AT LAST, THE SUPREME COURT SOLVES THE TAKINGS PUZZLE

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The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[1] The Takings Clause thus serves as a fulcrum upon which private property interests are balanced against the State's police power. The balance is a difficult one to maintain because both property and the police power are indeterminate concepts whose interpretations change over time and from place to place. Federalism, which traditionally has left the definition of property to state common law, and separation of powers, which serves as a check in preventing the federal judiciary from usurping functions that are better left to majoritarian legislative determination, are two structural complexities that make maintaining this balance even more difficult.

Many commentators and practitioners, ranging from property rights advocates to police power hawks, have viewed the Supreme Court's takings cases as incoherent, piecemeal, or categorical.[2] Some of the criticism is deserved, some not. Indeed, this Article will show that with the Court's decision in *Dolan v. City of Tigard*,[3] the Court largely has solved the takings puzzle. It has calibrated the property-police power balance in a way that has not been achieved, or even acknowledged, in other areas of economic regulation. Since *Lochner*[4] and the decline of substantive economic due process, the Court has been reluctant to review economic regulations in a meaningful way. The Court has been silent whenever there is any conceivable rational basis for the regula-

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1. Armstrong v. United States, 364 U.S. 40, 49 (1960).

2. *See, e.g.*, Damon C. Watson, Recent Development, Dolan *and the "Rough Proportionality" Standard: Taking Its Toll on Loretto's Bright Line:* Dolan v. City of Tigard, 18 HARV. J.L. & PUB. POL'Y 591 (1995).

3. 114 S. Ct. 2309 (1994).

4. Lochner v. New York, 198 U.S. 45 (1905) (the much-criticized high point of economic substantive due process).

tion, and often has been silent even when there appears to be no basis that is either conceivable or rational.

In economic matters, the Court has refrained from substituting its will for that of the legislative majority, despite the fact that specific textual provisions of the Constitution—such as the Privileges and Immunities[5] or Contract[6] Clauses—seemingly invite, or even obligate, the Court to do just that. This lack of judicial review is responsible in part for the excessive growth of the federal government's presence in much of daily life, from the workplace to schools. The popular perception of that federal presence as bloated or unwarranted or worse has triggered a seismic political change, the likes of which has not been seen in over four decades.

With *Nollan v. California Coastal Commission*,[7] *Lucas v. South Carolina Coastal Council*,[8] and now *Dolan*, the Court has awakened to its responsibility under the Takings Clause to ensure the maintenance of the property-police power balance. The Court's growing recognition that an objective standard exists by which it can responsibly check the legislative process while still respecting it explains this conquering of judicial timidity. This objective standard is not a spontaneous judicial creation, as is so much of the Court's most controverted case law,[9] but it is the product of hundreds of years of refinement, on-going evaluation, and modification. Most importantly, the standard originates primarily at the state level, and thus is consistent with the federalist structure of the republic. This standard is none other than the common law.

In particular, it is the common law of nuisance that simultaneously defines the limits of individual property rights and outlines the general scope of the police power. Relatedly, the application of the common law of nuisance is consistent with the Constitution's original understanding[10] and is aimed at stability and order, rather than social engineering. This was implicit in *Mugler v. Kansas*,[11] in which the Court explained that the use of property

5. *See* U.S. CONST. art. IV, § 2; U.S. CONST. amend. XIV, § 1.

6. *See* U.S. CONST. art. I, § 10; Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525 (1987).

7. 483 U.S. 825 (1987).

8. 112 S. Ct. 2886 (1992).

9. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Roe v. Wade, 410 U.S. 113 (1973).

10. *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988).

11. 123 U.S. 623 (1887).

may be limited by the law of the land, and thus allowed the State to deny without compensation the noxious use of producing and selling liquor. In *Village of Euclid v. Ambler Realty Co.*,[12] this understanding also was the basis of the express linkage of the police power to the *sic utere* maxim.[13] For the better part of this century, however, this understanding was lost. Wholesale schemes of wealth redistribution took hold, unfettered by a judiciary that was cowed into submission by a misstated notion of judicial restraint. In the property field, the Court mustered only the weak admonition that such economic regulation should not go "too far."[14] As recently as the late 1970s, the Court did no more than speculate about a set of ad hoc factors that might limit the police power and determine the threshold of a taking.[15]

After *Euclid*, the Court's response to the excessive use of the police power faltered; it was cut adrift analytically from the common law of nuisance which, however imprecisely, gives meaning to both property and the police power. The Court's focus on "diminution in value" has proven to be unworkable and unprincipled. To gauge the constitutionality of a taking by asking how much a person has lost is an analytical *non sequitur*, even though such an inquiry is helpful in assessing damages or in speculating about the likelihood of judicial intervention in rectifying particular takings claims.

Loretto v. Teleprompter Manhattan CATV Corp.,[16] in which the Court held that a permanent, physical occupation always is a taking, was one of the first modern takings cases to reattach the takings analysis to the common law of property. Here, the categorical protection of the right to exclude others emerged from the common law's ancient protection against trespass. At first, *Loretto* seemed both jolting and puny. The constitutional need to compensate for a four inch square box and accompanying cable wire seemed downright silly in the face of other million-dollar diminutions in value that have not merited compensation for a taking. Despite its small price tag, *Loretto*'s significance was great because it was a reminder to the Court that

12. 272 U.S. 365, 387 (1926).

13. The maxim *sic utere tuo ut alienum non laedas* translates to "use your own property in such a manner as not to injure that of another." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987).

14. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (explaining that if a regulation goes "too far" it will be recognized as a taking).

15. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 126-30 (1978).

16. 458 U.S. 419 (1982).

no matter how high-minded the justifications for a public regulatory scheme might be in our democratic republic, those schemes are limited by the objective reality of privately-held property resources.

As significant as *Loretto*'s reminder was, its practical application was limited, because not much land use regulation directly depended upon physical occupation, and so very few cases fit into *Loretto*'s bright-line rule.[17] Thus, neither the Court nor land use players realized how directly the analytical line based on the common law of property connected the per se rule of *Loretto* with *Nollan* and its "essential nexus" test.[18] Indeed, the Supreme Court Term that produced *Nollan* had coughed up *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[19] a precedent-based hiccup repackaging Justice Holmes's "too far" limitation from *Pennsylvania Coal Co. v. Mahon*[20] in the ad hoc balancing factors of *Penn Central Transportation Co. v. City of New York*.[21]

With *Nollan*, the Court returned to a sounder course, defining property and the police power in relation to a state's common law. The Court's emphasis upon a formulation requiring a regulation "substantially advancing a legitimate governmental interest," as distinct from the reasonableness or rational basis standards applied in other economic contexts and in prior cases, was the legal equivalent of a surveyor restaking parcel corners that had become hidden by overgrowth. And, of course, like neighbors who had grown accustomed to a bigger yard because of the unmarked lot line, police power hawks groused about *Nollan*'s seeming break with precedent.[22] However, it was the intervening diminution in value cases that were the aberration from the common law balancing of private and public interests.

Although *Nollan* returned to the common law to define the limit of property and the police power, its version of a takings test was not applied easily to all situations. *Nollan*'s primary requirement that there be an essential nexus between regulatory means and ends failed to convey its important reassertion of the com-

17. *But cf.* Watson, *supra* note 2, at 599-601 (arguing that a proper application of *Loretto*'s per se rule should have decided *Dolan*).

18. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

19. 480 U.S. 470 (1987) (holding that the bundle of property rights should be considered in their entirety and thus the elimination of one stick is not a per se taking).

20. 260 U.S. 393, 415 (1922).

21. 438 U.S. 104 (1978).

22. *See, e.g.*, Norman Williams, *A Narrow Escape?*, 16 ZONING & PLAN. L. REP. 4-5 (1993).

mon law definition of property and police power, because a tight nexus between means and ends still left any nexus with a particular landowner unaddressed. Both the opinion and the opinion's author, Justice Scalia, were denigrated.[23] Some argued that the opinion should be confined to cases in which there was a property concession.[24] Land use regulators concluded that all that was required to meet the *Nollan* test was a facile matching of regulatory means and ends.[25] Thus, if the public end was a bikepath over a permit applicant's property, it should be a simple matter to require the conveyance of an easement or fee interest underlying the path.

Or so it mistakenly was thought. However, a critical part of the story is missing. *Lucas v. South Carolina Coastal Council*[26] is that part. In argument, *Lucas* was portrayed as the ultimate diminution in value case. In fact, Lucas's argument uncomfortably—and wrongly—conceded a virtually unlimited police power. He just wanted to be paid when regulation effectively took his property rights from him, by denying his right to develop the land. Ironically, it was the State that resurrected the analytical connection to the common law to justify this total deprivation of value. Calling upon the harm-benefit distinction of common law nuisance, South Carolina declared Lucas's homebuilding plans on a barrier island to be a harm. The Court partially agreed with South Carolina in 1,575,000[27] ways that the State now regrets.

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23. *See* Jerold S. Kayden, *Judges as Planners: Limited or General Partners?*, *in* ZONING AND THE AMERICAN DREAM 223, 233 (Charles M. Harr & Jerold S. Kayden eds., 1989) (characterizing Justice Scalia's analysis in *Nollan* as based upon "shoddy scholarship and misguided analysis").

24. *See, e.g.*, Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1608 (1988) ("The decision seems most satisfactorily understood as a further manifestation, albeit in somewhat surprising form, of the talismanic force of 'permanent physical occupation' in takings adjudication").

25. For a case, even after *Dolan*, illustrating this facile matching of means and ends in disregard of common law property interests, see the discussion of the *Ehrlich* case, *infra* note 43.

26. 112 S. Ct. 2886 (1992).

27. The Court agreed with South Carolina only to the extent that it could prove that Mr. Lucas's homebuilding plans were a nuisance-like activity not part of his antecedent title. South Carolina did not make this proof on remand, but rather entered into a negotiated settlement whereby Mr. Lucas received $425,000 for each of his two lots and $725,000 in interest, attorneys' fees, and costs. South Carolina later resold Mr. Lucas's property to another developer for $785,000. *See* Douglas W. Kmiec, *Clarifying the Supreme Court's Taking Cases—An Irreverent but Otherwise Unassailable Draft Opinion in* Dolan v. City of Tigard, 71 DENV. U. L. REV. 325, 330 (1994) ("Apparently, however, it's no fun regulating if it's not for 'free'"); H. Jane Lehman, *Accord Ends Fight Over Use of Land; Property Rights Activists Gain in S.C. Case*, WASH. POST, July 17, 1993, at E1.

Yes, said the Court in *Lucas*, the harm-benefit distinction does matter—but Justice Brennan stated in *Penn Central Transportation Co. v. City of New York* that one person's harm is another's benefit.[28] Thus, the distinction must be connected not to landowner or regulator assertion, but to the objective reality of the state's common law. To justify its regulation and refusal to pay compensation, South Carolina had to show by antecedent inquiry that what Mr. Lucas planned to do never was part of his common law property bundle in the first place.

With this one bold stroke, the Court solved the takings puzzle. The *Lucas* decision seemingly returned the land use power to its roots as a reasonable codification of the *sic utere* principle, the law of nuisance. As Justice Sutherland predicted in *Euclid*, this principle is a "helpful clew" for determining the acceptable scope of the police power in relation to private property.[29] With the distracting and unhelpful diminution in value factor functionally eliminated from the *Lucas* case, the Court could see clearly that judicial intervention as a constraint upon the exercise of police power was not unwarranted judicial activism, but duty borne of the Takings Clause itself. This was not judicial predilection displacing majority will, but judicial reminder within a federalist structure (drawing directly upon a federalist source—state common law) that ours is not a democracy simpliciter, but a democracy bounded by human, and necessarily, property rights.[30]

It is possible to argue that *Lucas* was an incomplete acknowledgment of federalism because it accepted the property definition implicit in state common law, while rejecting (or at least limiting) its redefinition by state or local legislation.[31] But this is

28. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133 n.30 (1978).

29. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 387 (1926).

30. The Court has stated:

> Property does not have rights. People have rights. The right to enjoy property without lawful deprivation . . . is in truth a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

31. In *Lucas*, the Court stated that to prevail South Carolina had to "identify background principles of nuisance *and property law* that prohibit the uses" of Mr. Lucas's homebuilding. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901-02 (1992) (emphasis added). Does the reference to "property law" beyond nuisance include state legislative limitations on use? Perhaps. Clearly, it would be circular to include the very legislative limitation under challenge. On the other hand, well-established legislative limitations in place at the time of acquisition have a better claim for being included (and thus narrowing a landowner's property law bundle), especially if they reinforce or reasonably extend a common law nuisance limitation.

nothing more than the recognition that under the Constitution the state police power always is bounded by private right. As one commentator's appraisal of *Lucas* put it, "The majority [in *Lucas*] allocated this authority to the state judiciary rather than to the state legislature or the federal courts. Considerations of institutional competence, predictability, and federalism support the Court's decision."[32]

The *competence* of state courts in striking a proper balance between individual rights and majoritarian desire is manifest in traditional nuisance analysis,[33] which gradually develops within a precedential system of law that invites reliance, investment, and initiative. By contrast, state legislative bodies, or their local delegates, are not limited by prior decision or enactment and are highly responsive to the shifting interests of their political constituencies. This is too great a conflict of interest to overlook. "To allow the state legislature that enacts a regulation . . . *also* to determine when the federal constitution will require compensation unduly concentrates power in the hands of the legislature."[34] No state or local legislative body can appraise fairly and balance neutrally public desire and private right. "Without the protection that the Court provides in *Lucas* [premised upon the independent handiwork of the state judiciary], a state legislature could too easily use sleight-of-hand to convert benefit-conferring regulations into harm-preventing regulations and thus avoid the requirement of compensation for what would otherwise be a compensable regulatory taking."[35]

Nuisance determinations are both local and dynamic. If the aphorism "all politics are local" is correct, surely it applies to political efforts to reallocate property, which are necessarily local. A house on a barrier island susceptible to erosion and hurricane gales is not the equivalent of a house on the prairie in Kansas. So too, as the subtleties of local ecology are better understood by modern science and incorporated into local conceptions of harm, the house built yesterday may not be the equivalent of the house built today.

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32. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 274 (1992) [hereinafter *Lucas Comment*].

33. *See* Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614, 747 (1988) (arguing that courts "develop moral principles to govern the proper exercise of power in the marketplace" and are "experts in such principles").

34. *Lucas Comment*, *supra* note 32, at 276.

35. *Id.* at 275 n.55.

Some landowners may think this concession to the dynamic understanding of reality advantages the State too greatly. Yet, even with this dynamism, the fairness of looking to the state judiciary to sort out competing private and public claims is evident. The *Lucas* opinion enhances that fairness in two ways. First, *Lucas* places the burden of establishing that a landowner's use is nuisance-like on the State, which has the best means of appraisal of its regulatory interests and the greatest incentive to demonstrate any private incompatibility with them.[36] Second, *Lucas* properly reserves some federal supervision of state nuisance determinations.[37] Ripeness and abstention doctrines will hold these occasions to a minimum, but the fact that the Takings Clause is a *federal* assurance of property right means that such occasions cannot be nonexistent. Moreover, federal judicial review logically follows from the implicit distinction between the independent reality of a state's common law of property, and the rare possibility that any court, even a state court, may apply it incorrectly.[38]

Nuisance law is imprecise.[39] However, despite this imprecision, it is clear that common law nuisance can govern the constitutional acceptability of land use regulation. The imprecision cannot be denied, because it is at the heart of the concepts of property and the police power. Neither property nor the police power is an absolute right; each evolves in context and over time. The state courts are in the best position to monitor the evolution of these two concepts, and the federal courts—by recognizing property as largely defined by an "independent source such as state law,"[40] nuisance—are in the best position to assay any takings claim that results from this evolution. This remains true whether the dispute arises out of a state or a federal regulation.

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36. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901-02 (1992).

37. *See id.*

38. *See, e.g.*, Henry P. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 435-38 (1977) (recognizing the distinction between state property law and its interpretation); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1412-13 (1991) (stating that federal review implies a federal component to a state definition of property); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1450-54 (1990) (recommending federal review for takings that result from reversals of precedent by a state court).

39. *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) ("There is general agreement that [the term "nuisance"] is incapable of any exact or comprehensive definition").

40. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Lucas should have decided *Dolan*.[41] It did, but not as explicitly or definitively as it might have. On the surface, *Dolan* appears to extend the nexus analysis begun in *Nollan*. As the Court noted in *Nollan*,[42] the nexus required must connect not only regulatory means and ends, but also the need for a particular regulatory imposition on a particular landowner. Complaints abound about the imprecision of the Court's "rough proportionality" language, but the Court's language is precise enough to convey two unmistakable points: the government has the burden of justifying its regulation, and the justification must be reconciled with the common law of property. The greenway dedication failed for the same reason the *Loretto* cable box failed—the right to exclude holds an important place in the common law definition of property. The bikepath dedication failed because there was no relationship between the landowner's activity and the public purpose sought to be furthered. The common law does not impose an affirmative obligation without cause.

Lucas and *Dolan* are siblings. When the takings analysis in *Dolan* is linked to the search for causation, it also is linked to the takings analysis in *Lucas* premised upon the common law definition of property. A landowner is not the proximate cause of a public land use problem, and by similar reasoning no public harm is created, by the landowner undertaking a common law use. We may want our neighbors to furnish bikepaths, beautiful buildings, or open space for an aesthetic view, and the charitable impulse may prompt individual landowners to make these welcome contributions to their communities. The rule of law, however, secures private land from public confiscation for these purposes.

Although *Dolan* and *Nollan* are rooted in the common law analysis announced in *Loretto* and made explicit in *Lucas*, these cases appear to continue an unfortunate contextual limitation. The facts of *Nollan*, *Dolan*, and *Lucas* nominally confine the Court's

41. For a suggested alternative opinion written and published *before* the case was decided, see Kmiec, *supra* note 27 (arguing that the *Dolan* easement is compensable because it effects a total deprivation of a state-law recognized portion of the Dolans' land, and that the required dedications did not inhere in the owners' title).

42. Justice Scalia, foreshadowing the Court's opinion in *Dolan*, wrote, "If the Nollans were being singled out to bear the burden of California's attempt to remedy [the various regulatory] problems, although they had not contributed to [them] more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 n.4 (1987).

resolution of the takings puzzle to either property concession or total diminution in value cases. Both factors are remnants of the outdated "too far" or ad hoc approach, and both now deserve outright repudiation by the Court.

There is no constitutional basis for confining the *Lucas* analysis or the derivative *Dolan* and *Nollan* nexus analysis to cases of complete value deprivation or property concession. The Court implicitly recognized this by vacating and remanding a case involving fee exaction.[43] The common law of property recognizes property in many forms, physical and monetary; specious arguments should not obscure this point. Therefore, the Court arguably was mistaken in including dicta in *Dolan* suggesting that the "rough proportionality" standard might not be applicable to general land use limitations.[44] It is error to conclude that land con-

43. *See* Ehrlich v. Culver City, 114 S. Ct. 2731 (1994). The California Court of Appeal had held that a $280,000 "mitigation" fee Culver City imposed upon a landowner who intended to convert his unprofitable private tennis club into town homes was valid. *See* Ehrlich v. Culver City, 19 Cal. Rptr. 2d 468, 473-76 (1993). The court also held that Culver City could require the developer to pay $33,220 in lieu of placing art on the town home development. *See id.* at 480-82. The Supreme Court vacated the judgment and remanded the case for reconsideration in light of *Dolan*. The notion that private owners must maintain recreational uses or supply "public art" on their property for public enjoyment would be a novel one even under the common law of California. On remand, the California Court of Appeal sustained the exactions, notwithstanding *Dolan*, in an opinion that the court (wisely) directed to remain unpublished. *See* Ehrlich v. Culver City, Case No. B055523 (Cal. Ct. App. 1995), *review granted* (Cal. 1995) (No. 5033642).

To reach its result, which is quite jarring to those of us residing in less exotic environments, the California appellate court asserted that "it is beyond dispute that the City has a legitimate government interest in making available [*private*?] community recreational facilities." *See id.*, slip op. at 19 (query and adjective added). Reading this without the adjective, one is tempted to say that cities do have unquestioned authority to buy park land and to put up public tennis courts and to tax all of its residents for these amenities. But on second reading in context, it is apparent that this well-established common law authority is not what the city is asserting, but rather the extraordinary notion that once a private landowner has undertaken a permitted common law use, like a private swimming pool or tennis court, he either must continue that use or must pay to stop, or, as the appellate court blithely comments several times, go out of business or sell the property.

The appellate court's analysis well illustrates the danger—warned against in this Article—of not seeing the relationship between *Lucas*'s reliance upon the common law of nuisance as the premise to *Dolan*'s inquiry into whether a landowner can in any credible way be said to be the "cause" of harm that then can be addressed legitimately by the police power.

In theory, of course, a given community might refine its common law over an extended period of litigation to include affirmative recreational and artistic exhibition duties within the common law conception of private property ownership. One can imagine this, but given the loss of personal freedom entailed by such coerced duties, few would care to live in such a community. However, this is not the present state of the common law of ownership in California, even though the appellate court disingenuously asserted that requiring recreational mitigation and art fees is no different than routine subdivision requirements for storm drains, curbs, and gutters.

44. The Court observed that Mrs. Dolan's situation differed from a case involving "essentially legislative determinations classifying entire areas of the city." Dolan v. City of

cessions, fee exactions, and total deprivations differ in kind from garden variety land use restriction—they differ in degree only. Concessions, exactions, and total deprivations involve matters of diminution in value, which, unlike the common law of property, are not at the explanatory heart of the purpose of the Takings Clause.

The diminution in value formulation may forestall temporarily the Court's recognition that *Loretto*, *Nollan*, *Lucas*, and *Dolan* are all of a piece; the odd man out is *Penn Central* and its distant ancestor, *Pennsylvania Coal*. The later cases convert diminution in value, at the core of *Penn Central*, into a side issue or an early surrogate for the more searching inquiry into whether the police power has been asserted in league with, or opposition to, the common law. Even *Penn Central* recognized diminution in value as a side issue with its reference to "reasonable investment-backed" expectations. These expectations are formed largely in reference to state common law. If the Court is to find the proper denominator for the loss calculation fraction, the answer is to be found in such reasonably formed expectations.

The *Penn Central* position that landowners cannot conceptually sever their property for purposes of demonstrating regulatory loss will not hold. It should not hold because it is fundamentally at odds with the common law nature of property in which expectations often (but not always) are formed with respect to discrete aspects or segments of property. Property investment, development, sale, and descent rely upon the flexibility and utility of such property segmentation; it is artificial for the Court to maintain an anti-conceptual severance posture. This feature of *Lucas*, along with the parallel dictum in *Dolan* that general use limitations are not subject to heightened scrutiny, gradually should now recede.

Tigard, 114 S. Ct. 2309, 2316 (1994). The Court also explained that the *Dolan* case involved a property concession. As argued here, these distinctions are partially beside the point if they are used to distract the Court from the more fundamental takings inquiry—whether there has been a disproportionate imposition of public burdens in light of the common law of property. A property concession may be an example of a disproportionate burden, but it is not the only example. A general law, in application, can disproportionately burden as well, whether or not it involves a property concession. The Court seemed to grasp this point by characterizing Mrs. Dolan's circumstance as involving an "adjudicative decision." *Id.* Later, the Court used this "adjudicative" label again to explain why the burden of proof is on the city. *See id.* at 2320 n.8. This adjudicative label and burden shift should apply to a circumstance in which a general use restriction is used to justify a permit denial, provided the plaintiff has made a prima facie showing that the restriction and denial are inconsistent with the common law property interest involved.

Although there is no constitutional limitation preventing the Court from removing the anti-conceptual severance or general use regulation exceptions from the Court's successful balancing of the property and the police power, there is a pragmatic one: the limited nature of judicial resources. It will take time, but several factors should help the Court meet this concern. First, the standard for a taking claim to be ripe for review is high.[45] Second, state common law already is developing in ways that give greater identification and precision to the property segments that in proper cases should form the denominator against which to measure loss.[46] Once this happens, it is a minor step to the recognition that general use limitations can result in compensable losses every bit as much as property invasions, concessions, exactions, or total deprivations.

The takings puzzle has been solved. Of course, its specific applications always will remain contentious. As with other features of our constitutional system, a "machine that would go by itself,"[47] takings analysis is subject to constant push and counterpush; so too, the destiny of the countervailing property and police power forces. *Dolan* is a modern work of genius anchored in the common sense of the ancient (yet dynamic) principle of the common law. The Supreme Court worked its way out of a judicially complacent posture that was as untenable as it was dangerous to the importance of the preservation of property to the republic.[48] In this, the members of the present Court likely would attribute the resolution of the takings puzzle

45. A "final" decision is said to exist only after the landowner makes a "meaningful"—that is, not grandiose—proposal and makes at least one attempt at a variance should the development proposal be rejected. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (holding that a takings case was not ripe for review when the developer had not obtained a final decision as to whether an ordinance and its regulations applied to his property).

46. *See* DOUGLAS W. KMIEC, ZONING AND PLANNING DESKBOOK § 7.02[5][b] (1995) and cases cited therein. The Federal Circuit also has begun to outline factual circumstances in which a discrete segment may be the relevant focus of analysis. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); KMIEC, *supra*, at § 7.02[5][a].

47. *See generally* MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO BY ITSELF (1986).

48. James Madison wrote, "Government is instituted to protect property of every sort .... This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 14 PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983); *see also* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (1991) (arguing that property rights and personal rights should be accorded the same degree of constitutional protection); Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991) (suggesting that the protection of property rights has played a central role in the history of the United States).

less to themselves than to those who "built better than they knew," the Framers of our Constitution.[49]

49. The expression now modernly employed to refer to the Founders actually comes from a bit of doggerel popular in the 19th Century: "The hand that rounded Peter's dome / And groined the aisles of Christian Rome / Wrought in sad sincerity. / He builded better than he knew!" FRED R. SHAPIRO, AMERICAN LEGAL QUOTATIONS 151 (1993).