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Lessened Protection for Property Rights--The Conjunctive Application of the Agins v. City of Tiburon Disjunctive Test

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I. INTRODUCTION

> "We see no reason why the Takings Clause of the Fifth Amendment, as much as a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."
>
> Chief Justice William Rehnquist[1]

The last two decades have seen a dramatic change in the United States Supreme Court's analysis of regulations affecting private property. While governmental actions affecting private property were formerly subjected only to the minimal scrutiny standards of the Fourteenth Amendment's Due Process and Equal Protection Clauses,[2] the Just Compensation Clause of the Fifth Amendment[3] has risen to its rightful place of prominence and offers newly recognized protections for private property.[4]

The Just Compensation Clause, which prior to the *Agins v. City of Tiburon*[5] line of cases[6] went ignored and underutilized, offers protections different in kind from those of the Fourteenth Amendment's Due Process Clause.[7] While sub-

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1. Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994).

2. *See* Goldblatt v. Hempstead, 369 U.S. 590, 596 (1962) (holding that a town "safety regulation" preventing the continued operation of a sand and gravel mine is valid because it is a reasonable exercise of the police power); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (upholding a city ordinance that prohibited the manufacture of bricks as a valid exercise of the police power since the only limitation upon such power was that it could not be exerted arbitrarily or with unjust discrimination); *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

3. *See* U.S. CONST. amend. V (providing in pertinent part that "private property [shall not] be taken for public use without just compensation").

4. *See Dolan*, 114 S. Ct. at 2320; Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987); *see* discussion *infra* Parts II.B., C. (examining the development of the conjunctive test and the Supreme Court's recognition of the Fifth Amendment's property protections).

5. 447 U.S. 255 (1980).

6. This line of cases, discussed *infra* Part II, served to resurrect the Fifth Amendment Just Compensation Clause, and is complementary to the protections afforded landowners under due process.

7. Factual scenarios, such as those present in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), arguably could have supported Fifth Amendment just compensation claims. Although such claims were advanced by the *Goldblatt* plaintiffs, the Supreme Court concluded that the ordinance in question was a valid exercise of the police power without utilizing a just compensation analysis. *Goldblatt*, 369 U.S. at 594.

stantive due process protects persons from arbitrary or capricious government action, and may be used to challenge the validity of a regulation, the Just Compensation Clause is implicated when the regulation of property substantially interferes with owners' use and enjoyment of their property, and thus, rises to the level of a "taking."[8] If the regulation goes "too far"[9] and rises to the level of a "taking," the question then becomes how much compensation is owed to the landowner.[10]

This is where confusion often arises. Judges, attorneys and commentators alike may fail to recognize that the issue of whether a regulation "goes too far" and thus effects a "taking" of private property, is distinct from the due process question of whether the regulation bears a rational relationship to a legitimate state interest and is thus a valid exercise of the police power.[11] Although a regulation enacted pursuant to the government's police power may satisfy the rational relationship standard applicable to due process claims, the regulation may nonetheless so substantially interfere with owners' use and enjoyment of their property, that just compensation will be required under the Fifth Amendment.[12]

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8. A "taking" of property may occur when governmental action substantially interferes with an owner's use and enjoyment of the property. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 105 (1978). Moreover, governmental interference with an owner's use and enjoyment can ripen into a "takings" claim without a physical invasion or appropriation of the property. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). For example, a "taking" may be effected by an ordinance that denies the owner economically viable use of the land. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992). Not all governmental actions affecting property require compensation, but when the interference reaches a certain magnitude, just compensation must be paid. *See Pennsylvania Coal*, 260 U.S. at 413.

9. In *Pennsylvania Coal*, Justice Holmes, delivering the opinion of the Court, stated: "The general rule at least is that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415.

10. *See* United States v. Clarke, 445 U.S. 253, 257 (1980) (characterizing the Just Compensation Clause as "self-executing," meaning that once private property is "taken" compensation must be awarded); *see also* Jacobs v. United States, 290 U.S. 13, 16 (1933) (stating that once there is a taking, whether there has been a formal condemnation proceeding instituted or not, compensation must be awarded because there is a duty imposed by the Fifth Amendment).

11. *See* Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (stating that the Court "refuse[s] to sit as a superlegislature to weigh the wisdom of legislation" (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952))); *see also* Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (holding that economic regulations will be upheld if the legislature "might of concluded" that the regulation promoted the public health, safety, or welfare; and that it is irrelevant whether or not any interest is actually advanced); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (stating that minimal scrutiny is appropriate for economic regulations because of a presumption of their constitutionality due to the ordinariness of the legislation and their adoption through the regular political process).

12. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987); *see also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 647-53 (1981) (Brennan, J., dissenting) (arguing that an otherwise valid exercise of police power can result in an unconstitutional taking of property without just compensation); *Agins*, 447 U.S. at 260 (stating that the determination that a governmental action constitutes a taking is a determination that the public, rather than a single owner, must bear the burden of an exercise of state police power in the public's interest); *Goldblatt*, 369 U.S. at 594 (stating that "governmental action in the form of regulation [can] be so onerous as to constitute a taking which constitutionally requires compensation," although the Court refused to entertain arguments based upon the Fifth

In essence, the determination that just compensation is owing is a determination that the government should have exercised its power of eminent domain[13] and paid for the property interests it has taken.[14]

The Supreme Court, in a line of cases beginning with *Agins*, has sought to clarify what is required under the Just Compensation Clause of the Fifth Amendment and to distinguish it from the minimal scrutiny used under a substantive due process protections analysis applicable under the Fourteenth Amendment's Due Process Clause.[15] The *Agins* line of cases developed a two-pronged disjunctive test for the analysis of regulatory takings claims.[16] Under this two-pronged test, a regulation effects a taking if it fails to either substantially advance legitimate state interests, or denies an owner economically viable use of the owner's land.[17] Thus, for the court to compensate a landowner for a taking, the regulation need only fail one of the two prongs.[18]

This newly articulated change from the deferential substantive due process standard to the more demanding just compensation standard has not gone unnoticed.[19] However, despite repeated attempts by the Supreme Court to clarify

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Amendment).

13. Eminent domain is a legal proceeding in which a governmental entity asserts its authority to condemn property. *See Clarke*, 445 U.S. at 255-58.

14. *Id.*

15. *See Dolan*, 114 S. Ct. at 2319; *Nollan*, 483 U.S. at 835-36 n.4. *But see Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting) (arguing that the Just Compensation Clause analysis employed by the majority is in reality a resurrection of *Lochner*-era substantive due process); Edward J. Sullivan, *Substantive Due Process Resurrected Through The Takings Clause:* Nollan, Dolan, *and* Ehrlich, 25 ENVTL. L. 155, 160 (1995) (asserting that *Nollan*, *Dolan*, and *Ehrlich* represent a resurrection of substantive due process which is subject to the imposition of the court's own value judgments). *See generally* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (illustrating the rational relation standard of the Due Process Clause that is applicable to economic regulations); *supra* note 11 and accompanying text (explaining the rational relation standard of the Due Process Clause).

16. *See* discussion *infra* Part II (illustrating the development of the disjunctive test). *But see* discussion *infra* Part III.C. (examining cases which have interpreted the *Agins* test as conjunctive).

17. *Agins*, 447 U.S. at 260.

18. The burden of proving the propriety of the regulation is placed upon the government. This was implicit in the manner in which the test was stated in *Nollan*; however, the shift in burden was made explicit in *Dolan*, 114 S. Ct. at 2320 n.8.

19. An enormous amount of literature has been written examining the United States Supreme Court's recent holdings in the area of "takings." *See generally* Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187 (1992); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1 (1987) [hereinafter *Takings*]; Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627 (1988); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). Additionally, many cities and counties joined an amicus curiae brief filed in *Nollan v. California Coastal Comm'n* arguing that the acceptance of the newly articulated recognition of Fifth Amendment protections would sound the death knell for urban planning and land use regulations promoting public health, safety, and welfare. Brief of Designated California Cities and Counties as Amici Curiae in Support of Appellee at 18-20, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (copy on file with the *Pacific Law Journal*); *see* Brief of the Council of State Governments, U.S. Conference of Mayors, National Association of Counties, National Conference of State Legislatures, International City Management Association, and National League of Cities; Joined by the American Planning Association as Amici Curiae in Support of Appellee, Nollan v. California Coastal Comm'n,

what is required under the Just Compensation Clause, and although common to nearly all states is the recognition that the *Agins* two-pronged test is disjunctive,[20] the analyses vary among the many state and federal courts.[21]

In particular, California's Fourth District Court of Appeal and the Ohio Supreme Court have produced a unique interpretation of the Just Compensation Clause test as stated by the United States Supreme Court in *Agins*.[22] These courts have applied the two-pronged disjunctive test conjunctively, shifting the burden of proof from the government to the landowner and requiring the landowner to prove the challenged regulation both fails to advance legitimate state interests substantially and denies the owner economically viable use of the land.[23] The conjunctive application of the *Agins* test is contrary to the Supreme Court's consistent

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483 U.S. 825 (1987) (copy on file with the *Pacific Law Journal*) (arguing that the imposition of the nexus requirement, which would require that the exaction be related to the public harm caused by the landowner's development, would severely hamper the ability of state and local governments to solve complex land use problems).

20. Most state and federal cases recognize the disjunctive nature of the *Agins* test. *See, e.g.*, Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1576 (10th Cir. 1995); Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1176 (Fed. Cir. 1991); National Ass'n of Home Builders of the United States v. Chesterfield County, 907 F. Supp. 166, 167 (E.D. Va. 1995); Galbraith v. Planning Dep't of Anderson, 627 N.E.2d 850, 852 n.2 (Ind. Ct. App. 1994); Offen v. County Council for Prince George's County, Md. Sitting as the Dist. Council, 625 A.2d 424, 431 (Md. Ct. Spec. App. 1993), *rev'd*, 639 A.2d 1070, 1076 (Md. 1994); Wilson v. Commonwealth, 583 N.E.2d 894, 899 (Mass. App. Ct. 1992), *aff'd in part and rev'd in part*, 597 N.E.2d 43, 46 (Mass. 1992); Bevan v. Brandon Township, 475 N.W.2d 37, 40 (Mich. 1991); Naegele Outdoor Adver. Co. of Minn. v. City of Lakeville, 532 N.W.2d 249, 253 (Minn. Ct. App. 1995); Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 257 (N.J. 1991); Moroney v. Mayor and Council of the Borough of Old Tappan, 633 A.2d 1045, 1047 (N.J. Super. Ct. App. Div. 1993); Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 482 (N.Y. 1994); Miller v. Columbia River Gorge Comm'n, 848 P.2d 629, 630 & n.1 (Or. Ct. App. 1993); Commonwealth v. Rogers, 634 A.2d 245, 248 (Pa. Super. Ct. 1993); Rainey v. City of Norfolk, 421 S.E.2d 210, 213 (Va. Ct. App. 1992); Northlake Marine Works, Inc. v. City of Seattle, 857 P.2d 283, 296 (Wash. Ct. App. 1993); McFillan v. Berkeley County Planning Comm'n, 438 S.E.2d 801, 809 (W. Va. 1993).

21. *See* McAndrews v. Fleet Bank, 989 F.2d 13, 18 (1st Cir. 1993) (ignoring the first prong of *Agins* and proceeding under *Penn Central*); Eide v. Sarasota County, 908 F.2d 716, 720 (11th Cir. 1990) (dividing claims into just compensation, due process takings, arbitrary and capricious due process, and equal protection claims); *Manocherian*, 643 N.E.2d at 486-87 (applying the disjunctive test to invalidate a statute regulating the use of rental properties); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1065-66 (N.Y. 1989) (applying the disjunctive standard established by the Supreme Court in a manner consistent with the *Agins* line of cases); *see also infra* note 37 (discussing the failure of courts to distinguish between Due Process Clause protections and Just Compensation Clause protections).

22. Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 37 Cal. Rptr. 2d 677 (1995), *cert. denied*, 116 S. Ct. 86; Central Motors v. City of Pepper Pike, 653 N.E.2d 639 (Ohio 1995); Gerijo, Inc. v. City of Fairfield, 638 N.E.2d 533 (Ohio 1994). These cases have reinterpreted the disjunctive standard first announced in *Agins*, *see infra* notes 37-44 and accompanying text, as a conjunctive standard requiring a landowner to establish that a regulation fails to serve a legitimate governmental interest *and* deprives the landowner of economically viable use of the land. *See* discussion *infra* Part III.C. (discussing the adoption of the conjunctive test).

23. *See* discussion *infra* Part III.C. (examining California's and Ohio's use of a conjunctive standard).

reiteration of a disjunctive test[24] and leads to results which are of questionable constitutional validity.[25] For example, no recovery will be available for a plaintiff who is completely denied economically viable use of the land if the regulation advances legitimate state interests.[26] Similarly, the conjunctive standard will validate an admittedly bad regulation which utterly fails to advance any legitimate state interests unless the owner is also denied economically viable use of his or her property.[27]

The purpose of this Comment is to provide an overview of the modern takings standards as developed in the *Agins* line of cases including exemplars of their proper application.[28] This discussion is followed by an examination of the conjunctive application of the *Agins* disjunctive test by the California and Ohio courts.[29] This Comment also presents a re-examination of landmark Supreme Court cases in light of the conjunctive application of *Agins*, and considers the possible effects of these state court decisions upon private property rights.[30]

II. THE FIFTH AMENDMENT'S JUST COMPENSATION CLAUSE—THE DEVELOPMENT OF THE *AGINS* DISJUNCTIVE STANDARD

The Fifth Amendment of the United States Constitution establishes a minimum level of protection for private property and is applicable to the states through the Fourteenth Amendment.[31] Although states may confer greater rights upon individuals than those afforded under the Federal Constitution, state pro-

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24. *See, e.g., Dolan*, 114 S. Ct. at 2316; *Lucas*, 505 U.S. at 1016; Pennell v. City of San Jose, 485 U.S. 1, 18 (1988) (Scalia, J., concurring in part and dissenting in part); *Nollan*, 483 U.S. at 834; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985); *see also* Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 14 (1984) (stating that a taking is effected if the landowner is denied economically viable use of the land).

25. *See* discussion *infra* Part V (examining the effects of the conjunctive standard upon landowners and property rights); *see also infra* notes 31-32, 247-48 and accompanying text (establishing that the Fifth Amendment provides a minimum level of protection for private property rights).

26. *See infra* notes 36-37, 247-48 and accompanying text.

27. *See infra* notes 36-37, 247-48 and accompanying text.

28. *See* discussion *infra* Parts II, III.B. (discussing the development of the *Agins* disjunctive test and providing examples of its proper application).

29. *See* discussion *infra* Part III.C. (examining the use of a conjunctive test by California's Fourth District Court of Appeal and by Ohio courts).

30. *See* discussion *infra* Parts IV-V (analyzing *Nollan*, *Dolan*, and *Lucas* under a conjunctive standard and considering the possible effects upon private property rights).

31. *See* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897) (incorporating the Fifth Amendment into the Fourteenth Amendment of the United States Constitution); *see also* Michael J. Davis & Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses*, 68 OR. L. REV. 393, 393-94 (1989) (discussing the history of the due process and just compensation clauses and the various views of the relationship between the two). *See generally* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) (stating that the Fourteenth Amendment applied the Bill of Rights to the various states, "creating a federal floor of protection").

tections may not fall below the minimum guarantees mandated by the Federal Constitution.[32]

As a result of the incorporation of the Fifth Amendment's protections into the due process protections of the Fourteenth Amendment, landowners have available two distinct causes of action when seeking just compensation or the invalidation of unconstitutionally burdensome regulations: a Fifth Amendment claim for a taking of property without just compensation under *Agins*, *Penn Central Transp. Co. v. New York City*,[33] or *Loretto v. Teleprompter Manhattan CATV Corp.*,[34] and a Fourteenth Amendment claim for denial of property without due process of law under the Supreme Court's line of substantive due process cases.[35] Although the Due Process Clause of the Fourteenth Amendment and the Just Compensation Clause of the Fifth Amendment each offer protection of private property rights, and both may be implicated in any single factual scenario, each possesses its own identity and differs in standard and application.[36] Although a regulation may implicate both clauses, courts have historically given deference to governmental actions and often apply only due process standards, failing to recognize that an examination under the Just Compensation Clause may be warranted also.[37] This is where *Agins* and its progeny become important.

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32. The Supremacy Clause of the United States Constitution provides that federal law shall prevail over state law. U.S. CONST. art. VI, § 2.

33. 438 U.S. 104 (1978).

34. 458 U.S. 419 (1982); *see infra* notes 133-34 and accompanying text (discussing the Supreme Court's holding in *Loretto*).

35. Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System With Integrity*, 63 ST. JOHN'S L. REV. 433, 437-38 (1988).

36. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 n.3 (1987) (stating that "there is no reason to believe . . . that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical"). *Compare* U.S. CONST. amend V. ("[P]rivate property [shall not] be taken for public use without just compensation") *with* U.S. CONST. amend. XIV, § 1 ("[n]o State shall . . . deprive any person of . . . property without due process of law").

37. *See* Wiseman, *supra* note 35, at 437-39 (stating that courts frequently fail to distinguish between the due process and just compensation protections of property, as well as between two possible abuses of governmental power: "[F]irst the government may act arbitrarily in violation of due process; second, the government may so intrusively regulate the use of property in pursuit of legitimate police power objectives as to take the property without just compensation, in violation of the just compensation clause."). *See generally* Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990) (applying due process standards where just compensation standards may have been appropriate); Davis & Glicksman, *supra* note 31, at 394 (arguing that the Supreme Court's difficulty with regard to the Fifth Amendment stems from a consistent failure to differentiate between deprivations of property without due process and takings of property without just compensation); *Takings*, *supra* note 19, at 4 (arguing that the confused and contradictory decisions of the Supreme Court in the area of takings is due to the Court's refusal to give the Takings Clause the natural reading that the text suggests).

A. Agins v. City of Tiburon: *The Just Compensation Clause Revived and the Genesis of the Disjunctive Test*

Modern Supreme Court jurisprudence with respect to the Just Compensation Clause begins with *Agins*.[38] In *Agins*, the landowner brought a facial challenge to a zoning ordinance which would limit the development of his five acre property to the construction of up to five residences.[39] The landowner had not submitted a plan for development of the property, and therefore, the only question before the Court was whether the enactment of the zoning ordinance constituted a taking.[40] The Court articulated a two-pronged *disjunctive* test to be applied in regulatory takings cases: "[A regulation] effects a taking if the ordinance does not substantially advance legitimate state interests, *or* denies an owner economically viable use of his land."[41] Thus, a landowner may recover for a "regulatory taking" if the regulation fails *either* of the two prongs.[42]

The test, although first stated in the disjunctive, may be rephrased in the negative, thus becoming conjunctive.[43] This could be called the "negative conjunctive" form of the *Agins* test. Under the negative conjunctive formulation, a land-use regulation *does not* effect a taking if the regulation *both* substantially advances legitimate state interests *and* does not deny an owner of economically viable use of the land.[44] Logically, if a landowner need only satisfy one prong of the test to recover, the regulation must satisfy both prongs to be deemed constitutional. Reformulation in this manner does not change the meaning of the test or alter its application.[45]

Although the *Agins* test was intended to be a Just Compensation Clause standard, in formulating the first prong of the test, Justice Powell used the "substantial relationship" standard of the Due Process Clause as a starting point.[46] Thus, the view that the first prong should be analyzed under due process

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38. 447 U.S. 255 (1980).

39. *Agins*, 447 U.S. at 260.

40. *Id.*

41. *Id.* (emphasis added) (citations omitted).

42. *Id.*

43. *See Nollan*, 483 U.S. at 834 (stating the *Agins* test in the negative conjunctive form); *see also* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (reiterating the *Agins* test in the negative conjunctive form).

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

45. *See id.* (utilizing the negative conjunctive form of the *Agins* test).

46. The language of the first prong was based upon the following due process cases: *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928) (stating that a regulation cannot be imposed if it does not bear a "*substantial relation* to the public health, the public morals, the public safety, or the public welfare") (emphasis added), and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (stating that a regulation is unconstitutional if its "provisions are clearly arbitrary and unreasonable, having no *substantial relation* to the public health, safety, morals, or general welfare") (emphasis added). *See Agins*, 447 U.S. at 260.

standards is not wholly specious.[47] The mingling of due process and just compensation language belies the Court's continued difficulty in determining what is required under the Just Compensation Clause. However, the first prong, in light of later authority, is clearly intended as a just compensation standard, rather than a due process standard, and is to be invoked when a landowner is singled out to disproportionately bear societal burdens.[48] Justice Scalia, writing for the majority in *Nollan v. California Coastal Commission*,[49] sought to dispel the notion that the first prong of *Agins* was to be evaluated using due process precepts.[50]

B. Nollan v. California Coastal Commission*: Distinguishing Just Compensation from Due Process*

Justice Scalia, delivering the opinion of the Court, applied the two-pronged *Agins* test to the California Coastal Commission's requirements that conditioned the issuance of the Nollans' building permit on the exaction[51] (some may say extortion)[52] of an easement across their property.[53] Justice Scalia's opinion provided two important refinements of the first prong of *Agins*. First, the *Nollan* opinion clarified what is required under the first prong of *Agins* when it is applied

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47. *See Agins*, 447 U.S. at 261; *supra* note 46 (discussing the use of due process language as a starting point for the development of the disjunctive test); *see also* Sullivan, *supra* note 15, at 160 (arguing that *Nollan*, *Dolan*, and *Ehrlich* are actually substantive due process cases, rather than Just Compensation Clause cases).

48. *See Agins*, 447 U.S. at 260-61; discussion *infra* Part II.B. (examining the Court's decision in *Nollan* and Justice Scalia's attempt to differentiate the first prong of the *Agins* test from due process standards).

49. 483 U.S. 825 (1987).

50. *Nollan*, 483 U.S. at 834 n.3.

51. *See* BLACK'S LAW DICTIONARY 557 (6th ed. 1990) (defining an "exaction" as "[t]he wrongful act of an officer or other person in compelling payment of a fee or reward for his services, under color of his official authority, where no payment is due").

52. *See Nollan*, 483 U.S. at 837 (stating that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion'" (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14-15 (N.H. 1981))).

53. *Nollan*, 483 U.S. at 834. The permit condition imposed upon the landowners would require the granting of an easement in favor of the public that would allow the public to pass along the Nollans' property above the mean high tide line but below the landowners' seawall. *Id.* at 828.

Article X, section 4 of the California Constitution guarantees the public's right to access to beaches and navigable waters by explicitly incorporating the public trust doctrine. Article X, section 4 provides that:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.

Under the public trust doctrine, owners of land adjacent to navigable waters own the land subject to a trust interest on behalf of the public in tidelands and in lands between the high and low water marks in nontidal navigable lakes. *See* City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 291, 644 P.2d 792, 793-94, 182 Cal. Rptr. 599, 600-01 (1982); Carstens v. California Coastal Comm'n, 182 Cal. App. 3d 277, 288, 227 Cal. Rptr. 135, 142-43 (1986).

to exactions.[54] Second, the *Nollan* opinion attempted to dispel the notion that the first prong was a due process standard requiring only minimal scrutiny.[55]

Under the first prong of *Agins*, the regulation must substantially advance legitimate state interests if it is to comport with the Just Compensation Clause.[56] The municipal zoning ordinance at issue in *Agins* however, was quite different from the regulations at issue in *Nollan*. The regulations in *Nollan*, like *Agins*, were part of a comprehensive scheme to regulate land use; however, the regulations at issue in *Nollan* authorized the exercise of discretion by the California Coastal Commission to condition the issuance of coastal development permits on the exaction of easements across landowners' property.[57] Concomitant with the discretion present in *Nollan* was the danger that the discretion and permit conditions would be used for impermissible purposes.[58] The heightened danger of governmental abuse justified some form of heightened scrutiny over and above the easily satisfied "substantially advance" requirement articulated in *Agins*.[59]

In the majority's view, where exactions are imposed upon landowners, satisfaction of the "substantially advance legitimate state interests" requirement applicable to zoning ordinances would not be enough to satisfy the Just Compensation Clause: The majority would also require a "nexus" between the condition imposed and the justification for the regulation.[60] This does not mean that any asserted governmental interest is enough to serve as the justification for the regulation; the justification for the regulation must be the mitigation of harm caused by the landowner's development activities.[61]

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54. *Nollan*, 483 U.S. at 837; *see also* John J. Delaney, *What Does It Take to Make a Take? A Post-Dolan Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 25 URB. LAW. 55 (1995) (characterizing *Nollan* and *Dolan* as exactions cases).

55. *Nollan*, 483 U.S. at 834 n.3; *see supra* note 2 and accompanying text (providing examples of results under due process standards).

56. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

57. *Nollan*, 483 U.S. at 828; *see* CAL. PUB. RES. CODE §§ 30106, 30212, 30600 (West 1986) (providing the California Coastal Commission with the discretionary ability to condition the development of private coastal lands upon the granting of an easement from the public roadway to the beach and along the coast); *see also Agins*, 447 U.S. at 257 (discussing zoning ordinances that limited the development of the landowner's property to single-family dwellings and that allowed only one to five dwellings on their five-acre tract).

58. *Nollan*, 483 U.S. at 835 n.4, 837 & n.5, 841; *see* Dan Walters, *Best Intentions Can Go Wrong*, SACRAMENTO BEE, June 2, 1996, at A3 (asserting that the Coastal Act implemented by the California Coastal Commission created an opportunity for political abuse). For example, federal investigators caught Mark Nathanson, a coastal commissioner, extorting payoffs from property owners in exchange for approval of projects. *See id.*

59. The Court stated that a broad range of governmental purposes and regulations, including zoning and landmark preservation, satisfied the requirement that regulations substantially advance legitimate state interests. *Nollan*, 483 U.S. at 834-36.

60. *Id.* at 837.

61. The majority would require the permit condition to serve the same governmental interest as a development ban on the property. *Id.* at 836-37. If the development ban would serve to prevent some form of public harm, the permit condition must serve to prevent the same public harm. *Id.* Therefore, the justification for the regulation must be the mitigation or prevention of public harm caused by the development. *Id.*

Thus, in exaction scenarios, to satisfy the first prong of *Agins* and the Just Compensation Clause, the advancement of legitimate state interests may not be speculative or imaginative as permitted under substantive due process,[62] but must be "substantial" and bear a nexus to the harm caused by the landowner's development of the property.[63] To do otherwise would be to sanction the use of regulations that serve only as a pretext to obtain interests in land without the payment of just compensation.[64]

Justice Brennan, whom Justice Marshall joined in dissent, believed the standard articulated by the majority was unprecedented[65] and argued for what is best described as a "minimum-rationality" due process or equal protection standard.[66] Justice Brennan's inquiry into the validity of the permit condition would have ended with whether the Coastal Commission "could rationally have decided" the condition might achieve the objective of preserving public access to the beach.[67] Refusing to acknowledge any distinction between standards of review under the Just Compensation or Due Process Clauses, Justice Brennan argued that where the rationality of governmental action is at issue, the inquiry is always the same despite semantical differences.[68] This argument begs the question: Cannot government act rationally, yet take property without providing compensation? Attempting to address this problem with his argument, Justice Brennan conceded for a moment that valid exercises of the police power may still violate specific provisions of the Constitution, thus requiring review under standards other than the rational basis standard.[69] However, in his view, the more stringent standards applicable under other constitutional provisions are inapplicable here, where the issue is the rationality of government action.[70] To demonstrate that review under other constitutional provisions would be unwarranted. Justice Brennan then proceeded with a facile review under *Penn Central*, concluding that in his view, none

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62. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (stating that under the minimal scrutiny standard, a regulation affecting economic interests will be upheld if the legislature "might have concluded" the regulation was necessary to promote state interests and that it is irrelevant whether any interest is actually advanced).

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

64. *Id.* at 837.

65. Justice Brennan characterized the standard articulated by the Court as a revival of *Lochner*-era substantive due process, which had long been abandoned. *Id.* at 842 (Brennan, J., dissenting).

66. *Id.* at 843 (Brennan, J., dissenting).

67. *Id.* (Brennan, J., dissenting) (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981)).

68. *Id.* at 843 n.1 (Brennan, J., dissenting).

69. Justice Brennan argued that *Penn Central* provided an alternative framework that protected the values underlying the Just Compensation Clause, but that the standard of review remained the rational basis standard. *Id.* However, this conclusion is unsupported by *Penn Central*. In *Penn Central*, the Court considered the economic impact upon the landowner, the interference with legitimate investment backed expectations, and the character of the governmental action, not merely whether there was a rational basis for the regulation. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

70. *Nollan*, 483 U.S. at 843 n.1, 854 (Brennan, J., dissenting).

of the interests protected by the Just Compensation Clause were implicated by the permit condition.[71]

In response to Justice Brennan's argument that the minimum rationality due process standard was applicable, Justice Scalia maintained that the takings standards are not the same as due process or equal protection standards.[72] The *Agins* requirement that the regulation "substantially advance" the "legitimate state interest" sought to be achieved is different from whether the state "rationally could have decided" that the regulation might advance the state's interests.[73] Although the Court may have previously appeared to assume that the two inquiries were the same, Justice Scalia stated that this assumption was inconsistent with later cases.[74] The Just Compensation Clause, as incorporated into the Fourteenth Amendment, will not be satisfied by speculation or conjecture as the Due Process Clause may be, but requires more: The government must show that the regulation substantially advances legitimate state interests.[75]

Nollan, in addition to distinguishing the Just Compensation Clause from the Due Process and Equal Protection Clauses, also reinforced the disjunctive nature of the two-pronged test formulated in *Agins*. Although Justice Scalia stated the *Agins* test in the negative conjunctive,[76] the inquiry remained the same: The government needs to fail to prove only that the regulation substantially advances legitimate state interests for the landowner to prevail.[77] The majority based its decision solely on the first prong, concluding that the regulation failed to advance substantially legitimate state interests.[78] The majority found it unnecessary to examine whether the Coastal Commission's actions denied the Nollans economically viable use of their property.[79] Thus, the disjunctive nature explicit in the original formulation of the test is also implicit in its application.[80]

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71. *Id.* at 853-61 (Brennan, J., dissenting).

72. *Id.* at 834 n.3.

73. *See id.* (citing *Agins*, 447 U.S. at 260, the equal protection case of *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981), and the due process cases of *Williamson*, 348 U.S. at 487-88, and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)). *Compare Agins*, 447 U.S. at 260 (requiring that the regulation "substantially advance" the "legitimate state interest") *with Clover Leaf Creamery Co.*, 449 U.S. at 466 (upholding a regulation if the state "could rationally have decided" that the regulation might achieve state objectives).

74. *Nollan*, 483 U.S. at 834 n.3. *See generally* Hadacheck v. Sebastian, 239 U.S. 394, 410-11 (1915) (balancing a deprivation of economically viable use against the police power).

75. *Nollan*, 483 U.S. at 834 n.3.

76. *See supra* notes 43-45 and accompanying text (discussing the negative conjunctive form of the test).

77. *Nollan*, 483 U.S. at 834. Implicit in the negative conjunctive form of the test is a shift of the burden of proof from the property owner to the government. This shift of the burden, although implicit in *Nollan*, is made explicit in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). *Dolan*, 114 S. Ct. at 2320 n.8.

78. *Nollan*, 483 U.S. at 839.

79. *Id.* at 834.

80. *Agins*, 447 U.S. at 260.

C. Dolan v. City of Tigard—*Finishing What* Nollan *Began*

Under the first prong of *Agins*, the relevant inquiry is whether the regulation "substantially advances legitimate state interests."[81] Justice Scalia, in his *Nollan* opinion, recognized that the Supreme Court had not elaborated on what was a "legitimate state interest" or what relationship satisfied the "substantially advance" requirement.[82] The "essential nexus" requirement introduced in *Nollan* offered little help.[83] In *Dolan*, the Supreme Court granted certiorari to clarify the degree of connection required between exactions imposed on a landowner and the asserted governmental interest, as required under the first prong of *Agins*.[84]

The plaintiff, Florence Dolan, was a plumbing and electric supply store owner. She sought to expand her store and pave the parking lot, both of which were adjacent to Fanno Creek which runs through the City of Tigard, Oregon. As a condition to the granting of her redevelopment plans, the City Planning Commission required Ms. Dolan to dedicate to the City the portion of her property which fell within the 100-year flood plain of the creek and an additional fifteen-foot strip adjacent to the flood plain which was to be used as a pedestrian/ bicycle pathway.[85]

Before deciding whether the conditions imposed on the landowner satisfied the nexus requirement of *Nollan*, the Supreme Court sought guidance from state court decisions and undertook an examination of the standards used by a number of states for evaluating the relationship between exactions imposed by a municipality and the impact of a landowner's proposed development.[86] While some states accepted generalized statements about the connection between the exaction and the impact of the development, this standard did not offer adequate protection for property owners to satisfy Fifth Amendment requirements.[87] Also, the "specific and uniquely attributable" test[88] employed by some states was a more

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81. *Id.*; *Nollan*, 483 U.S. at 834.

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

83. When deciding the *Nollan* case, the Supreme Court was not required to clarify what relationship would satisfy the nexus requirement, as the exactions failed to meet even the most "untailored standards." *Id.* at 838.

84. Dolan v. City of Tigard, 114 S. Ct. 2309, 2312 (1994).

85. *Id.* at 2314.

86. *Id.* at 2318-20.

87. *Id.* at 2318; *see, e.g.*, Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182, 190-91 (Mont. 1964) (upholding a Montana district court decision finding that a land exaction in exchange for a subdivision plat map approval was permissible based upon the county's desire to promote the public comfort, welfare, and safety); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673, 675 (N.Y. 1966) (upholding a fee and land exactions based on abstract statements of need for recreational facilities in the community).

88. *See* Pioneer Trust & Savings Bank v. Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961) (holding that burdens imposed upon a landowner must be "specifically and uniquely attributable" to the development activity, or else the burdens would "amount[] to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power").

exacting standard than required by the Fifth Amendment.[89] The Court believed the intermediate standard adopted by a majority of state courts, the "reasonable relationship" test, was closest to constitutional requirements.[90] Despite the Court's initial approval of the "reasonable relationship" test, Chief Justice Rehnquist declined to employ the term "reasonable relationship" due to the confusing similarity of the "rational basis" language of the Equal Protection Clause's minimal scrutiny standard.[91] He thought the phrase "'rough proportionality' best encapsulat[ed] . . . the requirement of the Fifth Amendment."[92]

Under the rough proportionality test, "[n]o precise mathematical calculation is required," however, a city must make an "individualized determination" that the costs imposed on an individual landowner are "related in both nature and extent" to the impact of the landowner's development activities.[93]

Applying the test to the conditions placed upon the expansion of Dolan's store, the Court first analyzed whether there was an essential nexus between the permit conditions and the legitimate interests sought to be advanced by the City.[94] Unlike *Nollan* where there was no plausible argument that lateral access across the beach would increase visual access from the roadway, the conditions placed upon Dolan's development would satisfy the essential nexus requirement.[95] The expansion of Dolan's plumbing store would increase the impervious surface on the property and contribute to the stormwater run-off into Fanno Creek.[96] Similarly, if the City's assertions were true, the dedication of a bicycle/pedestrian pathway would alleviate any increase in traffic congestion resulting from the expansion, thus satisfying the essential nexus requirement.[97]

Accepting that the essential nexus existed between the permit conditions and the City's interests in flood prevention along Fanno Creek and in the reduction of congestion in the business district, the Court was next required to examine whether the conditions were roughly proportional to the impact of the plumbing store expansion.[98]

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89. *Dolan*, 114 S. Ct. at 2319.

90. *Id.*; *see* J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 15 (N.H. 1981) (applying a "reasonable regulation" test in deciding that a zoning ordinance forced unconstitutional burdens on a landowner), *overruled on other grounds by* Town of Auburn v. McEvoy, 553 A.2d 317, 319 (N.H. 1988).

91. The significance of *Dolan* does not end at the clarification of the first prong; it was also an additional attempt to distinguish Fifth Amendment standards from Fourteenth Amendment Due Process standards. *Dolan*, 114 S. Ct. at 2319. The Court made a conscious effort to avoid confusion, and unequivocally indicated that the first prong is not a due process standard. *Id.*

92. *Id.*

93. *Id.* The requirement that the government make an individualized determination that the dedication is related to the nature and extent of the development to justify its imposition effectively shifts the burden of proof from the landowner to the government. *See id.* at 2320 n.8.

94. *Id.* at 2317.

95. *Id.* at 2318.

96. *Id.*

97. *Id.*

98. *Id.* at 2318-22.

The City contended, and probably rightly so, that the increase in impervious surfaces on the Dolan property would increase the stormwater run-off into Fanno Creek.[99] The City, however, wanted more than the fifteen percent Dolan was already required to leave as open space under the Community Development Code.[100] The City wanted Dolan to dedicate all of the land within and fifteen feet above the 100-year flood plain to the City as part of its greenway system, thus depriving Dolan of the ability to exclude others from the land.[101] Moreover, the new construction could not intrude into the greenway area.[102]

The City did not explain why a public, rather than private, greenway and flood plain were necessary to offset any increase in stormwater run-off.[103] Additionally, the proposed development would not encroach on any existing greenway, and thus there was no need for Dolan to provide any alternate greenway space.[104] The Court concluded that the flood plain and greenway conditions failed the reasonable relationship test.[105] The City's findings that there would be increased stormwater run-off due to the expansion of the plumbing store did not show any reasonable relationship to the flood plain easements that the City demanded.[106]

The City's findings in support of the pedestrian/bicycle pathway also failed the reasonable relationship requirement.[107] The City estimated that the proposed development would increase traffic by an additional 435 trips per day.[108] However, the City failed to establish that the requirement for the dedication of a pedestrian/bicycle pathway was in proportion to any impacts of the proposed development.[109] Any relationship was merely speculative, and was based upon the argument that the pathway "*could* offset some of the traffic . . . and lessen the increase in traffic congestion."[110] Arguably, the pathway conditions were merely a pretext to gain title to land the City wanted that would avoid eminent domain proceedings and the need for the City to pay just compensation.[111]

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99. *Id.* at 2318.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 2320-21.
104. *Id.* at 2321.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 2321-22 (emphasis added).
111. *Id.* at 2322 n.10. The City, in refusing to grant Dolan a variance from the pathway dedication condition, stated that granting a variance conflicts with its adopted policy of establishing a continuous pathway system. *Id.* That the permit condition was pretextual is the only reasonable explanation: It is implausible that enough customers would ride a bicycle to make their plumbing purchases to offset any increase in traffic due to the proposed development.

D. Lucas v. South Carolina Coastal Council*:* Agins' *Second Prong Clarified—What Is a Denial of Economically Viable Use?*

Whereas the *Nollan* and *Dolan* decisions rested on the first prong of *Agins*, the inquiry in *Lucas v. South Carolina Coastal Council*[112] focused upon the second prong: whether the regulation "denies an owner economically viable use of his land."[113]

In *Lucas*, the plaintiff purchased two beachfront residential lots on which he intended to construct single-family homes.[114] Prior to the purchase, the South Carolina Legislature enacted its Coastal Zone Management Act, requiring landowners in the "critical area" of the coastline to seek approval from the South Carolina Coastal Council prior to any development.[115] 1988 legislation, the Beachfront Management Act, subsequent to Lucas's purchases, expanded the "critical area" and prohibited construction within the "critical area."[116] Unfortunately for Lucas, his parcels fell within the expanded "critical area" and were rendered valueless.[117]

While examining whether Lucas's property was "taken" by the regulation, the Court stated that there are two types of regulatory action that are compensable without an inquiry into the governmental interest advanced in support of the regulation: first, where the landowner suffers a physical invasion of the property, and second, where the regulation denies the landowner economically viable or productive use of the land.[118]

Notwithstanding these per se rules requiring compensation or an invalidation of the regulation as applied, the Court acknowledged that not all regulations that affect property values are compensable.[119] However, "regulations that leave the

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112. 505 U.S. 1003 (1992).

113. *Lucas*, 505 U.S. at 1009-10. The issue of whether the regulation substantially advanced legitimate state interests was not discussed. The plaintiff conceded that the Beachfront Management Act was validly enacted pursuant to the State's police power and served the legitimate state goal of preserving South Carolina's beaches. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896-98 (S.C. 1991), *rev'd and remanded*, 505 U.S. 1003 (1992).

114. *Lucas*, 505 U.S. at 1006-07.

115. *Id.* at 1007-08.

116. *Id.* at 1008-09. The Court noted that the Beachfront Management Act still permitted some construction, such as decks and walkways. *Id.* at 1009 n.2.

117. *Id.*

118. *Id.* at 1015-16. Regulations that deny an owner all economically viable use are likened to physical takings and are compensable, because as far as the owner is concerned, the denial of use is tantamount to a physical appropriation. *See id.* at 1017; United States v. Causby, 328 U.S. 256, 267 (1946) (holding low flying aircraft immediately above a landowner's property rendered the property useless and constituted a taking because the low flying air traffic had the same effect as if the government had taken physical possession of the property).

119. *Lucas*, 505 U.S. at 1017-18; *see* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (stating that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

owner of land without economically beneficial or productive options for its use . . . carry with them the heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm," thus justifying compensation without an inquiry into the government objectives.[120]

Justice Scalia conceded that the per se rule articulated by the Court did not offer guidance as to what is a compensable denial of economically viable use.[121] Justice Stevens in his dissent attacked the categorical rule requiring compensation as lacking support from prior decisions, and more importantly, that the rule was "wholly arbitrary."[122] In Justice Stevens's view, "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."[123] In refutation of Justice Stevens's argument that the rule arbitrarily provided for an all or nothing recovery, Justice Scalia turned to the three prong analysis of *Penn Central*,[124] and concluded that a landowner may still recover even though the deprivation is less than complete.[125] Adoption of the deprivation of economically viable use standard did not foreclose use of *Penn Central*.[126] Thus, the categorical rule articulated in *Lucas* is available to a plaintiff who is denied all economically viable use, while a plaintiff whose denial of economically viable use is less than complete can seek compensation or an invalidation of the regulation under *Penn Central*.[127] For landowners seeking compensation under *Penn Central*, the determination of whether compensation is due will turn upon the owner's legitimate expectations, the nature of the governmental action,[128] and whether the restrictions were a part of the owner's title in the first place.[129]

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120. *Lucas*, 505 U.S. at 1018.

121. *Id.* at 1016 n.7; *see id.* (stating that the Court's lack of a clear standard as to when a deprivation of economically feasible use requires compensation has produced inconsistent pronouncements).

122. *See id.* at 1064 (Stevens, J., dissenting).

123. *Id.* (Stevens, J., dissenting).

124. 438 U.S. 104, 124 (1978).

125. *Lucas*, 505 U.S. at 1019 n.8. Although Justice Scalia called for the use of the *Penn Central* factors, he believed the Court erred in its analysis, using the landowner's total land holdings in the vicinity, rather than the particular parcel burdened by the regulation, to determine the impact upon the landowner. *Id.* at 1016 n.7. In *Penn Central*, the Court held that the determination whether a taking has occurred depends "upon the particular circumstances in that case." *Penn Central*, 438 U.S. at 124. Although the *Penn Central* court has been "unable to develop any 'set formula'" for examining takings, the determination is dependent upon "ad hoc, factual inquiries" weighing three primary factors: first, the economic impact upon the claimant; second, the extent to which the regulation interferes with legitimate investment-backed expectations; and finally, the character of the government action. *Id.*

126. *Lucas*, 505 U.S. at 1019 n.8.

127. *See infra* notes 121-25 and accompanying text (discussing Justice Scalia's use of *Penn Central* to refute Justice Stevens's view that the second prong of *Agins* provided for an all or nothing recovery).

128. The Supreme Court is more likely to find a taking if the governmental action can be characterized as a physical invasion rather than an adjustment of benefits and burdens among members of society. *See Penn Central*, 438 U.S. at 124.

129. *Lucas*, 505 U.S. at 1016 n.7.

Although Justice Scalia likened a denial of economically viable use to a physical taking, they are not one and the same.[130] The analogy between physical invasions and denials of economically viable use served as a justification for the per se rule requiring just compensation where the owner is denied economically viable use.[131] It would be unwise for landowners suffering a physical invasion of their land to proceed under *Lucas*.[132] Instead, landowners suffering a physical invasion of their property have available the per se rule established in *Loretto v. Teleprompter Manhattan CATV Corp.*[133] Under *Loretto*, a taking has occurred and requires just compensation if the landowner is forced to suffer a physical invasion of his or her property, regardless of the economic impact upon the landowner.[134] Analysis of physical invasions under the second prong of *Agins* would require the landowner to show there was a resultant denial of economically viable use, which is contrary to the holding in *Loretto*, and would lessen the likelihood of recovery by the landowner.[135]

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130. While a physical invasion requires just compensation regardless of the impact upon the landowner, *see infra* notes 133-34, the per se rule requiring just compensation for a denial of economically viable use requires the denial to be complete, not merely a relatively minor restriction upon the use of the property. *See Lucas*, 505 U.S. at 1018; Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); *see also* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 498 (1987) (holding that the denial of economically viable use was to be measured by the effect upon the whole parcel, not a particular portion).

131. *Lucas*, 505 U.S. at 1015-16; *cf.* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) (arguing that whatever the form of the burden imposed on a landowner, condemnation or land use restriction, the effects upon the landowner and the benefits to society are the same).

132. *See infra* notes 133-34 and accompanying text (describing the more easily satisfied rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, which is available to landowners suffering physical invasions).

133. 458 U.S. 419 (1982). In *Loretto*, the owner of an apartment building sued a cable television company that had installed its transmission lines and distribution boxes on her building pursuant to a New York statute, claiming that the intrusion constituted a taking of property without just compensation. *Id.* at 421-22. Although the intrusion into Loretto's property was small and did not interfere with the use and enjoyment of the property, the Court held that it had "uniformly found a taking regardless of the extent of the occupation, without regard to whether the action achieves an important public benefit *or has only minimal economic impact on the owner.*" *Id.* at 422, 434 (emphasis added). However, the extent of the invasion is a relevant factor in determining the compensation due. *Id.* at 437. Earlier cases found takings on a variety of facts. *See, e.g.*, Griggs v. Allegheny County, 369 U.S. 84, 89-90 (1962) (holding that air flights at low altitude resulted in the taking of an air easement requiring compensation); *Causby*, 328 U.S. at 267 (deciding that continuous low flights resulted in the taking of an easement); Portsmouth Harbor Land & Hotel v. United States, 260 U.S. 327, 329-30 (1922) (concluding that the firing of projectiles over private property constituted a servitude on the private property); United States v. Cress, 243 U.S. 316, 327-28 (1917) (ruling that permanent flooding constituted a taking requiring just compensation).

134. *Loretto*, 458 U.S. at 434.

135. *Compare Lucas*, 505 U.S. at 1017-18 (requiring the landowner to suffer a complete denial of economically viable use) *with Loretto*, 458 U.S. at 434 (holding that physical invasions are compensable regardless of the economic impact upon the landowner).

E. Ehrlich v. Culver City—*A Taste of What Is to Come?*

The *Ehrlich v. Culver City*[136] decision, which remanded the case to the trial court for reconsideration in light of *Dolan* on the next court day after *Dolan* was decided, is an additional indication of what the Supreme Court will require under the Just Compensation Clause.[137] In *Ehrlich*, a landowner wanted to construct luxury townhomes on a site which formerly contained private recreational facilities, including private tennis courts.[138] The City approved the project but imposed a $280,000 mitigation fee for the loss of the private tennis courts, and a $33,220 fee in lieu of a requirement that art be placed on the development project.[139] The question before the trial court was whether the imposition of the fees constituted an unconstitutional taking of property within the meaning of the Fifth Amendment.[140]

The trial court invalidated the mitigation fee upon finding that there was "no reasonable relation" between the plaintiff's project and the need for public tennis courts in the city.[141] Finding no distinction to be made between public and private tennis courts, the appellate court reversed, opining that the loss of private tennis courts due to the landowner's development activities justified the imposition of exactions to provide public community recreational facilities elsewhere in the city.[142] The United States Supreme Court granted certiorari, then vacated the decision and remanded in light of its decision in *Dolan*.[143] Thus, although the rough proportionality requirements of *Nollan* and *Dolan* pertained to the exaction of interests in real property, the remand of *Ehrlich* intimates that the nexus and rough proportionality requirements of the first prong of the *Agins* test may be applicable to permits conditioned upon monetary exactions as well.[144]

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136. 114 S. Ct. 2731 (1994).

137. By remanding *Ehrlich* in light of *Dolan*, the Court intimated that monetary exactions will be subject to the same scrutiny as exactions of interests in land. *Ehrlich*, 114 S. Ct. at 2731.

138. Ehrlich v. Culver City, 15 Cal. App. 4th 1737, 1743, 19 Cal. Rptr. 2d 468, 471 (1993), *vacated and remanded*, 114 S. Ct. 2731 (1994).

139. *Id.*

140. *Id.* at 1744, 19 Cal. Rptr. 2d at 472.

141. *Id.*

142. *Id.* at 1750, 19 Cal. Rptr. 2d at 476.

143. *Ehrlich*, 114 S. Ct. at 2731.

144. *See id.*; Northern Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384, 389 (Ill. 1995) (applying a two-pronged *Agins* analysis to an impact fee imposed on new development). *But see* Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 902 P.2d 1347, 1352 (Ariz. 1995) (holding that because the agency that developed the water development fee at issue did not permit an adjudicative decision, the "rough proportionality" standard of *Dolan* did not apply).

F. Broad Applicability of the Nollan *and* Dolan *Decisions*

Agins established that in general, land-use regulations would be subject to the requirement that the regulation substantially advance legitimate state interests.[145] *Nollan* and *Dolan*, which further developed this standard as requiring a "rough proportionality" between the burdens imposed on the landowner and the landowner's development activities, have been characterized as applicable only to exaction cases.[146] However, there is support for the broad application of *Nollan* and *Dolan* to cases outside of the narrow exaction context.[147] The theoretical bases for *Nollan* and *Dolan* are equally as applicable to costs imposed on landowners through regulations that do not mandate the imposition of exactions, yet substantially impair the value of the landowner's property.[148] Why deny an examination under the rough proportionality standard, rather than the lower-scrutiny "substantially advance" standard merely because the burdens imposed on the landowner do not take the form of an exaction? From a landowner's point of view, a regulation which destroys seventy-five percent of the landowner's property value is no different from a requirement that the landowner deed seventy-five percent of the land to the state.[149]

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145. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

146. Delaney, *supra* note 54, at 64.

147. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 n.14 (1992) (asserting that a regulation which is applicable to landowners on a general basis, rather than individual landowners, should not be immunized from attack on that basis, and to do so would render the Just Compensation Clause little more than a restatement of the Equal Protection Clause); *see also* Michael M. Berger, *Happy Birthday Constitution: The Supreme Court Establishes New Ground Rules for Land Use Planning*, 20 URB. LAW. 735, 783-85 (1988) (stating that there is no principled reason to distinguish between physical and regulatory takings since what is important is the impact upon the citizen); James L. Huffman, Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 ENVTL. L. 143, 150 (1995) (arguing that there is no reason to distinguish between adjudicative takings such as in *Dolan*, from legislative takings, and that the relevance of this distinction to the protection of property rights is unclear). *See generally Home Builders Ass'n of Cent. Ariz.*, 902 P.2d at 1353 (Grant, P.J., dissenting) (disagreeing with the majority's conclusion that because the imposition of a water resource development fee was a legislative determination and did not permit a "*Dolan*-like ad hoc, adjudicative determination," the rough proportionality standard did not apply); Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (upholding a city zoning ordinance requiring curbs, landscaping, and trees in surface parking lots under the "rough proportionality" standard), *cert. denied*, 115 S. Ct. 2268 (1995).

148. *See* Pennell v. City of San Jose, 485 U.S. 1, 21 (1988) (Scalia, J., dissenting) (arguing that a provision of San Jose's rent control ordinance violated the Fifth Amendment by failing to substantially advance legitimate state interests and that the landlord was not the cause of the harm the City sought to address); *see also* Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989) (applying *Agins*'s first prong, as developed in *Nollan*, to a municipal ordinance preventing the conversion, alteration, or destruction of single-room occupancy housing and holding that a taking had occurred); Cope v. City of Cannon Beach, 855 P.2d 1083, 1086 (Or. 1993) (applying the disjunctive *Agins* test and *Nollan* "nexus" requirement to a municipal ordinance prohibiting transient occupancy and concluding that *Agins* was satisfied).

149. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) (arguing that whatever the form of the burden imposed on the landowner, condemnation or land use restriction, the effects upon the landowner and the benefits to society are the same).

To justify the disparate treatment between exaction requirements and other types of land-use regulation, such as zoning ordinances, the Court has attempted to draw a distinction between legislative determinations classifying entire areas of a city, and the ad hoc decisionmaking present in *Nollan* and *Dolan*.[150] This distinction may be illusory, depending upon the level of abstraction with which one views the nature of the governmental action. Although *Nollan* and *Dolan* involved adjudicative decisions conditioning the issuance of building permits to landowners on the conveyance of a portion of their property, the adjudicative decisionmaking represented the implementation of a legislative determination classifying a portion of the city, or in the case of *Nollan*, classifying a portion of the state pursuant to the Coastal Act.[151] Therefore, the exactions at issue in *Dolan* arguably were not solely the product of an ad hoc adjudicative determination, but to the contrary, were part of a comprehensive land use plan required by the State of Oregon and codified in the City of Tigard's Community Development Code (CDC).[152]

The exactions required by the California Coastal Commission in *Nollan*, much like those in *Dolan*, also represented the implementation of a legislative determination.[153] This determination, rather than classifying a portion of the city, applied to all coastal lands within the State of California. When any development by landowners seeking to replace single family dwellings would have an adverse impact on public access to the sea, the Commission was authorized to condition the permit approval on exactions to ensure public access.[154]

These exaction requirements were not isolated to only a few landowners, but were visited upon many.[155] In *Dolan*, the CDC applied the exaction requirements to all development within the 100-year flood plain of Fanno Creek.[156] Similarly, the exaction requirements challenged in *Nollan* had been applied to forty-three out of sixty coastal development permits along the same tract of land; un-

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150. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (attempting to distinguish cases that involved generalized zoning and public health, safety, and welfare ordinances adopted pursuant to the government's police power, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Euclid v. Ambler*, 272 U.S. 365 (1926), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), from the instant matter involving an adjudicative determination and a greater focus of governmental power upon an individual landowner).

151. *See* CAL. PUB. RES. CODE §§ 30106, 30212, 30600 (West 1996); *see also Dolan*, 114 S. Ct. at 2314.

152. The City also developed a Master Drainage Plan, codified in the CDC, to combat the increased risk of flooding attendant with the increase in impervious surfaces due to new construction. *Dolan*, 114 S. Ct. at 2313.

153. CAL. PUB. RES. CODE §§ 30106, 30212, 30600 (West 1996).

154. *Id.*

155. Pursuant to the CDC, all property owners in the area zoned "central business district" must comply with open space requirements, and all landowners seeking to develop property adjacent to Fanno Creek's 100-year flood plain must dedicate land suitable for the construction of a pedestrian/bicycle pathway. *See Dolan*, 114 S. Ct. at 2313-14.

156. *Id.* at 2314.

doubtedly the exactions were imposed along other portions of the California coast as well.[157]

Much of the Court's trepidation with respect to the adjudicative decision-making present in *Nollan* and *Dolan* appears to be caused by the discretion that an agency, whether the CDC or the Coastal Commission, may have in conditioning development permits upon exactions.[158] The discretion of an agency to engage in ad hoc determinations requiring exactions increases the risk that individuals will be forced to bear societal burdens and carries the possibility that the government will attempt to circumvent the Just Compensation Clause or engage in "out-and-out plan[s] of extortion."[159] The Coastal Act vested the California Coastal Commission with the discretion to decide whether or not a particular development would adversely impact access to the sea and accordingly, whether to condition permit issuance on the exaction of an easement across the property.[160] The discretion in *Dolan* took the form of the CDC's ability to grant a variance[161] if the zoning provisions would cause an "undue or unnecessary hardship."[162] Nevertheless, the fact remains that all of the regulations in question represented the implementation of legislative determinations and thus, should all be subject to the same heightened level of scrutiny.[163]

The broad applicability of the "rough proportionality" standard is also supported by the Supreme Court's consistent reiteration that otherwise legitimate uses of the police power may nevertheless result in an unconstitutional taking of property without just compensation in violation of the Fifth Amendment.[164] For example, Justice Holmes's statements that "if a regulation goes too far it will be recognized as a taking"[165] and that "a strong public desire to improve the public condition is not enough to warrant achieving the desire to a shorter cut than the

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157. Nollan v. California Coastal Comm'n, 483 U.S. 825, 829 (1987); *see* Pacific Legal Found. v. California Coastal Comm'n, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982) (suit by a nonprofit foundation and two property owners challenging the use of dedication conditions by the California Coastal Commission); Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (seeking invalidation of a dedication requirement conditioning the issuance of a development permit). *See generally* CAL. PUB. RES. CODE §§ 30212, 30600 (West 1996).

158. *Dolan*, 114 S. Ct. at 2318.

159. *Nollan*, 483 U.S. at 837 (citing J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).

160. *See supra* note 151 and accompanying text (establishing the Commission's discretion whether to permit an application upon an exaction).

161. *See* BLACK'S LAW DICTIONARY 1553 (6th ed. 1990) (defining a "variance" as "[p]ermission to depart from the literal requirements of a zoning ordinance by virtue of unique hardship due to special circumstances regarding a person's property").

162. *Dolan*, 114 S. Ct. at 2314.

163. *See supra* note 147 and accompanying text (arguing that regardless of the form of the burden placed upon the landowner, all should be subject to the same level of scrutiny).

164. *See supra* note 12 and accompanying text (asserting that a legitimate exercise of the police power may result in a taking of property without just compensation).

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

constitutional way of paying for the change" are omnipresent in takings cases.[166] Similarly, the Supreme Court's famous quote from *Armstrong v. United States*[167] stating that the "Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" has almost become a mantra to be recited in every takings analysis.[168] The spirit and intent of these quotes embody the central principles of the Fifth Amendment: The right of persons to own property, and that if the public, through the government, desires it for its own purposes, the public must pay for it.

G. *Summary—What Is Required Under the Two-Pronged* Agins *Disjunctive Test?*

The area of takings law remains uncertain and is at times contradictory; however, some relatively clear and consistent pronouncements have arisen.[169] Despite cries that it is a veiled attempt to revive the judicial subjectivism of *Lochner*-era substantive due process,[170] courts now recognize that land use regulations enacted pursuant to a state's police power may violate the Just Compensation Clause of the Fifth Amendment.[171] This represents a dramatic shift

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166. *See id.* at 416; *e.g.*, Esposito v. South Carolina Coastal Council, 939 F.2d 165, 174 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992); Devines v. Maier, 665 F.2d 138, 141 (7th Cir. 1981), *aff'd in part*, 728 F.2d 876 (7th Cir. 1984), *cert. denied*, 469 U.S. 836; Jacobsen v. Tahoe Reg'l Planning Agency, 558 F.2d 928, 947 (9th Cir. 1977); Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 4 n.3 (W.D. Tex. 1995), *aff'd in part, vacated in part, and remanded*, 94 F.3d 996, 1005 (5th Cir. 1996); Golemis v. Kirby, 632 F. Supp. 159, 162 (D.R.I. 1985); Althaus v. United States, 7 Cl. Ct. 688, 693 (Cl. Ct. 1985); Adams Outdoor Adver. v. East Lansing, 483 N.W.2d 38, 51 (Mich. 1992); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1062 (N.Y. 1989).

167. 364 U.S. 40 (1960).

168. *Armstrong*, 364 U.S. at 49. An integral element of every takings analysis is the recognition that the Fifth Amendment was intended to protect individuals from the imposition of burdens which should be borne by society. As such, *Armstrong* is often quoted when explaining the purpose of the Fifth Amendment. *See, e.g.*, *Dolan*, 114 S. Ct. at 2316; *Pennell*, 485 U.S. at 9; *Nollan*, 483 U.S. at 836 n.4; First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-19 (1987); United States v. Locke, 471 U.S. 84, 106 n.15 (1985); Kirby Forest Indus. v. United States, 467 U.S. 1, 14 (1984); *San Diego Gas & Elec. Co.*, 450 U.S. at 656 (Brennan, J., dissenting); *Home Builders Ass'n of Cent. Ariz.*, 902 P.2d at 1350; Taylor v. Village of N. Palm Beach, 659 So. 2d 1167, 1170 (Fla. 1995); *Northern Ill. Homebuilders Ass'n*, 649 N.E.2d at 388; Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 481 (N.Y. 1994).

169. *See supra* note 24 and accompanying text (detailing the United States Supreme Court's consistent use of a disjunctive test); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) (establishing a per se rule of unconstitutionality for physical invasions).

170. *See supra* note 15 and accompanying text (supporting the argument that the *Agins* line of cases is a return to *Lochner*-era subjectivism).

171. *See* discussion *supra* Parts II.A.-D. (examining cases in which regulations enacted pursuant to a state's police power were valid under due process, yet were invalid under the Just Compensation Clause); *supra* note 12 and accompanying text (providing cases in which the Court acknowledged that a regulation may satisfy due process, but still violate the Just Compensation Clause).

away from the almost nonexistent protections under substantive due process in the analysis of regulations affecting private property.[172]

Examining land use regulations under the newly recognized protections of the Just Compensation Clause, the United States Supreme Court has consistently employed the two-pronged disjunctive framework of the *Agins* line of cases.[173] Under the disjunctive test, the landowner is owed just compensation if the regulation either fails to substantially advance legitimate state interests, or denies the landowner economically viable use of the land.[174]

Where the regulation employs an adjudicative decisionmaking process to determine whether an exaction will be required from a landowner, the Court will apply the semi-strict heightened scrutiny articulated in *Nollan* and *Dolan*, rather than the less exacting "substantially advance" requirement under the first prong of *Agins*.[175] Under these circumstances, the exactions imposed upon the landowner must be roughly proportional to the potential burdens created by the landowner's development of the property.[176]

If the regulation denies the landowner economically viable use of the property, regardless of whether an adjudicative decisionmaking process was used, and irrespective of the government interest advanced in support of the regulation, a taking will be judged to have occurred, and just compensation must be paid.[177]

III. CALIFORNIA'S AND OHIO'S CONJUNCTIVE STANDARD

A. *Introduction*

The Supreme Court has oft stated that just compensation analysis is not given to strict formulation[178] and that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for

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172. Under the Due Process Clause, a regulation will be upheld if the legislature might have concluded it promoted public health, safety, or welfare, and that it is irrelevant whether any interest is actually advanced. *See supra* note 11 and accompanying text. In property rights cases in the period between 1937 and 1980, only one case, *Morey v. Dowd*, 354 U.S. 457 (1957), found a regulation unconstitutional, but *Morey* was overruled in *New Orleans v. Dukes*, 427 U.S. 297 (1976). *See* Karlin, *supra* note 19 (citing B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 6 (1980)).

173. *See supra* note 24 and accompanying text (acknowledging cases in which the Supreme Court has relied upon the *Agins* disjunctive test).

174. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

175. *See Nollan*, 483 U.S. at 834. Justice Scalia indicated that a wide variety of regulations that are generally applicable, and do not require ad hoc decisionmaking, easily satisfy the substantially advance requirement. *Id.* at 834-35.

176. *See Dolan*, 114 S. Ct. 2319; *Nollan*, 483 U.S. at 836-37.

177. *See supra* notes 118-20 and accompanying text (stating that the governmental interests advanced in support of a regulation are irrelevant when the owner is denied economically viable use of the land).

178. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (stating that there is no "set formula" for determining when "justice and fairness" dictate just compensation be paid).

every such change in the general law."[179] Notwithstanding these difficulties, the Supreme Court has clearly created a two-pronged analytical framework for the examination of regulatory takings claims.[180] These recent developments stand in stark contrast to the deferential analysis applied just a few decades ago.[181]

In spite of the United States Supreme Court's consistent use of a disjunctive *either/or* type test, courts in California and Ohio have held that the *Agins*, *Nollan*, and *Dolan* cases support the use of a conjunctive test.[182] Admittedly, state applications of the requirements articulated in *Agins*, *Nollan*, *Dolan*, and *Lucas* are widely varied,[183] but irrespective of these variations, the use of a disjunctive either/or test is common to all other states.[184]

B. *Disjunctive Application of* Agins v. City of Tiburon

Two recent New York cases, *Seawall Associates v. City of New York*[185] and *Manocherian v. Lenox Hill Hospital*,[186] are exemplars of the proper application of the Just Compensation Clause as developed in the *Agins* line of cases. Moreover, these cases recognize the distinction between the Due Process and Just Compensation Clauses, and their respective standards.[187]

In *Seawall Associates*, the owners of single-room occupancy housing challenged the constitutionality of a New York City law which not only prevented the demolition or conversion of their properties, but required the owners to restore units to habitability and rent them at controlled rates.[188] As an additional "extortionary" measure, landowners subject to the law could buy their freedom from its provisions by either paying $45,000 per rental unit demolished or converted, or by constructing replacement rental units elsewhere in the city.[189]

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179. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

180. *See* discussion *supra* Part II (recounting the development of the disjunctive standard).

181. *See supra* notes 2, 11 and accompanying text (providing cases in which the deferential standards applicable under due process are employed).

182. *See supra* note 24 and accompanying text; discussion *infra* Part III.C. (exploring the use of a conjunctive test by California's Fourth District Court of Appeal and the Ohio Supreme Court).

183. *See supra* note 21 and accompanying text (reviewing the various manners in which *Agins* is implemented).

184. *See supra* note 20 and accompanying text (establishing that nearly all states recognize the disjunctive nature of the *Agins* test).

185. 542 N.E.2d 1059 (N.Y. 1989).

186. 643 N.E.2d 479 (N.Y. 1989).

187. Implicit in the application of the law in these cases is a recognition of the distinction between just compensation and due process. *See Manocherian*, 643 N.E.2d at 485 (opining that the State's generalized interests failed to satisfy constitutional requirements for such State action although such interests would have been satisfactory under due process); *Seawall Assocs.*, 542 N.E.2d at 1069 (rejecting the "indirect and at best conjectural" connection between the means and the ends of the law as insufficient to satisfy the "substantially advance" requirement although it would have satisfied due process).

188. *Seawall Assocs.*, 542 N.E.2d at 1061.

189. *Id.*

The court stated that whether viewed as a physical or regulatory taking, the law violated the Fifth Amendment.[190] After first invalidating the law as a physical invasion of the plaintiffs' property, the court proceeded with an alternate analysis under *Agins*.[191]

Applying the *Agins* test to the case, the court acknowledged its two- pronged disjunctive nature stating, that satisfaction of "[e]ither would be sufficient to invalidate a property use regulation."[192] Under the denial of the economically viable use prong, the regulation had the effect of stripping owners of any profitability inherent in the property.[193] The owners were required to put their property to public service, whether or not the only economically viable use of the property was to tear it down and construct a new building.[194] Moreover, the regulation's requirements for the expenditure of funds to rehabilitate the properties, and rental at controlled rates, destroyed the possibility of the property owners disposing of the property with only minimal losses.[195]

The New York City law also failed the first prong of *Agins*, which requires the regulation to substantially advance legitimate state interests. Although the City's asserted interest was to prevent homelessness,[196] the City's own study showed that the law would do little to solve the homeless problem.[197] Any advancement of legitimate interests was at best, speculative and "conjectural."[198] Speculative as it was, the nexus between the interest served and the means employed failed to satisfy the "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships."[199]

A few courts treat the first prong as a threshold issue, and if the regulation fails to substantially advance legitimate state interests, the analysis never reaches whether the regulation denies economically viable use of the land.[200] In *Manocherian*, apartment owners challenged a New York City rent stabilization law requiring the apartment owners to offer renewal leases to not-for-profit hospitals.[201] The court held that the law failed to lessen substantially the housing

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190. *Id.* at 1062.
191. *Id.* at 1065-66, 1068-69.
192. *Id.* at 1066.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 1068 n.10.
197. *Id.*
198. *Id.* at 1069.
199. *Id.*
200. *See, e.g.*, Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 410 (Neb. 1994) (holding that a municipal zoning ordinance did not further legitimate state interests and was enacted arbitrarily and capriciously, thus effecting a taking of the plaintiff's property, without an inquiry into whether there was a denial of economically viable use); Schultz v. City of Grants Pass, 884 P.2d 569, 573 (Or. Ct. App. 1994) (ending the court's inquiry after deciding that conditions imposed upon a landowner's development of the land failed the first prong of *Agins*).
201. *Manocherian*, 643 N.E.2d at 480.

shortage, or to prevent excessive rents or profiteering.[202] The only effect of the law was to subsidize the hospitals at the expense of individual apartment owners.[203] The court found that the regulation failed to satisfy the first prong and was therefore unconstitutional.[204] Since the City's law failed the first prong of *Agins*, an examination under the denial of the economically viable use prong was unnecessary.[205] Applying the *Agins* test, the court stated that "even if the economic impact aspect of this test were not to be satisfied, that feature alone could not defeat the owners' interests and claims in a controversy such as this."[206]

C. *Conjunctive Application of* Agins v. City of Tiburon

A new line of cases ostensibly applying the two-pronged *Agins* test has developed in California and Ohio.[207] These California and Ohio cases apply *Agins* conjunctively, requiring that a regulation must fail to substantially advance legitimate state interests *and* that it must also deny the landowner economically viable use of the land in order for the owner to recover.[208] The conjunctive application may have resulted from courts confusing the United State Supreme Court's use of the disjunctive[209] and "negative conjunctive" [210]forms of the *Agins* test, which in effect are identical.[211] Although few in number, these cases set precedent hostile to the protection of private property rights.

California has been recognized as an innovator in land use regulations.[212] However, the state's innovations, coupled with the narrow view of landowner rights held by California courts, has resulted in an environment often hostile to

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202. *Id.* at 484.

203. *Id.*

204. *Id.* at 483.

205. *Id.* at 482; *see* Nollan v. California Coastal Comm'n, 483 U.S. 825, 838-39 (1987) (finding that a taking had occurred without an inquiry into whether the landowner was denied economically viable use).

206. *Manocherian*, 643 N.E.2d at 482.

207. Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 37 Cal. Rptr. 677 (1995); Central Motors Corp. v. City of Pepper Pike, 653 N.E.2d 639 (Ohio 1995); Gerijo v. City of Fairfield, 638 N.E.2d 533 (Ohio 1994).

208. *Del Oro Hills*, 31 Cal. App. 4th at 1079, 37 Cal. Rptr. 2d at 689-90; *Central Motors Corp.*, 653 N.E.2d at 643; *Gerijo*, 638 N.E.2d at 538.

209. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating a regulation effects a taking if the regulation fails to substantially advance legitimate state interests *or* denies the landowner economically viable use of the property).

210. The regulation *does not* effect a taking if it substantially advances legitimate state interests, *and* does not deny the landowner economically viable use of the property. *See supra* notes 43-45 and accompanying text (explaining the development of the negative conjunctive form of the test).

211. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (formulating the *Agins* test in the negative conjunctive did not alter its application); *see also supra* note 37 and accompanying text (arguing that, due to confusion in the area of takings, courts have made inconsistent and contradictory rulings).

212. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION, SHAPING SOCIETY THROUGH LAND USE REGULATION 113 (1993).

property rights.[213] For example, the California Supreme Court has held that the just compensation provisions of the state and federal constitutions do not apply to regulatory takings, a proposition that was later refuted by the United States Supreme Court.[214] California courts' restrictive view of landowner rights is evident in the recent approval of a conjunctive test.[215]

The California case which exemplifies the conjunctive application of *Agins* is *Del Oro Hills v. City of Oceanside*,[216] which was decided by California's Fourth District Court of Appeal. In *Del Oro Hills*, a partnership, Del Oro Hills (Del Oro), acquired a 300-acre parcel of property in the City of Oceanside.[217] Seeking to develop the property, Del Oro obtained city approval of a master tentative subdivision map.[218] The project was to be completed over a five year period.[219] Del Oro then obtained approval of a specific plan and planned development master plan.[220] The development would consist of smaller neighborhoods, each of which would be sold to other developers for construction after Del Oro completed the infrastructure.[221] Additional permits, tract plans, and maps would be required before a purchasing developer could build its neighborhood.[222]

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213. *See* COYLE, *supra* note 212, at 114-18; *see also* RICHARD F. BABCOCK & CHARLES L. SIMEON, THE ZONING GAME REVISITED 293 (1985) (noting that "[p]ractitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat").

214. *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979) (holding that an invalid use of police power can never result in a takings claim), *aff'd*, 477 U.S. 255 (1980). "[W]hile such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available." *Id.* The only remedy available to a plaintiff would be an invalidation of the unconstitutional regulation. *See id.*; *see also* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 311 (1987) (declaring that "the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment"). *But see* R.R. Hensler v. City of Glendale, 8 Cal. 4th 1, 14, 876 P.2d 1043, 1051, 32 Cal. Rptr. 2d 244, 252 (1994) (stating that a landowner could receive compensation through an inverse condemnation action, in spite of the clear language in the earlier *Agins* holding that an action under the Fifth Amendment Just Compensation Clause was unavailable to plaintiffs, and that plaintiffs could only seek an invalidation remedy). *See generally* CAL. CONST. art. I, § 19.

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit into court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

Id.

215. *Del Oro Hills*, 31 Cal. App. 4th at 1079, 37 Cal. Rptr. 2d at 690.

216. *Id.*

217. *Id.* at 1069, 37 Cal. Rptr. 2d at 683.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

Del Oro recorded its master final subdivision map in 1986, then obtained the necessary financing for the completion of the infrastructure.[223] Del Oro entered into agreements for the construction of the infrastructure, and contracts for the sale of several neighborhoods conditioned upon the completion of the infrastructure.[224] After several of the sale agreements were forged between Del Oro and other parties, Oceanside's voters approved a growth control initiative limiting the number of dwelling units to be constructed in any given year.[225] As a result of the initiative's enactment, several of Del Oro's escrows were canceled and Del Oro was forced to decrease sale prices and make monetary concessions to keep escrows going.[226] Del Oro alleged several causes of action, including an unconstitutional taking of property without just compensation, based in part upon the substantial decrease in the value of the property.[227]

The California Court of Appeal analyzed the enactment of the initiative in light of a conjunctive formulation of the *Agins* test.[228] In concluding the *Agins* test is conjunctive, the Court of Appeal acknowledged that the *Agins* test may be stated in the negative conjunctive, but failed to recognize it is merely a reformulation of the disjunctive test and does not alter its substance.[229] The conjunctive interpretation, contrary to United States Supreme Court precedent and the overwhelming majority of state and federal courts,[230] would require the plaintiff to prove that the regulation *both* fails to substantially advance legitimate state interests, *and* denies them economically viable use of the land.[231]

The narrow view of landowner rights held by the court was belied by the reasoning it used to conclude that the *Agins* test was conjunctive. The court stated that "[f]irst, we cannot accept Del Oro's theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law."[232] The court continued to show either its hostility toward the *Agins* test and landowner rights, or its lack of understanding of takings jurisprudence when it misconstrued the United States Supreme Court's analyses in *Nollan*, *Lucas*, and *Dolan*, and held:

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 1070, 37 Cal. Rptr. 2d at 684.

228. *Id.* at 1078, 37 Cal. Rptr. 2d at 690.

229. *Id.* at 1074, 37 Cal. Rptr. 2d at 686; *see supra* notes 43-45 and accompanying text (discussing the negative conjunctive form of the *Agins* test).

230. *See supra* notes 20, 24 and accompanying text (showing the overwhelming authority in support of a disjunctive test).

231. *Del Oro Hills*, 31 Cal. App. 4th at 1079, 37 Cal. Rptr. 2d at 690.

232. *Id.*

> In *Nollan, Lucas*, and *Dolan*, the United States Supreme Court's analysis of the takings issue inextricably interlinked both the regulation's validity, and the question of whether any economically viable use of the property remained in light of the regulation. *In light of later authority, Agins did not establish an 'either/or' type of test.*[233]

Ironically, *Nollan, Lucas*, and *Dolan*, the cases the court cites in support of a conjuntive test, are the very cases which have established the disjunctive nature of the *Agins* test.[234] These cases explicitly state, and implicitly show the disjunctive nature of the two-pronged test.[235]

However, the "rough proportionality" standard of the first prong of *Agins* may be the source of the court's misinterpretation that the analyses of the validity of a regulation and whether it denies economically viable use are inextricably interlinked.[236] Recall that under the rough proportionality standard, the impact of a regulation upon a landowner must be roughly proportional of the impact of the landowner's proposed development.[237] Although under the rough proportionality standard the restriction of possible uses to the property may be an important consideration, the Supreme Court has never required a denial of economically viable use as a predicate to a finding that the standard has not been met. This mischaracterization belies the court's lack of understanding of the *Agins* test, and to follow the court's interpretation would allow the first prong to subsume the whole *Agins* test. Regardless of whether the court of appeal interpretation is an intentional mischaracterization, or based on a lack of understanding of the *Agins* line of cases, the Supreme Court's use of a disjunctive test cannot reasonably be disputed.[238]

The Supreme Court of Ohio adopted recently the conjunctive form of the *Agins* test also, over the objections of a minority of its justices. In *Central Motors v. City of Pepper Pike*,[239] and *Gerijo, Inc., v. City of Fairfield*,[240] the Ohio court explicitly stated that a landowner must "prove beyond fair debate, *both* that the

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233. *Id.* at 1079, 37 Cal. Rptr. 2d at 690 (emphasis added).

234. *See* discussion *supra* Parts II.A.-D. (reviewing the development of the *Agins* test by the United States Supreme Court in *Nollan, Dolan*, and *Lucas*).

235. *See supra* note 234 and accompanying text. In *Nollan* and *Dolan*, the Supreme Court decisions were based solely upon the first prong. Dolan v. City of Tigard, 114 S. Ct. 2309, 2322 (1994); *Nollan*, 483 U.S. at 834. *Lucas*, on the other hand, was decided under the second prong: whether the regulation denied the owner economically viable use of the land. *See* discussion *supra* Part II.D. (examining the Supreme Court's clarification in *Lucas* as to what is a denial of economically viable use).

236. *Dolan*, 114 S. Ct. at 2319.

237. *Id.*

238. *See* discussion *supra* Part II (detailing the development of the disjunctive test).

239. 653 N.E.2d 639 (Ohio 1995).

240. 638 N.E.2d 533 (Ohio 1994).

enactment deprives him or her of an economically viable use *and* that it fails to advance a legitimate state interest."[241]

The development of the conjunctive standard in Ohio began with *Columbia Oldsmobile, Inc. v. Montgomery*.[242] The court in *Columbia Oldsmobile* examined a municipal zoning ordinance in light of a two-pronged test requiring the landowner to prove the ordinance "denies them the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community."[243] The constitutional basis for this test is unclear since the court made no mention of specific provisions of the United States Constitution or the State of Ohio Constitution. Although the court cited *Penn Central*, as well as *Goldblatt v. Hempstead*[244] and *Euclid v. Ambler*,[245] due process cases, and various Ohio cases in support of its conjunctive test, *Agins* and its progeny are conspicuously absent.[246] Similarly, the majorities in both *Gerijo* and *Central Motors* failed to address the Supreme Court's holding in *Agins*.

Ohio Supreme Court Justices Wright and Pfeifer objected in both *Central Motors* and *Gerijo* to the majority's use of a conjunctive test. Justice Wright concluded that, "[the conjunctive test] effectively strips individuals of rights guaranteed by the United States Constitution . . . . Although states may afford individuals greater rights than those afforded under the federal Constitution, states cannot deprive individuals of rights guaranteed by the federal Constitution."[247] Because the conjunctive application of the test fails to afford individuals the full protections mandated by the federal Constitution, the conjunctive standard is likely to be found unconstitutional.[248]

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241. *Gerijo*, 638 N.E.2d at 538 (emphasis added); *see Central Motors*, 653 N.E.2d at 643.

242. 564 N.E.2d 455 (Ohio 1990).

243. *Columbia Oldsmobile*, 564 N.E.2d at 457.

244. 369 U.S. 590 (1962); *see id.* at 596 (upholding a "safety regulation" enjoining the operation of a sand and gravel pit on the grounds that it was a reasonable exercise of the police power).

245. 272 U.S. 365 (1926); *see id.* at 395 (stating a regulation violates due process and is unconstitutional if its "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").

246. *Columbia Oldsmobile*, 564 N.E.2d at 457.

247. *Central Motors*, 653 N.E.2d. at 645-46 (Wright, J., concurring in judgment only); *see supra* notes 31-32 and accompanying text (affirming that the federal constitution establishes a minimum level of protection for individual rights which the state cannot fall below).

248. *See Central Motors*, 653 N.E.2d at 645-46 (Wright, J., concurring in judgment only); *see also supra* notes 31-32 and accompanying text (establishing that under the Supremacy Clause of the United States Constitution, federal enactments and constitutional protections take precedence over state constitutions and enactments).

IV. RE-EXAMINATION OF *NOLLAN*, *DOLAN*, AND *LUCAS* UNDER A CONJUNCTIVE STANDARD

To understand fully the implications of a conjunctive application of the *Agins* disjunctive test, it is necessary to undertake a re-examination of recent United States Supreme Court takings cases in the light of a conjunctive test. Not a single plaintiff has faced a conjunctive test at the Supreme Court level, for if they had, modern jurisprudence with regard to the Just Compensation Clause would be very different. The plaintiffs in *Nollan*, *Dolan*, and *Lucas* faced a disjunctive test which protected all of their property interests under the Fifth Amendment, and were judged to have suffered takings without just compensation.[249] However, had a conjunctive standard been applied, not one of these plaintiffs would have recovered.[250]

A. Nollan *Revisited—The Coastal Commission Eases on Through the Just Compensation Clause and the Public Can Ease on Through the Landowner's Property*

As previously discussed, the Supreme Court applied the two-pronged *Agins* disjunctive test to the California Coastal Commission's requirements that conditioned the issuance of the plaintiffs' building permit on the exaction of an easement across the plaintiffs' property.[251] The Court's analysis and decision were based entirely on the first prong: whether the regulation substantially advanced legitimate state interests.[252]

Requiring the plaintiffs to also show that the regulation denied them economically viable use of the property would have defeated their claims. They did not argue that the regulation denied them economically viable use, nor could they plausibly have argued that prong.[253] Although the regulation required them to grant an easement in favor of the public to a portion of their property, thus constituting a diminution in value of the whole, it did not necessarily constitute a denial of economically viable use of the property.[254] The right to pass and repass

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249. *Dolan*, 114 S. Ct. at 2316; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); *Nollan*, 483 U.S. at 834.

250. *See* discussion *infra* Parts IV.A.-C. (examining the effects of a conjunctive standard upon the decisions in *Nollan*, *Dolan*, and *Lucas*).

251. *See* discussion *supra* Part II.B. (examining the United States Supreme Court's decision in *Nollan*).

252. *See Nollan*, 483 U.S. at 834.

253. *See infra* note 254 and accompanying text (arguing that plaintiffs like the Nollans who have merely suffered a diminution in the value of their property have not ipso facto suffered a denial of economically viable use of their property).

254. *See Nollan*, 483 U.S. at 827; Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 175-76, 212 Cal. Rptr. 578, 596 (1985) (holding that although an exaction causes a diminution in value of the whole, it is not a deprivation of substantially all reasonable use); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (holding that the value that has been taken from the property must be

along the dry sand portion of the beach, as made possible by the easement, would not have interfered with the Nollans' use or enjoyment of their property; moreover, they would have retained title to the land, subject to the easement in favor of the public.[255] The *Nollan* plaintiffs would still have had the ability to construct their new home, unlike the *Lucas* plaintiffs who were required to leave their property idle,[256] or if they chose not to rebuild their beachfront bungalow, they could likely have sold the property at a profit, unlike the apartment owners in *Seawall Associates*.[257] Because the categorical rule for denial of economically viable use as articulated in *Lucas* is not available to plaintiffs who have only suffered a diminution in value,[258] the conjunctive standard cannot be satisfied.[259]

The *Nollan* plaintiffs' failure to satisfy the denial of economically viable use prong, regardless of the regulation's failure to satisfy the first prong, would have proven fatal to their claims and would have denied them just compensation under the conjunctive standard. The California Coastal Commission would have been able to force the Nollans to permit the public to ease on through their property.

B. Lucas *Reconsidered—Mr. Lucas, You Have What the State Wants, So Hand It Over*

Recall that whereas the decision in *Nollan* rested upon the first prong of *Agins*, *Lucas* rested upon the second prong of *Agins:* whether the landowner is denied economically viable use.[260] Under the second prong, the United States Supreme Court has categorically required just compensation when a landowner is denied economically viable use, regardless of the government interests advanced.[261] The conjunctive application of *Agins* fundamentally changes this approach and brings the government's interests back into the compensation equation. If the government can demonstrate a legitimate state interest substantially advanced by the denial of economically viable use, under a conjunctive

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measured against the value that remains in the property); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) (holding that the diminution in value is to be measured against the value of the parcel as a whole).

255. *Nollan*, 483 U.S. at 855 (Brennan, J., dissenting).

256. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009 (1992).

257. Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1066 (N.Y. 1989).

258. *See supra* notes 121-28 and accompanying text (demonstrating that unless the denial of economically viable use is complete, a landowner cannot proceed under the categorical rule established in *Lucas*).

259. *See supra* note 254 (asserting that an exaction requirement does not necessarily constitute a denial of economically viable use).

260. *See* discussion *infra* Part II.B., C. (examining the holdings in *Nollan* and *Lucas*).

261. *See supra* notes 118-20 and accompanying text (likening a deprivation of all economically viable use to a physical invasion because as far as the landowner is concerned the effect is the same).

application the Fifth Amendment inquiry is complete.[262] Regardless of the economic impact of the denial of use upon the landowner, the landowner will be denied just compensation.[263]

Mr. Lucas did not challenge the validity of the Beachfront Management Act (Act) as a lawful exercise of the State's police power under the Due Process Clause before either the South Carolina courts or the United States Supreme Court.[264] Mr. Lucas also conceded the first prong of *Agins*, recognizing the importance of South Carolina's goal of the preservation of its sensitive beach/dune system, and that construction upon his beachfront lot would contribute to the erosion and destruction of this valuable public resource.[265] However, to recover under the conjunctive standard, Mr. Lucas would have been required to challenge whether the Act substantially advanced legitimate state interests.[266]

In furtherance of the State's legitimate goal in the preservation of the coastline, the Act absolutely prohibited any construction of occupiable structures upon the property, and provided for no exceptions.[267] There was no adjudicative process or danger of abuse of discretion as present in *Nollan* or *Dolan*, and the Act represented a legislative determination classifying a portion of the state.[268] Because there was no danger of an abuse of discretion, based upon the Supreme Court's holdings in *Nollan* and *Dolan*, the "rough proportionality" requirement arguably would not apply.[269] The Act would only be required to substantially advance legitimate state interests, amorphous as that standard may still be.[270] Applying this standard, the Supreme Court has indicated that a wide range of regulations, including landmark preservation and zoning ordinances, satisfy this

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262. Under the conjunctive standard, the burden is shifted back to the landowner to show that the regulation fails both prongs of the test. *See* Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1079, 37 Cal. Rptr. 2d 677, 689-90 (denying that *Agins* established an either/or test, thus requiring the landowner to prove that the ordinance denies the landowner all economically viable use in addition to proving the first prong), *cert. denied*, 116 S. Ct. 86 (1995). Therefore, if the government can establish that the regulation substantially advances a legitimate state interest, the landowner cannot satisfy both prongs, and the inquiry must end. *See id.*

263. *See Del Oro Hills*, 31 Cal. App. 4th at 1074, 1079, 37 Cal. Rptr. 2d at 686, 689-90 (requiring both prongs of the test to be satisfied).

264. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896-99 (S.C. 1991), *rev'd and remanded*, 505 U.S. 1003 (1992).

265. *Lucas*, 404 S.E.2d at 898.

266. *See Del Oro Hills*, 31 Cal. App. 4th at 1079, 37 Cal. Rptr. 2d at 689-90 (utilizing a conjunctive standard).

267. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009 (1992).

268. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (justifying the imposition of heightened scrutiny because an adjudicative decision was used to determine whether conditions would be placed on the landowner's development); *see also supra* notes 58-59 and accompanying text (arguing that the danger of abuse of discretion justifies some form of heightened scrutiny).

269. *See supra* notes 56-59, 268 and accompanying text (justifying the imposition of heightened scrutiny).

270. *See supra* note 268 and accompanying text (showing that where there is a danger of abuse of discretion, heightened scrutiny is justified).

requirement.[271] Due to the direct relationship between the prohibition on construction and the resulting prevention of harm to the State's legitimate interest in protecting the beach/dune system, the Act as applied to Lucas's property easily satisfies the "substantially advance legitimate state interests" standard. Because the regulation can satisfy the first prong of *Agins*, the conjunctive test is therefore not satisfied, and Lucas would be denied just compensation under this standard. Lucas would have had to meet the demands of the State and give the State his property.

C. Dolan *Re-Examined—Individuals Can Be Forced to Bear Societal Burdens Disproportionately*

Much like the plaintiffs in *Nollan* and *Lucas*, the *Dolan* plaintiff would also have suffered without compensation under the conjunctive standard. Regardless of the failure of the regulation to satisfy the first prong of the test, the plaintiff nevertheless still possessed the ability to rebuild her plumbing store and pave the dirt parking lot, deriving greater economic benefit than before reconstruction, and thus making satisfaction of the conjunctive test impossible.[272]

Recall that under the conjunctive standard, in addition to satisfaction of the first prong, the landowner must be denied economically viable use of the land to recover.[273] Notwithstanding that the requirement that Dolan deed portions of her land to the City would diminish the value of her parcel of land, the requirements that she dedicate land to the City for flood protection and pedestrian/bicycle pathway projects would not constitute a denial of economically viable use of the whole parcel of land.[274] The United States Supreme Court addressed the issue in a footnote and opined: "There can be no argument that the permit conditions would deprive petitioner 'economically beneficial use' of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive some economic use from her property."[275]

Although Dolan would be singled out to bear disproportionately the costs associated with the City's goals of offering flood protection, increasing open space, and facilitating the use of pedestrian/bicycle pathways as alternate modes of travel, because she was not denied economically viable use there would be no recovery under the conjunctive standard.

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271. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987).

272. The proposed expansion of the plumbing store would nearly double its size, and was expected to increase the traffic to the store. *See Dolan*, 114 S. Ct. at 2313.

273. *See supra* notes 231-33, 242 and accompanying text (discussing the adoption of the conjunctive test).

274. *See supra* note 85 and accompanying text (noting that Dolan was required to give the City title to the portion of her property which fell within the Fanno Creek flood plain, plus an additional 15-foot strip to be used as a pedestrian/bicycle pathway).

275. Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 n.6 (1994).

V. WHAT ARE THE EFFECTS OF THE USE OF A CONJUNCTIVE STANDARD UPON PRIVATE PROPERTY RIGHTS?

The questionable constitutionality of the conjunctive *Agins* test is evident when applied. The disjunctive test protects two of the various rights landowners possess under the Fifth Amendment's Just Compensation Clause: the right to be free from regulation that fails to advance legitimate state interests and the right to put private property into productive use.[276] If either of those rights are abridged, just compensation must be paid.[277] The conjunctive standard dramatically changes this. Only if the offending regulation abridges both of those interests, must compensation be paid.[278] For example, no recovery is available when a regulation that advances legitimate state interests completely denies the owners economically viable use of their property.[279] In these circumstances, the state should exercise its power of eminent domain and compensate the landowners for the property taken.[280] This instance, where the property's value is destroyed yet no compensation will be forthcoming, is repugnant to the values underlying the Just Compensation Clause. It cannot be harmonized with Supreme Court holdings in which a taking is found to have occurred when a regulation forces an individual to bear disproportionately a burden which in all fairness "should be borne by the public as a whole."[281] Moreover, it is inconsistent with Justice Holmes's statement that where a regulation goes "too far" it too will be deemed a taking.[282] Thus it is clear—the conjunctive standard eviscerates the protections that the Fifth Amendment provides for landowners against gross overreaching by the government.

Conversely, the conjunctive standard will not invalidate an admittedly bad regulation which fails to advance any state interest. Only if the regulation also denies the owner economically viable use of the property will there be a com-

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276. The protection of these interests is evident from the formulation of the *Agins* test. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). Property has also been conceptualized as a bundle of sticks composed of the various rights inherent in private ownership of property, the most fundamental of which is the right to exclude others. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Property rights have also been described as the right to "possess, use and dispose of" the property. *See* United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).

277. *See Dolan*, 114 S. Ct. at 2316; Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); *Agins*, 447 U.S. at 260.

278. *See* Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1079, 37 Cal. Rptr. 2d 677, 689-90, *cert. denied*, 116 S. Ct. 86 (1995).

279. *See id.*

280. *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (requiring payment of just compensation because the regulation denied the owner economically viable use of the land).

281. *Dolan*, 114 S. Ct. at 2316 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

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

pensable taking.[283] This is directly contrary to the Supreme Court's holdings in *Nollan* and *Dolan*.[284] Landowners may still seek redress under the Due Process Clause.[285] However, under the minimal scrutiny standard applicable to economic regulations, it is unlikely any plaintiff will recover.[286]

Landowners in California and Ohio may now face an almost insurmountable challenge when seeking compensation for regulations which impose unconstitutional exactions or deny them economically viable use of their property. Had the United States Supreme Court applied a conjunctive standard in *Nollan*, *Dolan*, or *Lucas*, none of the plaintiffs would have recovered.[287] The same fate awaits the claims of plaintiffs who, although burdened by failed regulations or denied economically viable use of their property, are unable to satisfy both prongs. Thus, the conjunctive application of *Agins* effectively removes the Just Compensation Clause from consideration by many landowners who are forced to disproportionately bear societal burdens.[288]

While *Agins* and its progeny increased the burdens placed upon land use regulators to ensure that individual citizens were not singled out to disproportionately bear the costs of implementing societal goals, adoption of the conjunctive standard effectively eliminates that burden.[289] The conjunctive standard gives land use regulators the choice of which prong they wish to satisfy, and as such, the conjunctive standard is an easy burden for the government to meet. Careful land use planners will be capable of crafting regulations which may seriously restrict or deny all economically viable use, yet will satisfy the requirement of substantially advancing legitimate state interests. The converse is also true: Irrespective of how badly a regulation fails to advance any governmental

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283. *See Del Oro Hills*, 31 Cal. App. 4th at 1079, 37 Cal. Rptr. 2d at 689-90.

284. *See Dolan*, 114 S. Ct. at 2316 (reciting the negative conjunctive form of the *Agins* test); *Nollan*, 483 U.S. at 834 (holding that a taking had occurred without an inquiry into whether the plaintiff had been denied economically viable use).

285. *See* discussion *supra* Parts I, II (discussing the relationship between the Due Process and Just Compensation Clauses).

286. *See supra* notes 2, 11 and accompanying text (setting forth the minimal scrutiny standard under the Due Process Clause that is satisfied if the legislature might have concluded the regulation promoted the public health, safety, or welfare).

287. *See* discussion *supra* Part IV (re-examining the claims of the property owners in *Nollan*, *Dolan*, and *Lucas* under the conjunctive standard). The *Nollan* plaintiffs were not denied economically viable use of their property by the regulation at issue. *See supra* note 254. Conditioning the issuance of a permit to construct a new dwelling upon the granting of an easement along the beach failed only to advance legitimate state interests. *See Nollan*, 438 U.S. at 834. Similarly, the South Carolina Beachfront Management Act, that denied the *Lucas* plaintiffs economically viable use, survives scrutiny under the conjunctive standard because it substantially advanced legitimate state interests in protecting valuable coastal habitats. *Lucas*, 505 U.S. at 1009. Thus, none of the plaintiffs were capable of satisfying the conjunctive standard and none would have recovered.

288. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960); discussion *supra* Part IV (re-examining *Nollan*, *Dolan*, and *Lucas* under the conjunctive standard).

289. Under the rough proportionality standard, a city is required to quantify its findings and make an individualized determination that the conditions imposed upon the landowner are related to both the nature and extent of the landowner's activities. *See Dolan*, 114 S. Ct. at 2319-20.

interest, it will be upheld if the land use regulator is clever enough to leave the owner with some form of economically viable use.

Presumably, under the formulations of the Fourth District Court of Appeal of California and the Supreme Court of Ohio, the economic impact upon the owner and interference with the owner's legitimate investment backed expectations that are taken into consideration by the *Penn Central*[290] factors are also now irrelevant as an independent basis for a constitutional claim. To the extent that *Penn Central* remains viable, it is essentially an alternate inquiry to *Agins,* to be used if the denial of economically viable use is less than complete.[291] Because the conjunctive standard requires the landowner to be completely denied economically viable use of the property, in addition to satisfying the first prong of *Agins*, it is unlikely that these courts will allow any recovery under *Penn Central.*[292] By definition, if landowners are seeking recovery under *Penn Central,* they cannot recover under the conjunctive standard because there has not been a complete denial of economically viable use.[293]

What viable cause of action does this leave a property owner? Although the Fifth Amendment's Just Compensation Clause would be effectively eliminated from consideration by the almost insurmountable burden under the conjunctive standard, an aggrieved property owner may nonetheless still seek redress under the Fourteenth Amendment's Due Process Clause, although recovery will be unlikely.[294] The minimal scrutiny standard of the Due Process Clause applicable to economic regulations is extremely easy for legislative enactments to satisfy.[295] Property regulations fall within the classification of mere economic regulation and will be upheld if the legislature "might have concluded" that the regulation promoted the public health, safety, or welfare.[296] Surprisingly, it is irrelevant whether any legitimate governmental interest is actually advanced.[297] Unless the connection between the regulation and the governmental interest sought to be advanced is completely irrational, it will most likely be upheld.[298]

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290. *See supra* note 125 (setting forth the *Penn Central* factors that are used to determine whether a taking has occurred, and are applicable if the denial of economically viable use is less than complete).

291. *See supra* notes 121-29 and accompanying text (explaining that *Penn Central* provides for recovery by landowners who are subject to regulations that do not completely deny the landowner economically viable use of the property).

292. *See Del Oro Hills*, 31 Cal. App. 4th at 1079, 37 Cal. Rptr. 2d at 690.

293. *See supra* notes 121-29 and accompanying text (discussing the appropriate use of *Penn Central*).

294. *See infra* notes 295, 301 (citing cases that show the presumption of constitutionality and difficult burdens a plaintiff is required to carry under the Due Process Clause).

295. Economic regulations enjoy a presumption of constitutionality. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Since the decline of *Lochner*-era substantive due process review, the courts have refused to second guess the judgment of the legislature. *See* Ferguson v. Skrupa, 372 U.S. 726, 731 (1963).

296. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955).

297. *See id.*

298. *See id.*

Regardless of whether the landowner proceeds under the Just Compensation Clause, or is forced to proceed under the Due Process Clause due to the difficulty of satisfying the conjunctive standard, the burden of proof will be placed upon the landowner rather than the government.[299] While the Supreme Court placed upon the government the burden of proving the propriety of the regulation in cases arising under the Just Compensation Clause, the conjunctive application of the *Agins* test effectively shifts the burden of proof from the government to the landowner. The government needs only to prove the regulation satisfies one prong of the test to thwart any recovery by the landowner. Thus, contrary to the dictates of *Nollan* and *Dolan* that placed the burden on the government, the landowner must prove the regulation fails both prongs of the *Agins* test to prevail.[300] Should a landowner choose to proceed under the Due Process Clause of the Fourteenth Amendment rather than face the conjunctive standard, the landowner will also have to carry the burden of proof.[301] Due to the strong presumptions in favor of constitutionality and the minimal rationality standard under the Due Process Clause, this is a very onerous burden for plaintiffs to carry.[302]

While many state and local governments, and even a Supreme Court Justice, decried the *Agins* line of cases as a severe restriction on the ability of cities and states to engage in land use planning,[303] the holdings in *Del Oro Hills*, *Central Motors*, and *Gerijo* represent the other extreme.[304] Knowing that land use regulations are unlikely to result in a taking under the conjunctive standard, and that the planning decisions of state and local governments will continue to be given great deference under the Due Process Clause, state and local governments are

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299. In *Del Oro Hills*, the court did not explicitly place the burden of proof on the landowner, *Del Oro Hills*, 31 Cal. App. 4th at 1079, 37 Cal. Rptr. 2d at 689-90, but the Ohio Supreme Court has explicitly done so. *See* Central Motors Corp. v. City of Pepper Pike, 653 N.E.2d 639, 642 (Ohio 1995); Gerijo, Inc. v. City of Fairfield, 638 N.E.2d 533, 536 (Ohio 1994). *But see Dolan*, 114 S. Ct. at 2319-20 (stating that "the *city* must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development") (emphasis added); *Lucas*, 505 U.S. at 1027 (holding that where the State seeks to sustain regulation that denies land of all economically viable use, the *State* must show the prohibited use was not a part of the owner's title to begin with) (emphasis added).

300. *See supra* note 299 (highlighting the shift in the burden of proof from the government to the landowner).

301. The modern Court has almost completely withdrawn from the review of regulations affecting property. *See Ferguson*, 372 U.S. at 731. Due to the great deference given legislatures, and the strong presumptions of constitutionality, legislatures are required to do little if anything to justify economic or land-use regulations, thus causing the plaintiff's who seek to invalidate such regulations to carry a heavy burden. *See Williamson*, 348 U.S. at 487; *Carolene Products*, 304 U.S. at 152 n.4; *see also Dolan*, 114 S. Ct. at 2320 n.8 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

302. *See supra* notes 295, 301 and accompanying text (pertaining to the presumption of constitutionality afforded economic regulations and the heavy burden on landowners under the Due Process Clause).

303. *See Nollan*, 483 U.S. at 866 (Stevens, J., dissenting); *supra* note 19 and accompanying text.

304. *See supra* notes 276-99 and accompanying text (discussing the ramifications of the use of a conjunctive test).

likely to feel free to push the envelope of land use regulation.[305] The long-term ramifications of *Del Oro Hills*, *Central Motors*, and *Gerijo* remain to be seen, but the immediate effects are readily apparent; property owners seeking compensation for takings effected by burdensome or ineffective regulations are less likely to prevail.

VI. CONCLUSION

The question of when just compensation must be paid to a landowner will not likely be settled at any time in the foreseeable future. As long as there is private ownership of property in the United States, the conflict between private property rights and the government's desire to regulate land for the benefit of society will remain. As new societal needs and awarenesses arise so will the demand for more regulations; however, this demand must be tempered by the constitutional protections afforded individuals for their property rights. This is not to imply that states should not remain free to experiment, but only that states must remain cognizant of the rights of individual property owners, however laudable their goals may be.

The conflict between individual rights and governmental goals is actively under litigation in *Ehrlich v. City of Culver City*.[306] Upon remand from the United States Supreme Court, the California Appellate Court reaffirmed its earlier ruling in an unpublished opinion, and again denied relief to the *Ehrlich* plaintiffs.[307] The Supreme Court of California has reviewed the Court of Appeal's ruling, concluding that the heightened scrutiny of *Nollan* and *Dolan* apply to monetary exactions in addition to possessory exactions,[308] and that the City met its burden of demonstrating the required nexus.[309] However, the court concluded that the amount of the exaction was excessive and failed to satisfy the rough proportionality requirement.[310] Reversing the judgment of the Court of Appeal, the court remanded the case for a determination of what monetary exaction would satisfy the rough proportionality requirement.[311]

The recent developments in *Ehrlich* are evidence that state courts are experimenting with more expansive applications of the *Agins* line of cases, and un-

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305. Where land use regulators are aware that regulations will be deemed noncompensable and not in violation of the Just Compensation Clause, government is not forced to bear the cost of taking private property, and regulators are given an incentive to overregulate. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 198-201 (1988).

306. *See* discussion *supra* Part II.E. (examining the remand of *Ehrlich* in light of *Dolan*).

307. Ehrlich v. City of Culver City, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993).

308. Ehrlich v. City of Culver City, 12 Cal. 4th 854, 859, 911 P.2d 429, 433, 50 Cal. Rptr. 2d 242, 246 (1996).

309. *Id.* at 860, 911 P.2d at 433, 50 Cal. Rptr. 2d at 246.

310. *Id.*

311. *Id.*

doubtedly, the application of *Agins* to monetary exactions and property regulations in general is not a dead issue.[312] Given the tenor of the United States Supreme Court's holdings in the *Agins* line of cases, their willingness to cast a skeptical eye upon land use regulations, and the consistent use of a disjunctive test, it is unlikely that the Supreme Court will allow the conjunctive application of *Agins* to persist. Although the Supreme Court did not grant certiorari in *Del Oro Hills*, this may not be taken as a tacit approval of a conjunctive test.[313] Undoubtedly, a case applying *Agins* conjunctively, which presents the factual scenario and procedural history that four of the nine justices will deem proper for review will eventually arise, and only then will we know.

312. *See* Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961 (1995); Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (N.Y. 1989).

313. *See* Teague v. Lane, 489 U.S. 288, 296 (1989) (stating a denial of certiorari "imports no expression of opinion upon the merits of the case"); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917 (1950) (explaining that a denial of certiorari "simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion'") (citations omitted).