

VERMONT LAW SCHOOL

**THE 12TH ANNUAL CLE CONFERENCE ON LITIGATING
REGULATORY TAKINGS AND OTHER LEGAL CHALLENGES TO
LAND USE AND ENVIRONMENTAL REGULATION**

**NOVEMBER 6-7, 2009
SOUTH ROYALTON, VERMONT**

PROPORTIONALITY IN TAKINGS LAW

by

Gregory S. Alexander

PROPORTIONALITY IN TAKINGS LAW

Gregory S. Alexander*

Proportionality—in the U.S. and Elsewhere

The proportionality principle is not unknown in American constitutional law, but its use is at best spotty. Most recently, the Supreme Court in *City of Boerne v. Flores*¹ used the proportionality principle as a means of testing the constitutionality of the Religious Freedom Restoration Act. Use of the proportionality requirement evoked criticism from commentators, who argued that the test was unprincipled and unprecedented.² This criticism is not surprising since, as Vicki Jackson has pointed out, "U.S. constitutional law does not ordinarily and explicitly resort to the idea of proportionality as a measure of constitutionality...."³

The only other context in which the Supreme Court has used a proportionality test is in one corner of takings law--exactions. In *Dolan v. City of Tigard*,⁴ the Court held that for a local land-use planning agency to sustain a public land-use dedication that it requires of a private owner in exchange for issuing a development permit, the agency must show that a "rough proportionality" exists between the proposed development's impact and the public dedication sought.⁵ The test focuses on the value of the public harm caused by the proposed development and, on the other side, the value of what the owner loses as a result of the dedication.⁶ The Court has expressly limited its proportionality requirement to these so-called land-use exactions and has not made it a general requirement for all land-use regulations.⁷ In general, then, proportionality is an unknown concept to American constitutional law.

The situation is different elsewhere in the world. Proportionality is a widely used legal requirement throughout the western world.⁸ It is used in many areas of public law, including

* A. Robert Noll Professor of Law, Cornell University.

¹ 521 U.S. 507 (1997).

² See, e.g., John T. Noonan, Jr., *Religious Liberty at Stake*, 84 Va. L. Rev. 459, 470-71 (1998). See generally Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality,"* *Rights and Federalism*, 1 U. Pa. J. Const. L. 583, 602-43 (1999).

³ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, p. 603.

⁴ 512 U.S. 374 (1994). I discuss the *Dolan* case in light of the Canadian version of the proportionality principle later in this chapter in the section titled "Would a Proportionality Principle Make Any Difference in Takings Law?"

⁵ 512 U.S. at 375.

⁶ 512 U.S. at 375.

⁷ See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999). See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 Iowa L. Rev. 1 (2000).

⁸ See Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, p. 604 ("proportionality is a widespread concept in European law"); Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London: Springer, 1996), p. xi (to the same effect);

administrative and constitutional law.⁹ However, proportionality does not have a single, fixed meaning either in all countries or across all fields of public law in the same country. In some countries, such as Canada, for example, different versions of the proportionality requirement are used in different aspects of constitutional law. A different version of the proportionality test is used in federalism cases than is used in individual rights cases.¹⁰

Among the areas of constitutional law in which the proportionality principle has been used is constitutional protection of property. Proportionality review is a common aspect of constitutional property law in many countries, including countries that have no conventional type of constitutional property clause. It applies, for example, in Canada¹¹ and Australia.¹² The same is true in Germany, where the German Constitutional Court (*Bundesverfassungsgericht*) applies the proportionality principle to limitations on property, although the Basic Law does not expressly call for it.¹³ The German courts apply basically the same three-part analysis as the Canadian courts do. The proportionality principle is also used by the South African courts in constitutional property cases,¹⁴ and their mode of analysis largely tracks that of the Canadian and German cases,¹⁵ which the South African courts have followed.¹⁶

The Mechanics of Proportionality

As commonly applied in individual rights cases in Canada and elsewhere, the proportionality principle is the second of a two-part approach. The first part requires that the court find that the statute or regulation violates some particular constitutional or entrenched right.¹⁷ If no such violation has occurred, the inquiry stops there. Assuming, however, that the court finds that the statute has violated the right, the statute will nevertheless be sustained if the

David M. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995); Jeremy Kirk, *Constitutional Guarantees, Characterisation and the Concept of Proportionality*, 21 *Melbourne U. L. Rev.* 1, 4 (1997) (“Proportionality has been...applied in public law around the world.”). On the growth of proportionality in Europe, see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), pp. 97-99, 114-24.

⁹ In European Community law, the proportionality principle is used primarily in two substantive areas: the law of common agricultural policy and the law of the free movement of goods. See Emiliou, *The Principle of Proportionality*, pp. 1-2.

¹⁰ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, p. 605 (discussing Canadian cases); Kirk, *Constitutional Guarantees*, p. 2 (discussing the Australian proportionality principle).

¹¹ See *R. v. Oakes* [1986] 1 S.C.R. 103, 138-40.

¹² The Australian Commonwealth Constitution (1900) does not include a conventional bill of rights. See Van der Walt, *Constitutional Property Clauses*, p. 39. However, the courts treat Section 51 (xxxi) of the Australian Commonwealth Constitution as the equivalent of a constitutional property provision. They have developed a proportionality principle that works as outlined above.

¹³ See, for example, BVerfGE 21, 150 (154-55).

¹⁴ See *S. v. Makwanyane*, 1995 (2) SA 391 (CC).

¹⁵ See Mostert, *The Constitutional Protection and Regulation of Property*, p. 134.

¹⁶ Section 36 of the final version of the South African Constitution, the general limitation provision, is basically a codification of the analysis followed by the South African Constitutional Court in the *Makwanyane* case. The court’s analysis in that case, in turn, was premised on the reasoning in the Canadian cases, especially *Oakes*. See van der Walt, *Constitutional Property Clauses*, p. 95, n. 60; Stuart Woolman, *Out of Order? Out of Balance? The Limitation Clause of the Final Constitution*, 13 *S. Afr. J. Hum. Rights* 102 (1997). Mostert argues that although “the roots of the South African proportionality test are mostly sought in its Canadian counterpart, the German Basic Law remains the best comparative agent as far as the content and nature of the proportionality test in South Africa is concerned.” Mostert, *The Constitutional Protection and Regulation of Property*, pp. 135-36 (footnote omitted).

¹⁷ This version of the proportionality test was initially developed by the Canadian Supreme Court in *R. v. Oakes*, [1986] 1 S.C.R. 103.

legislative means are proportional to the ends. To establish proportionality, three requirements must be met. First, the means must be rationally connected to achievement of a legitimate state objective, Second, they must impair the affected right as little as possible, Third, the legislative measure must be generally proportional to the ends to be achieved.¹⁸

The upshot of this three-pronged proportionality test, in Canada and elsewhere, has not been what one might expect. On the basis of language alone, the principle seems to require a high degree of stringency. The second requirement in particular, requiring that the legislative means must impact the protected rights as little as possible, could potentially make the proportionality principle a basis for a very rigorous form of judicial review. To the American listener, the second requirement sounds like the highly demanding "least restrictive alternative" standard that is used in some areas of American constitutional law. But at least in Canada, it has not been applied in the way that the original articulation of the test in the Canadian case of *Regina v. Oakes* seemingly indicates. Rather than requiring that the selected method be the one that minimally impairs the protected right, the second requirement has been used, as Vicki Jackson notes, as "a more fluid, sliding-scale standard measuring the nature of the intrusion on the protected right against the importance of the objective."¹⁹ In all of the jurisdictions where it has been adopted, the proportionality principle has functioned, as Jackson puts it, "as a more flexible analysis of whether the degree of impairment of protected rights is justifiable, considering the importance of the right, the degree of intrusion, and the nature of the asserted governmental interest."²⁰

The Characteristics of Proportionality

Discussing the Canadian experience, Jackson has identified four salient characteristics of judicial proportionality analysis: contextuality, transparency of the relevant factors and reasons, breadth in the competing considerations, and overt normativity.²¹ Contextuality means that the court focuses its attention on the immediate circumstances of the challenged provision. Proportionality analysis, as it is practiced in Canada, rejects the formalist, categorical approach taken by the U. S. Supreme Court in some areas of constitutional law, including aspects of takings law. In a case involving a challenge to hate-speech regulation, for example, the court closely examined empirical material concerning the problem of hate crimes in Canada to determine the magnitude of the problem.²²

The second factor is transparency. The Canadian court is quite explicit and candid in its discussion of the conflicting considerations involved in the case. Discussing one major case in which the Court used proportionality analysis, Jackson states, "[The Canadian Justices identified the baseline constitutional values and empirical judgments that divide them, providing differing

¹⁸ See Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, pp. 606-607. This is essentially the same set of requirements used in German constitutional law as well. See Currie, *The Constitution of the Federal Republic of Germany*, pp. 309-310.

¹⁹ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, o. 615 (citing *R. v. Keegstra*, [1990] 3 S.C.R. 697, as illustrative).

²⁰ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, 608.

²¹ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, pp. 610, 616, 617.

²² See *R. v. Keegstra*, [1990] 3 S.C.R. 697, 744-58.

assessments of the weight to be given to the competing values and of the likely effects of enforcing the particular law.”²³ The effect of this approach has been to make the Canadian decisions, and the real reasons for the decisions, more accessible, although not necessarily more predictable, to the public.

The third factor is closely related to transparency. The Canadian court considers a wide range of competing factors, interests, and approaches involved in the regulation. The Court has explicitly taken into consideration and openly assessed all relevant considerations, including possible social consequences of the regulated behavior and the governmental restriction. Further, it has taken international and comparative materials into account, contrary to the American practice.

Finally, proportionality analysis is, as Jackson puts it, "frankly normative" in character.²⁴ This is perhaps the major difference between the Canadian Supreme Court's approach and that of the U.S. Supreme Court. The Canadian Supreme Court has explicitly acknowledged the normative character of its reasoning when it assesses the relative weight it assigns to the right being restricted as well as its judgment about the importance of the governmental interest.²⁵ Members of the Court have openly addressed their differences over the amount of weight they assign to the constitutional values at stake. Moreover, the court takes moral and political considerations into account as well as more strictly legal factors.

Proportionality = Balancing?

Does the proportionality principle amount to balancing? Is it just another term for the method of balancing with which American lawyers are highly familiar? Putting aside for the moment whether proportionality as another form of balancing would be a good or bad thing for American takings law,²⁶ it is certainly possible that proportionality, in the hands of American courts, might morph into balancing. The similarity between the two is obvious, and some commentators have treated proportionality testing as a matter of balancing.²⁷ Both reject the formalism of a strictly categorical approach. However, from both an analytical and experiential perspective, proportionality is different from balancing. Analytically, the two are distinct, although proportionality analysis clearly involves aspects of balancing. The most apparent analytical difference is that while the American balancing approach begins and ends with weighting factors, under the three-prong approach used in Canada and Germany, the balancing of benefits and burdens comes, if at all, only at the end of the inquiry, after the court has analyzed the purpose of the restriction and the restriction's necessity.²⁸ One purpose of this structured approach, in fact, is to minimize the amount of balancing involved in the process. As

²³ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, pp. 613-614.

²⁴ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, p. 616.

²⁵ See, for example, *RJR MacDonald v. Canada*, [1995] 3 S.C.R. 199, 268-78 (LaForest, J., dissenting).

²⁶ See the discussion later in this chapter in the section titled "Can/Should the Proportionality Doctrine Be Transplanted to American Takings Jurisprudence?"

²⁷ See, for example, Kirk, *Constitutional Guarantees*, p. 5.

²⁸ See Woolman, *Out of Order? Out of Balance?* p. 111

South African legal scholar Henk Botha puts it, the aim is "not to banish the balancing metaphor from constitutional adjudication, but to find an alternative to a crude model of weighting and ranking interests."²⁹

German constitutional law draws a theoretical distinction between balancing (*Güterabwägung*) and proportionality (*Verhältnismässigkeit*). Balancing is a matter of an abstract weighting or ranking of fundamental rights. Proportionality, on the other hand, is seen as a matter of legislative competence. The court uses the proportionality test to determine whether the legislature overstepped its competence to determine the content and scope of the property guarantee.³⁰ Of course, the point of both bases of judicial review is the same, namely, to determine whether the legislative limitation on the property right is excessive. Moreover, this theoretical difference at times is just that-theoretical. The actual processes of balancing and proportionality review substantially overlap and often yield the same result.³¹

In the United States, balancing is basically a form of cost-benefit analysis, in which multiple factors are weighed in the abstract rather than in a contextualized fashion. Proportionality analysis, on the other hand, is a form of contextualized practical judgment. Like balancing, the court takes multiple factors into account, but it evaluates the relative weight to be given to each factor in the immediate context of the problem before the court. The proportionality test places context at the front and center of legal analysis. Moreover, proportionality analysis is less formless and more structured than balancing. As the three-prong analysis used in Canada, Germany, and elsewhere makes clear, it explicitly unpacks different questions and requires the court to focus on each separately. Balancing involves a more amorphous process of tossing all relevant factors into a single calculus.

Experience provides another reason to resist reducing the proportionality test to balancing. The experience of the U.S. Supreme Court with balancing in some areas of constitutional law, especially freedom of speech under the First Amendment, has been that a balancing approach tends to translate into blanket deference to the legislature. This was most obvious in Justice Frankfurter's analysis in the infamous and now repudiated case of *Dennis v. United States*,³² and it is the reason why many progressive American constitutional lawyers reject balancing in dealing with fundamental constitutional rights.³³ Proportionality analysis in Canada, Germany, and South Africa has not translated into blanket deference to the legislature. This is largely due to the contextual nature of the court's analysis. It evaluates interests differently in each case on the basis of the immediate considerations involved.

²⁹ Henk Botha, *Metaphoric Reasoning and Transformative Constitutionalism*, part 2, *J.S. Afr. L.* 20, 20 (2003).

³⁰ See Mostert, *The Constitutional Protection and Regulation of Property*, pp. 294-95.

³¹ See Loammi Blaauw-Wolf, *The "Balancing of Interest" with Reference to the Principle of Proportionality and the Doctrine of Güterabwägung- A Comparative Analysis*, *South African Publikreg/Public Law* 178, 198-201 (1999).

³² 341 U.S. 494, 525-26 (1951) (Frankfurter, J., concurring).

³³ See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L.J.* 943 (1987); Mark Tushnet, *An Essay on Rights*, 62 *Texas L. Rev.* 1363 (1984); Laurent B. Frantz, *The First Amendment in the Balance*, 71 *Yale L.J.* 1424 (1962).

The contextuality and transparency of proportionality analysis distinguishes it from balancing practice in another way. In American judicial practice, balancing tends to amount to a form of cost-benefit analysis, with a pretense of scientific rigor that makes the outcome appear objective.³⁴ Courts that have engaged in balancing commonly are less than candid, hiding the real bases for their decisions. This contrasts strongly with the Canadian experience with proportionality. The courts using proportionality analysis have made no such pretense of objectivity, certainly not of science, and their opinions have laid open the factors animating their decisions.

Would a Proportionality Principle Make Any Difference in Takings Law?

Would it matter if American courts applied a general proportionality principle in takings jurisprudence? Would there be any practical effect of this doctrinal borrowing? Were American courts to use the proportionality principle in the way the Canadian courts have, at a minimum there would be a difference in judicial opinions. As I have already indicated, Canadian opinions in which the proportionality test is used are highly transparent, something that no one would say about the U. S. Supreme Court's takings opinions. If American courts applied a general proportionality principle in takings jurisprudence, the courts would more frankly disclose what considerations were the driving force in their decisions and they would more directly acknowledge competing considerations and the reasons why those considerations did not carry the day. The courts' reasoning would also be more contextual. Because the Supreme Court's dominant method in takings cases is ad hoc balancing, there is necessarily some degree of contextuality in its opinions. But even in those cases where the Court has frankly engaged in ad hoc balancing, the Court has not focused in a sustained way on matters like the nature and function of the property interest immediately before it or even the public interest involved in the challenged restriction. Its discussion of these matters, which constitutes the core of proportionality analysis, is typically vague and short.

Consider the majority opinion in *Penn Central Transportation Co. v. City of New York*,³⁵ the locus classicus of modern balancing in takings law. In that case, the Court upheld the action of the New York City Landmark Preservation Commission denying the owners of the famous Grand Central Terminal building the legal right to construct a tower in the air-space above the building. The Court's opinion is characterized by a degree of contextuality and transparency but only a limited degree. The Court provided a considerable amount of information about the contextual background of the case, but when it turned to analysis its discussion turned formulaic. The Court specified three factors involved in its "essentially ad hoc factual inquir[y]": the economic impact of the regulation on the affected owner, interference with "distinct investment-backed expectations" of the owner, and the character of the governmental action.³⁶ Marching through each of these factors, the Court devoted most of its attention to rejecting the owner's arguments and distinguishing cases. The most context-specific aspect of the opinion concerned the severity of the economic impact of the regulatory decision on Grand Central's owner, Penn Central Transportation Corporation. The Court did not discuss how the landmark designation of

³⁴ See Aleinikoff, *Constitutional Law in the Age of Balancing*, p. 993.

³⁵ 438 U.S. 104 (1978).

³⁶ See *Penn Central*, 438 U.S. at 124.

Grand Central fit into the Commission's overall regulatory plan or what specific injury to the public welfare would occur were the proposed development to go ahead. What specific values did the landmark designation serve? Were they strictly aesthetic in character, or was there another dimension to the public interest?

The failure to address questions like these also limited the degree of transparency of the Court's opinion. By transparency, I mean clarity and candor regarding the immediate factors that led the Court to reach its decision and the reasons why the Court weighted those factors more heavily. One wonders, for example, whether the Court was influenced by the fact that the property interest involved was strictly commercial in character.

Would the case have been decided differently if the affected property had been the owner's personal residence? A more functional approach to analyzing the property interest, another possible borrowing from other jurisdictions that I will discuss shortly,³⁷ would have prompted the Court to be more candid about all of the relevant factors at work in its thinking. Another doctrinal borrowing that will be discussed later, an explicit social obligation norm, would also have greatly added to the opinion's transparency. To what extent did the Court regard owners of special properties, buildings whose specialness was well-known even before any governmental stamp of approval like the Landmark Commission's designation, as inherently owing duties to the public to preserve the integrity of buildings such as Grand Central Terminal? Reading the Court's opinion, one has the sense that such a notion played a role in the Court's thinking, but nothing of the sort was acknowledged.

Along with transparency, predictability also suffered from the Court's approach. Critics of "ad hocery"³⁸ often make this charge against the Supreme Court's current balancing approach in takings cases. But the Court's experience with balancing seems to point exactly to the opposite conclusion. There is a great deal of predictability of outcome under the balancing approach. Constitutional challenges to property regulations rarely win. In the vast majority of takings cases where the extant balancing approach applies, the outcome is nearly always in favor of the government. It is only in those pockets of takings law where the Court has fashioned some sort of formal, categorical rule that it has been more apt to strike down land-use regulations and other forms of property rights limitations. Ironically, it is just the effort to develop a more categorical approach to takings case that has exacerbated the "muddle" of Supreme Court takings law. Cases like *Lucas v. South Carolina Coastal Council*³⁹ have made takings jurisprudence less predictable rather than more because the Court's newly minted categorical rule of finding per se that a taking has occurred where the regulation results in total economic deprivation undercuts itself with a nuisance exception. That exception restricts predictability in *Lucas*-type cases not because it is a standard rather than a rule but because it establishes a formal benchmark what counts as a "nuisance" under historical local state law-that will be troublesome to identify. The general point is not that standards better promote predictability than rules do, but that a context-specific form of analysis, encouraged by the proportionality principle, does not necessarily result in

³⁷ See the discussion of functional analysis later in this chapter in the section titled "A Social-Obligation Norm."

³⁸ See, e.g., Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697 (1988).

³⁹ 505 U.S. 1003 (1992).

unpredictability. As Vicki Jackson aptly observes, "Much of the answer to the question whether 'proportionality' analyses will be too unpredictable will lie in the 'doing.'"⁴⁰

An open, and important, question is what effect, if any, the proportionality principle would have on the Court's use of categorical rules. Would adoption of the proportionality test as a general part of takings law prevent the Court from developing any categorical rules, rules like the *Lucas* "total economic deprivation" rule or the *Loretto* "permanent physical occupation" rule? Putting aside the question whether such rules are desirable, the answer is, again, not necessarily. Proportionality analysis might lead to development of formal rules. One could imagine the Court relying on contextual judgment about a wide variety of factors, including the owner's privacy interest and less restrictive alternative forms of regulation to justify a *Loretto*-like rule that applies only in the context of cases like *Loretto*, where the affected property interest is the owner's personal residence. While it seems unlikely that proportionality analysis would commonly produce formally realizable rules, it is not out of the question.

Substantively, there is no guarantee that the proportionality principle in takings cases would significantly add clarity to American takings doctrine. Again, to paraphrase Jackson, the answer will lie in the doing. One uncertainty is whether American courts would adopt the full structure of proportionality analysis, especially the distinction between the proportionality test and the analytically prior question whether the regulatory limitation violates the plaintiffs constitutional property right. Proportionality should be analyzed only if the court has determined that the regulation has encroached upon the proper constitutional boundaries of the affected property interest. If American courts adhered to this structure, as they should, that would add special weight to how the court analyzes the property interest.

What difference, if any, would the Canadian version of the proportionality test have on the American "rough proportionality" requirement under *Dolan v. City of Tigard*? Clearly, the analysis would differ. Procedurally, under the proportionality principle the city would not have been given the burden of proving the existence of a "rough proportionality," as it was under the *Dolan* decision, because the court would have undertaken the investigation itself. This change alone might well have changed the result of the case, for the Supreme Court's decision seemed to be based on the city's failure to sustain its burden of proof as much as on any other factor.

Analytically, under the Canadian version of the proportionality test, the first question is whether the city's land-use regulation and exaction had violated Florence Dolan's constitutionally protected property right. The answer clearly seems to be yes. Even under a capacious view of the social obligation norm, Dolan's ownership interest included the right to exclude the public under the circumstances of the case. Unlike the property in *Penn Central*, there was nothing unique about her property that created a basis for supposing that the public had a prior legitimate reason to gain access to her land. It certainly cannot be argued that the fact that the city found it necessary to impose a restriction on her land is evidence of such a prior public interest. Had Dolan not planned on expanding her business and parking facilities, the city would have taken no action to restrict the use of her property in any way. In a real sense, she, not the city, initiated the land-use restriction.

⁴⁰ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, p. 622.

The second part of the proportionality test then requires that the court address three questions. First, the court investigates the real legislative purpose behind the regulation and asks whether that purpose is legitimate and rationally connected to the regulation.⁴¹ This question would replace the "nexus" requirement that the Court first imposed in the *Nollan* case.⁴² Basically, it would replicate the Court's "rational relationship" test that it used in its equal protection jurisprudence and would almost certainly be satisfied on the facts of *Dolan*, given the minimal amount of scrutiny involved under that test. The city sought to maintain the integrity of its drainage system and to minimize parking congestion in its downtown area.⁴³ These purposes clearly were legitimate, and the even the Court acknowledged that there was a nexus between them and the exactions the city sought from the owner.⁴⁴

The second two questions would track *Dolan's* idea of moving beyond a mere "nexus" or "rational relationship" requirement to require proportionality. The second question would turn to whether the regulatory limitation impairs the property right as little as possible. As previously indicated, under the Canadian practice this test does not approximate the American "least restrictive alternative" test. Instead, in the more recent cases it has been used as a sliding scale comparing the importance of the governmental interest, the importance of the right, and the degree of intrusion with that right.⁴⁵ The facts in *Dolan* ought to satisfy this requirement. The governmental interest was significant. The concern with flooding especially is difficult to minimize, giving the high social costs associated with serious and repeated flooding, particularly in highly populated areas. While the exactions had a high qualitative impact on Florence Dolan's right, the right to exclude - traditionally one of the incidents of private ownership most highly protected⁴⁶ - the quantitative impact was not great. Only ten percent of her land was affected by the public dedication. Moreover, while the incident of property that was affected, the right to exclude, is important, the functional type of property involved is less weighty. Under the Canadian approach, judges have assessed the relative value of the property interest involved.⁴⁷ Reinforced by a frankly functional method of analyzing the affected property interest, the court should find that Dolan's property interest is not entitled to the same degree of protection as the type of property that immediately affects the owner's personal security or autonomy. It was a commercial interest whose function was strictly economic.

Under the "flexible" sliding scale used by the Canadian courts then, the second of the proportionality principle's three-part test should be found satisfied in *Dolan*. The degree of regulatory impairment of the owner's property interest was justifiable in view of the substantial

⁴¹ See Mostert, *The Constitutional Protection and Regulation of Property*, p. 289.

⁴² See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁴³ *Dolan*, 512 U.S. at 374.

⁴⁴ 512 U.S. at 386-87.

⁴⁵ See Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, p. 608.

⁴⁶ See Thomas W. Merrill, *Property and the Right to Exclude*, 77 *Neb. L. rev.* 730 (1998).

⁴⁷ See Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, pp. 616.

public concern with health and safety and the relatively lower degree of protection to which a solely commercial interest is entitled.

The third and final inquiry is proportionality in the narrow sense of the term: "are the effects of the measure generally proportional to the objective."⁴⁸ This is the inquiry that comes closest to capturing the Court's "rough proportionality" requirement. The problem is that the *Dolan* Court failed to identify what factors were exactly involved in this requirement. To what exactly did the development exaction have to be proportional? Professors David Dana and Thomas Merrill have usefully unpacked three values that might be implicated: (1) the social cost attributable to the development; (2) the fair market value of the property interest the government acquires by the exaction; and (3) the reduction in the social cost resulting from the regulatory restriction.⁴⁹ While the Supreme Court in *Dolan* appeared to say that the two values that should be compared are those listed in items 1 and 3, in at least one other case the Court seemed to compare 1 and 2.⁵⁰ Dana and Merrill argue that on the basis of the theory that the takings clause is aimed at making the government's use of the resource efficient, the relevant comparison should be between 2 and 3.⁵¹ Since the Canadian courts have not made clear exactly what their theory of constitutional protection of property is, we cannot be certain what comparison they would view as the appropriate one. Consequently, it is difficult to know how the third element of the Canadian proportionality principle would be resolved on the facts of *Dolan*. My own sense is that the Canadian courts (like their German counterparts) have not confined the constitutional concern with property solely, or even primarily, to one of economic efficiency or wealth maximization. At least as important to them is the noneconomic interest in maintaining a relationship of mutuality, reciprocity, and respect between individual owners and the communities to which they belong. On that view, proportionality in the narrow sense is not strictly a matter of a cost-benefit calculus to determine whether the market value of what the government obtains equals the reduction of social costs, although that is certainly a relevant aspect of the narrow proportionality requirement. It is a matter of making a normative judgment about whether a degree of parity exists among all three of the factors that Dana and Merrill identify. The issue is not strictly an economic one but a political one as well. Is there a significant imbalance of power between the government and the owner, an imbalance that the more powerful side has exploited? The issue is also relational. Exactions represent adjustments in an ongoing relationship between individual owners and the communities to which they belong. Does the proposed exaction so change the relationship that it is no longer one of reciprocity and mutuality? The third element of the Canadian version of the proportionality test invites this rather more holistic approach to investigating the effect of the regulatory condition on the relationship between owner and community.

Under the circumstances of *Dolan*, there was no evidence that the dedication that the city sought as a quid pro quo for granting the development permit fundamentally altered the nature of their relationship or constituted an abuse of power. The city sought the dedication only in response to Florence Dolan's proposed expansion, a change of her land use that by all accounts

⁴⁸ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, pp. 606-607.

⁴⁹ David A. Dana and Thomas W. Merrill, *Property: Takings* (New York: Foundation Press, 2002), pp. 223-24.

⁵⁰ See *City of Monterey*, 526 U.S. at 702.

⁵¹ Dana and Merrill, *Property: Takings*, p. 224.

would have had a material impact on the community. What the city sought in exchange for permitting her to change her land use certainly was functionally tied to the harmful impacts of her proposed development, and it was not obviously out of scale with those negative effects on the community. There was no abuse of power, no abuse of the individual-community relationship. The exaction would (and should) have been permitted.

Can/Should the Proportionality Doctrine Be Transplanted to American Takings Jurisprudence?

From a strictly doctrinal perspective it would not be difficult for American courts to apply proportionality analysis as a general aspect of takings law. While proportionality as such is not a general principle of American constitutional law, the basic idea behind the proportionality principle- instrumental means lends rationality -- is well-established in many areas of constitutional law, especially free speech⁵² and equal protection.⁵³ The proportionality doctrine that is used elsewhere is little more than a reformulation, a more formally expressed version, of the sort of means lends rationality review that is so familiar elsewhere in American constitutional law. There is nothing uniquely "foreign" about it.

The real questions are whether the proportionality principle should be transplanted to American soil, and if so, in which doctrinal contexts. Several objections and concerns (apart from opposition to the whole notion of comparative borrowing) might be raised to the idea of transplanting the proportionality principle. One is the possibility that, especially in the hands of balancing-loving American judges, proportionality analysis will be reduced to balancing, plain and simple. This possibility cannot be dismissed out of hand, but it is not inevitable. As I have already indicated, there are apparent and important doctrinal differences between proportionality review and balancing, and a court that is open to the idea of borrowing a doctrinal innovation from a non-American jurisdiction is likely to be sensitive to the particular details of the transplanted doctrine. Even the most cursory review of the Canadian cases applying the proportionality principle will reveal the substantial differences between it and pure balancing. The greatest risk is that after the initial borrowing, American courts, especially lower courts, will gradually transform the proportionality doctrine into nothing more than balancing. The risk cannot be ignored. Even if this were to occur, however, the impact on existing takings jurisprudence would be trivial. Balancing is already the dominant methodology in takings cases, and there is nothing in the three-part proportionality test that might exacerbate whatever defects one perceives in the existing version of balancing, the *Penn Central* analysis.⁵⁴

The concern in the opposite direction is that the proportionality principle will import a version of strict scrutiny into takings law.⁵⁵ If balancing translates into "the government always

⁵² See, for example, *Ward v. Rock against Racism*, 491 U.S. 781, 796-802 (1989); *Central Hudson Gas & Elec. Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 565 (1980).

⁵³ See Geoffrey R. Stone et al., *Constitutional Law*, 3d ed. (Boston: Little Brown, 1996), pp. 567-68.

⁵⁴ The Supreme Court recently reaffirmed its use of the *Penn Central* analysis in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

⁵⁵ Hanoch Dagan has raised this concern, arguing that a "strict proportionality rule" "undermin[es] social responsibility." Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 Mich. L. Rev. 134, 136 (2000). As my description of proportionality should indicate, however, the version of proportionality that I discuss is not the "strict proportionality" principle that Dagan rejects.

wins," then "strict scrutiny" in the takings context would equal "the owner always wins." One commentator has gone so far as to suggest that the necessity requirement can "rais[e] the spectre of subjective substantive due process jurisprudence reminiscent of American *Lochnerism*."⁵⁶ As the courts of those countries have applied it, however, the reality is far less dramatic. *Lochnerism* does not reign in other countries any more than it does in the United States.

The real risk is not *Lochner*; but *Dolan*. The possibility is that American courts would apply the *Dolan* version of proportionality across the board, basically reversing the Supreme Court's current approach to most takings cases. While this possibility does exist, there are several reasons to believe that it is not inevitable that proportionality analysis will pave the way for general strict scrutiny in takings cases. First, the *Dolan* doctrine⁵⁷ applies only in one limited and atypical type of takings case: land-use exactions. Subsequent to *Dolan*, the Court in *City of Monterey v. Del Monte Dunes*⁵⁸ explicitly announced that its "rough proportionality" requirement applies only to exactions cases. More recently still, the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*⁵⁹ unambiguously affirmed its commitment to its deferential balancing approach in all takings cases other than exactions challenges and Lucas total deprivation cases.⁶⁰ Even within the context of exactions cases, there is evidence that some state courts are not applying the *Dolan* "rough proportionality" requirement.⁶¹ There seems no reason to believe that the Court is prepared to abandon its longstanding deferential approach in favor of a general strict scrutiny approach.

The version of proportionality analysis proposed here would not upset this apple cart. Proportionality analysis, as the German and Canadian courts have developed it, is not a surrogate for strict scrutiny. As I have already discussed, proportionality analysis, properly formulated, involves three discrete inquiries. Only the last two of these pose any risk of becoming a wedge for strict scrutiny. The second, which asks whether the regulatory limitation impairs the property right as little as possible, conceivably could be translated into a "least restrictive alternative" requirement, but, as I have indicated, that is not as it has been interpreted by Canadian courts. Rather they have used it in a kind of sliding scale fashion that resembles American takings jurisprudence's multifactor balancing approach that was recently reaffirmed in *Tahoe-Sierra*. The third question, whether the effects of the measure are "generally proportional" to the objective, poses the most serious risk of developing into strict scrutiny. Here again, the Canadian experience undermines this concern. As the Canadian courts have applied it, the crux of this

⁵⁶ Van der Walt, *Constitutional Property Clauses*, p. 85.

⁵⁷ On the *Dolan* doctrine, see the discussion earlier in this chapter in the section titled "Would a Proportionality Principle Make Any Difference in Takings Law?"

⁵⁸ 526 U.S. at 702-703.

⁵⁹ 535 U.S. 302 (2002).

⁶⁰ For criticisms of the Court's bifurcated approach, see Mark Fenster, *Taking Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 *Calif. L. Rev.* 609 (2004); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 *Iowa L. Rev.* 1 (2000).

⁶¹ *Lambert v. City & County of San Francisco*, 67 *Cal. Rptr. 2d* 562 (Ct. App. 1997), cert. denied, 529 U.S. 1045 (2000). See Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, *Fordham 6 Envtl. L.J.* 523, 555-56 (1995) (collecting earlier state court cases ignoring *Nollan*, *Dolan*, and *Lucas*). But see *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W. 3d 620 (Tex. 2004).

inquiry appears to be whether there is a significant imbalance of power between the government and the owner, an imbalance that the government, as the more powerful side, has exploited. But that inquiry is already a, if not the, central focus of American takings doctrine. As Saul Levmore has stated, "[T]akings law protects parties that are least secure in the political process."⁶² Takings jurisprudence is all about power imbalance, about perceived imbalances of power between private owners and government regulators.⁶³ Nothing in the third step of proportionality analysis, as currently practiced by other courts, invites a more stringent form of review than American takings law already involves. On balance, then, the risk of proportionality analysis paving the way for strict scrutiny in takings law seems slight.

One possibility for minimizing the risk of proportionality becoming a basis for general strict scrutiny is to limit proportionality review to specific corners of takings law. Two possible candidates are the public-use⁶⁴ and "just compensation" requirements. I will discuss how proportionality might change compensation practices later in this chapter, but for now, a brief discussion of the public-use requirement will illustrate the basic idea of a targeted use of the proportionality principle.

Proportionality can be understood and applied in a way that would implement the approach to the public-use question that I described in chapter 2. Briefly, it could allow the Court to scrutinize the regulatory decision to expropriate the landowner's property in a way that steers a middle course between the Court's currently deferential approach, based on a naively optimistic conception of ordinary democratic politics, and a version of strict scrutiny, based on the equally naive conception of government regulators as wont to engage in "out-and-out plan[s] of extortion"⁶⁵ in dealing with landowners. Following Professor Merrill's model, the court would look at such matters as whether the government could have voluntarily purchased the land, whether there is, from a planning perspective, a suitable substitute site for the proposed project, and whether the exercise of the eminent domain power was primarily the product of secondary rent seeking. If the court finds affirmative answers to these questions, then the exercise of the eminent domain power could be found to be unconstitutional as being disproportionate. Used alone or in conjunction with changes in compensation practices, the proportionality principle might enhance both the fairness and the progressive character of takings law.

A final consideration that warrants some hesitation about transplanting the proportionality principle to American takings law is the difference in local legal culture between the United States and Canada. As Vicki Jackson points out, it is plausible to suppose that the framers of the Canadian Charter of Rights, a document of far more recent vintage than the American Constitution, intended the courts to engage in the kind of overtly normative reasoning that has been their practice under the proportionality principle.⁶⁶ Unlike in Canada, there has been no recent opportunity in the United States for public deliberation about the judicial power to impede the ordinary processes of democratic politics. Concern with the "counter-majoritarian

⁶² Saul Levmore, *Takings, Torts, and Special Interests*, 77 *Va. L. Rev.* 1333, 1334-35 (1991).

⁶³ See Gregory S. Alexander, *Takings, Narratives, and Power*, 88 *Colum. L. Rev.* 1752 (1988).

⁶⁴ I am indebted to Hanoch Dagan for making this point to me.

⁶⁵ *J.E.D. Assocs v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981).

⁶⁶ Jackson, *Ambivalent Resistance and Comparative Constitutionalism*, p. 618.

difficulty" appears to be greater in the United States than in Canada, where the need for the constraining effects (or at least the appearance of such effects) of formal rules, especially in constitutional law, seems considerably weaker than it is in the United States. This cultural difference suggests that the legitimacy of any version of the proportionality test in which the courts openly base their decisions on the sort of nonformal factors that Canadian courts emphasize would be problematic, to put it mildly. For all of the arguments about ad hoc balancing, judicial reasoning in American takings cases is still highly formulaic in an effort to maintain the appearance of objectivity and value-neutrality. A legal culture that is still preoccupied with denying that judges make controversial value choices is one in which a general, Canadian-style proportionality principle may not play well.

These concerns are reasons for caution, but they are not reasons for ignorance. At a minimum, American judges ought to become more familiar with the proportionality principle, a principle that is in widespread use throughout the world. Applied tentatively and modestly in the context of takings law, the principle might ameliorate some of takings law's muddled state. It can hardly make things worse.