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PROPERTY RIGHTS AFTER *DOLAN*: THE SEARCH FOR THE MADISONIAN SOLUTION TO THE REGULATORY TAKINGS CONUNDRUM

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*Yesterday the active area in this field was concerned with "property." Today it is "civil liberties." Tomorrow it may again be "property." Who can say that in a society with a mixed economy, like ours, these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom?*¹

The "Takings Clause" of the Fifth Amendment to the United States Constitution loudly proclaims that private property shall not "be taken for public use, without just compensation."² In 1922, Justice Holmes relied on this clause in declaring that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³ With Holmes' famous dicta as its launch pad, the Supreme Court embarked on its long and meandering journey into the dense forest of regulatory takings jurisprudence.⁴ In its recent decision in *Dolan v. City of Tigard*,⁵ the Court followed the path beaten by James Madison and has emerged from the forest toting a sensible approach to solving the regulatory takings conundrum.

The Fifth Amendment's Takings Clause is clear in certain respects. If the government utilizes its power of eminent domain and condemns private property, it must adequately compensate the landowner.⁶ Furthermore, if the government

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¹ FELIX FRANKFURTER, OF LAW AND MEN 19 (Philip Elman ed., 1956).

² U.S. CONST. amend. V. Although the framers intended the Fifth Amendment to fetter only the federal government, the Supreme Court has held that the Takings Clause and just compensation requirement of the Fifth Amendment apply to the states through the Fourteenth Amendment's due process requirements. See *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 235-41 (1897).

³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁴ When a government regulates private property in a manner that restricts the property rights of a landowner, the government has in a sense "taken" property without physically seizing any land. See *infra* notes 8-12 and accompanying text.

⁵ 114 S. Ct. 2309 (1994).

⁶ See, e.g., *United States v. Carmack*, 329 U.S. 230, 241-42 (1946); *Kohl v. United States*, 91 U.S. 367, 372-73 (1875). The Constitution does not contain a specific provision specifying the power of eminent domain. The Supreme Court, however, has asserted that the Fifth Amendment's Takings Clause "is a tacit recognition of a preexisting power to take private property for public use." *Carmack*, 329 U.S. at 241.

undertakes action that results in a permanent physical invasion of privately owned property, then the government must likewise compensate the landowner.⁷

What is not so clear, however, is how courts should adjudicate when a government does not physically invade one's property, but regulates the property in such a way as to deprive the owner of a particular use of the property.⁸ Local governments have proscribed landowners from developing their land as a result of zoning regulations,⁹ have prohibited coal production companies from mining their coal because the mining activities may lead to subsidence problems of the surface structures,¹⁰ and have prohibited property owners from enlarging their buildings because the buildings are historic landmarks.¹¹ When do these actions trigger the Takings Clause of the Fifth Amendment and require the government to provide just compensation to the landowner? This is the regulatory takings dilemma, and the Supreme Court has previously voiced its frustration in not being able to devise any concrete judicial standards to resolve this issue.¹²

Deeply entrenched in the morass of regulatory takings jurisprudence is the authority of local governments to impose developmental exactions as the City of Tigard attempted to do in *Dolan*.¹³ Developmental exactions are a form of land-use regulation that arise when a property owner petitions a local government for a permit to develop his or her land, and the local government conditions the grant of the permit upon the property owner giving up something in return.¹⁴ The recent

⁷ In *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871), the Court held that the government's construction of a dam that resulted in permanent flooding of a landowner's property constituted a taking requiring compensation. *Id.* at 181. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court held that a federal navigational servitude did not apply to the landowner's pond and that if the government required public access, it would have to compensate the landowner. *Id.* at 179-80. The Court has made it clear that a taking occurs regardless of the magnitude of the physical invasion. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court ruled that cable boxes consisting of only one cubic foot attached to a building still resulted in a permanent physical invasion and that therefore just compensation was required. *Id.* at 438-40.

⁸ The Supreme Court has long recognized that the term "property" in the Fifth Amendment does not refer only to the physical aspect of an item such as land. Rather, the Court considers "property" to stand for "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

⁹ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-95 (1926).

¹⁰ *Mahon*, 260 U.S. at 413.

¹¹ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 133-37 (1978).

¹² Justice Stevens stated: "[T]he Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting). Justice Stevens continued, claiming that the Court's regulatory takings cases are "open-ended and standardless." *Id.* See also William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059 n.11 (1980) (referring to takings jurisprudence as "disheveled as a ragpicker's coat").

¹³ 114 S. Ct. at 2312. For a discussion of *Dolan*, see *infra* text accompanying notes 57-88.

¹⁴ For a thorough discussion of developmental exactions, see Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51 (1987).

upsurge in local governments' use of developmental exactions¹⁵ has forced the Supreme Court to grapple with a new breed of cases that implicate the clouded regulatory takings doctrine.¹⁶

Property rights advocates hail the *Dolan* decision as the appropriate progression in a line of cases since 1986 in which the Supreme Court has applied a heightened form of scrutiny to land-use regulations.¹⁷ Such heightened scrutiny, according to these advocates, is necessary to protect landowners in the face of an increasing barrage of environmental regulations.¹⁸ Many in Congress, as well as in various state legislatures, are attempting to carry the property rights movement further by proposing bills that would make it more difficult for government agencies to enact land-use regulations without compensating affected landowners.¹⁹ However, others decry *Dolan*, asserting that the Court should not inhibit the efforts of local governments to enact rational land-use regulations, even if the regulations limit the rights of individual property owners.²⁰

After providing an analysis of contemporary regulatory takings jurisprudence, this Note will suggest that the Supreme Court's holding in *Dolan* clearly reflects the degree of property rights that James Madison envisioned when drafting the Fifth Amendment. In making this argument, this Note will examine and refute the suggestion that the Supreme Court's heightened means-end scrutiny espoused in *Dolan* will substantially limit the ability of local governments to enact necessary land-use regulations. Rather, *Dolan* allows governmental bodies to enact land-use regulations but properly forces governments to be more careful and efficient in enacting regulations which affect the rights of private property owners.

Next, this Note will submit that, although the Supreme Court has taken steps to ensure that property owners receive the rights guaranteed them by the Fifth Amendment, takings jurisprudence in the United States is still muddled. This Note then will survey various legislative attempts to strengthen property rights in the regulatory takings arena and discuss why these attempts do not provide a satisfactory solution to the problem. Finally, this Note will suggest measures which state courts could implement that would allow governmental bodies to enact

¹⁵ As local governments face increasing financial difficulties, they are turning to private owners and transferring the costs of various items such as sidewalks, roads, sewer lines, and even greenways to them. See Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing*, 23 REAL EST. L.J. 7, 7 (1994).

¹⁶ See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). For a discussion of *Nollan*, see *infra* text accompanying notes 47-55.

¹⁷ See *infra* notes 39-55 and accompanying text.

¹⁸ See, e.g., Michael M. Berger, *Property Owners Have Rights, Too*, L.A. TIMES, July 3, 1994, at M5 (claiming that "[l]ocal governments and environmental activists have gotten used to treating property owners who need permits as convenient fish in a barrel").

¹⁹ See *infra* notes 186-97 and accompanying text.

²⁰ A spokesman for the Audubon Society claimed that the *Dolan* decision "is an extraordinary intrusion by the court into the authority of local government" which "elevates the interests of property owners over the interests of the community as a whole." Berger, *supra* note 18, at M5.

necessary land-use regulations, while providing landowners with the rights guaranteed them by the Constitution.

I. CONTEMPORARY REGULATORY TAKINGS JURISPRUDENCE

*[T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government*²¹

When governmental entities want to restrict the rights of a private property owner without resorting to eminent domain, they often will attempt to regulate the land in the desired manner without actually condemning or physically invading the land. Without providing any compensation to the property owner, local governments have been able to limit development of property,²² require developers to grant public easements,²³ and force landowners to give up their mining rights.²⁴ Frequently local governments accomplish these goals without resorting to eminent domain by relying on the valid use of their "police powers" to impose land-use regulations.²⁵

Although the Constitution does not explicitly grant police powers to federal or state governments, the Supreme Court has consistently maintained that a government inherently has the general power to act to protect the health, safety, and welfare of the people.²⁶ The notion of police powers has its origins in such thinkers as John Locke and Thomas Jefferson, who believed that citizens grant police powers to their government so that it can maintain a peaceful and just society.²⁷

The extent of the role of police power in the regulatory takings arena has evoked considerable controversy. Such controversy is illustrated best by the opposing views of Justice Holmes and Justice Brandeis in the seminal case of *Pennsylvania Coal Co. v. Mahon*.²⁸ In that case, a landowner purchased a home with a chain of title which reserved to a coal company the right to extract coal from

²¹ *Penn Central*, 438 U.S. at 124.

²² *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980).

²³ *Kaiser Aetna*, 444 U.S. at 170-80.

²⁴ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-93 (1987).

²⁵ For a thorough discussion of police powers and their importance in takings jurisprudence, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 107-45 (1985).

²⁶ *See id.* at 107-09. The Supreme Court also attempted to define police powers as such. In *Lochner v. New York*, the Court stated that there are "certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers Those powers . . . relate to the safety, health, morals, and general welfare of the public." 198 U.S. 45, 53 (1905).

²⁷ *See* JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 16-30, 59-60 (1992); James L. Oakes, 'Property Rights' in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 584-90 (1980).

²⁸ 260 U.S. 393 (1922).

beneath the surface of the property.²⁹ Subsequently, Pennsylvania enacted a statute that prohibited the mining of coal located beneath a house because of the possibility of subsidence.³⁰ Because the regulation would have precluded the coal company from mining the coal to which it had purchased a right, the Court ruled that the regulation constituted a taking.³¹ Writing for the majority, Justice Holmes asserted:

When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.³²

Justice Brandeis, in dissent, rebutted:

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is . . . an abridgement by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.³³

Ever since these justices voiced their opinions, this fundamental argument has been continually debated.³⁴ One school of thought in line with Justice Brandeis' position espouses the view that any regulation that is a valid exercise of a government's police power cannot constitute a taking.³⁵ Therefore, if a government regulates

²⁹ *Id.* at 412.

³⁰ *Id.*

³¹ *Id.* at 416.

³² *Id.* at 415.

³³ *Id.* at 417 (Brandeis, J., dissenting).

³⁴ See MARK POLLIT, *GRAND THEFT AND PETIT LARCENY* 74-83 (1993).

³⁵ In earlier cases, the Supreme Court espoused the "noxious use" principle. Under this principle, governments could regulate private land use without providing compensation to the landowner if necessary to prevent harm to the public. For a thorough discussion of the noxious use theory, see EPSTEIN, *supra* note 25, at 160-84. See also *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (allowing government to forbid continued operation of quarry due to dangers to residences in area); *Mugler v. Kansas*, 123 U.S. 623 (1887) (permitting government to forbid manufacture of alcoholic beverages because of health related dangers).

In later cases, however, the Court relied simply on the government's broad police powers to uphold land-use regulations necessary to protect the general public. In *Lucas v. South Carolina Coastal Council*, the Court explicitly rejected the noxious use principle, declaring that whether a land-use regulation requires compensation to the affected landowner is not contingent upon a regulation being labeled as "harm-preventing" rather than "benefit-conferring." 505 U.S. 1003, 1023 (1992).

someone's property in an effort to protect the health, safety, or welfare of the citizenry, a court logically could not find a taking or demand that the property owner be compensated. The alternative view, in line with Justice Holmes' position, recognizes that, although a regulation may be a valid exercise of police power, the regulation may infringe the constitutionally-protected property rights of an individual and require just compensation.³⁶

Since *Mahon*, the Supreme Court has vacillated from one extreme to the other but in time has sided with Holmes, recognizing that even valid exercises of police power can constitute takings.³⁷ Prior to the 1980s, the Court had failed to delineate a clear-cut standard and instead had relied on ad hoc solutions to individual cases.³⁸ In the 1980 decision of *Agins v. City of Tiburon*,³⁹ the Supreme Court overruled a California Supreme Court decision and held that a local government could not, in an effort to keep an attractive hilltop area free of development, zone the area such that development on private property had to be kept to a bare minimum.⁴⁰ Opining that the ordinance deprived the landowners of practically all economic use of their land, the Supreme Court held that a land-use regulation constitutes a taking unless the regulation "substantially advance[s] legitimate state interests"⁴¹ and does not deprive an owner of all "economically viable use of his land."⁴² The Court affirmed this holding in *Lucas v. South Carolina Coastal Council* in 1992.⁴³ In *Lucas*, the South Carolina Coastal Council, in accordance with a newly enacted regulation, prohibited an owner of beachfront property from building a single-family home on his land because it was located on a section of beach vulnerable to erosion.⁴⁴ The Supreme Court ruled that the regulation, which was enacted after Lucas purchased his property, denied Lucas substantially all economically viable use of his land.⁴⁵ Therefore, he was entitled to just compensation.⁴⁶

Justice Scalia, writing for the majority, stated that courts of the past used the noxious use principle to justify government regulations that "we nowadays acknowledge explicitly with respect to the full scope of the State's police power." *Id.* For a full discussion of *Lucas*, see *supra* text accompanying notes 43-46.

³⁶ See EPSTEIN, *supra* note 25, at 107-10.

³⁷ See Nicholas V. Morosoff, Note, "'Take' My Beach Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 833-40 (1989).

³⁸ For a discussion outlining the various tests the court employed, see John A. Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311, 314-18 (1987).

³⁹ 447 U.S. 255 (1980).

⁴⁰ *Id.* at 262-63.

⁴¹ *Id.* at 260.

⁴² *Id.*

⁴³ 505 U.S. 1003 (1992).

⁴⁴ *Id.* at 1007.

⁴⁵ *Id.* at 1031.

⁴⁶ *Id.*

In the 1987 case *Nollan v. California Coastal Commission*,⁴⁷ the Court added to the *Agins* standard by requiring that there must exist an "essential nexus" between the regulation chosen by the government to advance legitimate state interests and the interests themselves.⁴⁸ If there was no such essential nexus, the regulation would constitute a taking and require compensation to the adversely affected property owner.⁴⁹ In *Nollan*, petitioners wanted to rebuild the home that was located on beachfront property.⁵⁰ The local land governance board prevented petitioners from rebuilding, unless they agreed to grant a public easement traversing the sandy beach which stretched from their home to the ocean.⁵¹ The governing board claimed that a larger home would obstruct the view of the ocean from those driving by the property and would also increase the use of public beaches, which in turn would cause a greater need for pedestrian access to the sandy strip of beach in front of petitioners' home.⁵²

Justice Scalia, writing for the majority, explained that the demanded easement lacked the essential nexus to the ramifications that would result from the proposed rebuilding.⁵³ He asserted that the easement could not in any way enhance the view of people driving by, nor would the rebuilding cause increased pedestrian traffic on the beaches such that an easement was required to relieve congestion from pedestrians trying to get from one end of the beach to the other.⁵⁴ The Court held that "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"⁵⁵ Until the Court handed down its opinion in *Dolan*, the Court did not add further to these regulatory takings standards.

II. *DOLAN V. CITY OF TIGARD*

*[P]roperty owners have surely found a new friend today.*⁵⁶

Florence Dolan owned and managed a plumbing and electric supply retail store in the main business district of Tigard, Oregon.⁵⁷ The store itself covered 9,700 square feet of her 1.67-acre parcel of land, with a portion of the land in a floodplain bordering a creek.⁵⁸ In 1988, Dolan applied to the city for a permit to

⁴⁷ 483 U.S. 825 (1987).

⁴⁸ *Id.* at 837.

⁴⁹ *Id.*

⁵⁰ *Id.* at 827.

⁵¹ *Id.*

⁵² *Id.* at 828-29.

⁵³ *Id.* at 838-41.

⁵⁴ *Id.*

⁵⁵ *Id.* at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981)). For a complete analysis of *Nollan*, see Morosoff, *supra* note 37, at 825-30, 870-74.

⁵⁶ *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting).

⁵⁷ *Dolan v. City of Tigard*, 854 P.2d 437, 438 (Or. 1993), *rev'd*, 114 S. Ct. 2309 (1994).

⁵⁸ *Id.*

raze the existing structure and build a new store which would be approximately twice the size of the original store.⁵⁹ In addition, Dolan planned to construct another building for some smaller businesses, as well as a larger parking area.⁶⁰ All of the proposed plans fit within Tigard's zoning scheme, and the city granted Dolan's permit.⁶¹ The grant, however, was conditioned upon Dolan's dedicating the portion of her property lying within the floodplain as a greenway to improve drainage.⁶² The city also demanded that Dolan dedicate an additional fifteen-foot strip of land for conversion into a pedestrian/bicycle pathway.⁶³ Dolan sought a variance from the exactions, which the city denied.⁶⁴ The Oregon Land Use Board of Appeals,⁶⁵ the Oregon Court of Appeals,⁶⁶ and the Oregon Supreme Court⁶⁷ all sustained the city's denial of a variance, holding that the city's imposed exactions did not constitute a taking under the Fifth Amendment or the corresponding clause in the Oregon Constitution.⁶⁸ All three bodies interpreted the *Nollan* standard to require a "reasonable relationship" between Dolan's proposed development and the city's exaction requirements.⁶⁹ The United States Supreme Court, however, disagreed with the Oregon courts' interpretation and reversed, holding that Tigard's developmental exactions constituted a taking.⁷⁰

In a majority opinion written by Chief Justice Rehnquist, the Supreme Court first examined whether the city's purported interests were proper and agreed with the city that the goals of the exactions were legitimate.⁷¹ Because Dolan's parcel of land was located within a floodplain, any further development would lead to increased precipitation run-off, and the prevention of flooding was a legitimate state interest.⁷² Likewise, with respect to the pathway, the city's goal of reducing traffic congestion which could result from increased development was also a valid state interest.⁷³

Next, the Court inquired into whether the city's demanded exactions met

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 439.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Dolan v. City of Tigard*, LUBA 91-161 (1992), *aff'd*, 832 P.2d 853 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 114 S. Ct. 2309 (1994).

⁶⁶ *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd* 114 S. Ct. 2309 (1994).

⁶⁷ *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *rev'd* 114 S. Ct. 2309 (1994).

⁶⁸ *Dolan*, 854 P.2d at 444; *Dolan*, 832 P.2d at 856. The Oregon Constitution mandates that "[p]rivate property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation." OR. CONST. art. I, § 18.

⁶⁹ See *Dolan*, 854 P.2d at 441-44; *Dolan*, 832 P.2d at 854-56.

⁷⁰ *Dolan*, 114 S. Ct. 2309.

⁷¹ *Id.* at 2317-18.

⁷² *Id.* at 2318.

⁷³ *Id.*

the “essential nexus” test mandated by *Nollan*.⁷⁴ Both the greenway and the bicycle/pedestrian pathway met the “essential nexus” test as both were effective ways of dealing with the problems which the city suggested would result from Dolan’s increasing the size of her supply store.⁷⁵

The Court then proceeded to perform an additional analytical step not appearing in *Nollan*. It was in this step that the Court enumerated greater protection for property owners. In *Nollan*, the Court ended its analysis when it determined that there was not even a loose nexus between the anticipated ramifications of the proposed development and the government’s demanded exactions.⁷⁶ After finding that an essential nexus existed in *Dolan*, the Court further asserted, “[W]e must then decide the required degree of connection between the exactions and the projected impact of the proposed development.”⁷⁷ In other words, the exaction must be related not only in nature to the proposed development, but it must also be related in extent.⁷⁸

In determining how to articulate the necessary extent of connection, the Court resorted to surveying the various standards employed by state courts.⁷⁹ The Court held that the Fifth Amendment requires that there be a “rough proportionality” between the exaction and the anticipated ramifications of the proposed development.⁸⁰ The Court qualified the standard by asserting that no “precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”⁸¹ A significant component of the Court’s new standard is the city’s burden of showing that the required degree of connection, rough proportionality, is met.⁸² Finally, the Court held that Tigar did not meet the newly articulated rough proportionality standard.⁸³ Chief Justice Rehnquist observed that the city had failed to demonstrate that Dolan’s surrendering of approximately ten percent of her property for a public greenway was roughly

⁷⁴ *Id.*; see *supra* text accompanying notes 48-49.

⁷⁵ *Dolan*, 114 S. Ct. at 2318.

⁷⁶ *Nollan*, 483 U.S. at 837-42.

⁷⁷ *Dolan*, 114 S. Ct. at 2317.

⁷⁸ *Id.* at 2319-20.

⁷⁹ The Court identified generally three different standards which exist among the various states courts. The Court asserted that the states with very generalized statements as to the necessary connection between the required exaction and the impact of the proposed development are too lax and are constitutionally insufficient. *Id.* at 2318-19. The Court then declared that the standard at the other extreme, which is termed the “specific and uniquely attributable test” and demands direct proportionality, is excessive. *Id.* at 2319. The Court settled on an intermediate standard which the Court labeled as “rough proportionality.” *Id.* at 2319-20.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2320 n.8.

⁸³ *Id.* at 2321-22.

proportional to increased flood prevention needs.⁸⁴ Likewise, the city's findings that the bicycle/pedestrian pathway "could" offset some of the traffic problems did not demonstrate sufficient basis for the demand of the pathway.⁸⁵

Justice Stevens, in a dissenting opinion, assailed the majority's decision to place the burden on the city, arguing that there was no precedent for this requirement.⁸⁶ Chief Justice Rehnquist responded to Justice Stevens' attack by distinguishing zoning regulations, in which the burden is not placed upon the local government, and exactions, in which the burden must be placed upon the local government because it makes decisions specifying conditions necessary for property owners to develop their land.⁸⁷

Dolan mandates that an exaction regulation constitutes a taking unless: (1) there is an essential nexus between the regulation chosen by the government to advance legitimate state interests and the interests themselves, (2) the government demonstrates a rough proportionality between the exaction and the anticipated ramifications of the proposed development, and (3) the regulation does not deprive the property owner of economically viable use of his land.⁸⁸

III. THE REVIVAL OF MADISONIAN PROPERTY RIGHTS

*In civilized communities, property as well as personal rights is an essential object of the laws In a just & a free, Government, therefore, the rights both of property & of persons ought to be effectually guarded.*⁸⁹

*In no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned.*⁹⁰

A. Madisonian Property Rights

A discussion of regulatory takings jurisprudence cannot be confined to contemporary cases but also must focus on the thoughts of the Framers and the property rights they envisioned in designing the Constitution. James Madison

⁸⁴ Rehnquist asserted that "[i]t is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems." *Id.* at 2320.

⁸⁵ *Id.* at 2321-22.

⁸⁶ *Id.* at 2323 (Stevens, J., dissenting).

⁸⁷ *Id.* at 2320 n.8.

⁸⁸ See *supra* notes 39-80 and accompanying text.

⁸⁹ James Madison, Speech of Aug. 7, 1787, reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 395 (Marvin Meyers ed., Brandeis Univ. Press 1981) (1973) [hereinafter *THE MIND OF THE FOUNDER*].

⁹⁰ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 638-39 (Jacob P. Mayer & Max Lerner eds., 1st ed. 1966) (1961).

drafted the Fifth Amendment of the Constitution,⁹¹ and, hence, any standard underlying the takings issue should generally conform to Madison's design.

Madison's belief in property rights stemmed from those principles espoused by English thinkers such as William Blackstone and John Locke. Blackstone's legal philosophies permeated early American law,⁹² and Madison adhered to Blackstone's notion of property. In his essay *Property*, Madison quoted Blackstone when claiming that property "means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.'"⁹³ Blackstone proclaimed that property rights emanated from natural law, and thus the absolute rights of property could not be infringed, "not even for the general good of the whole community."⁹⁴

The thinking of John Locke reflected a similar natural law belief in the individual's right to property. Locke asserted that the "supreme power cannot take from any man any part of his property without his own consent."⁹⁵ According to these ideologies, property rights are absolute and should receive at least as much respect as other individuals' rights.⁹⁶

Madison recognized the importance of an individuals' right to property and drafted the Fifth Amendment to ensure that these rights were protected from the broad powers of government. During the revolutionary era, the prevailing political ideology was republicanism, with Thomas Jefferson and Benjamin Franklin acting as its leading proponents.⁹⁷ Republicans held dear the belief that citizens sacrificed their individual interests for the common good of the nation.⁹⁸ Consequently, legislatures had virtually free reign to impose on an individual's property rights if the imposition was necessary for the common good.⁹⁹ It was exactly this free reign against which Madison intended the Fifth Amendment to protect. Madison did not trust the legislature to protect adequately individual rights and was wary that the republican ideology would validate the uncompensated taking of an individual's property.¹⁰⁰

Although Madison believed that property rights were fundamental, he also recognized that, in order for the government to rule effectively, it must have the

⁹¹ See ELY, *supra* note 27, at 53.

⁹² See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 112 (2d ed. 1985); ELY, *supra* note 27, at 32.

⁹³ James Madison, *Property*, reprinted in 14 *THE PAPERS OF JAMES MADISON* 266 (Robert Rutland et al. eds., 1983) [hereinafter *Property*].

⁹⁴ WILLIAM BLACKSTONE, *COMMENTARIES* *135.

⁹⁵ JOHN LOCKE, *OF CIVIL GOVERNMENT*, SECOND ESSAY 85 (Henry Regnery ed., 1948).

⁹⁶ See Oakes, *supra* note 27, at 583.

⁹⁷ See William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694, 694-701 (1985).

⁹⁸ *Id.* at 699.

⁹⁹ Judge Oakes labels the Republican beliefs as the "Social View" of property and contrasts them with the principles of Madison's "Dominion View." Oakes, *supra* note 27, at 584-87.

¹⁰⁰ See Treanor, *supra* note 97, at 706-10.

power of eminent domain.¹⁰¹ Madison specifically intended the Fifth Amendment to be a judicial check on the government's right to invoke its powers of eminent domain.¹⁰² Madison's writings reflect not only his belief that property could not be "directly" taken without compensation but also his recognition of the dangers of government infringing on property rights without formally condemning private property.¹⁰³ Madison proclaimed that a government "which indirectly violates [the people's] property, in their actual possessions . . . is not a pattern for the United States."¹⁰⁴

B. *Recognition of Fundamental Property Rights in Reviewing Land-Use Regulations*

The Supreme Court's recent willingness to extend heightened scrutiny to land-use regulations in cases such as *Nollan* and, most recently, in *Dolan*, has generated significant controversy. Many commentators have argued that an individual's property rights are not fundamental and that courts should not afford them the same protection as established fundamental rights, such as the right to free speech.¹⁰⁵ In fact, Justice Stevens in his dissenting opinion in *Dolan* argued that the level of scrutiny applied should not "approximate the kind of review that would apply if the city had insisted on a surrender of Dolan's First Amendment rights in exchange for a building permit."¹⁰⁶

The Supreme Court's heightened scrutiny in *Nollan* and *Dolan* certainly reflects Madison's view that courts must carefully examine any legislative attempt to violate an individual's fundamental property rights. Accordingly, in *Dolan* Chief Justice Rehnquist denounced claims that the Court should not provide the same protection to property rights as it does to other fundamental rights, declaring: "[W]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."¹⁰⁷ Indeed, this argument is exactly in accordance with Madison's intentions. Madison

¹⁰¹ See POLLOT, *supra* note 34, at 43-46.

¹⁰² See James Madison, Speech Proposing the Bill of Rights (June 8, 1789), [hereinafter Speech Proposing] in 12 THE PAPERS OF JAMES MADISON 207 (Charles F. Hodson et al. eds., 1979) (asserting that "independent tribunals of justice will consider themselves . . . guardians of those rights").

¹⁰³ See ELY, *supra* note 27, at 55-56.

¹⁰⁴ *Property*, *supra* note 93, at 267-68 (emphasis omitted).

¹⁰⁵ See, e.g., Kenneth Berlin, *Just Compensation Doctrine and the Workings of Government: The Threat From the Supreme Court and Possible Response*, 17 HARV. ENVTL. L. REV. 93, 94-96 (1993); J. Freitag, Note, *Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid Lochner Redivivus*, 28 VAL. U. L. REV. 743, 745 (1994).

¹⁰⁶ *Dolan*, 114 S. Ct. at 2328-29 (Stevens, J., dissenting); see also Freitag, *supra* note 105, at 745 (suggesting that regulations targeting property use should receive more deferential review than regulations protecting "fundamental constitutional rights").

¹⁰⁷ *Dolan*, 114 S. Ct. at 2320.

proclaimed that he considered the Fifth Amendment to be of "equal if not greater importance than" the others.¹⁰⁸

Ever since the emergence of the New Deal programs in the 1930s, the status of property rights has never been afforded the same level of protection as other fundamental rights such as the right to free speech and the right to free exercise of religion.¹⁰⁹ However, various Supreme Court justices and other prominent judges have not always agreed with the lesser judicial protection granted to property rights. In 1958, Learned Hand noted that "it would have seemed a strange anomaly" to the drafters of the Fifth Amendment "to learn that [the drafters] constituted severer restrictions as to Liberty than Property."¹¹⁰ In 1972, Justice Potter Stewart speaking for the Court argued that "the dichotomy between personal liberties and property rights is a false one. . . . That rights in property are basic civil rights has long been recognized."¹¹¹ The Court's insistence in *Dolan* that property rights are fundamental rights signals a welcome restoration of the property rights envisioned by Madison.¹¹²

Justice Stevens, in his dissenting opinion in *Dolan*, criticized the Court for focusing particularly on the fact that the imposed exactions would deprive Dolan of the ability to exclude others.¹¹³ Stevens argued that the right to exclude is only one "strand" in the bundle of property rights and that the destruction of a single right does not constitute a taking.¹¹⁴ This reasoning is not unprecedented in Supreme Court takings jurisprudence. In *Penn Central Transportation Co. v. New York City*,¹¹⁵ the Supreme Court upheld a regulation prohibiting the owners of Grand Central Terminal from building modern business offices atop the terminal.¹¹⁶ The Court ruled that the regulation was a valid method of preserving a historic landmark.¹¹⁷ The owners of the terminal complained that the regulation prohibited them from utilizing one portion of their property, namely the airspace above the

¹⁰⁸ Speech Proposing, *supra* note 102, at 208. In a personal letter, Madison emphasized that there are "two cardinal objects of Government; the rights of persons, and the rights of property." James Madison, Remarks on Mr. Jefferson's Draught of a Constitution (October 15, 1788), reprinted in *THE MIND OF THE FOUNDER*, *supra* note 89, at 36.

¹⁰⁹ See DENNIS J. COYLE, *PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION* 15-16 (1993). See also Oakes, *supra* note 27, at 608 (asserting that "property rights were essentially confined to a legal dust bin").

¹¹⁰ LEARNED HAND, *THE BILL OF RIGHTS* 50-51 (1958).

¹¹¹ *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). In making these arguments, Justice Stewart cited works of John Locke and William Blackstone. *Id.*

¹¹² See *supra* notes 91-104 and accompanying text.

¹¹³ Justice Stevens stated: "Although limitation of the right to exclude others undoubtedly constitutes a significant infringement upon property ownership . . . restrictions on that right do not alone constitute a taking." *Dolan*, 114 S. Ct. at 2324-25 (Stevens, J., dissenting) (citation omitted).

¹¹⁴ *Id.* at 2324 (Stevens, J., dissenting).

¹¹⁵ 438 U.S. 104 (1978).

¹¹⁶ *Id.* at 138.

¹¹⁷ *Id.* at 109.

terminal.¹¹⁸ Justice Brennan, writing for the majority, dismissed this argument and asserted:

'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.¹¹⁹

This stance unquestionably forsakes the original meaning of the Takings Clause by downplaying the significance of the right to exclude others. Madison himself emphasized the extreme importance of this right.¹²⁰ Madison's sentiment is echoed in a 1979 case in which the Court found a taking when the government imposed a navigational servitude requiring public access to a private landowner's pond.¹²¹ The Court emphasized that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property [rights]."¹²²

C. *The Return of Lochnerism?*

Some opponents decry the Supreme Court's use of heightened scrutiny in takings jurisprudence as nothing more than a revival of the application of substantive due process to economic regulations, a judicial concept which the Court abandoned fifty years ago.¹²³ Throughout a forty-year period beginning in 1897, the Supreme Court frequently relied on the notion of substantive due process arising from the Fourteenth Amendment to invalidate various state measures affecting economic freedom.¹²⁴ This era is typified by the Court's decision in *Lochner v. New York*,¹²⁵ in which the Court struck down a state measure that limited the hours a

¹¹⁸ *Id.* at 130.

¹¹⁹ *Id.* at 130-31. *See also* *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety").

¹²⁰ *See supra* text accompanying note 93.

¹²¹ *Kaiser Aetna*, 444 U.S. 164 (1979).

¹²² *Id.* at 176.

¹²³ *See* Freitag, *supra* note 105, at 745. Justice Stevens, in his dissenting opinion, asserted that "[e]ven more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago." *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting).

¹²⁴ *See* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 11.3 (4th ed. 1991).

¹²⁵ 198 U.S. 45 (1905).

bakery employee could work.¹²⁶ In *Lochner* and other decisions of this era, the Court extended almost no deference to state legislatures and instead determined on its own whether the law in question was a proper use of a state's police powers.¹²⁷ The reach of the Court's substantive due process jurisprudence extended into the realm of land-use regulations as well. In *Nectow v. City of Cambridge*,¹²⁸ the Court struck down a zoning ordinance limiting a portion of the plaintiff's land to residential property because the ordinance did not promote the general welfare of the city.¹²⁹

The Court's aggressive use of substantive due process began to decline when Congress started enacting various New Deal legislative measures to protect the public welfare.¹³⁰ Most notably, in the 1938 decision of *United States v. Carolene Products Co.*,¹³¹ the Court upheld a federal regulation proscribing the interstate shipment of milk that contained non-milk fat additives.¹³² The Court explicitly deferred to the discretion of Congress and held the "existence of facts supporting the legislative judgment is to be presumed for regulatory legislation . . . unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."¹³³ Since 1938, the Court has applied a substantially reduced form of scrutiny to regulations affecting economic freedom, essentially presuming the constitutionality of such regulations.¹³⁴

By applying a heightened form of scrutiny to land-use regulations, the Court has not revived the specter of *Lochner*.¹³⁵ Instead of questioning the power of local legislatures to enact police power regulations, the Court presumes the legitimacy of land-use regulations but ensures that individual property owners are not deprived of their Fifth Amendment rights. In *Nollan*, the Court presumed the California Coastal Commission's proposal that the public's ability to see the beach is a legitimate governmental interest.¹³⁶ In fact, the Court affirmed that "a broad

¹²⁶ *Id.* at 64.

¹²⁷ See NOWAK & ROTUNDA, *supra* note 124, § 11.3. For a discussion of the *Lochner* era and how the courts viewed property rights during that era, see JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 128-31 (1990).

¹²⁸ 277 U.S. 183 (1928).

¹²⁹ *Id.* at 188.

¹³⁰ See ELY, *supra* note 27, at 119-34.

¹³¹ 304 U.S. 144 (1938).

¹³² *Id.* at 154.

¹³³ *Id.* at 152.

¹³⁴ See, e.g., *Whalen v. Roe*, 429 U.S. 589, 597 (1977) (holding that a state regulation was an "orderly and rational legislative decision" and therefore not substantive due process violation); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding state law against substantive due process attack declaring that Court would not second guess wisdom of legislature); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding state regulation governing opticians because legislature "might have concluded" it was necessary in certain situations).

¹³⁵ *Lochner*, 198 U.S. 45 (1905).

¹³⁶ *Nollan*, 483 U.S. at 835.

range of governmental purposes and regulations satisfies these requirements."¹³⁷ Likewise, in *Dolan* the Court acknowledged that the government has valid police powers to regulate development in such a way as to prevent flooding and relieve traffic congestion.¹³⁸ Thus, the Supreme Court, in applying heightened scrutiny in regulatory takings cases, is not conducting unwarranted judicial fact-finding and second-guessing the legislature's purpose as the Court did in the *Lochner* era. Instead, the Court is simply ensuring that property owners receive the full panoply of rights guaranteed them by the Fifth Amendment.

D. *The Need for Heightened Scrutiny*

Will the Court's invocation of heightened scrutiny in reviewing land-use regulations have a devastating effect on local governments' ability to carry out their role as guardians of the public welfare? As a result of growing urban populations and increasing environmental concerns, local governments are resorting more frequently to land-use regulations and developmental exactions as a feasible way to implement various land-use planning strategies.¹³⁹ In response to *Dolan*, some commentators have expressed concern that local governments will no longer be able to implement land-use regulations without violating the Takings Clause and, because of financial difficulties, will not be able to condemn land in exchange for just compensation. Joseph M. Manko, a Delaware county commissioner and land-use attorney, warns that "the Supreme Court's retrenchment of private property rights, combined with the downturned economy, may force cities and towns to endure greater hardships to reap the fruits of growth."¹⁴⁰

In *Dolan*, the Court conceded that the exactions represented a sound method of preventing flooding and relieving traffic congestion.¹⁴¹ The Court, however, correctly refused to defer entirely to the legislature and relax its judicial scrutiny, a solution to which courts too often resort after acknowledging that the regulation will result in a public benefit.¹⁴² If the Court had simply required that

¹³⁷ *Id.* at 834-35.

¹³⁸ See *supra* text accompanying notes 71-73.

¹³⁹ See, e.g., Page C. Dringman, Comment, *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245, 246 (1994).

¹⁴⁰ Joseph M. Manko, *Decision May Give Builders Upper Hand*, PHILA. INQ., Aug. 14, 1994, at 3. See also, Jessica Mathews, *Takings Exception*, WASH. POST, Feb. 14, 1994, at A16 (alleging that takings movement is "shortsighted, dangerous, backdoor attack on the means that allow us as neighbors, towns, states or a nation to live and compete in reasonable harmony").

¹⁴¹ See *supra* text accompanying note 71.

¹⁴² See, e.g., *Goldblatt v. Hempstead* 369 U.S. 590 (1962). The Goldblatt quarry was a typical quarry with a deep pool of water at the bottom. *Id.* at 591. The local government prohibited Goldblatt from conducting any further quarrying, purportedly to prevent children from drowning in the deep water. *Id.* at 592, 595. Despite the fact that the regulation probably would have little impact on the number of drownings in the quarry, and despite the fact that there were a variety of alternative solutions that the local government could have required, such as a fence, the Supreme Court relinquished its inquiry after deferring to the local government's determination that prohibiting future quarrying was a rational

the city's exactions have an essential nexus to the city's purported interest in preventing flooding and traffic congestion, the Court would have yielded too much deference to the legislature without providing adequate protection to Dolan. For instance, if the Court had stopped at its finding of an essential nexus and did not inquire into the extent of the exaction, the city could demand a thirty foot wide bike path and twenty percent of the land for a stormwater drainage area, and the Court would not have found a taking.¹⁴³ There would have been no taking because there would have been an essential nexus between the exaction and the city's interests in preventing flooding and traffic congestion.¹⁴⁴

Instead, the Court's "rough proportionality" standard demands that courts examine regulations to ensure that a government is not imposing arbitrary regulations which generally benefit the public.¹⁴⁵ In *Dolan*, the city argued that the pedestrian/bicycle pathway "could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion."¹⁴⁶ The Court was not satisfied with the city's finding that the construction of the bicycle/pedestrian pathway "could" alleviate any additional traffic congestion that the development might cause.¹⁴⁷ The Court held that the city must conduct adequate studies to demonstrate that the proposed development warranted a new pathway.¹⁴⁸

The Court was even more circumspect with regard to the city's demand that Dolan turn over ten percent of her property so that the city could maintain a greenway for better stormwater drainage.¹⁴⁹ Once again, the Court noted that a greenway is generally a valid exaction in an effort to prevent flooding, but the Court was not convinced that Dolan should give the land to the city so that the city could maintain it as a greenway.¹⁵⁰ The city did not demonstrate any reasons as to why a public greenway was needed to prevent flooding rather than a private one owned by Dolan.¹⁵¹

The Court's newly articulated "rough proportionality" standard, and the Court's placement of the burden of proof upon local governments, ensures that

solution. *Id.* at 595-96. See also POLLOT, *supra* note 34, at 69. Professor Pollot observes that regulations are often supported by legislative claims that the regulations are immediately necessary to protect the public. *Id.* He admonishes that, "at just such times, public passions—against which the Framers attempted to construct a barrier—are at their highest." *Id.*

¹⁴³ *Dolan*, 114 S. Ct. at 2318-19.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 2319 (citing *Simpson v. North Platte*, 292 N.W.2d 297, 302 (Neb. 1980)).

¹⁴⁶ *Dolan*, 114 S. Ct. at 2315 (quoting city's petition for certiorari).

¹⁴⁷ *Id.* at 2321-22.

¹⁴⁸ The Court specifically held that "[n]o precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." *Id.* at 2322.

¹⁴⁹ See *supra* text accompanying note 84.

¹⁵⁰ *Dolan*, 114 S. Ct. at 2320-21.

¹⁵¹ *Id.*

property rights will not expand and contract with the caprice of the legislature.¹⁵² Courts must heed Madison's premonition that, if left in the hands of the legislature, property rights will not be adequately secure.¹⁵³ If legislatures go unchecked, land-use regulations, especially in the form of developmental exactions, will force individual property owners to bear the burden of the public. In *Dolan*, for instance, the city's general land-use plan required developmental exactions for bicycle/pedestrian pathways when development was to occur in an area that was "located on a street with designated bikepaths or adjacent to a designated greenway/open space/park."¹⁵⁴ Through this provision, the City of Tigard required private property owners to foot the bill for what amounted to a public easement. Of course, such a pathway is beneficial and most likely very popular with the public, but it is not likely to be fair to private landowners. The Supreme Court has observed that a fundamental purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁵⁵ Likewise, the greenway demanded by the city was justified as a protection against the risk of flooding.¹⁵⁶ The city, however, could have devised a solution more narrowly tailored to preventing flooding rather than requiring Dolan to give a portion of her land to the city to maintain as a greenway.¹⁵⁷ The more legislative justifications are allowed without judicial scrutiny, the more the rights guaranteed by the Fifth Amendment are abandoned.

According to Justice Stevens, the Court should consider how the totality of an owner's property rights are affected by the exactions and what benefits the owner would receive as a result of the development permit.¹⁵⁸ He noted that a better stormwater drainage system would benefit Dolan and the other property owners abutting the creek.¹⁵⁹ The benefit of increasing the commercial potential of the property as a result of the city granting the permit, according to Justice Stevens,

¹⁵² Madison noted that "[t]he sober people of America are weary of the fluctuating policy which has directed the public councils." THE FEDERALIST NO. 44, at 288 (James Madison) (Issac Kramnick ed., 1987).

¹⁵³ Madison warned that legislative abridgements of property rights brought "into question the fundamental principle of republican Government, that the majority who rule in such governments are the safest Guardians both of the Public Good and private rights." James Madison, Vices of the Political System of the United States (April 1787), reprinted in THE MIND OF THE FOUNDER, *supra* note 89, at 62.

¹⁵⁴ *Dolan*, 114 S. Ct. at 2313 n.1 (quoting the City of Tigard's Community Development Code, § 18.86040.A.1.b). The Supreme Court did not pass on the constitutionality of the city's general land use regulations and their variance provisions themselves. *Id.* at 2316 n.4.

¹⁵⁵ *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *Mahon*, 260 U.S. 393, 416 ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

¹⁵⁶ *Dolan*, 114 S. Ct. at 2318.

¹⁵⁷ See *id.* at 2320-21.

¹⁵⁸ *Id.* at 2324 (Stevens, J., dissenting).

¹⁵⁹ *Id.*

more than offset the fact that Dolan would lose a portion of her property.¹⁶⁰ Not only does this view contradict Justice Holmes' definition of regulatory takings in *Mahon*,¹⁶¹ but it condones the fact that Dolan would then unfairly shoulder the cost of public benefits without just compensation.

IV. REGULATORY TAKINGS AFTER *DOLAN*: WHERE DO WE GO FROM HERE?

*[T]he ends no longer justify the means in the regulation of land use.*¹⁶²

*The good news is the [C]ourt's explicit recognition that land use can and should be regulated.*¹⁶³

The Court's continued willingness to apply heightened scrutiny to land-use regulations will certainly have an impact on regulatory takings jurisprudence, and, as succinctly put by Justice Stevens, *Dolan* is "unquestionably an important case."¹⁶⁴ The Court has made it clear that the Fifth Amendment protects the rights of property owners from unwarranted governmental intrusions.

But how significant will the Court's attempt to strengthen property rights be? In certain aspects, the Court's heightened scrutiny standard is not completely clear, and commentators have expressed concern that regulatory takings jurisprudence is still muddled.¹⁶⁵ In fact, since *Nollan* and *Lucas*, many state courts have ignored or misinterpreted the Supreme Court's restoration of property rights.¹⁶⁶

Although *Dolan* provides a sensible approach to restoring Madisonian property rights, the Court has failed to provide adequate guidance, leaving the practical effect of *Dolan* questionable. In response, Congress as well as many state legislatures have proposed a variety of measures attempting to restore property rights without resorting to the courts.¹⁶⁷ Many of these measures diverge from the Madisonian concept of property rights because they would thwart valid land-use

¹⁶⁰ *Id.* at 2325-26. Justice Stevens went as far to presume that "the duty to pay taxes and the responsibility for potential tort liability may well make ownership of the fee interest in useless land a liability rather than an asset." *Id.* at 2326. This position illustrates the trap about which Justice Holmes warned when he said, "When this seemingly absolute [property rights] protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Mahon*, 260 U.S. at 415.

¹⁶¹ See POLLOT, *supra* note 34, at 92-94. Professor Pollot observes that Holmes required just compensation when any interest is taken from a property owner, regardless of the interests that were not taken from the property owner. *Id.*

¹⁶² Linda Greenhouse, *Supreme Court Gives Developers Crucial Victory: They Are Freed from Many Local Environmental, Public Use Rules*, SAN FRAN. CHRON., June 25, 1994, at A1.

¹⁶³ Laurie Asseo, *High Court Ruling Favors Landowners: Governments Must Prove Regulations Are Valid*, BOST. GLOBE, June 25, 1994, at 3.

¹⁶⁴ *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting).

¹⁶⁵ See *supra* text accompanying notes 162-63.

¹⁶⁶ See *supra* notes 163-65 and *infra* notes 167-77 and accompanying text.

¹⁶⁷ See *infra* notes 178-88 and accompanying text.

regulations.¹⁶⁸ This section discusses some of the remaining problems in the takings arena and some of the proposed remedies and concludes with suggestions for improving the protection of property rights while facilitating valid land-use regulations.

A. *The Impact of Heightened Scrutiny in Land-Use Regulations*

Some lower courts have heeded the Supreme Court's decree that property rights are to be afforded greater protection through increased judicial scrutiny.¹⁶⁹ Commentators point out that many lower courts, however, are not abiding by the Supreme Court's recent decisions concerning regulatory takings.¹⁷⁰ Professor Williams has suggested that lower courts are either directly evading Supreme Court policy in the area of regulatory taking, or simply ignoring the Court's rulings.¹⁷¹ Indeed, in *Trimen Development Co. v. King County*,¹⁷² the Washington Supreme Court upheld park development fees against a takings challenge. The court cited the "rough proportionality" standard of *Dolan* and interpreted it to require that the development exactions be only "reasonably necessary" as a result of the landowners proposed development.¹⁷³ When lower courts fail to apply the increased scrutiny demanded by the *Dolan*, the legislative machinations that Madison feared materialize.¹⁷⁴

*Ehrlich v. City of Culver City*¹⁷⁵ provides a more startling example of legislative intrusion into the rights of property owners despite the Supreme Court's explicit proscription of such. A California developer, Richard Ehrlich, purchased a vacant lot upon which a private tennis club formerly existed.¹⁷⁶ When Ehrlich proposed to build thirty townhouses on the site, the city imposed a \$280,000 "mitigation fee" for the loss of recreational facilities, plus a \$33,220 "in lieu art fee."¹⁷⁷ The city reasoned that, because townhouses would be constructed where a tennis facility previously existed, the mitigation fee was necessary for the city to provide comparable public recreational facilities elsewhere.¹⁷⁸ Moreover, the "in

¹⁶⁸ See *infra* notes 181-88 and accompanying text.

¹⁶⁹ See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (finding taking when Corps of Engineers prohibited landowner from constructing on wetlands because prohibition was not sufficiently related to government interests and denied owner economically beneficial use of land); *Petermann v. Department of Natural Resources*, 521 N.W.2d 499 (Mich. 1994) (finding taking because government did not meet Supreme Court's essential nexus and rough proportionality tests).

¹⁷⁰ See AMERICAN INSTITUTE OF CERTIFIED PLANNERS, *LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE* 91-93 (Brian W. Blaesser & Alan C. Weinstein eds., 1989).

¹⁷¹ *Id.* at 92.

¹⁷² 877 P.2d 187 (Wash. 1994).

¹⁷³ *Id.* at 194.

¹⁷⁴ See *supra* notes 146-47 and accompanying text.

¹⁷⁵ 15 Cal. App. 4th 1737 (1993), *vacated* 114 S. Ct. 2731 (1994).

¹⁷⁶ *Id.* at 1742-43.

¹⁷⁷ *Id.* at 1743.

¹⁷⁸ *Id.* at 1744.

lieu art fee” was necessary because the townhouses diminished “the opportunity for creation of cultural and artistic resources.”¹⁷⁹ Ehrlich argued that the exactions constituted a taking because they did not meet the nexus test of *Nollan*.¹⁸⁰ The California Court of Appeals ruled that the nexus test did not apply because the city was not demanding property from the landowner, only a fee.¹⁸¹ According to the court, even if the heightened scrutiny of *Nollan* did apply, the exactions satisfied the test because there was a substantial nexus between the land-use restriction and the condition of approval.¹⁸² In 1994, the Supreme Court, relying on *Dolan*, vacated and remanded the *Ehrlich* opinion.¹⁸³ Once again, the California court ignored the decree of the U.S. Supreme Court, ruling that the city’s exactions met the rough proportionality test of *Dolan*.¹⁸⁴ Not surprisingly, the court ordered that its opinion not be published.¹⁸⁵

B. Legislative Attempts to Ensure Adequate Protection of Property Rights

Even in light of the Supreme Court’s clear intent to restore property rights to the level envisioned by Madison, throughout the past few years federal and state legislators have proposed various bills to address takings issues.¹⁸⁶ These bills fall under one of two general categories. First, there are bills that would require the government to compensate private property owners when land-use regulation devalues their property by a specified percentage.¹⁸⁷ The second category comprises bills that would require government agencies to conduct a “takings analysis” before enacting any regulations affecting land use.¹⁸⁸ Neither of these two solutions provides a viable method to ensure appropriate property rights protection while allowing for necessary land-use regulation.

In 1995, the House of Representatives passed a bill sponsored by Representative Charles Canady that would require the federal government to

¹⁷⁹ *Id.* at 1755.

¹⁸⁰ *Id.* at 1747. For a discussion of the nexus test, see *supra* text accompanying notes 47-55.

¹⁸¹ The court held that monetary exactions must only be rationally related to legitimate governmental interests. *Ehrlich*, 15 Cal. App. 4th at 1749.

¹⁸² *Id.*

¹⁸³ 114 S. Ct. 2731 (1994).

¹⁸⁴ See Gideon Kanner, *Rule of Law: In California, a Land Owner Loses Again*, WALL ST. J., Feb. 8, 1995, at A15.

¹⁸⁵ *Id.*

¹⁸⁶ Many lawmakers believe that recent Supreme Court rulings are too narrow on the takings issue and thus do not provide adequate property rights protection. See *Takings: State Legislators Adopt Resolution Opposing Federal Laws to Define Takings*, 144 Daily Env’t Rep. (BNA) d8 (July 29, 1994). Legislators frequently cite the increasing number of intrusive government regulations, especially environmental regulations, as the impetus for proposing bills that would provide greater property rights. See *General Policy: ‘Contract’ Takings Provision Would Lead to Corporate ‘Windfalls,’ Official Says*, 25 Env’t Rep. (BNA) 2006 (Feb. 17, 1995).

¹⁸⁷ See *infra* notes 188-91 and accompanying text.

¹⁸⁸ See *infra* notes 192-96 and accompanying text.

compensate landowners if federal regulations devalue their property by more than twenty percent.¹⁸⁹ Such bills would essentially render the federal government's police powers ineffective to enact valid land-use regulations. Choosing an arbitrary diminution-in-value amount which would trigger just compensation, would thwart regulations necessary to protect the public health, safety, and welfare. For instance, if the federal government forbade an industrial company from destroying a natural wetland and this lowered the company's return on investment by more than twenty percent, the government would have to compensate the company. These bills blatantly eviscerate the government's police powers in the name of property rights protection.

Legislators, environmental groups, and others have mounted a fierce opposition to these legislative proposals. United States Associate Attorney General John Schmidt described the takings proposals as "a blunderbuss approach that would provide unjust windfalls to wealthy corporations at a tremendous cost to the health, safety, and pocketbooks of middle-class Americans."¹⁹⁰ With a substantial deficit weighing down the federal government, it is unreasonable to suggest that governmental bodies can compensate landowners for regulations regardless of whether the regulations are necessary to protect the public welfare.¹⁹¹ Although the Fifth Amendment demands that the rights of property owners be shielded from unnecessary government intrusion, as the Supreme Court has ruled, government must still maintain the power to enact necessary land-use restrictions to protect the public welfare.

Other property rights bills require government agencies to conduct extensive analyses before enacting any land-use regulations. Senator Robert Dole has proposed the Omnibus Property Rights Act of 1995¹⁹² which requires federal agencies to prepare an analysis detailing the purpose of the regulation, assessing the likelihood that a taking of property will occur under the regulation and the amount of compensation that would result, and discussing alternatives to the regulation.¹⁹³ Many state legislators have proposed similar bills which would apply to state agency regulations.¹⁹⁴ At first glance, these proposals appear to constitute

¹⁸⁹ H.R. 925, 104th Cong., 1st Sess. (1995).

¹⁹⁰ *Property Rights: Takings Provision Under 'Contract' Draws Fire from Government Officials*, 29 Daily Env't Rep. (BNA) d11 (Feb. 13, 1995).

¹⁹¹ Justice Holmes asserted that "[g]overnment 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." *Mahon*, 260 U.S. at 413.

¹⁹² S. REP. NO. 22, 104th Cong., 1st Sess. (1995).

¹⁹³ S. REP. NO. 605, 104th Cong., 1st Sess. (1995). This bill also proposes that the federal government be required to compensate property owners when federal regulation devalues their property by more than 33%. *Id.*

¹⁹⁴ See, e.g., H.R. 2220, 42d Leg., 1st Sess. (Ariz. 1995) (providing that owner of private property can be compensated for state action reducing value of property); S. 747, 1995 Sess. (Cal. 1995) (requiring compensation whenever implementation of state regulatory program denies permitted property use); H.R. 801, 18th Leg., 1995 Sess. (Haw. 1995) (establishing guidelines for agency actions relating to

a reasonable stop-and-think approach to adequately ensure that government does not make unnecessary intrusions upon private property. However, the time and cost constraints of agency actions render such analyses infeasible. Neither federal nor state agencies have the resources to prepare extensive studies for every land-use regulation considered by a federal agency or local governing board. Some commentators suggest that this "look before you leap" approach will not be overly burdensome but will simply require government agencies to be more careful in enacting regulations.¹⁹⁵ Others rebut this argument by pointing out that agencies already conduct scientific studies before enacting regulations and that imposing formal bureaucratic requirements would cost millions of dollars in staff time in the states alone.¹⁹⁶

In the past, takings issues have been left to the jurisdiction of the courts,¹⁹⁷ and any future interpretation of the takings clause should remain in the courts. The takings question is fundamentally one of constitutional interpretation, and the judicial system is the appropriate forum for providing solutions to private property disputes. To ensure the Madisonian balance of protecting property rights while allowing government to exercise adequately its police powers, takings issues must be decided on a case-by-case basis. Only in that manner can a judicial body take into account the individual circumstances, including: (1) the economic impact on an affected property owner, (2) the public purpose for which a particular land-use regulation was adopted, and (3) the nature of the government action.

C. State Courts Should Implement Both Substantive and Procedural Changes to Improve Regulatory Takings Jurisprudence

Most cases involving land-use regulations are heard by state courts, and thus the improvement of regulatory takings jurisprudence must begin at the state court level.¹⁹⁸ The lack of a cohesive and comprehensible takings standard has lead

land-use regulations that may constitute taking); S. 2117, 1995 Sess. (Miss. 1995) (providing remedy for owners of property value of which has been diminished by implementation of governmental regulatory programs); H.R. 311, 54th Leg. Sess. (Mont. 1995) (requiring review and assessment of proposed state actions that might result in depriving property owner of economic value of private property); H.R. 2504, 68th Leg. Sess. (Or. 1995) (requiring regulating entities to pay compensation for certain types of regulation affecting private property); S. 374, 1995 Sess. (S.C. 1995) (providing compensation under certain conditions as result of state regulations that substantially interfere with private property); S. 55, 1995 Sess. (Vt. 1995) (requiring compensation to property owners whenever regulations reduce value of property to less than 50% of its value).

¹⁹⁵ See *Regulatory Reform: Moratorium Bills Take 'Meat Axe' Approach to Regulations*, Chafee Says, 39 Daily Env't Rep. (BNA) d18 (Feb. 28, 1995).

¹⁹⁶ See *White House Seeks to Mitigate Effect of Hill's 'Regulatory Relief' Agenda*, 91 Daily Env't Rep. (BNA) d15 (May 13, 1994).

¹⁹⁷ See *supra* notes 22-55 and accompanying text.

¹⁹⁸ In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), the Supreme Court held that property owners cannot bring a claim under the Takings Clause of the Fifth Amendment until they have exhausted available state remedies. This is typically referred to as

to confused jurisprudence and inefficient land-use policy making.¹⁹⁹ When state courts refuse to apply heightened scrutiny to questioned land-use decisions, property owners cannot feel secure that their rights will not be subject to the caprice of government. By applying heightened scrutiny, state courts will force local governments to tailor land-use regulations so that infringements of private property will be minimized to only those necessary to promote the public welfare.²⁰⁰ William H. Hussmann, a Maryland county planning board chairman, summed it up when he observed that *Dolan* "will probably cause us to be more concerned about the reasonableness of what we're requiring [property owners] to do."²⁰¹

In addition to espousing the substantive standards established by the Supreme Court, state courts should implement procedural measures that will allow for quicker resolution of regulatory takings disputes. For both property owners and local governments alike, drawn out court proceedings result in increased losses and costs.²⁰² While a property owner awaits a court's decision, development may be halted, rents may go uncollected, and litigation fees abound.

Time also can mean money for government entities facing potential liability to compensate the injured property owners for "temporary takings." In *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*,²⁰³ the Supreme Court held that an ordinance preventing the church from any development of its land, even a temporary restriction, constituted a taking.²⁰⁴ More importantly, the Court ruled that the state government must compensate the church for the entire

the "ripeness doctrine." See DAVID L. CALLIES, PROPERTY RIGHTS: ARE THERE ANY LEFT, in REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS 265-68 (G. Richard Hill ed., 1990) [hereinafter REGULATORY TAKING].

¹⁹⁹ See discussion of *Ehrlich*, *supra* notes 175-85 and accompanying text. A telling illustration of the inefficiency of local governments that have not carefully planned their land-use regulation strategies involves the *Lucas* case, discussed *supra* text accompanying notes 43-46. The landowner in that case purchased his property for \$975,000, but the local government prohibited him from developing the land. See John Gallagher, *Laws of the Land in Property-Use Disputes, Judges Have Begun to Side More Often With Landowners*, DETROIT FREE PRESS, July 18, 1994, at F6. After the Court ruled that the land-use regulation constituted a taking, the local government paid the landowner \$1.2 million in damages. *Id.* Shortly after paying out the damages, the state sold the beachfront property to another developer. *Id.*

²⁰⁰ For a synopsis of the current test that the Court employed in *Dolan*, see *supra* text accompanying note 88.

²⁰¹ Joan Biskupic, *Justices Broaden Property Rights; Land Use Requirements May Be 'Takings'*, WASH. POST, June 25, 1994, at A1. See also David G. Savage, *Supreme Court Strengthens Rights of Property Owners; Development*, L.A. TIMES, June 25, 1994, at A1 (reporting that number of legal defenders of property rights believe that *Dolan* will affect those situations in which cities become overzealous in their regulation).

²⁰² See John Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*, in REGULATORY TAKING, *supra* note 198, at 307-22.

²⁰³ 482 U.S. 304 (1987).

²⁰⁴ *Id.* at 318.

period that development was prohibited.²⁰⁵ By imposing liability for temporary takings, the Supreme Court has made it clear that government entities must be very circumspect in enacting land-use regulation, or face potential liability even if the government later decides to revoke the regulation upon complaint by the landowner.²⁰⁶ If takings disputes are not resolved quickly, local governments may forego enacting valid regulations for fear of triggering instant liability for prolonged proceedings.²⁰⁷

To facilitate quicker resolution of takings disputes, state courts could develop specialized courts to decide all land-use matters. Professor Mixon advocates such a specialized judicial system and proposes that these courts could employ trained investigators to conduct and manage preliminary matters to expedite the entire process.²⁰⁸ If specialized land-use courts are not feasible, Mixon suggests the use of a panel of traveling judges which could hear and decide land-use cases quickly.²⁰⁹ Alternatively, states could establish administrative agencies to oversee regulations affecting property owners. Through the use of trained and experienced adjudicatory boards, agencies could expedite hearings and reduce costly delays.

By consistently applying the judicial standards delineated by the Supreme Court in *Dolan*, state courts would enable both local governing boards and property owners to better understand their respective rights to individual parcels of land. This alone would likely reduce the quantity of litigation arising from land-use regulations. Additionally, swift hearings and resolutions by adjudicatory boards or specialized land-use courts would diminish potential economic losses by property owners and would allow for local governments to provide integral land-use management without heightened fear of liability for temporary takings as a result of *First Evangelical*.

V. CONCLUSION

*Freedom and property rights are inseparable, you cannot have one without the other.*²¹⁰

As a result of increasing population and greater environmental degradation, increased land-use regulation has become inevitable. Accordingly, government

²⁰⁵ *Id.* at 322. It is important to note that the Court explicitly limited the results of *First Evangelical Church* to the facts of that case. *Id.* at 321. That is, this case involved a regulation that deprived a landowner of substantially all use of his property for a relatively long time (six years). The Court noted that this ruling does not apply to "quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.*

²⁰⁶ *See id.*

²⁰⁷ Takings litigation may drag on for many years. In *First Evangelical*, the ordinance in question was first adopted in 1979, but the case was not decided by the Supreme Court until 1987. *Id.* at 307.

²⁰⁸ Mixon, *supra* note 202, at 313.

²⁰⁹ *Id.*

²¹⁰ George Washington, *quoted in* Dringman, *supra* note 139, at 245.

entities must utilize their police powers to protect the public welfare through necessary land-use regulation. It is crucial, however, for governments to recognize that the furtherance of important public land-use goals is not inconsistent with the full protection of property rights. Government entities must use their powers creatively to tailor solutions to pressing environmental concerns while respecting property rights just as they respect other fundamental rights.

It is tempting for lawmakers to use regulations to benefit segments of society at the expense of private property owners. Bicycle paths, walkways, scenic easements, and greenways all benefit the public at large and are typically easy for local governments to justify. Yet, the property rights of the landowners who are forced to donate their land for the sake of the public are as important as the other fundamental rights protected by the Constitution. If the courts fail to protect these rights, then property ownership is dictated by the whims of legislative sufferance.

In recent cases such as *Nollan* and *Dolan*, the Supreme Court has delineated a judicial policy that recognizes the necessity for a broad range of governmental police powers while simultaneously preserving the property rights which James Madison and the founding fathers sought to protect. Yet regulatory takings jurisprudence remains obscure because state courts have not uniformly interpreted the Supreme Court's rulings or have simply failed to adhere to the rulings. Furthermore, takings jurisprudence does not lend itself to bright-line legislative solutions which do not adequately balance the competing interests of land-use regulations and the constitutional rights of private property owners. State courts must espouse the Supreme Court's latest ruling in *Dolan* so as to allow for the proper balance of government police powers and private property rights.