TAKING SIDES: THE BURDEN OF PROOF SWITCH IN *DOLAN v. CITY OF TIGARD*

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INTRODUCTION

In June 1994, the United States Supreme Court handed down a decision which, for all its real or imagined inventiveness, followed tradition in at least one important respect. *Dolan v. City of Tigard*,[1] the eagerly awaited addition to the Rehnquist Court's already controversial takings jurisprudence, said a mouthful about the constitutional status of the Takings Clause[2] and the shape of the regulatory takings doctrine.[3] Along the way, and almost matter-of-factly, the Court announced a shift in the burden of proof[4] to the government. However, while it devoted a great deal of effort to its discussion of constitutional issues and state takings cases, the *Dolan* Court chose to make this burden shift without extended comment and confined its remarks to the space of a short footnote and a few lines of text. That a burden of proof shift occurred so quietly, yet coincided with considerable advancement in the substantive law, represents a familiar judicial tactic.

Whether subtly achieved as in *Dolan* or not, burden of proof shifts have been a part of some of this nation's most celebrated cases. For example, *Summers v. Tice*[5] shifted the burden of showing cause-in-fact to the defendants, allowing plaintiff Summers a victory and of-

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1 114 S. Ct. 2309 (1994).

2 The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

3 More precisely, *Dolan* addressed the aspect of regulatory takings in which local governments demand dedications of property, or exact fees, in exchange for permitting property owners to develop their property notwithstanding regulations that could otherwise prohibit them from developing entirely. Faithful to the facts of *Dolan*, this Note's analysis will largely focus on this practice as exercised by local governments.

4 As noted infra Part I.A, the term "burden of proof" denotes two distinct concepts—the burden of producing evidence and the burden of persuading the factfinder. For purposes of this Note, the term "burden of proof" will be used to represent both concepts except where each is discussed specifically by name.

5 199 P.2d 1 (Cal. 1948). In *Summers*, the plaintiff was injured from a shot fired by one of two defendants but could not determine which defendant's gun had fired the pellet that hit him. See infra text accompanying notes 29-32.

fering all subsequent tort plaintiffs enticing language for analogy.[6] Similarly, *Brown v. Board of Education*[7] left states with a nearly insurmountable burden of proof to show equality in their schools, thus helping to nail the coffin shut on the "separate but equal" doctrine.[8] For all their differences, in each of these cases—and in the many less notorious like them—the burden of proof shift acted as the medium for important substantive legal change. In these cases—the Title VII arena, later desegregation cases, and even First Amendment law—the burden of proof shift has been both an important signal of and a vehicle for legal change. Many of the considerations that steer the direction of the substantive law may also motivate a reassignment in the burden of proof,[9] and the two have often acted interchangeably.

While the Court may not have chosen to acknowledge it, the decision in *Dolan* falls well within this tradition. Florence Dolan, who owned a plumbing and electrical supply store in Tigard's business district, sought a permit from the city to expand her store and parking lot, and to build another structure on her land.[10] Tigard informed Dolan that she could have her permit if she met two conditions: first, that she deed to the city the portion of her property lying within the floodplain of the adjacent Fanno Creek,[11] and second, that she provide a strip of land next to the floodplain for use as a bicycle/pedestrian path.[12] To justify this dedication of over ten percent of Dolan's property, Tigard claimed that its previously adopted comprehensive zoning plan had identified the floodplain as a protected greenway that would be strained were Dolan to add additional impervious surface to the area, and that the bike path could alleviate the anticipated traffic congestion from Dolan's expanded facility.[13]

In deciding whether Tigard's demands amounted to a taking, the *Dolan* Court significantly altered the substantive law of regulatory takings: it required that there be "rough proportionality" between the

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6 See Roger B. Dworkin, Easy Cases, Bad Law, and Burdens of Proof, 25 Vand. L. Rev. 1151, 1169 (1972) ("[F]or plausible reasons of policy the court [in *Summers*] permitted plaintiff to win a case despite his inability to prove one of the critical elements of his cause of action simply by shifting the burden of proof on that element from plaintiff to defendants.").

7 347 U.S. 483 (1954).

8 See Richard H. Gaskins, Burdens of Proof in Modern Discourse 55 (1992) (arguing that *Brown* "did not directly overrule [the separate but equal doctrine] but instead raised to an unbearable weight the burden on states to prove that their segregated services were, in truth, equal").

9 See infra Part I.B.

10 See Dolan v. City of Tigard, 114 S. Ct. 2309, 2313-14 (1994).

11 See id. at 2314.

12 See id.

13 See id. at 2314-15.

government's demands and the harm it fears from development, and it required that the government establish that proportionality.[14] Building on the Court's increasing distrust of government regulation of property, and containing forceful rhetoric deploring the marginal status of the Takings Clause, *Dolan* and its burden shift represent another example in the class of cases where burden reallocations and substantive legal change reinforce one another.

As in *Summers* and *Brown*, the burden shift in *Dolan* represents the desire of the Court to disadvantage a litigating party and its argument.[15] Seeming to heed the warnings of both public choice theorists and property rights advocates that local government cannot be trusted to regulate private property, the *Dolan* majority, through its burden shift, retreated from the historical deference accorded to government in the land use area. However, rather than handicap the government with an announcement that all regulatory takings cases would now come under a heightened scrutiny review, the *Dolan* Court chose a more subtle but equally significant approach: it demanded that governments come forward and justify their regulatory land use decisions to the factfinder. If this requirement amounts to a shift in both the burden of production *and* the burden of persuasion, local governments after *Dolan* may find land use regulation a far more treacherous task. Far from a mere procedural move, the burden of proof shift in *Dolan* packs a powerful yet largely unspoken substantive legal punch.

This Note investigates the relationship between the *Dolan* Court's quiet reassignment of the burden of proof and the rationales for and effects of the Court's move. Part I provides an overview of burden of proof doctrine, focusing on what the burden of proof achieves and the common rationales used by courts in assigning it. After a discussion in Part II of the legal, political, and social forces that informed *Dolan* and the burden shift it accomplished, Part III considers possible explanations for and an evaluation of the Court's move. The Note argues that a clear though quiet reallocation of the burden of proof occurred in *Dolan*. It concludes that the reallocation may be justified if it results only in a burden of production shift, but is unnecessary and undesirable if it represents a shift in the burden of persuasion as well.

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[14] See id. at 2319-20.

[15] See infra Part I.B.3.

I
BURDEN OF PROOF DOCTRINE

A brief glance at almost any area of common or statutory law would show our legal system to have embraced the notion that "[n]o lawsuit can be decided, rationally, without the application of the . . . concept of burden of proof."[16] However undisputed this point may be, much less clear is how courts go about the assignment of burdens of proof. This Part investigates that question, looking first at the two underlying meanings the concept has come to convey and some of the historical reasons for its development. Next, before analyzing the burden of proof switch in *Dolan*, this Part surveys the three most common rationales used by courts in assigning the burden of proof. Despite its central place in our legal system, the burden of proof remains particularly resistant to easy explanation or application.

A. Definitions

The term "burden of proof" encompasses two distinct aspects: the burden of production and the burden of persuasion.[17] Largely a procedural device, the burden of production allows a judge "to determine whether a dispute is within the limits of the jury's competence."[18] This understanding of the burden of production stems from its historical roots: whereas early English juries could decide all matters based on knowledge gained outside the courtroom, by around 1750 the judge had acquired the power to determine whether the jury had been presented with sufficient facts at trial to reach a verdict.[19] As a result, not only did litigants have the responsibility to gather facts

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16 J.P. McBaine, Burden of Proof: Degrees of Belief, 32 Cal. L. Rev. 242, 242 (1944).

17 See Fleming James, Jr., Burdens of Proof, 47 Va. L. Rev. 51, 51 (1961) (noting that "burden of proof" refers to "two separate and quite different concepts"); Leo P. Martinez, Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases, 39 Hastings L.J. 239, 246 (1988) (explaining that "burden of proof" describes "two distinct aspects of trial proceedings"); John T. McNaughton, Burden of Production of Evidence: A Function of a Burden of Persuasion, 68 Harv. L. Rev. 1382, 1382 (1955) (noting "great emphasis . . . placed on the difference between the 'duty of bringing forward' evidence and the 'burden of persuasion of a jury'"). As explained supra note 4, unless explicit reference is made to the burden of production or the burden of persuasion, this Note uses the term "burden of proof" to encompass both concepts.

18 Martinez, supra note 17, at 248.

19 See Jack B. Weinstein et al., Cases and Materials on Evidence 1103-04 (8th ed. 1988); Dworkin, supra note 6, at 1156 ("The modern concept of burden of proof grew up as the jury slowly shaped itself into the fact-finding, law-applying body we have today."). The rise of peremptory ruling practice also played a role. See id. at 1157-58 ("Now, for the first time, a burdened party had to present evidence to persuade two different triers—judge and jury—at two different times—motion for peremptory ruling and deliberation after submission of the case—of two different, but related things—that the jury reasonably could find for the party and that it should find for him.").

for the tribunal,[20] but also they were forced to produce enough of them to convince the judge that the jury should be set to work.

Today, the burden of production asks whether a party has proved the existence or nonexistence of a fact sufficient to bring the dispute before the trier of fact. In a negligence jury trial, for example, the burden of production would require the plaintiff to demonstrate cause-in-fact and proximate cause such that a reasonable jury should entertain the plaintiff's claim; aware of this burden, the defendant is free to argue on a directed verdict motion at the close of plaintiff's case that the plaintiff has not produced sufficient evidence regarding causation to allow a reasonable jury to find in her favor.

In contrast, the burden of persuasion, a "more elusive dimension of the burden of proof,"[21] addresses how the trier of fact should treat the case once it is placed in its hands. This aspect, too, has historical roots: once the jury's decisionmaking had been confined to the facts raised at trial, a risk remained that the jury would not find either side's case convincing—that it would find the facts to be in equipoise.[22] The burden of persuasion avoids this result; the party bearing this burden faces defeat should the jury find the facts adduced by both sides to be in equipoise. In the hypothetical negligence case, for example, the plaintiff may satisfy the judge as to the sufficiency of her prima facie case of duty, breach, cause, and harm, but because she bears the burden of persuasion, she may still lose if she fails to overcome equipoise and convince the jury that her facts warrant a finding in her favor. The burden of persuasion, aptly termed the "risk of nonpersuasion," therefore entails a "different level of risk" than the production burden because it goes directly to the outcome of the trial.[23] As a result, it has been characterized as having substantive import. In Weinstein's words, whenever there is a "shifting [of] the possibility of victory towards one side or the other," the act will involve "distinct substantive policies favoring one class of litigant over another."[24]

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20 See Weinstein et al., supra note 19, at 1103 ("As to each issue of fact to be resolved at the trial a modern Anglo-American court has no knowledge.").

21 Gaskins, supra note 8, at 3.

22 See Note, Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation, 100 Harv. L. Rev. 653, 653 n.1 (1987) (defining burden of persuasion as "the burden of persuading the finder of fact that the disputed fact, in light of all the evidence, is more likely true than not"); see also James, supra note 17, at 51 (noting that burden of persuasion addresses situations where trier may "regard the existence or non-existence of the fact as equally likely—a matter in equipoise").

23 See Martinez, supra note 17, at 248.

24 Weinstein et al., supra note 19, at 1109.

The two burdens have also been distinguished by the "popular conception"[25] that while the burden of production may shift during the course of trial, the burden of persuasion remains fixed with the plaintiff and cannot shift.[26] However, for all the longevity of this general rule,[27] it has not gone unchallenged. One commentator asserts that "the [Supreme] Court has approved deviations from the normal rule on numerous occasions going back to the early days of the Court."[28]

Though not decided by the Supreme Court, one of the more famous examples of a shifting burden of persuasion is found in *Summers v. Tice*,[29] where the plaintiff was unable to show which of two defendants had fired the shot that injured him because both defendants had fired simultaneously.[30] The *Summers* court allocated to each of the defendants the burden of showing that his gun had not caused the plaintiff's injury.[31] Arguably, this burden shift may have involved only the burden of production since the defendants, not the plaintiff, were merely assigned a duty to come forward with facts sufficient for the jury to be set to work. The *Summers* court's "substantial policy discussion,"[32] however, indicates that it meant to go further. Merely shifting the burden of production to the defendants without shifting the burden of persuasion as well would have exposed the plaintiff to nonrecovery if the jury had found the defendants' causation evidence in equipoise with the plaintiff's. Even if the two defendants met their burden of production by adducing sufficient evidence as to which one fired the shot, without a burden of persuasion shift the plaintiff would go away empty-handed were the jurors left unconvinced by either defendant's evidence. Thus, to vindicate its policy of eliminating the handicap that plaintiff could not prove precisely which of two defendants had injured him, the *Summers* court had to shift both the burden of production and persuasion.

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25 Dworkin, supra note 6, at 1162.

26 See, e.g., Martinez, supra note 17, at 248 (explaining that since burden of production may shift while burden of persuasion may not, two are "in sharp contrast with each other").

27 See Dworkin, supra note 6, at 1162 (noting first statement that "burden of persuasion never shifts" is found in early case of Powers v. Russell, 30 Mass. (13 Pick.) 69 (1832)).

28 Ronald J. Allen, Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform, 76 Nw. U. L. Rev. 892, 899 (1982) (citing examples).

29 199 P.2d 1 (Cal. 1948).

30 See id. at 2.

31 See id. at 5.

32 Dworkin, supra note 6, at 1173; see also id. at 1169 (asserting that *Summers* court "did shift the burden of persuasion").

B. Rationales for Allocating the Burden of Proof

While there is no doubt, given both its history and use, that "the need for allocating the burden of proof is inescapable,"[33] courts and commentators have been less than clear on exactly how to do so. Many have come to acknowledge that "there is no key principle governing the apportionment of the burdens of proof" but rather there are several factors to consider, some of which may be more weighty in one case than in others.[34] Among these considerations are fairness to the party who must bear the burden, the likelihood of the facts to be proved, and whether a party is advancing a judicially disfavored contention.

1. Fairness

In general, the fairness consideration involves a concern with whether one party in a particular case has greater access to certain facts than the other.[35] Allocation of the burden of proof, and particularly the burden of production, along fairness lines has often trumped other rationales, especially the assumption that the plaintiff should always bear the burden of proof because she wishes to employ the judicial system to change the status quo.[36] In the Title VII employment discrimination context, for example, the difficulty of showing employer motivation results in a burden shift so that employers must, in order to prevail, "articulate [a] legitimate, nondiscriminatory reason for the employee's rejection."[37] Similarly, in the school desegregation

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33 Martinez, supra note 17, at 249.

34 McCormick on Evidence § 337, at 952 (Edward W. Cleary ed., 3d ed. 1984); see also Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973) ("There are no hard-and-fast standards governing the allocation of the burden of proof in every situation."); Nelson v. Hughes, 625 P.2d 643, 645 (Or. 1981) (noting that "[a]llocation of the burden of proof has vexed courts and commentators for decades" and that "[t]here are no fixed rules in allocating the burden of proof"); Martinez, supra note 17, at 255 (noting lack of overriding principle in allocating burden of proof and arguing that "ultimate allocation depends on general considerations of fairness, convenience, and policy").

35 See Richard A. Epstein, Pleadings and Presumptions, 40 U. Chi. L. Rev. 556, 579 (1973) ("The [t]est of '[f]airness' . . . suggests only that each issue and its burden be allocated for reasons of efficiency to the party with superior access to the evidence necessary to resolve it as a matter of fact."); see, e.g., Selma, Rome & Dalton R.R. Co. v. United States, 139 U.S. 560, 568 (1891) (burden of proof regarding right to payment rests with party possessing relevant account books); United States v. Continental Ins. Co., 776 F.2d 962, 964 (11th Cir. 1985) (burden of proof on issue of compensation allocated to party performing relevant work).

36 See Allen, supra note 28, at 896 (noting that "[t]here are exceptions to the rule that plaintiffs bear th[e] burden," one of which is that "the burden of production . . . may be placed on one party if the means of proving the issue are normally within his or her knowledge").

37 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

context, where there is often difficulty in showing the intent of a governing body, the Supreme Court has shifted to the school board the burden "of proving that other segregated schools within the system are not also the result of intentionally segregative actions."[38] The fairness rationale has been criticized as inconsistent with practice, i.e., although defendants presumably know more about their negligence than do plaintiffs, the law does not alleviate the need for plaintiffs to make a prima facie case.[39] This critique notwithstanding, however, the fairness rationale remains valid because, as Martinez points out, the party with superior access is "plainly in a better position to meet its burden."[40]

2. *Judicial Assessment of the Probabilities*

In what seems to be a corollary to the rationale that the burden should be carried by the party attempting to change the status quo, judges will often assign the burden of proof to the party seeking to establish the least-likely scenario.[41] For example, in *Johnson v. Johnson*,[42] the plaintiff-daughter attempted to receive payment for housework she had done for her mother, the defendant. The court found that the plaintiff needed to overcome the presumption, in accord with what was most probable, that the housework had been done gratuitously.[43]

Fairness also seems to drive this rationale. That the party attempting to show the improbable should be made to do so seems more fair and likely to reduce the risk of unjust results.[44] This rationale, however, has been criticized for its impracticality. Even though the estimate of probabilities requires no set formula, "judges would be

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[38] *Keyes*, 413 U.S. at 208. This burden shift occurs after the plaintiff has made a prima facie showing of "intentionally segregative school board actions in a meaningful portion of a school system." Id.; see Note, supra note 22, at 659 ("Fairness considerations supporting the *Keyes* burden rule focus upon the likelihood that the defendant school board possesses superior knowledge concerning its own motivations and hence is better positioned to offer evidence to support its contentions.").

[39] See Epstein, supra note 35, at 579-80 ("Suppose the defendant has better access to evidence on all issues. Does this mean, under the rule, that the plaintiff need not state a prima facie case at all?").

[40] Martinez, supra note 17, at 253.

[41] See McCormick on Evidence, supra note 34, § 337, at 950 ("The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred."); Martinez, supra note 17, at 252 ("The party who seeks to establish the improbable generally is allocated the burden of proof . . . .").

[42] 111 A.2d 820 (N.H. 1955).

[43] See id. at 822.

[44] See Edward W. Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5, 13-14 (1959) (noting that "a proper application of the probability factor is calculated to produce a minimum of unjust results").

forced to make intuitive estimates of the probabilities that in most cases will at best be of uncertain worth."[45] In addition, assigning the burden of proof on this basis would result in an ad hoc, case-by-case allocation, defeating the certainty and aid in risk calculation which the burden of proof provides our law.[46]

3. *Disfavored Contention*

Finally, many of the policy considerations alluded to by Weinstein[47] appear to be expressed in the disfavored contention rationale, which places the burden of proof on the party advancing a contention disapproved by the court.[48] The question remains as to which contentions are considered disfavored, though many examples involve an allegation of "reprehensible conduct."[49] Commentators also favor the example of contributory negligence; since some judges disliked that a negligent defendant could escape liability merely on the fortuity that a plaintiff had also been negligent, they assigned to the defendant the burden of proving contributory negligence.[50] In this way the disfavored contention rationale, more so than either fairness or the assessment of probabilities, incorporates policy concerns and reveals the

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[45] Epstein, supra note 35, at 581.

[46] See id. ("[A]n intuitive estimate of the probabilities suggests a great variation across the range of negligence cases, indicating . . . that no uniform pleading rule is possible.").

[47] See supra text accompanying notes 25-26.

[48] See Cleary, supra note 44, at 11 (noting that influence of policy "may nevertheless extend into the stage of allocating th[e material] elements by way of favoring one or the other party to a particular kind of litigation"); Martinez, supra note 17, at 252 ("[P]ublic policy considerations affect the choice of method used in assigning the burden of proof to a party by favoring one party over another with respect to particular issues.").

[49] Martinez, supra note 17, at 252 (offering allegations of fraud and illegality as examples of "disfavored contentions"); see Alabama By-Products Corp. v. Killingsworth, 733 F.2d 1511, 1514 (11th Cir. 1984) (holding in action by coal miner against mine operator that operator bears burden of persuasion to show plaintiff's illness is fraudulent, not totally debilitating, or not result of mining work); Sharp v. Coopers & Lybrand, 649 F.2d 175, 188 (3d Cir. 1981) (noting that in securities fraud action, "[t]he plaintiff traditionally assumes the burden of demonstrating causation" and "[o]nly in unusual circumstances is this burden shifted from the plaintiff to the defendant"), cert. denied, 455 U.S. 938 (1982).

[50] See Epstein, supra note 35, at 578 (noting argument that "[t]he test of policy helps . . . to avoid the disfavored result [of excusing a negligent defendant] because it requires the defendant to plead the issue [of contributory negligence] . . . and to prove it"). Cleary offers a different formulation, explaining that judges wishing to "exercise restraint[ ]" on recovery for negligence assigned to plaintiffs the burden of showing both the defendant's negligence and the lack of their own. Cleary, supra note 44, at 11. The difference helps to understand the workings of the rationale; since the more modern tendency is to disfavor the defense of contributory negligence, judges came to place the burden of proving it on the defendant rather than, as Cleary describes, using the burden to hamper plaintiffs in bringing a negligence action.

link between the procedural device of the burden of proof and substantive legal concerns.[51]

Not surprisingly then, criticism of this rationale focuses on the fact that it necessarily involves judicial policy-making and perhaps even an underhanded alteration of substantive law. Where a contention is available as part of the substantive law, critics argue, its use should not be curtailed or withheld by a particular judge's opinions as to its virtue.[52] These criticisms have not escaped the courts, who eschew plain reliance on the disfavored contention rationale but seem instead to do so subtly. For example, in *International Brotherhood of Teamsters v. United States*,[53] a Title VII employment discrimination case, the Supreme Court sought to justify a presumption in favor of relief once the plaintiff had established proof of a discriminatory pattern.[54] While the Court explicitly alluded to both "judicial evaluations of probabilities" and "superior access to the proof," it also noted that "the finding of a pattern . . . [of discrimination] changed the position of the employer to that of a proved wrongdoer."[55] In effect, though it did not use the language of disfavored contention, the Court found that upon a prima facie showing of discrimination, any justification given by the employer would be disfavored in that the employer would bear the burden of proving it. Just as some courts disapproved of excusing a negligent defendant merely because the plaintiff was also negligent, so the *Teamsters* Court objected to excusing a prima facie discriminatory employer upon easy justification. While the Court may not have wanted to state so explicitly, it seems plain that its decision had as much if not more to do with policy considerations than with one party's superior access to information or a judicial estimate of the probabilities.

California's Supreme Court offers another, though less explicit, example of how courts disfavor litigants through burden shifting. Beginning around 1967,[56] the California Supreme Court set out to direct the state's land use law so as to retard development and advance

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51 See James, supra note 17, at 61 (noting that "[s]ubstantive considerations may also be influential" in allocating burden of proof against disfavored contention).

52 See Epstein, supra note 35, at 579 ("[O]nce the substantive question has been decided, the decision should not be undermined by manipulating procedural rules.").

53 431 U.S. 324 (1977).

54 See id. at 359 n.45 (arguing "that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally"). The rebuttable presumption had been created by the Court just one year earlier in Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976) (holding that trial court erred in placing burden on individual plaintiffs).

55 *Teamsters*, 431 U.S. at 359 n.45.

56 Statistics and research on the California Supreme Court's activity may be found in Joseph F. DiMento et al., Land Development and Environmental Control in the California

preservationist interests, by not only refusing to engage in substantive review of any antidevelopment regulation but also "actively thr[owing] new roadblocks in the way of developers."[57] Among these roadblocks was an invigorated scrutiny of decisions by government agencies to allow development through the issuance of zoning variances. As of 1965, no California appellate court had upset an agency's decision to issue a variance, but in 1967 the California Supreme Court held that the findings and evidence supporting a height variance were inadequate.[58] Both this and subsequent decisions by the court demanded that agencies issuing variances provide greater support for their decisions, in line with the "[s]trict scrutiny of variances [that] was by then sweeping the country."[59] Though this strategy did not explicitly involve a burden shift, it did manipulate the burdens that litigants would bear in the dispute and thus achieved a similar result. And though this particular roadblock alone did not and most likely could not have disadvantaged the position of developers,[60] it shows how useful the orchestration of the burden of proof can be in tilting the litigation playing field against one party and, at times, altering the substantive law as a result. In California, the result has been the loss of property rights for many owners of undeveloped land.[61]

That the courts use the technique of burden shifting to achieve substantive legal ends does not mean, however, that they always act

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Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras, 27 UCLA L. Rev. 859 (1980).

[57] William A. Fischel, Regulatory Takings: Law, Economics, and Politics 227 (1995).

[58] See Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals, 427 P.2d 810, 819 (Cal. 1967); DiMento et al., supra note 56, at 954.

[59] DiMento et al., supra note 56, at 954-55; see also *Broadway, Laguna*, 427 P.2d at 814 ("The presumption that an agency's rulings rest upon the necessary findings and that such findings are supported by substantial evidence does not apply to agencies which must expressly state their findings and must set forth the relevant supportive facts." (citations omitted)).

[60] The DiMento study also points to the broadened requirement to use environmental impact reports, see DiMento et al., supra note 56, at 974-76; the strict enforcement of certain procedural requirements against developers, see id. at 871; the elimination of the availability of the vested rights doctrine, see id. at 872; the awarding of attorney's fees to any party challenging prodevelopment governments, see id. at 873-74; and the court's practice of choosing the source of law which best allowed it to achieve antidevelopment ends, see id. at 906-12 (analyzing legal bases of land development and environmental control decisions). In Fischel's view, with these various approaches "[t]he California court changed the legal rules so that any number of parties could stop a given development up to the moment at which it was physically improved." Fischel, supra note 57, at 251.

[61] See Fischel, supra note 57, at 251 (noting that one interpretation of California Supreme Court's approach is that "[o]wners of undeveloped land throughout the state . . . lost their property rights to already-established California residents"); DiMento et al., supra note 56, at 871 ("[T]he court's increased devotion to procedural details was not an end in itself but a means for achieving preservationist substantive outcomes.").

underhandedly or even through the language of disfavored contention. Even when shifting the burden of persuasion, and thus deviating from what many consider settled law,[62] courts have routinely acted from a plain desire "to favor one class over another, or to protect certain interests, such as the exercise of constitutional rights."[63] For example, in *Mount Healthy City Board of Education v. Doyle*,[64] the Supreme Court upheld, without comment, a shift in the burden of persuasion that struck a balance between the plaintiff's First Amendment rights and the practical interests of the employer. Plaintiff Doyle, an untenured teacher, had been fired for several stated reasons, one of which involved his action in phoning a local radio station to complain about the adoption of a dress code at the school.[65] Not wishing to allow the exercise of First Amendment freedoms to tie employers' hands, but also not wishing in any way to chill that exercise, the Court sustained a burden allocation which left the employer with the burden of persuasion: once the plaintiff had met his burden of showing that his conduct was constitutionally protected and that this conduct was a motivating factor in the employer's decision to fire him, "the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence" that the plaintiff would have been fired regardless of the protected conduct.[66] That the Court in *Mount Healthy* chose to use burden-shifting techniques to decide retaliatory firings claims based on the exercise of First Amendment rights[67] again reveals that policy rationales drive allocation of the burden of proof—often without explanation.

II

THE BURDEN OF PROOF SHIFT IN *DOLAN*

Although many of the terms of art and much of the doctrine addressing the burden of proof did not find their way into the *Dolan* opinion, a reallocation of the burden of proof did. The actual text of the opinion, trends in takings jurisprudence, and external political and social forces all support the view that in *Dolan*, however quietly, the Court chose to redraw the boundaries of the regulatory takings litigation playing field. This Part lays bare the Court's move, first by pro-

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62 See supra text accompanying notes 26-27.

63 Allen, supra note 28, at 899.

64 429 U.S. 274 (1977).

65 See id. at 283 n.1.

66 Id. at 287.

67 See David S. Cohen, The Evidentiary Predicate for Affirmative Action after *Croson*: A Proposal for Shifting the Burdens of Proof, 7 Yale L. & Pol'y Rev. 489, 501 n.64 (1989).

viding a brief overview of takings law and politics prior to *Dolan*, and then by examining *Dolan* itself.

A. *The Pre-*Dolan *Landscape*

1. *The Law*

As shaped by the Supreme Court, regulatory takings law prior to *Dolan* did not make much mention of burdens of proof. Instead, the various opinions focused largely on the elements plaintiffs needed to establish to demonstrate a taking. In so doing, however, these opinions revealed which side of the bar—landowner or government—would have the most to demonstrate and would bear the greatest risk of loss in a regulatory takings case. This Section will provide a brief overview of these cases and a more specific look at one case in particular, *Nollan v. California Coastal Commission*,[68] that set the stage for *Dolan*.

Many contemporary regulatory takings cases have aimed to clarify what the shape of a complete takings claim might be. Almost uniformly, however, these cases have left the plaintiff with a lot to do. For example, in *Penn Central Transportation Co. v. New York City*,[69] to determine whether a taking had occurred, the Supreme Court examined and balanced the regulation's economic impact, particularly its interference with the claimant's "investment-backed expectations," and the character of the government action.[70] While the Court did not specifically assign to a party the burden of proving these elements, it did emphasize at several points that Penn Central had not convincingly demonstrated a deprivation of reasonable return on its investment.[71] Later, in *Agins v. City of Tiburon*,[72] the takings test set forth

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[68] 483 U.S. 825 (1987).

[69] 438 U.S. 104 (1978). *Penn Central* involved a claim by the property owners, ultimately unsuccessful, that New York City's historic preservation ordinance had taken their property without compensation by forbidding the development of a skyscraper atop the landmark Grand Central Terminal.

[70] See id. at 124.

[71] See, e.g., id. at 136 (noting that "on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment"); id. at 138 n.36 (noting New York City's concession at oral argument "that if [Penn Central] can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable,' [Penn Central] may obtain relief"). Some commentators have labelled *Penn Central* the low mark of property protection under the Takings Clause. See, e.g., Fischel, supra note 57, at 55 (noting that *Penn Central* had been partly responsible for leaving regulatory takings in "toothless condition"); Michael H. Schill, Intergovernmental Takings and Just Compensation: A Question of Federalism, 137 U. Pa. L. Rev. 829, 844 n.55 (1989) (citing *Penn Central* for proposition that "[i]n practice, federal courts permit property owners to bear significant losses resulting from government regulation without requiring compensation").

[72] 447 U.S. 255 (1980). *Agins* involved an unsuccessful claim by an owner of un-

by the Court again proved difficult for the plaintiff to surmount. Even though the Court supplemented *Penn Central*'s focus on economic consequences with a requirement that a land use regulation "substantially advance legitimate state interests" to survive a takings challenge,[73] this loose formulation still left room for a balancing of interests. Indeed, the Court acknowledged this in stating that the takings question "necessarily requires a weighing of private and public interests."[74] Like Penn Central, Agins could not anticipate how the balancing would come out and ultimately lost in part because he had failed to show that no value remained in his property after the regulations had been passed.[75] Though not specifically addressing the burden of proof, *Penn Central* and *Agins* reveal that the Court's formulation of the test for a takings claim left plaintiffs with a large burden to bear before the Takings Clause could grant them relief.[76]

In contrast to the reasoning and result in *Penn Central* and *Agins*, more recent takings cases retreat from the balancing test and in so doing rework the character and magnitude of a takings claim. The turn away from balancing and, perhaps more tellingly, the increasing ability of landowners to win[77] foreshadow and underpin the *Dolan* Court's burden of proof shift. Most significant of recent opinions is *Nollan v. California Coastal Commission*,[78] in which the Supreme Court established an "essential nexus" test for determining a regulatory takings claim involving exactions imposed upon property owners.

In *Nollan*, the landowner applied for a permit to raze an existing beachhouse and replace it with a larger structure.[79] The California Coastal Commission conditioned approval on the dedication of an easement across Nollan's land so as to connect two public beaches separated by the property and to diminish the obstruction in the ocean

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developed land that Tiburon had taken his property through zoning regulations that reduced his ability to develop the land as densely as permitted under the zoning scheme in existence at the time he had purchased the property.

[73] Id. at 260.

[74] Id. at 261.

[75] See id. at 262 ("At this juncture, [Agins is] free to pursue [his] reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land use regulations has denied [him] the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments." (citing *Penn Central*, 438 U.S. at 124)).

[76] Cf. Fischel, supra note 57, at 52 (noting that "[o]pen-ended balancing tests" like that set forth in *Penn Central* and applied in *Agins*, "run the risk of balancing the Just Compensation Clause out of the Constitution entirely").

[77] See id. at 47 (noting that 1987 Supreme Court victories of two landowners stood in contrast to modern regulatory takings decisions, which nearly always upheld government regulation).

[78] 483 U.S. 825 (1987).

[79] See id. at 828.

view resulting from the larger house.[80] In determining whether Nollan deserved compensation, Justice Scalia looked not to a balancing of factors but rather to whether an "essential nexus" existed between the state interest and the conditions imposed by the Commission.[81] While finding visual access to be a legitimate state interest, he failed to discern an essential nexus between this interest and an easement allowing beachgoers to traverse across Nollan's property.[82]

More so than the balancing of factors in *Penn Central* or the "substantially advance" analysis of *Agins*, *Nollan*'s essential nexus test provided fertile ground for a burden of proof shift because it focused the inquiry more directly on the government's action. By pointing out the absurdity of the Commission's regulation[83] and later comparing it to extortion,[84] Justice Scalia infused takings law with a concern for government overreaching that would naturally lead to a more intense examination of the government's actions.[85] Thus, even though it did not shift the burden of proof, *Nollan* and its essential nexus test offered strong precedent and reasoning for any later Court that wished to do so.[86]

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[80] See id.

[81] See id. at 836-37.

[82] See id.

[83] Justice Scalia found the utter lack of an essential nexus in the case to render the situation "the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury." Id. at 837.

[84] See id. ("[U]nless 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.'" (citation omitted)).

[85] See Bruce W. Burton, Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation, 72 Or. L. Rev. 603, 655 n.230 (1993) (noting that, in *Nollan*, "[t]he Court's skepticism about government's motives is clear" and thus, "formally or informally, government appears to be accumulating a larger burden of proof with respect to . . . linkage between the purpose of the regulation and the evils being regulated"); id. at 604 (noting that Justice Scalia and Chief Justice Rehnquist have overseen "significant judicial reinvigoration" of "constitutional principles which inform and shape government's regulatory activities under the Takings Clause"). Justice Scalia does not limit his distrust of local government to takings cases. In an affirmative action decision, he stated: "An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523 (1989) (Scalia, J., concurring in the judgment).

[86] Even though it did not involve permit conditions, the most recent important takings case before *Dolan*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), offered another stepping stone in the path to *Dolan*'s burden shift. As one commentator argued, *Lucas* "resembles nothing more than a squad of demolition experts sent out ahead of a main wave of attack to clear out . . . certain statist-oriented principles of takings jurisprudence." Burton, supra note 85, at 630.

2. *Social and Political Forces*

The theory of public choice, the increasing regulation of property, and budgetary constraints also helped to nourish a burden of proof shift. Courts have grown more and more distrustful of the integrity and motives of local legislatures, which have become "increasingly tempted to maximize public benefits by regulations and mandates affecting the use of privately owned property while avoiding the fiscal burden of compensating affected owners."[87] Alarming situations like the bankruptcy of once-rich Orange County, California only support fears that financially strapped local governments might attempt to achieve land use goals through extortionist tactics. The combination of aspersions cast by scholars on the legislative process[88] and the aggressive property rights movement[89] have combined to enhance *Nollan*'s critical approach to government land use regulation.

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[87] Burton, supra note 85, at 604; see, e.g., Bruce W. Burton, Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy," 44 Ark. L. Rev. 65, 66-68 (1991) (citing examples of "aggressive governmental tactics used to reorder private property values in an effort to further municipal land uses without payment"); Susan M. Denbo, Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?, 23 Real Est. L.J. 7, 7 (1994) ("Municipalities faced with [a] capital financing crisis have responded by adopting local government policies that seek to transfer the cost of new capital expenditures necessitated by growth to the parties responsible for that growth."); James C. Nicholas, Impact Exactions: Economic Theory, Practice, and Incidence, Law & Contemp. Probs., Winter 1987, at 85, 88 ("Increasingly, local governments have been turning to impact exactions or payments in lieu (impact fees) as a means of financing the growing need for capital improvements. . . . [T]his shift can impose the ultimate burden upon the . . . property owner."); see also Agins v. City of Tiburon, 598 P.2d 25, 27 (Cal. 1979) (Tiburon City Council, though authorized to sell bonds in order to acquire property of Agins that had been designated suitable for acquisition for open space, passed zoning ordinance restricting intensity of development of Agins's and surrounding properties), aff'd, 447 U.S. 255 (1980); Fischel, supra note 57, at 52-53 (noting that Tiburon decided to pass zoning ordinance after efforts to buy Agins's property failed due to increased property values).

[88] See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 263 (1985) ("The need for diligent judicial supervision in land use cases derives in large measure from the persistent risk of faction in local government politics."); see also William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures, 74 Va. L. Rev. 373, 374 & n.2 (1988) (noting that "majority rule provides no inherent protection for the rights of minorities" and defining minority as "any identifiable group on which a legislative majority imposes a disproportionate amount of the costs of seeking its legislative ends"). But see Fischel, supra note 57, at 316 ("Public choice theory does not, however, necessarily lead to the position that judges need to order compensation for the victims of special interest legislation."); Daniel A. Farber, Public Choice and Just Compensation, 9 Const. Commentary 279, 298 n.52 (1992) (noting that exploitative projects where concentrated costs are imposed on landowners "are atypical" and "usually less attractive to factions than . . . pork-barrel projects").

[89] See, e.g., Dennis J. Coyle, Takings Jurisprudence and the Political Cultures of American Politics, 42 Cath. U. L. Rev. 817, 823 (1993) (noting "quite a bit of recent 'quacking' about property rights"); Douglas N. Silverstein, *Lucas v. South Carolina Coastal Council*:

Much of this trend has been fueled by the disgruntlement of property owners with burdensome environmental regulation[90] and the willingness of legislators, especially conservative ones, to take interest. Aggressive lobbying produced the Private Property Protection Act of 1995,[91] which declared: "It is the policy of the Federal Government that no law or agency action should limit the use of privately owned property so as to diminish its value."[92] The Act, which passed the House on the vote of 219 Republicans and 58 Democrats,[93] requires the government to compensate owners suffering more than a twenty percent decline in their property's fair market value as a result of specified regulations,[94] and to purchase any property whose value has declined more than fifty percent.[95] Statehouses, too, have taken notice; as of the time *Dolan* came down, eleven states had enacted bills protecting private property and six more had similar bills pending.[96] The effects of the property rights movement have also been felt beyond the arena of conservative legislative politics. At the 1991 Senate confirmation hearings of now-Justice Clarence Thomas, Democratic Senator Joseph R. Biden, Jr. questioned Thomas as to his views on private property rights and his judicial role in protecting them.[97] Even some lower court judges have thrown in their hats; in 1993, federal district judge Robert Vinson, using environmental statutes as an example, "lashed out at the extremes to which government has gone to expropriate property."[98]

Where Has the Supreme Court Taken Us Now?, 15 Whittier L. Rev. 825, 825 (1994) (characterizing *Lucas* as victory for "property rights advocates").

90 See Fischel, supra note 57, at 140 (noting that "much modern environmental regulation has placed great burdens on individual property owners").

91 H.R. 9, 104th Cong., 1st Sess. (1995).

92 Id. § 202, at 56. The bill was sponsored by a Republican and had 132 Republican cosponsors. See 141 Cong. Rec. H2638 (daily ed. Mar. 3, 1995). The text of H.R. 9 was subsequently incorporated into an omnibus regulatory reform bill, H.R. 925, which passed the House of Representatives on March 3, 1995, on a vote of 277-148. See id. Neither measure has been passed by the Senate.

93 See 141 Cong. Rec. H2638. Eight Republicans and 132 Democrats voted against. Id. at H2638-39.

94 Notably, the specified regulations included the Endangered Species Act of 1973, ch. 35, 16 U.S.C. §§ 1531-1544 (1994), "whose burdens are often especially acute for landowners." Fischel, supra note 57, at 140.

95 See H.R. 9, 104th Cong., 1st Sess. § 203(a) (1995).

96 See A Good Day for Property Owners, Wash. Times, June 30, 1994, at A22 (editorial).

97 See Linda Greenhouse, The Opening Skirmish, N.Y. Times, Sept. 11, 1991, at A1; see also Fischel, supra note 57, at 142 ("The senator seemed alarmed that Judge Thomas might be overly sympathetic to judicial protection of property rights.").

98 A Good Day for Property Owners, supra note 96 (commenting on *Dolan* and noting that "[e]verywhere one looks, property owners seem to be finding more and more friends all the time").

B. *Dolan*

These legal, social, and political forces culminated in the case of Florence Dolan to produce a shift in the burden of proof to the government. Adding to the essential nexus test announced in *Nollan*, and giving a rhetorical nod to the movement for greater property protection, the *Dolan* Court stated that government "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."[99] With only these and a few other words, the Supreme Court brought both its own jurisprudence and outside pressures to their logical conclusion: examining the government's motives means that the government must reveal and defend them.

Several aspects of *Dolan*, in addition to the sparse text, indicate that the Court meant to shift the burden of proof. First, at the outset, Chief Justice Rehnquist made clear that the facts of the case warranted an essential nexus analysis and not the general command of *Agins* that a land use regulation "substantially advance" legitimate state interests.[100] In so doing the Court positioned itself to draw upon *Nollan* and its focus on examining government means and ends. Second, and along similar lines, Chief Justice Rehnquist quickly characterized Tigard's findings not as an "essentially legislative determination[ ]" but rather as an "adjudicative decision" to condition Dolan's permit request.[101] Because the landowner's claim challenged "the showing made by the city" to justify the exactions instead of a broad land use act or even the city's right to exact dedications, the Court found it necessary to investigate the nature of this showing so as to evaluate the takings claim.[102] Here again the focus was placed not on a general balancing of landowner and government interests or an inquiry into the government's police power but rather on the specific means used by Tigard to effect land use control.[103] In short, the Court made clear early on that the opinion would center around Tigard's

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[99] Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994).

[100] See id. at 2316. Chief Justice Rehnquist also found an *Agins* analysis inapposite because the exactions in *Dolan* did not merely regulate the use of the property but rather required the owner to cede portions of it to the city. See id.

[101] Id. The distinction arises in the process used to effect land use policy. Whereas the adoption of a comprehensive plan or a zoning ordinance ordinarily involves a determination by the local legislative body, the granting of a permit to vary from these plans brings one resident before local land use boards much in the same way as a litigant might approach a court of law to seek a change in the status quo. Thus, the granting of a permit may be characterized as an "adjudicative" decision which does not involve the workings of a legislature but rather brings local government policies directly to bear on one or a small group of individual residents.

[102] See id. at 2317.

[103] See id.

showing, not Dolan's, thus laying the foundation for a burden of proof switch to the government.

Third, and perhaps most important, the Court's extended elaboration of its addition to the *Nollan* essential nexus test provided the rationale for its more abbreviated decision to reassign the burden of proof. Nearly all of *Dolan* involves a discussion of the secondary analysis never reached in *Nollan*—whether the exact conditions imposed are in proportion to the harm expected to arise from the proposed development. Even though an essential nexus did indeed exist between both the pathway and greenbelt conditions and Tigard's legitimate interests in "reduction of traffic congestion" and "preventing flooding along Fanno Creek,"[104] the Court believed that the Takings Clause required "rough proportionality" between the specific demands made and the harms foreseen.[105]

Critically, however, the Court did not wish the plaintiffs to dispute "rough proportionality" but rather looked to the government to establish it. Relying both on the state courts' use of a similar test[106] and the adjudicative nature of the case, the Court went beyond *Nollan*'s essential nexus test to require governments to justify the extent of their land use exactions. Cities like Tigard could no longer hide behind the police power test of *Agins* or even escape once *Nollan*'s essential nexus had been found. Rather, they had to show the tribunal that what they sought from the plaintiff was commensurate to the expected impact of plaintiff's development. The Court did not rely on burden of proof doctrine in requiring the "individualized determination," and it did not at all allude to burdens of proof as it had in *Teamsters* and *Mount Healthy*.[107] In addition, the Court devoted but a tiny portion of the opinion to the burden shift in comparison with its discussion of the "rough proportionality" test. However, this underemphasis does not mean that the burden shift is indistinguishable from the new test; on the contrary, the Court meant to incorporate both a "rough proportionality" requirement and a burden shift to accompany it. Even Chief Justice Rehnquist's qualification that "[n]o precise mathematical calculation is required"[108] belies the

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104 Id. at 2318.

105 See id. at 2319 (finding term "rough proportionality" to "best encapsulate[ ] what we hold to be the requirement of the Fifth Amendment").

106 See id. (approving of "reasonable relationship" test used by majority of state courts to determine proportionality in part because test focused on danger of legislative act that leaves realm of police power and becomes "'an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit'" (quoting Simpson v. North Platte, 292 N.W.2d 297, 301 (Neb. 1980))).

107 See supra text accompanying notes 54-55, 66.

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

Court's burden shift: however loose, a calculation by the government had become a part of federal takings litigation after *Dolan*, where none had been required before.

The Court's ensuing application of the new requirement reveals both the presence and power of the new burden shift. In its view, both dedications required of Dolan had not been shown "roughly proportional" and thus could not withstand a takings challenge.[109] Chief Justice Rehnquist found the greenway condition unacceptable because it went too far; although Tigard was justified in wanting more open space to accommodate the anticipated increase in runoff, it could have opted to leave the property with Dolan and to require her not to build there rather than seize her land.[110] For the Court the difference was crucial as it implicated the right to exclude, "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[111] By taking Dolan's land to effectuate its flood control, the city essentially granted a "permanent recreational easement" upon the land which would have "eviscerated" Dolan's right to exclude others from her property.[112] The Court also doubted the existence of a reasonable relationship because Dolan's development did not encroach on any of the existing greenway, a situation which would have strengthened the validity of the city's concerns with the need for more land, and thus would have made a stronger case for the seizure of Dolan's property so as to mitigate the loss.[113] In short, Tigard had not shown why its particular means of alleviating the impacts of development—a physical occupation—was commensurate to the impacts foreseen.

As for the bicycle pathway, the Court rejected this condition using a seemingly picayune but very telling semantical distinction. Since the city's findings stated that such a pathway "could" but not "would" alleviate some of the anticipated increase in traffic, Chief Justice Rehnquist concluded that "the city has not met its burden" that the

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109 See id. at 2319, 2321.

110 See id. at 2320. Chief Justice Rehnquist pointed out that "[t]he city has never said why a *public* greenway, as opposed to a *private* one, was required in the interest of flood control." Id. (emphasis added).

111 Id. (citation omitted).

112 See id. at 2321. Chief Justice Rehnquist distinguished the seemingly similar case of PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), in which the Court forbade a private shopping center servicing many thousands of patrons daily from prohibiting access to persons wishing to distribute petitions and to solicit petition signatures. Chief Justice Rehnquist characterized this holding as a restriction or regulation on the shopping center's right to exclude, in contrast to the conditions in the case at bar, which would have required Dolan to "lose all rights to regulate the time in which the public entered." *Dolan*, 114 S. Ct. at 2321.

113 See *Dolan*, 114 S. Ct. at 2321.

increase is reasonably related to the need for a pathway easement.[114] In his view, a conclusory statement of need would not suffice.[115] Far from mere syntax, this distinction between "could" and "would" meant that the city had to demonstrate a beneficial result rather than merely speculate as to one. The Court's preference for "would," and its use of the word "burden," go far in demonstrating that *Dolan* did much more than merely add a new prong to *Nollan*'s essential nexus test; it gave the responsibility to the government of *establishing* that prong as well.

Finally, aside from its legal reasoning and application, even *Dolan*'s rhetoric supports the notion of a burden of proof shift. Chief Justice Rehnquist bristled at the dissent's assertion that the majority had applied too strict a standard because the dedications demanded of Dolan are "'a species of business regulation that heretofore warranted a strong presumption of constitutional validity.'"[116] Chief Justice Rehnquist drew support from First and Fourth Amendment cases to show that the protections of the Bill of Rights could not be disabled merely by assigning a business purpose to a regulation.[117] He added: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[118] This powerful statement dovetails with the burden of proof shift because it challenges the underlying notion, so long a part of takings jurisprudence, that government's property regulations enjoy a wide presumption of validity.[119] Since

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114 Id. at 2321-22. As he had earlier, Chief Justice Rehnquist qualified this view with a statement that "[n]o precise mathematical calculation is required." Id. at 2322.

115 See id. at 2322.

116 Id. at 2320 (quoting id. at 2325 (Stevens, J., dissenting)).

117 See id. Chief Justice Rehnquist argued that the doctrine of unconstitutional conditions forbids the government's requirement that Dolan surrender her constitutional right to receive just compensation in exchange for a benefit conferred by the government when the property taken has "little or no relationship to the benefit." Id. at 2317. As Justice Stevens acknowledged in dissent, this argument invites analogy to First Amendment cases since "modern decisions invoking the doctrine have most frequently involved First Amendment liberties." Id. at 2328 n.12 (Stevens, J., dissenting). For a more complete discussion of this analysis, see generally Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473 (1991).

118 *Dolan*, 114 S. Ct. at 2320.

119 See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962) (holding that state's exercise of police power toward property will be presumed reasonable if "any state of facts either known or which could be reasonably assumed affords support for it" (citing United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938))). It is significant that the *Goldblatt* Court cited *Carolene Products* to support this proposition. One commentator has observed that, in the years after *Carolene Products*, "if a lawyer defending such a restriction [on land use] was struck dumb as he rose before the court, and could think of nothing to say, the restriction would be in some real trouble—but as long as he could

this presumption left property owners with a significant burden of proof,[120] it follows that a challenge to this presumption would coincide with a reexamination of the burden of proof.[121] Justice Stevens's rhetoric in dissent picked up this theme; he lamented a return to the days of *Lochner*[122] and found no valid reason for abandoning the strong presumption of constitutionality afforded to land use regulations and a burden of proof placed "squarely on the shoulders of the party challenging the state action."[123] Such a burden had served well in the past, and, he scolded, the Court "stumbled badly"[124] by reversing it. Though perhaps no more strident than in any other important Supreme Court opinion, the rhetoric of the majority and dissenting Justices in *Dolan* offers vital indicators that a major change in the regulatory takings landscape—a shift in the burden of proof—had occurred.

III
UNDERSTANDING AND EVALUATING THE BURDEN SHIFT IN *DOLAN*

While cataloguing the rationales employed by various courts in allocating the burden of proof may be difficult, even more complex is the task of identifying the rationales used in a specific case. As Martinez notes, "some uncertainty and confusion necessarily follow if an allocation of the burden of proof rests on not one but several prin-

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manage to keep on making a noise like a lawyer, all would be well." Norman Williams, Jr., The Background and Significance of *Mount Laurel II*, 26 Wash. U. J. Urb. & Contemp. L. 3, 4-5 (1984); see also Epstein, supra note 88, at 214-15 (noting "the modern framework of preferred freedoms and fundamental rights, which relegates the takings clause to the fringes of constitutional interpretation").

120 See Burton, supra note 87, at 97 (commenting that "presumption [of constitutionality] places a significant burden of proof upon the private landowner to show the elements of a takings clause violation").

121 See Epstein, supra note 88, at 102, 134 (arguing that strong presumption in favor of governmental regulation of property "set[s] the margin in the wrong place" and that "[t]he state must meet a clear burden of justification where it imposes land use restrictions . . . that are directed toward particular nuisances which can be largely controlled by more tailored means"); John J. Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U. L. Rev. 465, 499 (1983) (predicting that Court's refashioning of pattern of presumed validity for property regulations will impact "burden's selection"); see also J. Freitag, Note, Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid *Lochner Redivivus*, 28 Val. U. L. Rev. 743, 745-46 (1994) ("[T]he holdings in the proliferation of new takings decisions forebode a return to the stricter scrutiny of regulatory legislation under the police power . . . .").

122 See *Dolan*, 114 S. Ct. at 2329 (Stevens, J., dissenting) (warning that majority's likening of Takings Clause to free speech right may "signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era").

123 Id. at 2330 (Stevens, J., dissenting).

124 Id.

ciples, none of which have primacy over any other."[125] Complicating matters further is that courts often fail to state which burden—either production or persuasion—they mean to shift.[126] Finally, and perhaps most vexing, courts addressing the issue of burden allocation often fail to mention any rationale at all for their decision.[127] Even though *Dolan* possesses each of these failings, this Part attempts to understand what motivated the Court to shift the burden of proof and the precise reaches of the shift that occurred, and concludes by offering an evaluation of the Court's tactic.

A. Which Rationale?

Merely because the Court failed to mention any of the more common rationales for shifting the burden of proof does not mean that none played a role. On the contrary, the very same concerns which make the Court's move a seemingly consistent one also implicate both the fairness and disfavored contention rationales.

A concern over government's deeper motivations, a critical element in the school desegregation cases,[128] also operates in the regulatory takings area and certainly has its place, however muted, in *Dolan*. If the true purpose behind a regulation has become an even more central fighting issue in takings, as both *Nollan* and *Dolan* suggest, then both fairness and efficiency would be best served by having the government bear the burden of production. Factfinding in this area could be enhanced and quickened were the body with superior access to facts made to bear the duty of showing them.[129]

While it would be outlandish to argue that the Supreme Court has come to the point of identifying any government defense of its land use regulation as a disfavored contention, this rationale does help to explain the burden shift in *Dolan* and may support not only a shift in the burden of production but in the burden of persuasion as well. As with the employer in *Teamsters*, once the plaintiff in a regulatory

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125 Martinez, supra note 17, at 255.

126 See Allen, supra note 28, at 899 n.40 ("It is not always clear which burden the court is shifting.").

127 See Cleary, supra note 44, at 11 ("[T]he reported decisions involving problems of allocation rarely contain any satisfying disclosure of the *ratio decidendi*.").

128 See supra text accompanying note 38.

129 See Burton, supra note 85, at 650 ("Perhaps this deference [to legislative determinations] and the accompanying burden of proof placed on private owners has outlived its usefulness in regulatory takings jurisprudence."); Allison B. Waters, Casenote, 37 S. Tex. L.J. 267, 295 (1996) ("It is logical to place the burden upon governmental authorities to prove that a particular parcel is needed to accomplish legitimate planning goals because city planners unquestionably have better access to information with which to show the necessity of the exaction.").

takings case has made a prima facie showing,[130] the government may find itself cast as a wrongdoer required to make an affirmative showing so as to avoid having to compensate.[131] Moreover, depending on the intensity of the policy concerns that make the government's contentions disfavored, it may also find itself having to prove by a preponderance of the evidence that its demands are warranted—and thus assume the burden of persuasion. These results may have less to do with the finding of a disfavored contention than the general policy basis behind the rationale; just as the Court wishes to punish employers who discriminate, it also has demonstrated a greater distrust of government and a tendency to offer expanded protection to property owners.[132] At least in the regulatory takings area, the Court seems to have come to favor one class of litigant, the property owner, over another, the government, just as the California Supreme Court once disfavored and disadvantaged developers.[133] While the majority in *Dolan* attempted to downplay this favoritism by twice noting that "[n]o precise mathematical calculation is required,"[134] it seems unavoidable that a shift in either the burden of production or persuasion, or both, will heighten the defensive posture governments take regarding their land use regulations—a result which does not directly handicap their actions with a disfavored contention label but which may well have that ultimate effect. Whatever the extent of this outcome, the *Dolan* Court seems worthy of Epstein's concern that courts manipulate the procedural device of burden of proof to advance their policy and substantive goals.[135]

B. A Shift in the Burden of Persuasion

That the Court would shift the burden of production to the government in *Dolan* appears largely unremarkable, especially since it has seen fit to do so in other areas.[136] However, if the Court meant to

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130 Though the Court does not set out what elements constitute a prima facie case, it seems likely that the plaintiff will at least have to show facts supporting those claims made by Dolan—"that the city has identified 'no special benefits' conferred on her, and has not identified any 'special quantifiable burdens' created by her new store that would justify the particular dedications required from her which are not required from the public at large." Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994).

131 Here might enter a judicial estimate of the probabilities; once the plaintiff has made a prima facie showing, the least-likely scenario would be that the government can show a justifiable purpose for its regulation.

132 See supra notes 79-86 and accompanying text.

133 See supra text accompanying notes 56-61.

134 *Dolan*, 114 S. Ct. at 2319, 2322.

135 See supra note 52 and accompanying text.

136 See supra text accompanying notes 37-38; see also Dworkin, supra note 6, at 1169 ("If the burden of proof the court was talking about was merely the burden of producing

shift the burden of persuasion, all of the effects of its move will be intensified; under such a shift, once the plaintiff has made a prima facie case, not only would the government have to produce evidence showing a reasonable relationship between its regulation and its interests, it also would have to convince the trier of fact by a preponderance of the evidence that such a relationship existed.[137] In addition, a shift in the burden of persuasion would seem to justify the many accusations of inventiveness in Justice Stevens's dissent, as it would involve a violation of the general rule that the burden of persuasion remains fixed.[138]

Given the Court's "[n]o precise mathematical calculation"[139] language, and its equal focus on the quantity and quality of the required showing, an argument can be made that it did not wish the burden of persuasion to shift. However, these specific indications notwithstanding, a general look at the majority opinion hints to the contrary. As he had in *Mount Healthy*, Chief Justice Rehnquist in *Dolan* faced two conflicting demands—the need to protect the right to compensation and the concern that such protection should not hamper what Justice Stevens termed the "commendable task of land use planning."[140] Yet throughout *Dolan* the Court either implied or flatly stated that the right to compensation should be lifted from the depths to which earlier regulatory takings cases had let it sink. Perhaps the strongest indicators—both noted by Justice Stevens—are the Court's dictum that the Takings Clause should not be relegated to the "status of a poor relation"[141] and its reliance on First Amendment cases. Chief Justice Rehnquist's seeming adoption of Justice Scalia's distrust of land use regulation[142] only tips the balance further away from concern for the task of land use planning. Given this distrust, and the reinvigorated

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evidence, then *Summers v. Tice* contains nothing unusual; everyone knows that the burden of producing evidence shifts.").

137 See, e.g., Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) ("[T]he District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.").

138 See supra text accompanying notes 26-27.

139 Dolan v. City of Tigard, 114 S. Ct. 2309, 2319, 2322 (1994).

140 Id. at 2322 (Stevens, J., dissenting); see also E.F. Roberts, Mining with Mr. Justice Holmes, 39 Vand. L. Rev. 287, 291 (1986) (noting tension between compensation right and police power and possibility that without Takings Clause check, "the public . . . always will resort to the police power in lieu of the eminent domain power and the institution of private property itself will be in jeopardy").

141 *Dolan*, 114 S. Ct. at 2320 (Rehnquist, C.J.).

142 See supra text accompanying notes 83-85, 100-01; cf. Epstein, supra note 88, at 263 (noting that in field of land use regulation, "there are easily exploitable gains to be made under public control, both from owners of undeveloped plots and from those who wish to acquire them").

compensation right, the new balance struck in Chief Justice Rehnquist's mind may be that the need for constitutional protection justifies the government bearing the risk of nonpersuasion in takings litigation once the plaintiff has made a prima facie showing. Such an interpretation of *Dolan* would alter takings litigation quite radically; even when an essential nexus existed between the state interest and the permit conditions demanded, the government would be forced to compensate unless it could establish, by a preponderance of the evidence, the "required degree of connection between the exactions and the projected impact of the proposed development."[143] This interpretation would also extend the substantive import of *Dolan* even further:[144] with factfinders in equipoise always left to side with landowners, any presumption of validity the government may have enjoyed prior to *Dolan* would be effectively neutralized.[145] Unfortunately, lacking a clear direction from the *Dolan* Court as to its specific intentions for the burden shift, trial courts will have to speculate over how far to take *Dolan*. However, given *Nollan*, the social and political forces that preceded *Dolan*, and *Dolan*'s apparent growth from them, trial courts would not necessarily be wrong were they to find that *Dolan* supported a shift in the burden of persuasion.[146]

C. *Evaluating the Burden Shift*

Any evaluation of the Court's burden-shifting tactic in *Dolan* turns on whether the Court meant to move the burden of production alone or the burden of persuasion as well. In many ways a burden of production shift makes sense; not only does it accord with the fairness rationale[147] but it also meshes with numerous conceptions of how the Takings Clause should inform local land use regulation. Whether as the moderator of a bargain between a property owner and a regulatory body, the guiding law in a legal dispute between the two, or as a safeguard to ensure that a property owner has not been denied a rea-

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143 *Dolan*, 114 S. Ct. at 2317.

144 Cf. Dworkin, supra note 6, at 1172 ("The practical effect of *Summers* was, of course, to lay down a new rule of substantive law . . . .").

145 See supra note 119 and accompanying text.

146 Nor would the state legislatures, a few of which have actually gone as far as to codify *Dolan*'s burden shift and thus have increased the likelihood that courts will treat it as a shift in the burden of persuasion. See, e.g., Ariz. Rev. Stat. Ann. § 9-500.12(E) (1996) (stating that "[an] agency or official of the city or town has the burden to establish that there is an essential nexus between the dedication or exaction and a legitimate governmental interest and that the proposed dedication or exaction is roughly proportional to the impact of the proposed use, improvement or development"); id. § 9-500.13 (directing cities and towns to comply with *Dolan*).

147 See supra text accompanying notes 128-29.

sonable entitlement, the Takings Clause's goals of fairness and equity[148] are enhanced by a burden of production shift. A burden of persuasion shift, however, has little to recommend it. Forcing local governments to bear the ultimate risk of loss in land use litigation no doubt would enhance property rights, but at the unacceptable and unnecessary cost of frustrating the ability of localities to accommodate competing land uses.

1. The Burden of Production Shift

A burden of production shift will improve the Takings Clause's ability to ensure that bargains between property owners and local regulators will not be unconscionable. Property owners usually face zoning regulations as a barrier to proposed development, and as a result land use decisions often involve bargains between the owner and the regulator.[149] In *Dolan*, for example, Mrs. Dolan's planned enlargement of her store and parking lot could only be accomplished in accordance with the comprehensive zoning plan previously adopted in Tigard.[150] As a result, Mrs. Dolan and Tigard entered into a bargaining relationship; in exchange for an exception to the comprehensive plan that would allow Mrs. Dolan's redevelopment, she was asked to cede land for both greenway and a bike path.

Often such exchanges reconcile seemingly incompatible land uses and thus spawn no dispute,[151] but sometimes the regulator seeks too much in return for an exception or makes demands on the property

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148 See Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); Costonis, supra note 121, at 486-87 (noting that takings inquiry turns on whether property owner has been "unfairly singled out to bear losses that should be distributed among the public generally"); Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1171-72 (1967) ("[T]he only 'test' for compensability which is 'correct' in the sense of being directly responsive to society's purpose in engaging in a compensation practice is the test of fairness: is it fair to effectuate this social measure without granting this claim to compensation for private loss thereby inflicted?").

149 See Fischel, supra note 57, at 58 ("[M]any ordinary land use regulations are routinely bargained for cash and goods in kind. Planning commissions are often asked by developers to grant an exception to regulations, for which the developer agrees to donate land."); see also Nicholas V. Morosoff, Note, "'Take' My Beach, Please!": *Nollan v. California Coastal Commission* and a Rational-Nexus Constitutional Analysis of Development Exactions, 69 B.U. L. Rev. 823, 848 (1989) (defining "exaction" as "generic term for the contribution that a developer must make to a community in exchange for permission to develop").

150 See supra text accompanying note 13.

151 See Fischel, supra note 57, at 58 ("Exchanging exceptions to regulation for transfers of physical property has long been common practice, and curtailing it could harm developers as well as community interests.").

owner having little or nothing to do with the regulation excepted.[152] In such cases the burden of production switch should play a positive role. By forcing the government both to come forward with a showing as to its motives and to justify the ratio of what it demands to the regulation's purposes, the burden shift will help deter unconscionable or unfair bargains.[153] This concern helps explain why the *Dolan* Court took pains to distinguish between "could" and "would,"[154] and to note that the conditions imposed on Mrs. Dolan resulted from an "adjudicative decision."[155] Both of these factors increased the likelihood that Mrs. Dolan received an unfair bargain. A mere hypothetical finding of increased traffic congestion failed to show that the bargain Tigard offered Mrs. Dolan involved an appropriate exercise of regulatory authority as opposed to a mere attempt to expropriate her property for unrelated ends. Similarly, an adjudicative decision implied that Tigard, as "judge," could exercise concentrated power to impose this uneven bargain. By denying local governments such as Tigard the ability to rely on conclusory reasons for exacting conditions, a burden of production shift promises fairer bargains without threatening to eliminate the practice entirely, and on this account makes good sense.[156]

Some might argue that, although the burden of production shift will not eliminate land use bargaining, it may too severely chill the practice. This argument, however, underestimates the motives and abilities of regulators and planners. Two lawyers prominent in the field of advising municipalities on land use commented that the burden shift in *Dolan* may mean "some additional work" but added that "the results—more and better planning, effective regulation and appropriate dedications—are welcome to regulators and developers alike."[157] They also noted that while *Dolan*'s burden of proof shift

152 Fischel offers *Nollan* as an example, noting that because the Coastal Commission's demand for an easement along the beach had nothing to do with the regulation's concern over beach views from inland, a one-sided bargain resulted. See id. at 57 ("The commission was using its authority to regulate redevelopment as a lever to provide greater public access along the beach.").

153 These bargains may qualify as unconscionable in that it may cost "tens if not hundreds of thousands of dollars" and may take "three to four years" to get a judicial resolution regarding the validity of exactions requirements. Richard F. Babcock, Foreword, Law & Contemp. Probs., Winter 1987, at 1, 2.

154 See supra text accompanying notes 113-15.

155 Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); see supra note 101 and accompanying text.

156 See Waters, supra note 129, at 295 (characterizing *Dolan* as "pro-planning decision because it encourages smarter planning").

157 Dwight H. Merriam & R. Jeffrey Lyman, A Practical Guide to "Substantially Advancing Legitimate Governmental Interests" with Dedications and Other Exactions, C930 ALI-ABA 321, 328 (Aug. 1994), available in Westlaw, ALI-ABA database.

involved a "flip side" of "time and money," the practice of demonstrating a relationship between the harms of development and the means to mitigate them "is nothing new in many municipalities."[158] Given this generally optimistic outlook, the burden of production shift in *Dolan* should not deter planners from bargaining with property owners so as to bring more development to their communities while mitigating any resulting harms. Indeed, these attorneys suggest that the history of environmental regulation will offer the parties a way to share *Dolan*'s burden: as with the environmental impact statements required under federal and state environmental policy acts, the property owner negotiating over exactions may draft a "property rights impact statement" to travel with the development proposal.[159] Such accommodation shows that while *Dolan*'s burden of production shift will produce fairer bargains it will not at the same time reduce their availability.

Along similar lines, the burden of production shift will help the factfinder to look more critically at local land use exactions. Fischel convincingly argues that the judicial intervention licensed by takings law remains most warranted when "assets . . . are immobilized and the political process is inexorably majoritarian or highly attenuated by the political isolation of the regulators."[160] Mrs. Dolan presents a paradigm case; with an established business in downtown Tigard, she is unable to avoid the regulatory powers of a majoritarian local government[161] by taking her property out of the jurisdiction. In this sense, Mrs. Dolan and similar property owners deserve the protection of increased scrutiny from the courts, both to prevent localities from regulating with the sole purpose of avoiding the compensation

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158 Id.

159 Id. Indeed, legislation requiring such statements has already been proposed or passed in several states. See Robert Meltz, Property Rights Legislation: Analysis and Update, CA24 ALI-ABA 17, 20-21 (Jan. 1996), available in Westlaw, ALI-ABA database (describing legislation as using "'front-end' approach," which requires "government to assess takings implications (or property rights implications) of its proposed actions in a formal process" that "[o]ften includes demands that written takings impact assessments (TIAs) be prepared"). For an example of such a statute, see Tex. Gov't Code Ann. § 2007.043 (West 1996) (requiring government entity to prepare written takings impact assessment that specifies, inter alia, "whether and how the proposed action substantially advances its stated purpose" and "the burdens imposed on private real property and the benefits to society resulting from the proposed use of private real property"); id. § 2007.003(a)(2) (including dedications and exactions under § 2007.043).

160 Fischel, supra note 57, at 7; see Epstein, supra note 88, at 263-64 (noting that in cases where "diligent judicial supervision" is needed, "there is no correlation between ownership rights and voting power" and that "the developer and the prospective purchasers are often outside the jurisdiction and thus do not have voting rights or direct political influence").

161 See Fischel, supra note 57, at 7 ("The paradigmatic instance of the majoritarian problem is local government land use regulation.").

requirement[162] and to compensate for the failings of the political process that produce such a result.[163] Exactions, unlike regulation, more often involve "attention in individual circumstances" and "innovative land-use controls,"[164] and thus increase the likelihood and ability of planners to concentrate community-wide burdens on one property owner.[165] The burden of production shift accomplished in *Dolan* will improve the courts' ability to check such behavior. Since the burden of proof developed in part from the inability of tribunals to gather the relevant facts,[166] the fact that the government must make a showing rather than merely respond to the property owner's case will help the factfinder better examine the government's means and ends.

This enhanced examination, however, may bring with it an increase in the number of federal takings claims and corresponding uncertainty for land use planners.[167] The extent of these difficulties remains unclear. While the burden of production shift may provide property owners with greater incentive to seek federal relief, this might not be a lasting effect because the shift does not necessarily encourage courts to deviate from their normal practice of finding in

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[162] See id. at 356 (noting "the threat of liability for taking apparently *does* make the government's agents cautious"); Farber, supra note 88, at 299 ("[T]he takings clause prevents strategic defections by the legislature from the political 'trade usage' of just compensation."); Saul Levmore, Just Compensation and Just Politics, 22 Conn. L. Rev. 285, 311 (1990) (noting that takings law forces government to "internalize costs that it might not otherwise take into account"); Schill, supra note 71, at 864 ("The compensation requirement reduces the incentive for a faction to gain political power for the purpose of appropriating property for its own benefit.").

[163] See Levmore, supra note 162, at 310 (arguing that notion of "discrete and insular" minority might be applied to takings inquiry so as to protect individual property owners "that had a history of being the odd group out in political bargains"). But see Farber, supra note 88, at 293 ("[T]he lesson of public choice theory is that minorities are often disproportionately powerful compared with majorities.").

[164] Merriam & Lyman, supra note 157, at 326, 327; see also J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981) (characterizing exaction scheme as "extortion" in that "some developers would be permitted to pay the town the value of the land in lieu of its dedication" while others, like plaintiff, were forced to dedicate land itself); Waters, supra note 129, at 283-84 & 284 n.91 (defining exaction as adjudicative decision and adding that "[a]djudicative determinations, as opposed to legislative, involve a small number of persons and exceptionally affect each case upon individual grounds").

[165] See Denbo, supra note 87, at 38 (noting that "it is probable" that municipalities' use of exactions will have new developments "shoulder more than their fair share of infrastructure costs"); Jason R. Biggs, Comment, *Nollan* and *Dolan*: The End of Municipal Land Use Extortion—A California Perspective, 36 Santa Clara L. Rev. 515, 553 (1996) (noting that use of exactions "as a source of funding public needs" is "approaching extortionate levels").

[166] See supra note 20 and accompanying text.

[167] See James H. Freis, Jr. & Stefan V. Reyniak, Putting Takings Back into the Fifth Amendment: Land Use Planning After *Dolan v. City of Tigard*, 21 Colum. J. Envtl. L. 103, 134 (1996) (criticizing *Dolan* for "failing to present a guiding principle for application" and for "inject[ing] more uncertainty into this area of the law").

the government's favor.[168] In addition, the courts may not be willing to give *Dolan* wide application.[169] The uncertainty[170] faced by planners may also fade as courts come to provide more content to *Dolan*'s rough proportionality test, a process which has already begun.[171]

Finally, the burden of production shift will help the court and factfinder focus on the existing regulation that the dedications presume to serve. Although courts have been very reluctant to review the validity of land use regulations and as a result have placed a significant burden of proof on property owners,[172] exactions cases, like those involving contributory negligence, do not naturally devolve all responsibility for proof upon one party. Rather, these disputes at bottom involve a contest over acceptable property entitlements;[173] the

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168 See Fischel, supra note 57, at 47 (noting that "modern regulatory takings doctrine had been constructed from opinions in which the government regulation has almost always been sustained").

169 See David L. Callies, After *Dolan*: Land Development Conditions and the Courts, CA34 ALI-ABA 13, 17, 21-22 (Aug. 1995), available in Westlaw, ALI-ABA database (noting that while "the *Dolan* case is having a large influence," some courts have applied it to only certain types of dedications or have declined to apply it beyond dedications context). But see Freis & Reyniak, supra note 167, at 132 ("Despite the narrow facts of the case, other evidence suggests that *Dolan* could be interpreted expansively to include areas beyond physical Takings of land.").

170 Though an extended discussion of post-*Dolan* cases is beyond the scope of this Note, one of the first of these cases exemplifies the uncertainty. In Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994), the court found that the city's dedication of a 20,000 square foot easement as a condition to develop 3.85 acres was not proportional to the increase of eight vehicle trips per day that the development would produce. See id. at 573. Even though city planners were not aware of the increased burden they would bear at the time they made their findings, they and their counterparts in other cities may question exactly what degree of specificity would satisfy a court applying *Dolan*. However, this concern ignores the fact that local governments have long felt the need to defend their land use decisions in advance of litigation and to structure their planning and procedures so as to prevail should litigation ensue. See Dwight H. Merriam, Limiting Land Use Liability, 8 Zoning & Plan. L. Rep. 113, 113, 118-19 (1985) (lamenting that "[p]ublic officials involved in local land use decision making . . . frequently find themselves tumbling down the rabbit-hole of litigation" and offering 13 steps for municipal planners to follow so as to reduce likelihood of liability); Merriam & Lyman, supra note 157, at 326-30 (advising planners considering dedication requirements of implications of *Dolan*).

171 See Callies, supra note 169, at 23 ("Several courts have been quite explicit in setting out how a local government might meet the stringent *Dolan* test . . . .").

172 See Morosoff, supra note 149, at 861 (noting that courts have been "unable and/or unwilling to examine the validity of the development prohibitions underlying exactions schemes" and that "landowners are saddled with a heavy burden of proof, in some cases necessitating proof beyond a reasonable doubt"); see also 1 Kenneth H. Young, Anderson's American Law of Zoning § 3.16, at 121 (4th ed. 1996) (noting that "degree of proof required to overcome the presumption of validity" of zoning ordinances "can properly be described as an 'extraordinary' one").

173 See Fischel, supra note 57, at 351 ("[T]he problem of exactions is intimately connected with the reasonableness of the regulation to which an exception is sought."); see also id. at 342-45, 351-55 (discussing importance of and how to determine initial land use entitlements); Robert C. Ellickson, Suburban Growth Controls: An Economic and Legal

property owner claims that her proposed use accords with her ownership of the asset while the neighboring owners, represented through the government, wish to or have already denied that use through regulation. The government's claimed entitlement, however, is not only embodied in passage of the regulation itself but also in the measures used by government to maintain it. Thus, while the nexus requirement assures the factfinder that the government's police power—its entitlement—has been served by the very demand for an exaction,[174] a burden of production shift will assure that the government has not overstated or redefined that entitlement in the specific exactions it imposes. The "real danger"[175] and thus the crucial issue in regulatory takings cases like *Dolan* is whether the government has used its power to excess and has not paid for the consequences.[176] Requiring the government to come forward and demonstrate that it has not overenforced the entitlement contained in the regulation but instead remained faithful to it will help factfinders to sort out the ultimate question of whether the government has gone too far.[177] Because the burden of production shift will, like the essential nexus test, assist courts in protecting property owners without requiring review of the land use regulation's validity,[178] it follows that the singular and significant burden of proof borne by takings plaintiffs should be shared. In *Dolan*, for example, this would mean not only that Mrs. Dolan come forward to demonstrate that Tigard had demanded too much, but also that Tigard come forward to show that the extent of its exactions rea-

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Analysis, 86 Yale L.J. 385, 427-28 (1977) (illustrating sometimes tenuous connection between exactions and underlying regulations they presume to service).

174 See Morosoff, supra note 149, at 859-62 (arguing that rational nexus requirement ensures that government's land use regulation is constitutional exercise of police power); see also Ellickson, supra note 173, at 468 (concluding that local government should use development charges in response to urban infrastructure costs raised by development but should never be permitted to levy "charges designed to raise general revenue" and thus unrelated to those costs).

175 Morosoff, supra note 149, at 860.

176 See id. at 863 (arguing that it is "necessary to prevent municipalities from using excessive development prohibitions to extort dedications for which they would otherwise have to pay").

177 See Waters, supra note 129, at 294 (defending rough proportionality requirement in *Dolan* as "necessary because the effects upon private property rights are not considered under the first prong of *Dolan*, the nexus test").

178 See Morosoff, supra note 149, at 860 (noting that courts "focus on the nexus rather than scrutinizing the underlying development prohibition directly" because "courts are ill-equipped to judge the validity of typical land-use regulations"); see also Waters, supra note 129, at 294 n.147 (noting that in enacting rough proportionality requirement, "the [*Dolan*] Court is addressing neither the ability of the legislature to enact land use regulations nor the validity of such regulations, which is the heart of substantive due process analysis").

sonably supported its entitlement in the comprehensive plan which Mrs. Dolan threatened to disrupt.

In this way the burden of production shift will enhance both the fairness and efficiency of resolving exactions disputes. Rather than force the property owner to prove both a positive (that the government has demanded too much) and a negative (that it cannot justify its demands), the burden shift divides the responsibility evenly and places it with the party who may best carry it.[179] Finally, this burden shift helps focus the takings inquiry on the two crucial factors to balance in light of the regulation whose exceptions caused the dispute: "the value of what the public loses from the [proposed development]" and "the value to the owner of the property to be taken."[180] With a shared burden of production the proceedings will be driven less by the parties' responses to one another and more by a formal showing as to each of these factors. As in Title VII litigation, where it is expected that the plaintiff show harm and the defendant attempt to justify its actions,[181] the burden of production shift in exaction cases like *Dolan* should come to produce trials where both parties address the concerns necessary for the factfinder to understand and to resolve the dispute.

2. *The Burden of Persuasion*

For all the benefits a burden of production shift would bring, however, a shift in the burden of persuasion would go too far. In cases like *Mount Healthy*,[182] which involve a shift in the burden of persuasion, the decisions have a much greater tendency to disfavor one party to the litigation.[183] *Mount Healthy*, for example, taught that employers who fire employees for their exercise of First Amendment rights were more often than not liable.[184] While this result may be defensible given the preferred status of First Amendment freedoms, a similar result in exaction cases like *Dolan* cannot be so easily defended. Those who chill speech may only rarely be able to justify their acts, but local governments very often can. As a result, it is both unnecessary[185] and undesirable to subject localities to a standing assumption that the dedications they seek more often than not violate

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179 See supra text accompanying note 129 (discussing fairness rationale of burden of proof and superior access to facts).

180 Fischel, supra note 57, at 348.

181 See supra text accompanying notes 53-55.

182 Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); see supra text accompanying notes 64-67.

183 See supra Part I.B.3.

184 See supra text accompanying notes 65-67.

185 See, e.g., Farber, supra note 88, at 298 ("[T]he takings clause is not best considered as forcing compensation on generally unwilling legislatures. Even without a constitutional

the Takings Clause. For all of Fischel's concern over majoritarianism in local governments, even he admits to being "impressed with the underappreciated efficacy of local government in delivering local public goods."[186] Echoing this view in *Dolan*, Justice Stevens expressed legitimate concern that the sum of the Court's opinion would leave local governments less able to regulate.[187] While the burden of production shift may leave planners uncertain for a time as to exactly what showing will suffice,[188] a burden of persuasion shift would have a more lasting effect of making the courtroom a far less hospitable environment for regulators.

What the Court failed to recognize, or did not want to recognize explicitly, is that shifts in the burden of persuasion have "far-reaching—even revolutionary" effects.[189] Should *Dolan* be construed as having shifted the burden of persuasion to the government, these effects will extend well beyond the increased litigation in the federal courts that may result from a burden of production shift. Rather, local governments in exactions cases[190] will confront the significant risk that they will be required to compensate the property owner whenever the factfinder is unconvinced by either side's showing. This risk, in contrast to the burden of production's effects,[191] will noticeably impair the ability of government to accommodate conflicting land uses, both because of substantially reduced bargaining power with property owners and a heightened fear of judicial override. Few would dispute the benefits of a legal rule that will help encourage local legislators to pay for their externalities (i.e., regulations devaluing property), but a burden of production shift is sufficient to remind governing bodies of this responsibility and to prevent the "strategic misbehavior" of deviating from this practice.[192] Obliging the government to come forward and evidence its good motives differs significantly from framing exactions litigation such that even meticulous planning may not save the government from a court predisposed to operate from the directive

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mandate, legislatures could be expected to offer compensation quite often, perhaps routinely.").

186 Fischel, supra note 57, at 3.

187 See supra text accompanying notes 122-24; see also Mrs. Dolan and the Bike Path, Wash. Post, June 26, 1994, at C6 (editorial) ("In future cases, this holding may prove to be a significant roadblock for governments with legitimate objectives and limited resources.").

188 See supra notes 167-71 and accompanying text.

189 Gaskins, supra note 8, at 7.

190 They may face similar hardship in other land use litigation contexts as well. See Merriam & Lyman, supra note 157, at 327 (noting that "plaintiffs' lawyers will undoubtedly try to extend the *Nollan/Dolan* reasoning to all land use controls").

191 See supra text accompanying notes 156-59.

192 See Farber, supra note 88, at 302.

that the Takings Clause must no longer remain a "poor relation" to other Bill of Rights guarantees.

CONCLUSION

Though Justice Stevens refused to go along, Chief Justice Rehnquist treated his shifting of the burden of proof to the government in *Dolan v. City of Tigard* as a matter-of-fact happening. He did not plainly acknowledge that he was doing so, devoted only a few lines of text to the move, and offered no rationale consistent with any of the literature addressing such a tactic. Perhaps Chief Justice Rehnquist believed that with all his constitutional discussion on the one hand and detailed factual analysis on the other, his shift might slip by with little objection. As Justice Stevens recognized, however, Chief Justice Rehnquist did not deserve a clean getaway.

In questioning the value of burdens of proof, Dworkin lamented that "the notion that burdens are important to decision making is so firmly established that commentators occasionally even attempt to explain important substantive decisions as if they involved mere procedural manipulations."[193] However far-reaching *Dolan*'s substantive effects might be, few would invite Dworkin's disdain by attempting to hang them all on the burden of proof switch which it achieved; what *Dolan* did for the law of regulatory takings could hardly be characterized as "procedural manipulation."

At the same time, however, to treat the burden switch as indifferently as the Court did ignores that such moves can hold a great deal of meaning. A shift in the burden of production, for example, promises to benefit exactions litigation by improving the fairness and nature of the evidence put forth in the proceedings. It will also serve to remind local legislators that they must not merely speculate as to the benefits of and need for their regulation but actually demonstrate that the property owner's conduct warrants their chosen response. On the other hand, a shift in the burden of persuasion will overreach in attaining these goals and will have a greater likelihood of stifling the ability of local governments to accommodate competing land uses.

"[B]urden-shifting," Gaskins observed, "indicates a challenge to established presumptions . . . ."[194] In the context of recent developments both outside the law and in the text of the opinion itself, the burden shift in *Dolan* amounts to just that. Seeming at once to ad-

193 Dworkin, supra note 6, at 1178.

194 Gaskins, supra note 8, at 7.

dress both the intensified property rights movement[195] and the alarm bells of some public choice theorists,[196] the reallocation of the burden of proof, whether of production or persuasion, signals a shift in the default setting away from acceptance of government's motives and toward a distrust of them. This move coincides with a trend, having tentative roots as far back as the Burger Court,[197] in which the Court increasingly recognized that "judicial protection of property interests is congruent with a comprehensive theory of modern civil rights jurisprudence."[198] Just as in the past the Court has coupled greater protection of civil rights through shifts in the burden of proof in Title VII, school desegregation, and First Amendment law, so now has it come to elevate property rights in a similar manner. Perhaps a better explanation for the Court's near silence on the burden shift is that, while the move has been used historically to conceal substantive legal change,[199] the *Dolan* Court made no such pretense: rather than presage or cloak changes in underlying assumptions, the burden reallocation in *Dolan* seems to coincide with them comfortably.

Of course, these theories should not overshadow the very real practical effect that the burden shift in *Dolan* will have on regulatory takings litigation. In *Penn Central*,[200] considered by some the low point of regulatory takings protection, the Court gave much weight to the fact that the property owner had not shown a decline in property value sufficient to warrant compensation.[201] That this allocation of responsibility for proof has created difficulty for property owners in bringing takings claims only hints that, with its new responsibility, the

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195 See Michael M. Berger, Recent Takings and Eminent Domain Cases, C930 ALI-ABA 221, 231 (Aug. 1994), available in Westlaw, ALI-ABA database (noting of *Dolan* that "[i]t will undoubtedly be said by some governmental spokesman or environmental activist that the decision somehow elevates property rights above the rights of society").

196 See supra note 88.

197 See Costonis, supra note 121, at 468 (arguing that Burger Court came to recognize "dominion interest" in property, or notion that property serves to protect individual liberty); William W. Van Alstyne, The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court, Law & Contemp. Probs., Summer 1980, at 66, 70 (describing "tighter, more conservative view of liberty: liberty as security of private property").

198 Fischel, supra note 57, at 100 (discussing history of Takings Clause jurisprudence from "Madisonian concerns" to present).

199 See Dworkin, supra note 6, at 1173 (noting possible argument that court in *Summers v. Tice* couched its decision in burden of proof terms because "the court wanted to appear to be making a 'conservative' decision rather than striking out in a bold new direction in negligence law").

200 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978).

201 See supra note 71 and accompanying text.

government may now face elevated hardship in defending them.[202] Ultimately, however, this impairment seems fitting in an era of takings jurisprudence where property rights—not government objectives—seem to rule the day.

[202] See Burton, supra note 87, at 115 ("A new burden of proof would be a handicap to government and a boost to private ownership.").