Dolan v. City of Tigard: Taking a Closer Look at Regulatory Takings

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NOTES

DOLAN v. CITY OF TIGARD: TAKING A CLOSER LOOK AT REGULATORY TAKINGS

The Takings Clause of the Fifth Amendment to the United States Constitution prevents the government from appropriating private property unless it is for public use and the government compensates the property owner. To determine whether a taking has occurred within the meaning

1. U.S. Const. amend. V. The Takings Clause provides that no "private property [shall] be taken for public use, without just compensation." This Amendment has been made applicable to the states through the Fourteenth Amendment. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (characterizing the issue as whether a governmental action constituted a taking within the meaning of the Fifth Amendment, which was made applicable to the states through the Fourteenth Amendment). But see Dolan v. City of Tigard, 114 S. Ct. 2309, 2326-27 (1994) (Stevens, J., dissenting) (contesting the majority's conclusion that the Takings Clause applies to the states through the Fourteenth Amendment).

Although there is some debate as to whether the Takings Clause of the Fifth Amendment applies to the states via the Fourteenth Amendment, the Supreme Court has ruled that the Fourteenth Amendment's Due Process Clause requires the government to pay just compensation when property is taken for public use. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (holding that a county's taking of interest accruing on an interpleader fund constituted a taking under the Fifth and Fourteenth Amendments); see also Brian W. Blaesser et al., Land Use and the Constitution 210 (Brian W. Blaesser & Alan C. Weinstein eds., 1989) (concluding that "despite the different language of the Fifth and Fourteenth Amendments, and regardless of whether the just compensation clause of the Fifth Amendment has been incorporated into the Fourteenth Amendment, the substantive standard in a governmental takings [sic] of property is now identical under each").

2. It is important to note that the Takings Clause does not necessarily grant the government the power to take property, but rather confirms and sets limits on a preexisting power to take private property for public use. United States v. Carmack, 329 U.S. 230, 241-42 (1946) (noting that the Fifth Amendment is "a tacit recognition of a preexisting power"). Generally, there are two restrictions on the government's power to take property. First, the government may take private property only for public use. See Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 416-17 (1896) (invalidating a taking by the government under the Fourteenth Amendment's Due Process Clause, because it was not for public use). This limitation prevents the government from taking property from one individual and giving it to another. Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55, 80 (1937). The Court recently weakened the public use restriction, however, by broadly interpreting the meaning of what constitutes "public use." See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984) (noting that the public use requirement of the Takings Clause

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of the Fifth Amendment, thereby triggering the compensation requirements, a court must perform a balancing test. Such test balances the government's interest in regulating property to ensure the safety, health, and general welfare of the community against an individual's right to use his property as he sees fit and to be free from bearing public burdens. 3

is coterminous with the states' police power and upholding a state's use of its eminent domain power to take property from large landholders and transfer it to tenants presently residing on the land). But see Armstrong v. United States, 364 U.S. 40, 49 (1960) (noting that the primary rationale behind 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"). For a general discussion on what constitutes public use, see Lawrence Berger, The Public Use Requirement in Eminent Domain, 57 OR. L. REV. 203 (1978) (discussing the meaning and history of the public use requirement of the Takings Clause).

The second restriction on the government's power to take property is that it must justly compensate the owner for the property it takes. See United States v. 50 Acres of Land, 469 U.S. 24, 26 (1984) (holding that the just compensation requirement of the Takings Clause only requires the government to pay the market value of the property at the time of the taking and not the substitution value of the property); Richard A. Posner, Economic Analysis of Law 51 (3d ed. 1986) (noting that the requirement of just compensation prevents the government from overusing the Takings Clause); see also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 313 (1987) (discussing compensation for "temporary takings"). For a general discussion on compensation for takings, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 182-215 (1985).

See generally Fred Bosselman et al., The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control 51-107 (1973) (discussing the history of taking and regulation). The roots of the Takings Clause can be traced to Article 29 of the Magna Carta, which prevented the King from depriving a landowner of property without judicial action. Id. at 56. This concept was reformulated by Sir William Blackstone, who believed that it was an Englishman's inherent right to use, enjoy, and dispose of his property freely. Id. at 91. Prior to the enactment of the Bill of Rights, at least one state promulgated legislation preventing the government from taking private property unless a public exigency required it and the owner was compensated for the taking. Id. at 94; see also William B. Stoeckel, A General Theory of Eminent Domain, 47 WASH. L. REV. 553, 553-56 (1972).

3. Compare Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (upholding a state's right to engage in land use planning) and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (acknowledging that a state could not operate effectively if it was compelled to compensate landowners each time a change in the law diminished property values) with Armstrong, 364 U.S. at 49 (noting that the primary purpose of the Takings Clause is to prevent the government from forcing an individual to bear a public burden that, in all fairness, should be borne by all).

This balancing contrasts a landowner's right to be compensated justly under the Takings Clause against a state's inherent right to enact legislation pursuant to its police power. A state's police power grants it the right to enact laws to secure its general comfort, health, and prosperity. Christopher G. Tiedeman, A Treatise on the Limitations of Police Power in the United States 2 (1886). For example, the police power permits the government to prevent an individual from yelling "fire" in a crowded theater, notwithstanding the individual's First Amendment right. See Schenck v. United States, 249 U.S. 47, 52 (1919) (noting that the government has an interest in preventing speech that will
This balancing becomes more intricate in the context of regulatory takings. Ever since Justice Holmes declared that a regulation would constitute a taking within the meaning of the Fifth Amendment if it went "too
bring about certain "substantive evils"). The police power also allows the government to forbid a landowner from mining coal on his property when such mining would cause damage to surrounding buildings, notwithstanding the owner's right to use his property for productive purposes. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (rejecting a landowner's claims that a state statute prohibiting mine subsidence constituted a taking and impaired his right to contract pursuant to the Contract Clause of the United States Constitution). The police power allows the government to override some substantive protections of the Constitution in the name of the public welfare. See Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 59 (1988) (noting that a state may justify overriding substantive protections of the Constitution through use of its police power). Without this power, and if the rights provided in the Constitution were absolute, the state would have a difficult time maintaining order and discipline within the community. Id.

Some restrictions on the government's use of its police power, however, are necessary. Without such restrictions, substantive rights protected by the Constitution would be rendered meaningless because the state could always justify its constitutional infringements as legitimate uses of its police power. See Mahon, 260 U.S. at 413 (noting that without some limitation on a state's police power, the Due Process and Contract Clauses of the Constitution would offer no protection). The exact point at which a state's police power must yield to an individual's constitutional rights is determined partially by the level of scrutiny the courts use to review the government's justification for using its police power. Epstein, supra, at 59 (stating that the effective scope of a state's police power depends significantly upon the level of scrutiny applied). For a discussion the various levels of scrutiny used to review property regulations, see infra note 126.

4. A regulatory taking is generally defined as governmental action that does not involve an acquisition of title by the government, but which effectively deprives the owner of all or most of his interest in the property. United States v. General Motors Corp., 323 U.S. 373, 378 (1945). Regulatory takings issues usually arise in situations where the government does not seek to obtain title or physical occupation of the property, but rather, attempts to regulate the property with such an onerous regulation that the individual's property interests are significantly affected. See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992) (remanding the case but stating that a taking occurs where a government regulation denies a landowner all economically beneficial use of his land); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013 (1984) (holding that a federal statute requiring the disclosure of certain information constituted a taking to the extent that the individual had a state created trade-secret property right in the information required to be disclosed); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (holding that a state constitutional provision prohibiting a shopping center owner from excluding protesters from its property did not constitute a taking); Village of Euclid, 272 U.S. at 395 (upholding a zoning ordinance which restricted the use of an owner's land).

The determinative issue is at what point does a restriction become so onerous that it is a "taking" under the Fifth Amendment. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that a land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land"); Mahon, 260 U.S. at 415 (noting that a regulation will constitute a taking if it "goes to far").
courts have struggled to find the fulcrum that ensures an equal balance between the government's power to regulate and an individual's property rights. The focal point of this balancing is the determination of whether the regulation relates sufficiently to the government's stated purpose to pass constitutional scrutiny. This relatedness requirement ensures that the regulation complies with both the Takings Clause of the Fifth Amendment and the substantive due process component of the Fourteenth Amendment. Generally, to withstand a substantive due process challenge, a regulation need only be reasonably necessary to further

5. See Mahon, 260 U.S. at 415. Specifically, Justice Holmes stated, "[i]t]he 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." Id.

6. The court must identify the point at which a government regulation becomes so onerous that it deprives the owner of basic property rights, thereby having the same effect as a physical appropriation. See Lucas, 112 S. Ct. at 2894-95 (holding that where a landowner is deprived of all economical use of his land, the landowner has suffered a taking under the Fifth Amendment).

7. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (noting that in order for the governmental regulation to be upheld, there must be an "essential nexus" between a legitimate state interest and the regulation). In Nollan, the Court struck down a land-use regulation that required the landowners to provide a public easement across their beachfront property. The Coastal Commission imposed this condition in exchange for their approval of the Nollans' pending building permit which would allow them to build a new, larger home on their property. Id. at 828. The Court agreed that for such a land-use regulation to be lawful it must substantially further the same governmental purpose that would justify a complete denial of the building permit. See id. at 836. For a more detailed discussion on Nollan and its "essential nexus" test, see infra notes 134-151 and accompanying text.

8. 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, 831 (1989) (noting that land-use regulations must pass both substantive due process scrutiny and takings scrutiny to be found constitutional). In pertinent part, the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.

When an owner challenges a land-use regulation in court because it violates the substantive due process component of the Fourteenth Amendment, the owner usually claims that the regulation does not sufficiently further a legitimate state interest. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962) (implying that a land-use restriction will constitute a taking if not reasonably necessary to achieve a public purpose); Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928) (holding invalid a zoning regulation on substantive due process grounds because it was not sufficiently related to a public purpose); Village of Euclid, 272 U.S. at 394-97 (upholding a land-use regulation because it was sufficiently related to a public purpose).

Generally, property regulations, like other economic regulations, are granted a presumption of constitutionality and are reviewed under a rational basis standard. See United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). The Court has, however, negated this presumption of constitutionality and employed a higher level of scrutiny in reviewing a specific type of property regulation. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) For a further discussion on the impact of the Dolan decision, see infra notes 152-96 and accompanying text.
a legitimate government purpose. To withstand a Takings Clause challenge, however, the required nexus between a regulation and the government's stated purpose for the regulation is not so clear. Some cases require that the regulation be reasonably necessary to achieve the legitimate government purpose, while others dictate that the regulation must be substantially related to the legitimate stated purpose.

Whether the Takings Clause requires a property regulation to "substantially advance" a legitimate state interest, or just be "reasonably necessary" to effect that same end was the focus of intense debate in Nollan v. California Coastal Commission. In Nollan, the majority reasoned that while the Court's past decisions did not state clearly that a property regulation must "substantially advance" a governmental purpose, the Court required such a relationship when the regulation concerned the

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9. *Goldblatt*, 369 U.S. at 590-91, 94 (upholding a regulation that prohibited the landowner from using his property in a productive manner, against a substantive due process challenge, because the regulation was reasonably related to the purpose of promoting the health and safety of the town); *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (noting that the government is justified in exercising its police power if: the public interest requires it; the means used are reasonably necessary to accomplish the stated purpose; and the means are not unduly burdensome upon individuals). See infra notes 61-66 and accompanying text.

10. *Compare Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (requiring that the regulation "substantially advance" a legitimate state interest) with *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (stating that the regulation need only be "reasonably necessary" to carry out the government purpose). This inconsistency was the focus of intense debate between the majority and dissent in Nollan, 483 U.S. at 834-35 n.3. Although the Nollan majority conceded that the Court's prior cases failed to define fully the exact degree of relatedness that was needed between the regulation and the legitimate state interest, the "substantially advance" requirement appears to have prevailed. *Id.* at 834-35. For a further discussion on the debate between the majority and dissent in Nollan, see infra notes 134-51 and accompanying text.

11. *See*, e.g., *Penn Central*, 438 U.S. at 127 (noting that a regulation that restricts the use of property may constitute a taking if it is not reasonably necessary to accomplish the public purpose).

12. *See Agins*, 447 U.S. at 260 (stating that a land-use regulation does not effect a taking if it substantially advances legitimate state interests); *see also* infra notes 125-51 and accompanying text (discussing this apparent inconsistency among Supreme Court decisions). The difference between whether the regulation need be only "reasonably necessary" to accomplish the government end or must "substantially advance" such an end has significant consequences for both the landowner and the government. If the regulation need only be reasonably necessary to accomplish the government end, the regulation will most likely be upheld. *See* DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION, SHAPING SOCIETY THROUGH LAND USE REGULATION 42 (1993) (noting that for forty years after the Court's decision in Carolene Products, no government regulation was invalidated under the rational basis scrutiny). By contrast, if the regulation must substantially advance the governmental purpose, it stands a greater chance of being struck down. *See*, e.g., *Nollan*, 483 U.S. at 834, 837-39 (applying the stricter standard and striking down a land-use regulation because it did not substantially advance the stated governmental purpose).

13. 483 U.S. 825 (1987); *see* infra notes 134-51 (discussing the Nollan decision).
transfer of a property interest. The Nollan Court determined that to satisfy the “substantially advance” requirement, there must be an “essential nexus” between the state interest and the regulation. Conversely, the dissent asserted that the “substantially advance” requirement was a type of heightened scrutiny that the Court had not applied to government regulations since the Lochner Era. The dissent argued that the “classic statement of the rule” is that the regulation need only be “reasonably necessary” to achieve a governmental purpose. In Dolan v. City of Tigard, the Supreme Court adopted and refined the Nollan majority’s standard. Specifically, the Court refined the term “substantially advance” and outlined the proof necessary to satisfy this requirement.

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15. Id. at 837.
16. See id. at 842 (Brennan, J., dissenting) (arguing that the majority’s demand that the government's regulation substantially advance a public purpose “imposes a standard of precision for the exercise of a State's police power that has” not been seen since the early part of the century).

The Lochner Era is the label given to that period of time in which the Court continually struck down certain economic regulations as violating an individual's substantive due process rights. See Lochner v. New York, 198 U.S. 45 (1905) (invalidating a state statute that limited the number of hours a bakery employee could work because such a law was deemed to infringe upon an individual's right to contract); see also Adkins v. Children's Hosp., 261 U.S. 525 (1923) (holding invalid a minimum wage regulation for women on freedom to contract grounds). The Lochner Era lasted from the Court's decision in Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) (upholding an individuals “liberty to contract” right over the government's right to pass economic legislation), until its decision in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (upholding a state minimum wage law for women and minors). The Court in West Coast Hotel explicitly overruled its decision in Adkins which had held invalid a similar minimum wage law. Id. Moreover, the Court “officially” abandoned its ardent review of economic legislation. See COYLE, supra note 12, at 40 n.5.

In applying a type of strict scrutiny, the Court invalidated many of the statutes because they did not sufficiently further the stated governmental purpose. See Lochner, 198 U.S. at 64 (noting that there had to be a “real and substantial” relationship between the governmental purpose and the statute). For a discussion on how the Court’s decisions in Nollan and Dolan purport to resurrect the heightened scrutiny applied during the Lochner Era in the area of property regulations, see infra notes 134-51, 152-96 and accompanying text.

17. Nollan, 483 U.S. at 843 n.1 (Brennan, J., dissenting).
19. Id. at 2317-19.
20. Id. at 2316, 2319-20. The regulations involved in both Nollan and Dolan were developmental exactions. Developmental exactions are regulations which demand that a property owner dedicate some item of value to the city in return for the permission to build or develop a parcel of property. See Morosoff, supra note 8, at 823. Exactions may be in the form of a dedication of land to the city, a monetary payment, and/or a restriction on the use of the developer's land. Id. at 848-49. For example, a municipality may require the developer to dedicate a portion of his land to the city so that it may be used for a city park or a bike path. See, e.g., Dolan, 114 S. Ct. at 2313 (requiring a building permit applicant to dedicate a portion of her land to the city for a proposed bike path). In addition, the munic-
Florence Dolan, the petitioner, owned an electric and plumbing supply store in the Central Business District of the city of Tigard.\textsuperscript{21} Her property was adjacent to a small creek and part of the property fell within the city's 100-year floodplain.\textsuperscript{22} The city's comprehensive land-use plan designated this floodplain as part of a public "greenway" and included plans to build a recreational pathway in this area.\textsuperscript{23} Dolan applied to the city for a building permit to raze her existing store and to construct a new, larger store with a paved parking lot.\textsuperscript{24} The city approved Dolan's application subject to a number of conditions.\textsuperscript{25} The conditions required Dolan to grant to the city the portion of her property located within the 100-year floodplain for the greenway, and an additional fifteen-foot strip of land adjacent to the floodplain so the city could construct a recreational pathway.\textsuperscript{26}

Regardless of form, exactions have become an important strategic component of a municipality's comprehensive plan and a vital aid in meeting the needs of its growing metropolis. See, e.g., Dolan, 114 S. Ct. at 2322 (specifying the need for land-use planning, because of increasing urbanization in metropolitan areas). Many municipalities have actually codified exactions in their comprehensive plans or other type ordinances. See, e.g., TIGARD, OR., COMMUNITY DEV. CODE § 18.120.180.A.8 (1989) (requiring as a condition for site plan approval the dedication of a "sufficient open land area for [a] greenway . . . for the construction of a pedestrian/bicycle pathway") (cited in Respondents Brief at 45b-46b, Dolan (No. 93-518)). In similar fashion, many cities have passed Adequate Public Facilities Ordinances (APFO's) which require developers to help build roads, schools, water and sewer systems, and other public improvements if the proposed development increases the demand on these service beyond a pre-set threshold.

\textsuperscript{21} Dolan, 114 S. Ct. at 2313.

\textsuperscript{22} Id. Dolan's lot was about 1.67 acres in size. Id. Aside from the building used as a store, most her property was surfaced with gravel and devoted to customer parking. Petitioner's Brief at 3.

\textsuperscript{23} Dolan, 114 S. Ct. at 2313. The city adopted a plan to build a recreational pathway through the downtown area in an effort to encourage people to walk or ride their bikes into town and thus, reduce automobile traffic in the business district. Id. Pursuant to this plan, the city required new developers to dedicate a portion of their land for this pathway. Id. The city also had a Master Drainage Plan which was designed to reduce flooding and erosion along the nearby creek. See id. To implement this plan, the city adopted a policy to require landowners to dedicate that portion of their land that was within the 100-year floodplain. Petitioner's Brief at 5.

\textsuperscript{24} Dolan, 114 S. Ct. at 2313. Dolan's existing store consisted of approximately 9,700 square feet. Id. The new store would be about 17,600 square feet. Id. In addition, she wanted to pave about 40% of her lot and use it as a parking lot. Petitioner's Brief at 4.

\textsuperscript{25} Dolan, 114 S. Ct. at 2314.

\textsuperscript{26} Id. This specific condition was imposed pursuant to the city's Community Development Code which required such a dedication for site development approval. See id. (citing CDC § 18.120.180.A.8 (1989)). This dedication requirement amounted to approxi-
Dolan challenged the dedication requirements as an unconstitutional taking of her property without just compensation.\(^\text{27}\) The city justified these conditions on two grounds.\(^\text{28}\) First, it determined that the land dedication condition of the floodplain area for use as a greenway was "reasonably related" to Dolan's request to increase the size of the paved parking area on her property.\(^\text{29}\) Second, the city concluded that the dedication condition of the fifteen-foot strip of land for use as a recreational pathway was "reasonably related" to Dolan's request to enlarge her store.\(^\text{30}\) On appeal, the Land Use Board of Appeals (LUBA) affirmed the city's findings.\(^\text{31}\)

Dolan appealed to the Oregon Court of Appeals, where she argued that the Supreme Court's decision in Nollan demanded a "substantial relationship" between the dedication requirements and the government's stated purpose, as opposed to the "reasonably related" standard proffered by the city.\(^\text{32}\) The appellate court rejected Dolan's contention and

\(^{27}\) Dolan, 114 S. Ct. at 2315. Dolan originally sought an exemption from these conditions in the form of a variance. \textit{Id.} at 2314. The city, however, denied her request. \textit{Id.}

\(^{28}\) \textit{Id.} at 2314-15.

\(^{29}\) \textit{Id.} at 2315. The city contended that the added paved area on Dolan's property would increase the storm-water runoff that flowed into an already "strained creek." \textit{Id.} Thus, the city concluded that the "public needs the 'ability to make channel modifications in this area to offset the increase in stream flow.' " \textit{Petitioner's Brief} at 7-8.

\(^{30}\) Petitioner's Brief at 8. The city assumed that customers and employees of Dolan's new store could use the pathway, which would help offset any increase in traffic congestion caused by the larger store. \textit{Id.} Specifically, the city stated that the "creation of a convenient, safe pedestrian/bicycle pathway system . . . 'could offset some of the traffic demand on [nearby] streets.' " \textit{Dolan}, 114 S. Ct. at 2315 (emphasis added). The city's use of the word "could" instead of a more definite word like "would" in its assumption that the bike path may offset traffic in the area became a contested issue between the majority and the dissent. \textit{See id.} at 2321-22; \textit{Id.} at 2326 (Stevens, J., dissenting). Doubt arose as to whether shoppers would be able to use such a bike path because most of the sales at Dolan's store involved "bulky merchandise" such as plumbing and electrical equipment. Petitioner's Brief at 8; \textit{see infra} note 174 and accompanying text (discussing this "semantic battle").

\(^{31}\) Dolan, 114 S. Ct. at 2315. Dolan appealed the city's decision to the LUBA, claiming that the dedication requirements constituted an uncompensated taking of her property because the requirements were not "related to the proposed development." \textit{Id.} LUBA adopted the city's findings and concluded that there was a "reasonable relationship" between both the greenway and recreational path exactions and Dolan's development. \textit{Id.} Thus, LUBA held that there was no constitutional violation. \textit{Id.} Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed LUBA's decision. \textit{Id.}

affirmed LUBA's ruling.\textsuperscript{33} The Oregon Supreme Court affirmed, noting that the \textit{Nollan} Court had not abandoned the reasonableness standard.\textsuperscript{34} Rather, the court asserted, the \textit{Nollan} decision simply provided guidance as to the required nexus between the exactions and the impact that Dolan's new store would have on the city.\textsuperscript{35}

The United States Supreme Court reversed the Oregon Supreme Court and held that the dedication requirements imposed by the city constituted a taking of property without compensation in violation of the Fifth Amendment.\textsuperscript{36} The Court maintained that the conditions attached to the approval of Dolan's building permit were not merely restrictions on the use of Dolan's property, but actually required Dolan to deed a portion of her land to the city.\textsuperscript{37} The Court, in reviewing the conditions' constitu-

\textsuperscript{33} Id. at 856. The court of appeals reasoned that the \textit{Nollan} decision developed a three-part test for determining when a condition on development would constitute a taking. \textit{Id.} at 853. First, the regulation that creates the condition must further a legitimate state interest. \textit{Id.} Second, that regulation and condition must substantially advance the legitimate state interest. \textit{Id.} Third, a reasonable relationship must exist between the condition imposed and the impact that the new development is going to have on the city. \textit{Id.} at 854-55. In the court's view, the issue before it concerned the third part of the \textit{Nollan} test and not the second part. \textit{Id.} at 854. Thus, the court asserted that Dolan's contention that there needed to be a substantial relationship between the condition imposed and the developmental impact was misplaced because this heightened standard applied to the second prong, not the third. \textit{Id.} at 855.

\textsuperscript{34} Dolan v. City of Tigard, 854 P.2d 437, 442-43 (Or. 1993), rev'd, 114 S. Ct. 2309 (1994).

\textsuperscript{35} See \textit{id.} at 443 (reasoning that for a regulation to substantially advance a legitimate state interest, which it must do, the imposed condition must reasonably relate to the developmental impact).

\textsuperscript{36} Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). In a 5-4 decision, Chief Justice Rehnquist delivered the majority opinion and was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. \textit{Id.} at 2312. Justice Stevens authored the dissenting opinion and was joined by Justices Blackmun and Ginsburg. \textit{Id.} at 2322. Justice Souter filed a separate dissenting opinion. \textit{Id.} at 2330.

\textsuperscript{37} \textit{Id.} at 2316. The Court speculated that if Dolan had not sought to expand her store and the city had just demanded that she deed over to the city a portion of her land, a taking would have occurred. \textit{Id.} The Court's assumption that there would be a taking under these circumstances is based, in part, on its decision in \textit{Loretto} v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In \textit{Loretto}, a landowner challenged a state law permitting cable companies to install cable boxes on the owner's property without permission. \textit{Id.} at 421. The Court found that this statute authorized a physical invasion of the owner's property. \textit{Id.} at 432. In distinguishing between governmental actions that merely regulate the owner's use of property and those regulations that authorize a physical invasion of property, the \textit{Loretto} Court held that where the governmental action results in a "permanent physical occupation" of property, a taking has occurred. \textit{Id.} at 432 n.9. Thus, because the statute authorized a permanent physical occupation of the owner's property it was found to effect a taking. \textit{Id.} at 426. The \textit{Loretto} holding established a \textit{per se} takings rule because the Court asserted that a taking would be found regardless of the public benefit derived from the regulation or of the fact that the regulation had a minimal economic impact on the owner. See \textit{id.} at 434-35. \textit{But see} \textit{PruneYard Shopping Center v. Robins,
tionality, first examined whether there was an "essential nexus" between the stated governmental purpose and the dedication requirements. After finding that this requirement was satisfied, the Court next determined whether a "rough proportionality" existed between the dedication requirements and the actual impact that Dolan's larger store would have on the city. The Court placed the burden on the city to demonstrate how the dedication requirements it imposed upon Dolan would, at least to some degree, offset the problems that Dolan's new store would create. The Court concluded that the city failed to meet this burden, and thus, had taken Dolan's property without compensation.

The dissent in Dolan staunchly opposed the majority's shifting of the burden to the city to demonstrate that the regulation was in "rough proportion" to the impact that Dolan's new store would have on the city. In the dissent's view, such burden shifting reversed the presumption of constitutionality that general economic regulations have enjoyed. Thus, the dissent argued that the Court should limit the extent of its inquiry to determining whether Nollan's "essential nexus" test had been satisfied. Anything beyond this, the dissent contended, was an exercise of judicial activism that had long since been rejected.

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447 U.S. 74 (1980) (finding no taking where a government action resulted only in a temporary invasion of a shopping center that was open to the general public).

38. Dolan, 114 S. Ct. at 2317. The Court was merely applying Nollan's "essential nexus" test. Id. The Nollan Court asserted that the conditions the city imposed on the applicant must be designed to serve the same purpose as a simple denial of approval of the project. Nollan, 435 U.S. at 836. The conditions imposed cannot be a taking, therefore, if denial of the project would not constitute a taking. Id. Applying this test to the facts of Dolan, the city had justified the dedication requirement as a means to reduce flooding and traffic in the downtown area. Dolan, 114 S. Ct. at 2314-15. The Court found these reasons to be legitimate state interests that would allow the city to outright deny Dolan the right to construct a larger store. See id. at 2317-18. Thus, because the dedication requirements, as a condition to allow Dolan to build a new store, furthered the same legitimate state interest that would permit the city to deny Dolan the right to construct a larger store, Nollan's "essential nexus" test was deemed to be satisfied. Id. at 2318.

39. Dolan, 114 S. Ct. at 2319-20. Specifically, the Court held that while "[n]o precise mathematical" formula was needed, the city had the burden of making an "individualized determination" that the dedication requirements were in "rough proportionality" to the impact that Dolan's new store would have on the city. Id.

40. Id.

41. Id. at 2321. For a further discussion on the majority's opinion see infra notes 152-75 and accompanying.

42. Dolan, 114 S. Ct. at 2325-26 (Stevens, J., dissenting).

43. Id. at 2326.

44. Id. at 2325.

45. Id. at 2326. For a further discussion on the dissenting opinion, see infra notes 176-84 and accompanying text.
This Note first outlines the historical development of Takings Clause jurisprudence by considering what constitutes a regulatory taking of property under the Fifth Amendment. It then analyzes the Supreme Court's decision in *Dolan v. City of Tigard* and its impact on Takings law. Third, this Note examines the implication of the *Dolan* decision in the area of regulatory takings, with special reference to the limitations of, and justifications for, the *Dolan* holding. This Note concludes that the Court's decision in *Dolan* broke new ground in the area of property regulation by applying a type of heightened scrutiny to property regulations and by shifting the burden to the government to make specific findings that a regulation is sufficiently related to a legitimate public purpose. Furthermore, this Note argues that while *Dolan*'s burden shifting and heightened scrutiny are justified, these requirements only apply to a specific type of property regulation; namely, developmental exactions.

I. REGULATIONS, TAKINGS, AND RIGHTS

A. The Government's Power to Regulate Property

The government may regulate private property through either its eminent domain power or its police power. The eminent domain power of a government permits it to appropriate private property for public use. This power stems from the Takings Clause and requires the government to pay just compensation to the landowner upon its exercise. The government's police power is used to promote the public welfare by regulating the use and enjoyment of property. By contrast, the government's eminent domain power is used to promote the general welfare by appropriating private property for a public use after compensating the owner.

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46. See *Coyle*, supra note 12, at 27. In general, the police power is used to promote the public welfare by regulating the use and enjoyment of property. By contrast, the government's eminent domain power is used to promote the general welfare by appropriating private property for a public use after compensating the owner. 11 *Eugene McQuillen, The Law of Municipal Corporations* § 32.04, at 309 (3d ed. rev. 1991). A key distinction between the state's exercise of its police power and its eminent domain power is that the state must pay "just compensation" to the landowner when it acts pursuant to its eminent domain power; whereas the state does not have this obligation when acting pursuant to its police power. Compare *Mugler v. Kansas*, 123 U.S. 623 (1887) (denying a landowner compensation for the loss in value to his property caused by a government regulation that was enacted pursuant to the state's police power) with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (finding that the state should have used its eminent domain power to accomplish its objective and as a consequence, compensated the landowner for the loss of his property rights caused by the regulation). For further discussion on these cases, see infra notes 76-101 and accompanying text.

47. Eminent domain is defined as "a power of government by which property of private persons may be transferred to the government . . . over the [landowner's] immediate, personal protest." *Stoebuck*, supra note 2, at 599.

48. U.S. Const. amend. V. For further discussion on the origins of the Takings Clause, see supra notes 1-2.

49. See supra notes 1-2 and accompanying text. For more on the origins of the eminent domain power of government, see 1 *Julius Sackman, Nichols, The Law of Eminent Domain* §§ 1.1-1.12 (3d ed. rev. 1995); *Stoebuck*, supra note 2.
ernment may use its eminent domain power to take private property only if it is for public use.\textsuperscript{50} This limitation, in theory, prevents the government from taking private property from one individual and distributing it to another.\textsuperscript{51} The United States Supreme Court, however, has interpreted the term "public use" broadly.\textsuperscript{52} In fact, the Court noted that the public use requirement of the Takings Clause is "coterminous with the scope of a sovereign's police powers."\textsuperscript{53} This broad interpretation has led to the conclusion that as long as the government compensates the land-

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  \item \textsuperscript{50} U.S. Const. amend. V (stating that the government may not take private property for public use without compensating the owner). The Takings Clause implicitly recognizes that, at times, the government will need to take private property for a public benefit. \textit{See} United States v. Carmack, 329 U.S. 230, 241 (1946) (noting that eminent domain was a preexisting power of the government that the Takings Clause reaffirmed); Kohl v. United States, 91 U.S. 367, 371 (1875) (noting that the government's power of eminent domain is "essential to [the government's] independent existence and perpetuity"). Indeed, it would be difficult for a government to accomplish many of its goals without such a power. For example, it would be almost impossible for the government to construct interstate highways if it could not force non-cooperating landowners to transfer their land to the government for such a purpose. On the other hand, there needs to be limits on when the government may exercise its eminent domain power. The Takings Clause provides those limitations by permitting the government to take property only for public purposes and requiring the government to compensate the landowner for the property it does take. U.S. Const. amend. V.

  \item \textsuperscript{51} Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55, 80 (1937) (noting that even when compensation is paid, a person's property may not be taken for the benefit of another unless there is a public purpose justifying such action). \textit{But see} Berman v. Parker, 348 U.S. 26, 31-32 (1954) (permitting the legislature broad discretion in determining what "public purpose" would justify taking property from an individual); \textit{see also} Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239-41 (1984).

  \item \textsuperscript{52} \textit{See}, e.g., Midkiff, 467 U.S. at 239-40. In \textit{Midkiff}, the government used its eminent domain power to take private property from large landowners and transfer it to the tenants living on the land. \textit{Id.} at 232-33. The state's primary purpose for taking the land and transferring it to the tenants was to reduce the concentration of land ownership on the island of Oahu. \textit{Id.} at 232. The Court recognized that Hawaii's actions seemed to contradict the well settled notion that an individual's property may not be taken for the benefit of another without a justifiable public purpose, even if the state compensates the owner. \textit{See id.} at 241. The Court went on to state, however, that as long as the state's exercise of its eminent domain power was rationally related to some conceivable public purpose it would not prohibit the state from taking the property. \textit{See id.} at 241. Thus, the Court upheld the state's use of its eminent domain power to take property from large land holders and transfer the property to the tenants living on the land. \textit{Id.} at 241-42.

The holding and reasoning in \textit{Midkiff} means that the government does not have to possess or use the property it takes pursuant to its eminent domain power to satisfy the public use requirement of the Takings Clause. Rather, the government must merely demonstrate that there is a public purpose rationally related to the exercise of its eminent domain power. \textit{See id.}

  \item \textsuperscript{53} \textit{Id.} at 240.
\end{itemize}
owner for his property, it is free to exercise its eminent domain power regardless of the purpose. The government also may regulate property through its police power. State's derive their police power from the Tenth Amendment of the United States Constitution. Police power permits a state to adopt laws and regulations that promote the comfort, safety, morals, health, and prosperity of its citizens. The Takings Clause of the Fifth Amendment and the substantive due process component of the Fourteenth Amendment, however, limit the government's use of its police power. The Takings Clause, while not precluding the government from enacting property regulations, requires the government to compensate a landowner when a court deems a regulation a taking. On the other hand, the sub-

54. COYLE, supra note 12, at 187-88 (concluding that the combination of Berman and Midkiff demonstrates that the only real limitation on a government's use of its eminent domain power is that it pay just compensation).

55. The "police power" is defined as the power of a state to "adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens." BLACK'S LAW DICTIONARY 1156 (6th ed. 1990); see Thurow v. Massachusetts, 46 U.S. 504, 583 (1847) (consolidating three cases and stating that the police power is a sovereign's inherent power to "govern men and things"). The police power allows the government to restrict individual freedoms unless such a restriction is specifically prohibited by the Constitution. See, e.g., id.; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (historic preservation is a proper police power function); State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970) (preserving aesthetics is a proper police power function); Golden v. Planning Board of Ramapo, 285 N.E.2d 291 (N.Y. 1972) (growth management is a proper police power function), appeal dismissed sub nom., Rockland County Builders Ass'n v. McAlevey, 409 U.S. 1003 (1972); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) (protection of shorelands is a proper police power function); see also TIEDEMAN, supra note 3, at 5-7, 13-15 (discussion the limitations imposed upon the police power).

56. U.S. CONST. amend. X; supra note 55.

57. TIEDEMAN, supra note 3, at 2-4. The courts have generally upheld property regulations as valid uses of a state's police power where they reasonably can conclude that such regulation would further the general welfare. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding as a valid exercise of the police power the enactment of a zoning ordinance); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a property regulation, as a valid exercise of police power, that prohibited a landowner from continuing to use his land as a brickyard).

58. The Takings Clause limits the government's use of its police power by preventing the government from "taking" property by way of its police power without compensating the landowner. See U.S. CONST. amend. V.

59. See Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (a regulation constitutes a taking when it "goes too far"). The point at which a property regulation constitutes a
stantive due process limitation may prevent the government from enacting property regulations pursuant to its police power if a court finds a regulation to be "unreasonable." 60

A court determines the reasonableness of a regulation by a three-part test first outlined in Lawton v. Steele 61 and later confirmed by Goldblatt v. Town of Hempstead. 62 First, a court must conclude that the regulation furthers some public purpose. 63 Second, the regulation must be "reasonably necessary" to accomplish the public purpose. 64 Finally, the regula-

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60. See William B. Stoebuck, Police Power, Takings, and Due Process, 37 WASH. & LEE L. REV. 1057, 1058 (1980) (noting that a court will declare a regulation invalid if it is found to be "arbitrary, capricious, or unreasonable"). Compare Village of Euclid, 272 U.S. at 394-95 (upholding a zoning ordinance enacted pursuant to the state's police power against a due process challenge because the ordinance was not unreasonable and the ordinance bore a substantial relationship to the general welfare) with Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928) (striking down a property regulation on substantive due process grounds because the regulation did not have a substantial relation to the general welfare).

61. 152 U.S. 133 (1894) (upholding a state regulation as a valid exercise of the state's police power against a due process challenge).

62. 369 U.S. 590 (1962) (upholding as a reasonable exercise of a state's police power a regulation that prohibited the most beneficial use of the owner's property).

63. Lawton, 152 U.S. at 137. The Court distinguished the "public purpose" requirement from a situation where the government was interposing its authority on behalf of a particular group of people. Id. At issue in Lawton was a New York regulation that prohibited the use of nets to fish at a particular location within the jurisdiction of the state. Id. at 135. The Court noted that the right to fish was "common to all." Id. at 138 (quoting State v. Roberts, 59 N.H. 256 (1879)). Thus, the Court reasoned, any regulation that was meant to preserve that right was enacted for the public benefit. Id. at 139.

64. Id. at 137; see also United States v. Carolene Products Co., 304 U.S. 144 (1938). The Court in Carolene Products asserted that a state's exercise of its police power would be upheld if any set of facts known, or which could reasonably be assumed, would support its justification. Id. at 154. In light of this pronouncement, courts give great deference to legislatures' justification for property regulations. See infra note 126 and accompanying text (discussing judicial review of property regulations).
tion must not be "unduly oppressive." If the regulation does not satisfy each requirement, a court will declare it "unreasonable" and void.

Whether a specific government action has been executed pursuant to the government’s police power or eminent domain power has important consequences for both landowners and the government. If the government bases its action on the reasonable use of its police power, the government has no obligation to compensate the landowner. Conversely, eminent domain actions require compensation. Because, in many in-

65. Lawton, 152 U.S. at 137. In Lawton, the Court emphasized that it was the responsibility of the judicial branch to ensure that the legislature did not use the pretense of the public interest to restrict otherwise lawful activities. Id.; see also Goldblatt, 369 U.S. at 595 (stating that in order to evaluate the reasonableness of a regulation, courts must balance the “nature of the menace” which the regulation was enacted to avoid with the impact on the landowner); Stoebuck, supra note 60, at 1058 (noting that the determination of whether a regulation is unduly oppressive involves a subjective balancing of public needs and private interests that will inevitably lead to inconsistent decisions based on similar fact patterns).

66. See Lawton, 152 U.S. at 137; Stoebuck, supra note 60, at 1058. Because courts presume that the government’s exercise of its police power is constitutional and reasonable, the landowner has the burden of demonstrating that the government’s use of its police power is unreasonable. See Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959) (noting that a government’s exercise of its police power is presumed constitutional); Salisbury v. Maryland, 346 U.S. 545, 553 (1954) (finding that the presumption of reasonableness is with the state). Moreover, the Court has explicitly stated that it will go to great lengths to find a reasonable justification for the regulation in question. See Carolene Products, 304 U.S. at 154. Thus, considering the deference the courts give to the government’s justifications, it is uncommon for a court to strike down a property regulation as an invalid use of police power even where the regulation seriously affects a landowner. See, e.g., Miller v. Schoene, 276 U.S. 272 (1928) (upholding a regulation enacted under the state’s police power which demanded the removal of red cedar trees because they produced dust that was harmful to nearby apple trees). The Court noted that the commercial value of the apples was a “preponderant public concern” justifying the use of the state’s police power. Id. at 279. But see Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994). In Dolan, the Court shifted the burden to the government to justify a property regulation that required a landowner to dedicate a portion of her property to the City in exchange for the city’s permission to enlarge her store. Id. The Dolan Court, however, based its holding on the Fifth Amendment, rather than the Fourteenth Amendment. Id.

67. Compare Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (invalidating a state statute that prohibited the mining of coal because the statute was found to be an unreasonable use of the state’s police power that amounted to a taking and thus required the state to compensate the landowner) with Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987) (upholding a similar state statute as a valid exercise of the state’s police power thereby not requiring the state to compensate the landowner).

68. See Goldblatt, 369 U.S. at 592-93 (noting that a state’s use of its police power cannot be burdened with the obligation of paying compensation to landowners for losses caused by laws enacted for the public benefit); see also Mahon, 260 U.S. at 413 (stating that the government must be free from paying compensation for losses incurred due to every change in the law).

69. U.S. Const. amend. V; see Armstrong v. United States, 364 U.S. 40, 49 (1960) (noting that where government action constitutes a taking there is a “constitutional obliga-
stances, a government's police and eminent domain powers overlap,\textsuperscript{70} courts must endeavor to distinguish the two powers and identify those situations where the government is using its police power as a subterfuge to circumvent its obligation of paying just compensation to the property owner.\textsuperscript{71}

\textbf{B. The Takings Clause}

1. \textit{No Taking without a "Touching"}

A government's actual physical appropriation of property generally falls within the purview of the Takings Clause and thus warrants compensation.\textsuperscript{72} The idea that a regulation involving less than a complete physi-

\textsuperscript{70} See Morosoff, \textit{supra} note 8, at 832-33 (stating that much of what the government can accomplish under its eminent domain power may be achieved through its police power). Given the fact that a state does not have to compensate a landowner for the impact that the state's police power regulation has on the landowner, states have an incentive to attempt to use this power before instituting eminent domain proceedings. See \textit{id.}; E.F. Roberts, \textit{Mining With Mr. Justice Holmes}, 39 \textit{VAND. L. REV.} 287, 291 (1986) (noting that a government may accomplish the same eminent domain goals at "no cost" by using its police power rather than its right of eminent domain).


\textit{In Nollan}, the government attempted to justify the taking of private property for a public easement as a legitimate use of its police power. \textit{Nollan}, 483 U.S. at 836. The government contended that the easement was necessary to offset the blockage of an ocean view that the construction of a beachfront house would cause. \textit{Id.} at 838-39. The Court conceded that protecting the ocean view was a legitimate state interest. \textit{Id.} at 835. The Court found implausible, however, the government's claim that the taking of property for a public easement furthered the legitimate state interest of preserving the ocean view. \textit{Id.} at 837. The Court concluded that the government's contention was nothing more than "an out-and-out plan of extortion" meant to circumvent the requirement that the landowner be compensated for the taking of his property. \textit{Id.} (quoting J.E.D. Assoc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)). \textit{See infra} notes 134-51 for a further discussion of the \textit{Nollan} decision.

\textit{A similar situation arose in Mahon.} Rather than purchasing the subsurface mining rights from various coal companies, Pennsylvania passed a law, pursuant to its police power, prohibiting subsurface mining. \textit{Mahon}, 260 U.S. at 412-13. Justice Holmes, writing for the majority, noted that when determining if a regulation is a reasonable exercise of the government's police power, or if the government must use its eminent domain power and compensate the landowner, the crux of the issue is who should bear the loss caused by the regulation. \textit{Id.} at 416. If the court finds that the landowner should solely bear the loss, then the police power is appropriate. By contrast, if the court determines that the public as a whole should bear the loss, then the government must accomplish its goal through its eminent domain power and compensate the landowner with the public treasury. \textit{See infra} notes 83-101 and accompanying text (discussing the \textit{Mahon} decision).

\textsuperscript{72} See \textit{United States v. Lynah}, 188 U.S. 445 (1903) (holding that a taking occurred with the flooding of a landowner's rice plantation caused by the government's work on the Savannah River); \textit{Pumpelly v. Green Bay Co.}, 80 U.S. 166 (1871) (holding that the govern-
cal appropriation of property could constitute a taking because of its adverse effect on a person's property, however, has not always been accepted. See Mugler v. Kansas, 123 U.S. 623, 667-69 (1887) (rejecting the contention that a land-use regulation could be deemed a taking and require compensation where the regulation was enacted for the health, morals, or safety of the community); see also Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding that a city ordinance, enacted pursuant to its police power which prohibited the landowner from using his property to make bricks, causing a significant decrease in the value of the owner's property, did not constitute a taking without due process of law). For a further discussion on the Mugler decision, see infra notes 76-82 and accompanying text.

73. See Mugler, 123 U.S. at 668-69 (supporting the no taking without a touching philosophy that a state's eminent domain power is separate and distinct from its police power).

74. Boselman et al., supra note 2, at 114 (citing Professor Sedgwick's assertion that, historically, for there to be a taking within the meaning of the Fifth Amendment there had to be an actual physical invasion by the government).

75. Mugler, 123 U.S. at 668-69 (supporting the no taking without a touching philosophy that a state's eminent domain power is separate and distinct from its police power).

In Commonwealth v. Alger, 61 Mass. 53 (1851), the Supreme Court of Massachusetts upheld a state statute prohibiting property owners from building a wharf on their property which would impede the public's use of Boston Harbor. Id. at 84. In an opinion authored by Chief Judge Shaw, the Court noted that property owners hold their land subject to the condition that the property not be used to injure others. Id. at 84-85. Consequently, if an owner's use of property injured others, the government was justified in exercising its police power to restrict the landowner from using the property in such an injurious manner. Id.

The court differentiated the government's police power from its eminent domain power, the latter of which permitted the government to appropriate private property after compensating the landowner whenever the property was needed for a public use. Id. at 85. In effect, as long as the regulation was for the purpose of combating some societal "evil" and furthered the public welfare, the regulation was deemed to be a legitimate exercise of the government's police power. Therefore, the government was not required to compensate the property owner. See id. This is sometimes referred to as the "noxious-use" test. Stoebuck, supra note 60, at 1061-62 (arguing that the "noxious-use" test is really a substantive due process test and supports the notion that as long as the government action is a valid exercise of its police power, no taking can occur); see also Commonwealth v. Tewksbury, 11 Met. 55, 59 (Mass. 1846) (holding that a statute prohibiting the plaintiff from removing stones and gravel from his beachfront property was a just and reasonable use of the state's police power because it restricted an injurious use of plaintiff's property).

In Alger, the court acknowledged that it would be difficult for a government to decide when to use its police power and when to exercise its eminent domain power. Alger, 53 Mass. at 85-86. The court concluded that such a determination would have to be made on a case-by-case basis. Id. at 86. One can only surmise, however, that when the legislature is in doubt as to which power to use, it would most likely opt for the police power so as to avoid the obligation of compensating the affected landowner. See Mahon, 260 U.S. at 415 (noting that the "natural tendency of human nature" is to exploit the police power to the point where the protection of the Takings Clause is rendered meaningless).
The United States Supreme Court adopted the "no-taking without a touching" rationale in *Mugler v. Kansas*. Justice Harlan, writing for the majority, contended that as long as the government was combating a societal evil and had not physically invaded the property, the government regulation would not be considered a taking. In *Mugler*, Kansas enacted a law prohibiting the manufacturing of intoxicating liquors, rendering the plaintiff's brewery worthless. The Court rejected the plaintiff's argument that the law constituted an implicit taking of his property, and stated that the government's limitation on a landowner's property may not be considered a taking when the limitation is for the public benefit. 

Justice Harlan asserted that the difference between regulating the use of property through the state's police power and actually taking property through the eminent domain power was one of kind, rather than of degree. Thus, as long as the government regulation furthered the public welfare and did not appropriate the owner's property permanently, the Court would uphold the regulation as a valid exercise of the state's police power.

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76. 123 U.S. 623 (1887).
77. Id. at 668-69.
78. Id. at 624.
79. Id. The plaintiff based his takings argument on the diminution in property value the regulation caused. Specifically, he claimed that the value of his property diminished from $10,000 to $2,500 after the law was passed. Id. at 633.
80. Id. at 668-69. The Court noted that the regulation did not prohibit the owner from using his property for lawful purposes, nor did it prevent the landowner from disposing of his property. Id. at 669. Rather, the regulation merely forbade anyone from using the property as a brewery because such use was determined to be against the public interests. See id.
81. See id. Specifically, Justice Harlan noted that a major difference existed between the state's exercise of its police power to limit the use of property and the state's exercise of its eminent domain power to take property for public use. Id. With the police power, he stated, a nuisance is only abated, but with the eminent domain power property is taken away from an innocent owner. Id.; see also Boselman et al., supra note 2, at 120 (noting that, regardless of the purpose, governmental action that permanently appropriates an owner's property must be compensated).
82. *Mugler*, 123 U.S. at 668-69. What is profound about the strict construction of the Takings Clause and the support for a strong and broad based police power, at least in the realm of property regulation, was that it occurred during a period when the Court was extremely aggressive in striking down other legislative initiatives on substantive due process grounds. See, e.g., Adkins v. Children's Hosp., 261 U.S. 525, 545 (1923) (invalidating a minimum wage law for women on "freedom of contract" grounds), overruled in part by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); see also supra note 16 for a general discussion on the Lochner Era. Thus, at least when compared with other constitutional rights, property rights were seen as inferior and government regulation of property was given the constitutional benefit of the doubt. See Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 37 AM. U. L. REV. 9, 9-10 (arguing that property rights receive little protection from legislative regulations).
2. Justice Holmes' "Too Far" Test

The Court departed from the "no-taking without a touching" doctrine in Pennsylvania Coal Co. v. Mahon. Mahon involved a state statute that prohibited subsurface mining where such mining would cause the earth's surface to collapse, resulting in damage to homes and other buildings. The coal company had conveyed the surface rights of its property to various homeowners but retained the subsurface mining rights. The statute prevented the coal company from mining under the homeowners' property, thereby depriving the company of its subsurface property rights. The coal company argued that the statute took private property without just compensation. The state maintained that the statute was a legitimate use of its police power because the purpose of the statute was to protect the general health and safety of the residents by preventing the coal company from engaging in potentially injurious conduct.

The Court focused on whether the statute was a government attempt to circumvent the requirement of just compensation by accomplishing its objective through its police power instead of its eminent domain power. In holding the statute invalid, Justice Holmes stated "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," thereby triggering the requirement of compensa-

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Indeed, the inferior status of property rights was confirmed in United States v. Carolene Products Co. when the Court made its landmark distinction between general regulatory legislation and governmental restrictions on fundamental constitutional rights. United States v. Carolene Products Co., 304 U.S. 144, 152 & n.4 (1938); see Coyle, supra note 12, at 42 (stating that Carolene Products "announced that not all constitutional rights were created equal"). Specifically, the Court stated that regulatory legislation affecting property or economic interests would be upheld unless there was no rational basis for its enactment. Carolene Products, 304 U.S. at 152. By contrast, legislation that "appears on its face to be within a specific prohibition of the Constitution, . . . restricts . . . political processes . . . [and is] prejudicial against discrete and insular minorities . . ." would be subject to heightened judicial scrutiny. Id. at 152-53 n.4. This heightened scrutiny soon became defined as "strict scrutiny." See generally Coyle, supra note 12, at 40-49 (explaining the history of the demise of landowner rights); infra note 126.

83. 260 U.S. 393 (1922).
84. Id. at 412.
85. Id. Pennsylvania recognized three different divisible estates in land: the surface of the land, the minerals below the land, and the right of support of the land. Roberts, supra note 70, at 288.
86. Mahon, 260 U.S. at 412-13. The Court framed the issue as whether or not the police power could be "stretched so far" so as to deprive the mining company of their subsurface mining rights. Id. at 413.
87. Id. at 412.
88. See id. at 413.
89. See id. at 416 (stating that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change").
This "too far" test sought to strike a balance between the government's legitimate need to regulate property and the landowner's right to be compensated for the destructive effects a regulation has on the property. Justice Holmes recognized that the government could not operate

90. Id. at 415. Specifically, Justice Holmes stated:

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. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation . . . .

Id. at 413.

91. See id. at 416. There is some debate as to whether this balancing was being executed pursuant to the Takings Clause or was merely an extension of the substantive due process test outlined in Lawton v. Steele. One commentator contends that Justice Holmes' "too far" test was founded on the Taking Clause. Roberts, supra note 70, at 292. Professor Roberts argues that the language used by Justice Holmes in Mahon suggests that he meant to "explode the notion" that a "touching" was needed before a taking could occur. Id. Moreover, Professor Roberts points out that Justice Holmes thought that the regulation in Mugler, which prohibited the manufacturing of intoxicating liquors, was nothing more than a ploy to mask an uncompensated taking. Id.

It has also been argued that Justice Holmes' "too far" test was founded on substantive due process grounds. See Norman Williams, Jr. et al., The White River Junction Manifesto, 9 VT. L. REV. 193, 210-12 (1984) (contending that Justice Holmes used the word "taking" metaphorically and based the Mahon decision on the substantive component of the Due Process Clause). Professor Williams and his co-authors state that Justice Holmes used the term "taking" in Mahon only to connote the idea that a regulation that went "too far" was "equivalent to a 'taking' " and thus invalid ab initio. Id. at 210-11. Thus, Mahon mandates that if the government wants to achieve its objective, it must institute eminent domain proceedings. Id. at 211-12; see also Robert H. Freilich, Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts, 15 Urb. L. 447, 464 (1983) (stating that Justice Holmes "too far" test was "describing the point at which police power use becomes an invalid exercise, as well as where the government must turn to its eminent domain powers to achieve its goals").

If Justice Holmes' "too far" test was based on substantive due process, there would be, in effect, two different substantive due process tests: the Lawton three-part test and Justice Holmes' "too far" test. Although not explicitly stated, it must be inferred that Justice Holmes' use of the "too far" test was meant to invoke a type of heightened judicial scrutiny for property regulations that was not offered by the Lawton test. This conclusion is based on two points. First, if Justice Holmes simply meant to add another factor to the Lawton test he surely would have mentioned Lawton in Mahon. He did not, however, do so. See Mahon, 260 U.S. at 412-16. Second, it is apparent from Justice Holmes' opinion that he was concerned that the government would exploit the police power until certain constitutional protections were gone. Id. at 413. Again, if Justice Holmes thought that the Lawton test was sufficient to prevent the government's exploitation of its police power, he would have invalidated the statute in Mahon using the Lawton test. Thus, if Justice Holmes' "too far" test was founded on substantive due process grounds, his test was meant to invoke a type of heightened judicial scrutiny of land-use regulations (i.e., a more rigorous test than that provided by the Lawton test). This conclusion, however, casts doubt on the idea that
effectively if it had to compensate each landowner that was affected, no matter how slightly, by the government's actions.\textsuperscript{92} On the other hand, Justice Holmes was aware that restrictions on the government's use of its police power were necessary.\textsuperscript{93} Without any limitations, the government would be able to mask eminent domain takings by painting them as police power regulations that furthered the public welfare.\textsuperscript{94} Thus, the gov-

Justice Holmes based his "too far" test on substantive due process grounds, as opposed to the Takings Clause, because he has a strong history of opposing heightened scrutiny of economic regulations. See, e.g., Coppage v. Kansas, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting) (noting that if it were reasonable to believe that labor unions were necessary, then the legislature should be able to enact laws that support them); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (opposing the majority's invalidation of a state regulation on substantive due process grounds and stating that the Court had no right to impose its own economic views in place of the legislature's).

For a discussion on why the above distinction may make a difference with respect to compensation for the landowner, see Morosoff, \textit{supra} note 8, at 841 (noting that the remedy afforded to the landowner may differ according to which theory is adopted); see also infra note 124 (discussing the importance of keeping the takings test and substantive due process test separate).

\textsuperscript{92} See \textit{Mahon}, 260 U.S. at 413.

\textsuperscript{93} See \textit{id.} at 413 (noting that the police power must have its limits otherwise the Due Process and Contract Clauses would be rendered meaningless). Without a Takings Clause limitation on the police power, the protection of the clause would be illusory because any time the government wished to appropriate private property for public use, it simply could enact regulations, pursuant to its police power, that would effectuate the same outcome. As Justice Holmes noted, it is the "natural tendency of human nature" to use the police power "more and more until at last private property disappears." \textit{id.} at 415.

\textsuperscript{94} See, e.g., Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981). The \textit{Burrows} case is a good example of how a government may attempt to use its police power to obtain an objective that it should accomplish through its eminent domain power. In \textit{Burrows}, the plaintiff had purchased approximately 124 acres of land with the intention of developing it into a subdivision. \textit{id.} at 17. At the time of the owner's purchase, the property was zoned to permit such a development. \textit{id.} The city, however, did not want the property developed and offered to purchase the property from the owner at about half its market value. \textit{id.} The landowner declined the city's offer and went forward with his development plans. \textit{id.} The city refused to approve the landowner's subdivision development plan. \textit{id.} The landowner then petitioned the court for a review of the city's decision. \textit{id.} In the meantime, however, the city amended its zoning ordinance, placing the owner's property in a conservation zone prohibiting development. \textit{id.} By enacting a regulation pursuant to its police power, the city kept the owner's property undeveloped just as if it had purchased the property from the owner. \textit{id.} The windfall to the city, of course, was the fact that it did not have to pay to obtain its goal. Fortunately, for the landowner, the court saw through the city's scheme and found that the zoning regulation significantly devalued the owner's property and, therefore, constituted a taking requiring compensation. \textit{id.} at 21-22.

This concept is discussed in Morosoff, \textit{supra} note 8, at 839. In his article, Morosoff discusses how a city could use its police power to circumvent the requirement of paying landowners for property condemned to construct a public highway. \textit{id.} He notes that instead of the city using its eminent domain power to take private property and compensate the landowner, the city could simply pass a regulation that prohibits anyone from interfering with the construction of a public highway. \textit{id.} Such a regulation would pass the \textit{Lawton v. Steele} substantive due process test because: 1) building a public highway is a legitimate
government could circumvent the requirement of compensation, regardless of the damage the regulation inflicted upon an owner's property.95

Justice Holmes' "too far" test created the concept of a regulatory taking.96 Where the Court previously required a "touching" before it would find a taking, the Mahon decision indicated that a "touching" was no longer necessary.97 This would be the case, as it was in Mahon, when a government regulation went "too far" and had the effect of significantly diminishing the value of an individual's property interest.98 Determining

public interest; 2) the regulation is "reasonably necessary" to achieve this public interest; and 3) the public gain in having a new highway would most likely outweigh the landowners' loss. Id. at 839-49; see Roberts, supra note 70, at 291 (noting that without a takings limitation on the police power the government would always employ the police power instead of eminent domain and "the institution of private property itself [would] be in jeopardy").

It short, Justice Holmes was merely preventing the government from doing indirectly what it had no right to do directly; that is, if the government had no right to take private property directly without paying just compensation, then it should not be able to take the same property indirectly, through its police power without paying for it.

95. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) (refusing to invalidate a police power regulation that caused the owner's property to drop in value from $800,000 to $60,000); Mugler v. Kansas, 123 U.S. 623 (1887) (refusing to invalidate a police power regulation that resulted in a 75% devaluation of the owner's property).

96. See Mahon, 260 U.S. at 415. Justice Holmes' contention that a government regulation could constitute a taking because of its adverse affect on a person's property directly contradicted the Court's earlier decisions that held a taking could not occur unless there was a physical invasion. See supra notes 72-82 and accompanying text (discussing the Court's previous decisions requiring a touching before a taking could be found).

97. Compare Mahon, 260 U.S. at 413-15 (noting that the difference between a regulation and taking was one of degree) with Mugler, 123 U.S. at 668-69 (asserting that the difference between a regulation and a taking was one of kind, rather than degree).

98. See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). The Lucas decision is an example of a regulation that did not authorize a physical invasion of an owner's property, but which the Court concluded had gone "too far" and thus amounted to a taking. See id. at 2900. In Lucas, a developer had purchased two residential lots of beach front property on a barrier island off of the South Carolina Coast. Id. at 2889. Two years after the developer's purchase, but before he had begun construction on the lots, South Carolina enacted a statute that barred the developer from building any permanent structures on his lots. Id. The owner contended that the statute rendered his property worthless. Id. The Supreme Court held that under certain circumstances a regulation can have the same effect as physical invasion of property. See id. at 2893. Thus, the Court concluded that where a regulation forces an owner to sacrifice all beneficial use of his land for the common good, such a sacrifice would constitute a taking. Id. at 2895.

The Court also provided two exceptions to its holding. First, the Court noted that the government would not have to pay compensation, notwithstanding the fact that the regulation deprives an owner of all beneficial use of his land, where the regulation merely prohibits a public or private nuisance. Id. at 2897. Second, if the regulation is consistent with "existing rules or understandings" and is buttressed by "background principles" of property law, then such regulation will not be considered a taking. Id. at 2901. See generally, DAVID L. CALLIES, AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (1993) (discussing the impact of Lucas on takings law).
the exact point at which the regulation goes "too far," however, was a matter yet to be resolved.\textsuperscript{99} In Justice Holmes' view, this determination depended upon the particular facts of each case.\textsuperscript{100} Henceforth, courts were forced into a quandary and called upon to scrutinize property regulations to ensure that they did not go "too far."\textsuperscript{101}

It is also important to note that \textit{Lucas} is limited to situations where the owner is deprived of all beneficial use of his property. \textit{Lucas}, 112 S. Ct. at 2895. The fact that the owner has been deprived of a specific use or the most valuable use of his property will not be sufficient to constitute a taking. \textit{Compare Lucas}, 112 S. Ct. at 2895 (holding that a total ban on building any structure on property constitutes a taking) \textit{with} Goldblatt \textit{v. Town of Hempstead}, 369 U.S. 590 (1962) (holding that a regulation prohibiting the most beneficial use of the owner's property would not amount to a taking).

The \textit{Lucas} decision also should be compared with the Court's takings decisions prior to \textit{Mahon} to appreciate the value that \textit{Mahon} had for property owners. For example, in \textit{Mugler v. Kansas}, 123 U.S. 623 (1887), a state regulation that prohibited the manufacturing of intoxicating liquors resulted in a significant devaluation of brewer's property, but the Court refused to find a taking and thus the landowner was not compensated for his loss. \textit{See supra} notes 76-82 and accompanying text (discussing \textit{Mugler}). The Court came to a similar conclusion in \textit{Powell v. Pennsylvania}, 127 U.S. 678, 684 (1888). In \textit{Powell}, the Court refused to find a taking where a state regulation prohibited the manufacturing of oleomargarine and thereby rendered the owner's factory valueless. \textit{Id}. The landowner in \textit{Lucas}, however, did not suffer the same fate as the owners' in \textit{Mugler} and \textit{Powell}. As a consequence of the \textit{Mahon} decision, the \textit{Lucas} Court found a taking based on the impact that the regulation had on the property. \textit{See Lucas}, 112 S. Ct. at 2893-95.

\textsuperscript{99} See C. Haar, \textit{Land Use Planning} 766 (3d ed. 1976) (noting that the determination of when a regulation "goes to far" is "the lawyer's equivalent of the physicist's hunt for the quark"); Williamson County Regional Planning \textit{Comm'n v. Hamilton Bank}, 473 U.S. 172, 199 (1985) (noting that defining the point at which a regulation "goes to far" has proven to be a "difficult problem").

\textsuperscript{100} \textit{Mahon}, 260 U.S. at 413.

\textsuperscript{101} See Morosoff, \textit{supra} note 8, at 835 (noting that Justice Holmes' "too far" test opened the "Pandora's Box of 'regulatory takings'" which would continually plague the courts).

While Justice Holmes certainly signaled that the Court was willing to look at land-use regulation in a different light, the Court was extremely timid in doing so. After its 1922 decision in \textit{Mahon}, the Court heard only one land-use/takings case, Goldblatt \textit{v. Town of Hempstead}, 369 U.S. 590 (1962) (holding that a landowner had not sustained the burden of showing that the property regulation was so onerous and unreasonable to amount to a taking), and only two zoning cases, Nectow \textit{v. Cambridge}, 277 U.S. 183 (1928) (holding invalid a zoning ordinance because the regulation was an unreasonable use of the government's police power), Village of Euclid \textit{v. Ambler Realty Co.}, 272 U.S. 365 (1926) (upholding a government's zoning ordinance as a valid use of its police power), in the following 50 years. Morosoff, \textit{supra} note 8, at 837 n.109.

It is unclear whether the Court's timidity stemmed from prudential concerns, see Coyle, \textit{supra} note 12, at 43 (noting that Robert McCloskey has concluded that at times it might be better "to let sleeping rights lie to conserve scarce judicial resources for more important matters"), its reluctance to attempt to reconcile its decision in \textit{Mahon} with its past, contrary decision in \textit{Mugler}, see Stoebuck, \textit{supra} note 60, at 1063 (noting that \textit{Mugler} is "hopelessly at odds" with \textit{Mahon} and the Court refuses to recognize this contradiction), or simply its frustration with its inability to formulate an effective test to apply to takings cases, see Penn Cent. Transp. Co. \textit{v. New York City}, 438 U.S. 104, 123 (1978) (stating "what
3. The Penn Central Factors

While the *Mahon* decision attempted to balance the government’s need to regulate property against an individual’s property rights, the decision offered little guidance on the factors a court should consider in determining whether a regulation had gone “too far.” In *Penn Central Transportation Co. v. New York City*, the Supreme Court sought to clarify the vague “too far” test by outlining a number of factors a court should consider. New York City had enacted a Landmarks Preservation Law to ensure that existing historic buildings would be preserved. The owners of Grand Central Station, a historic landmark, sought to build a high-rise office building over the terminal. The city's Landmark Preservation Commission denied the owners’ request for a building permit because implementing the owners’ plans for the office building would have destroyed the historic and aesthetic features of the terminal. At issue was whether New York City's enactment of a Landmarks Preservation Law constituted a regulatory taking because it constitutes a taking for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty”). In the last two decades, however, the Court has shed its “see-no-land-rights, hear-no-land-rights” shell and started hearing land cases on a more regular basis. 

Justice Holmes has been criticized for his opinion in *Mahon*. Some have only mildly criticized Holmes for his vagueness and failure to reconcile *Mugler* with *Mahon*. See Stoebuck, *supra* note 60, at 1063. Justice Stevens has stated that Justice Holmes' decision was an invitation for judicial activism because it granted judges a method to invalidate certain legislation that they felt was unwise or unfair. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2327 (1994) (Stevens, J., dissenting); see *Fred Bosseman and David Callies, The Quite Revolution in Land Use Control* 314-18 (1971).

102. *See Mahon*, 260 U.S. at 413. Justice Holmes recommended that the diminution in value that the regulation caused to the owner’s property should be considered in applying the “too far” test. *Id.* Justice Holmes made clear, however, that this was only one factor and that the determination of whether a regulation went “too far” should be based on the facts of each particular case. *Id.* In addition, Justice Holmes noted that if a landowner was gaining some benefit from a regulation (what he called a “average reciprocity of advantage”), it too should be considered. *Id.* at 415.


104. *Id.* at 123-24. In an almost apologetic tone the Court conceded its failure to develop a set formula to apply to regulatory takings cases. *Id.* Specifically, the Court stated, “what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any ‘set formula’ for [such determinations].” *Id.* at 123-24.

105. *Id.* at 108-09. The law also placed an affirmative duty on the landowner to maintain his historic property in good repair. *Id.* at 111.

106. *Id.* at 116.

107. *Id.* at 117-18. The Commission maintained that “to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke.” *Id.*
went “too far” in preventing the landowner from using his property in the most economically beneficial manner.\(^{108}\)

The Court deduced that several factors play a key role in determining whether a taking has occurred.\(^{109}\) First, the Court noted that it must assess the economic impact of the regulation on the owner's property.\(^{110}\) The Court was not necessarily concerned with the loss in value to the owner's property, but rather with the regulation's interference with the owner's “distinct investment-backed expectations.”\(^{111}\) Specifically, the Court focused on the owner's present use of the property and whether the regulation interfered with this use.\(^{112}\) If the regulation did not interfere with the owner's “primary expectation concerning the use” of its land, or did not deprive the owner from “obtain[ing] a ‘reasonable return’ on its investment,” then the regulation may not have sufficiently interfered with the owner's property rights to warrant compensation.\(^{113}\) The mere fact that the regulation caused the owner's property to lose value was insufficient to constitute a taking.\(^{114}\)

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108. Id. at 122. The owners specifically claimed that because the Landmarks Preservation Law prevented them from building a high-rise office building, the law essentially denied them of their “airspace” property rights. Id. at 136-37.

109. Id. at 124. The Court noted that most of its prior takings decisions had relied on ad hoc factual inquiries to determine whether a taking had occurred. Id.; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (noting that whether a regulation “goes too far” and thus constitutes a taking depends on the particular facts of each case).

110. Penn Central, 438 U.S. at 124.

111. Id. at 124. While acknowledging that economic harm to the property owner was a factor to consider, the Court noted that a severe loss of value would not necessarily constitute a taking. See id. at 125. But see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that where a regulation authorizes a physical occupation of an owner's land, regardless of how small the economic impact, such would be deemed a taking).

112. Penn Central, 438 U.S. at 136. The Court distinguished cases like Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (upholding a regulation that prevented the claimant from continuing to use his property as a sand and gravel mining business), Miller v. Schoene, 276 U.S. 272 (1928) (upholding a regulation that ordered the claimant's ceder trees to be cut down), and Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a regulation that prevented the claimant from continuing to operate a brickyard on his property), from Penn Central on the grounds that those cases involved regulations that actually interfered with the owners' present use of their property. See Penn Central, 438 U.S. at 136. By contrast, in Penn Central's case there was no such interference. Id. The Court was making the point that in Goldblatt, Miller, and Hadacheck, it upheld regulations that were much more burdensome on the owner than the regulation at issue in Penn Central, which do not interfere with the owners' present use. See id.

113. Penn Central, 438 U.S. at 136. The Court reasoned that the regulation did not prevent the owners from continuing to use the property as a railway station and office building as they had been doing for the past 65 years. Id.

114. See id. at 124-25. Rather, the crux of the issue was whether the regulation sufficiently destroyed an owner's current interest in his property. Id. at 136; accord Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495-96 (1987) (holding, in part, that
The *Penn Central* Court also noted that the character of the government action was relevant in determining whether a regulation constituted a taking.\(^{115}\) The Court distinguished government regulations that authorize a physical invasion of an owner's property from those that regulate the owner's use of his property.\(^{116}\) Where a physical invasion was involved, the Court would be more apt to find a taking.\(^{117}\) Even where the regulation did not actually authorize a physical invasion, the Court explained that

...because the Coal Association failed to demonstrate that a Pennsylvania Mine Subsidence Act made it impossible for the Association to continue its for-profit mining operations, the Association could not show that its investment-backed expectations had been sufficiently interfered with to justify compensation); see also *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (noting that where the government has a history of regulating or controlling a certain aspect of property the reasonableness of an owner's investment-backed expectations is undermined).

The Court, in *Penn Central*, reaffirmed Justice Holmes' contention in *Mahon* that government could not operate effectively if it had to compensate property owners for every loss in property value caused by its regulations. *Penn Central*, 438 U.S. at 124; see *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding, in part, that a taking occurs when a regulation "denies an owner economically viable use of his land"). For a more detailed account of Justice Holmes' argument, see supra notes 83-101 and accompanying text.

\(^{115}\) *Penn Central*, 438 U.S. at 124.

\(^{116}\) See id. (stating that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good") (citation omitted). Compare United States v. *Causby*, 328 U.S. 256, 261-63 & n.7 (1946) (characterizing the low fly-over of military airplanes as a physical invasion by the government, and thus a taking, because the effects of the fly-overs were so intrusive that they deprived the owner of most of his interest in the land) with *Connolly*, 475 U.S. at 212 (holding, in part, that a regulation requiring an employer to fund a pension plan did not constitute a taking because such obligation stemmed from a "public program that adjusts the benefits and burdens of economic life to promote the common good") and *Goldblatt*, 369 U.S. at 594-96 (upholding a regulation that restricted the use of the owner's property because it served a substantial public purpose).

\(^{117}\) See *Penn Central*, 438 U.S. at 124; see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). In *Loretto*, the Court invalidated a statute that required a landowner to grant cable companies the right to install their cables on a landlord's property. The Court distinguished between those situations where the government is only limiting the owner's use of his property and those situations where the government is actually permitting a physical occupation of the owner's land. *Id.* In the Court's view, permitting the physical occupation, regardless of how small, was "qualitatively more intrusive than perhaps any other category of property regulation." *Id.* Thus, the Court concluded that where a government regulation authorizes the permanent physical occupation of the property, this automatically would be found to constitute a taking regardless of whether the government regulation served a legitimate public purpose or had only a minimal economic impact on the owner. *Id*; *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (assuming a taking would have occurred if the government required a landowner to dedicate her land to a city); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (assuming a taking would occur if the government had required an easement across an owner's land); see supra note 37 (discussing in detail the *Loretto* decision).
plained that it would be more likely to find a taking if the regulation could be “characterized as a physical invasion.”\footnote{118}

The \textit{Penn Central} Court also focused on the purpose of the government regulation and the fit between that purpose and the means used to effect such purpose.\footnote{119} The Court first noted that it had upheld land-use regulations that significantly affected an owner’s interest in his property where the regulation furthered “the health, safety, morals, or general welfare.”\footnote{120} Later in its opinion, however, the Court qualified this assertion by noting that a land-use regulation still may constitute a taking if it was not “reasonably necessary to the effectuation of a substantial public purpose.”\footnote{121}

In light of the above factors, the \textit{Penn Central} Court upheld the restrictions on the owner’s property because they could not be characterized as a physical invasion,\footnote{122} they did not unduly interfere with the owner’s “distinct investment-backed expectations,”\footnote{123} and they were “substantially related to the promotion of the general welfare.”\footnote{124}

\footnote{118. \textit{Penn Central,} 438 U.S. at 124; see, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1992) (recognizing that a regulation which deprived an owner of all economic and beneficial use of his land was no different, in the owner’s perspective, from a physical invasion of the owner’s property); United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (noting that regulations short of authorizing a physical invasion of the owner’s property may still constitute a taking if the effects of the regulation are “so complete as to deprive the owner of all or most of his interest” in the property). For a further discussion on the \textit{Lucas} decision, see supra note 98.}

\footnote{119. \textit{See Penn Central,} 438 U.S. at 125-27.}

\footnote{120. \textit{Id.} at 125. The Court discussed Miller v. Schoene, 276 U.S. 272 (1928) (upholding a regulation that ordered the destruction of cedar trees on property that lay near apple orchards) and Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a regulation that, in the name of the general welfare, prohibited a landowner from using his property in the most beneficial manner).}

\footnote{121. \textit{Penn Central,} 438 U.S. at 127. The Court stated that it might also find a taking if the regulation had “an unduly harsh impact upon the owner’s use of [his] property.” \textit{Id.} The Court used Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), to support its position. In \textit{Goldblatt,} the government passed a statute that prohibited excavating below the water table. \textit{Id.} at 592. The statute prevented the plaintiff from continuing his sand and gravel mining business. \textit{Id.} at 591-92. The Court upheld the statute as a reasonable use of the government’s police power. \textit{Id.} at 598. Specifically, the Court stated that so long as the government regulation was reasonably necessary to further a public purpose and did not unduly burden the landowner, the regulation would be upheld as a legitimate use of the government’s police power. \textit{Id.} at 594-95; see supra notes 62-66 (discussing the \textit{Goldblatt} decision).}

\footnote{122. \textit{See Penn Central,} 438 U.S. at 135.}

\footnote{123. \textit{See id.} at 136-37.}

\footnote{124. \textit{Id.} at 138. The Court’s upholding of the regulation appears to be founded on the \textit{Lawton v. Steele} substantive due process test. This test required the regulation to further a public purpose, to be reasonably necessary to further that public purpose, and not to be “unduly oppressive” on the landowner. \textit{Lawton v. Steele,} 152 U.S. 133, 137 (1894). Although the \textit{Penn Central} Court did not explicitly state that it was applying the \textit{Lawton}}
test, it relied heavily on Goldblatt, a case that reaffirmed the Lawton test. See Penn Central, 438 U.S. at 123-26, 130-31, 133-136, 138; see supra notes 61-66 and accompanying text.

Moreover, the language used by the Penn Central Court supports the conclusion that it was implicitly applying the Lawton test. Specifically, aside from discussing the various factors that the Court would consider to determine if the regulation constituted a taking, the Court noted that it had previously upheld, as a permissible public purpose, regulations like the one at issue in Penn Central, thus satisfying the first part of the Lawton test. See Penn Central, 438 U.S. at 129 (noting that the preservation of historic and architectural structures is a legitimate governmental goal). The Court then noted that the land-use regulation at issue in Penn Central was an "appropriate means of securing" this public purpose, thus satisfying the second part of the Lawton test. See id. Finally, in appearing to apply the third-part of the Lawton test, the Court inquired as to the extent of the burden placed on the landowner as a result of the regulation. See id. at 127 (noting that a regulation may constitute a taking if it has an "unduly harsh impact" on the owner). To satisfy this part of the Lawton test, the Court noted that the regulation did not interfere with the present use of the owners' property or prevent them from earning a reasonable return on their investment. Id. at 136. Thus, it could be concluded that because the regulation did not interfere with the owner's "distinct investment-backed expectations," and it permitted the owner to earn a reasonable return on his investment, the regulation was not unduly burdensome.

The Court, by implicitly applying the Lawton test subconsciously merged the substantive due process and taking tests into one. Indeed, the Penn Central opinion cited Justice Holmes' "too far" test for the proposition that a regulation that "substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" Id. at 127. With this statement the Court appeared to be incorporating Justice Holmes' "too far" test into the balancing involved in the "unduly oppressive" component of the Lawton test. See Rose, supra note 59, at 564 n.22 (noting that since the Mahon decision, the Court has "collapse[d] the police power argument into the takings issue"). The problem with this approach, however, is that it permits the protection of the Takings Clause to be balanced away. It assumes that as long as the public need is greater than the private loss the regulation does not go "too far," and thus the government is justified in appropriating the property without paying compensation to the landowner. But this reasoning is dangerous because, taken to its extreme, it would allow the government to physically take private property or completely abrogate property rights without paying compensation as long as there was a public exigency. See Stoebuck, supra note 60, at 1065-66 (noting that it is inappropriate to use the Lawton test to evaluate eminent domain takings because a physical appropriation without compensation would result whenever a public necessity justified such). It was exactly this problem that Justice Holmes was attempting to combat when he promulgated the "too far" test. See Mahon, 260 U.S. at 413-15 (arguing that the police power must have its limits otherwise the Due Process and Contract Clauses would be rendered meaningless and the protection of the Takings Clause would be merely illusory); Roberts, supra note 70, at 291 (noting that without a separate Takings Clause limitation on the police power the government would always use the police power instead of its eminent domain power and the "the institution of private property [would] be in jeopardy"); see supra notes 83-101 and accompanying text (discussing the Mahon decision).

Aside from ensuring that the protections of the Takings Clause are not balanced away, it is also important to keep the Lawton substantive due process test separate from the takings test because the remedy afforded to the landowner under each is different. If the regulation fails to satisfy the Lawton test, the Court will merely invalidate the regulation and not require the government to compensate the landowner. See Lawton, 152 U.S. at 137; Nectow v. City of Cambridge, 277 U.S. 183 (1928) (invalidating a regulation on substantive due process grounds but not awarding compensation). Conversely, if the Court invalidates a regulation because it constitutes a "taking," the government may be required
C. Agins v. City of Tiburon & Nollan v. California Coastal Commission: Increased Scrutiny?

Because courts will uphold a regulation that adversely affects an owner’s property if it is sufficiently related to the effectuation of a public purpose, the level of scrutiny courts employ when reviewing the government action becomes a crucial factor. Generally, courts consider to compensate the landowner for the “temporary taking.” See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) (holding that a regulation that is deemed to constitute a taking will require that the government compensate the landowner for the “temporary taking” of the property regardless of whether the government intends to continue it regulatory activity); San Diego Gas & Elec. v. San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) (arguing that the Constitution demands that the government pay compensation once the Court determines that there has been a regulatory taking).

125. See Goldblatt, 369 U.S. 590 (1962); Lawton, 152 U.S. 133 (1894).

126. See Epstein, supra note 3, at 59 (noting that the effective scope of a states’ police power is a function of the level of scrutiny applied to the regulation).

Since its decision in Carolene Products, the Court has granted some constitutional rights greater protection than others by using a higher degree of scrutiny in reviewing the regulations and requiring a closer fit between the government’s stated purpose and the regulatory means utilized to obtain that purpose. See United States v. Carolene Products Co., 304 U.S. 144, 152-53 & n.4 (1938). The Court in Carolene Products stated that “the existence of facts supporting the legislative judgement is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis.” Id. at 152. The Court, however, qualified this statement in the now famous “footnote 4” by pronouncing that there might be a “narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution” and that certain circumstances may warrant heightened judicial scrutiny. Id. at 152 n.4.

The most lenient standard of review employed by the courts is the rational basis test. See id. at 152. Under this standard, the government regulation will be upheld as long as the end being pursued falls within the purview of a state’s police power and there is some rational basis to believe that the means used will accomplish the end. See Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 82-83 (1978) (holding that economic regulations enjoy a presumption of constitutionality and will not be overturned unless shown to be arbitrary or irrational); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949) (noting that the states have the authority to regulate against “injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition”); Carolene Products, 304 U.S. at 154 (stating that “any state of facts either known or which could reasonably be assumed” will be sufficient to support economic regulation).

The most rigorous standard of review the courts employ is the strict scrutiny test. See Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (noting that where a government regulation interferes with a fundamental right a “critical examination’ of the state interests” is warranted by the courts). This standard is usually used when the government regulation infringes upon some “fundamental right” or deprives a person of a right the Constitution specifically guarantees. See Carolene Products, 304 U.S. at 152 n.4 (indicating that heightened judicial scrutiny may be employed where regulations touch upon specific constitutional protections or affect disadvantaged minorities). For a regulation to be upheld it
property regulations a form of economic regulation that warrant rational basis scrutiny.\footnote{127} Thus, as long as a reasonable set of facts exist to support the government's contention that the regulation was reasonably necessary to further the public welfare, the court will uphold the regulation.\footnote{128}

In \textit{Agins v. City of Tiburon},\footnote{129} however, the Court purported to depart from the requirement that the property regulation only be "reasonably necessary" to further the general welfare.\footnote{130} Specifically, the Court stated that a property regulation would constitute a taking if it did not "substantially advance" a legitimate state interest.\footnote{131} The Court's use of the phrase "substantially advance" stood in stark contrast to the Court's previous substantive due process test outlined in \textit{Lawton} and \textit{Goldblatt}, which only required that the regulation be "reasonably necessary" to accomplish the government purpose.\footnote{132} The Court in \textit{Agins} was unclear as to whether it chose its words in a conscious effort to carve out a new level

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\footnote{127} See, e.g., \textit{Hodel v. Indiana}, 452 U.S. 314 (1981) (upholding a regulation against an equal protection claim and noting that land-use regulations are a type of social and economic legislation that must be upheld if the regulation is rationally related to a legitimate state interest and does not infringe upon a fundamental right); \textit{Goldblatt}, 369 U.S. at 595-96 (upholding a zoning ordinance that prohibited the most beneficial use of the owner's property because the regulation enjoyed a presumption of constitutionality and was not unreasonable).

\footnote{129} See, e.g., \textit{Goldblatt}, 369 U.S. at 594-95 (stating that as long as the government regulation was reasonably necessary to further a public purpose and did not unduly burden the landowner, the regulation would be upheld as a legitimate use of the government's police power); \textit{Carolene Products}, 304 U.S. at 154 (noting that regulations concerning commercial transactions will be upheld as long as there is some rational basis supporting them); \textit{Miller v. Schoene}, 276 U.S. 272, 279 (1928) (holding that it was reasonable for the state to conclude that the cutting down of cedar tress was necessary to preserve the state's apple orchards).

\footnote{128} \textit{Id.} at 260.

\footnote{130} \textit{Id.} at 255 (1980).

\footnote{131} \textit{Id.} The Court also stated that a taking would occur if the regulation had the effect of denying the owner the economic use of his land. \textit{Id.} This part of the \textit{Agins} test was further developed in \textit{Lucas v. South Carolina Coastal Council}, 112 S. Ct. 2886 (1992), which required the regulation to deprive the owner of "all economically beneficial uses . . . [of] property" before a taking could occur. \textit{Id.} at 2895 (emphasis in original); see infra note 98 (discussing the \textit{Lucas} decision).

\footnote{132} \textit{Goldblatt}, 369 U.S. at 594-95 (quoting \textit{Lawton v. Steele}, 152 U.S. 133, 137 (1894)).
of scrutiny for property regulations enacted pursuant to the government's police power, or whether it was simply paraphrasing Lawton and Goldblatt.\(^{133}\)

The ambiguity of Agins' "substantially advance" requirement was a hotly debated issue between the majority and dissent in Nollan v. California Coastal Commission.\(^{134}\) In Nollan, the landowners sought a building permit from the California Coastal Commission to replace their existing beach-front home with a larger house, which would impede, to some extent, the public's view of the ocean.\(^{135}\) The Coastal Commission granted the Nollans qualified permission to build the new house under the condition that they allow a lateral public easement across their property to connect two public beaches.\(^{136}\) The Coastal Commission claimed that the easement promoted the legitimate state interest of preserving the public's view of the ocean.\(^{137}\) The Court assumed that preserving the ocean view was a legitimate state interest,\(^{138}\) but found it implausible that a lateral public easement across the Nollans' property furthered such a state interest.\(^{139}\)

In holding the Coastal Commission's demand for a public easement in exchange for its approval of the Nollans' building permit unconstitutional, the Court stated that there must be an "essential nexus" between the legitimate state interest (i.e., the ocean view) and the government's permit condition (i.e., the public easement).\(^{140}\) In the majority's view,

\(^{133}\) See supra notes 61-66 and accompanying text for a discussion on the Lawton and Goldblatt tests.
\(^{134}\) 483 U.S. 825 (1987).
\(^{135}\) Id. at 828.
\(^{136}\) Id. The Nollans challenged this condition as a taking without compensation in violation of the Takings Clause. Id. at 829.
\(^{137}\) Id. at 828-29. The Commission argued that the Nollans' larger house would create a "psychological barrier" that would hinder the public from realizing that they had a right to traverse along the nearby coastline. Id. Thus, the Commission reasoned that it could require the Nollans to grant the public an easement across their property to offset this "psychological wall." See id. at 829.
\(^{138}\) Id. at 835.
\(^{139}\) Id. at 837. Specifically, the Court assumed, without deciding, that preserving the public's view of the beach and helping the public overcome the "psychological barrier" created by a developed shorefront were legitimate governmental purposes. Id. at 835. The Court then noted that the Commission could justifiably deny the Nollans' permit if their larger house would impede these governmental purposes unless the denial of the permit "would interfere so drastically with the Nollans' use of their property as to constitute a taking." Id. at 835-36. Because the easement condition would not further the same legitimate governmental purposes as would a building prohibition, however, the Court held the Commission was not validly exercising its police power. Id. at 836-37.
\(^{140}\) Id. at 837. The Court's creation of the "essential nexus" test was a means to ensure that a police power regulation which affected private property would "substantially advanced" a legitimate state interest. See id. at 841. The Court asserted that this "essential
this "essential nexus" test would be satisfied only if the building permit condition served the same governmental interest as would a complete denial of the building permit.\textsuperscript{141} In this instance, the Court concluded that such a nexus was lacking.\textsuperscript{142} The Court reasoned that, although the state would have served its interest of preserving the ocean view by completely denying the building permit, thereby preventing the Nollans from building their larger home, it did not serve the same interest by granting the building permit subject to the public easement.\textsuperscript{143}

Justice Brennan, dissenting in \textit{Nollan}, criticized the majority for applying heightened scrutiny to the government regulation.\textsuperscript{144} In his view, the majority's "essential nexus" test was an unprecedented review of government regulations not seen since the \textit{Lochner} Era.\textsuperscript{145} Justice Brennan as-
asserted that it was well established that the Court’s review of police power regulations only merited rational basis scrutiny. Under this level of scrutiny, a court should uphold a property regulation as long as the government could have rationally concluded that the regulation would achieve the legitimate state interest. To support his position, Justice Brennan cited both Goldblatt and Lawton, noting that both of these cases clearly state that a regulation must only be “reasonably necessary” to accomplish a legitimate state interest. Moreover, he contended that the difference between “substantially advance” as used in Agins, and “reasonably necessary” as used in Goldblatt, was simply a matter of semantics and that both phrases were different ways of expressing the same level of scrutiny courts should apply to government property regulations.

phasized that the majority’s “narrow conception of rationality . . . has long since been discredited as a judicial arrogation of legislative authority.” Id. at 846.

146. Id. at 843. Justice Brennan stressed that a more deferential standard of review was needed because local governments need the flexibility to engage in comprehensive planning to cope with the intense development taking place in their area. Id. at 863. In a separate dissent, Justice Blackmun also noted the need for legislatures to be given flexibility to cope with increased development. Id. at 865 (Blackmun, J., dissenting) (stating that “land-use problems this country faces require creative solutions”).

147. Id. at 843 (Brennan, J., dissenting). In Justice Brennan’s view, it was rational for the Commission to impose the easement condition on the landowner’s building permit. Id. at 843-46. Although the Nollan’s larger house would have impeded the public’s view of the ocean, the easement granting the public the right to pass along the shoreline in front of owner’s house would have offset this impediment. Id. at 845.

148. Id. at 843-44 n.1 (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

149. Id. (citing Lawton v. Steele, 152 U.S. 133 (1894)).

150. Id. Justice Brennan argued that a regulation may be a valid exercise of a state’s police power and at the same time violate another provision of the Constitution. Id. at 844 n.1. Thus, he distinguished between a substantive due process challenge under the Fourteenth Amendment and a takings challenge brought pursuant to the Fifth Amendment. See id.; supra notes 58-60 accompanying text (discussing the difference between these challenges). Justice Brennan noted that each of these provisions required a different standard of review. Nollan, 483 U.S. at 844 n.1. The proper analytical framework for a takings challenge requires the Court to consider the factors outlined in Penn Cent. Transp. Co. v. New York City, 483 U.S. 104, 125 (1978) (character of the governmental action; distinct investment back expectations, etc.). Nollan, 483 U.S. at 844 n.1; see supra notes 102-24 and accompanying text (discussing Penn Central). On the other hand, Justice Brennan argued that the Court uses a different standard when it reviews the validity of the exercise of the police power. Nollan, 483 U.S. at 843-44 n.1. In such instances, the Court should employ the Lawton test. See id.; supra notes 61-66 and accompanying text (reviewing Lawton).

151. Nollan, 483 U.S. at 844 n.1. Justice Scalia, writing for the majority, rebutted Justice Brennan’s contention. Id. at 834-35 n.3. Although conceding that the Court’s cases have not defined the precise connection needed between the regulation and the state interest to satisfy the “substantially advance” requirement, Justice Scalia indicated that this requirement was different from the normal “rational basis” test employed when reviewing other non-property related economic regulations. See id. Justice Scalia’s contention apparently has prevailed as the Court’s view. See Dolan v. City of Tigard, 114 S. Ct. 2309,
II. Dolan v. City of Tigard: Quantifying Nollan's "Essential Nexus" Test

In Dolan v. City of Tigard, the Supreme Court held that the city's demand that Dolan dedicate a portion of her property for a public greenway and recreational path, as a condition precedent to the city's approval of her building permit, was unconstitutional. The Court conceded that both the greenway and pathway dedication requirements were sufficiently related to the legitimate state interest of preventing flooding and controlling traffic congestion in the city's downtown area. Thus, the Court concluded that the city satisfied Nollan's "essential nexus" test.

The Court did not end its analysis there, however, but added further refinement to its scrutiny.

The Court ultimately held that the dedication requirements were unconstitutional because the city failed to meet its burden of demonstrating that the dedication requirements bore the required relationship to the

2320 (1994) (stating "[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"); Lucas v. South Carolina Coastal Comm'n, 112 S. Ct. 2886, 2895 n.8 (1992) (stating that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause").


153. Id. at 2312-22. In finding for the landowner, the Court reversed both the Oregon Supreme Court and the Oregon Court of Appeals. See id. at 2315. Both of the state courts' decisions affirmed LUBA's finding that there was a reasonable relationship between the impact that Dolan's new store would have on the city and the required dedication of land for the greenway and recreational path. Id. Dolan argued, however, that the Court's "essential nexus" test outlined in the Nollan decision mandated that a court apply heightened scrutiny in reviewing the dedication requirements. See id. Thus, Dolan asserted, the use of a "reasonable related" standard of review was inadequate to meet Nollan's stringent "essential nexus" test. See id. The Oregon Court of Appeals rejected Dolan's argument, Dolan v. City of Tigard, 832 P.2d 853, 855 (1992), and the Oregon Supreme Court affirmed, Dolan v. City of Tigard, 854 P.2d 437, 442-43 (1993), stating that it was "unable to agree with [Dolan] that the Nollan court [sic] abandoned the 'reasonably related' test." Id. at 442. The Oregon Supreme Court interpreted the Nollan decision as meaning that a dedication requirement "is reasonably related to an impact if the [dedication requirement] serves the same purpose that a denial of the permit would serve." Id. at 443. The U.S. Supreme Court granted certiorari to clarify its decision in Nollan, Dolan v. City of Tigard, 510 U.S. 544 (1993), and to determine "the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." Dolan, 114 S. Ct. at 2312.


155. Id. at 2318. In short, the Court stated that the Nollan "essential nexus" test was met because the city had sufficiently demonstrated two things: that the expansion of Dolan's store would bring in more customers that would use the bicycle/pedestrian path, and that the greenway was justified because the increase in impervious services on Dolan's lot would increase the water runoff flowing into a nearby creek. Id.
projected impact that Dolan's new store would have on the city. The Court ruled that, while no "precise mathematical calculation" was needed, the Fifth Amendment required the city to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." The Court held that there needed to be a "rough proportionality" between the dedication requirements demanded by the city and the projected adverse affects that Dolan's new store would have on the city, thereby formulating a second prong to Nollan's "essential nexus" test.

A. The Majority Opinion: Shifting the Burden and Increasing Judicial Scrutiny

In Dolan, the majority applied a three-part analysis in invalidating the city's dedication requirements. First, the Court examined whether a taking would have occurred had the city simply demanded that Dolan dedicate her property to the city, as opposed to conditioning the grant of her building permit on such a dedication. The Court concluded that such a demand would have amounted to a taking, and then proceeded

156. Id. at 2318-19.
157. Id. at 2319-20.
158. Id. at 2319.
159. Note that the Court indicated that there only are two parts to its analysis: Nollan's "essential nexus" test and the "rough proportionality" test that is developed and applied in Dolan. See id. at 2317-18. In actuality, however, there were three parts to the Court's analysis. The second and third components of the Court's analysis were Nollan's "essential nexus" test and Dolan's "rough proportionality" test, respectively. See id. at 2317-19. The first part of the Court's analysis was its inquiry into whether a taking would have occurred had the state merely demanded that Dolan dedicate her property for public use as a pathway, as opposed to requiring the same as a condition to having her building permit approved. See id at 2316; infra note 161 (discussing the importance of this initial inquiry).
160. Dolan, 114 S. Ct. at 2316.
161. Id. This is a rational conclusion because such a dedication involves a "physical invasion" and total appropriation of a portion of Dolan's property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1983) (holding that a "permanent physical occupation authorized by the government," no matter how small, will constitute a taking regardless of the public purpose it serves); supra note 37 and accompanying text (discussing Loretto and the takings issue).

This initial inquiry by the Court is important because it acts as a threshold determination of whether or not the Court must apply Nollan's "essential nexus" test and Dolan's "rough proportionality" test. If the Court finds that the exaction in question does not amount to a taking, it would end its analysis without applying the Nollan or Dolan tests and uphold the exaction. See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that a land-use restriction did not constitute a taking and therefore the Court did not inquire as to the connection between the restriction and the impact that the owner's new development would have on the city). This conclusion is based on the logic that if the exaction is constitutional as an independent regulation, then it necessarily follows that such a regulation would be constitutional as part of an exactions scheme. See Dolan, 114 S. Ct. at 2318-19.
to apply Nollan’s “essential nexus” test as the second part of its analysis. In noting that the “essential nexus” test was a “loose[ ] standard,” the Court held that the dedication requirements were sufficiently related to a legitimate state interest to pass the Nollan test. The third part of the Court's analysis, and the crux of the Dolan decision, focused on the degree of connection required between the dedication requirements and the projected impact that Dolan's new store would have on the city.

It was this third part of the Court's analysis that broke new ground in the area of property regulation. By requiring the city to make an “in-
individualized determination” that the dedication requirements were in “rough proportion” to the impact that Dolan’s new store would have, the Court shifted the burden to the government to justify its own property regulation. Moreover, to determine whether the city had met its burden, the Court reviewed the city’s proffered reasons for the dedication requirements with a higher level of scrutiny than it normally uses when reviewing economic or social regulations.

With regard to the greenway dedication requirement, the Court agreed with the city that Dolan’s new store would increase the water run-off into the nearby creek, causing a higher risk of flooding. The Court also agreed that the city had a legitimate interest in preventing such flooding. The Court noted, however, that an existing provision that required Dolan to keep fifteen percent of her property as “open space” would resolve the problem of the additional water run-off. Thus, in the Court’s view, there was no need for Dolan to dedicate a portion of her property to solve the same problem.

166. See id. at 2319.
167. See id. at 2320-21. Economic regulations normally will be upheld as long as there is some rational reason to support them. See United States v. Carolene Products, 304 U.S. 144, 152 (1938). Moreover, the Court has even gone so far as to hypothesize a reason that would support the regulation if the government has failed to give a supporting reason for the regulation. Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955); see supra note 126 (discussing the various levels of scrutiny).

The city, in Dolan, did promulgate its reasons for the dedication requirements. Dolan, 114 S. Ct. at 2317-18. In addition, the Court conceded that the city’s reasons were rational. Id. The Court, however, found these reasons insufficient to support the dedication requirements. Id. at 2320-23. Specifically, the Court demanded that the city make an “individualized determination” that the dedication requirements were sufficiently related to its stated interests. Id. at 2319. This demand demonstrates a higher level of scrutiny than what is normally employed when reviewing economic regulations. Compare Dolan, 114 S. Ct. at 2319 (demanding that the government make an individualized determination that the regulation is related in “both in nature and extent to the impact of the proposed development”) with Williamson, 348 U.S. at 490 (noting that the Court will uphold an economic regulation if it can be assumed that the legislature “might conclude” that there is a reasonable relationship between the regulation and the ends sought to be accomplished) and Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) (noting that a police power regulation will be granted a presumption of constitutionality unless the government acted with “arbitrariness and irrationality”).

169. Id.
170. Id.
171. Id. In short, the Court asserted that the city had not sufficiently stated “why a public greenway, as opposed to a private one, was required in the interest of flood control.” Id. As long as the property was kept “open” it did not matter who owned the property; the water runoff would not change based on the ownership of the property. See id. Thus, there was no reason for Dolan to dedicate that portion of her property.
In reviewing the recreational pathway dedication requirement, the Court conceded that dedications of land for streets and sidewalks are usually permissible regulations because they aim to relieve potential congestion created by a proposed development.\textsuperscript{172} The city, however, demonstrated only that the recreational pathway “could,” as opposed to “would,” offset some of the congestion created by Dolan’s larger store.\textsuperscript{173} Thus, the Court concluded that the city failed to sustain its burden of proving that the dedication requirements were in “rough proportion” to the impact that Dolan’s new store would have on the city.\textsuperscript{174} The majority’s decision not only shifted the burden to the government to justify its findings, it also increased the level of scrutiny that would be used to review the government’s findings.\textsuperscript{175}

\textbf{B. The Dissenting Opinion—Fears of the Lochner Era}

Justice Stevens, in his dissent, attacked the majority’s shifting of the burden to the city to demonstrate that there was a “rough proportionality” between the dedication requirements and the projected impact of

\begin{itemize}
\item \textsuperscript{172} \textit{Id.} at 2321.
\item \textsuperscript{173} \textit{Id.} at 2321-22. Specifically, the Court noted that “‘[t]he findings of fact that the bicycle pathway system \textit{could} offset some of the traffic demand’ is a far cry from a finding that the bicycle pathway system \textit{will}, or is \textit{likely to}, offset some of the traffic demand.” \textit{Id.} at 2322 (quoting Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting)). While Justice Stevens contended that the distinction between “could” and “will” or “likely to” appears to be merely a “play on words,” see \textit{id.} (Stevens, J., dissenting), it may be that the Court’s true reason for rejecting the city’s findings is the unrealistic assumption by the city that customers of Dolan’s plumbing and electric store would be able to use the bike path. See Petitioner’s Brief at 8 (noting that the city concluded that Dolan’s store was similar to retail stores that sell bulky merchandise). Thus, the Court appears to have been questioning how many people would actually ride their bike to buy a new bathtub or toilet.
\item \textsuperscript{174} \textit{Dolan}, 114 S. Ct. at 2322. This “could” versus “would” distinction illustrates the Court’s close scrutiny of the city’s findings and justification for the regulation. As noted, when a court is reviewing the constitutionality of economic regulations it normally will go to great lengths to conceive a possible reason that would furnish a rational basis for the regulation. See \textit{Williamson v. Lee Optical Co.}, 348 U.S. 483 (1955); \textit{supra} note 126. If the \textit{Dolan} Court was applying this deferential standard, it surely would have upheld the city’s regulation, at least to the extent of the recreational pathway dedication. Just as the \textit{Williamson} Court upheld a regulation that prevented opticians from fitting eyeglass lenses into frames without a prescription based on the assumption that the legislature might have concluded that prescriptions were necessary to ensure a correct fitting, the \textit{Dolan} Court also might have concluded that some of Dolan’s patrons would use the recreational pathway to traverse to and from her store, notwithstanding the fact that she sold mostly bulky merchandise from her store. The \textit{Dolan} Court, however, demanded more from the city. See \textit{Dolan}, 114 S. Ct. at 2321-22. The Court required the city to make an “individualized determination” and quantify its findings that the recreational pathway would in fact alleviate some of the traffic congestion Dolan’s new store would create. \textit{Id.}
\item \textsuperscript{175} \textit{Dolan}, 114 S. Ct. at 2319-20.
\end{itemize}
Dolan's new store on the city. In his view, the Court should have focused solely on Nollan's "essential nexus" test. Additionally, he argued that the Court should apply a heightened level of scrutiny when reviewing the city's justification for the dedication requirements only if the landowner, not the government, could demonstrate that the dedication requirements were so "grossly disproportionate" to the potential adverse effects of the proposed development. Thus, Justice Stevens would place the burden on the property owner to demonstrate that the city's proffered reasons for the dedication requirements were merely subterfuge to avoid having to compensate the landowner for the taking of his property.

176. Id. at 2326 (Stevens, J., dissenting). Justice Stevens framed the issue before the Court solely as being a Fourteenth Amendment, substantive due process question. Id. at 2322. Specifically, he stated that the issue was "whether the city has violated the Fourteenth Amendment . . . by refusing to allow Dolan's planned construction to proceed unless" she dedicated a portion of her property. Id. Justice Stevens also struck at the majority's contention that the Takings Clause of the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment. Id. at 2327-28. He noted that the case cited by the majority for its contention that the Takings Clause is applicable to the states, Chicago, B. & O. R.R. v. Chicago, 166 U.S. 226 (1897) (holding a state does not afford due process of law when it takes property for public use without paying for it), stands for the proposition that due process requires a state to compensate the landowner for property taken for public use, as opposed to the Fifth Amendment being incorporated as applying to the states via the Fourteenth Amendment. See Dolan, 114 S. Ct. at 2327-28.

Whether a property regulation is evaluated under the Fourteenth Amendment or the Fifth Amendment is important because the analysis used to evaluate the regulation and the remedy afforded to the landowner differs under each amendment. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.3 (1987) (noting that where a property regulation is at issue the standard for evaluating takings and due process challenges are not necessarily the same). Compare First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) (holding that the Fifth Amendment is self-executing and demands that the landowner be compensated for the period of time that the regulation was found to effect a taking) with Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928) (invalidating a regulation on Fourteenth Amendment grounds but awarding no compensation to the landowner for the period of time in which the regulation was enacted). Under the Fourteenth Amendment, the Court would apply the Lawton test, which is inherently deferential to the government's findings and permits the Court to balance the public's needs against the individual's loss. By contrast, analyzing a property regulation under the Fifth Amendment would require the Court to use the factors outlined in Penn Central to determine if a taking had occurred. See Nollan, 483 U.S. at 843-44 n.1 (Brennan, J., dissenting) (agreeing with the majority that the evaluation of a takings claim and the validity of a police power regulation are reviewed under different standards); see also infra note 179.

177. Id. at 2325 (Stevens, J., dissenting). Anything more, Justice Stevens noted, would hinder the city's ability to pursue land use planning. See id.

178. Id. Specifically, Justice Stevens stated that the Court should "venture beyond considerations of a condition's nature or germaneness" only if the landowner, not the government, demonstrates that the dedication requirement "is so grossly disproportionate to the proposed development's adverse effects that it manifests motives other than land use regulation on the part of the city." Id.

179. Id. at 2329. Justice Stevens argued that if the
Justice Stevens also disagreed with the increased level of scrutiny the majority used in evaluating the city’s justification for the dedication requirements. He argued that, because Dolan used her property for commercial purposes, conditions imposed on such property are a form of economic regulation that warrant a strong presumption of constitutional validity. Justice Stevens asserted that property regulations should be reviewed under a rational basis analysis, as are other economic regulations. Government can demonstrate that the conditions it has imposed in a land-use permit are rational, impartial and conducive to fulfilling the aims of a valid land-use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action’s constitutionality. *Id.* at 2329-30.

Justice Stevens' argument that the burden should be on the landowner is consistent with his theory of the case. As noted, Justice Stevens contended that the issue in *Dolan* was solely a Fourteenth Amendment issue. *Id.* at 2322; see *supra* note 176. Generally, when a police power regulation is reviewed by a court to determine whether it is in violation of the substantive due process component of the Fourteenth Amendment, it is presumed to be constitutional. *Hodel v. Indiana*, 452 U.S. 314, 331 (1981) (stating that a land-use regulation “carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality”); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (maintaining that the exercise of the police power is presumed to be constitutional); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (stating “the existence of facts supporting the legislative judgment is to be presumed”). Thus, from Justice Stevens’ perspective, the majority, by shifting the burden to the government to justify its regulation, was overruling well established precedent. *See Dolan*, 114 S. Ct. at 2328-30 (Stevens, J., dissenting). In Justice Stevens’ words, the placing of the burden on the landowner “has served us well in the past. The Court has stumbled badly today by reversing it.” *Id.* at 2330.

The majority, on the other hand, based its theory of the case on the Takings Clause of the Fifth Amendment. *See id.* at 2316-20; *supra* note 176. Thus, from the majority’s perspective, it was not reversing the well established presumption of constitutionality that land-use regulations have enjoyed. *See Dolan*, 114 S. Ct. at 2316, 2320 n.8. Rather, it was outlining what must be demonstrated to ensure the regulation does not effect a taking in violation of the Fifth Amendment. *See id.* at 2316 (stating “[a] land use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ ”) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).


181. *Id.* at 2325. In Justice Stevens’ view, the Court’s meddling with economic regulations was a step back to the *Lochner* Era. *Id.* at 2328-29. In equating the majority’s “judicial innovation” in *Dolan* with Justice Holmes’ decision in *Mahon*, Justice Stevens denounced both, as well as the substantive due process cases under *Lochner*, as creating judicial doctrines that were “potentially open ended sources of judicial power to invalidate state economic regulations” that raise serious prudential concerns. *Id.* at 2327.

Justice Stevens also pointed out that the majority’s increased scrutiny and showing of judicial power would open the “floodgates” of litigation. *See id.* at 2326. Justice Stevens stated that the majority was “extending its welcome mat to a significant new class of litigants” and that “property owners have surely found a new friend today.” *Id.*
He concluded that as long as the government can demonstrate that the property regulations are a rational and impartial means of achieving a legitimate state interest, such regulations should be presumed to be constitutional, and the property owner should have the burden of proving that such regulations were unreasonable. In Justice Stevens' view, the majority's burden shifting and heightened scrutiny analysis was a form of judicial activism not seen since the days of the Lochner Era.

III. PUTTING DOLAN IN ITS PLACE: THE LIMITATIONS OF AND JUSTIFICATION FOR DOLAN'S BURDEN SHIFTING AND INCREASED SCRUTINY

A fundamental debate between the majority and dissent in Dolan was the level of scrutiny courts should employ when reviewing government regulations affecting property. Inherent in this debate is the scope of the states' police power and the amount of protection property rights are afforded. With a higher level of scrutiny, the government's police power is restricted in scope, and property rights, in turn, are afforded greater protection. Because the amount of protection afforded prop-

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182. Id. at 2329-30. The majority rebuffed Justice Stevens’ contention by noting that merely characterizing a government action as a “business regulation” will not immunize it from a constitutional challenge that the action violates a specific constitutional provision. Id. at 2320. Justice Stevens responded by stating that while the city’s conditions are not immune from constitutional scrutiny, the level of scrutiny should not parallel the standard of review used to evaluate First Amendment abridgments. Id. at 2328-29 (Stevens, J., dissenting). The majority rebutted this assertion by stating that “[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.” Id at 2320.

183. Id. at 2329-30.

184. Id. at 2329. Justice Stevens noted that the majority’s burden shifting and increased judicial scrutiny was “resurrect[ing] . . . a species of substantive due process analysis that [the Court] firmly rejected decades ago.” Id. at 2326 (citing Ferguson v. Skrupa, 372 U.S. 726 (1963)). In Ferguson, the Court “refuse[d] to sit as a superlegislature to weigh the wisdom of legislation” and to use the Due Process Clause to strike down unwise legislation. Ferguson, 372 U.S. at 731; see also supra note 16 (discussing the Lochner Era).

185. The divergence of the majority’s and dissent’s positions is illustrated by the “would” verses “could” distinction made by the majority. See Dolan, 114 S. Ct. at 2321-22. The majority would not accept as constitutionally sufficient the city’s findings that the recreational pathway “could” offset the increase in traffic caused by Dolan’s new store. Id. The majority demanded that the city make an “individualized determination” that the pathway “would” offset the increase in traffic. See id. at 2319, 2322. By contrast, the dissent called such a subtle distinction a “play on words” and denounced the majority’s close scrutiny as judicial micro-management. Id. at 2326 (Stevens, J., dissenting).

186. See Epstein, supra note 3, at 59 (stating that the applicable level of scrutiny determines the scope of the police power).

187. Id.
Property rights is dependent upon the level of scrutiny employed by a court, and because the level of scrutiny employed is determined, in part, by whether the court's analysis is based on the Fifth Amendment or the Fourteenth Amendment, the critical issue for both the property owner and the government is whether a court is basing its analysis on the Fifth Amendment or the Fourteenth Amendment. It is on this precise issue—whether the Court should have based its analysis on the Fifth Amendment or the Fourteenth Amendment—that the majority and dissent in Dolan were adamantly opposed.

In essence, the majority and dissent were arguing past each other. On one hand, the majority declared that under the Fifth Amendment a court should examine regulations affecting property with heightened scrutiny. In response, the dissent exclaimed that under the Fourteenth Amendment a court should review regulations affecting property with the traditional rational basis scrutiny.

Neither the majority nor dissent did

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188. See supra notes 185-87 and accompanying text.

189. Because the majority in Dolan based its decision on the Fifth Amendment alone, its heightened scrutiny presumably is not applicable to situations were the property owner challenges a government regulation on Fourteenth Amendment grounds. See Dolan, 114 S. Ct. at 2319-20. Thus, a court would apply a rational basis scrutiny to evaluate a Fourteenth Amendment challenge and Dolan's heightened scrutiny to evaluate Fifth Amendment challenges, assuming the other requirements of Dolan are met.

190. The property owner, in most cases, will argue that the court should base its analysis on the Fifth Amendment so as to invoke Dolan's burden shifting and heightened scrutiny. By contrast, the government will most likely frame its argument in terms of the Fourteenth Amendment in hopes of avoiding Dolan's arduous requirements and having its regulation reviewed under a rational basis scrutiny.

191. See supra notes 176, 179 (discussing the different theories of the majority and dissent); see also infra notes 192-96 and accompanying text.

192. Dolan, 114 S. Ct. at 2319-20 (arguing that Fifth Amendment rights deserve the same level of scrutiny as First and Fourth Amendment rights).

193. Id. at 2325 (stating that the conditions placed on Dolan's property are "a species of business regulation that heretofore warranted a strong presumption of constitutionality").

Since its decision in Carolene Products, the Court has been extremely deferential to legislative enactments affecting economic interests. See United States v. Carolene Products, 304 U.S. 144, 152 (1938) (stating that "the existence of facts supporting the legislative judgment is to be presumed" and economic regulations should be upheld if there is a rational basis supporting them). Land-use regulations have generally been considered economic regulations and have enjoyed the same deferential treatment by the courts. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (holding that the Coal Company failed to "satisf[y] their burden of showing that the . . . [regulation] constitutes a taking"); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) (noting that land-use regulations enjoy a presumption of constitutionality); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (stating that as long as the validity of the regulation is "fairly debatable, the legislative judgment must be allowed to control"); See also Coyle, supra note 12, at 43 (explaining that during the years following Carolene Products the Court relegated property rights to the "constitutional waste basket" of the rational basis test).
Correctly refuted the other's contention. The dissent did not refute the majority's contention that the Fifth Amendment demands heightened scrutiny. Rather, its argument was that the facts of *Dolan* present a Fourteenth Amendment issue, not a Fifth Amendment issue.\(^{194}\) Thus, under the traditional Fourteenth Amendment analysis for economic regulations the Court should review the government regulation under a rational basis scrutiny and grant the regulation a presumption of constitutionality.\(^{195}\) In turn, the majority did not contend that its heightened scrutiny should apply in the context of Fourteenth Amendment challenges. Rather, its argument was that where a property owner's Fifth Amendment right has been infringed by a government regulation in an exactions scheme, the Court should review the regulation under heightened scrutiny.\(^{196}\) The core of the disagreement between the majority and dissent lies, therefore,

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194. *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting). The dissent reasoned that the issue before it was purely a Fourteenth Amendment issue, and that the Fifth Amendment was not implicated, because, in its view, a taking had not occurred. *Id.* 2324-25, 2328. Justice Stevens argued that takings analysis required courts to consider the impact of the government's actions on the entire parcel of property and not merely focus on a particular portion of the property. *Id.* at 2324-25. He contended that the majority was wrong to focus solely on "one strand in the property owner's bundle of rights." *Id.* at 2325. Justice Stevens also stated that the Court's past decisions had rejected the idea that a taking could be found by "divid[ing] a single parcel into discrete segments and . . . [determining] whether rights in a particular segment have been entirely abrogated." *Id.* at 2324 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)). He concluded that because Dolan was required only to deed a small portion of her property to the city, and thus was only giving up the right to exclude others from that portion, the majority was wrong to find that the city's actions constituted a taking of Dolan's property. *See id.* at 2324-25.

Justice Stevens also argued that the majority's conclusion that a taking had occurred was premature because the city had not yet acquired Dolan's property. *Id.* at 2328. He asserted that because Dolan had no right to compensation until the city actually acquired the property, and the city had not yet done so, Dolan's Fifth Amendment right to receive just compensation could not be infringed. *Id.* In addition, Justice Stevens noted that even if a taking was found, Dolan was not necessarily being denied just compensation for such a taking. *Id.* In his view, the benefit conferred upon Dolan in the form of the approval of the building permit should be considered in the calculation of the compensation to be paid to Dolan. *Id.*

195. *See id.* at 2328-29; supra note 179.

196. *Dolan*, 114 S. Ct. at 2320. The majority reasoned that because Dolan was required to deed a portion of her land to the city she was entitled to compensation under the Fifth Amendment. *Id.* at 2316-17. In turn, the Court argued that under the unconstitutional conditions doctrine, Dolan could not be forced to give up her constitutional right to receive compensation under the Fifth Amendment in exchange for the city's approval of her building permit "where the property sought [by the city] ha[d] little or no relationship to the benefit [i.e., the approval of the building permit]." *Id.* at 2317; *see also* Epstein, supra note 3, at 6-7 (stating that the unconstitutional conditions doctrine provides that "even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights").
in the level of government intrusiveness that each considers to be sufficient to infringe upon the property owner's Fifth Amendment rights. Under the facts of *Dolan*, the majority found that the government action was intrusive enough to infringe upon Dolan's Fifth Amendment rights; the dissent did not.

### A. The Limitations

While *Dolan* is a clear victory for property rights advocates, the Court's holding does have important limitations. Dolan's holding should not be construed to apply to every property regulation, much less every type of economic regulation, the government enacts. The Dolan majority focused on the character of the government action and made two distinguishing points that purport to limit Dolan's holding to a specific type of property regulation.

First, the Court noted that the property regulation at issue in *Dolan* was a developmental exaction that only affected a single parcel of property. Thus, the regulation was not a legislatively enactment, like other economic regulations, that affected a wide array of property interests. Rather, the city made an adjudicative decision which burdened only a single individual. The majority's classification of the dedication requirements as an adjudicative decision, rather than as a legislative enactment, allowed it to shift the burden to the government and to review the city's findings with heightened scrutiny, without overruling the well-established presumption of constitutionality and rational basis analysis the

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197. *See Dolan*, 114 S. Ct. at 2316 (distinguishing the regulation at issue from those in the Court's previous decisions).

198. *Id.*

199. *Id.; see supra* note 20 (discussing developmental exactions). An example of a regulation that does not solely affect a single landowner would be a zoning ordinance. See, *e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The regulation at issue in *Village of Euclid* was a zoning ordinance that divided the whole village into residential, commercial, and industrial areas. *Id.* at 379-80. Although the regulation devalued the petitioner's property by reclassifying it from industrial use to residential use, he was not the only property owner affected. *See id.* at 384. Thus, the landowner was not being singled out to bear a public burden. *See id.* The Court noted that the zoning ordinance was a valid exercise of the state's police power because it furthered the public welfare. *Id.* at 383; *see also* Welch v. Swasey, 214 U.S. 91, 107 (1909) (upholding a state's right to enact height restrictions on buildings). The height restrictions in *Welch* applied to all persons owning property in the area. *Id.* at 93-94. By contrast, the regulation at issue in *Dolan* only applied to Dolan, not her neighbors. *Dolan*, 114 S. Ct. at 2314. The city demanded that she dedicate a portion of her property before it would issue her building permit. *See id.; see also* North Amber Meadows Homeowners Ass'n v. Haut Enters., 647 A.2d 127 (Md. Ct. Spec. App. 1994) (recognizing that there are fundamental differences between general zoning regulations and subdivision regulations which demand exactions).

200. *See Dolan*, 114 S. Ct. at 2316; *see supra* note 199.
Court generally employs when reviewing economic regulations.\textsuperscript{201} From the majority's perspective, the regulation was not an ordinary economic regulation.\textsuperscript{202} Thus, in theory, the dissent's fear that the Court was "resurrect[ing] a species of substantive due process analysis that it firmly rejected decades ago" by utilizing heightened scrutiny to review economic regulations was unfounded.\textsuperscript{203} In reality, however, whether the dissent's fear was justified will depend on how well this distinction fares in future court decisions. If courts blur the line between adjudicative decisions and

\begin{quotation}
\textsuperscript{201} See \textit{Dolan}, 114 S. Ct. at 2319-20. The Court's distinction between legislative regulations that affect a wide array of individuals and adjudicative enactments that affect only a single property owner is buttressed by a fundamental principal underlying the Takings Clause. Specifically, the Court stated in \textit{Armstrong v. United States}, 364 U.S. 40, 49 (1960), that the primary purpose of the Takings Clause is to prevent the government from forcing individuals to bear a burden that in all fairness should be borne by the public at large. \textit{Id.} at 49. Legislative enactments that affect a wide array of individuals and property have less of a risk of violating this fundamental concept (i.e., the "\textit{Armstrong principal}") because such regulations affect a larger number of individuals and thereby diffuse the public burden. Because such regulations carry a lower risk of violating the \textit{Armstrong} principal, they do not require the increased scrutiny and burden shifting outlined in \textit{Dolan}. \textit{Dolan}, 114 S. Ct. at 2319. On the other hand, such a risk is extremely high with exactions because the government is asking a single individual to contribute to the public welfare. See supra note 20 (discussing exactions). Therefore, such a regulation does merit increased scrutiny to combat the greater risk of violating the \textit{Armstrong} principal that is associated with an exaction. \textit{Compare Dolan}, 114 S. Ct. at 2319-20 (invalidating a developmental exaction because the government failed to make an "individualized determination" that such a regulation was "related both in nature and extent to the impact of the proposed development") \textit{with Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365 (1926) (upholding a zoning regulation that affected a wide array of individuals because such regulation was rational and not arbitrary).

\textsuperscript{202} See \textit{Dolan}, 114 S. Ct. at 2316.

\textsuperscript{203} See \textit{id.} at 2326. Note too, that the majority invalidated the regulation on Fifth Amendment as opposed to Fourteenth Amendment grounds. \textit{See id.} at 2316 (framing the issue in terms of the Takings Clause). \textit{But cf. id} at 2322 (Stevens, J., dissenting) (framing the issue in terms of the Fourteenth Amendment). The majority's burden shifting and heightened scrutiny were done under the guise of the Takings Clause. \textit{Id.}; supra notes 192-96. The Court used \textit{Nollan}'s "essential nexus" test and \textit{Dolan}'s "rough proportionality" test to determine whether the city's regulation substantially advanced the city's stated interest so as not to constitute a taking in violation of the Fifth Amendment. \textit{See id.} The majority never asserted that it was invalidating the regulation on due process grounds. Thus, technically, the majority was not resurrecting \textit{Lochner}-type substantive due process to invalidate an economic regulation, but rather was asserting Fifth Amendment rights. The bottom line, however, is that regardless of whether the regulation is being reviewed under Fourteenth or Fifth Amendment grounds, the Court is applying a type of heightened judicial scrutiny. \textit{See Respondent's Brief at 30} (arguing that the petitioner wants to return to the \textit{Lochner} Era of heightened judicial scrutiny of economic regulations under the guise of a takings analysis rather than the substantive due process analysis); \textit{see also supra} note 176 (discussing the majority's and dissent's divergent theories of the case).
\end{quotation}
legislative enactments, Dolan could be expanded beyond the realm of developmental exactions.\footnote{See supra notes 180-88 (discussing the dissent's concern about the majority's deviation from the traditional presumption of constitutionality).}

The second distinguishing factor that purports to limit the Dolan decision concerns the Court's inquiry into the character of the government action and whether such action authorized a physical invasion of the owner's land.\footnote{See Dolan, 114 S. Ct. at 2316. Note that the majority in Dolan was building on one of the factors the Court had set forth in Penn Central as relevant in determining whether a taking had occurred. The Penn Central Court stated that it would be more likely to find a taking where a government regulation could be characterized as authorizing a physical invasion of property. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). By comparison, the Dolan Court stated that where a government regulation authorized a physical invasion of property the burden was on the government to justify such invasion. See Dolan, 114 S. Ct. at 2316, 2319. In addition, the Court stated that it would review the government's justification with a type of heightened scrutiny. See id. at 2319. By shifting the burden and applying a heightened level of scrutiny, the Court, as it stated in Penn Central, will be more apt to find a taking because fewer regulations will be upheld as valid uses of the government's police power. See supra notes 186-87 and accompanying text (discussing the impact the level of scrutiny has on a state's police power). Thus, under Dolan's arduous requirements more regulations will constitute takings.}
The Court acknowledged that the regulation involved a dedication of land—a physical invasion that in most cases would be deemed a taking.\footnote{Dolan, 114 S. Ct. at 2316. The Court distinguished this type of regulation from one that merely limits the use of an owner's property. Id. The Court reasoned that the dedication requirement deprived Dolan of the right to exclude others from her property which is "one of the most essential sticks in the bundle of [property] rights." Id. (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).}

It is interesting to note that the Court did not cite Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), which held that a permanent physical occupation of property by the government constitutes a taking regardless of how important the public benefit is or how minimum the economic impact is on the landowner. See Loretto, 458 U.S. at 434-35. It would certainly appear that the regulation in Dolan authorized a permanent physical invasion of property and a taking in accordance with the Loretto rule. Thus, the Dolan Court could have found that the regulation violated the Loretto rule, declared it a taking, and ended its analysis without promulgating the "rough proportionality" test. The Court, however, did not choose this line of analysis. Most likely, the Court saw the need to carve an exception to the Loretto rule to ensure that municipalities would continue to have the authority to require developers to dedicate land for streets, sidewalks, and other needs created by the developer's new project.

\footnote{Dolan, 114 S. Ct. at 2316. Such a demand by the city would have authorized a physical invasion of Dolan's property and thus a taking in accordance with the holding in Loretto. See id. At a minimum, the dedication would amount to a taking under the holding of Kaiser Aetna, 444 U.S. at 179-80, which held that the right to exclude is such a fundamental element of property that a regulation depriving an owner of this right constitutes a taking. Id.; see Penn Cent. Transp. v. New York City, 438 U.S. 104, 124 (1978)}
the case, however, because Dolan had applied for a building permit and the city demanded that she dedicate a portion of her property as a condition for the permit’s approval. Under this scenario, the Court was willing to uphold the city’s dedication requirements and not declare such a taking if the city could prove that the dedication requirements actually were needed to alleviate the adverse effects of Dolan’s new store on the city. The Dolan holding merely specifies what proof the government must demonstrate to convert what would otherwise be a compensable taking into a legitimate use of its police power. It follows that if the court’s initial inquiry determines that the government’s actions would not

(noting that where the interference with property can be characterized as a physical invasion by the government a taking will more readily be found).

208. Dolan, 114 S. Ct. at 2319-20. In essence, the city had to show that its regulation substantially advanced a legitimate governmental purpose. See id. at 2316. To accomplish this, the regulation first had to satisfy Nollan’s “essential nexus” test; that is, the permit condition must have furthered the same governmental purpose that a complete denial of the permit would. See id. at 2317; Nollan v. California Coastal Comm’n, 483 U.S. 825, 836 (1987). Assuming Nollan’s “essential nexus” test is satisfied, then the government has the burden of demonstrating that the dedication requirements are in “rough proportion” to the impact of the proposed development. Dolan, 114 S. Ct. at 2319-20. Only after the regulation satisfies both these tests will it be deemed to “substantially advance” legitimate state interests, and be declared a valid exercise of the police power, not just a farce to circumvent the requirement of compensation. See id. at 2321-22.

209. Note conceptionally what has happened here. First, a court must examine whether the regulation would constitute a taking if it was not a condition attached to a building permit. See Dolan, 114 S. Ct. at 2316. Presumably, the Court would use the Penn Central factors to determine if the regulation would amount to a taking in this context. See supra notes 102-24 and accompanying text. In Dolan, this initial inquiry was fairly simple. The regulation authorized a physical invasion and deprived Dolan of the right to exclude others from her property, thus the Court declared that it would have amounted to a taking. See Dolan, 114 S. Ct. at 2316; supra notes 161, 205.

Assuming a court determines that the regulation would constitute a taking as an independent government action (i.e., not as a condition attached to a building permit), it then would review the regulation to determine whether it may nevertheless be upheld as a valid exercise of police power in the form of a condition attached to the approval of the owner’s building permit. See Dolan, 114 S. Ct. at 2316. At this point, the burden would shift to the government to show that, although the regulation would normally amount to a taking, in this particular case it substantially advances a legitimate state interest by alleviating the adverse effects created by the landowner’s new development and thus should be upheld. See id. at 2316-21; Nollan, 483 U.S. at 841 (noting that the test “for abridgement of property rights through the police power” is whether the government actions substantially advance legitimate state interests). Nollan’s “essential nexus” test and Dolan’s “rough proportionality” test are then used to determine if the government has met its burden. Dolan, 114 S. Ct. at 2317, 2319. Placing the burden on the government to justify its regulation makes sense, in this context, because, once the regulation is determined to constitute a taking, as an independent government action, it should not automatically be converted into a valid use of the police power merely because it is now a condition attached to the approval of the landowner’s building permit. Rather, the government should have to show that extenuating circumstances exist which convert what would otherwise be a taking into a valid use of the government’s police power.
amount to a taking, then the government does not need to meet *Dolan*’s arduous requirements.\(^{210}\) The *Dolan* holding is limited to those situations where the government’s action is first determined to constitute a taking. Only after the Court makes this determination does the burden shift to the government to demonstrate that the Court should not require it to compensate the landowner because its actions were necessary to offset some adverse affect that the landowner’s development created.\(^{211}\)

The majority’s two distinctions attempted to limit *Dolan* to a particular set of circumstances; namely, where the character of the government action is an adjudicative, as opposed to a legislative, determination and where such action authorized a physical invasion of land.\(^{212}\) Only time will tell, however, if the foundation of the Court’s distinctions will withstand the inevitable attempts by property owners to extend *Dolan* beyond its facts.\(^{213}\) For example, the Court’s legislative-adjudicative determination distinction is rather vague and is vulnerable to manipulation by inventive attorneys and courts alike.\(^{214}\) Moreover, the *Dolan* Court did not clarify whether it was confining its holding to situations

\(^{210}\) See *Dolan*, 114 S. Ct. at 2317.

\(^{211}\) See *id.* at 2317-19.

\(^{212}\) See *id.* at 2316-17.

\(^{213}\) See, e.g., *id.* at 2326 (Stevens, J., dissenting) (noting that the majority’s decision has extended a “welcome mat” to a new class of litigants).

\(^{214}\) See, e.g., *Peterman v. State Dept. of Natural Resources*, 521 N.W.2d 499 (Mich. 1994) (using the *Dolan* standards to force a state to compensate a landowner for damage to the landowner’s beachfront property caused by the state’s navigational improvements); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 (N.Y. 1994) (applying *Nollan* and *Dolan* to invalidate a state rent control statute), *cert. denied*, 115 S. Ct. 1961 (1995). But see *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994) (refusing to apply *Dolan*’s burden shifting and heightened scrutiny to a general zoning ordinance that limited land-use around an airport), *aff’d*, 1996 U.S. App. LEXIS 209 (10th Cir. 1996); Third & Catalina Assoc. v. City of Phoenix, 895 P.2d 115, 120 (Ariz. Ct. App. 1994) (upholding a city ordinance against a takings claim that required the owner to retrofit his building with fire sprinklers and distinguishing *Dolan* on the grounds that the city’s regulation did not force the owner to donate private property for public use as was the case in *Dolan*).

The *Peterman* case is one of the first to employ *Dolan*’s heightened scrutiny and burden shifting to regulations other than developmental exactions. *See Peterman*, 521 N.W.2d at 511-12. In *Peterman*, the State constructed a boat ramp near the landowner’s property. *Id.* at 502. The construction of the ramp and jetties led to the destruction of the landowner’s beach. *Id.* The Michigan Supreme Court held, *inter alia*, that there was no “essential nexus” between the building of the ramp and the destruction of the landowner’s beach. *Id.* at 512. In addition, the Court stated:

> the government must show particularized findings that “rough proportionality” exists between the legislative goal and the actual regulations. While “[n]o precise mathematical calculation is required, [the governmental entity] must make some sort of individualized determination that the [regulation] is related both in nature and extent to the impact of the” property’s use or proposed use.

*Id.* at 506 n.17 (quoting *Dolan*, 114 S. Ct. at 2319-20) (emphasis added) (brackets in original) (citations omitted).
where a regulation authorizes a physical invasion of an owner's property. Thus, Dolan's burden shifting and heightened scrutiny could, conceivably, be extended to those government actions that, while not being a physical invasion per se, have the similar effect of depriving the owner of a basic property right. If and when the Court's distinguishable barriers begin to fall, and Dolan is expanded beyond its facts, the consequences will be far reaching.

The court ordered the State to compensate the landowner because the "taking of the property served no public interest because the ramp could have been built without destroying plaintiffs' property." Id. at 512.

The Peterman case is a prime example of how the language in Dolan can be manipulated and applied to regulations other than developmental exactions. As noted by the italics in the above block quote, the Peterman court placed the burden on the government to demonstrate a "rough proportionality" between the State's purpose and the regulation. This statement over-generalizes the Dolan holding. Cf. Dolan, 114 S. Ct. at 2316. Dolan held that the government must demonstrate a "rough proportionality" between the conditions imposed on the landowner (i.e., the exactions) and the specific needs created by the landowner's new development. See id. The Peterman quote purports to place the burden on the government to justify all property regulations, not just regulations involving exactions. See Peterman, 521 N.W.2d at 506. Thus, under the Peterman interpretation of Dolan, a government may find itself with the burden of justifying its general zoning ordinances notwithstanding the fact that the Dolan Court meant otherwise. See Dolan, 114 S. Ct. at 2320 n.8 (stating that in evaluating zoning regulations, the burden normally rests on the individual challenging the ordinance).

In Dolan, the Court merely noted that the conditions imposed on Dolan involved a physical invasion of her property as opposed to a restriction on the use of her property. Dolan, 114 S. Ct. at 2316. The Court never stated that there had to be an actual physical invasion. Id. This leaves open the possibility that other conditions that are as onerous as a physical invasion would be sufficient to trigger Dolan's burden shifting and heightened scrutiny. See, e.g., United States v. Causby, 328 U.S. 256 (1946) (holding that overflights by government planes which destroyed the owner's use of the land as a chicken farm constituted a taking); see also Peterman, 521 N.W.2d at 511-12 (implementing Dolan's "rough proportionality" test outside the realm of developmental exactions).

One of the biggest reverberations Dolan may have is in the area of developmental exaction fees, or "impact fees." Impact fees are a type of monetary exaction that is usually attached as a condition for the government's approval of a landowner's building permit. See DANIEL R. MANDELMAN, LAND USE LAW § 9.11 (3d ed. 1993); see also supra note 20 (discussing the various types of exactions). Generally, the landowner is required to pay a specific amount of money to help expand or improve water and sewer services, roads, or other public facilities that the developer's project may use. Because many local governments find themselves financially pressed and in need of money to make such capital improvements, impact fees have become very popular and have increased in amount. Id. Whether Dolan applies to impact fees is an unresolved issue. A recent case, however, suggests that Dolan would apply to such fees. See Ehrlich v. City of Culver City, 15 Cal. App.4th 1737 (Cal. Ct. App. 1994), cert. granted, 114 S. Ct. 2731 (1994) (vacating judgment and remanding case for further consideration in light of Dolan). In Ehrlich, a developer sought a building permit from the city. Id. at 1743. The city approved the building permit subject to the condition that the developer pay an impact fee of $280,000 so the city could build public tennis courts. Id. The developer sued, arguing that the impact fee constituted a taking because the fee did not bear any relationship to the impact that his new development would have on the city. Id. at 1747. The state court found for the city, and on appeal,
B. The Justification

The Court should aggressively extend Dolan's "rough proportionality" test beyond its specific facts because the test is economically sound and is necessary to ensure that the government does not violate a fundamental principle underlying the Takings Clause. The Court has made clear that the primary 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." To understand how Dolan's "rough proportionality" test ensures the government will not violate this principal, the relative "bargaining positions" of the city and Dolan must be examined. Dolan is bargaining from the position of a consumer who needs to obtain a building permit so she may construct her new store. The city, on the other hand, bargains from the position of a monopolist because it holds the sole authority to issue building permits.

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the Supreme Court granted certiorari. Id. at 1750, 1760; Ehrlich, 114 S. Ct. at 2731. The Court then vacated the judgment of the lower court and remanded "for further consideration in light of Dolan." Id. The fact that the Court remanded "for further consideration in light of Dolan" is a strong indication that the Court intended that Dolan apply to impact fees.

217. Armstrong v. United States, 364 U.S. 40, 49 (1960). An example of the Armstrong principle in practice is United States v. Causby, 328 U.S. 256 (1946). In Causby, the plaintiffs operated a chicken farm located near a municipal airport that was leased to the federal government to conduct military airplane training exercises. Id. at 258-59. To land and takeoff at the airport the military planes (bombers, heavy transport, and fighter planes) flew over the plaintiff's chicken farm at very low altitudes. Id. The noise from the planes was so loud that many of the plaintiff's chickens were killed and the production of their farm fell. Id. at 259. As a result, the plaintiffs had to stop farming chickens and they brought suit claiming that the frequent and low level flights constituted a taking of their property. Id. The Court agreed with the plaintiff and held that the government overflights destroyed the owner's present use of the land and thus constituted a taking. Id. at 261-62.

Note that if the Court had reached a contrary decision in Causby it would have forced the plaintiffs to "bear [a] public burden[ ] which, in all fairness and justice, should be borne by the public as a whole." Cf. Armstrong, 364 U.S. at 49. This conclusion is based on the fact that military planes were the culprits of the overflights. Presumably, the military planes were training in an effort to further the national defense. The public as a whole benefits from the national defense and thus the national defense may be considered a "public burden" that should be supported by public funds. By declaring a taking and compelling the government to compensate the plaintiff, the Court was ensuring that the public as a whole bore the burden of the national defense (i.e., via federal taxes), not just one chicken farmer who happened to live next to the airport.

218. The term "bargaining positions" is used to denote the relative positions of Dolan and the city in the context of a buyer and seller relationship. Because Dolan must obtain a building permit before starting construction on her new store, she is a "buyer" or consumer of building permits. By contrast, because the city issues the permits, it is considered the "seller" of permits.
permits.\textsuperscript{219} In short, if Dolan wants to construct her new store, she must bargain with the city.

The city's monopoly in the issuance of building permits gives it an extremely strong bargaining position.\textsuperscript{220} It has the power to impose stringent conditions on the building permit, to exact an abnormally high "price" for the permit,\textsuperscript{221} or to demand whatever else it deems necessary.\textsuperscript{222} By contrast, Dolan has a very weak bargaining position; she can either accept the city's conditions, pay the higher "price," or altogether forego the expansion of her store.\textsuperscript{223} The uneven bargaining positions of the parties permits the city to exact from Dolan an amount greater than what is justified to cover the costs and needs the city incurs from Dolan's new store.\textsuperscript{224} By exacting an amount greater than that needed to cover its costs, the city is violating the basic tenet of the Takings Clause; that is, the city is forcing Dolan to bear a public burden which ought to be borne by the public at large.\textsuperscript{225}

\begin{footnotesize}
\begin{enumerate}
\item[219.] See Dolan, 114 S. Ct. at 2317 (noting that Dolan argued that she was forced to choose between the building permit or foregoing development).
\item[220.] See Dolan v. City of Tigard, 854 P.2d 437, 448-49 (Or. 1993) (Peterson, J., dissenting) (stating that the "power of the government gives it tremendous leverage against landowners who seek to improve their property"), rev'd, 114 S. Ct. 2309 (1994).
\item[221.] The term "price" here is used to denote a type of impact fee or other monetary condition that the city may demand in return for the building permit. An "abnormally" high price would be any price greater than what is needed to alleviate the adverse affects that the owner's new development is going to have on the government.
\item[222.] With dwindling tax bases and budget constraints, municipalities have an incentive to overreach, and use exactions as a way to raise revenue to provide general public services. See Dolan, 854 P.2d at 448 (Peterson, J., dissenting). Judge Peterson argued that in times of limited tax revenues there is a greater temptation for the government to shift the funding of public projects to private property owners regardless of whether an owner's use of property bears any relation to the proposed public project. See id. at 448. He described this as nothing more than "an attempt at licensed extortion". Id. One way to accomplish this is for the government to demand that the landowner pay impact fees greater than what is needed to offset the adverse affects created by the developer's particular project. Any amount over what is needed to alleviate the needs created by the owner's development could then be used to finance other public projects. See \textit{infra} note 225 for a numeric example of how the government can use impact fees and other exactions to finance public projects not related to pending development.
\item[223.] Note that if the city did not have a monopoly in the issuance of building permits and there were other "sellers" of building permits, Dolan would have much more leverage.
\item[224.] See, e.g., Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (noting that while certain dedication regulations are a valid exercise of the police power, there is a substantial possibility that a municipality could invalidly use such regulations to exact land or fees from a landowner that are extremely disproportionate to the needs created by the landowner, thereby relieving the municipality from imposing new taxes on the public to pay for additional services).
\item[225.] See Armstrong v. United States, 364 U.S. 40, 49 (1960). A numeric example will help to clarify this point. Assume that the projected impact of Dolan's new store on the city, in monetary terms, would be $30,000 (i.e., it would cost the city this amount to allevi-
Dolan's "rough proportionality" test places a check on the city's monopoly power and evens the respective bargaining positions. This test creates a "relatedness" requirement that ties the city's exaction directly to the projected impact of Dolan's new store. By requiring the city to make specific findings that the exactions are in "rough proportion" to the projected impact of the development, the Court has limited, in effect, the traffic and flooding problems caused by her new store. Further assume that the building permit would increase the value of Dolan's property by $200,000 and the city is well aware of this. Thus, the minimum price the city would be willing to "sell" the permit for would be $30,000 and the maximum price that Dolan would pay to "buy" the permit would be $200,000. Thus, there is a bargaining range of $170,000 (i.e., from $30,000 to $200,000). In a normal non-monopoly situation, there would be other buyers and sellers in the market to limit this bargaining range and to equalize the relative bargaining positions of Dolan and the city. This, however, is not the case. As noted, because the city is the only "seller" of permits, its bargaining position is extremely strong. By contrast, Dolan's bargaining position is very weak. The city's superior bargaining position grants it the power to extract a price for the building permit that is substantially greater than the $30,000 it would cost to alleviate the traffic and flooding problems Dolan's new store creates. Thus, the city could demand that Dolan pay $150,000 for the permit. Because Dolan has no other alternatives, she can either pay the $150,000 or forego constructing a new store. Presumably, she would pay the $150,000 because even after paying such an extraordinary amount she still increases her wealth by $50,000 (property value increase of $200,000 minus $150,000 cost for permit = $50,000). After receiving the $150,000 for the building permit, the city can use $30,000 to remedy the traffic and flooding problems created by Dolan's new store and use the other $120,000 for other public projects (e.g., to build a new school, upgrade water and sewer facilities, etc.). This conclusion leads to Dolan being forced to bear a public burden (the extraction of the $120,000 used for other public projects) that ought to be borne by the public as a whole via tax revenues. See Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 801-02 (1961) (holding invalid a regulation requiring the landowner to dedicate a portion of his property for a public school in exchange for the approval of his development plans because, the court found, the need for educational facilities was not "specifically and uniquely attributable" to the landowner's proposed development). The Pioneer Trust court concluded that the landowner alone should not bear the financial burden of alleviating the community's overcrowded schools because such a problem was a result of the whole community being developed and not just this specific landowner's development. Id.

226. Neither Dolan nor the cases preceding it requires that the city be exact in the amount it charges for the permit. See Dolan, 114 S. Ct. 2319-20 (stating that "[n]o precise mathematical calculation is required"); United States v. Sperry Corp., 493 U.S. 52, 60 (1989) (noting that the Takings Clause does not require that a government user fee be "precisely calibrated" to the burden imposed on the government); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 487 n.16 (1987) (noting "[t]hat a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it"). Thus, had the city, in the example outlined in note 225 supra, demanded that Dolan only pay $50,000 for the permit instead of the $150,000 (i.e., only $20,000 over the city's cost instead of $120,000), then, most likely, the Armstrong principle would not be violated. On the other hand, if the amount bears no relationship to the burdens placed on the city, then such becomes nothing more than "an out-and-out plan of extortion." See Dolan, 114 S. Ct. at 2317 (quoting J.E.D. Assoc., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).
amount the city can “charge” for its building permit.\textsuperscript{227} Thus, \textit{Dolan}’s “rough proportionality” test prevents the city from overreaching and forcing Dolan to bear a public burden.\textsuperscript{228}

\section*{IV. Conclusion}

The \textit{Dolan} decision marks a distinct change in the Supreme Court’s view of property rights. The majority’s statement equating property rights under the Takings Clause with those found in the First and Fourth Amendments signals the Court’s intention to scrutinize property regulations closely for constitutional violations. There are important limitations, however, to \textit{Dolan}’s proffered heightened scrutiny and burden shifting. \textit{Dolan} does not subject all regulations affecting property to its arduous requirements. The character of the government action and its impact on the property owner will determine, in part, whether \textit{Dolan}’s requirements apply.

In addition, the \textit{Dolan} decision invites courts to assume a more active role in reviewing property regulations. \textit{Dolan} is not a green-light for activist courts to sit as super-legislatures and determine the merits of specific property regulations. It is, however, a summons for courts to take a closer look at property regulations to ensure that they are not a subter-

\textsuperscript{227} The previous example, outlined in note 225, \textit{supra}, may be used to understand the impacts of \textit{Dolan}’s “rough proportionality” test. In that example it was concluded that although it would cost the city only $30,000 to remedy the traffic and flooding problems Dolan’s new store caused, the city had the power to extract from Dolan $150,000 for the building permit. With \textit{Dolan}’s “rough proportionality” test, however, the city’s bargaining power is significantly curtailed because it now has to justify its “price” and demonstrate that the amount it extracts from Dolan is in “rough proportion” to the impact her new store will have on the city. While the city’s justification does not have to be exact, see \textit{Dolan}, 114 S. Ct. at 2319-20 (stating that no “precise mathematical calculation is required”), it must be in rough proportion to the true burden Dolan’s new store created. See \textit{id.} Instead of being able to extract $150,000 from Dolan for the building permit, the city may now only demand the she pay $40,000 to $50,000, depending on how inventive the city is in “buffing-up” the impact of Dolan’s new store. \textit{Dolan}’s “rough proportionality” test cures the violation of the \textit{Armstrong} principle presented in the example outlined in note 225, \textit{supra}. The city no longer can force Dolan to bear a public burden by paying the extra $120,000 to build a new school; the amount she pays must be narrowly tailored to the need she created.

\textsuperscript{228} The use of a judicially created doctrine to curtail a monopoly power is not new to the law. In contract law, for example, monopoly power by one of the contracting parties is thought to undermine the requirement that a contractual promise be voluntary for it to be enforceable. \textit{See} \textit{Robert Cooter \\& Thomas Ulen, Law and Economics} 235-36 (1988). In fact, a court may set aside a contract as “unconscionable” if the court finds extreme bargaining disparity between the parties and such disparity resulted in the terms of the contract severely in favor of the stronger of the two parties. \textit{See, e.g.,} Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969).
fuge to circumvent a landowner's right to compensation under the Takings Clause.

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