from usurpations of pre-existing bottom-up property. Id.* at 338-39.
25. *See generally William E. Leuchtenburg, The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (describing President Roosevelt's attempt to expand Court membership for ideological purposes during the mid-1930s).
any relationship to a legitimate state interest or where the taking denied its owner all economically viable use of the land.\textsuperscript{26} Given the weak nature of the rational basis standard, some courts merged the standards into the single proposition that only regulation that renders property valueless is subject to takings challenges.\textsuperscript{27} A few courts held that even land-use regulation contrary to state law may advance "legitimate state interests,"\textsuperscript{28} perhaps as a corollary to the proposition that the federal constitution does not supply remedies for state law violations.\textsuperscript{29}

\textbf{B. Physical Occupations and the Common Law Right To Exclude}

The rediscovery of the natural law objective reality of the common law features of property now offers the Court the prospect of better resolving takings claims. The first analytical trace of this rediscovery of the reality of private property occurred, neither in \textit{Nollan} nor its rhyming sibling \textit{Dolan}, but in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{30} Here, the categorical protection of the right to exclude emerged from the ancient protection against trespass.\textsuperscript{31} At first, \textit{Loretto} seemed both startling and trivial. The constitutional need to compensate for a four-inch-square box and accompanying cable wire\textsuperscript{32} seemed

\begin{itemize}
  \item \textsuperscript{26} See, \textit{e.g.}, Agins v. City of Tiburon, 447 U.S. 255 (1980) (upholding a zoning limitation against a facial challenge).
  \item \textsuperscript{27} See, \textit{e.g.}, Hunziker v. State, 519 N.W.2d 367, 370 (Iowa 1994); Finch v. City of Durham, 384 S.E.2d 8, 16 (N.C. 1989); Gerijo, Inc. v. City of Fairfield, 638 N.E.2d 533, 537 (Ohio 1994).
  \item \textsuperscript{28} See, \textit{e.g.}, Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104-05 (8th Cir. 1992) (finding that enacting a zoning plan in violation of state law is not a basis for a substantive due process claim); Bello v. Walker, 840 F.2d 1124, 1126 (3d Cir. 1988) (stating that the unlawful denial of a permit is not a taking); Conistin Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (finding that rejecting a site plan in violation of state law is not a basis for a substantive due process claim); Chiplin Enters., Inc. v. City of Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983) (finding that a violation of state law is not necessarily a violation of constitutional rights).
  \item \textsuperscript{29} See Nordlinger v. Hahn, 505 U.S. 1, 26 (1992) (Thomas, J., concurring); Snowden v. Hughes, 321 U.S. 1, 6-7 (1944).
  \item \textsuperscript{30} 458 U.S. 419 (1982).
  \item \textsuperscript{31} See id. at 435.
  \item \textsuperscript{32} See id. at 422.
\end{itemize}
downright silly in the face of the million dollar diminutions that had not merited compensation. Yet, Loretto's significance was great because it reminded the Court that no matter how high-minded the justifications for a public regulatory scheme might be, in a democratic republic with a natural law foundation, the objective reality of privately-held property resources limits those schemes.

As important as was Loretto's reminder, its practical significance was less: not much land-use regulation depends directly upon physical occupation. And, at first, neither the Court nor land-use players generally realized how directly the analytical line based upon the common law of property connected Loretto with Nollan, and later Lucas with Dolan. Nevertheless, with Nollan, the Court returned more explicitly to the sounder course of defining property and police power reciprocally in relation to a state's background principles of property law, especially the common law of nuisance. With heightened scrutiny, now arguably
(or at least possibly) to be applied in all land-use takings cases, the Court gave genuine adverbial and adjectival strength to the previously feeble recital of "substantially advancing a legitimate governmental interest," which had become indistinct from the reasonableness or mere rational basis standards applied in other economic contexts.

C. Essential Nexus—The Proper, Partial Eclipse of Diminution-in-Value

Although some complained that Nollan broke from precedent, in actuality the intervening diminution-in-value cases from time to time, and from place to place, either because of changes in the common law, or because of alterations by statute. At any one time and place, however, there is a maximum combination of rights, privileges, powers and immunities that is legally possible, and which constitutes complete property.

Id. § 5, cmt. e.

As reflected throughout this Article, the Court's ability to resolve the takings puzzle hinges on its recognition that, as variable or imprecise as this definition of the background principles of property may be, it is not an empty definition—or at least, it is not as empty as the rational basis standard employed in Agins and Penn Central indicates. In this Article, I suggest that particular case authority—dealing with common law rights to develop; the identification of property interests for purposes of substantive due process analysis; and vested rights theory—should be brought into line with the Court's recognition of the "background principle" content of the Takings Clause. See infra text accompanying notes 118-35. This should not be misunderstood as a suggestion that the Court "constitutionalize" the definition of property, however, beyond the general principles articulated in this footnote, and the large body of state common law that is consistent with it.


[There is no basis in Nollan itself for concluding that the Supreme Court decided to apply different takings tests, dependent on whether the takings were purely regulatory or physical. The Court promulgated a principle for all property and land-use regulation matters.

Id. at 483. The court invalidated a statute requiring landlords to provide renewal leases to employees of nonprofit hospitals, relying upon "the judiciary's constitutional duty to decide this case within appropriate precedential and judicial review templates, [which requires the court to conclude that] the generalized presumption of constitutionality accorded to statutes cannot substitute for the fundamental defect [of the statute], to wit, no substantial advancement of a legitimate State interest . . . ."

Id. at 487.


were the aberrations. Not surprisingly, the inventor of the diminution-in-value standard, Oliver Wendell Holmes, disavowed America’s natural law tradition, a trait shared by Justice David Souter. Yet, it is surely ironic that Justice Holmes’s decision in *Pennsylvania Coal Co. v. Mahon* has been lionized so long for assisting individual property rights. This is deception. Holmes’s “too far” formulation is about as helpful to a correct takings outcome as someone—say, on his way to the kitchen during a commercial break—inserting into a puzzle-in-progress a piece that deceivingly appears to, but does not, fit. Having abjured properly Herbert Spencer’s *Social Statics* in his famous *Lochner* dissent, Holmes flayed about for an alternative

37. As a proponent of pragmatism, Holmes tended to overlook even the obvious. He wrote tellingly: “The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.” Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

38. In a remarkably heated, and historically disingenuous, dissent in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), voiding part of the Indian Gaming Act and finding that Congress may not use its commerce power to override common law principles of state sovereignty embedded in the Eleventh Amendment, Justice Souter decided to launch a somewhat nongermane attack (really a denial) of America’s entire natural rights history. See id. at 1177-78 (Souter, J., dissenting). Justice Souter, among other things, mocked the notion that America was founded upon “certain vital principles” of natural justice, id. at 1177, arguing based on an academic book from the 1980s that “[l]ater jurisprudence” (which he does not identify) vindicated the view that “the idea that ‘first principles’ or concepts of ‘natural justice’ might take precedence over the Constitution or other positive law ‘all but disappeared in American discourse’.” Id. at 1177 (citation omitted). This grievance that Justice Souter apparently has against the common law, state sovereignty, and the natural rights of mankind at the foundation of the American republic, see THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“All men are ... endowed ... with certain unalienable Rights”), is perhaps the best explanation of his rather consistent dissent to the Court’s takings cases in *Lucas* and *Dolan*. As the Chief Justice observed for the Court in *Seminole Tribe*: “[i]n putting forward a new [weakened] theory of state sovereign immunity, the dissent develops its own vision of the political system created by the Framers . . . .” *Seminole Tribe*, 116 S. Ct. at 1131.


40. See generally Thomas W. Fahey, Jr. & Richard T. Roznay, *Aquifer Protection in Connecticut: Environmental Land Use Restrictions Run Deep*, 68 CONN. B.J. 98, 112 (1994) (stating that it was not until Pennsylvania Coal that the Court found an “individual right violated when overruling necessity required the ‘preservation of life and property . . . by the sacrifice of that which is less valuable’”).

41. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s ‘Social Statics’.”).
means by which judicial review could continue. He hit upon diminution-in-value,\textsuperscript{42} but it has proven to be a pragmatist’s blind alley.

Diminution-in-value tries to assess the “propriety” of a government requirement using the non sequitur: “How much did it cost you?” As a takings standard, diminution-in-value is a side issue, an ersatz substitute for more searching inquiry into whether the police power has been asserted in league with, or in opposition to, the background principles of state property law.\textsuperscript{43} Even \textit{Penn Central}\textsuperscript{44} recognized this with its passing reference to “reasonable investment-backed” expectations.\textsuperscript{45} These expectations are largely common law ones. If the Court is to find the proper denominator for the loss calculation fraction it speculates about in \textit{Lucas},\textsuperscript{46} the answer can be found in these common law expectations.

More on the missing denominator puzzle piece in a moment, but first it must be noted that \textit{Nollan}’s primary requirement that there be an essential nexus between regulatory means and

\begin{itemize}
  \item \textsuperscript{42} \textit{See Pennsylvania Coal}, 260 U.S. at 413 (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).
  \item \textsuperscript{43} \textit{Cf. Daniel A. Farber, Public Choice and Just Compensation}, 9 CONST. COMMENTARY 279, 304 (1992), arguing for a uniformity principle that would provide: a strong argument for compensation when the government uses a preservation ban to achieve the same goal [as an acquisition]. The uniformity rationale also helps explain why the \textit{Lucas} rule applies only to land, since the government does not customarily seize personal property for preservation purposes. It also explains why incidental effects on land values are irrelevant; unless a regulation is targeted at land use, it is unlikely to be a covert method of establishing a nature preserve.
  \item \textit{Id.}
  \item Oddly, however, Professor Farber does not extend his uniformity rationale to what he calls the large “grey area” that exists between acquisition and preventing a nuisance. \textit{See id.} at 305. He asserts that this grey area is not the “functional equivalent” to acquisition. \textit{See id.} at 304-05. With respect, however, that assertion begs the question of the allocation of the right to develop under the background principles of state property law. \textit{See infra} notes 137-49, 206-07 and accompanying text (arguing that common law rights of development cannot be ipso facto and retroactively declared nonexistent without compensation for the same reason that Professor Farber finds compensation necessary for a narrower band of acquisition).
  \item \textsuperscript{45} \textit{See id.} at 124.
  \item \textsuperscript{46} \textit{See Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1016-17 n.7 (1992).
\end{itemize}
ends failed to convey how property and police power are reciprocally defined against the backdrop of state property law. Both the opinion and the opinion's author have been denigrated. Some commentators argued for confining the opinion to cases in which a property concession existed. Land-use regulators contended that all the case required was a facile matching of regulatory means and ends. Thus, if the public end was to construct a bike path over a permit applicant's property, then it should be a simple matter to require the conveyance of an easement or fee interest underlying the path.

The manipulation of Nollan in this fashion occasionally is aided by a generation of efficiency-based instruction in law schools, portraying all harms merely as competing resource demands. This perspective blurs the power of property concepts, especially at common law, to establish causation in legal terms. For Ronald Coase and economic analysis, it is true that polluters and breathers contend for the same air, and one arguably rational way to allocate air is in terms of who values the resource more highly. However, law is more than economics; law is also fairness. And fairness is embodied in the common law's reasoned respect for private choices that sometimes forego wealth's redistribution or maximization.

Had the legal community paid full attention, it could have gleaned from the Court's implicit focus on causation some hint of the significance of the fairness consideration in the working out

47. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987).
49. See, e.g., Frank I. Michelman, Takings, 1987, 88 COLUM. L. REV. 1600, 1608 (1988) ("The decision seems most satisfactorily understood as a further manifestation, albeit in somewhat surprising form, of the talismanic force of 'permanent physical occupation' in takings adjudication.").
50. See id.
52. See Coase, supra note 51, at 41-42.
of regulatory taking disputes. In *Nollan*, an important footnote to the articulated essential nexus standard disclosed this emphasis.\(^5\) Shortly after *Nollan*, the point was made explicit in the dissenting opinion of Justices Scalia and O'Connor in *Pennell v. City of San Jose.*\(^4\) In that case the Court declined—largely on ripeness grounds—to invalidate a rent control measure that facially precluded landlords from raising rents if, among other reasons, their particular tenants were down on their luck and suffering personal financial hardship.\(^5\) The dissenters properly saw that the law's facial invalidity derived from its disregard of causation, and that this statutory defect trumped the ripeness concern.\(^6\) The dissent stated:

Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the 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 our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.\(^7\)

---

53. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987). Justice Scalia, foreshadowing the Court's opinion in *Dolan*, wrote:

If the Nollans were being singled out to bear the burden of California's attempt to remedy [the various regulatory] problems, although they had not contributed to [them] more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.

*Id.*


55. See *id.* at 15.

56. See *id.* (Scalia, J., concurring in part and dissenting in part).

57. *Id.* at 20 (Scalia, J., concurring in part and dissenting in part).
D. Takings and Causation Reattached

Dolan advanced the reattachment of takings jurisprudence and causation. Dolan also limited police power authority to impose land dedication conditions on a permit application to circumstances in which the dedications are "roughly proportional" to the needs created by the proposed land use. Nominally, Dolan appears to extend the nexus analysis begun in Nollan. As the Court suggested in the Nollan footnote referenced previously, however, the essential nexus must connect not only regulatory means and ends but also the need for this particular regulatory imposition on this particular landowner. Dolan's "rough proportionality" language thus inserts the causation principle fully into Nollan's essential nexus, and in so doing, conveys that government has the burden of justifying the regulation and it must reconcile its justification with the state's law of property. As indicated below in the discussion of California's Ehrlich decision, the puzzle-solving work that remains is to have state and lower federal courts comprehend fully, and apply more widely, those two requirements.

59. See Dolan, 512 U.S. at 391.
61. See infra notes 161-258 and accompanying text.
62. Some courts are applying Dolan faithfully and are using the causation principle discussed in the text of this Article. Because the causation principle is an essential part of the Fifth Amendment's balanced and reciprocal definition of property and police power, its application, notwithstanding heightened scrutiny, has not uniformly favored the landowner. Compare Henderson Homes, Inc. v. City of Bothell, 877 P.2d 176 (Wash. 1994) (invalidating a fee-per-lot charge), with Trimen Dev. Co. v. King County, 877 P.2d 187 (Wash. 1994) (determining that an exaction fee calculated in reference to the zoning, projected population, and assessed value of a specific site comports with Dolan). See also Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 486 (N.Y. 1994) (noting that when the state acts it must "show a legitimate, substantial State interest that is closely, causally related to the action undertaken") (emphasis added), cert. denied, 115 S. Ct. 1961 (1995).
E. Lucas—The Right Methodology Applied Too Narrowly

_Lucas_ might have completed the puzzle altogether; it strengthened the analytical bond between the background principles of state property law and the reciprocal definition of property and the police power. Ironically, the state's own argument facilitated this salient analytical connection by calling upon the harm/benefit distinction in its failed attempt to justify a total deprivation of value. Yes, said the Court in _Lucas_, the harm/benefit distinction matters. But Justice Brennan taught us in _Penn Central_ that one person's harm is another's benefit. Thus, the distinction must be connected _neither_ to landowner _nor_ regulator assertion, but to the objective reality of the background principles of state property law. To justify its regulation, South Carolina needed to show by antecedent inquiry that what Mr. Lucas planned to do (build a house on a residentially platted beach lot) was never part of his property law bundle in the first place. South Carolina, as it turns out, could not meet this burden.

With the decision in _Lucas_, the Court solved the takings puzzle by explicitly returning regulatory power to its roots, as a reasonable codification of the _sic utere_ principle, the law of nuisance. This principle was indeed the "helpful clew" that Justice Sutherland, in _Euclid_, said it always would be for determining the acceptable scope of the police power in relation to private property. As I have written before:

With the distracting and unhelpful diminution in value factor functionally eliminated from the _Lucas_ case, the Court could see clearly that judicial intervention as a constraint upon the exercise of police power was not unwarranted judicial activ-

64. See _id._ at 1022.
66. See _Lucas_, 505 U.S. at 1008, 1031-32.
68. See _Lucas_, 505 U.S. at 1022-26.
ism, but duty borne of the Takings Clause itself. This was not judicial predilection displacing majority will, but judicial reminder within a federalist structure (drawing directly upon a federalist source—state common law) that ours is not a democracy simpliciter, but a democracy bounded by human, and necessarily, property rights.70

This solution does not, as some speculate, "make hash" of federalism.71 It is both highly respectful of federalism, by substantially defining property in relation to the background principles of state property law, and attentive to the checking function of the federal judiciary in a federalist republic. Consistently, federal intervention under the Court's takings puzzle solution wisely is deferred by ripeness considerations.72 Largely confined to putting states to the clear identification of its regulatory policy, federal intervention occasionally—but rarely as a practical matter—is aimed at ensuring that legislative factions within a state have not made sudden changes to its law in a way that burdens particular landowners unfairly or disproportionately.73

70. Kmiec, supra note 1, at 152. Furthermore, Justice Stewart observed:
Property does not have rights. People have rights. The right to enjoy property without lawful deprivation...is in truth a 'personal' right.... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.
72. See infra notes 84-87 and accompanying text.
73. As Justice Stewart wrote in his concurrence in Hughes v. Washington, 389 U.S. 290 (1967):
We cannot resolve the federal question whether there has been such a taking without first making a determination [as to whom owned the property in question]. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.
II. Finishing the Job—a Survey of Case Decisions and the Task of Completing the Takings Puzzle

The *Lucas*, *Nollan*, and *Dolan* analysis should govern the methodology of all land-use takings claims. This presently is not the case. Because *Lucas* involved a total taking and *Dolan* and *Nollan* arose in the context of property concessions, outcomes in other settings remain confused by the less-than-satisfactory rulings in *Agins* and *Penn Central*. Because it has been explained elsewhere why considerations of institutional competence, predictability, and federalism support the wider

---

*Id.* at 296-97 (Stewart, J., concurring).

78. See *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 274-79 (1992) [hereinafter *Leading Cases*]. The competence of state courts to strike a proper balance between individual right and majoritarian desire is manifest in traditional nuisance analysis. See *id.* at 275; cf. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 744-48 (1988) (discussing the judicial role in balancing the property rights of a corporation with the property claim of the community). As Professor Singer has pointed out, courts “develop moral principles to govern the proper exercise of power in the marketplace” and are “experts in such principles.” *Id.* at 747. Nuisance law gradually develops within a precedental system of law that invites reliance, investment, and initiative.

By way of contrast, state legislative bodies, or their local delegates, are not limited by prior decision or enactment and are highly responsive to the shifting interests of their political constituencies. See *Leading Cases, supra*, at 275. This is too much of a conflict of interest to overlook. “To allow the state legislature that enacts a regulation . . . also to determine when the federal constitution will require compensation unduly concentrates power in the hands of the legislature.” *Id.* at 276. No state or local legislative body can fairly appraise and neutrally balance public desire and private right.

Without the protection that the Court provides in *Lucas* [premised upon the independent handiwork of the state judiciary], a state legislature could too easily use sleight-of-hand to convert benefit-conferring regulations into harm-preventing regulations and thus avoid the requirement of compensation for what would otherwise be a compensable regulatory taking.

*Id.* at 275 n.55.

I also have previously pointed out the importance of nuisance determinations being both local and dynamic. See Douglas W. Kmiec, *The Original Understanding of
application of Lucas, Nollan, and Dolan, those issues will not be re-examined in this Article. Rather, in what follows, the focus is on particular case decisions and how a fuller resolution of the takings puzzle might exist outside the contextual limits of Lucas, Nollan, and Dolan.

A. Total Takings Versus Partial Takings—Defining a Reasonable Investment-Backed Expectation

Lucas solved the takings puzzle in the context of a total taking.79 These total takings were said to merit special scrutiny because they were not unlike physical occupations.80 The Court admitted that it had “never set forth the justification for this

the Taking Clause Is Neither Weak nor Obtuse, 88 COLUM. L. REV. 1630 (1988). Only nuisance law developed gradually over time by a judiciary in the same location as the property in question can meaningfully distinguish abrupt, reallocative legislative mischief from proper legislative codification of the subtleties of local ecology or local conceptions of harm. Also, because nuisance law is dynamic, it allows local communities to address new or unforeseen threats to the environment.

The fairness of looking to the state judiciary to sort out competing private and public claims is evident. The Lucas opinion enhances that fairness in two ways. First, Lucas places on the state the burden of establishing that a landowner’s use is nuisance-like because the state has the best appraisal of its regulatory interests and the greatest incentive to demonstrate any private incompatibility with them. See Lucas, 505 U.S. at 1029. Second, Lucas properly reserves some federal supervision of state nuisance determinations. See id. at 1031-32: Ripeness and abstention doctrines will hold these occasions to a minimum, but the fact that the Takings Clause is a federal assurance of private property rights means that it cannot be nonexistent. Such federal review follows logically from the implicit distinction between the independent reality of a state’s common law of property and the rare possibility that any court, even a state court, may misapply it. See, e.g., Henry P. Monaghan, Of “Liberty” and “Property”, 62 CORNELL L. REV. 405, 435-38 (1977) (recognizing the distinction between state property law and its interpretation); Jeremy Paul, The Hidden Structure of Takings Law, 64 S. CAL. L. REV. 1393, 1412-13 (1991) (asserting that federal review implies a federal component to a state definition of property); Barton H. Thompson Jr., Judicial Takings, 76 VA. L. REV. 1449, 1495-98 (1990) (suggesting federal review for takings that result from radical reversals of precedent by a state court).

Neither property nor police power is an absolute right; each evolves contextually and over time. State courts are in the best position to monitor this evolution, and the federal courts—by recognizing property as largely defined in an “independent source such as state law,” Board of Regents v. Roth, 408 U.S. 564, 577 (1972)—are in the best position to assay any takings claim that results from this evolution. This is true whether the dispute arises from state or federal regulation.

79. Lucas, 505 U.S. 1003.
80. See id. at 1017.
rule, but speculated that short of complete deprivation of value, legislatures need flexibility to adjust the "benefits and burdens of economic life" without having to pay for every change in general law. Implicit in that speculation was a proper desire to avoid judicial policy-making—in other words, to keep the federal courts from becoming super-zoning bodies. No federal court should be so enlisted. This appropriate concern, however, already is well-handled by substantial ripeness requirements that keep most land-use disputes out of federal courts. Following the Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, a landowner making an "as-applied" challenge to a regulation must obtain a final decision from local land-use authorities, and if dissatisfied with that final decision—or if making a facial challenge—pursue compensation in state court before appealing to a federal forum. In light of

81. *Id.*
82. *Id.* at 1017-18.
83. This is the view of Justice Stevens, who dissented in *Nollan, Dolan,* and *Lucas*. For instance, Justice Stevens wrote:

> If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.


85. 473 U.S. 172 (1985). As this Article went to press, the Court granted certiorari in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), cert. granted, 117 S. Ct. 293 (1996) (considering whether an "as applied" regulatory taking claim is ripe without a landowner application for theoretically available transfer of development rights).

86. See *Williamson County*, 473 U.S. at 186. The final decision requirement is not applicable to physical occupations. See *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). Some authority states that it is not applicable to dedication and exaction cases, see *Nelson v. City of Lake Oswego*, 869 P.2d 350, 353-54 (Or. Ct. App. 1994). Arguably, the final decision requirement is tied to an analysis of economic impact or diminution in value, although Professor Roberts has argued that it also might be used to give the government an opportunity to change its mind. See Roberts, *supra* note 84, at 45. The final decision requirement also is not required when it would be futile, although futility is difficult to establish. See *Celentano v. City of W. Haven*, 815 F. Supp. 561, 568-69 (D. Conn. 1993).
this well-formed ripeness doctrine, the total taking qualification is unnecessary for responsible federal judicial administration.

The total taking qualification also fails to provide sufficiently meaningful legislative flexibility because it is unstable, easily circumvented, and frequently indefensible in light of reasonable, investment-backed expectations premised upon the background principles of state property law.87 A total taking necessarily implicates the so-called denominator problem—that is, the identification of the property interest against which regulatory loss should be gauged. At first, in Pennsylvania Coal, the Court calculated diminution-in-value in relation to the affected interest.88 Subsequently, in Penn Central, the Court opined that loss must be calculated in relation to the whole property.89 In Lucas, the Court admitted that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, because the rule does not make clear the 'property interest' against which the loss of value is to be measured."90 The Court did not resolve the perplexity but counseled that:

The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings

There is no exception to the requirement that compensation first be pursued in state court. Every state court is capable of affording such remedy, even absent explicit statutory or state constitutional authorization, by virtue of the Fifth Amendment's self-executing nature. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 312-13 (1987).

87. Professor Epstein has suggested that the terminology of investment-backed expectation is problematic because it leaves donees unprotected. See Epstein, supra note 5, at 1370. This formal objection need not be true, however, as the expectation of a donee can be logically traced to the investment by purchase or labor of the donor.

88. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Justice Brandeis, in his dissenting opinion, argued that takings analysis should be performed in reference to the whole property and not just to the interest affected. See id. at 419 (Brandeis, J., dissenting).

89. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1977) ("In deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the . . . extent of the interference with rights in the parcel as a whole.").

claimant alleges a diminution in (or elimination of) value.\footnote{91}

In searching for the solution to the denominator problem in the objective manifestations of ownership as encapsulated in state law, the Court is on the right track. Significantly, it is a track that leads directly to the eventual de-emphasis of the total taking qualifier in \textit{Lucas},\footnote{92} or at least the recognition that there can be a "total taking of a partial estate"\footnote{93} based on distinct, investment-backed expectations. The likelihood was adverted to by the Court in \textit{Lucas},\footnote{94} and, in fact, \textit{Lucas} has not been solely confined to the total taking of a total estate context.\footnote{95}

The significance of reasonable investment-backed expectations is augmented further by the separate concurring opinion of Justice Kennedy,\footnote{96} who, in light of changes in the Court's composition,\footnote{97} is likely to be pivotal in the further deployment of the

---

\footnote{91}{Id. at 1017 n.7.} \footnote{92}{See id. at 1030.} \footnote{93}{D. Benjamin Barros, \textit{Defining 'Property' in the Just Compensation Clause}, 63 \textit{Fordham L. Rev.} 1853, 1872 n.99 (1995); see also Layne v. City of Mandeville, 633 So. 2d 608, 611 n.6 (La. Ct. App. 1993) (stating that \textit{Lucas} allows a fact-specific inquiry to determine impact on investment-backed expectations, even if the regulation is not a total taking). \textit{But see} Zealey v. City of Waukesha, 548 N.W.2d 528, 532 (Wis. 1996) ("We conclude that the United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel; rather the Court has consistently held that a landowner's property in such a case should be considered as a whole.") (emphasis added).} \footnote{94}{See \textit{Lucas}, 505 U.S. at 1019 n.8.} \footnote{95}{See, e.g., M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995). The court wrote: While \textit{Lucas} involved an alleged 'total taking,' one in which the land owner was deprived of 'all economically beneficial use' of his land, which is not true in the present case, the \textit{Lucas} formulation is useful for analyzing takings claims involving land use restrictions even when deprivation is not complete. Specifically, in analyzing a governmental action that allegedly interferes with an owner's land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property. \textit{Id.} at 1153. The court found that federal mining regulations in place at the time of acquisition precluded the landowner's taking claim. \textit{See id.} at 1155.} \footnote{96}{See \textit{Lucas}, 505 U.S. at 1032 (Kennedy, J., concurring in the judgment).} \footnote{97}{Justice White, part of the \textit{Lucas} majority, has since retired, with his seat on the Court having been filled by Justice Breyer, a Clinton appointee. Of the two dissenting Justices, Justice Stevens remains on the Court, while Justice Blackmun was replaced by Justice Ginsburg. Justice Souter filed a separate statement. \textit{See id.} at 1076.}
Justice Kennedy understands that the protection of the Takings Clause would tend "towards circularity," or, as mentioned before, be rendered a tautology if "[t]he expectations protected by the Constitution [were not] based on objective rules and customs that can be understood as reasonable by all parties involved." Recognizing that "nuisance prevention accords with the most common expectations of property owners who face regulation," Justice Kennedy would expand the base upon which reasonable expectations are formed to include "the whole of our legal tradition." It is not entirely clear what Justice Kennedy meant to include in that description, but the description implies that in a given case this broader source of expectation can run in favor of either the landowner or the regulating entity. For example, Justice Kennedy indicated that fragile land resources may justify special regulation not entirely within the domain of common law nuisance. On the other hand, the entirety of the legal tradition also persuaded Justice Kennedy that the promotion of tourism, so substantively unlike either nuisance or meaningful environmental concern, could not suffice as a regulatory justification "without a corresponding duty to compensate." Justice Kennedy was also skeptical of regulation occurring after investment.

Because what is considered "property" is largely a state law issue, fleshing out what counts as a "reasonable investment-

98. For one discussion of Justice Kennedy's significance in future takings cases see Richard J. Lazarus, Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases, 38 WM. & MARY L. REV. 1099, 1107-09, 1131-40 (1997), although Professor Lazarus, I believe, understates Justice Kennedy's essential agreement with the majority in Lucas.

100. Id. at 1035 (Kennedy, J., concurring in the judgment).
101. Id. (Kennedy, J., concurring in the judgment).
103. See Lucas, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment).
104. Id. (Kennedy, J., concurring in the judgment).
105. See id. at 1035-36 (Kennedy, J., concurring in the judgment).
106. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
backed expectation” should generally be the task of state courts.\textsuperscript{107} Some statutory modifications are inescapable, so that government can “go on” in the adjustment of the benefits and burdens of economic life, but, for the most part, these should be applied prospectively. The deference of Agins and Penn Central is unwarranted.\textsuperscript{108} The history of the regulatory state reveals that the fairness required by the takings inquiry can no more be presumed than a rational basis.\textsuperscript{109} To this end, there are several specific areas in which clarity of public authority and security of private investment might be advanced. In these areas, the phraseology of investment-backed expectation needs to be reconciled with several parallel, but thus far nonintersecting, lines of case authority that run through land-use practice.\textsuperscript{110} Premised upon the intellectually superseded decisions in Penn Central and Agins, these alternative lines of authority remain unconsciously at odds with the analytical direction of the Lucas majority and concurrence, as well as Nollan and Dolan.

1. Clear Affirmation of a Common Law Right To Develop

To illustrate, it is commonly assumed that property ownership invites, and thus assures, some responsible level of improvement or development. Yet precisely how are the development rights associated with the background principles of state property law, or for that matter, common law property ownership? The question is more problematic than it may first appear. Commentators have noted, for example, that many state decisions “do not recognize a property interest in either zoning modifications or existing zoning classifications.”\textsuperscript{111} Case law denying any vested right in existing public land-use classifications surely does exist,\textsuperscript{112} but just as surely it contradicts the objective, common

\textsuperscript{107} See supra note 78 (explaining the special competence of state courts over state or local legislatures or the federal judiciary).
\textsuperscript{109} See supra note 33.
\textsuperscript{110} See infra notes 111-49 and accompanying text.
\textsuperscript{112} See, e.g., Bankoff v. Board of Adjustment, 875 P.2d 1138, 1141 (Okla. 1994)
law premise of Lucas, Nollan, and Dolan. Indeed, the fact of this contradiction has led to an overly clever, but faulty, proposition that Nollan and Dolan might be finessed by the simple expedient of using formal eminent domain to take the equivalent of what would have been the dedication condition, and then “paying” for the property interest, not with cash, but with the “benefit” or privilege of a development permit. The authors of this hypothetical proposal recognize its intuitive implausibility by admitting that “[w]e would think it preposterous, for example, to compensate someone for a taking of land by letting him keep his car.” Indeed, it is preposterous. Too much modern land-use law is erected, courtesy of the highly deferential rational basis standard of Agins and Penn Central, not only upon the proposition that providing a benefit can cure the harm, but also upon the further mugger-like suggestion that it is all right to let a scoundrel keep your watch and wallet because he “generally” let you keep your life! By contrast, Lucas, Nollan, and Dolan are premised on causation, which depends in part upon an as-

(stating that a property owner has no vested right in the continuation of a zoning classification); Save Oxnard Shores v. California Coastal Comm'n, 224 Cal. Rptr. 425, 432 (Cal. Ct. App. 1986) (stating that a California property owner has no vested right in an existing or anticipated zoning classification).

113. It also tends to create this anomaly: no one owns the property right to develop. Consider in this regard, the Federal Circuit decision in Board of County Supervisors v. United States, 48 F.3d 520 (Fed. Cir.), cert. denied, 116 S. Ct. 61 (1995), in which the federal government condemned land over which the county had exacted concessions from the developer to leave portions in open space, provide storm drains, and construct other amenities. The county argued that these regulatory concessions were “property” for purposes of compensation in eminent domain. See id. at 524. The court thought otherwise, indicating that the developer's concessions merely resulted from the county's exercise of its police power. See id. Thus, regulatory assertion of power is not the equivalent of, say, a private restrictive covenant, which would be compensable in eminent domain. Rather, common law rights to develop remain in the landowner and would comprise part of the landowner's compensation in eminent domain. Because the owner's interests can be identified for acquisition purposes in the condemnation context, there is no reason to leave them insufficiently acknowledged, or wholly undefined, as a result of the undefinable scope of Agins's and Penn Central's rational basis deference. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978). 114. See Kendall & Ryan, supra note 111, at 1816-17. 115. Id. at 1845. 116. See Dolan v. City of Tigard, 512 U.S. 374, 388 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1024-25 (1992); Nollan v. California Coastal Comm'n,
sessment of the external effects of proposed development under zoning existing at the time of investment, a part of the background principles of state law.

2. Ownership Should Satisfy the Due Process Property Predicate

A second line of case authority that is anomalous in light of Nollan, Dolan, and Lucas makes it virtually impossible for a landowner pursuing a substantive due process claim to prove the predicate existence of an affected property right. In a number of circuits, the landowner must establish that the regulating entity "lacks all discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest." Because it is highly unlikely that a landowner will be heard, let alone prevail, in these jurisdictions, this hardly coincides with "reasonable investment-backed expectations," whether premised upon Justice Scalia's conception of the traditional common law of nuisance or Justice Kennedy's "the whole of our legal tradition." Not every circuit is this ungenerous; a number of circuits properly assume the existence of a property right from the fact of ownership itself and proceed to the merits. The exis-

117. See, e.g., Trimen Dev. Co. v. King County, 877 F.2d 187, 194 (Wash. 1994) (holding that proper calculation of park fee exaction depends upon the zoning specific to the site).
118. Gardner v. Mayor of Baltimore, 969 F.2d 63, 68 (4th Cir. 1992); see also Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989) (discussing the city's discretion in issuing a certificate of occupancy); RRI Realty Corp. v. Village of Southampton, 870 F.2d 911, 915-18 (2d Cir. 1989) (discussing the role of issuing authorities' discretion in entitlement analysis); Carolan v. City of Kansas City, 813 F.2d 178, 181 (8th Cir. 1987) (discussing the city's discretion in issuing building permits and certificates of occupancy).
120. Id. at 1035 (Kennedy, J., concurring in the judgment).
121. See, e.g., Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988) (holding that the municipal council's denial of a building permit for personal reasons violated due process); Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983) (holding that the zoning board's denial of building permits was not arbitrary or capricious); Cordeco Dev. Corp. v. Vasquez, 539 F.2d 256 (1st Cir. 1976) (affirming the district court's finding that the issuing authority abused its discretion in failing to grant the applicant's permit in a timely manner); South Gwinnett Venture v. Pruitt, 491 F.2d
tence of this circuit conflict, however, warrants Supreme Court review. Assuming the conflict is taken up, the standard of review for substantive due process claims deserves realignment with *Lucas*, *Nollan*, and *Dolan*. As Justice Scalia observed in *Nollan*, "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'." 122 The "reasonable investment-backed expectations" of ownership deserve greater due process sanctuary from arbitrary forms of regulation.

Recognizing ownership as satisfying the due process property predicate might also yield a further salutary advantage—the re-internment of substantive due process review by virtue of its merger into takings analysis. The *Lochner* episode made plain that federal courts are not evaluators of the substance of legislative policy. 123 Rather, the courts act as ultimate guarantors of individual rights (including individual property rights). 124 Continuing the overlapping case authority of substantive due process and takings confuses, rather than clarifies, this judicial role. A soundly conceived takings jurisprudence returns due process to its procedural focus, 125 and potentially eliminates multiple subdeformities affecting the application of ripeness, finality, and remedial considerations in constitutional adjudication, as courts struggle with whether they have a due process or takings claim before them. 126

Takings and substantive due process were joined by judicial

5 (5th Cir. 1974) (holding that the zoning board's actions were consistent with the objectives of a zoning resolution).
123. *See supra* text accompanying note 13.
124. *See Lochner v. New York*, 198 U.S. 45, 73 (1905) (Harlan, J., dissenting) ("Our duty... is to sustain the statute as not being in conflict with the Federal Constitution.").
125. See, for example, *Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995), in which a developer's substantive due process cause of action against the city was rejected because that cause of action was abolished after *Lochner*, and the developer should have filed under the Takings Clause. The court further stated that "a municipality may bring residential development to a halt for strong reasons or weak reasons. If the latter, the municipality has to pay for the privilege." *Id.*
incorporation,\textsuperscript{127} yet they remain bafflingly separate. As Kenneth Bley has noted, the first prong of the takings formulation in \textit{Agins} is really a due process inquiry.\textsuperscript{128} Whether regulation is “arbitrary or capricious” is the forerunner of “advancing state interests.”\textsuperscript{129} Unfortunately, this language has meant both everything and nothing. Most often, however, the language has tended toward the nothing that characterizes deferential rational basis review. Deference, too, has meant many things. A few courts have held that substantive due process is violated only if the action complained of is irrational;\textsuperscript{130} for others, only if governmental action shocks the judicial conscience;\textsuperscript{131} for still others, a land-use regulator can be irrational only if he has \textit{no} discretion;\textsuperscript{132} for some, substantive due process violations can occur in the exercise of discretion;\textsuperscript{133} paying attention to what the neighbors want may also violate substantive due process,\textsuperscript{134} but then again, maybe it is appropriate to consider

\begin{footnotes}
\item 127. \textit{See} Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897) (asserting that the due process guarantee of the Fourteenth Amendment includes protection against the taking of private property for public use).
\item 128. \textit{See} Bley, \textit{supra} note 126, at 291.
\item 129. \textit{See} id.
\item 130. \textit{See}, e.g., Anderson v. Douglas County, 4 F.3d 574, 577 (8th Cir. 1993) (holding that the county’s decision to deny a permit to allow a landowner to “thin spread” contaminated soil was rational); Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992) (“[T]he threshold for establishing the requisite ‘abuse of government power’ is a high one indeed.”); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (“[T]he [zoning] decision can be said to deny substantive due process only if it is irrational.”).
\item 131. \textit{See}, e.g., Licari v. Ferruzzi, 22 F.3d 344, 350 (1st Cir. 1994) (stating that defendant’s conduct was found not to be “sufficiently ‘conscious-shocking’”); G.M. Eng’rs & Assocs. v. West Bloomfield Township, 922 F.2d 328, 332 (6th Cir. 1990) (“The test [for illegal official acts] asks whether the alleged conduct shocks the conscience of the court.”).
\item 133. \textit{See}, e.g., Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1116 (10th Cir. 1991) (finding that zoning bodies must exercise “reasonable” discretion in their decisions); Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1540 (11th Cir. 1991) (“[A] plaintiff may claim that the zoning applied to his property goes too far and destroys the value of his property . . . [so that it amounts to a taking . . . without due process of law.”); Herrington v. County of Sonoma, 834 F.2d 1488, 1498 n.7 (9th Cir. 1987) (stating that “substantive due process claims may involve an assessment of whether the action was a reasonable and proper exercise of police power”).
\item 134. \textit{See}, e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d
the neighbor's desires.\textsuperscript{135}

The heightened scrutiny of \textit{Lucas, Nollan,} and \textit{Dolan} can end this confusion. Takings analysis can displace the more spurious and suspect judicial avenue of substantive due process. The issue in litigation becomes whether a regulation substantially advances a legitimate state interest, with "substantially advancing" and "legitimacy" measured, as it should have been all along, not against the happenstance of judicial insight, but against the background principles of a particular state's nuisance and property law.\textsuperscript{136}

3. \textit{Reasonable Investment-Backed Expectations and "Vested Rights"}

There is also a need to reconcile the concept of reasonable investment-backed expectation with various "vested rights" doctrines. As noted earlier, landowners presently have little formal basis for certainty of use based solely on existing regulation or common law at time of acquisition.\textsuperscript{137} However, even cases that

\textsuperscript{135} See, e.g., \textit{Corn v. City of Lauderdale Lakes,} 997 F.2d 1369, 1392 (11th Cir. 1993) ("Because the City's action was substantially related to the general welfare, its actions did not violate [the developer's] substantive due process rights."); \textit{Midnight Sessions, Ltd. v. City of Philadelphia,} 945 F.2d 667, 685 (3d Cir. 1991) ("The state may consider community sentiment in evaluating applications for licenses if community objection is based on legitimate state interests . . . .").


\textsuperscript{137} This is the venerable chestnut that no one has a vested right to the continuation of existing zoning. See 1 \textsc{Robert M. Anderson, American Law of Zoning} § 4.28 (3d ed. 1986). This rule has been applied to both owners, see \textit{Orange Lake Assocs. v. Kirpatrick,} 21 F.3d 1214, 1224-25 (2d Cir. 1994); \textit{Aquino v. Tobriner,} 298 F.2d 674, 677 (D.C. Cir. 1961), and neighbors, see \textit{Ellentuck v. Klein,} 570 F.2d 414, 429 (2d Cir. 1978). Like so many chestnuts, however, they are not always swallowed. See \textit{Nemmers v. City of Dubuque,} 716 F.2d 1194, 1200 (8th Cir. 1994) (giving
deny use or development rights premised upon the zoning exist-
ing at acquisition occasionally find a vested right when there is
subsequent and substantial good faith reliance upon a building
permit. Nevertheless, uncertainty abounds. Some jurisdic-
tions especially aggravate this uncertainty by the so-called
"pending ordinance" doctrine pursuant to which landowners are
denied permits under announced, but unenacted, laws. Cutting
in the opposite direction, Nollan articulates the view that
even some restrictions in place at the time of acquisition do not
necessarily bind the owner. The Court in Nollan wrote: "So
long as the Commission could not have deprived the prior own-
ners of the easement without compensating them, the prior own-
ers must be understood to have transferred their full property
rights in conveying the lot." The Nollan observation in con-
text is correct, but putting it together with the prior observation
that landowners are often denied building permits on the basis
of announced but unenacted laws, the general proposition
that emerges is: a landowner is neither guaranteed anything
by existing regulation, nor necessarily bound by it. This is a pre-
scription for anarchy, not investment.

The level of indefiniteness surrounding vested rights doctrine is
too high and therefore promotes litigation unnecessarily. Perhaps
common law doctrine governing private land transactions might
be employed to advance certainty. In particular, the concept of
bona fide purchasers taking title free of private encumbrances

138. See Bankoff v. Board of Adjustment, 875 P.2d 1138, 1142 (Okla. 1994) (stating
that courts will protect a landowner's interests "where he has made substantial ex-
penditures or committed himself to a substantial disadvantage in reliance thereon").
139. For a description of the doctrine, see DOUGLAS W. KMIEC, ZONING AND PLAN-
NING DESKBOOK § 6.05 (3d ed. 1996); for a partisan defense of the notion that land-
owners can be bound by unenacted policy expression, see Frank I. Michelman, Prop-
erty, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensa-
tion" Law, 80 HARV. L. REV. 1165, 1238 (1967), restated in Michelman, supra note
140. Justice Scalia wrote that the Nollans' property rights were not "altered be-
cause they acquired the land well after the Commission had begun to carry out its
policy [of demanding lateral easements as a condition of development]." Nollan v. Cali-
141. Id.
142. See supra note 139 and accompanying text.
absent actual or constructive notice of the encumbrance (usually through proper recordation) might, for example, be extended to public restriction. Assuming the broader application of Lucas, Nollan, and Dolan, as argued for here, incorporating some consideration of actual or constructive notice (or lack thereof) of existing regulation arguably makes the same economic sense as discouraging private investment from “coming to the nuisance.”

143. Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700, 706-07 (Ariz. 1972). The presence or absence of regulation at the time of investment, be it acquisition or later improvement, has been grasped by the Federal Circuit in its own formulation of investment-backed expectations as limiting “ takings recoveries to owners who [can] demonstrate that they bought [or improved] their property in reliance on a state of affairs that did not include the challenged regulatory regime.” Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (citations omitted). Cf. Wesley J. Liebeler & Armen Alchien, Constitutional Baselines by Virtual Contract: A General Theory and Its Application to Regulatory Takings, 3 SUP. CT. ECON. REV. 153 (1994) (suggesting that courts might ascertain investment-backed expectations or constitutional baselines independent of state positive law by employing common law as a surrogate for a hypothetical ex ante contract as it would maximize the value of “specialized assets,” that is, those whose value is interdependent with another, especially by reason of location). The Liebeler and Alchien theory, as well as related ones depending upon some form of economic efficiency balancing, see, e.g., Smith, supra note 102, is unlikely to be attractive to a Court sensitive to a restrained judicial role or unwilling to undertake complex economic analysis that many will see as Lochner reborn.

By contrast, the Loveladies approach and the approach suggested in this Article and by Justice Scalia in Lucas, is designed less as an invitation to judicial instruction in policy efficiency, than as a better calibration of reciprocal property and police power interests, allowing legislative policy-making (even if thought economically unwise by judges, economists, or even judicial economists) so long as it is respectful of prior private investment and reliance. As Benjamin Barros nicely explains:

For example, suppose that a regulation prohibits the filling of wetlands. $P_1$, who owned property affected by the regulation before the regulation took effect, may have a taking claim against the government. Whether compensation will be paid or not, the regulation can be seen as taking the right to fill the wetlands from $P_1$ and reserving the right to prohibit the filling of wetlands in the state. If $P_2$ later bought the property from $P_1$, the bundle of rights purchased by $P_2$ would not include the right that allows the filling of wetlands, and $P_2$ would not have a taking claim against the government. The price $P_2$ paid for the property should [properly, as in “coming to the nuisance” theory] reflect the effect of the regulation, and the regulation would not interfere with $P_2$’s investment-backed expectations. Thus, the investment-backed expectations test asks whether the property interests affected by the regulation were held by the property owner or reserved in the state—the same inquiry suggested by the nuisance exception to the Lucas categorical rule.

Barros, supra note 93, at 1873 n.100. Mr. Barros has stated the general rule, but it
this regard, the notice factor easily might be included as an element of the government’s burden to prove by antecedent inquiry that the background principles of state property law do not support the landowner’s particular development claim.

Again, however, although notice is important, it should not be dispositive. The fundamental issue remains whether a given landowner is disproportionately singled out. Suggestions in case\(^\text{144}\) and commentary\(^\text{145}\) that the landowner should assume the burden of regulatory risk stand fundamentally in contradistinction to the Court’s reattachment of takings jurisprudence in *Lucas*, *Nollan*, and *Dolan* to the objective reality of the background principles of state property law. As Justice Scalia opined in *Nollan*, the right to develop is not a “government benefit” to be taken away on notice.\(^\text{146}\) So too, the relative size of landowner expenditure in reliance upon a permit skirts the Fifth Amendment’s underlying “singling out” concern\(^\text{147}\) which again

---

\(^{144}\) See Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994) (treating the issue of notice as a threshold bar to recovery); Atlas Enters. Ltd. Partnership v. United States, 32 Fed. Cl. 704, 708 (1995) (“Generally, when an owner buys property with knowledge of restrictions upon the development of that property, he assumes the risk of any economic loss.”).

\(^{145}\) See Daniel R. Mandelker, Investment-Backed Expectations in Takings Law, in TAKINGS, supra note 67, at 119, 129.

\(^{146}\) See Nollan v. California Coastal Comm’n, 483 U.S. 825, 833-84 n.2 (1987).

\(^{147}\) See Mandelker, supra note 145, at 129-30 (considering landowner reliance as a factor in recognizing investment-backed expectations).
can only be answered by antecedent inquiry. State cases decided since Lucas, Nollan, and Dolan seem to grasp the point that factors of notice and relative amounts invested are not dispositive of the takings issue, although the judicial record is still mixed.

B. Physical Occupation Was Not the Whole Point—Heightened Scrutiny Should Apply Generally to Land-Use Takings Cases

Nollan and Dolan apply heightened scrutiny when a landowner is required to dedicate a property interest in order to obtain a development permit. In Nollan, the Court unequivocally rejected the rational basis standard, noting that "our verbal formulations in the takings field... have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, ... not that 'the State could rationally have decided' that the measure adopted might achieve the State's objective." The Court further noted that it viewed "the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." Interestingly, the Court

148. See, e.g., Carpenter v. Tahoe Reg'l Planning Agency, 804 F. Supp. 1316, 1328 (D. Nev. 1992) (protecting an investment-backed expectation and rejecting "caveat emptor" analogy to regulated market); Bowles v. United States, 31 Fed. Cl. 37, 51 (1994) (finding that a reasonable investor would not have been on notice); Lopes v. City of Peabody, 629 N.E.2d 1312, 1314-15 (Mass. 1994) (holding that a landowner had a right to challenge the validity of a wetlands zoning ordinance affecting his property, even though he purchased the land with knowledge of the ordinance's restrictions); Somol v. Board of Adjustment, 649 A.2d 422, 428 (N.J. Super. Ct. Law Div. 1994) (holding that the right to a variance was not lost as a result of purchaser's knowledge); Hoberg v. City of Bellevue, 884 P.2d 1339, 1342 (Wash. Ct. App. 1994) (holding that the mere fact that a purchaser of land had actual or constructive knowledge of an area variance does not, without more, justify a denial of such a variance); see generally 3 EDWARD ZIEGLER, RATHKOPP'S THE LAW OF ZONING AND PLANNING § 38.06 (4th ed. 1993) (discussing the effect of a self-created hardship on a request for a variance).

149. See, e.g., Dodd v. Hood River County, 855 P.2d 608, 616 (Or. 1993) (prohibiting house construction in a forest zone because regulatory notice precluded investment-backed expectations).

150. See supra note 136 and accompanying text.

151. Nollan, 483 U.S. at 834 n.3 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980) and 483 U.S. at 843 (Brennan, J., dissenting)).

152. Id. at 841.
stressed that it was "inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction . . ." Dolan confirmed that the Court meant what it said, but again, this was in the circumstances of a permit condition of a land dedication. Is the Court not at all interested in being adverbially careful outside of this context?

It should be. Heightened scrutiny should apply outside the area of imposed land dedications, as a notable, though not yet overwhelming, number of decisions suggest. Heightened scrutiny thus has been applied when individual landowners have been required to undertake activity or to supply benefits for an overall community need that the landowner did not cause. Older cases similarly have found takings when land-use restrictions were imposed to sustain distinctly governmental functions, such as flood control, airports, and public schools. Additionally, pre-Nollan/Dolan case law has looked

153. Id. (emphasis added).
154. See Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 482 (N.Y. 1994), cert. denied, 115 S. Ct. 1961 (1995); supra note 62; infra notes 212-17 and accompanying text. I am indebted to Professor Edward Ziegler of the University of Denver for bringing to my attention the case development trend discussed in the text.
155. See, e.g., Manocherian, 643 N.E.2d at 479 (striking down an obligation to provide renewal leases for a favored hospital); Guimont v. Clarke, 854 P.2d 1 (Wash. 1993) (holding that a low income tenant relocation assistance statute violated the owners' substantive due process rights); Robinson v. City of Seattle, 830 P.2d 318 (Wash. 1992) (finding that an ordinance prohibiting destruction of low income housing without the payment of a fee violated the landowners' substantive due process rights); Seawall Assocs. v. New York City, 542 N.E.2d 1059 (N.Y. 1989) (holding that a law that required the maintenance of single-room-only facilities for the homeless is facially invalid as a regulatory taking); Property Owners Ass'n v. Township of N. Bergen, 378 A.2d 25 (N.J. 1977) (striking down an ordinance imposing subsidy on housing for senior citizens); Aspen-Tarpon Springs Ltd. Partnership v. Stuart, 635 So. 2d 61 (Fla. Dist. Ct. App. 1994) (holding that monetary assistance for tenant relocation costs was a regulatory taking).
156. See, e.g., Panhandle E. Pipe Line Co. v. Madison County Drainage Bd., 898 F. Supp. 1302 (S.D. Ind. 1995) (holding that a taking had occurred when a utility was singled out to bury pipelines for general drainage needs); Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ky. 1953) (finding that a taking had occurred as a result of a zoning resolution designating private land for flood basin storage).
157. See, e.g., Sneed v. County of Riverside, 32 Cal. Rptr. 318 (Cal. Dist. Ct. App. 1963) (finding that a taking had occurred when the city had instituted restrictive overflight zoning).
158. See, e.g., Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983) (holding that
unfavorably on the singling out of one owner for the particular benefit of a neighbor. 159 Finally, courts also have applied heightened scrutiny when restrictions validly address externalities caused by the landowner but lack meaningful compensating benefits for the landowner. 160 The common thread unifying all these cases is not physical occupation or a dedication requirement, but the finding that a burden on a single landowner is disproportionate in light of background state property law principles.

I. Ehrlich v. City of Culver City 161 — The Facts

In considering the application of heightened scrutiny to a broader range of takings cases, the recent California Supreme Court decision in Ehrlich v. City of Culver City supplies a useful backdrop. From the early 1970s until 1988, Richard Ehrlich constructed and operated a private tennis club and recreational facility in Culver City, California. 162 The club began to lose money in 1981, and it ultimately closed for financial reasons in 1988. 163 The month after it closed, Mr. Ehrlich applied for a zoning change to allow construction of a thirty-unit condominium complex on the site. 164 Although the city initially explored purchasing the closed tennis club, it concluded that it lacked the

---

159. See, e.g., Heck v. Zoning Hearing Bd., 397 A.2d 15, 19 (Pa. Commw. Ct. 1979) (invalidating the denial of a permit for a home addition that would have blocked a neighbor's view); cf. Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269, 1274 (8th Cir. 1994) (citing Nollan and asserting that it was improper to require a landowner to provide a drainage system for his neighbors' benefit).

160. See, e.g., Bowles v. United States, 31 Fed. Cl. 37, 52-53 (1994) (finding a substantial loss of value resulting from wetlands regulation and compensating the owner for the loss). In Florida Rock Industries v. United States, 18 F.3d 1560 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 898 (1995), the Federal Circuit inquired whether there were "direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few?" Id. at 1571.


162. See id. at 433-34.

163. See id. at 434.

164. See id.
necessary funds. Instead, the city simply disapproved the zone change to residential, noting a need for recreational facilities. While the city deliberated, however, Mr. Ehrlich demolished the structure and donated the sports equipment to the city. Thereafter, the city agreed to Mr. Ehrlich's proposed rezoning to residential use on condition that he pay the city $280,000 to be used for public recreational facilities. In addition, Mr. Ehrlich was required to donate $33,200 to the “Art in Public Places” fund, pursuant to a local ordinance that required new residential, commercial, and industrial projects valued over a certain amount to donate a percentage of that value to “public art.” Also pursuant to local ordinance, Mr. Ehrlich was required to pay $30,000 for local park and recreational facilities needed to serve the residents of his new condominium development.

Mr. Ehrlich chose not to challenge the park donation, but he paid the art and recreational fees under protest. The trial court set aside the recreational, but not the art fee. The court of appeals upheld both fees. Following Dolan, the United States Supreme Court remanded, but the court of appeals found both fees to be “roughly proportional” to the needs generated by the project. In a divided opinion, the California Supreme Court reversed in part, questioning the analysis supporting the recreational fee, but finding the art fee to be constitutional.

165. See id.
166. See id.
167. See id.
168. See id. at 434-35.
169. See id. at 435.
170. See id. at 435 n.2.
171. See id. at 435.
172. See id.
175. See Ehrlich, 512 U.S. at 1231.
177. See Ehrlich, 911 P.2d at 449-50.
2. The Startling Outcome

Prior to the California Supreme Court's decision, I fully ex-
pected a complete and decisive reversal of the appellate decision,
rather than the more mixed outcome that the state high court
produced. The notion that property owners must maintain pri-
ivate recreational uses or supply “art” on their private property
for public enjoyment is a novel one, even under the common law
of California. The California Court of Appeals, in a wisely un-
published opinion, asserted that “it is beyond dispute that the
City has a legitimate governmental interest in making available
community recreational facilities.”178 Reading this, one is
tempted to say, sure, that's right, a city does have unquestioned
authority to buy park land, put up public tennis courts, and tax
all of its residents for these amenities. On second reading, how-
ever, it is apparent that the city is not asserting this well-estab-
lished municipal authority, but rather is asserting the extraor-
dinary notion that once a private landowner has undertaken a
permitted common law use, like building a private tennis court,
it must either continue that use, or pay the city for permission
to stop.

3. The Flaw

The appellate court's analysis illustrates the danger of not
perceiving the relationship between Lucas's reliance upon the
common law or background principles of state property law and
Dolan's inquiry into whether a landowner can in any credible
way be said to have caused a harm that “roughly proportional”
police power can then legitimately address.179 The California
Supreme Court reversed the recreational fee, but only, it said,
because the lower court calculated the “loss” incorrectly.180 Ac-
cording to the state supreme court, “[t]he loss which the city
seeks to mitigate by levying the contested recreational fee is not
the loss of any particular recreational facility, but the loss of

179. See Dolan, 512 U.S. at 391.
180. See Ehrlich, 911 P.2d at 449-50.
property reserved for private recreational use."\textsuperscript{181} The assumption inherent in that statement is that the landowner may own his improvements privately, but the common law right to develop is wholly public. A similar unconventional idea was urged by the economist Henry George in the nineteenth century,\textsuperscript{182} but it was so greatly incongruous with American common law tradition that it never took root. In academic writing over a decade and a half ago, I reformulated the Georgian concept of "unearned increment"—that is, value associated with undeveloped land traceable to neighboring community or private improvement—to proffer an alternative land-use control model.\textsuperscript{183} Under this hypothetical model, landowners generally would trade their unearned increment for relative freedom of use selection and site design. Every academic delights when classroom ideas resonate in the real world, but it is hardly proportionately fair for Culver City's less generous version of this idea to begin and end with Mr. Ehrlich. The California Supreme Court asserted that "it is well accepted in both the case and statutory law that the discontinuance of a private land use can have a significant impact justifying a monetary exaction to alleviate it."\textsuperscript{184} The court volunteered no accompanying citation of authority.

No direct support exists in California land-use law, or even in the law of eminent domain for the court's proposition. Quite the contrary, the common law has always been suspicious of imposing affirmative duties generally,\textsuperscript{185} let alone affirmative duties that arise by a type of self-imposed adverse possession—hang around long enough as a private tennis court and don't expect to be anything else, ever. Moreover, even if one assumed that the city could ipso facto confiscate the value associated with voluntarily undertaken and unsubsidized private use, it is not abundantly clear how, on remand, the lower court is to calculate this

\begin{footnotes}
\footnotetext[181]{\textsuperscript{181} Id. at 448.}
\footnotetext[182]{\textsuperscript{182} See Henry George, Our Land and Land Policy: Speeches, Lectures and Miscellaneous Writings 108-12 (1902).}
\footnotetext[184]{\textsuperscript{184} Ehrlich, 911 P.2d at 446.}
\footnotetext[185]{\textsuperscript{185} See generally Jesse Dukeminier & James E. Krier, Property 887 (3d ed. 1993) (discussing the reluctance of the courts to approve affirmative covenants).}
\end{footnotes}
loss of value to the city. The state supreme court speculated that the city’s value may be the “additional administrative expenses incurred in redesignating other property within Culver City for recreational use,” or then again, maybe the city’s value is the “additional costs of attracting the development of comparable private recreational facilities.” The state court really did not address this issue, other than to remind the city—and the reviewing lower court now stuck with the problem—that “[t]he determination of such a fee will, of course, require[s] . . . specific findings supported by substantial evidence.”

4. Justice Kennard’s Near-Perfect Dissent and Less-Wise Concurrence

In her separate concurring and dissenting opinion, Justice Kennard perceived the novelty (and in that novelty the unfairness) of the majority view in Ehrlich. Justice Kennard’s perceptive ability was aided by reference to the fundamental purpose of the Takings Clause—avoiding disproportionate public burdens. In her words:

This constitutional protection does not evaporate when we discontinue a use of our property that we gratuitously undertook and that the government could not constitutionally have required us to continue, no matter how greatly the community may have benefited from that use.

Justice Kennard reasoned that it was questionable, even on conventional takings grounds, whether Culver City could have confined the use of Mr. Ehrlich’s property to private recreational uses, as those uses have proven to be economically nonviable. Apart from that, however, she likened the majority’s finding that Mr. Ehrlich had a specialized continuing duty to stay in a particular use to discriminatory “spot zoning”—which is instructive, early

186. Ehrlich, 911 P.2d at 449.
187. Id. at 450.
188. Id.
189. See id. at 461-68 (Kennard, J., dissenting).
190. See id. at 463 (Kennard, J., dissenting).
191. Id. at 468 (Kennard, J., dissenting).
192. See id. at 467 (Kennard, J., dissenting).
common law terminology manifesting the Fifth Amendment’s guarantee against being singled out disproportionately.¹⁹³

Interestingly, Justice Kennard did not decide whether the essential nexus required by Nollan was also absent from the Culver City recreational fee imposition. The majority thought Nollan’s essential nexus was satisfied merely with its unsupported assumption that “the discontinuance of a private land use” is unquestionably related to public need.¹⁹⁴ With more subtlety, Justice Kennard pondered whether Nollan really resolved this question. She wrote:

The United States Supreme Court has not yet clarified whether “the projected impact” [for essential nexus purposes] includes only positive effects such as the additional burdens that the new development will impose on the community (in this case, the increased demand for city services resulting from the addition of 30 townhouses) or also negative effects such as the reduction in the total area of land zoned for a particular use (in this case, the reduction in land designated for recreational uses) or the loss of public benefits from the preexisting use of the land (in this case, the benefits City residents derived from the use of the athletic facilities).¹⁹⁵

Justice Kennard arguably was correct in stating that Nollan did not resolve this question,¹⁹⁶ but Dolan did.¹⁹⁷ Not surprisingly, therefore, she found that Dolan’s rough proportionality standard was not met because, as already discussed, it was fatuous to suggest under existing California common law that anything other than the additional burdens of the new development could be fairly attributable to Mr. Ehrlich.¹⁹⁸

This is not to say that cessation of a publicly valued or enjoyed private use is not, in a pure economic sense, an externality.¹⁹⁹ According to the majority, Mr. Ehrlich made a

¹⁹³. See id. at 467 (Kennard, J., dissenting).
¹⁹⁴. Id. at 446.
¹⁹⁵. Id. at 466 n.2 (Kennard, J., dissenting).
¹⁹⁶. See id. (Kennard, J., dissenting) (asserting that the Supreme Court has not defined the meaning of “projected impact”).
¹⁹⁷. See Dolan v. City of Tigard, 512 U.S. 374, 394 (1994) (suggesting that a development’s “projected impact” could include the reduction of greenway space).
¹⁹⁸. See supra notes 192-93 and accompanying text.
¹⁹⁹. See generally DUKEMINIER & KRIER, supra note 185, at 49-50 (discussing land
decision that adversely affected citizens of Culver City not by harming them (in the nuisance sense), but by withdrawing a desired benefit.\textsuperscript{200} It might be desirable for communities to hold landowners accountable for the withdrawal of privately supplied benefits when transaction costs prevent the landowner from considering the worth of continuing such benefits. Yet, two points need to be made. First, considerable factual doubt exists in this case, and probably in many regulatory cases, whether transaction costs or simply lack of demand impede the continuation of privately supplied benefits. After all, Culver Citians were not exactly leaping over the nets to patronize Richard Ehrlich's tennis club.\textsuperscript{201} But, even if there is a perceived transaction cost barrier, isn't removing the barrier (that is, the inalienability of regulatory control) a better alternative?

For present purposes, however, a second point is more crucial. Externality or not in terms of formal economic analysis, the declination to continue to supply a private use that also yields a public benefit is not presently cognizable under common law property conceptions; in short, it is neither a nuisance nor inherent in the background principles of state property law. Without those background principles, the \textit{Nollan}/\textit{Dolan} nexus requirements are cut adrift and the reciprocal definitions of police power and property become entangled. The heightened scrutiny of \textit{Nollan} and \textit{Dolan} requires the background principles of property law referenced in \textit{Lucas}\textsuperscript{202} to work. If there is a latent defect in the original \textit{Nollan} opinion, it is that the passage that "assumed without deciding" that the Nollans could have been required to leave a "view spot" on their property for the benefit of passers-by\textsuperscript{203} misleads readers into thinking that such a power actually exists. The passage is nominally an anti-\textit{Lochner}\textsuperscript{204} assurance designed to disclaim any judicial interest in the substance of the

\begin{itemize}
  \item \textsuperscript{200} See generally \textit{Ehrlich}, 911 P.2d at 448 (discussing the loss to the city).
  \item \textsuperscript{201} See generally id. at 434 (indicating a lack of patronage through a discussion the club's financial losses and management and maintenance problems).
  \item \textsuperscript{203} See \textit{Nollan} v. California Coastal Comm'n, 483 U.S. 825, 836 (1987).
  \item \textsuperscript{204} See \textit{Lochner} v. New York, 198 U.S. 45 (1905); \textit{supra} notes 12-15 and accompanying text.
\end{itemize}
ultimate social policy sought to be advanced. As *Dolan* and *Lucas* effectively reveal, however, whatever the social goal, the judiciary does have some interest: namely, ensuring that land-use legislation does not disproportionately burden any single landowner. And, in this, burdens are calculated by reference—not to judicial predilection—but to the nuisance and property law of the state.205

This poses a further question, one not without difficulty in application. If the legitimacy of Takings Clause supervision of the land-use legislative process depends upon an independent source of state law, is not that source dynamic, and therefore capable of evolving through case law or statute to include the imposition of affirmative duties on landowners? Yes, and here the teaching of *Lochner*206 applies. The Court must admit the possibility of the common law evolving to accept affirmative obligations, followed by the statutory law of the state eventually mirroring that development. The loss of freedom implicit in such coerced duty might be anathema to individual members of the Court, but that, except at the extreme, is only a policy matter. *Lucas*'s linkage of the concept of *reasonable* investment-backed expectation to state law207 allows this evolutionary change to occur within individual communities. "Reasonableness," however, when linked to "expectation" also implies that, absent extraordinary or sudden environmental or public danger, such common law or statutory change should be wholly prospective.208 Support for this prospective qualification on state law

---

206. *Lochner*, 198 U.S. at 45; see *supra* notes 12-15 and accompanying text.
207. See *Lucas*, 505 U.S. at 1027-28.
208. Recall the earlier discussion about defining protectable property interests largely in relation to the regulation in effect at the time of investment acquisition or improvement and the common law, thus giving greater certainty to vested and common law rights to develop. See *supra* notes 33, 143 and accompanying text. The kind of affirmative duties anticipated in that discussion would require compensation, but once established, subsequent investors would understand that such duties would be continuing, and market interest and price would be adjusted in subsequent transactions (positively or negatively depending upon the wisdom of the duty imposed) accordingly. Ironically, it may be the counterfeit concept of "new property" that retards the ability of communities to take full advantage of the dynamic of the common law or statutory modifications thereto. In this regard, the Court's insistence on applying due process formalism to statutory benefit acts as a disincentive to statutory change
can be drawn analogously from the conceptual framework underlying the Contract Clause, which is best understood as prospective in its application, absent some extraordinary or temporary need such as the pervasive financial collapse of the Great Depression.

5. Fees and Dedications—One and the Same—Well, Almost

Disappointingly, no member of the California Supreme Court applied the Nollan/Dolan heightened scrutiny analysis to the "public art" fee. Reviewed under the rational basis standard, the majority asserted that the required public art donations fell "well within the authority of the city to impose." The court reasoned that such art fees are easily sustainable because they were the equivalent of other traditional land-use requirements and were more or less generally applicable. Neither basis suffices to deny heightened scrutiny review. Before exploring why, however, mention should be made of an important bit of ground-clearing that the California Supreme Court did accomplish. Prior to the United States Supreme Court's remand in Ehrlich, some state and federal courts drew an artificial distinction between dedications and monetary exactions for purposes of heightened scrutiny. For example, cases from California that could faithfully (and only once) pay compensation to the preregulatory change owner, and not repeatedly pay (albeit indirectly) through the cost of imposed administrative process. Thus, when the Court wrote in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985) (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1973) (Powell, J., concurring)), that "[w]hile the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards [imposed by the Court]," the Court essentially ossified common law or statutory right, although the state legislature may have intended that the created right be conditional or qualified by, say, the later imposition of an affirmative duty.

209. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.")


213. See id.

and various federal circuits lamely had denied heightened scrutiny for exactions on the basis of the lack of physical invasion associated with monetary demands. This kind of "thingness" view of property is enough to give a long-time property instructor the willies, as it suggests that far too many judges apparently forgot or failed to comprehend the conceptual nature of property taught to them in their first year of law school. Importantly, the California Supreme Court "reject[ed] the proposition that Nollan and Dolan are entirely without application to monetary exactions," and the court applied the heightened standard of review to fees, at least in those circumstances in which the court believed that the municipal power was likely to be extortionate.

That is the good news. The bad news is that the court concluded that the art fee was not an extortionate circumstance. According to the court, the art fee was akin to a "traditional land-use" regulation. This was error. Although it is true that aesthetic regulation has gained greater acceptability in state courts, such regulation often is sustained in relation to manifest harm such as a decline in property value. In addition, the United States Supreme Court in Lucas suggested that special caution be exercised when the police power pursues aesthetic, rather than "core" health and safety purposes. At any

215. See, e.g., Blue Jeans Equities W. v. City of San Francisco, 4 Cal. Rptr. 2d 114, 118 (Cal. Ct. App. 1992) (maintaining that heightened scrutiny is limited to possessory rather than regulatory takings); see also Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991) (holding that "the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land" remains low) (citing St. Bartholomew's Church v. New York City, 914 F.2d 348, 357 n.6 (2d Cir. 1990)); Adolph v. Federal Emergency Mgmt. Agency, 854 F.2d 732, 737 (5th Cir. 1988)).
216. Ehrlich, 911 P.2d at 444.
217. See id. at 449.
218. See id. at 450.
219. See id.
221. See, e.g., State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305, 309-10 (Mo. 1970) (holding that a city could deny a building permit in order to sustain property values and promote general welfare).
222. The Court suggested this caution in light of "[t]he many statutes on the
rate, it is questionable whether "public art fees" really are the equivalent, as the California Supreme Court claims, to "minimal building setbacks, parking and lighting conditions, [etc.]." Setbacks and parking requirements are allied closely with the negative burdens caused or created by particular development, and thus these "traditional" controls bear little similarity to "art fees." To this midwesterner at least, it seems extraordinary that any claimed analytical connection could exist between condominium development and a hankering for public art. Courts should willingly listen to the argument, of course, but the fairness called for by the Fifth Amendment suggests that the listening or the scrutiny must be heightened and bound by the state's background property law principles.

6. Individual Versus Legislative Assessment—Why Should It Matter?

Apart from the substantive nature of the art fees, the California Supreme Court also premised its deferential review upon the fact that the art fees were not individually assessed development exactions. Justice Kennard concurred, reasoning that "[t]he art in public places fee was imposed under a municipal ordinance of general applicability." The distinction between general and individual requirements is one that troubles a number of areas of constitutional law. Under First Amendment analysis, religious practices cannot be singled out for disfavor but, as a matter of constitutional doctrine, can be prohibited as a consequence of generally applicable law. Yet, singling out is a ques-
question of degree and circumstance. For example, a city may think that it is just generally trying to rid its streets and alleys of dead animal carcasses, but if the impact of the law—when conjoined with some illicit legislative motivation—is felt by a single religion engaging in animal sacrifice, then the ordinance is constitutionally unacceptable.\footnote{See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (invalidating a city ordinance prohibiting the ritual slaughter of animals).} Similar problems arise in limited public fora where content, but not viewpoint, discrimination is permissible.\footnote{See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2516 (1995) (holding that the university could not deny funding to a religious student group because that denial amounted to viewpoint discrimination); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (holding that the school district could not deny a church access to school premises after hours because of the religious content of films that the church wished to show).} Differentiating viewpoint from content discrimination, however, seems merely to depend upon how finely substantive topic lines are drawn.\footnote{See supra notes 227-30 and accompanying text.}

Factually, the art fee in \textit{Ehrlich} can be similarly assailed. The fee does not apply to every property owner or even to every new development in Culver City. Justice Mosk nevertheless argued that this selective application did not differ from manifold revenue raising schemes that impose fees or taxes on some individuals, but not others.\footnote{See \textit{Ehrlich} v. City of Culver City, 911 P.2d 429, 458 (Cal.) (Mosk, J., concurring), \textit{cert. denied}, 117 S. Ct. 299 (1996).} The majority responded to Justice Mosk, who would have applied a deferential standard of review to all the development fees in the case, by separating the individualized and discretionary recreational fee from the more general public art fee requirement.\footnote{See id. at 447-51 (analyzing the respective fees differently and in separate parts of the opinion).}

With all due respect, the court has hold of the thread when what it really needs is a better grasp of the sleeve. Yes, where fees are individually imposed in a discretionary fashion, there is considerable risk that a landowner may be singled out disproportionately. As the religion and speech cases\footnote{See Rosenberger, 115 S. Ct. at 2517 (discussing the university's argument that it was discriminating on the subject of culture, not the viewpoint of religion).} and
even *Loretto*,\(^{234}\) suggest, however, this answer is not complete. In *Loretto*, the Court held that general legislation authorizing physical occupation of a small portion of property belonging to a relatively broad class of owners was unconstitutional.\(^{235}\) Justice Mosk purported to distinguish *Loretto* on the basis of the “thingness” offensiveness of physical occupations,\(^ {236}\) but again, this is just so much doctrinal assertion. When a generally enacted fee is structured for collection as part of a permit-issuing process, as opposed to a tax or special assessment to be collected independent of landowner need for municipal approval, a risk of extortion is present. It is likely in these circumstances, as it is in the case of the individually imposed fee, that a particular landowner is being singled out as a convenient revenue target to supply desirable public benefits, rather than, applying *Dolan*, to rectify proportionately the causal impacts of a particular development measured against the background principles of state property law. As Justice Scalia wrote in his dissenting opinion in *Pennell v. City of San Jose*,\(^ {237}\) these are simply occasions “to establish a [privately funded] welfare program.”\(^ {238}\) Justice Scalia continued:

> Singling out [individual landowners] to be the transferors may be within our traditional constitutional notions of fairness, [only when] they can plausibly be regarded as the source or the beneficiary of the [land-use] problem. Once such a connection is no longer required, however, there is no end to the social transformations that can be accomplished by so-called “regulation,” at great expense to the democratic process.\(^ {239}\)

Denying heightened scrutiny because of the more general nature of the art fee is contrary to *Dolan*. *Dolan* illustrated that constitutional unfairness can be the product of general legislative enactment. The bikepath and greenway dedications required by Tigard did, in fact, originate in the city’s legislatively codified

\(^{234}\) See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

\(^{235}\) See id. at 421.

\(^{236}\) See *Ehrlich*, 911 P.2d at 454 (Mosk, J., concurring).


\(^{238}\) Id. at 22 (Scalia, J., concurring in part and dissenting in part).

\(^{239}\) Id. (Scalia, J., concurring in part and dissenting in part).
Community Development Code. Yet, Dolan blurred this fact somewhat by hiding its significance under the label "adjudicative." Thus, the Court in Dolan seemingly exempts from heightened scrutiny land-use regulations that "involve[ ] essentially legislative determinations classifying entire areas of the city." What is legislative and what is adjudicative in land-use control has been the subject of extended debate in the state courts. Ironically, given Dolan's prominence, the best discernment of the legislative/adjudicative line occurs in an opinion by the Oregon Supreme Court. In Fasano v. Board of County Commissioners, the Oregon court wrote:

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different [and more demanding] test.

Although legislative developments in Oregon have superseded Fasano, the clarity of its insight perhaps better expresses the distinction that the United States Supreme Court sought to highlight in Dolan than does the Court's own legislative and adjudicative labels. In this regard, it should matter little whether a particular land-use regulation originates with a legislative or an adjudicative pronouncement. What counts is whether the legislative

241. Id. at 385.
242. Id.
243. Compare Fasano v. Board of County Comm'rs, 507 P.2d 23, 26 (Or. 1973) (discussing a zone amendment as an adjudicative land-use control), with Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 569 (Cal. 1980) (discussing a zone amendment as a legislative land-use control). Cf. Carol M. Rose, Planning and Dealing: Piecemeal Land Controls As a Problem of Local Legitimacy, 71 CAL. L. REV. 839, 846 (1983) (theorizing that local zoning decisions should not be classed as either "legislative" or "judicial").
244. 507 P.2d 23 (Or. 1973).
245. Id. at 26.
246. See Neuberger v. City of Portland, 603 P.2d 771, 778 (Or. 1979).
determination has been brought to bear on particular property, either through the permitting and rezoning process or through initial mapping and classification. Again, the Court's significant ripeness requirements will keep the federal judiciary free of improper legislative interference. Challenges to permit-issuance conditions almost always will be "as applied" in nature, thereby necessitating a final decision and denial of any available administrative relief, such as a variance.248 There can be, however, "facial" challenges to the inclusion of property within a general land-use map or classification, but such challenges are rare.249 When they do occur, they require litigation in state court regarding the availability of compensation under state law.250

It can be hoped that the United States Supreme Court will soon take up a case to indicate that heightened scrutiny ought not be avoided by the unmindful recital of legislative and adjudicative labels or the related difference clung to by the California Supreme Court in Ehrlich:251 that a land-use requirement is general in nature. The United States Supreme Court missed an opportunity to provide such clarification when it denied review in Parking Association of Georgia, Inc. v. City of Atlanta.252

---

248. See, e.g., MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986) (requiring reapplication when the initial proposal was "grandiose"); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 192-93 (1985) (requiring finality, including variances, that can relieve the impact of a final decision).

249. See Jonathan Belcher, Exploring the Latitude of Lucas v. South Carolina Coastal Council: Local Control of Surface Mining, 17 WM. & MARY J. ENVTL. L. 165, 186 n.151 (1993) (stating that most takings challenges are "as-applied").

250. See Roberts, supra note 84, at 37 (citing Williamson, 473 U.S. at 194) (stating that when making a facial takings challenge, the compensation prong of the Williamson ripeness test requires that the property owner seek compensation in state court). But compare Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990) (applying ripeness analysis in a facial takings challenge), with Triple G Landfills, Inc. v. Board of Comm'rs, 977 F.2d 287 (7th Cir. 1992) (stating that it is not necessary to apply the ripeness test in facial takings challenges). See generally Eide v. Sarasota County, 908 F.2d 716, 722-23 (11th Cir. 1990) (distinguishing between as-applied and facial challenges).


Parking Association, the Georgia Supreme Court upheld a legislatively imposed requirement that a certain class of parking lots must landscape at least ten percent of their paved areas and have at least one tree for every eight parking spaces. The Georgia Supreme Court applied rational basis review, ultimately finding the ordinance to be neither a physical nor a regulatory taking. Dissenting from the denial of certiorari, and noting a conflict among the jurisdictions over the applicability of heightened scrutiny, Justices Thomas, joined by Justice O'Connor, wrote:

It is hardly surprising that some courts have applied [Dolan's] rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

In calling for the uniform application of heightened scrutiny, neither these Justices, nor I, suggest that property rights prevail uniformly over the police power. The Fifth Amendment Takings Clause is not a newly minted part of the Contract with America or the “sagebrush rebellion” or any other more singularly focused property rights movement. The Fifth Amendment is a means of ensuring a fair relationship between citizen and government; that relationship can, and should, favor the public interest in appropriate cases. Thus, in their dissent to the denial of review in Parking Association, Justices Thomas and O'Connor cited two cases in which heightened scrutiny was applied to legislative enactments, one finding a taking and the other not.

253. See id. at 201-02.
254. See id.
255. Parking Ass'n, 115 S. Ct. at 2268-69 (Thomas, J., dissenting).
256. Compare Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (applying heightened scrutiny to uphold a recreational fee in light of the park needs created by a proposed development), with Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 483 (N.Y. 1994) (finding that a statute requiring renewal leases was an
Responsible legislative and administrative action mitigating the impact or needs caused by new development is not unwarranted. Such responsible governmental behavior is advanced by specifying that rational basis review applies to legislative choice of policy, but not to its application to specific parcels. As Justices Thomas and O'Connor observed: "[a]lthough Dolan purports to be an exception to Agins, the logic of these two cases appears to point in different directions. The lower courts should not have to struggle to make sense of this tension in our case law."257

The Ehrlich decision illustrates the confusion born of this struggle. It is easily resolved in favor of "a uniform, clear and reasonably definitive [heightened] standard of review in [all land-use] takings cases."258 The Lucas methodology and allocation of proof burdens, together with the Nollan and Dolan nexus requirements, invite just such clarity. It is time that the "verbal formulation" of "substantially advancing a legitimate governmental interest" be given unmistakable meaning.

**CONCLUSION**

As noted, some courts already have perceived the value of the takings solution articulated by the United States Supreme Court in Lucas, Nollan, and Dolan, and have applied the proof burdens and heightened scrutiny from these cases to land-use takings claims generally. This trend should continue. It would be facilitated were Agins and Penn Central formally superseded and a clearly stated methodology of review outlined by the Court. What would such an outline look like or entail? By way of summary, the following is a sketch of the procedure for takings litigation (whether or not styled as a takings, substantive due process, or vested rights claim). To begin, the landowner would have the burden of producing evidence establishing: (1) a prima facie case of investment-backed expectation (ownership if referring to the acquisition investment alone and/or improvement

---


expenditure if referring to development expenditure) either with regard to a segment of the property if that segment is separately identifiable under state property law or if not, with regard to the property in its entirety; (2) that such an investment-backed expectation was reasonable in light of the totality of state property law in existence at the time of investment; and (3) that a change in law or other regulatory action (e.g., denial of permit) has frustrated this reasonable expectation.

Upon making this prima facie showing, the regulating entity would then have the burden of proof to establish that the regulation is justified by antecedent inquiry into "background principles of [state] nuisance and property law," including as an element thereof the landowner's actual or constructive notice of law existing (though not pending) at the time of investment. Ordinarily, this showing would succeed if (1) the regulatory prohibition was not categorically off-limits to the state (e.g., uncompensated physical occupation) and (2) the state could demonstrate that the prohibition of the intended use was necessary to avoid substantial harm to public or private lands and resources, which harm outweighs the social value of the intended use and cannot be avoided responsibly by other means. Showing the lack of available "other means" would be satisfied by reliance upon the causation principle, aptly incorporated in the essential nexus and rough proportionality aspects of Nollan and Dolan.259 Because of established ripeness standards, which implement important values of federalism and federal judicial restraint, this inquiry would largely occur in state court with that court applying heightened scrutiny. Were state courts inundated with takings claims, as some of the Court's dissenters have alarmingly theorized, the common law concept of damnum absque injuria260 could be employed.261

The Supreme Court has done its work by supplying a resolu-

259. See Dolan v. City of Tigard, 512 U.S. 374, 386-91 (1994); Nollan, 483 U.S. at 837.
260. Harm without legal injury.
261. The requirement in common law that intentional nuisances also constitute a substantial harm serves similar purposes. See generally CUNNINGHAM ET AL., supra note 33, § 7.2 (defining nuisance as "an 'unreasonable' activity or condition on the defendant's land that 'substantially' or 'unreasonably' interferes with the plaintiff's use and enjoyment of his land").
tion of the takings puzzle that respects both private right and public need. The missing pieces or complications discussed in this Article are partially attributable, as Justices Thomas and O'Connor have observed, to a few inconsistencies remaining within Court doctrine.262 There is also the inevitable sluggishness of doctrinal application in state and lower federal courts. The Supreme Court can promote the realization of its well-considered reattachment of takings jurisprudence to the natural or common law reality of property, and the reciprocal definition of property and the police power by forthrightly extending the Lucas, Nollan, and Dolan methodology to all land-use takings disputes.

Nothing the Court can do, however, will illuminate fully the inherently indeterminate nature of property and police power concepts. Natural law can do only so much. The rest depends upon prudential judgment exercised against an unknown future. The genius of a Takings Clause applied largely or presumptively by reference to state property law, especially state common law, developments is that it neither treats particular specifications of private property as absolute rights nor as licenses revocable by unsupervised police power. Rather, the natural law respects the character of a local community as it has defined itself chiefly within state judge-made precedent, rather than solely and deferentially in the too often acquisitive or exclusionary immediacy of legislative enactment. The building of any community takes time, and the incremental nature of common law adjudication reasonably supplies this opportunity and, with it, the promise of fairness called for by the Fifth Amendment.

262. See Parking Ass'n, 115 S. Ct. at 2269 (Thomas, J., dissenting).