An Originalist's Evaluation of Modern Takings Jurisprudence

> All across the country it is conspicuous that many liberals who construe the constitutional "privacy" value expansively to enlarge abortion rights construe it narrowly when property rights are at risk.[1]

The nationwide property rights revolt has begun.[2] As with other movements, it appears to have spawned from—and indeed has its most fervid sentiments in—the various local level rebellions.[3] Recently, the movement has taken on a much larger significance: the United States Congress has proposed legislation that would minimize the federal government's interference with private property rights.[4]

These sentiments may be attributable, in part, to the capricious nature of property rights generated by the Supreme Court's

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[1] George F. Will, *Extortionist City Government*, WASH. POST, Mar. 20, 1994, at C7.

[2] Richard Miniter, *You Just Can't Take It Anymore: America's Property Rights Revolt*, POL'Y REV., Fall 1994, at 40.

[3] *Id.* Specifically, Mr. Miniter wrote:

> Meet the grass-roots rebels of the 1990s: The private property rights movement. Like the early tax rebels, these activists were often strangers to politics until the government disrupted their lives. Their cause promises to have similarly dramatic results.
>
> Indeed, the property rights revolt already is changing the political calculus in Washington. There are more than 500 active property rights groups across the country, with a total of some 2 million members. They have helped thwart the environmental agenda in Congress and several federal agencies, successfully pushed legislation in a [sic] more than a dozen state legislatures, helped elect at least a score of state and federal lawmakers, and won key cases in the courts, including two landmark U.S. Supreme Court cases. Like supply-side economics, the movement has touched off a paradigm shift in the way many view property rights. All of these accomplishments from a movement that didn't exist five years ago.

Id.

[4] *See, e.g.*, Private Property Rights Act of 1994, S. 2006, 103d Cong., 2d Sess. §§ 1-8 (1994). The purpose of the Act is "to minimize takings of private property by the Federal Government." *Id.* at § 3. It requires that:

> [A]ll agencies of the Federal Government shall submit a certification to the Attorney General of the United States that a private property taking impact analysis has been completed before issuing or promulgating any policy, regulation, proposal, recommendation (including any recommendation or report on proposal for legislation), or related agency action which could result in a taking or diminution of use or value of private property.

Id. at § 5(a)(2); *see also* Private Property Rights Act of 1995, S. 22, 104th Cong., 1st Sess. (1995).

traditionally convoluted takings jurisprudence.[5] The past decade, however, has witnessed a distinct trend in the Court's decisions that has benefitted property owners.[6] Those favoring the trend are pleased because, in their view, it is consonant with the express principles of the Constitution's framers.[7]

To evaluate this contention, a brief look at the constitutional philosophy known as "originalism" is in order. Judge Robert H. Bork, one of the most famous and eloquent spokesmen for original understanding in our time, provided a trenchant exposition of it in his treatise, *The Tempting of America.*[8] According to Bork, originalism refers to adjudication that adheres to the principle, or major

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[5] *See, e.g.*, Peter P. Cvek, *Private Property and the Power of Eminent Domain, in* THE BILL OF RIGHTS: BICENTENNIAL REFLECTIONS 131, 131-32 (Yeager Hudson & Creighton Peden eds., 1993) (stating that contradictory takings case law continues to engender intense controversy). Mr. Cvek provides a famous example of the "takings muddle" by comparing Penn Central Transp. Co. v. New York, 438 U.S. 104, 138 (1978), and Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982):

> In *Penn Central*, the Court upheld a municipal landmark preservation law which prohibited the construction of a high-rise office building over property in New York City. While in *Loretto*, the Court struck down a state law requiring landlords to allow the installation of cable television lines on their rental property. For many legal scholars, something certainly has gone wrong when the Court could rule in the first instance, where a property owner stood to lose millions of dollars, that no compensation was required, but then require compensation in the second instance for what was admittedly a "minor" physical occupation. Despite the best efforts of the Supreme Court and cadres of legal scholars to explain the reasoning behind these divergent decisions, takings jurisprudence continues to be a source of intense controversy.

Id.

[6] *See* William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1774 (1988) (discussing cases largely considered favorable to property holders). *But see* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles (Part I)*, 77 CAL. L. REV. 1299, 1303-04 (1989) (opining that despite common perceptions, the Court's current takings jurisprudence is still in disarray). For a discussion of the most significant of these cases, see *infra* notes 141-97 and accompanying text.

[7] *See* Will, *supra* note 1, at C7 (stating that "property rights are a privacy right the Constitution explicitly protects, because the Framers understood that liberty is no stronger than the protections accorded property").

[8] *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). Judge Robert Bork was a professor of law at Yale, U.S. Solicitor General and Acting Attorney General in the Nixon Administration, and a federal appellate court judge for the District of Columbia. Jodi Cleesattle, *The Man Who Would Be Justice*, THE NAT'L JURIST, Jan. 1993, at 9, 12, 13. In 1987, President Reagan nominated Judge Bork to the United States Supreme Court. *See id.* at 8. Because of his prolific writings on the subject of originalism, various special-interest groups, such as the National Abortion Rights Action League and the National Organization for Women, mobilized campaigns against his nomination. *Id.* at 9. After a controversial and heated confirmation battle, the Senate rejected the nomination of Judge Bork to the Supreme Court. *Id.* at 8. Currently, Judge Bork is a legal scholar at

premise, intended by the men who ratified the Constitution.[9] Originalist judicial understanding requires formulation of that premise,[10] after which the presiding judge must determine whether it is threatened or undermined by the challenged state action.[11] This determination provides the minor premise of the judicial syllogism, from which the conclusion follows.[12]

This Comment examines the Court's most recent and complete pronouncement of its takings doctrine in *Dolan v. City of Tigard*.[13] Part I of this Comment examines the text of the Takings Clause.[14] The history of governmental takings prior to the advent of just compensation requirements is explored in Part II.[15] Part III probes the change in the ideological climate of the American colonies, and the concomitant rise of just compensation clauses in various pieces of legislation.[16] The Takings Clause of the Fifth Amendment, as understood by its author, James Madison, and early theorists and cases, is discussed in Part IV.[17] Part V analyzes the modern takings cases, culminating with a comprehensive discussion of *Dolan*.[18] Finally, this Comment concludes that the Court's current construction of the Takings Clause is a laudable effort to remain loyal to its original purpose.[19]

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the American Enterprise Institute in Washington, D.C., a guest lecturer, and legal counsel for special cases. *Id.* at 9.

9 BORK, *supra* note 8, at 143, 162.

10 *Id.* at 162. According to Judge Bork, formulation of the premise is accomplished by referring to the abundant historical sources on the topic. *Id.* at 165. These include, but are not limited to, the constitutional text, the ratification debates, the *Federalist Papers*, and early constructions of the Constitution by courts and scholars familiar with the authoritative thought of the time. *Id.*

11 *Id.* at 163.

12 *Id.* In applying this method, Judge Bork admonishes fellow jurists, stating that:

> We must not expect too much of the search for original understanding in any legal context. The result of the search is never perfection; it is simply the best we can do; and the best we can do must be regarded as good enough—or we must abandon the enterprise of law and, most especially, that of judicial review.

Id.

13 114 S. Ct. 2309, 2319, 2321 (1994) (holding that the City of Tigard failed to meet the evidentiary burden necessary to establish "rough proportionality"). For a discussion of the rough proportionality test, see *infra* notes 177-87 and accompanying text.

14 *See infra* notes 20-24 and accompanying text.

15 *See infra* notes 25-62 and accompanying text.

16 *See infra* notes 63-84 and accompanying text.

17 *See infra* notes 85-119 and accompanying text.

18 *See infra* notes 120-97 and accompanying text.

19 *See infra* notes 198-207 and accompanying text.

I. THE ORIGINAL TEXT OF THE TAKINGS CLAUSE

The starting point of original understanding entails an examination of the controlling textual provision.[20] The Fifth Amendment's Takings Clause declares, "nor shall private property be taken for public use, without just compensation."[21] The clause presumes the power of eminent domain while simultaneously placing restrictions on the exercise of that power: the government may seize an individual's property, but only for a public purpose, and it must provide just compensation.[22] As with other constitutional provisions phrased in general language,[23] however, the Takings Clause raises more questions than it answers.[24]

II. TAKINGS PRIOR TO THE JUST COMPENSATION REQUIREMENT

To fully appreciate the original purpose of the Takings Clause, it may be helpful to examine the historical background against which it stands.[25] As mentioned previously,[26] history aids in the formulation or discovery of the major premise laid down by the Constitution's framers.[27] It is, therefore, necessary to discuss the body of law that had a profound impact on the American framers, the English common law.[28]

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[20] BORK, *supra* note 8, at 162.

[21] U.S. CONST. amend. V. The Fifth Amendment provides in full:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

[22] *See, e.g.*, Cvek, *supra* note 5, at 131.

[23] *See* U.S. CONST. amend. V. (providing that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law").

[24] *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 6 (1977) ("Like many other fundamental provisions . . . the compensation clause is couched in language of such abstraction as to strike terror in the hearts of literalists who imagine that the constitutional text will somehow reveal its secrets without the further intervention of human minds. . . .").

[25] *See* BORK, *supra* note 8, at 165 (listing numerous historical sources for constitutional understanding, including Constitutional Convention records, contemporary newspaper articles, the *Federalist Papers*, and various treatises).

[26] *See* discussion *supra* note 10.

[27] *See* BORK, *supra* note 8, at 165 (discussing historical sources of constitutional interpretation).

[28] *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS

A. *The English Common Law*

American property law in general, and the Just Compensation Clause specifically, are deeply rooted in the English common law tradition.[29] Although Americans were still in the aftermath of throwing off the yoke of British imperialism, the consensus among delegates to the Constitutional Convention of 1787 was to employ the British Constitution as a guide to drafting the new American plan of government.[30] In his prodigious treatise on the Constitution, Justice Joseph Story, a man thoroughly abreast of the intellectual climate pervading the Convention,[31] declared that the Takings Clause memorializes the common law's traditionally protective

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OF THE CONSTITUTION 6 (1985) (discussing the influence of English political institutions and common law on the American colonies).

29 *See* Gordon S. Wood, *Preface* to LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION ix, xii (Ellen Frankel Paul & Howard Dickman eds., 1989); *see also* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure, in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, *supra*, 141, 150 (stating that the idea of the Takings Clause was "deeply embedded in both the common law and natural law traditions").

In his essay on the historical significance of the Takings Clause, Professor Scheiber noted that the Framers

> were eighteenth-century political men; and educated persons of that era were keenly aware of property ownership and its claims, the interplay of property and political consent and allegiance, the place of property in political theory from Locke's writings to their own time. They were also well versed in the maxims of the common law, a law profoundly protective of quiet possession and concerned with the proper legal boundaries of governmental and private action against property owners' claims. They knew and despised the depredations of the Stuart kings in their disregard of parliamentary prerogatives in regard to life, liberty, and property of the political opposition. All these were core elements of political consciousness and the lexicon of political values well known to them. This is important to remember as we try to reconstruct the milieu and the intellectual context of the takings clause in the Bill of Rights.

Harry N. Scheiber, *The "Takings" Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development, in* THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING 233, 234 (Eugene W. Hickok, Jr. ed., 1991) (footnotes omitted).

30 *See* MCDONALD, *supra* note 28, at 6 (stating that only a small minority of delegates questioned the usefulness of the British Constitution as a model for the new American government).

For an interesting discussion of the British Constitution's relation to Natural Law and the American Constitution, see Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1038 (1994) (noting that in 1775, Blackstone's *Commentaries on the Laws of England* was as widely read in America as it was in Great Britain, notwithstanding the difference in population).

31 BORK, *supra* note 8, at 165.

view of private property.[32]

The right of property at common law was not a solitary concept.[33] Instead, property was an elaborate bundle of customs, rights, expectations, and obligations regarding the relationships among individuals, society, and the state.[34] It was one of the traditional "rights of Englishmen" that the English, and later the Americans, held sacred.[35] While precise definition of this right has remained elusive, that proffered by William Blackstone has been the most influential.[36] This definition,[37] along with those found in eighteenth-century legal dictionaries, precludes the existence of a property right when there is infringement upon another's property.[38] The harm-benefit distinction embodied in Lord Blackstone's definition was a fundamental principle of the common law.[39]

A logical corollary to the harm-benefit distinction, which implies that property may be regulated to abate harm, is the proscription against compelling benefits from an individual property owner for the enjoyment of many.[40] English law forbade arbitrary

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32 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (Fred B. Rothman & Co. 1991) (1833). Specifically, Justice Story described the Takings Clause as "an affirmance of a great doctrine established by the common law for the protection of private property." *Id.* (footnote omitted).

33 MCDONALD, *supra* note 28, at 13; *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 22-23 (1985) (stating that for centuries, the term "private property" has had a web of meanings surrounding its use).

34 JESSE DUKEMINIER AND JAMES E. KRIER, PROPERTY 86 (3d ed. 1993).

35 *Id.* The "rights of Englishmen" included, in addition to property, the right of liberty. MCDONALD, *supra* note 28, at 13.

36 *See* Douglas W. Kmiec, *The Original Understanding Of The Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1635 (1988); *see also* EPSTEIN, *supra* note 33, at 22-23 (explaining that Blackstone's definition is sufficiently comprehensive and flexible to withstand the reservations of modern professors).

37 *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *1-2. Blackstone wrote:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Id.

This right, Lord Blackstone added, "consists in the free use, enjoyment, and disposal of all . . . acquisitions, without any control or diminution, save only by the laws of the land." 1 WILLIAM BLACKSTONE, COMMENTARIES *138.

38 *See* Kmiec, *supra* note 36, at 1635.

39 *See id.* (tracing the historical development and effect of the harm-benefit distinction).

40 *Id.* at 1636-37 (quotation omitted). For example, it is impermissible to compel a property owner to relinquish his land to provide a parking lot for the public's convenience; but such an order is constitutional where the need for a parking lot results primarily from activity on his own land. *Id.* at 1636 (quotation omitted).

seizures of property by the Crown, requiring that all takings be authorized by public law.[41] Indeed, not until the latter-half of the eighteenth century could the power of eminent domain be exercised without specific authorization from Parliament.[42] Even then, it could not be used as a vehicle for the redistribution of wealth.[43] A legitimate public purpose for the taking had to exist; thus, property could not simply be taken from A and given to B, even if accompanied by just compensation.[44] Moreover, even when eminent domain was validly exercised, the individual property owner could not be divested of title: he enjoyed the full incidents of ownership, subject only to an easement held by the government.[45]

B. Early American Experience

Despite the dictates of the English common law, early American legislatures exhibited little restraint in their abridgement of private property rights.[46] It is necessary to examine these early practices because, clearly, they occupied the minds of those who ratified the Fifth Amendment—particularly the Takings Clause.[47]

In pre-Revolutionary America, the colonies, especially those in New England, usually appropriated individual property for the construction of town roads.[48] Acting pursuant to legislative delegation or royal decree, these governments contrived sophistic reasons for denying an award of just compensation.[49] For example, because a road was only a public right of way across property, legisla-

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41 MCDONALD, *supra* note 28, at 12, 22. In addition to being embedded in English common law, this principle was codified in the Magna Carta and confirmed by Parliament in the 14th and 18th centuries. *Id.* at 12.

42 *Id.* at 22. Under the Highway Act of 13 George III, c.78, "property could be taken by the action of two justices, provided that reasonable compensation (with appeal to jury trial in the event of disagreement) be paid the owner." *Id.* (citation omitted).

43 *See id.* (discussing the public purpose requirement for land seizures).

44 *Id.*

45 *Id.*

46 *See id.* (noting that unlike the British government, "American legislatures had been less squeamish about invading private property rights"); *see also* William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695 (1985) (observing that "[e]ighteenth-century colonial legislatures regularly took private property without compensating the owner").

47 *See* Scheiber, *supra* note 29, at 237 (remarking that in reference to the precarious status of eighteenth-century property rights, "one cannot doubt that this sort of activity by government was in the mind of those who voted on the Fifth Amendment language when, with its takings clause, it went before Congress and then to the states").

48 MCDONALD, *supra* note 28, at 22.

49 *See id.* at 22-23 (stating that "the legal position was that nothing had been taken from the owners and thus no compensation need be forthcoming").

tures did not consider use of the property to be a taking and thus did not require compensation: simply allowing landowners to retain a portion of their land constituted sufficient compensation in and of itself![50] Although legislatures were less reluctant to provide compensation for the taking of enclosed or improved land, Massachusetts remained the only colony to compensate citizens for public roads traversing unimproved tracts.[51]

With the advent of the American Revolution, the colonies achieved independence from the English Crown; American property owners, however, failed to win independence from government takings.[52] The uncompensated takings of undeveloped lands for roads continued, along with the impressment of civilian goods for military use and the seizure of property belonging to Tory Loyalists, those Americans remaining loyal to the English Crown.[53] State governments paid compensation only as required by specific statutes or judicial decisions, rather than as a matter of state consti-

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50 *Id.*

51 Treanor, *supra* note 46, at 695. The government generally avoided paying compensation to the owners of unimproved tracts because the practice fostered economic growth by reducing the cost of road construction and encouraging the productive use of resources. *Id.* at 696-97. Moreover, because all private property ownership was believed to originate with the sovereign or legislative grant, and a condition of the grant was settlement of the property, government officials justified the seizures by maintaining that the condition was never satisfied. *Id.* at 697.

52 *Id.* at 698. In discussing the ambient political climate of the Constitutional Convention of 1787, James Madison observed that the ideological underpinnings of the American Revolution conduced to a blatant disregard of property rights:

> The necessity of thus guarding the rights of property was for obvious reasons unattended to in the commencement of the Revolution. In all the Governments which were considered as beacons to republican patriots [and] lawgivers, the rights of persons were subjected to those of property. The poor were sacrificed to the rich. In the existing state of American population, [and] American property the two classes of rights were so little discriminated that a provision for the rights of persons was supposed to include of itself those of property, and it was natural to infer from the tendency of republican laws, that these different interests would be more and more identified. Experience and investigation have however produced more correct ideas on this subject.

11 JAMES MADISON, *Observations on the "Draught of a Constitution for Virginia,"* (1788), *in* THE PAPERS OF JAMES MADISON 287 (Robert A. Rutland and Charles F. Hobson eds., 1977).

53 Treanor, *supra* note 46, at 698; *see also* McConnell, *supra* note 29, at 150 (explaining that the seizure of Tory Loyalists' property was exempted from the general requirement of just compensation). In addition to land seizures by government, takings of property by the poor during violent disturbances were a common occurrence in the 18th century. Michael Parenti, *A Constitution for the Few, in* 1 TAKING SIDES, CLASHING VIEWS ON CONTROVERSIAL ISSUES IN AMERICAN HISTORY, THE COLONIAL PERIOD TO RECONSTRUCTION 162, 171 (Larry Madaras & James M. SoRelle eds., 1993).

tutional right.[54] Such takings continued because none of the early state constitutions contained provisions for just compensation.[55]

This scant respect for private property rights was consistent with the basic doctrines of republicanism, the prevailing ideology of colonial America.[56] In traditional republican thought, emphasis is placed on furthering the common good, and the state acts as the primary instrument used to direct individual citizens toward that end.[57] The needs of society, according to republican philosophy,

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54 McConnell, *supra* note 29, at 150.

55 Treanor, *supra* note 46, at 698.

56 *Id.* at 699.

57 *Id.* The ideological counterpart to republican philosophy is liberalism. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 170 (1990) (commenting on the debate surrounding the origin of American constitutional tradition, and whether that origin is republican or liberal). Lance Banning distinguished these two prominent philosophies as follows:

> *Liberalism* is a label most would use for a political philosophy that regards man as possessed of inherent individual rights and the state as existing to protect those rights, deriving its authority from consent. *Classical republicanism* is a term that scholars have employed to identify a mode of thinking about citizenship and the polity that may be traced from Aristotle through Machiavelli and Harrington to eighteenth-century Britain and her colonies. . . . A full blown, modern liberalism, as [Joyce] Appleby and [Isaac] Kramnick appear to use the term, posits a society of equal individuals who are motivated principally if not exclusively by their passion or self-interest; it identified a proper government as one existing to protect these individuals' inherent rights and private pursuits. A fully classical republicanism, as [J. G. A.] Pocock may best explain, reasons from the diverse capacities and characteristics of different social groups, whose members are political by nature. No republicanism will still be "classical" if it is not concerned with the individual's participation with others in civic decisions, where the needs and powers of others must be taken into account. Liberalism, thus defined, is comfortable with economic man, with the individual who is intent on maximizing private satisfactions and who needs to do no more in order to serve the public good. Classical republicanism regards this merely economic man as less than fully human.

Id. at 171 (quoting Lance Banning, *Jeffersonian Ideology*, WM. & MARY Q., Jan. 1986, at 11-12).

Professor Radin's distinction between republicanism and liberalism is simple, yet instructive: "If we see the government as 'them' we adopt a 'liberal' theory of politics, and if we see the government as 'us' we adopt a 'republican' theory of politics." Margaret J. Radin, *The Liberal Conception Of Property: Cross Currents In The Jurisprudence Of Takings*, 88 COLUM. L. REV. 1667, 1693 (1988).

A key component of republican thought was faith in legislatures. Treanor, *supra* note 46, at 700-01. Because legislatures were the voice of the polity and could be trusted to define and promote the common good, the authors of early state constitutions placed enormous discretion in the legislative branch and did not include just compensation clauses. *Id.*

must always transcend the rights of individuals.[58] Indeed, classical republicanism is a clear example of statecraft as soulcraft.[59]

Property's societal role occupied a place of special concern in republican ideology: it required a delicate balance of competing interests.[60] While citizens required some amount of property, for such uses as a workshop or farm in order to pursue the common good, republicanism also recognized that the desire to accumulate property could corrupt citizens and have them place their own interests above those of the state.[61] Therefore, in republican thought, the state acts as a guardian with the power to infringe on individual property rights to foster common or societal interests.[62]

III. THE RISE OF THE JUST COMPENSATION REQUIREMENT

The late eighteenth century witnessed the displacement of republican notions of government with liberalism.[63] In the post-Revolutionary political landscape, liberalism ascended as the preponderant philosophy in American political and economic discourse.[64] Although not categorically rejecting republicanism, the Founding Fathers desired to radically reshape it by supplementing it with the fundamental tenets of liberalism.[65]

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58 *See* Treanor, *supra* note 46, at 699 (noting that "[i]ndividual rights played no more than a secondary role in republican thought").

59 *See id.* (stating that republicanism regards "[t]he state's proper role [as consisting] in large part of fostering virtue, of making the individual unselfishly devote himself to the common good").

60 *Id.*

61 *Id.*

62 *See id.* at 699-700 (explaining that "a major strand of republican thought held that the state could abridge the property right in order to promote common interests"). Arguably, Jefferson's decision to list "life, liberty and the pursuit of happiness" as inalienable rights in the Declaration of Independence, instead of "life, liberty, and property," was prompted by republican motives. *Id.* at 700.

63 *Id.* at 703-04. The debate between republicanism and liberalism reached its climax during the French Revolution, when republicans embraced Edmund Burke's violently reproachful *Reflections on the Revolution in France*, and liberals, like Jefferson, espoused the ideals of Thomas Paine's *The Rights of Man*, a libertarian response to Burke. RICHARD HOFSTADTER ET AL., THE UNITED STATES: THE HISTORY OF A REPUBLIC 149 (1957).

64 Cathy Matson, *American Political Economy in the Constitutional Decade*, *in* THE UNITED STATES CONSTITUTION: THE FIRST 200 YEARS 16, 17 (R.C. Simmons ed., 1989).

65 *Id.* Specifically, the Founders "faced the need to retain republican order and elite, propertied rule, while also freeing Americans to pursue property according to natural rights and common law, in a manner which suited the materialism and mobility of expanding Americans." *Id.*; *see also* Jean Yarbrough, *Jefferson and Property Rights*, *in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, *supra* note 29, at 65 (asserting that "although Jefferson's view of property was essentially liberal, his liberalism was qualified by his understanding of the requirements of republican government and his view of human nature").

This new reigning philosophy had several distinguishing characteristics: first, the faith in legislatures that typified republican ideology eroded.[66] With legislatures no longer partners in resistance to imperialist Britain, individuals began to view lawmaking bodies as antagonists seeking to grow vigorously and luxuriantly at the expense of individual freedoms.[67] Citizens began to question the ability of local government to discern the common good, and they focused on the exaltation of self-interest and furtherance of the common good by private moral commitment rather than by coercive state edicts.[68]

Liberalism also championed a novel concern for individual rights.[69] A planted axiom of liberalism is that man possesses certain rights that are natural and inalienable.[70] Thus, the primary purpose of government, according to liberal ideology, is to secure those rights from infringement rather than to promote the common interests of the polity at any cost.[71] Indeed, liberal theory posits that government derives its legitimacy only through the consent of those governed.[72] Of special concern to the neo-liberals was the right of property.[73] This concern arose primarily because liberals felt that early state constitutions did not adequately secure property rights.[74]

Liberal notions of property were first embodied in three important governing documents of the Confederation period: the Vermont Constitution of 1777, the Massachusetts Constitution of 1780, and the Northwest Ordinance of 1787.[75] While each one of these documents required the payment of just compensation for governmental takings, the particular circumstances leading to their

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66 Treanor, *supra* note 46, at 704.

67 *See id.* at 704-05 & nn.55-56 (stating that the redistributive effect of legislative takings exposed hidden social divisions and undermined the perceived ideal of a discernible common good). In addition to James Madison, members of the looming nonrepublican movement included such luminaries as John Adams, Benjamin Lincoln, and Theophilus Parsons. *Id.* at 705.

68 *See* Matson, *supra* note 64, at 17; *see also* Treanor, *supra* note 46, at 705.

69 *See* NEDELSKY, *supra* note 57, at 171 (quotation omitted).

70 *Id.* (discussing "inherent individual rights").

71 *Id.*; *see also* Radin, *supra* note 57, at 1668 (stating that the jurisprudential model created by Richard Epstein incorporates a "classical liberal conception of private property").

72 NEDELSKY, *supra* note 57, at 171 (quotation omitted).

73 Treanor, *supra* note 46, at 705.

74 *Id.*

75 *Id.* at 701-02. Another possible antecedent to both the Just Compensation Clause and the Contracts Clause of the United States Constitution was the Treaty of Paris that ended the Revolutionary War with Great Britain. McConnell, *supra* note 29, at 148.

passage were different.[76] The Vermont constitution was the first to mandate compensation for governmental takings of private property.[77] The impetus for the clause was the New York Legislature's refusal to recognize the land claims of New Hampshire men who settled the territory.[78] With this in mind during their constitutional convention, citizens of Vermont sought to prevent similar injustices by requiring that property owners be compensated for governmental takings when their property was appropriated for the benefit of the public.[79]

The trepidation toward legislative action, along with greater recognition of individual liberties, also prompted the inclusion of just compensation clauses in the Massachusetts Constitution of 1780 and the Northwest Ordinance of 1787.[80] The Massachusetts clause was singularly liberal and was generally believed to be a boon to the propertied class.[81] The legislative act widely regarded as the most important of the Confederation period, however, was the Northwest Ordinance.[82] During the settlement of the Northwest Territories, members of Congress worried that the creation of territorial legislatures would jeopardize existing land grants.[83] The just compensation clause allayed these fears and Congress adopted the Northwest Ordinance on July 13, 1787, approximately six weeks

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76 *See* Treanor, *supra* note 46, at 701-08 (discussing the adoption of the just compensation requirement).

77 *Id.* at 702. Although statehood was proclaimed by Vermonters in 1777, it was not formally admitted into the Union until 1791. *Id.* at 702 n.38 (citation omitted).

78 *Id.* at 702. The New York Legislature was in control of the area by virtue of monarchical decree. *Id.*

79 *Id.* The takings clause of the Vermont Constitution stated, specifically, that "whenever any [person's] property is taken for the use of the public, the owner ought to receive an equivalent in money." VT. CONST. OF 1777, ch. 1, art. II (1793).

80 Treanor, *supra* note 46, at 706.

81 *Id.* In addition to its just compensation clause, the Massachusetts Constitution, in its Bill of Rights, contained the following Lockean dicta in Article I:

> All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their Lives and Liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

MASS. CONST. pt. 1, art. I; *see also* Edward J. Erler, *The Great Fence to Liberty: The Right to Property in the American Founding, in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, *supra* note 29, at 43, 51.

82 CLARENCE B. CARSON, A BASIC HISTORY OF THE UNITED STATES—BOOK II: THE BEGINNING OF THE REPUBLIC 1775-1825 68 (1984). Along with its just compensation clause, the Northwest Ordinance also provided for freedom of religion, habeas corpus, jury trials, and the sanctity of private contracts. *Id.* at 69.

83 Treanor, *supra* note 46, at 707.

after the commencement of the Constitutional Convention.[84]

IV. THE FIFTH AMENDMENT

A. *Madison and the Convention*

Against this backdrop of legislative attempts to curtail state abrogation of private property rights emerged the most important statement of the new republic's commitment to securing those rights: the Takings Clause of the Fifth Amendment.[85] The clause, like many other provisions in the Bill of Rights, was authored by James Madison, a classical eighteenth-century liberal.[86] Although he did not share John Locke's thesis that property was a natural and inalienable right, Madison nonetheless regarded it as one of the paramount institutions to be sanctioned by positive law.[87]

As a practitioner of the politics of prudence, Madison's transcendent goal in fashioning a new plan of government was finding the appropriate balance that would make republican government work.[88] He believed that the chief purposes of government were the protection of persons and the protection of property.[89]

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84 McConnell, *supra* note 29, at 147. The Ordinance's adoption took place under the Articles of Confederation. *See* SOURCES OF OUR LIBERTIES 389 (Richard L. Perry & John C. Cooper eds., 1978) (noting that the Northwest Ordinance was adopted before the states ratified the Constitution). The just compensation clause of the Northwest Ordinance stated:

> [N]o man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.

Northwest Ordinance of 1787, art. II, *reprinted in* SOURCES OF OUR LIBERTIES, *supra*, at 395.

85 *See* Treanor, *supra* note 46, at 708 (describing the synthesis of revolutionary trends and Madisonian liberalism that evolved into the Fifth Amendment's Takings Clause, which came to "dominate American legal and political thought").

86 *Id.* at 708, 709. For a thorough discussion of liberalism, see *supra* notes 63-74 and accompanying text.

87 Treanor, *supra* note 46, at 710. Perhaps the most incisive expression of Madison's view of the proper relation between private property and a free government is found in *The Federalist*, No. 10. *See* NEDELSKY, *supra* note 57, at 24 (stating that "[t]he finest expression of the relation between property and individual rights in Madison's thought is, of course, *The Federalist*, No. 10"). Madison asserted that "the first object of government" was "the protection of different and unequal faculties of acquiring property." THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961); *see also* Parenti, *supra* note 53, at 167 (asserting that Madison in *The Federalist* No. 10 was concerned with a propertyless majority assembling to disrupt the established social order).

88 NEDELSKY, *supra* note 57, at 37.

89 *Id.* at 22, 25.

Madison, however, also perceived the inherent dualism that exists between these two objectives: republican governments, through a propertyless majority, placed private property in jeopardy, while unbridled amassment and subsequent violations of property posed serious threats to the stability of government.[90] Madison's celebration of state-ensured property rights remained unflinching, however, even after ratification of the Fifth Amendment.[91]

Scholars differ over Madison's purpose in including the Takings Clause in the Fifth Amendment for ratification.[92] One school of thought contends that Madison designed the clause to have a restricted legal application and a wider, more symbolic purpose.[93] This interpretation sets forth that only direct, physical takings by the federal government could trigger payment of just compensation.[94] Moreover, according to this limited interpretation, a tak-

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[90] *Id.* at 25.

[91] *See generally* JAMES MADISON, THE COMPLETE MADISON: HIS BASIC WRITINGS (Saul K. Padover ed., 1953) (providing examples of Madison's political essays). In a 1792 essay entitled *Property and Liberty*, Madison explained the responsibility of government to act as a bulwark to property rights. James Madison, *Property and Liberty, reprinted in* THE COMPLETE MADISON: HIS BASIC WRITINGS, *supra*, at 267. After proffering an abstract and very broad definition of property, Madison continued:

> If there be a government then which prides itself on maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence . . . such a government is not a pattern for the United States.
>
> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights

Id. at 267, 268-69.

The essential point of this essay, it has been argued, was that property in both its narrow and broad formulations deserves legal protection. McConnell, *supra* note 29, at 146. That is, the right to acquire and transfer property through contracts warrants as much protection as the right to possession. *Id.*

[92] *See* discussion *infra* notes 93-98 and accompanying text.

[93] Treanor, *supra* note 46, at 708.

[94] *Id.* at 711. In an early case, Chief Justice Marshall explained why the Takings Clause, as well as the other amendments in the Bill of Rights, has no application to the states:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment indicated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they con-

ings clause inserted in the Bill of Rights would have an educative effect on the people. By imbuing the national conscience with the sanctity of property, the clause would mitigate any inclination toward confiscatory tax and land redistribution policies.[95]

Other theorists, however, believe that the Takings Clause incarnated William Blackstone's classical harm-benefit distinction that the right of private property did not include the right to commit nuisances.[96] Regulations that prevent harms do not require compensation, but those that extract public benefits do.[97] This approach, therefore, rejects the notion that the clause only applies to direct, physical takings, and instead links the requirement of compensation to an evolving state law of nuisance.[98]

Despite the varied opinions on the purpose and importance of the Takings Clause, none of the states had its delegates propose a just compensation clause to the Philadelphia Convention.[99] In fact, the clause received little attention both at the Convention and the subsequent ratification debates.[100] It was a palpable Madisonian initiative.[101] Nevertheless, its overall purpose is clear: the

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> ferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.
>
> If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states.

Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

With the application of the Takings Clause to the states via the Incorporation Doctrine of the Fourteenth Amendment, the Anti-Federalists' fear that the clause might be used against local governments was realized. *See* Treanor, *supra* note 46, at 708. Although the Fifth Amendment guarantee of just compensation has not technically been incorporated into the Fourteenth Amendment, the Court has nevertheless held that the Fourteenth Amendment due process guarantee affords the same protection against a state's taking of private property without paying just compensation. *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897) (applying due process to state takings of private property). For an in-depth discussion of the theoretical underpinnings of the Incorporation Doctrine, see generally CHARLES FAIRMAN & STANLEY MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY (1970).

95 Treanor, *supra* note 46, at 711-12.

96 Kmiec, *supra* note 36, at 1635.

97 *See id.* (discussing the harm-benefit distinction contained in the Takings Clause).

98 *Id.* at 1647. Thus, the Takings Clause "properly protects what state law once told its citizens was an identifiable and severable property interest." *Id.*

99 McConnell, *supra* note 29, at 151.

100 Treanor, *supra* note 46, at 708-09.

101 *Id.* at 709.

Takings Clause, like many other provisions in the Bill of Rights, was meant to be a shield for the individual property owner against overzealous property legislation.[102] Its underlying rationale is that the costs of furthering public policy ought not to be borne unfairly by the individual property owner; instead, the benefitted public should pay through taxation.[103] As such, the Takings Clause is a profound statement of the Framer's commitment to limited government.[104]

B. Early Theorists and Cases

In addition to examining the constitutional text, the general intellectual climate of the period, and the convictions of James Madison, another source for an original understanding of the Takings Clause is the specific interpretations of the clause by early theorists and courts acquainted with the opinions of the era.[105] Justice Joseph Story, a renowned constitutional theorist, declared that the Takings Clause affirms the great common law doctrine, founded in natural equity, that protects private property.[106] This buttresses the case for the view, mentioned previously, that the clause memorializes Lord Blackstone's classical harm-benefit distinction enshrined in the common law.[107]

Early cases also support this view. For example, in *Young v. McKenzie*, the Supreme Court of Georgia, in dicta, posed the question of whether the Takings Clause introduced a principle of restitution that had not previously existed.[108] Answering the question in the affirmative, the court explained that not only had the princi-

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102 David L. Callies, *Property Rights: Are There Any Left?*, *in* REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS 247, 256 (G. Richard Hill ed., 1990).

103 James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, *in* THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS 87, 92 (David J. Bodenhamer & James W. Ely, Jr., eds., 1993).

104 *See id.* (stating that "the desire to achieve a public objective does not justify confiscation of private property without compensation").

105 BORK, *supra* note 8, at 165.

106 STORY, *supra* note 32, at 661. Joseph Story continued:

> Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers.

Id.

107 *See supra* notes 96-98 and accompanying text (discussing Lord Blackstone's classical harm-benefit distinction).

108 Young v. McKenzie, 3 Ga. 31, 41 (1847).

ple been recognized by civil jurists, but it was embedded in the common law long before its adoption in the United States Constitution.[109]

The traditional common law approach to private property rights was embraced in the late nineteenth century by Justice Harlan.[110] Focusing on the Fifth Amendment's literal language, Justice Harlan deduced that a taking does not occur when the government is abating a public harm by exercising its police power; rather, it is when the state encroaches on property rights to extract public benefits that compensation must be paid.[111] According to this jurisprudence, the economic consequences of state action, regardless of their magnitude, never enter into the constitutional equation.[112]

The decline of Justice Harlan's influence on the Supreme Court marks the advent of the next major school of compensation theory, that of Justice Oliver Wendell Holmes.[113] Justice Holmes did not espouse the qualitative differences between takings and exercises of the police power advocated by Justice Harlan.[114] Instead, the Justice viewed the differences as lying on a range in which individual property owners were required to relinquish their rights more or less according to public appetite.[115] In considering the economic burden inflicted by a government regulation, Justice Holmes's approach required that some restrictions be placed on both the police power and the right of private property.[116]

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109 *Id.* at 42.

110 Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37-38 (1964). Justice Harlan is regarded as the "principal judicial architect of compensation theory." *Id.* at 38.

111 *Id.* Justice Brandeis later adopted this theory when he stated that:

> The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious,—as it may because of further changes in local or social conditions,—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).

112 Sax, *supra* note 110, at 39. For further discussion of Justice Harlan's formulation of the noxious use principle, see Cvek, *supra* note 5, at 133-34.

113 Sax, *supra* note 110, at 40.

114 *Id.* at 41.

115 *Id.*

116 *Id.* The crux of the Holmesian model for takings jurisprudence was expounded in *Pennsylvania Coal Co. v. Mahon.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (stating that "[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").

The takings jurisprudence of both Justice Harlan and Justice Holmes advances and affirms the original intent of the Takings Clause, which was to protect individual property owners from hostile legislative or executive action.[117] Their differences are matters of degree.[118] Justice Harlan accomplishes this by looking to the common law distinction of takings and exercise of the police power, while Justice Holmes adopted an economic—and indeed more protective—formulation of that principle.[119]

V. A BRIEF LOOK AT THE EVOLUTION OF THE TAKINGS DOCTRINE

The Supreme Court has recognized two classes of takings under the Fifth Amendment's Just Compensation Clause: physical takings and regulatory takings.[120] While the law is well-established with respect to physical takings,[121] the area of regulatory or implied takings is still evolving.[122]

The concept of the regulatory taking first arose in *Pennsylvania Coal Co. v. Mahon.*[123] In *Pennsylvania Coal*, the owners of surface rights to land above coal deposits sought injunctive relief against the Pennsylvania Coal Company, owner of mining rights to the

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117 *See supra* notes 110-16 and accompanying text (discussing the Justices' interpretations of the Takings Clause).

118 *See* Sax, *supra* note 110, at 42 (noting that the Supreme Court cites both Justices with similar authority).

119 *See id.* at 38, 41. It is appropriate to note that "Harlan and Holmes and their divergent attitudes provide the heritage upon which the present Court has built." *Id.* at 42.

120 Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243, 318-19 (1993).

121 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve"). The Court recently reaffirmed the view that a physical intrusion by government, no matter how minute, is a taking and added that a regulation depriving a property owner of all economic and productive uses of land requires compensation. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

122 Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 336 (1987) [hereinafter Peterson, *Land Use*].

123 260 U.S. 393, 415 (1922) (explaining that when a "regulation goes too far it will be recognized as a taking"). Previously, in *Mugler v. Kansas*, the Court refused to acknowledge the notion of a regulatory taking. Mugler v. Kansas, 123 U.S. 623, 664 (1887). Justice Harlan, in holding that the Fifth and Fourteenth Amendments did not restrict valid exercises of the State's police power, declared that "[i]t cannot be supposed that the States intended, by adopting [the Fourteenth] Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community." *Id.* For a thorough discussion of the *Pennsylvania Coal* decision, see generally Carol M. Rose, Mahon *Reconstructed: Why the Takings Test Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

same parcel.[124] The surface owners maintained that mining under their property violated Pennsylvania's Kohler Act by jeopardizing the integrity of the surface estate.[125] The coal company sought refuge in the Fifth Amendment,[126] alleging that the Act violated the Takings Clause by depriving it of the right to mine the coal located within its estate.[127]

Writing for the majority, Justice Holmes recognized that to have a workable government, the police power will often negatively impact property rights.[128] The Justice argued, however, that this power is not without limitations.[129] When a regulation goes "too far," the Justice opined, the Constitution mandates just compensation.[130] This determination, the Justice explained, would be made on a case-by-case basis, according proper deference to legislative judgments.[131]

The Court subsequently applied this principle to municipal land-use regulations in *Penn Central Transportation Co. v. City of New York*.[132] Although precise demarcations of valid exercises of the police power had previously remained elusive, the Supreme Court

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124 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).

125 *Id.* at 412-13. According to the Court, the Kohler Act proscribed "the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation." *Id.*

126 *Id.* at 395 (Argument for Plaintiff in Error).

127 *Id.* The Pennsylvania Supreme Court sustained the regulation as an appropriate exercise of the state's police power. Mahon v. Pennsylvania Coal Co., 118 A. 491, 493 (Pa.), *rev'd*, 260 U.S. 393 (1922). Although the Pennsylvania court noted that a substantial relationship must exist between the state's legitimate interest in protecting the public's health, safety, or morals and the requirements of the statute, the court accorded great deference to legislative judgments, stating that "[i]t is primarily for the Legislature to consider and decide on the fact of a danger, then meet it by a proper remedy." *Id.* (citation omitted). Thus, the Pennsylvania Supreme Court accepted the legislature's conviction regarding the public danger of excessive mining. *Id.*

128 *Pennsylvania Coal Co.*, 260 U.S. at 413.

129 *Id.* Otherwise, Justice Holmes stressed, both the Contracts Clause and the Due Process Clause would be effectively emasculated. *Id.* Although Justice Harlan placed limitations on a state's police power, they were not of an economic character. Mugler v. Kansas, 123 U.S. 623, 661 (1887). Regulation, according to Justice Harlan, must be substantially related to the ends sought and could not invade fundamental rights. *Id.*

130 *Pennsylvania Coal Co.*, 260 U.S. at 415. One way of gauging when a regulation has gone "too far," Justice Holmes suggested, is the extent of the diminution in the targeted parcel's value. *Id.* at 413. Specifically, the Justice stated: "When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.*

131 *Id.* Justice Holmes weighed the public concerns addressed by the statute with the private losses incurred by Pennsylvania Coal and concluded that the magnitude of the diminution in value warranted compensation. *Id.* at 413-15 (citations omitted).

132 438 U.S. 104, 136, 138 (1978) (applying *Pennsylvania Coal* and concluding that application of the Landmarks Law did not effect a taking).

nonetheless developed a framework to evaluate the constitutionality of zoning ordinances by identifying various factors germane to the inquiry of whether a regulation has gone too far.[133]

Penn Central Transportation Co. (Penn Central), who along with its affiliates owned the Grand Central Terminal in New York City, challenged operation of the city's Landmarks Preservation Law to their property.[134] Pursuant to the law, the Landmarks Preservation Commission denied Penn Central's application to erect an office structure atop the Terminal.[135] Penn Central then filed suit in the New York Supreme Court claiming that the Commission's denial amounted to an arbitrary and uncompensated taking of its property in contravention of the Fifth and Fourteenth Amendments' Takings and Due Process Clauses.[136]

The *Penn Central* Court acknowledged the essentially ad hoc, factual nature of takings inquiries.[137] To facilitate the analysis of whether a land-use regulation is reasonably necessary to the effectuation of a substantial government purpose, and therefore is not a taking, the Court propounded several factors for consideration.[138] These factors included the regulation's economic impact on the claimant, its degree of interference with investment-backed expectations, and the character of the state action.[139] Applying these criteria to the statute, the Court concluded that the restrictions

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133 *Id.* at 124 (citations omitted).

134 *Id.* at 115, 119. Under the law, the Landmarks Preservation Commission identifies properties and areas with special historical, aesthetic, or cultural value and determines whether to designate them as "landmarks." *Id.* at 110 (citations omitted). Once property is deemed a landmark site, the owners must maintain the exterior in good repair and obtain the Commission's approval for any exterior changes to the property. *Id.* at 111-12 (citation omitted).

135 *Id.* at 116-17. The Terminal was classified as a landmark on August 2, 1967. *Id.* at 115. In rejecting two plans for modification of the building's exterior, the Commission stated "[we have] no fixed rule against making additions to designated buildings—it all depends on how they are done .... But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke." *Id.* at 117-18 (quotation omitted).

136 *Id.* at 118-19. The trial court granted Penn Central injunctive and declaratory relief to begin construction above the terminal. *Id.* at 119. The New York Supreme Court, Appellate Division, reversed, holding that the Act furthered the public interest in landmark preservation and denied Penn Central only the most profitable use of its property. Penn Central Transp. Co. v. City of New York, 377 N.Y.S.2d 20, 29-30 (N.Y. App. Div. 1975), *aff'd*, 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978). The New York Court of Appeals affirmed, stressing that the Act allowed Penn Central a reasonable return on its investment. Penn Central Transp. Co. v. City of New York, 366 N.E.2d 1271, 1278, 1279 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

137 *Penn Central Transp. Co.*, 438 U.S. at 124.

138 *Id.*

139 *Id.*

substantially advanced the general welfare through landmark preservation, preserved beneficial uses of the property, and, therefore, did not effect a taking.[140]

Eight years later, in *Nollan v. California Coastal Commission*,[141] the Supreme Court revisited the question of when a land-use restriction "substantially advance[s] legitimate state interests" but does not "deny an owner economically viable use of his land."[142] The Court was faced with deciding what constitutes a legitimate state interest and the degree of nexus required between it and the challenged regulation.[143]

Mr. and Mrs. Nollan owned a small bungalow on beachfront property.[144] In an effort to comply with the condition placed on their purchase option, the Nollans requested a permit from the California Coastal Commission to replace the existing structure with a three-bedroom house.[145] The Commission approved the application subject to the Nollans' granting of a public easement across the lot to offset any hindrances the construction would pose to visual access to the adjoining community beaches.[146]

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140 *Id.* at 138. Specifically, the Court characterized the law's effect as follows:

> While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure owners of any such properties both a "reasonable return" on their investments and maximum latitude to use their parcels for purposes not inconsistent with the preservation goals.

Id. at 110.

141 483 U.S. 825 (1986). For a comprehensive evaluation of *Nollan*, see Peterson, *Land Use*, *supra* note 122, at 352-56.

142 *Nollan*, 483 U.S. at 834 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)) (other citations omitted).

143 *Id.* Justice Scalia explained: "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Id.*

144 *Id.* at 827.

145 *Id.* at 828. The Nollans leased the property with an option to buy, and when they exercised this option, the sellers conditioned the sale on the destruction of the bungalow and the construction of a new house to replace it. *Id.* at 827-28.

146 *Id.* at 828. After the trial court remanded the matter to the Commission to decide whether the development would have an adverse impact on the public's access to the beach, the Commission found that the new house would impair visual and physical access to the shore. *Id.* at 828-29 (citation omitted). The Nollans then filed suit in superior court, arguing that the permit condition violated the Takings Clause of the Fifth and Fourteenth Amendments. *Id.* at 829 (citation omitted). The court ruled in favor of the Nollans on statutory grounds. *Id.* The Commission appealed the ruling to the California Court of Appeals. *Id.* The court of appeals reversed, stating that the trial court erred in its application of the applicable statute. California Coastal Comm'n v. Nollan, 223 Cal. Rptr. 28, 31-32 (Cal. Ct. App.), *rev'd*, 483 U.S. 825, 837 (1986). The court also ruled that the Nollan's takings claim failed. *Id.* The Nollans appealed directly to the United States Supreme Court, bypassing the California

Writing for the Court, Justice Scalia determined that the Commission could promote a legitimate state interest by safeguarding visual access to the shore.[147] The Justice asserted, however, that compelling the outright relinquishment of an easement from the Nollans for public access, rather than conditioning the building permit on their consent, would obviously amount to a taking.[148] The primary issue for the *Nollan* Court was whether an "essential nexus" existed between the condition, which was the lateral easement, and the state interest, which was protecting the public's view of the ocean.[149] Concluding that no such nexus was present,[150] the Court ruled that the Coastal Commission's conditions effectuated a taking of the Nollans' property without just compensation.[151]

VI. *DOLAN V. CITY OF TIGARD*

Because the Coastal Commission's exaction did not share an essential nexus with the legitimate state interest, the *Nollan* Court was forced to abandon its inquiry without providing a comprehensive elucidation of the contours of its takings jurisprudence.[152] The opportunity for such analysis finally arose in *Dolan v. City of Tigard*,[153] ostensibly the Supreme Court's final word on the takings doctrine. Petitioner Dolan applied for a permit to refurbish the site of her plumbing and electrical supply store.[154] The City Planning Commission approved the application subject to conditions prescribed by the Community Development Code.[155] The peti-

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Supreme Court, to resolve the constitutional question. *Nollan*, 483 U.S. at 830-31 (citations omitted).

147 *Nollan*, 483 U.S. at 827, 835-36 (citation omitted).

148 *Id.* at 831.

149 *See id.* at 837 (discussing the importance of meeting the "essential nexus" test). Justice Scalia insisted that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981)).

150 *Id.* at 837. Justice Scalia stated that "[w]hatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them." *Id.*

151 *Id.* at 841-42. Specifically, the Court stated that if California wants "an easement across the Nollans' property, it must pay for it." *Id.*

152 *Id.* (finding that the Commission's belief that the community interest would be furthered could not justify the imposed exaction).

153 114 S. Ct. 2309 (1994).

154 *Id.* at 2313. The store rests on a 1.67-acre lot and comprises approximately 9,700 square feet. *Id.* Fanno Creek runs through the southwestern portion of the lot, as well as its western boundary. *Id.* Areas within its 100-year floodplain are unsuitable for commercial development. *Id.*

155 *Id.* at 2314. The City of Tigard, located on the outskirts of Portland, enacted the Community Development Code pursuant to the State of Oregon's comprehensive land use management policy. *Id.* at 2313 (citing OR. REV. STAT. §§ 197.005-197.860

tioner was required to pledge a portion of the parcel for renovating a storm drainage system.[156] Additionally, the city sought to exact a pedestrian/bicycle pathway from the land.[157]

(1993)). In 1973, the Oregon legislature declared that the "[u]ncoordinated use of lands within this state threaten orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state." § 197.005(1). The legislature thus created the Land Conservation and Development Commission and the Department of Land Conservation and Development, which together are charged with the responsibility to identify and adopt goals and guidelines to control land-use planning in Oregon. §§ 197.075, 197.225, 197.240.

Under the statute, each city and county in Oregon must adopt a "comprehensive plan" and implement regulations in accordance with the goals adopted by the Land Conservation and Development Commission. § 197.175. Oregon law defines a "comprehensive plan" as:

> [A] generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs.

§ 197.015(5).

The statute further defines "comprehensive" as "all-inclusive, both in terms of geographic area covered and functional and natural activities and systems occurring in the area covered by the plan." § 197.015(5). A land-use plan is considered "coordinated" when "the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible." § 197.015(5). Once the comprehensive plan sets forth the governing land use policies for the jurisdiction, those policies must be implemented through one or more land use regulations. § 197.010(c). Oregon law defines "land use regulation" to encompass "any local government zoning ordinance, land division ordinance . . . or similar general ordinance establishing standards for implementing a comprehensive plan." § 197.015(11).

Under the Community Development Code (CDC), property owners within the zone entitled "Central Business District" must accommodate a 15% landscaping and open-space requirement. *Dolan*, 114 S. Ct. at 2313 (citation omitted). This requirement limits the total coverage of buildings and parking space to 85% of the lot. *Id.*

156 *Dolan*, 114 S. Ct. at 2314. The City of Tigard crafted a Master Drainage Plan in response to flooding that occurred in the vicinity of Fanno Creek, including that portion of the creek that passed through petitioner's parcel. *Id.* at 2313 (citations omitted). The expansion of impervious surfaces due to continued development, the plan established, would aggravate the city's flooding problems. *Id.* To address these problems, the Drainage Plan proposed improvements along the Fanno Creek Basin, encompassing channel excavation adjacent to petitioner's property and creating a greenway along the length of the creek. *Id.*

157 *Id.* at 2314. The city enacted the plan for a pedestrian/bicycle pathway in response to a study indicating that congestion in the Central Business District was a serious problem. *Id.* at 2313 (footnote omitted). The city intended the plan to encourage alternate means of transportation for short trips, and the CDC enlists those seeking new development to facilitate the plan by requiring dedications of land for the pathways in certain areas. *Id.* The CDC states, in pertinent part:

> The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed:

After the City Council endorsed the Commission's action,[158] Dolan petitioned the Land Use Board of Appeals, alleging that the dedication requirements were insufficiently related to her development plans and, therefore, constituted a taking without just compensation in violation of the Fifth Amendment.[159] The Board found a "reasonable relationship" between the permit exactions and the impacts of the proposed redevelopment,[160] and Oregon's Court of Appeals affirmed.[161]

Upholding the decisions of the lower courts, the Oregon Supreme Court ruled that *Nollan v. California Coastal Commission* created a "reasonably related" test instead of a more stringent "essential nexus" test and, furthermore, that the City of Tigard established such a relationship in this case.[162] To resolve an apparent conflict between *Nollan* and the decision of the Oregon Supreme Court,[163] the United States Supreme Court granted Dolan's petition for certiorari.[164] The issue before the Court was whether there existed an essential nexus between a legitimate interest of the city and the permit conditions and, if so, what necessary degree of connection must exist between the city's exactions and the likely effect

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> (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connections cannot be made, require that the funds in the amount of the construction costs be deposited into an account for the purpose of constructing paths.

Id. at 2313 n.1 (quoting CDC § 18.86.040.A.1.b).

158 *Id.* at 2315 (citation omitted). The City Council, however, required that the city's engineering department—not petitioner—conduct the surveying and marking of the floodplain area. *Id.*

159 *Id.*

160 *Id.* The Land Use Board of Appeals (LUBA) assumed that Tigard's findings about the proposed development's impacts were bolstered by substantial evidence. *Id.* First, because petitioner's redevelopment would increase the parcel's imperviousness and storm-water runoff into the creek, LUBA maintained, a reasonable relationship existed between the development exaction to create a greenway along the creek and the proposed development. *Id.* Moreover, LUBA noted that a larger store would attract more customers and employees and their vehicles, and concluded that a dedication for a pathway to alleviate this congestion was reasonably related to that problem. *Id.* Therefore, LUBA rejected the Fifth Amendment argument. *Id.*

161 Dolan v. City of Tigard, 832 P.2d 853, 856 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 114 S. Ct. 2309 (1994). The Oregon Court of Appeals rejected Dolan's assertion that the Supreme Court abandoned the "reasonable relationship" test in *Nollan*, in favor of a more rigid "essential nexus" test. *Id.* at 855. For a discussion of the *Nollan* case, see *supra* notes 141-51 and accompanying text.

162 Dolan v. City of Tigard, 854 P.2d 437, 443 (Or. 1993), *rev'd*, 114 S. Ct. 2309 (1994).

163 *Dolan*, 114 S.Ct. at 2315-16.

164 Dolan v. City of Tigard, 114 S. Ct. 544 (1993).

of the planned development.[165]

In an opinion by Chief Justice Rehnquist,[166] the United States Supreme Court reversed Oregon's highest court, holding that the city's dedication requirements constituted an uncompensated taking of private property for public use.[167] The Chief Justice began by recounting the fundamental purpose of the Takings Clause.[168] The Chief Justice, reminiscent of *Nollan*, postulated that absent the permit conditions, the city's demands would have undoubtedly been a taking.[169] Acknowledging that in certain cases the police power authorizes state and local governments to regulate land use without compensating landowners,[170] the Court maintained that the facts in *Dolan* could be readily distinguished from those decisions affirming a state interest in land-use planning.[171]

Turning to the *Nollan* analysis, the Court noted that the development exactions bore a sufficient link to the city's land-use management policy.[172] The dedication of petitioner's property for a drainage system and pathway, Chief Justice Rehnquist reasoned, would adequately promote the objectives of preventing flooding and alleviating traffic congestion.[173] An issue remained, however, as to the requisite degree of connection between the conditions imposed on petitioner's permit and the anticipated impact of the planned development.[174]

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165 *Dolan*, 114 S. Ct. at 2317 (citing *Nollan*, 483 U.S. at 837, 838).

166 *Id.* at 2312. The Chief Justice was joined by Justices Scalia, Thomas, Kennedy, and O'Connor. *Id.*

167 *Id.* at 2322 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

168 *Id.* at 2316. That purpose is, according to the Court, "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." *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

169 *Id.* (citing *Nollan*, 483 U.S. at 831).

170 *Id.* (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that a land-use regulation does not constitute a "taking" where the regulation "substantially advance[s] legitimate state interests" and fails to "den[y] an owner economically viable use of his land"); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (holding that local governments have the authority to participate in land-use planning); *Pennsylvania Coal Co.*, 260 U.S. at 413 (explaining the importance of the government's power to regulate rights incident to property ownership without having to compensate landowners)).

171 *Id.* The facts in *Dolan* differ from those cases upholding land-use regulation, Chief Justice Rehnquist stressed, in two respects: First, prior cases involved regulations impinging on entire areas of a city, but here they targeted a single parcel. *Id.* Second, the present case was not only a limitation on petitioner's land use, but a demand that she deed a portion of her property to the city. *Id.*

172 *Id.* at 2318.

173 *Id.*

174 *Id.* (citations omitted).

To formulate a test, the majority examined the nexus demanded by the various state courts[175] and adopted a middle-tier approach: a reasonable relationship must be shown between the mandatory dedication and the proposed development's effect.[176] Endeavoring to avoid confusion with the "rational basis" test used in other constitutional areas, the Chief Justice substituted the term "reasonable relationship" with "rough proportionality."[177] Chief Justice Rehnquist opined that this test does not require mathematical precision; instead, rough proportionality demands that the city perform an individualized determination that the compulsory exactions are related to both the character and scope of the effect of the anticipated development.[178]

Applying this new test, the Chief Justice searched for rough proportionality between Tigard's exaction demands and the projected impact of Dolan's plans for expansion.[179] First, the majority examined the requirement that petitioner deed her land to the city for incorporation into its storm drainage system.[180] The Court agreed that an increase in the amount of a parcel's impervious surface would increase the storm-water runoff from the tract.[181] The Court also agreed that in furtherance of its flood control policy, the city could require Dolan to refrain from encroaching upon the

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175 *Id.* at 2318-19. The Court first refused to adopt the tests of New York and Montana which only required the government to provide generalized statements about the nexus between the exaction and planned development. *Id.* This standard, the Court concluded, is "too lax." *Id.* at 2319. The majority similarly rejected a "very exacting" standard that would compel the government to show that the connection is directly proportional. *Id.* The majority cited the Illinois Supreme Court as the leading proponent of this test, known as the "specifically and uniquely attributable test." *Id.* (citing Pioneer Tr. & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)). The Court also noted that a minority of other state courts have also embraced this test. *Id.* at 2319 n.7 (citing J.E.D. Assocs., Inc., v. Town of Atkinson, 432 A.2d 12, 15 (N.H. 1981); Divan Builders, Inc. v. Planning Bd. of Wayne, 66 N.J. 582, 602, 334 A.2d 30, 40 (1975); McKain v. Toledo City Planning Comm'n, 270 N.E.2d 370, 374 (Ohio 1971); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910, 913 (R.I. 1970)).

176 *Id.* at 2319. The Court pointed out that the Nebraska Supreme Court's decision in *Simpson v. City of North Platte* is illustrative of this "reasonable relationship" test. *Id.* (citing Simpson v. City of North Platte, 292 N.W.2d 297, 301-02 (Neb. 1980) (holding that a city could not require a landowner to dedicate privately owned property for future public use by imposing conditions on a building permit where the future use does not result from the owner's construction)).

177 *Id.*

178 *Id.* at 2319-20.

179 *Id.* at 2320.

180 *Id.*

181 *Id.*

floodplain.[182] Chief Justice Rehnquist concluded; however, that Tigard went too far because petitioner's proposed new building did not reasonably relate to a need for conveyance of a floodplain easement.[183]

The Court also concurred with the city's finding that an expansion of petitioner's business would increase vehicular and pedestrian traffic in the vicinity.[184] Moreover, the Court noted that compelling property dedications for roads, sidewalks, and other public paths has generally been recognized as a reasonable method for mitigating the added congestion associated with a proposed property use.[185] The majority remained dissatisfied, however, with the city's conclusory statement that the creation of a pathway could offset a portion of the traffic demand and reduce any increase in traffic congestion.[186] Accordingly, the Court held that the rough proportionality test had not been satisfied, and the city's exactions amounted to an uncompensated taking in violation of the Fifth Amendment.[187]

Vigorously dissenting, Justice Stevens criticized the majority both for the creation of the rough proportionality test and its operation in the present case.[188] The Justice first pointed to the absence of federal precedent supporting the majority's decision.[189] Moreover, the dissent argued, the state cases upon which the Court relied do not ineluctably lead to the new test.[190]

More specifically, Justice Stevens argued, the additional requirement that a city demonstrate rough proportionality between a permit exaction and the impact of the proposed development was a manifestation of judicial atavism: it revived a breed of substantive

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182 *Id.*

183 *Id.* The Court proclaimed that the petitioner's "right to exclude would not be regulated, it would be eviscerated." *Id.* at 2321. The Court pointed out that the city did not merely seek to prevent development of the land, but, rather, wanted to appropriate petitioner's land for the Greenway system. *Id.* at 2320.

184 *Id.* at 2321.

185 *Id.*

186 *Id.* at 2321-22. The Chief Justice asserted: "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it *could* offset some of the traffic demand generated." *Id.* at 2322 (emphasis added).

187 *See id.* (explaining that although the city's goals are "laudable," the Constitution imposes limits with respect to how the city could accomplish it goals) (citation omitted).

188 *Id.* (Stevens, J., dissenting). Justice Stevens was joined by Justices Blackmun and Ginsburg in dissenting. *Id.*

189 *Id.* at 2322-23 (Stevens, J., dissenting).

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

due process that for many decades lay fallow.[191] Additionally, the Justice faulted the majority for placing the burden of proof on the city, thereby erecting a formidable barrier to effective land-use planning.[192] For these reasons, the dissent asserted, the rough proportionality test and its present application "break considerable and unpropitious new ground."[193]

In a separate dissent, Justice Souter also criticized the majority for fashioning a standard that goes beyond the dictates of *Nollan*.[194] The Justice reasoned that the Court could have resolved the issues presented in *Dolan* by adhering to *Nollan*'s principles.[195] According to Justice Souter, the majority's uneasiness with Tigard's permit conditions did not stem from lack of proportionality; rather, it arose from lack of a rational nexus between the governmental interest and the property exactions.[196] The Justice concluded by declaring the inappropriateness of placing the onus to prove relationships on the city, reasoning that established precedent afforded governmental regulations a traditional presumption of constitutionality.[197]

VI. CONCLUSION

The result in *Dolan* strikes a reasonable balance between legislative power and individual liberties: a balance that is consistent with the Framer's design of the American Republic. If the City of Tigard is able to establish the rough proportionality between its property exaction and the projected impact of the proposed development required by the Court, then there will be no need to compensate Mrs. Dolan. Such a requirement is in accordance with the common law's harm-benefit distinction that animates the Takings Clause.

In formulating a more precise and comprehensive inquiry, by first calling for an essential nexus between a development exaction and a legitimate state interest, and then rough proportionality between the exaction and developmental impacts, the Court recognizes that as the modern regulatory state continues to grow and metastasize, the distinction between averting harms and compel-

191 *Id.* at 2326 (Stevens, J., dissenting).
192 *Id.* at 2323 (Stevens, J., dissenting).
193 *Id.* at 2322 (Stevens, J., dissenting).
194 *Id.* at 2330 (Souter, J., dissenting).
195 *Id.*
196 *Id.*
197 *Id.* at 2331 (Souter, J., dissenting).

ling benefits often becomes nebulous.[198] Moreover, by placing the burden to demonstrate rough proportionality on the city—albeit a break from precedent—the majority forces municipalities to think before they act and ensure they are not targeting an individual to defray what is actually a public expense. In its entirety, this test furthers the objective of the Fifth Amendment by requiring courts in takings cases to concentrate on the harm-benefit distinction inherent in property rights in order to protect individuals from capricious and inequitable exercises of the police power, while at the same time acknowledging the proper use of that power.[199]

Dolan is not, as the dissent believes, a resurgence of substantive due process. Its precursor, *Nollan*, conceded no substantive limitation, except in a footnote, on a state's police power.[200] The cases that recognized substantive due process rights, such as *Lochner v. New York*[201] and *Roe v. Wade*,[202] employed a procedural constitu-

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198 *See* Kmiec, *supra* note 36, at 1636-37 (quoting Professor Allison Dunham). Specifically, Professor Dunham argues that:

> It is unconstitutional to compel an owner to commit his land to park use in order to meet the public desire for a park, but an owner may be compelled to furnish a portion of his land for a park where the need for a park results primarily from activity on other land of the owner. It is unconstitutional to compel him to use his land as a parking lot in order to obtain a parking lot for the community, but it is within constitutional power to compel an owner to provide a parking lot for the parking needs of activities on his own land. . . . It is not permissible to compel an owner to hold land in reserve for industrial purposes by restricting his use to industrial purposes only, but it is permissible to exclude industrial development from districts where such development will harm other uses in the district.

Allison Dunham, *A Legal And Economic Basis For City Planning (Making Room For Robert Moses, William Zeckendorf, And A City Planner In The Same Community)*, 58 COLUM. L. REV. 650, 666-67 (1958) (footnotes omitted).

199 Kmiec, *supra* note 36, at 1640.

200 *Id.* at 1651. In what Professor Kmiec refers to as "what may be destined to become another famous footnote four," Justice Scalia wrote:

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

Id. (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 835-36 n.4 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))).

201 198 U.S. 45 (1905). In *Lochner*, the Court found a substantive right of "freedom of contract" in the Fourteenth Amendment's Due Process Clause. *Id.* at 56. As such, the limitation of employment in bakeries to 60 hours a week and 10 hours a day could not be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare. *Id.* at 64-65. For a discussion of *Lochner*, see Daniel

tional provision, the Due Process Clause, to create rights not expressly found in the Constitution. The Takings Clause, however, explicitly presumes a substantive right to property that cannot be infringed for public benefit without just compensation.[203] Justice Stevens's pejorative notwithstanding,[204] property owners do indeed have rights worthy of protection. As Chief Justice Rehnquist remarked, the Takings Clause of the Fifth Amendment should be given the same reverence accorded to other provisions in the Bill of Rights.[205]

Modern takings jurisprudence, therefore, adheres to the original intent of the Takings Clause. Although some scholars argue persuasively that James Madison intended the clause to have limited application—that is, it only applies to direct, physical takings[206]—their approach takes a far too narrow view of original understanding. The question is not how Madison and the other Framers would have decided a particular case, but whether the facts in a case before the Court warrant the protections of the general principles they placed in the Constitution.[207] In Mrs. Dolan's

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O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 216 (1987) (stating that the decision "heralded the Court's first sustained commitment to the use of substantive due process") and Charles B. Blackmar, *Neutral Principles and Substantive Due Process*, 35 ST. LOUIS U. L.J. 511, 513 (1991) (remarking that the doctrine of substantive due process "got a bad name in *Lochner v. New York*").

202 410 U.S. 113 (1973). In *Roe*, the Supreme Court, per Justice Blackmun, ruled that the substantive "right to privacy," whether in the Ninth or Fourteenth Amendment, includes the right of a woman to terminate an unwanted pregnancy. *Id.* at 153, 154. For a discussion of *Roe* and the subsequent refinements of its holding, see Conkle, *supra* note 201, at 220-21.

203 *Cf.* Kmiec, *supra* note 36, at 1651 (noting that *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1986), does not signal a return to *Lochner v. New York*, but, "[q]uite the contrary, not to observe the distinction [between using the police power to avoid harm rather than to extract benefits] would be as much a judicial abdication as declaring the first amendment's speech protections to be an empty vessel capable of being filled however the legislature wished"). *Id.*

204 Dolan v. City of Tigard, 114 S. Ct. 2309, 2326 (Stevens, J., dissenting) (commenting that "property owners have surely found a new friend today").

205 *Id.* at 2320.

206 Treanor, *supra* note 46, at 711.

207 *Cf.* BORK, *supra* note 8, at 167 (stating that judges must discern constitutional meaning as each case arises). Judge Bork provides a lucid illustration of this point when he recognizes that:

> The world changes in which unchanging values find their application. The fourth amendment, which prohibits unreasonable searches and seizures, was framed by men who did not foresee electronic surveillance. But that did not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy. The power of Congress to regulate commerce was established by men who did not foresee the scope, technologies, and intricate interdependence of today's economy. But that did not make it wrong for judges to

case, the question was asked, and answered, correctly.

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forbid states the power to impose burdensome regulations on the interstate movements of trailer trucks. The first amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication. But that does not make it wrong for a judge to find the values of the first amendment relevant to radio and television broadcasting.

Id. at 168.