THE RETURN OF THE PLATONIC GUARDIANS: *NOLLAN* AND *DOLAN* AND THE FIRST PRONG OF *AGINS*

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Pluralitas non est ponenda sine necessitate. [1]

I. INTRODUCTION

In a previous article,[2] both the genealogy and the wisdom of the Supreme Court's decision in *Agins v. City of Tiburon*[3] were called into question. In particular, it was argued that the Court's selective reliance on *Euclid v. Ambler Co.*[4] on one hand, and *Nectow v. Cambridge*,[5] on the other produced a constitutional test in land-use law at discredited substantive due process doctrine from the *Lochner*[6] era. Moreover, it was argued that *Agins* is a case with a dubious parentage, born of an eighty-year-old wrong turn in *Pennsylvania Coal Co. v. Mahon,*[7] which did nothing to provide a more definite takings test than the already problematic standard set in *Penn*

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1 WILLIAM OF OCCAM, QUADLIBETA, Book V. c.1324. Generally translated as "complexity is not to be assumed without necessity." "Occam's Razor" is a method of inquiry suggesting that when confronted with two or more explanations for the same phenomena, the simplest is to be preferred.

2 Edward. J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the* Agins' *Tests*, 33 URB. LAW. 343 (2001).

3 447 U.S. 255 (1980).

4 272 U.S. 365 (1926).

5 277 U.S. 183 (1928).

6 Lochner v. New York, 198 U.S. 45 (1905).

7 260 U.S. 393 (1922).

Central Transportation Co. v. New York City.[8] The case exemplified a recurring problem of constitutional interpretation, whereby public perceptions of judicial impartiality and the rule of law are fashioned, by judges, into instruments of political change (or, more often, opposition to change).

The purpose of this article is to press home the analysis of *Agins* by calling into question the legitimacy of the two Supreme Court decisions based on the "substantially advance legitimate state interests" test[9] announced in: *Nollan v. California Coastal Commission*[10] and *Dolan v. City of Tigard*.[11] To the extent the first prong of the *Agins* test is bad law, it is suggested that *Nollan* and *Dolan* must also fall, because it is based on that prong. Moreover, it should be noted that *Nollan* and *Dolan* stand alone, and aberrant, as being the only two land-use decisions that turn solely on the first prong of the *Agins* test. Never before (or since) these cases has the Supreme Court seen fit to impugn a land-use ordinance as a taking on the basis that it failed to substantially advance legitimate state interests.[12]

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[8] 438 U.S. 104 (1978). John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIG. 3 (2000) (criticizing the *Penn Central* tests).

[9] "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." (citations omitted) *Agins*, 447 U.S. at 260 (citing *Penn Central*, 438 U.S. 104, 138, n. 36).

A truly contradictory view emerges in the next sentence, where Justice Powell explains what is meant by "a taking." He states: "A determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins*, 447 U.S. at 260.

Yet this cannot be the case if the governmental action can be saved under the first prong of the *Agins* test by demonstrating that it *does* substantially advance a legitimate state interest.

[10] 483 U.S. 825 (1987).

[11] 512 U.S. 374 (1994).

[12] *See generally Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

Certainly the first prong of the *Agins* test has been questioned when applied *outside* the context of land-use regulations. In *Chevron v. Cayetano*,[13] the Court of Appeals for the Ninth Circuit addressed the question of whether an Hawaiian statute that regulated the maximum rent an oil company could charge dealers leasing its service stations ("Act 257") effected a regulatory taking on the ground that it failed to substantially advance a legitimate state interest. In a concurring opinion that disagreed with the rationale employed by the majority, Judge William Fletcher argued that the proper test for Act 257 was the less rigorous "reasonableness" test under the Due Process Clause of the Fourteenth Amendment, and not the "substantially advances a legitimate state interest" test under the Takings Clause.[14] The majority decided it was not open to them to decide the case under the Due Process Clause as the statute had not been challenged on that ground, but it is only Judge Fletcher who demonstrates sensitivity to the overlap between the first prong of *Agins* and the *Lochner* approach to the validity of economic regulations.[15] He states:

> The question before the judiciary is not the advisability of rent control laws but rather their constitutionality. Ever since its retreat from economic substantive due process at the end of the 1930s, the Supreme Court has essentially left it to the other branches of government to decide, in their political wisdom, whether to adopt rent and price controls.[16]

Nevertheless, the majority persisted with an analysis that, if followed, would appear to transform what would otherwise be "rational basis" scrutiny under the Fourteenth Amendment into

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13 224 F.3d 1030 (2001), *cert. denied,* 121 S. Ct. 1403 (2001).

14 *Id.* at 1033.

15 *Id*. at 1048.

16 *Id.*

substantive review of the likely effectiveness of the regulation under the Fifth Amendment.[17] Readers could be forgiven for a sense of déjà vu here, as this must be one of the more curious polar reversals of a legal position from early in the last century.

Cases like *Chevron v. Cayetano* and opinions like those of Judge Fletcher which, while not having the force of law, have the better of the argument to compel a view that questions the constitutional basis for *Nollan* and *Dolan*. Thus, the argument in this article consists of three principal segments. First, *Nollan* and *Dolan* will be explained and shown to be founded exclusively on the first prong of the *Agins* test for a taking. As such they resurrect a form of substantive due process that most thought had been consigned to the dustbin of history and, in so doing, they distract judges and the wider community from the text of the Fifth Amendment and from legislative and political solutions to perceived regulatory inequities. Secondly, it will be argued that the recent Takings Clause jurisprudence proceeds on unstated premises of natural law and natural rights that have been rejected in other areas of constitutional law. Finally, the case will be made for the return to a positivist approach to constitutional adjudication, and, in this vein, to an administrative law model providing a simpler and non-constitutional solution to the genuine fears of improper public administration, while leaving the public policy field clear for the people's elected representatives to make law as they see fit. Public officials who make decisions in the public interest are both legally and politically responsible for those decisions.

II. *NOLLAN* AND *DOLAN*

The Nollans were a couple with small children who leased a small beachfront lot in Ventura County, California.[18] Their lease incorporated an option to purchase the lot, but this

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17 *See generally id.*

18 *Nollan*, 483 U.S. at 827.

option was conditional on their undertaking to demolish the small bungalow on the lot and replace it.[19] The Nollans were amenable to compliance with the condition, because the previous bungalow was in a state of disrepair. In early 1982 they applied under the California Code for a coastal development permit from the California Coastal Commission allowing them to demolish the bungalow and replace it with a modern three-bedroom house, in keeping with the rest of the neighborhood.[20] Yet, rather than grant the permit to the Nollans outright, the Commission indicated that it would allow the development, subject to the Nollans' allowing the public an easement to pass across the beachfront side of their property.[21] It was the Commission's view that allowing public access would serve to lower the "psychological barriers" to the public using the beach.[22] The Nollans, believing that those using the public access would cause noisome disturbances to their family, challenged the condition and, when met with a final public hearing from the Commission, filed a petition for writ of administrative mandamus with the Ventura County Superior Court, arguing that the condition on development violated the Takings Clause of the Fifth Amendment.[23] In 1987, the case came before the federal Supreme Court.

The existing caselaw on regulatory takings provided little clue as to how *Nollan* would be decided.[24] However, the Supreme Court did not frame the issue in terms of whether the permit

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19 *Id*. at 828.

20 *Id*.

21 *Id.*

22 *Id*.

23 *Nollan,* 483 U.S. at 828.

24 However some indication of what was to come could have been gleaned from Justice Scalia's strongly worded dissent in *Pennell v. City of San Jose,* 485 U.S. 1 (1988). Landlords brought an action against an ordinance which allowed a hearing officer to determine whether an annual rent increase in excess of 8% was reasonable, having regard to, among other things, "the hardship of the tenant." Their challenge was facial rather than as-applied, claiming that the ordinance itself violated the Fifth Amendment (and the Due Process and Equal Protection Clauses of the Fourteenth Amendment). Justice Scalia said:

condition would have deprived the Nollans of all economically viable use of their property. Rather, Justice Scalia, delivering the opinion of the Court, relied on the "substantially advances a legitimate state interest" test put forward in *Agins*. The Commission was required to provide justification for the easement condition, and it argued that the easement was necessary to foster "visual access" to the beach and to overcome the "psychological barrier" created by the shore development.[25] The Court appeared to accept, at least in the abstract, that the Commission's reasons given by way of justification for the condition were legitimate state interests.[26] Nevertheless, paying very close attention to the facts of the case, it ultimately accepted the Nollans' argument that the permit condition did not advance the same ends as would have been advanced by an outright prohibition on development.[27] What the Court called the "essential nexus" between the permitted ends and the chosen means was missing, and the permit condition was held to have violated the Takings Clause of the Fifth Amendment on that basis.[28]

Dolan was also concerned with a conditional development permit. The Dolans had applied to the City Planning Commission of the City of Tigard for permission to redevelop a 1.67-acre parcel of land, comprising a plumbing and electrical supply store and a gravel parking

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> As we said in *Agins*, a zoning law 'effects a taking if the ordinance does not substantially advance legitimate state interests…or denies an owner economically viable use of his land.' The present challenge is of the former sort. Appellants contend that providing financial assistance to impecunious renters is not a state interest that can be legitimately furthered by regulating the use of property. Knowing the nature and character of the particular property in question, or the degree or its economic impairment, will in no way assist this inquiry. *Id*. at 18-19.

25 *Nollan*, 483 U.S. at 834.

26 *See id.*

27 *Id*. at 837.

28 *Id.*

lot.[29] They intended to double the size of their electrical supply store (to 17,600 square feet), to pave the existing parking lot, and then to continue development of the lot with an additional structure and additional parking.[30] The Dolans' expansion plans were consistent with the City's land zoning scheme in the central business district, so the Commission granted Mrs. Dolan's ("Dolan") permit application (her husband having died during the permit process), subject to a condition that she dedicate a portion of the property lying within an old floodplain for the improvement of a storm drainage system and a requirement that she keep that portion open for public recreation.[31] She was also asked to dedicate an additional fifteen-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.[32] The condition was imposed in accordance with the City's Community Development Code and was geared towards ensuring that the increased area of impervious surfaces on the Dolan site would not disrupt the water drainage situation in the floodplain area.

Dolan challenged the condition before the Land Use Board of Appeals ("LUBA") on the ground that the City's dedication requirements were not related to the proposed development and amounted to an uncompensated taking under the Fifth Amendment. LUBA, and subsequently the Oregon Court of Appeals and Supreme Court, rejected Dolan's contention, and the case came before the Supreme Court in 1994.[33] The Court expanded the "essential nexus" standard from *Nollan* and required that the City demonstrate a "rough proportionality" between the planning condition and the impact of the development. Rough proportionality did not require a "precise

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29 *Dolan*, 512 U.S. 377.

30 *Id.*

31 *Id.* at 377-78.

32 *Id.* at 378.

33 *Id.* at 382.

mathematical calculation," but it did require that the government make an individualized determination "that the required dedication is related both in nature and extent to the impact of the proposed development."[34] Demonstrating that *Dolan* went considerably beyond *Nollan*, the Court held that the City's permit conditions easily satisfied the *Nollan* "essential nexus" test. However, in holding that the permit conditions were in violation of the Takings Clause, the Court stated that the City had not shown why allowing the public to walk through the greenway floodplain area was necessary for flood control purposes, nor had it shown to the required extent that dedication to the City of the pathway for pedestrians and cyclists was "roughly proportional" to the additional number of people visiting Dolan's expanded store.[35] As with *Nollan*, *Dolan* is characterized by the Court's close attention to the facts and a robustly skeptical approach to the legitimate state interests pled by the City to justify the permit conditions.

III. THE ROLE OF PRONG I IN THE NOLLAN/DOLAN ANALYSIS

Agins provided two tests for a taking, the second of which was whether a land use measure "denies an owner economically viable use of his land."[36] There is considerable argument as to whether *Agins* incorporated some or all of the tests of *Penn Central*,[37] but whether this means the first two of the *Penn Central* tests, or all three, or none of them, the crucial point is that it is a test that surely stems from a natural law philosophy of property rights,

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[34] *Dolan*, 512 U.S. at 391.

[35] *Id*. at 390.

[36] *Agins*, 447 U.S. 255.

[37] J. Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 104 (1995) (arguing that it replaces the *Penn Central* test); *City of Wayneswill*, 900 F.2d 783 at 787 (4th Cir. 1990) (indicating it includes the *Penn Central* test); and *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) (stating that *Agins* includes only the economic impact and investment-backed expectations elements of the *Penn Central* test).

which has provided the ultimate justification for the Court's takings jurisprudence since *Pennsylvania Coal*.

Where the interests of an individual property owner clash with the public or governmental interest, property rights are viewed as the prime value, and exercises of official regulatory powers are viewed as an exception, or interference, requiring justification. Moreover, rather than understanding the Takings Clause in a literal way as requiring compensation for the physical taking of possession, or the taking of title to private property "for public use," the natural rights underpinning – and in particular the "bundle of sticks" analogy which so mesmerized Justice Oliver Wendell Holmes in *Pennsylvania Coal* – allows the Court to view any interference with the use of property, either as a taking, or as requiring a balance to avoid a taking.[38] The question is one of degree of interference, the extent of the restriction on economically viable uses, and it is only by appreciating this feature of the Court's jurisprudence that sense can be made of a claim that a regulation goes "too far" and thus amounts to a taking.

This understanding of property has been criticized elsewhere,[39] but the most striking feature of *Nollan* and *Dolan* is that neither case relies on these arguments (though we shall see below that they provide an essential background to the decisions) in order to establish the existence of a taking. Indeed, nowhere in *Nollan* or *Dolan* is there any analysis of the extent to which the conditions attached to the development permits in question affected either the value of the land or the landowners' ability to use the land.[40] In short, *Nollan* and *Dolan* do not turn on an application of the three-prong *Penn Central* test for a taking.

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38 *Pennsylvania Coal*, 260 U.S. 393.

39 Sullivan and Leeson, *Property, Philosophy and Regulation: The Case Against a Natural Law Theory of Property Rights*, 17 WILLAMETTE L. REV. 527 (1981).

40 *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

In *Nollan*, Justice Scalia recognizes that what has become the commonplace takings analysis under the second prong of the *Agins* test is unworkable in the case before him, given that the California Coastal Commission had not required the Nollans to make an uncompensated grant of an easement outright.[41] Instead, he cites *Agins* and *Penn Central* as authorities for the view that the Court has "long recognized" that land use regulation does not affect a taking if it substantially advances legitimate state interests. He continues, no doubt mindful of the novelty of the test:

> Our 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.[42]

His focus then shifts to the Commission's argument, by way of justification, that protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the beach are legitimate state interests.[43] Without deciding that these *were* legitimate state interests,[44] Justice Scalia turns to the question of whether they are substantially advanced by the conditioned permits.[45] In an embellishment of the *Agins* test, he requires that there be an "essential nexus" between the interest relied on by the state and the regulation made pursuant to that interest:

> If a prohibition designed to accomplish [some purpose] would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude

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41 *Nollan*, 483 U.S. 825.

42 *Id*. at 834.

43 *Id.*

44 *See id.* at 828. Justice Scalia's assumption that these are legitimate state interests contains within it the further assumption that it is ultimately the Court that decides what is and what is not a legitimate state interest. The Court thus reviews not only the means of government, but also the ends.

45 *Id.*

> that providing the owner with an alternative to that prohibition which accomplishes the same purpose is not.[46]

The question then became whether the condition in the development permit furthered the *same* purpose as an outright ban on development. This goes beyond the text of the test as put forward in *Agins* that the condition "substantially advance a legitimate state interest," and requires a direct link between the purpose of the regulation and the impacts caused by the owner's use of his property.[47] What is patently a question of administrative judgment became, under the gloss placed on the first prong of *Agins*, a question for substantive judicial decision. Having teased out the question to be answered, Justice Scalia embarked upon a curious and almost parodied analysis of whether a public right-of-way along the beachfront face of the Nollans' house would or would not serve to increase public access to the beach.[48] He concluded that it would not.[49] Reading the Commission's predictions of how the easement would affect public access to the beach in a literal and pedantic fashion, he concluded that the Coastal Commission's view that it would decrease the psychological barriers to the public using the beach was incompatible with their view that the new house would obstruct views of the beach:

> It is *impossible* to understand how it lowers any psychological barrier to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house.[50]

In effect, Justice Scalia himself took the final decision in a matter the legislature had left to be taken by the Commission. Furthermore, elements of the dissenting opinion of Justice Brennan

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46 *Nollan*, 483 U.S. at 836.

47 *Agins*, 447 U.S. at 265.

48 *See Nollan*, 483 U.S. 825.

49 *Id.* at 838.

50 *Id.* (emphasis added).

demonstrate not only the highly problematic nature of what is undoubtedly substantive due process by another name, but also the sheer impossibility of generating anything other than an *ad hoc* judicial decision on the facts with the *Agins* scrutiny.[51] Whereas Justice Scalia appears to have taken the view that increased public access to the beach could only follow if the public were able to see the beach from a location near the Nollans' house, Justice Brennan seems to have given more weight to the public interest in lowering the psychological barriers to the public from using the beach that might flow from people being able to see – presumably through the gaps between the houses on the beachfront – other people walking up and down in front of the Nollans' house.[52]

Moreover, going beyond the facts of *Nollan*, Justice Brennan's dissent (with Justice Marshall concurring) exposes many of the problems with this style of constitutional review:

> The first problem with this conclusion [that there is no reasonable relationship between the effect of the development and the condition imposed] is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century.[53]

Citing *Sproles v. Binford*,[54] which concerned an unsuccessful substantive due process challenge to a Texas law that regulated the maximum allowable weight for vehicles on Texas roads, Justice

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[51] *Id*. at 843 (Brennan, J. dissenting).

[52] Justice Scalia states, in *Nollan*, 483 U.S. at 840:

> JUSTICE BRENNAN argues that imposition of the access requirement is not irrational. In his version of the Commission's argument, the reason for the requirement is that in its absence, a person looking toward the beach from the road will see a street of residential structures including the Nollans' new home and conclude that there is no public beach nearby. If, however, that person sees people passing and repassing along the dry sand behind the Nollans' home, he will realize that there is a public beach somewhere in the vicinity. *Post*, at 849-850. The Commission's action, however, was based on the opposite factual finding that the wall of houses completely blocked the view of the beach and that a person looking from the road would not be able to see it at all.

[53] 483 U.S. at 842.

[54] 286 U.S. 374 (1932).

Brennan argued that the majority approach to the review of the State's exercise of its police power provided a "cramped" and "narrow" understanding of the rationality requirement for government action.[55] Perhaps ultimately and more importantly, Justice Brennan revealed an understanding of property rights, which differs, some would argue fundamentally, from that of the majority. He states:

> It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights. "[A]s a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer."[56]

He makes this point in the context of his argument that the Nollans could have had no reasonable claim on the second prong of the *Penn Central* test, the frustration of "investment-backed expectations." However, this is a difference of perception which underlies the first prong of the *Agins* test itself.

In *Dolan*, the Supreme Court took the *Nollan* analysis one stage further with the extension of the "essential nexus" requirement to a requirement that the government demonstrate a "rough proportionality" between the condition imposed and the nature and extent of the proposed development. Moreover, the Court makes explicit that it is engaged in a substantive

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55 *Id.*

56 *Nollan*, 483 U.S. at 857. In *Hughes v. Washington*, Justice Stewart stated:

> [S]urely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their rights from the United States somehow immune from the impact of these general state rules. *Joy v. St. Louis*, 201 U.S. 332, 342 (1906). For if they were then the property law of a State like Washington, carved entirely out of Federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union." *Hughes*, 389 U.S. 290, 295.

review of the government's action in imposing the dedication condition in Dolan's development permit.[57] It states:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm[.] But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[58]

Once again there is no analysis of whether the City of Tigard's dedication requirement in the development permit had any significant economic impact, or whether it affected investment-backed expectations.[59] Nor is there any serious analysis of the character of the condition, the sole question being the analysis of fit between means and ends presupposed by the first prong of the *Agins* test. Justice Stevens makes this clear in his dissent that previous state court decisions had examined not some particular interference with the right to exclude from one part of the land, but rather "the character of the entire economic transaction."[60] Further, he drew attention to the fact that Dolan offered no evidence that the burden of complying with the City of Tigard's dedication requirement would have any impact on the value or the profitability of her proposed development. Moreover, *Dolan*, like *Nollan*, is a case where the dissent reveals the subterfuge of the majority opinion on the question of substantive due process:

> The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. Even more consequential than its

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57 *Dolan*, 512 U.S. at 391.

58 *Id.*

59 *Id.*

60 *Id*. at 400 (Stevens, J. dissenting).

> incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago.[61]

Justice Stevens' reference to the novel burden of proof herein imposed on a city implementing its own comprehensive land-use plan relates to the argument put forward in this paper that the formulation of comprehensive plans should be encouraged, and will be referred to below. What is important at the moment, however, is his recognition, adding to that of the dissenters in *Nollan*, that the Court was reverting to territory it had long since rightly abandoned.

In a previous article, serious questions of legitimacy were raised concerning substantive due process and the subjective, vague and value-laden tests that purport to structure the Court's inquiries. It encourages the masking of judicial preferences with constitutional legitimacy. Further, given the standard of review is "on the merits" in that it amounts to the Court taking the decision again, and bearing in mind that the Supreme Court is in any plausible scenario the last word on the Fifth Amendment. The Court's pronouncements on questions of hypothetical fact are carried on an underlying presumption of judicial infallibility. Justice Scalia's decisions on questions that any reasonable person would regard as debatable – whether the public will be encouraged to use a beach, for example – are imbued with a tone of finality that only the infallible would assert. There can be equally little doubt that Justice Scalia's theory and practice

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[61] *Id*. at 405. Moreover, it seems that if the Court is sufficiently offended by a land-use regulation that appears to arbitrarily single out an individual landowner, it may invoke the Equal Protection Clause of the Fourteenth Amendment. The Court stated:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment[.] In so doing we have explained that "'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"

Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).

are in conflict in this area.[62] Indeed, it is because of the Court's own handiwork in the field of regulatory takings, that it is no longer a satisfactory answer to the charge of "substantive due process" to plead a label and say that *Nollan* and *Dolan* were decided under the Fifth Amendment, rather than the Fourteenth Amendment.

The Court's decision in *Nollan* announces no less than a return to the doctrine of substantive due process.[63] *Nollan* takes the first prong of *Agins* in a new direction in two ways. First, in requiring that a permit condition further the same ends as those, which would be advanced in justification of an outright prohibition on development, *Nollan* narrows the government's range of possible justifications for the condition. *Agins* required only that a regulation or condition "substantially advance legitimate state interests," not that the interests advanced by a permit condition be the same as those interests advanced by a prohibition.[64] Secondly, *Nollan* provides tantalizing glimpses of the Court's thinking on the substance of the "essential nexus" requirement.[65] For example, Justice Scalia said that although the purpose of the permit condition "may be legitimate, [it] is inadequate to sustain the ban."[66] Similarly, a few lines down he states that, "[w]hatever may be the outer limits of 'legitimate state interests' in the

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62 Fifth Amendment jurisprudence is little better than case-by-case decision making:

> We see broad agreement across the spectrum of justices that the jurisprudence remains a largely ad hoc one, occasional efforts by individual justices to find per se rules notwithstanding. The Court, we think, will continue to sacrifice certainty of outcome on the altar of flexibility.

MELTZ, MERRIAM & FRANK, THE TAKINGS ISSUE – CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 10 (Island Press, 1999).

Compare this analysis of the field with the publicly expressed views of Justice Scalia – whose opinion in *Nollan* is a particularly extreme example of "flexibility" – in his 1989 essay. Justice Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (delivering six arguments *against* a discretion-conferring approach).

63 *See generally Nollan*, 483 U.S. 825.

64 *Id.* at 837.

65 *Id.*

66 *Id.*

takings and land-use context, this is not one of them," and that, "this case does not meet even the most untailored standards."[67] Justice Scalia was clearly of the view that a new standard of Constitutional review had been announced, and that the Commission's permit requirement in *Nollan* was so plainly on the wrong side of that standard that there was no need for further elaboration. It appears that the *Nollan* court had already decided on substantive due process as its chosen end for the Takings Clause.

However, even if *Nollan* represents the legitimacy of the ends of land-use planning, then *Dolan* is calculus to weigh the means to that end. The Court must have known that to take root, the germ of substantive due process in *Nollan* would need augmentation by a gauntlet of caselaw through which public officials charged with making planning decisions would have to run. In *Dolan* this comes in the form of the "rough proportionality" criterion, and the requirement of "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." These are mere elaborations of the *Nollan* "essential nexus" rather than additions or extensions of the test, but the *Dolan* requirement of "fit" between legitimate state interests and government actions provides the means through which substantive due process has been reintroduced.

There is an additional problem with the first prong of the *Agins* test for a taking, and it is one that, to some extent, besets every oft-repeated judicial gloss on a legislative or constitutional provision. Over time, with enough repetition, judicial pronouncements regarding the purpose or effects of a constitutional provision become *talismanic*, acquiring greater legal significance than the text of the provision itself. In *Dolan*, the line of reasoning in Chief Justice Rehnquist's

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[67] *Id.* at 838.

opinion is a classic illustration of this phenomenon.[68] Within three pages of the case report, he shifts from the text of the Takings Clause, to the purpose behind it, as put forward in *Armstrong v. United States*,[69] and finally on to the Court's opinion in *Nollan* and the "nexus" test, which itself derives from *Agins*' "substantially advances legitimate state interests" test. The *Armstrong* purpose is particularly problematic, as from it emerges a principle of global scope, open to arbitrary application. In *Armstrong* Justice Black understood the Takings Clause thus:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole.[70]

This "principle" or a variation on it has been used on multiple occasions since its first enunciation in *Armstrong*[71] and, with each new repetition, it becomes more deeply entrenched and more of a distraction from the original text in the Fifth Amendment.[72] Nowhere in *Nollan* or

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[68] *Dolan*, 512 U.S. 374.

[69] 364 U.S. 40 (1960).

[70] *Id*. at 49.

[71] This formulation from *Armstrong* also appeared three times in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001). The formulation was used by Chief Justice Rehnquist and Justice Kennedy and in the concurring opinion of Justice O'Connor. *Id*. at 2458, 2466. In his dissenting opinion, Justice Breyer also accepts that the Takings Clause is concerned with fairness and justice. *Id*. at 2477.

[72] Justice Scalia's opinion in *Nollan* gives some indication of the potential reach of this principle. In footnote 4, he states:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it 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, 483 U.S. 825.

Once again, Justice Scalia's natural rights understanding of property – where property comes first and laws and regulations are an interference – is evident in this quote. The phrase "singled out" connotes persecution, and the choice of the word "burden" is compelled by the Court's inability to see past a rhetoric that places the individual and his property at the center of a pre-social universe; the development condition *must* have been a "burden" because the

Dolan is there any examination of whether the property has been "taken" in any sense people would ordinarily attribute to that word. Moreover, and more importantly, there is no discussion of the "public use" issue. Indeed, the "legitimate state interests" test serves, if anything, to undermine any inquiry into the public use issue, as its requirement of a proportional fit between means and ends in this regard (which derives from the *Armstrong* purpose) removes the focus from whether there is any state "use" of the property at all. To use property, one ordinarily has to have control and possession of it. Neither the Nollans' nor the Dolans' property was being "used" by the state through the conditions in their development permits.[73] In the final analysis, it was up to the Nollans and to Dolan whether to part with any property at all, as there was no requirement that they press ahead with their developments. Instead, the question became whether the Nollans and Dolan were required to bear a burden that "in all fairness and justice" should have fallen on the public (i.e., the state) as a whole. It hardly merits observation that fairness, justice, and the extent to which individuals should be subject to the will of society are open-ended questions with few uncontroversial answers, or that Supreme Court justices can use these inherently flexible standards as a vehicle for their own personal politics.[74]

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paradigmatically self-interested individual necessarily has no interest in improving public access to the beach. *See also supra* note 61.

[73] In *United States v. General Motors*, 323 U.S. 373, 377-378 (1945), Justice Roberts contrasted the term "property" used in "its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law" with "a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." What Justice Roberts fails to do, however, is distinguish clearly between natural rights and legal rights. He conflates the two. Our view is not that citizens may not hold numerous rights over a thing, but rather that those rights are knowable *legal* rights, not unspecified, unknowable natural rights derived from some mythical narrative. Although we accept – indeed argue that – property rights are rights as between people in respect of things, Justice Roberts' easy "how things really are" certainty about the bundle of sticks (or "group of rights inhering") masks an approach to legal adjudication indicative of a descent into irrationalism.

[74] *Armstrong* facilitates result-oriented jurisprudence under the guise of Constitutional interpretation. A similar bending of the Takings Clause to fit the facts is evident in *United States v. Causby*, 328 U.S. 256 (1946), a case from the same period. Respondents owned a dwelling and a chicken farm near a municipal airport, leased by the government for military use. Heavy bombers and fighter aircraft flew over the respondents' property as low as 83 feet, causing the chickens to injure themselves, alarming the respondents and destroying the property's usability

It is the Court's natural rights theory of property that prevents it from seeing – or from conceding – the nature of the arrangements in these cases, namely that they were bargains, whether of questionable wisdom or not, between planners and the individual private property owner, whereby permission for the private individual to develop his property was granted in return for compliance with the development condition. The Supreme Court is simply unable to acknowledge the commonsense equity of this approach – instead erecting a heightened standard of scrutiny on the government conditions alone – because it views the planning scene as a series of restrictions on an indeterminate "right" to build, rather than as a democratic and accountable forum for structuring and accommodating the competing interests of individuals in a community where land is a unique and finite resource. In *Nollan*, Justice Scalia is emphatic in his view that the "chicken and egg" question of private property and public planning controls has a sensible answer:

> [T]he right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as

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for their business. The Court held that flights that were "so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the land" amounted to a taking under the Fifth Amendment. *Id*. at 266. With its focus on the interference with use and enjoyment of land, *Causby* is clearly a nuisance case masquerading as Constitutional law. However, coming two years before the enactment of the Federal Tort Claims Act of 1948, the Court had to resort to the Takings Clause to achieve its desired end.

Moreover, it appears that the Takings Clause is not the only provision through which the Supreme Court can achieve its pre-determined doctrinal goals. In *Saenz v. Roe*, 119 S. Ct. 1518 (1999), the Court revived the long-dormant Privileges and Immunities Clause by striking a Californian law denying full Californian welfare benefits to newly arrived residents, partly on the ground that California's durational residency requirements frustrated such persons in the exercise of their right to become permanent residents of California (the so-called "third component" of the right to travel). In his dissent, Justice Rehnquist stated:

> Durational residence requirements were upheld when used to regulate the provision of higher education subsidies, and the same deference should be given in the case of welfare payments. See *Dandridge v. Williams*, 397 U.S. 471, 487, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970) ("The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

Id. at 1534.

Nevertheless, the Court sanctioned a reading of the Privileges and Immunities Clause, which takes power from the hands of government and gives it to the judiciary, again under the guise of Constitutional "interpretation."

> a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange[.]"[75]

This contrasts markedly with the understanding of Justices Brennan and Marshall in their dissent in *Nollan*, where they state that it is "axiomatic" that state law is the source of the strands in a property owner's bundle of rights.[76] One of the many features that makes this debate between the positivists and natural lawyers[77] so problematic is that the Takings Clause, other than recognizing the existence of private property, does not tell us in the text which approach is the correct one. This itself has implications for the claim of Scalia, that he is merely interpreting the text. However, although it is the economic impact, *Penn Central* test, that explicitly evinces the dominance of the natural rights agenda among the current Justices of the Supreme Court, we should note that the reintroduction of substantive due process through the first prong of *Agins* owes as much to the natural rights theory as the "rewriting of the Constitution" that has taken place from *Pennsylvania Coal* onwards.

IV. POSITIVISM VERSUS THE PLATONIC GUARDIANS?

While *Nollan* and *Dolan* must be criticized for re-establishing substantive due process as a technique of constitutional review, it is equally fitting to view them more broadly as the articulation of a particular legal-political tradition in constitutional law. This tradition can be traced perhaps as far back as to the proposals for a council of revision advanced by Edmund Randolph, Governor of Virginia, at the Constitutional Convention of 1787. Randolph proposed a

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75 *Nollan*, 483 U.S. at 834 n.2.

76 *Id.* at 857.

77 *See id.* at 853 (Brennan, J. dissenting) (providing judicial recognition of this philosophical approach).

> If the Court is somehow suggesting that "the right to build on one's own property" has some privileged natural rights status, the argument is a curious one. *Id.*

council of the President and judiciary with the power to veto legislation, and in this was supported by James Wilson, later Justice Wilson, of Pennsylvania who argued that it was insufficient for the judges' powers to be limited to striking down laws that were unconstitutional; they should also have the power to strike down laws that were unjust, unwise, dangerous, destructive and yet may "not be so unconstitutional as to justify the Judges in refusing to give them effect." On at least two occasions, proposals that the federal judiciary have a veto power over the legislative process were defeated, but the unwarranted faith in the wisdom of the Justices displayed by Randolph and Wilson survives in the current Takings Clause jurisprudence. In its essence it is part of a natural law and natural rights tradition of adjudication where the constitution, though a man-made document, is read as if it were merely the earthbound twin of a higher order law.[78]

What follows in the next section stems from an alternative jurisprudential tradition that emphasizes a positivistic approach to constitutional interpretation, fully cognizant of the man-made nature of the document, and is both more faithful to the original text and more suspicious of the layers of judicial gloss placed on its provisions in the name of abstract "purpose." In discarding a natural rights premise, this tradition is sensitive to the need for balance between courts and legislators, and maintains a clear-eyed realism on the potential for concealing judicial political bias within the rhetoric of natural law and natural rights. In the context of property rights in particular, it has been evident for some time, even to those Justices with an inclination towards natural law philosophy, that natural rights are insufficiently precise objects of

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[78] Whether we view this tradition as owing more to the Burkean, Christian and communitarian conception of natural law or the Jeffersonian vision stemming from Locke, both arms of the tradition spawn a style of judicial decision-making that effortlessly moves back and forth between the actual text of the Constitution and the judicial divination of the "purpose" of its various provisions. *See* R. Randall Kelso, *The Natural Law Tradition of the Modern Supreme Court: Not Burke, but the Enlightenment Tradition represented by Locke, Madison and Marshall*, 26 ST. MARY'S L.J. 1051 (1995).

adjudication and delineate little more than desirable end-states to be achieved through positive law. For example, in an essay entitled "Natural Law,"[79] Joseph Story, Justice of the Supreme Court responsible for the decision in *Prigg v. Pennsylvania*,[80] put forward a limited view of natural rights of property:

> Whatever right a man may have to property, it does not follow, that he has a right to transfer that right…or to transmit it, at his decease, to his children or heirs. The nature and extent of his ownership; the modes in which he may dispose of it; the course of descent, and distribution of it upon his death; and the remedies for the redress of any violation of it, are, in great measure, if not altogether, the result of the positive institutions of society.[81]

Justice Story's view was that natural law may inform the decisions and enactments of legislatures but it did not stand as an alternative or parallel to positive law. It consisted, if anything, of ends to be practically achieved, expressing, as Eisgruber states, "not so much the gap between what the law is and what the law ought to be, but rather the gap between what the polity is and what the polity ought to be."[82] The nature and extent of ownership of property was an issue reserved for the legislatures. Story's view of natural law as bearing on political rather than legal decision-making is therefore both consistent with the alternative jurisprudential tradition of constitutional positivism, and perceptive of the inherent political dangers should the Court attempt to incorporate natural law concepts into its reasoning.

In what may be one of the most sustained and incisive critiques of the value-laden constitutional review of the kind currently found in Takings Clause jurisprudence, Justice Hugo

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79 Joseph Story, *Natural Law*, in ENCYCLOPEDIA AMERICANA 150-58 (Francis Lieber, ed., 1832).

80 41 U.S. 539 (1842).

81 Story, *supra* note 79.

82 Christopher L. M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 319 (1988).

Black, in his dissent in *Griswold v. Connecticut*,[83] railed against what he saw as the Court's usurpation of the power of the democratically elected state legislatures under the guise of constitutional "interpretation." *Griswold* concerned a Connecticut statute, which made the use of contraceptives a criminal offense.[84] The directors of the Planned Parenthood League of Connecticut were charged and convicted as accessories under the statute for having given information, instruction and advice to married persons as to the means of preventing conception.[85] On appeal, the Supreme Court held that the statute was invalid as an unconstitutional invasion of the right of privacy of married persons.[86] Justices Harlan and White would also have invalidated the law as violative of the Due Process Clause of the Fourteenth Amendment, and Justice Goldberg relied on the Ninth Amendment.[87] While agreeing with the majority that the Connecticut statute was offensive and unwise, Justice Black vehemently dissented on the separate question of its constitutionality. Justice Black's dissent is lengthy and contains (at least) three interwoven arguments which, it is submitted, amount to a positivist perspective on constitutional interpretation that differs from, and indeed contradicts, the teleological method pursued by the majority in *Griswold* and perpetuated by the current court in *Nollan* and *Dolan*.

First, Justice Black argues that there simply is no constitutional "right of privacy" per se.[88] He notes that there are "guarantees in certain specific constitutional provisions which are

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83 381 U.S. 479 (1965).

84 *Id.* at 480.

85 *Id.*

86 *Id.* at 485-86.

87 *Id.* at 486-87.

88 *Griswold*, 381 U.S. at 508.

designed in part to protect privacy at certain times and places with respect to certain activities,"[89] but the term "right of privacy" is no more than a "substitute" for the Fourth Amendment's guarantee against unreasonable searches and seizures.[90]

> "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures.[91]

No question arose in Justice Black's opinion as to whether the Fourth Amendment was the embodiment of or was based upon some general principle of privacy;[92] there was no constitutional right to privacy because no specific provision of the constitution so provided.[93]

Secondly, Justice Black argues that in substituting its own words and formulations for those in fact used in the various provisions of the constitution, the Court alters the level of afforded protection at the same time as providing itself with flexible, malleable words and phrases with which to claim for itself "and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive."[94] This criticism is particularly apt in the light of Justice Harlan's and Justice White's conclusion that the Connecticut statute violated the Due Process Clause. Justice Black observed that the opinion of Justices Harlan and White was based on the premise that the Supreme Court was vested with the power to invalidate all state laws that were arbitrary, capricious, unreasonable, oppressive or on

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89 *Id.* at 508.

90 *Id.* at 508-09.

91 *Id.*

92 *Cf. Armstrong*, 364 U.S. 40.

93 Justice Black contrasted his own view with that of the Supreme Court of Georgia in *Pavesich v. New England*, 50 S.E. 68 (1905): "A right of privacy in matters purely private…is derived from natural law." *Id.* at 70.

94 *Griswold*, 381 U.S. at 511.

the basis that it has no "rational or justifying" purpose, or is offensive to a sense of "fairness and justice."[95] He continued:

> If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.[96]

This part of the dissent thus articulates that part of the alternative jurisprudential tradition that is suspicious of the judicial "gloss" placed upon constitutional provisions. What Justice Black called "the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice"[97] provide such flexible standards that, in practice, the clear words of a constitutional provision are ignored and the new "gloss" invoked, and referred to as if it were synonymous with the provision, to create a result agreeable to the justices. Thus in *Griswold*, the Court held that the Connecticut statute violated the Fourth Amendment because it infringed the defendants' constitutional right to privacy, despite there being no such right in the text of the constitution.[98] Similarly, in *Dolan*, one of the reasons the permit condition was invalidated was because it conflicted with the constitutional principle that the government should not force some people to bear public burdens which, in all fairness and justice, should be born by the public as a whole, despite there being no such constitutional principle in the text of the constitution. In his work, 'The Bill of Rights,' Learned Hand stated that:

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95 *See id.*

96 *Id.* at 511-12.

97 *Id.* at 513, n.4.

98 *Id.* at 485-86.

> Judges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary, they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences which are all that in fact lie behind the decision.[99]

This approach to constitutional adjudication – almost to the letter the very same approach that was rejected when proposed at the 1787 Convention – stands in contrast to the positivist tradition where the Court's main focus is the text of the constitution rather than its debatable aims, objectives or teleology.

Connected to this criticism is Justice Black's third argument, that the Court's use of such flexible standards as the fig leaf for its activities as "a day-to-day constitutional convention"[100] jeopardizes the separation of powers and undermines the ability of the people to govern themselves through their government. "The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country."[101] Justice Black also refers to a parting shot of Justice Holmes, in one of his last dissents, in *Baldwin v. Missouri*.[102] Justice Holmes said:

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I

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99 LEARNED HAND, THE BILL OF RIGHTS 70 (1958).

100 *Griswold*, 381 U.S. at 520.

101 *Id.* at 521.

102 281 U.S. 586 (1930). The case concerned the question of whether the credits, bonds, and notes belonging to a dying resident of Illinois were within the Missouri's jurisdiction for taxation purposes, some of the notes having been executed by citizens of Missouri and some secured on lands there. The Court held that they were not, and that to enforce Missouri transfer and inheritance taxes upon them would violate the Due Process Clause.

> see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.[103]

Justice Holmes' dissent encapsulates the central issue in the debate between the tradition of constitutional positivism and the natural law tradition to which the advocates of substantive due process belong, namely the question of whether the Court or the elected legislatures are the locus of power in the United States. How the Court interprets constitutional provisions is thus inseparable from how much freedom the legislatures have to make laws, and thereby how much freedom the people have to govern themselves. The only alternative, as Judge Learned Hand observes, is "irksome" rule by "a bevy of Platonic Guardians."[104]

This positivist tradition stands in stark contrast to the substantive due process approach pursued during the *Lochner* era, and revived in the first prong of *Agins* as interpreted in *Nollan* and *Dolan*.[105] Indeed it is a curious feature of the Court's jurisprudence that while the *Lochner* era remains discredited and characterized as a period where the Court illegitimately interfered with government action to improve the conditions of the least well off in society, Justice Black's dissenting opinion in *Griswold*, and the revival of substantive due process in the Takings Clause jurisprudence, receives relatively little academic scrutiny from the same quarter that criticized *Lochner*. It may be argued that the dilemma for liberal commentators in attacking the Court's natural law basis for adjudication is that, in undermining substantive due process and a

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103 *Id*. at 595. *See also Griswold*, 381 U.S. at 521, n.16.

104 HAND, *supra* note 99, at 73.

105 Justice Black states: "Of the cases on which my Brothers White and Goldberg rely so heavily, undoubtedly the reasoning of two of them supports their result here – as would that of a number of others which they do not bother to name, *e.g., Lochner v. New York*, 198 U.S. 45 (1905)…. The two they do cite and quote from, *Meyer v. Nebraska*, 262 U.S. 390 and *Pierce v. Society of Sisters*, 268 U.S. 510, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York, supra*, one of the cases on which he relied in *Meyer*, along with such other long-discredited decisions as, *e.g., Adams v. Tanner*, 244 U.S. 590 and *Adkins v. Childrens Hospital*, 261 U.S. 525." *Griswold*, 381 U.S. at 515.

teleological approach to the constitution, they also undermine the politically liberal decision of the Court in *Roe v. Wade*.[106] A full-scale assault on substantive due process would, to succeed, unhinge the legal theory on which the *Griswold, Roe* and *Casey*[107] privacy rights are based. Thus liberal and conservative critics alike are engaged in a degree of hypocrisy that allows each to claim to be supporting the Constitution while in fact advancing a particular political agenda. While not without the virtue of convenience, this instrumental use of the Court and the Constitution nevertheless emasculates democratic governments and politicizes, and thereby de-legitimizes, our judicial branch.[108] The administrative law model advocated in the following section should therefore be seen as a modest proposal that points the way back to a positivist jurisprudence.

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[106] 410 U.S. 113 (1973). As Justice Rehnquist said in his dissent, aware of the connection between *Lochner* and *Roe*:

> While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 74 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case…[T]he adoption of the compelling state interest standard will inevitably require this court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." 410 U.S. 113, 174.

[107] 505 U.S. 833 (1992).

[108] Even Justice Scalia – with what is now clearly breathtaking hypocrisy – was sensitive to this effect in his partial dissent in *Casey*. In criticizing the majority for glossing the text of the Constitution with unwritten rights, he said:

> In truth, I am as distressed as the Court is -- and expressed my distress several years ago…about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," which turns out to be nothing but philosophical predilection and moral intuition. *Id*. at 999-1000.

V. A MORE MODEST ALTERNATIVE –-THE ADMINISTRATIVE MODEL

Nollan and *Dolan* show that the Supreme Court pursues an extravagant version of the rule of law[109] that has lost faith with earlier understandings of the role of the Court and the Federal Constitution. In addition to a predilection towards judicial decision-making outside the accepted process for review of administrative decisions, the Court has also tended toward erection of elaborate constitutional structures to justify recalibration of the relationship between property owner and government. However, a simpler model, already inherent in administrative law, achieves the same result without extracting from the Fifth and Fourteenth Amendments that which are not found in their texts.

It has already been shown that early state Supreme Court decisions, such as *Commonwealth v. Alger*[110] and the U.S. Supreme Court decision of *Mugler v. Kansas*,[111] recognized the legitimacy of regulations, even those causing substantial economic loss for the property owner, and which undermine Justice Holmes' opinion in *Pennsylvania Coal* that the Takings Clause applies to regulations as well as to expropriations. It is perhaps unsurprising that

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[109] KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 2.11, 102 (2d ed. 1978). As an example of the extravagant version of the rule of law, Davis quotes John Dickson:

> [N]othing has been held more fundamental to the supremacy of law than the right of every citizen to bring the action of government officials to trial in the ordinary courts of the common law. That government officials should themselves assume to perform the functions of a law court and determine the rights of individuals, as is the case under a system of administrative justice, has traditionally been felt to be inconsistent with the supremacy of law . . . . In short, every citizen is entitled, first, to have his rights adjudicated in a regular common law court, and, secondly, to call into question in such a court the legality of any act done by an administrative tribunal.

JOHN DICKSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 33, 35 (1927).

Davis' counterargument to this prescription for sclerosis is that no legal system can operate without discretionary authority, and that a sound and workable understanding of the rule of law would involve only the elimination of *unnecessary* discretionary power. Davis' functional concerns over the use of common law adjudication might be combined with the elasticity of broad constitutional phrases, such as "due process" used outside the procedural field. The result is a witch's brew of providing for review of economic and social legislation utilizing a mask of fair procedure and constitutional objectivity.

[110] 61 Mass. 53 (1851).

[111] 123 U.S. 623 (1887).

focusing on the first prong of the *Agins* test for a taking reveals a similar re-writing of legal history. Our argument, therefore, is that *Nollan* and *Dolan* reveal an erroneous perspective on the judicial role, which is out of step with the basic structure of the body of administrative law, to which these cases belong.

First, it is clear that the position today contrasts markedly with the state of Fifth and Fourteenth Amendment jurisprudence during the New Deal period of active, economically interventionist government. In a case representative of that era, *United States v. Carolene Products Co.*, the Supreme Court accepted that if it were to jealously guard any rights it would be those political rights that allow citizens to organize and campaign against undesirable laws and would not act as a roving band of mercenaries attempting to strike down what it perceive to be improvident legislation.[112] The regulation of what Roosevelt called "economic tyranny"[113] was a matter to be left for Congress and the states. *Carolene Products* concerned whether the Filled Milk Act of 1923, prohibiting interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, exceeded Congress' power to regulate interstate commerce or violated the Fifth Amendment. Having been tempted to decide the case on the "presumption of constitutionality" alone, Justice Stone, delivering the opinion of the Court, held that economic regulation would typically be judged on the "rational basis" standard of review:

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[112] 304 U.S. 144 at 153, n.4 (1938).

[113] In his 1936 speech in acceptance of a second term, Roosevelt stated:

> "For too many of us the political equality we once had was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's lives. For too many of us, life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.
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> "Against economic tyranny such as this, the American citizen could only appeal to the organized power of government . . .

> [I]nquiries, where the legislative judgment is drawn into question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for [the statute]. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court . . . nor the verdict of a jury can be substituted for it.[114]

However, more basic to the constitutional inquiry is the nature of the decision under review. *Nollan* and *Dolan* did not make policy, but rather applied previously adopted policy to a specific case; in other words, it was quasi-judicial in nature.[115] The very nature of this distinction provides a guide for the nature of judicial review, a review that can satisfy the legitimate concerns of lack of effective review of administrative abuse.[116]

Even before this period, the Supreme Court decisions in *Londoner v. City and County of Denver*[117] and *Bi-Metallic Investment. Co. v. State Board of Equalization*[118] demonstrate that the

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[114] *Carolene Products*, 304 U.S. at 155.

[115] *See, e.g.*, *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23, 26-27 (Ore. 1973) (citing Comment, Zoning Amendments--The Product of Judicial or Quasi-Judicial Action, 33 OHIO ST. L.J. 130 (1972)).

[116] *See id.*

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

Id.

> By treating the exercise of authority by the commission in this case as the exercise of judicial rather than of legislative authority and thus enlarging the scope of review on appeal, and by placing the burden of the above level of proof upon the one seeking change, we may lay the court open to criticism by legal scholars who think it desirable that planning authorities be vested with the ability to adjust more freely to changed conditions. However, having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared.

Id. at 29-30 (showing the court's awareness of the nature of judicial review in such cases).

[117] 210 U.S. 373 (1908).

[118] 239 U.S. 441 (1915).

earlier Court placed judicial review of administrative action in its appropriate administrative context. *Londoner* concerned a tax assessed under the charter of the City of Denver, which conferred to the City the power to make local improvements and to assess the cost on property benefiting from those improvements. The tax was levied on landowners whose lands abutted a street, and it was intended to pay for the paving of the street. At issue was whether the failure to allow the landowners an opportunity to be heard during the tax assessment proceedings amounted to a denial of due process of law, guaranteed by the Fourteenth Amendment. Justice Moody stated:

> In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form. But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage in the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing.[119]

Justice Moody's distinction between a legislative decision and the decision of a subordinate quasi-judicial body established by the legislature has important implications for our understanding of when aggrieved parties can, as Dickson might put it, "have their day in court." In *Londoner*, the city council's error lay in its failure to hear the affected parties and afford them an opportunity to make, indeed to prove, their case against the assessment of the pavement tax. No question arose as to the constitutionality of the tax itself, as any such substantive review would be incompatible with the Court's finding that the Constitution "imposes few restrictions

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[119] *Londoner*, 210 U.S. at 385-86.

upon the states" so far as taxation is concerned. It would make little sense to interfere with the substance of a decision taken by an administrative body established by the legislature for the purposes of assessing tax, while also accepting that the legislature is virtually unlimited in its powers to impose taxes as it, *qua* legislature, sees fit. To do so would be to fetter the legislature's ability to impose such a tax at all.

In 1915, the Supreme Court reiterated this disinclination to intervene under the banner of the Constitution in *Bi-Metallic Investment Co*. In this case, the plaintiff, a real estate owner, challenged an order of the State Board of Equalization and the Colorado Tax Commission that would have increased the valuation of all taxable property in Denver by 40%. As in *Londoner*, the plaintiff's complaint was that he was not afforded an opportunity to be heard and that the order would mean his property would be taken without due process of law, contrary to the Fourteenth Amendment. In delivering the opinion of the Court, Justice Holmes expressed incredulity at the suggestion that the Constitution was even implicated in the case:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. *Their rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule*.[120]

Justice Holmes distinguished *Londoner* on the basis that it was essentially an adjudicative decision involving a relatively small number of people who were "exceptionally affected," each upon individual grounds. The valuation at issue in the *Bi-Metallic* case, by contrast, was in the nature of a rule affecting everyone in Denver to the same percentage extent.

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[120] *Bi-Metallic*, 239 U.S. at 445 (emphasis added).

Review of a government entity engaged in "rulemaking" differs from review of the same when engaged in "adjudication." It is not always easy to determine where the former ends and the latter begins, although the numbers of persons affected by a decision and the manner in which they are affected provide sound starting points. The issue, however, is always whether the administrative procedures a government uses in order to make decisions are suited for making those decisions. Similar criteria to those used in *Londoner* and *Bi-Metallic* were evident in *United States v. Florida East Coast Railway Co.*,[121] in which the Supreme Court found against certain railroad companies in their request for an oral hearing. Section 1(14)(a) of the Interstate Commerce Act authorized the Interstate Commerce Commission, "after hearing," to establish compensation to be paid by a railroad for the use of cars not owned by it. Based on information compiled by railroads, the Commission had issued a tentative draft of incentive *per diem* charges on standard boxcars, which were designed to spur prompt return of the cars to their owners. The Commission gave parties sixty days in which to file position papers, submissions of evidence and other particulars, but denied certain railroads' requests for an oral hearing before promulgation of the final rate schedule (i.e., before making the rule on compensation). This "notice and comment" approach to its rulemaking procedures was essentially that envisaged under the Administrative Procedure Act, but the question arose as to whether the Commission's actions satisfied the "hearing" requirement of the Interstate Commerce Act. Chief Justice Rehnquist, delivering the opinion of the Court, thought they did. He stated:

> The term "hearing" in its legal context undoubtedly has a host of meanings. Its meaning undoubtedly will vary, depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts.[122]

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121 410 U.S. 224 (1973).

122 *Id.* at 240.

The Chief Justice found that the Commission's proceedings were of the rulemaking rather than the adjudicative type. He noted that the proposed compensation payments, "were applicable across the board to all of the common carriers by railroad," and equally that "no effort was made to single out any particular railroad."[123] Moreover, the fact that one railroad may have regarded itself as more detrimentally affected by the order than another, "does not change its generalized nature."[124] The Commission had made "a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts."[125] Consequently, the "hearing" requirement did not necessarily include "either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decision-maker."[126] The Court thus used general principles of administrative law to provide a sensible and practical interpretation of what, *prima facie*, appeared to be an oral hearing requirement.

General background principles of administrative law also noted a contrary result in the Supreme Court's decision in *Califano v. Yamasaki*.[127] At issue was whether the Secretary of the Department of Health, Education and Welfare need to provide an oral hearing before deciding whether to waive recovery of benefits incorrectly overpaid in the social security disability program.[128] The Court's opinion contains important insights into administrative law and

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123 *Id.* at 246.

124 *Id.*

125 *Id.* at 246-47.

126 *Fla. E. Coast Ry.*, 410 U.S. at 240.

127 442 U.S. 682 (1979).

128 Section 204(a)(1) of the Social Security Act authorized the Secretary to recoup erroneous overpayments made to a beneficiary under the old-age, survivors', or disability insurance programs by reducing future payments to which the overpaid person was entitled.

Constitutional review. First, regarding administrative law generally, Justice Blackmun (delivering the opinion of the Court) alluded to the same background understandings that informed the decisions in *Londoner*, *Bi-Metallic* and *Florida East Coast Railway Co*. He argued that there was a distinction between a request for reconsideration of section 204(a) of the Social Security Act ("the Act"), which provided the general power to recover an overpaid benefit (in which case the dispute would be confined to whether there had in fact been an overpayment), and the administrative review required under section 204(b) of the Act, in which the Secretary would have to assess the presence or absence of "fault" on the part of the overpaid person, and whether or not recovery of the overpayment would be "against equity and good conscience."[129] Justice Blackmun stated that:

> [A] "broad 'fault' standard is inherently subject to factual determination and adversarial input." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 617 (1974). As the Secretary's regulations make clear, "fault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence…and physical and mental condition" as well as his good faith. 20 CFR S.404.507 (1978). We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case.[130]

Further, regarding Constitutional review, it is important to note that, as in *Londoner*, the Court achieved this result without reliance on the Due Process Clause of the Fourteenth Amendment and without recourse to any specific "hearing" provision of the statute. Indeed at the outset of his analysis of the petitioner's grounds for relief, Justice Blackmun said:

> A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question…. Due respect for the coordinate branches of government, as well as a reluctance when conscious of fallibility to speak with our utmost finality…counsels against unnecessary constitutional adjudication.[131]

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[129] *Califano*, 442 U.S. at 682.

[130] *Id*. at 697-98.

[131] *Id*. at 692-93.

Rather, the Court read a hearing requirement into the statute in order to further the statutory goals that no recovery should occur under section 204(a) when waiver was appropriate. As in *Londoner*, *Bi-Metallic* and *Florida East Coast Railway Co*., the question remained whether the administrative procedures used were functionally suited to the determinations they were required to make. The Court tailored what it required of the government agency by way of procedural safeguards to the nature of the administrative program involved. This variable standard of review is particularly appropriate in the policy-laden rulemaking context because, as Siegel notes, "trial-type hearings are not strongly needed to protect private rights in the rulemaking process, because a large group of private parties affected by a general rule should be able to seek to alter it through the political process."[132]

There are some indications that despite *Nollan* and *Dolan*, traces of the earlier more clear-sighted approach to judicial review of administrative action remain. In *Ehrlich v. City of Culver City*,[133] for example, the Supreme Court of California heard a plaintiff property owner who challenged a "mitigation fee" of $280,000 (a monetary exaction) imposed as a planning condition on the City's approval of his proposal to construct a condominium complex. The case is interesting as the judgment of Justice Arabian recognizes that the Court's standard of review needs to be sensitive to the issue in question. There are echoes of *Londoner* and *Bi-Metallic* in Justice Arabian's perspective:

> There is no question that the takings clause is specially protective of property against *physical occupation* or invasion . . . . It is also true [that] government generally has greater leeway with respect to noninvasive forms of land-use regulation, where the courts have for the most part given greater deference to its

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[132] Jonathon R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1069 (1998).

[133] 911 P.2d 429 (1996).

> power to impose broadly applicable fees, whether in the form of taxes, assessments, user or development fees. Both *Blue Jean Equities West v. City and County of San Francisco, supra*, [3 Cal. App. 4th 164; 4 Cal. Rptr. 2d 114 (1992) and *Commercial Builders v. Sacramento, supra*, [941 F.2d 872; 91 (1991)] dealt with such legislatively formulated development assessments imposed on a broad class of property owners. Fees of this nature may indeed be subject to a lesser standard of judicial scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of the "extortionate" use of the police power to exact unconstitutional conditions is not present.[134]

The majority opinion thus recognized that there is a need for flexibility in the standard of review, depending on the nature of the decision being reviewed. Courts deciding Fifth Amendment claims should be deferential to comprehensive plans and their implementation and more intrusive and circumspect only in situations where the relative positions of government and landowner gives cause for concern. This mirrors the distinction, discussed above, between "rulemaking" (the comprehensive plan) and "adjudication" (a negotiated "bargain" with the landowner). Typically, the latter will be found in cases where individual property owners are confronted with a "no dedication, no permit" arrangement from the government.[135] As Justice Arabian points out:

> The essential nexus test is, in short, a "means-ends" equation, intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners – whether they consist of possessory dedications or the exaction of cash payments – that, because they appear to lack any evident connection to the public impact of the proposed land use, *may* conceal an illegitimate demand – may, in other words, amount to "'out-and-out' . . . extortion."[136]

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[134] *Id*. at 443-44. Curiously, Justice Arabian's indication that the heightened scrutiny standard of both *Nollan* and *Dolan* might not always be appropriate was not the proverbial "red flag to a bull," and the petition for writ of certiorari was denied by the Supreme Court on October 15, 1996. 519 U.S. 929 (1996).

[135] This reflects a more generalized concern for parties' relative bargaining power that manifests itself in many fields of law.

[136] *Ehrlich*, 911 P.2d at 444.

When this "means-ends equation" is used to determine the constitutionality of decisions made to implement a comprehensive development plan (requiring a minimal weighing of facts), the subtext is that the Court is passing judgment on the plan itself, thereby limiting the legislature's room for maneuver.[137] One curious effect is that this heightened scrutiny of land-use decisions, which tend more towards the ministerial end of the spectrum than the adjudicative, reduces rather than increases the quality and predictability of administrative decision-making. It is surely commonsensical to suggest that if the Supreme Court intends to avoid situations where the individual landowner is "singled out," it ought to encourage administrative agencies and governments to base their planning arrangements on rulemaking rather than adjudicative procedures. Pierce, Shapiro and Verkuil suggest three indirect means through which Courts can do so:

> (1) by holding that agencies have rulemaking power in situations where the existence of that power is in doubt; (2) by making it less expensive and less time-consuming for agencies to use rulemaking procedures; and, (3) by giving powerful legal effect to rules adopted through rulemaking procedures.[138]

Nollan and *Dolan*, however, work against the third suggested indirect means of encouragement in that they give no legal effect to rules adopted through rulemaking procedures in the land-use

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[137] It is, of course, possible to mount a "facial challenge" to a land-use ordinance and argue that the regulation by its mere enactment affects a taking. However, there is now some confusion and overlap between facial and as-applied challenges. The *Agins* Court apparently accepted that the challenge involved in that case was facial, yet formulated its test for a taking as an as-applied challenge and purported to judge the constitutionality of a general zoning law (facial) in terms of its specific impact on a particular property (as-applied). The considerations in both should be the same: the economic impact on the particular property. On this point, *Agins* is a classic example of the Court expanding the takings doctrine by making it easier for landowners to challenge the regulations themselves, in federal courts, rather than challenge, through administrative appeals and state courts, the manner of their application. The gradual erosion of the heavy burden of proof traditionally resting on the plaintiff in cases of facial challenges thus marches in step with overbearing scrutiny of government decision-making.

[138] RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, 6.4.1c, 296 (3d ed. 1992).

context.[139] Similar observations are made by Jill Inbar in her article, *A One Way Ticket to Palookaville: Supreme Court Takings Jurisprudence and its Implications for New York City's Waterfront Zoning Resolution.*[140] Inbar's concern is that essentially ministerial acts implementing the Waterfront Zoning Resolution will – as a consequence of the decisions in *Nollan* and *Dolan* – be regarded as in violation of the Takings Clause. In noting that *Dolan* eliminates the distinction between "adjudicative" and "rulemaking" decisions and causes the burden of proof to always fall on the local government to justify the constitutionality of its actions, she states:

> The Court distinguished the facts in *Dolan* from cases upholding land use planning under the rationale that those cases "involved essentially legislative determinations classifying entire areas of the city," whereas *Dolan* involved an adjudicative decision. The Court reasoned that where the city makes an adjudicative decision, the "burden properly rests on the city" to prove its constitutionality. This distinction between legislative and adjudicative determinations, while seemingly harmless, has a dramatic impact on comprehensive land use plans. *Dolan* is a paradigm example of a local government complying with a comprehensive land use plan and enforcing mandates on an entire area of a city. Consequently, if the government's role in *Dolan* is considered adjudicative, then any action taken in accordance with a

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[139] Such an intrusive standard of review would ideally require that the Supreme Court review every land-use decision taken by a local government. By contrast, other jurisdictions recognize the inherently limited role of the "top court" in their legal systems. For example, within the European Union's legal framework there is growing understanding that the European Court of Justice ("ECJ") cannot hear every case that may ideally be referred to it on a question of interpretation of Community law. In the case of *Wiener S.I. GmbH v. Hauptzollamt Emmerich*, (1997) ECR I-6495 the German Federal Finance Court had referred to the ECJ the question of whether the term "nightdresses" when used in a provision of the Common Customs Tariff should be interpreted as covering undergarments that were clearly intended only to be worn as nightwear, or whether it may be interpreted to cover products that were intended mainly, but not exclusively, to be worn in bed. The question is a narrow one and, having noted the increasingly voluminous and complex case law on the interpretation of provisions of Community law, Advocate General Jacobs, in his advisory opinion to the ECJ, stated:

> > [I] do not consider that it is appropriate, or indeed possible, for the Court to continue to respond fully to all references which, through the creativity of lawyers and judges, are couched in terms of interpretation, even though the reference might in a particular case be better characterized as concerning the application of the law rather than its interpretation . . . . It seems to me that the only appropriate solution is a greater measure of self-restraint on the part both of national courts [which refer questions to the ECJ] and this Court (at para. 17-18).

[140] Jill Inbar, *A One Way Ticket to Palookaville: Supreme Court Takings Jurisprudence and its Implications for New York City's Waterfront Zoning Resolution*, 17 CARDOZO L. REV. 331 (1995).

> comprehensive plan could be classified as adjudicative. The classification is important because it dictates which party bears the burden of proof and consequently impacts the outcome of the dispute.[141]

Justice Stevens makes a similar observation in his dissent in *Dolan*.[142] Inbar may overstate the case in that implementing a land use plan may be seen as a ministerial or a discretionary function, whereas the "bargain" in *Dolan* places the planning condition within the fringes of discretionary authority. However, her argument is valid insofar as the problem with this general reversal of the burden of proof is the way it does nothing to encourage the development of administrative standards on planning controls. Why should a legislature incur the time and expense of crafting a comprehensive land use plan if decisions taken on the basis of that plan are regarded, by the Court, as no different from decisions taken in the absence of standards?[143]

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[141] *Id*. at 350-51.

[142] "The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan." *Dolan*, 512 U.S. at 405.

[143] A recent U.S. District Court case provides an intriguing example of the perverse incentives created by *Nollan* and *Dolan*. In *Danebo Properties v. City of Eugene* (cite?), Judge Goodwin denied the City's request for summary judgment in a suit involving allegations by plaintiffs, developers, of a conspiracy between the hearings officer and City officials to knowingly place illegal dedication demands on applicants with the hope that the applicants would simply concede rather than challenge them.

The arguments put forward in this paper also derive support from British administrative law. Although Britain's system of land-use planning differs from that employed in many states, there is a broad recognition throughout British administrative law, and particularly in the planning context, of the distinction between the adoption of a policy by a governmental agency and the adjudication of a fact-specific decision. In the case of *R (on the application of Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929, the House of Lords addressed the question of whether the Secretary of State could have regard to his own planning policy when making a final determination on an application for planning permission in an individual case. Ultimately the issue was whether he could be both policy-maker and decision-maker. In holding that he could, the House of Lords addressed the relationship between formulations of policy and administrative and quasi-judicial decision-making. At 2 All ER 929, para.140, Lord Clyde stated that:

> [P]arliament, democratically elected, has entrusted the making of planning decisions to local authorities and to the Secretary of State with a general power of supervision and control in the latter. Thereby it is intended that some overall coherence and uniformity can be achieved in the public interest and that major decisions can be taken by a minister answerable to Parliament. Planning matters are essentially matters of policy and expediency, not law. They are primarily matters for the executive and not for the courts to determine.

Not only do *Nollan* and *Dolan* undermine the rulemaking process by failing to distinguish between rulemaking and adjudication, they also frustrate the actions of local democracies. Again the contrast between *Nollan* and *Dolan* and the earlier cases beginning with *Londoner* and *Bi-Metallic* is stark. Whereas in *Dolan* the Supreme Court's strict constitutional standard overrode the City's decision to condition a planning permit with a dedication requirement, in *Yamasaki*, although the petitioner was successful, the Supreme Court's decision actually gave further effect to the legislative purpose of the Interstate Commerce Act. The "hearing" requirement was read into the Act not to prevent the Interstate Commerce Commission from acting as it saw fit, but in order to make sure it acted on the full facts. The contrast reveals that it is the Court rather than the governments who "go too far" in the field of land-use regulation. Legislators need to be free to adjust the standards determining when local governments can act to regulate, restrict, or permit certain land uses. A "strong" perspective of individual property rights is not incompatible with our view that places democratic control at the heart of our system of land-use planning, but that it is a perspective that a community through the democratic process can only legitimately assume itself. Property is an evolving cultural institution, with an ever-shifting balance of interests between individual and community. Our argument is that the arbiters of this balance must not be Supreme Court justices, but rather the legislators and their agencies, in decisions made within the administrative process, and subject to administrative review.

VI. CONCLUSION

It has already been argued that only by understanding judging as an extension of politics can the problems of the Takings Clause jurisprudence be appreciated and confronted. It would

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Thus as Lord Hutton said at 2 All ER 929, para.198, "[The Secretary of State] was answerable to Parliament as regards the policy aspects of his decision, and answerable to the High Court as regards the lawfulness and fairness of

seem that focusing on the first prong of the *Agins* test gives cause for another excursion into the territory outside the legal academy in order to better understand what goes on within it. Only after taking one or two steps back can *Nollan* and *Dolan* be seen as the ultimate product of the reintroduction of substantive due process by a Supreme Court that has lost a coherent perspective on its own role in the legal system and on the nature of Constitutional review. It cannot scrutinize every land-use decision taken by every public official in the United States, but it pursues a libertarian-conservative agenda of natural rights, and antipathy to government, which would generally require that it do so. While society, particularly urban communities, becomes ever more complex and interwoven, the politics of the judiciary remain in an Enlightenment pathology where the individual stands isolated from all others, cooperating only to the extent necessary to uphold her "natural rights".

The most charitable reading of *Nollan* and *Dolan* is that they represent the Court's "constitutional" response to the perception that local government can exact money or property from citizens, without standards, and without procedural or legal safeguards. Indeed, the *Ehrlich* opinion of Justice Arabian, which cautiously advocated a differing standard of review, depending on the kind of government decision subject to challenge, voices some of the legitimate concerns that judges and litigants (and planners) may share. This much is uncontroversial, indeed planning standards in the shape of legislative formulations of standards, zoning ordinances, comprehensive development plans and the like provide the people with a focus for political debate and for the expression of their concerns and aspirations for their environment. It is probably true that *ad hoc* or unprincipled decisions are not rendered much more palatable simply because they were taken by elected officials. Certainly land-use planning is not perfect within

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his decision-making process."

every, or indeed any state. *Nollan* and *Dolan*, and the "invention" of new Constitutional rights by twisting the text of the Takings Clause beyond recognition, are not, however, the answer. It is the very finality of the Supreme Court's decisions (though as the pendulum of Takings precedent shows, the decisions are hardly final unto themselves) that proves so problematic in the planning and land-use context characterized by its flexibility, sensitivity to local concerns and the routine need for judgments to be made on debatable or hypothetical facts. A non-constitutional solution whereby standards are adopted and decisions are made and challenged within the administrative process itself is not only more efficient, but more appropriate and legitimate for our continually shifting opinions on where the individual's ability to do as he wishes with his property ends and the community's ability to restrict or otherwise compromise the individual's use begins.

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