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PROTECTING PROPERTY RIGHTS WITH STRICT SCRUTINY: AN ARGUMENT FOR THE "SPECIFICALLY AND UNIQUELY ATTRIBUTABLE" STANDARD

*Daniel William Russo**

> The Fifth Amendment is not about property or about commerce. It is about individuals; it is about fairness; and it is about freedom.[1]

Introduction

Consider a builder who purchases a piece of property in a small city in order to build an apartment complex on the land. After submitting his plan to the local government, the builder is told that the permits to build are conditioned on whether or not he agrees to give a percentage of his land back to the city or pay an "impact fee."[2] The government explains that a study has found that the new complex will exacerbate the problems of overcrowded schools[3] and traffic congestion,[4] and that the conditions are being imposed to offset these implications.

The builder does not believe he should have to give any of his land back or pay any fees, other than those normally imposed. He alleges that the city is conditioning permits to which he is entitled,

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1. Roger Marzulla et al., Debate, *Taking "Taking Rights" Seriously: A Debate On Property Rights Legislation Before The 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 258 (1995).

2. *See* Noreen A. Murphy, Note, *The Viability of Impact Fees After Nollan and Dolan*, 31 NEW ENG. L. REV. 203, 204 (1996) ("An impact fee, a species of the development exaction, is a monetary charge imposed on developers as a condition of project approval.").

3. *See* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) (deciding whether an exaction of land in order to alleviate the problem of overcrowded schools was constitutional).

4. *See* Northern Illinois Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384 (Ill. 1995) (deciding whether the application of transportation impact fees was constitutional).

on whether he pays a price the city determines is fair.[5] This price, however, is not based on any evidence or material fact, and the city gives no guarantee that the price paid will be used to fix the potential problem(s) they are citing.[6] The builder is then faced with a dilemma: pay a fee he did not calculate into his costs and threaten profit; reduce the size of his land by a percentage dictated by the city; or sell his land and attempt to build elsewhere.[7] The builder, however, is not satisfied with any of the options presented by the city, so he decides to sue the municipality, alleging that the condition imposed is an unconstitutional regulatory taking under the Fifth Amendment.[8]

This scenario, while simplified, highlights some of the complicated questions that arise in regulatory takings cases. It presents the question of how a private citizen's property rights should be protected against government action. Some scholars argue that the takings issue is controversial because the United States Supreme Court did not provide any guidance for many years.[9] Because of this silence, state courts developed their own standards to determine when a regulation constituted a taking.[10] The state standards are similar in that each requires some type of relationship between the exaction imposed and the harm posed by the proposed devel-

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5. *See id.*

6. *See* Associated Home Builders of the Greater East Bay v. City of Walnut Creek, 484 P.2d 606 (1971) (holding that a required dedication is constitutional so long as it results in any public benefit).

7. *See* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965). In *Jordan*, the developer was presented with the options described in the accompanying text. *See id.* at 443.

8. *See* U.S. CONST. amend. V. The Fifth Amendment states "[N]or shall private property be taken for public use, without just compensation." *See generally Northern Illinois Home Builders Ass'n*, 649 N.E.2d 384 (Ill. 1995).

9. *See* Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 525 n.57 (1988) (discussing the Supreme Court's lack of guidance on the takings issue and how this affected the development of the issue).

10. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994). The Court states, "Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them." *Id.* at 389. The Court further explains that, despite some variations, state courts employ one of three general standards in determining regulatory takings cases. *See id.* at 389-91. First is the "judicial deference" standard, which is the least restrictive and thus favors municipalities. *See id.* Second is the "rational nexus" test, considered the intermediate standard, favoring neither municipalties nor developers. *See id.* at 390-91. Third is the "specifically and uniquely attributable" test. *See id.* at 389-90. This standard uses the court's strictest scrutiny in determining the validity of the exaction, and is therefore the standard most favorable to the party on which the condition is being imposed. *See id.*

opment.[11] The fundamental difference among the various standards is the degree of nexus the respective state courts require municipalities to demonstrate in order to validate the imposition of the exaction.[12]

In 1994, the Supreme Court decided *Dolan v. City of Tigard*[13] and adopted an intermediate standard of review for takings cases. This Note argues that this intermediate test does not sufficiently protect the property rights of individuals. Instead, this Note proposes that courts reviewing required exactions use a higher standard of scrutiny, particularly the "specifically and uniquely attributable" test adopted by the Illinois Supreme Court.[14]

Part I provides a background of the Fifth Amendment's Takings Clause and outlines three significant United States Supreme Court takings cases: *Pennsylvania Coal Co. v. Mahon*;[15] *Nollan v. California Coastal Commission*;[16] and *Dolan v. City of Tigard*.[17] Part II discusses the three levels of scrutiny that states apply when deciding regulatory takings cases: (1) the "judicial deference" standard; (2) the "rational nexus" standard; and (3) the "specifically and uniquely attributable" test. Part III analyzes the scope and application of *Nollan* and *Dolan*, and argues that the "judicial deference" and "rational nexus" standards are inefficient in deciding regulatory takings cases. This Note concludes that the "specifically and uniquely attributable" test is most effective in deciding such

11. *See* Christopher J. St. Jeanos, *Dolan v. Tigard and the Rough Proportionality Test: Roughly Speaking, Why Isn't a Nexus Enough?*, 63 FORDHAM L. REV. 1883, 1888 (1995) (stating that "[v]irtually every state court, when faced with a challenge related to development exactions, has required some sort of relationship between the exaction and a harm indentified with the proposed development.").

12. *See* 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, 864 (1989). "While every state court has embraced this principle, they have sometimes differed on how close of a nexus the municipality must demonstrate in order to validate the exaction." *Id.*

13. 512 U.S. 374 (1994).

14. *See* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961). In explaining the "specifically and uniquely attributable" standard, the Court states:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.

Id.; accord McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio 1971).

15. 260 U.S. 393 (1922).

16. 483 U.S. 825 (1987).

17. 512 U.S. 374 (1994).

cases because it properly balances the protection of fundamental private property rights with government regulations.

I. The Historic Evolution and Development of the Takings Clause

The political philosopher, John Locke, insisted that the only reason men created government was to protect the property rights of individuals.[18] The protection of property rights, however, has changed since the days of Locke.[19] The development of the Takings Clause is a good example of the evolution of real property law.

A. The Legislative Intent

The Fifth Amendment to the United States Constitution prohibits the government from taking private land from landowners without compensation.[20] In writing the Fifth Amendment, James Madison was concerned with protecting the individual against the government and the majority it represents.[21] By including the protection of property rights, Madison provided citizens with a sphere in which they were independent and secure in exercising other basic civil rights without government interference.[22] The Takings Clause ("Clause") was a solution to a problem Madison felt strongly about: protecting property rights against failures in the political process.[23]

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18. *See* ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN, 3 (Transactions Books eds., 1987).

19. *See* Andrew S. Yagoda, *Dolan v. Tigard: Taking A New Look At An Old Takings Issue*, 7 ST. THOMAS L. REV. 351, 353 (1995), "The law of real property usually develops in an evolutionary fashion. Change is often measured in terms of decades and centuries rather then in months and years." (quoting Grant S. Nelson & Dale A. Whitman, *Congressional Preemption of Mortgage Due-on-Sale Law: An Analysis of the Garn-St. Germain Act*, 35 HASTINGS L.J. 241, 243 (1983)).

20. *See supra* note 8.

21. *See* D. Benjamin Barros, *Defining "Property" In The Just Compensation Clause*, 63 FORDHAM L. REV. 1853, 1856 (1995).

22. *See id.* at 1856 (citing William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment,* 94 YALE L.J. 694, 699 (1985)); *see also* Marzulla, *supra* note 1. "Our system of private property is also essential to all of the other civil rights guaranteed by the Constitution. Property rights provide citizens with the independence and security they need to exercise their rights to free speech, freedom of religion and other basic civil rights." *Id.* at 258.

23. *See* William Michael Treanor, *The Original Understanding Of The Takings Clause And The Political Process*, 95 COLUM. L. REV. 782, 836-37 (1995).

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which

Although Madison's reasons for authoring the Clause are clear, his intent concerning its scope is an issue of debate.[24] This debate has been fueled considerably by the United States Supreme Court's attempts to determine the Clause's scope when deciding takings cases.[25] The controversy surrounding the Clause lies in the interpretation of its language and its application in takings cases.[26] Despite its use in regulatory takings actions since the late 1800s,[27] many questions remain unanswered.[28]

B. Judicial Scrutiny In Supreme Court Takings Cases

In 1922, the Supreme Court decided *Pennsylvania Coal Co. v. Mahon*,[29] a case which arose because the Mahons owned the surface rights to a plot of land above a coal deposit to which the Pennsylvania Coal Company ("Company") owned the subsurface rights.[30] When the Company sought to begin mining, the Mahons sued claiming the mining of the coal violated the Kohler Act.[31] The Company defended against the Mahon's suit by claiming that the Kohler Act deprived it of its property rights without just compensation and therefore constituted a regulatory taking.[32]

The Court agreed with the Company and held that the Kohler Act, as applied to these facts, constituted a regulatory taking in which just compensation was due.[33] This decision invalidated a land use regulation because, as Justice Holmes stated, it went "too

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not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.

Id. at 838 (quoting James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, in 14 THE PAPERS OF JAMES MADISON 266, 267 (Robert A. Rutland et al. eds., 1983)).

24. *See generally id.* (discussing the debate over the intended scope of the Takings Clause and posing the question whether it was Madison's intention to limit the Clause's application to physical takings only, or to protect property rights from government regulations which limit property use.).

25. *See id.* at 782.

26. *See* Morosoff, *supra* note 12, at 832.

27. *See* Treanor, *supra* note 23, at 795-97.

28. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."). *Id.* at 124.

29. 260 U.S. 393 (1922).

30. *See id.* at 412. This right was expressly granted in the deed conveying the surface rights. *See id.*

31. *See id.* at 412-13. The Kohler Act forbade the removal of coal when such mining would cause subsidence of structures such as homes. 1921 Pa. Laws 1198.

32. *See id.* at 395.

33. *See id.* at 415.

far."[34] However, the question of when a regulation went "too far," and therefore constituted a regulatory taking, remained unclear for decades because the Supreme Court failed to enact a bright line test.[35]

Sixty five years after *Pennsylvania Coal*, however, the Supreme Court decided *Nollan v. California Coastal Commission*,[36] and finally addressed the lingering questions surrounding the regulatory takings issue. As required by California law, the Nollans applied for a building permit with the California Coastal Commission ("Commission") to erect a three-story home on their beachfront lot.[37] The Commission granted the permit under the condition that the Nollans grant an easement across a portion of their land for public access between two public beaches.[38] The Nollans challenged this condition on the grounds that it constituted a regulatory taking.[39]

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34. *See id.* Justice Holmes states:

> [W]e see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without just compensation. . . . The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.

Id.

35. *See* Morosoff, *supra* note 12, at 837 (describing the "ad hoc" process the reviewing court must engage in when deciding takings claims); *see also id.* at 842-43 nn.135-37 (explaining that, in several cases after *Pennsylvania Coal*, the Court either rejected the takings claim because it did not deny the landowner all the use of the property or it simply ignored the takings claim and decided the case on other grounds).

36. 483 U.S. 825 (1987).

37. *See id.* at 827. The Nollans owned a beachfront lot with a small bungalow on it. When the bungalow fell into disrepair and was no longer worth fixing, the Nollans decided to destroy it and build a three story beachfront home. The opinion states, "In order to do so, under Cal. Pub. Res. Code Ann. §§ 30106, 30212, and 30600 (West 1986), they were required to obtain a coastal development permit from the California Coastal Commission." *Id.* at 825.

38. *See id.* at 825.

39. *See id.* at 828-30. Upon challenging the imposition of the easement condition, the Nollans were granted an evidentiary hearing in order to determine the validity of the condition. At the conclusion of the hearing, the Commission reaffirmed the easement condition on the basis that the new home would create a "psychological" barrier between the beach and the public, placing a burden on the public's right to use the beach. *See id.* at 828-29. The Commission reasoned that the easement was justified because it somewhat offset this burden. *See id.* The Nollans then filed a writ of administrative mandamus with the California Superior Court and were successful in getting the easement condition struck down. *See id.* at 829. The California Court of Appeals then reversed, holding that the permit condition was valid because it was

Writing for the Court, Justice Scalia stated that in order for a government to legitimately regulate private property, there must be an "essential nexus" between the imposed condition and the harm sought to be prevented.[40] Applying this new standard to the facts of the case, the Court held that no such nexus existed,[41] and that the Commission would have to pay for an easement across the Nollan's property under the Fifth Amendment.[42]

Despite clarifying some aspects of the takings issue, *Nollan* also left some important questions unanswered. First, to what type of government regulation was the "essential nexus" standard supposed to be applied,[43] and was the standard limited to physical dedications of property or could it also be applied to conditions like impact fees? Second, and perhaps most importantly, the Court did not decide the required degree of connection between the condition imposed and the projected impact of the development once the "essential nexus" between the state purpose and the condition was established.[44]

Seven years later, the Supreme Court granted certiorari in *Dolan v. City of Tigard*,[45] to "resolve a question left open by [its] decision in *Nollan v. California Coastal Comm'n* . . . of what is the required

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sufficiently related to the impact of the Nollan's new home. *See id.* at 830. The Court of Appeals stated that even if the home was not the sole reason for the need created and the relationship between the two was only indirect, the condition was still constitutionally valid. *See id.* The Nollans appealed to the Supreme Court, and were granted certiorari. *See id.*

Justice Scalia began the Court's analysis by reciting the general rule that a land use regulation is not a taking if it "substantially advances a legitimate state interest" and does not "den[y] an owner economically viable use of his land(.)" *See id.* at 834 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). Scalia also accepted the Commission's argument that protecting the public's ability to see the beach is a legitimate state interest. Scalia states, "We assume, without deciding, that this is so . . .", referring to the Commission's argument that protecting the view of the beach is a legitimate state interest. *See id.* at 835.

40. *See id.* at 837.

41. *See Nollan*, 483 U.S. at 837. The easement imposed on the Nollans, forcing the Nollans to allow the public to use their land to get from one public beach to another, in no way remedied the problem the Commission was citing, the obstruction of the public's view of the beach.

42. *See id.* at 841-42. Unless the Commission compensated the Nollans, the easement imposed was "an out and out plan of extortion." *Id.*

43. *See* Mark W. Cordes, *Discretionary Limits in Local-Land Use Control, Legal Limits On Development Exactions: Responding to Nollan And Dolan*, 15 N. ILL. U. L. REV. 513, 528 (1995). "Because *Nollan* involved the unusual scenario where there is no connection between an exaction and development impact, the full import of the 'essential nexus' standard was left undeveloped." *Id.* at 527.

44. *See* Murphy, *supra* note 2, at 236.

45. 512 U.S. 374 (1994).

degree of connection between the exactions imposed by the city and the projected impacts of the proposed development."[46] Intending to expand her store, Ms. Dolan submitted a plan to the city in which she proposed to knock down the existing store and build a larger one with additional parking spaces.[47] Based on Tigard's new Community Development Code ("CDC"),[48] the city approved Ms. Dolan's permit application but attached two conditions to the proposal. First, she was to dedicate to the City of Tigard the portion of her property lying in the 100-year floodplain of Fanno Creek.[49] Second, Ms. Dolan was required to dedicate an additional fifteen feet of land next to the floodplain.[50] In total, the dedications required by Tigard constituted approximately 7,000 square feet or ten percent of Ms. Dolan's land.[51]

Ms. Dolan contested the required dedications, asserting that they constituted a taking of private property without just compen-

46. *Id.* at 377 (granting certiorari on Petitioner's challenging of the Oregon Supreme Court which held that the City of Tigard could condition the granting of her building permit on the condition that Ms. Dolan dedicate a portion of her property).

47. *See id.* Petitioner, Florence Dolan, owned a plumbing and electrical supply store in Tigard, Oregon. The 9,700 square feet of store was situated on the east side of a 1.67-acre parcel of land which also included a gravel parking lot. Fanno Creek ran adjacent to the lot flowing through the land on the southwest corner. The first phase of Ms. Dolan's proposal called for 17,600 square feet of store and a paved 39 space parking lot, the second phase called for an additional building and more parking spaces. *See id.* at 379.

48. *See id.* at 378-80. Prior to Dolan's permit application, the state of Oregon required all the cities and counties of Oregon to pass a land use plan consistent with the state's planning goals. *See id.* Tigard's Community Development Code required all landowners in the area zoned "Central Business District" to comply with a 15% open space and landscaping requirement. *See id.*

49. *See id.* at 380-81. Tigard sought this land in order to improve the drainage system along the creek. *See id.* A portion of Tigard's Community Development Code addressed flooding problems with Fanno Creek. The plan established that an increase in impervious surfaces (i.e., paved parking lots) would increase the flooding problems. It also suggested a number of ways to decrease the flooding including channel excavation next to Dolan's property and keeping the floodplain free of structures. *See id.* at 379-80. The plan concluded that the costs of remedying the flooding problem would be shared with property owners. Owners along the creek would pay more because of the direct benefit they would receive from the improvements. *See id.*

50. *See id.* at 380-81. This portion of land was to be used as a pedestrian/bicycle pathway because a transportation study identified automobile congestion in the Central Business District as a problem. *See id.* at 380-83. This pathway was intended to give people an alternative to using their automobiles on short trips within the district. *See id.* at 381-83. The Community Development Code required developers supply the land for the pathway by dedicating land when beginning new developments. *See id.* at 379-80.

51. *See Dolan*, 512 U.S. 380-81.

sation.[52] The Court held that when the required "essential nexus"[53] is found between the imposed condition and the state's legitimate purpose, the state must then prove the existence of a "rough proportionality" between the projected effects of the development and the dedication required.[54] Applying the two-prong

52. *See id.* at 381-83. Ms. Dolan took her claim to the Oregon Land Use Board of Appeals (LUBA) asserting that Tigard's dedication conditions were not related to the proposed development and therefore constituted a taking. *See id.* After evaluating Ms. Dolan's claim, LUBA found a "reasonable relationship" between both conditions imposed and the proposed development. Concerning the requirement to dedicate land for the improved drainage system, LUBA found a "reasonable relationship" because the new building and parking lot would increase impervious surfaces, therefore increasing the runoff into Fanno Creek. *See id.* Concerning the dedication for a pathway, LUBA also found a "reasonable relationship" based on the conclusion that the larger store would require more employees and attract more customers, therefore increasing automobile congestion on the roads and in parking lots. *See id.*

The Oregon Court of Appeals and the Oregon Supreme Court, both affirmed LUBA's ruling. *See* Dolan v. City of Tigard, 832 P.2d 853 (Or. Ct. App. 1992) (rejecting Dolan's argument that the United States Supreme Court had adopted a stricter standard then the "reasonable relationship" test, by adopting the "essential nexus" test in *Nollan*), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994). After exhausting the state appellate remedies, Ms. Dolan appealed to the United States Supreme Court.

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

54. *See Dolan*, 512 U.S. at 391. The opinion, written by Chief Justice Rehnquist, states, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391-92.

Upon adding the "rough proportionality" standard as the second prong in determining regulatory takings cases, the Court analyzed three different state standards in order to determine the level of scrutiny required in the test. *See id.* at 388-91 (discussing three separate state standards and the level of scrutiny required in each one). The Court states, "Since state courts have been dealing with this question a good deal longer then we have, we turn to representative decisions made by them." *Id.* at 389.

The standard requiring the lowest level of scrutiny is the "judicial deference" standard. *See, e.g.*, Associated Home Builders of the Greater East Bay v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971) (holding that required exactions are justified on the basis of general public need); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966). *See infra* Part II.A. The *Dolan* Court felt this standard was too lax and did not adequately protect the property owner's rights. *See Dolan*, 512 U.S. at 391.

The standard requiring the highest level of scrutiny was the "specifically and uniquely attributable" test. *See, e.g.*, McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio Ct. App. 1971) (holding that the required exaction is permissable only if it is specifically and uniquely attributable to the developer's activity); Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970). *See infra* Part II.B. The Court felt this standard was too exact a standard for municipalities to meet. *See Dolan*, 512 U.S. at 391.

The majority determined that the intermediate standard, the "rational relationship" standard, was the required level of scrutiny under the Fifth Amendment. *See id.* The opinion states, "We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previ-

test to the facts in *Dolan*, the Court held that an "essential nexus" did exist between the conditions imposed and a legitimate state interest.[55] The Court, however, found that the city failed to meet the "rough proportionality" standard, and thus the regulation amounted to a taking.[56]

II. The State Standards of Review in Regulatory Takings Cases

The Supreme Court, in *Dolan*, analyzed three different state standards before selecting the intermediate level of scrutiny used in deciding the case.[57] The standards are similar in that all require some degree of relationship between the exaction imposed and the projected harm of the development.[58] They differ, however, in the level of scrutiny a court is required to use when analyzing a municipality's exaction or dedication.[59] In light of the Court's precedent in *Dolan*, it is important to understand the origins of the various state standards.

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ously discussed." *Id.* However, in order to prevent confusion with the term "rational basis" used to describe the level of scrutiny under the Equal Protection Clause, the Court renamed the standard "rough proportionality." *See id.*

55. *See id.* at 383-84.

56. *See id.* at 391-97. As to the dedication of land along Fanno Creek, the majority found that this dedication was based on "rather tentative findings" that Dolan's development would increase storm water flow thereby increasing the city's need to manage the land for drainage purposes. *See id.* at 384. The majority also relied on the fact that Ms. Dolan's loss of her right to exclude was disproportionate to the City's possible benefit of controlling floods. *See id.* at 391. Chief Justice Rehnquist states, "As we have noted, this right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). The dedication imposed for the land to be used as a pedestrian/bicycle pathway also failed the "rough proportionality" standard. *See id.* at 392-97. According to the Court, this dedication was not justified by the city's finding that the pathway "could" offset some of the projected increase in traffic congestion. *Id.* at 397. ("[t]he findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand.") (quoting Dolan v. City of Tigard, 854 P.2d 437, 447 (Or. 1993), *cert. granted*, 510 U.S. 989 (1993), *rev'd* 512 U.S. 374 (1994)).

57. *See id.* at 384-91 (analyzing the state standards of review); *see also supra* note 54.

58. *See* John J. Delaney et al., *Exactions: A Controversial New Source for Municipal Funds: The Needs-Nexus Analysis: A Unified Test For Validating Subdivision Exactions, User Impact Fees And Linkage*, 50-WTR LAW & CONTEMP. PROBS. 139, 147-56 (1987) (analyzing the various state standards in exaction cases).

59. *See* St. Jeanos, *supra* note 11, at 1888.

A. The "Judicial Deference" Standard

The "judicial deference" standard requires the lowest level of judicial scrutiny.[60] It requires only a general showing that the condition imposed may offset the potential harm of the development.[61] This standard requires the reviewing court to automatically accept the legislative determination that a nexus exists.[62] Therefore, the exaction plan is automatically approved unless the developer can show that the municipality's reasons for it are meritless.[63] This is an extraordinarily heavy burden for the developer to meet.[64]

In *Billings Properties, Inc. v. Yellowstone County*,[65] the Montana Supreme Court applied the "judicial deference" standard in a case where a developer's plan to subdivide a parcel of land was rejected because it did not provide for the dedication of land to Yellowstone for parks and playgrounds.[66] In reviewing the developer's claim, the *Billings* Court held that a municipality's determination that a proposed development may create a need for public land is sufficient to render the exactions imposed constitutional.[67] This holding suggests that the determination of a nexus between the condition and the projected harm is left solely to the municipality

60. *See* Morosoff, *supra* note 12, at 865.

61. *See, e.g.*, Associated Home Builders of the Greater East Bay v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971) (holding general public need justifies the required exaction); Billings Properties Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966).

62. *See Billings*, 394 P.2d at 185; *see also infra* note 64.

63. *See* Morosoff, *supra* note 12, at 865. "Under this judicial-deference standard, exactions [sic] schemes are automatically approved whenever a local government merely states that it found a connection between the exaction and some development-created need. The burden is in effect placed upon the developer to show that the scheme lacks the requisite nexus." *Id.*

64. *See* St. Jeanos, *supra* note 11, at 1889.

65. *See Billings*, 394 P.2d at 182; *see also Jenad*, 218 N.E.2d at 674 (deciding whether it was constitutional to allow the Village Planning Board to require a developer to allot land or pay an impact fee as a condition precedent to the approval of the proposed development). The *Jenad* Court held that the dedication of land or the payment of an impact fee is constitutional if the evidence reasonably establishes that the development creates the needs for such parks and playgrounds. 218 N.E.2d at 676 (citing *Billings*, 394 P.2d 182 (Mont. 1964)).

66. *See id.* at 184. The petitioner presented to the Planning Board of Yellowstone County a plan to subdivide a parcel of land and requested the plan's approval. The Planning Board denied petitioner's proposal because it did not include a dedication as required by state law. *See id.* The developer sued claiming that the required dedication of land was a taking because it did not provide the developer with just compensation. *See id.*

67. *See id.* at 185. The opinion states, "An act of the legislature is presumed to be valid . . . [and] every intendment is in favor of upholding its constitutionality." (citing Gas Products Co. v. Rankin, 207 P. 993, 999 (Mont. 1922)).

imposing the condition.[68] Because the developer did not prove that his subdivision would not create a need for a park, the Court held that the exactions did not constitute a regulatory taking.[69]

B. The "Rational Nexus" Standard

Courts using the "rational nexus" standard do not simply assume the validity of the municipality's determination that an exaction is necessary.[70] Instead, the reviewing court will require the municipality to demonstrate that the exaction bears some "rational nexus" to the negative impact of the proposed development.[71]

In *Jordan v. Village of Menomonee Falls*,[72] the Wisconsin Supreme Court applied the "rational nexus" standard in a case where the Village passed an ordinance requiring a subdivider to dedicate a portion of his land or pay an impact fee in lieu of the dedication.[73] In reviewing the ordinance, the *Jordan* Court held that for an exaction requirement to be constitutional, the municipality must provide evidence which reasonably establishes that approving the subdivision would require the municipality to provide more land for schools, parks, and playgrounds.[74] Based on the evidence presented, the Court upheld the Village ordinance.[75]

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68. *See id.* at 188 ("The question of whether or not the subdivision created the need for a park or the parks is one that has already been answered by our Legislature.").

69. *Id.* at 188.

> In the instant case no evidence has been introduced to rebut such presumption and mindful of the duty of this court to uphold enactments of the Legislature if there is any rational basis on which they can be upheld, it is found that the statute is not an unreasonable exercise of the police power.

Id.

70. *See* St. Jeanos, *supra* note 11, at 1891 ("Courts will not defer to unfounded assertions offered by a municipality to demonstrate why the exactions is necessary to offset the harm.").

71. *See, e.g.*, Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983) (holding that "the local government must demonstrate a reasonable connection, or rational nexus" between the municipalities need and the potential impact).

72. 137 N.W.2d 442 (Wis. 1965).

73. *See id.* at 443. The municipality reasoned that such dedications were required in order to provide for schools, parks and recreational needs. *See id.* at 443-44. The subdividers, with full knowledge of the ordinance, proceeded with the project after paying a $5,000 impact fee. *See id.* at 444. They then brought suit to have the money returned claiming the fee was an unconstitutional taking without just compensation. *See id.* at 445.

74. *See id.* at 448. "The test of reasonableness is always applicable to any attempt to exercise the police power." *Id.*

75. *See id.* at 448-49. The Court found that the Village's evidence showing a significant growth in population and in local school enrollment, as well as expert testimony

The "rational nexus" test thus requires a stricter level of scrutiny than the "judicial deference" standard.[76] Courts use this standard because it does not unduly inhibit the ability of government to regulate land use or give undue deference to legislative determinations.[77] This test attempts to balance the needs of the community with the property rights of the developer.[78] After its use in *Jordan*, many state courts adopted it when deciding regulatory takings cases.[79]

C. The "Specifically and Uniquely Attributable" Standard

In contrast to the "judicial deference" and "rational nexus" standards, the "specifically and uniquely attributable" test applies strict scrutiny when evaluating land use regulations.[80] This test requires that the imposed exaction be in direct proportion to a specifically created need and thereby limits required exactions to those specifically and uniquely attributable to the impact of the development.[81]

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regarding a healthy environment for human habitation, was enough to establish the rational nexus between the development and the exaction. *See id.* The expert testified that a minimum of 3,000 square feet should be dedicated for parks and schools for each family in the area, in order to create a "good environment for human habitation". *See id.*

76. *See* Morosoff, *supra* note 12, at 868. "Straddling the fence between the judicial-deference and the 'specifically and uniquely attributable' tests is a position known as the rational-nexus test." *Id.*

77. *See* Delaney, *supra* note 58, at 154. "[T]he more moderate rational nexus test . . . 'allows the local authorities to implement future oriented comprehensive planning without according undue deference to legislative judgments.'" *Id.* (quoting Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. Dist. Ct. App. 1976)).

78. *See id.*

79. *See, e.g., Wald Corp.*, 338 So. 2d at 868 (stating that the rational nexus approach provides a more feasible basis for analyzing dedication requirements and thereby explicitly adopting the rational nexus approach used in *Jordan*); Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980) (holding that the exaction requirement placed on the developer must have a reasonable relationship or nexus to the use of the property, if no such nexus exists the requirement is invalid); Call v. City of West Jordan, 614 P.2d 1257, 1258 (Utah 1980) (citing *Jordan* while applying the rational nexus test).

80. *See* St. Jeanos, *supra* note 11, at 1890.

81. *See id.* "Several state courts require a precise correlation between the requested exaction and the harms that would result from development. In jurisdictions following this standard, the exaction must be found necessary to alleviate a harm that will be caused specifically by the proposed development and is not attributable to development in general." *Id.*

The Illinois Supreme Court has championed this standard,[82] and other state courts have adopted it.[83]

82. The phrase "specifically and uniquely attributable" was first used in 1960 by the Illinois Supreme Court in *Rosen v. Village of Downers Grove,* 167 N.E.2d 230 (Ill. 1960). The Court, in *Rosen*, held that a required dedication of land or the payment of a fee, as a condition to development approval, must be specifically and uniquely attributable to the developer's activities. *See id.* at 233. Furthermore, the planning board's authority to regulate does not give them the power to require conditions in order to solve all of the municipality's problems. *See id.* at 233-34. One year later, the Illinois Supreme Court again applied this standard to another development exaction imposed under the same state-enabling legislation relied upon in *Rosen.*

In *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961), the plaintiff was a subdivider who submitted a plan to the Mount Prospect Planning Commission for approval. *See id.* at 800-01 (the proposal included the subdivision of a parcel of land and the building of 250 residential units). The plaintiff's proposal met all of the Planning Commission's requirements under the ordinance except for a required dedication of a percentage of the land being developed. *See id.* Under the statute, the plaintiff would have been required to dedicate 6.7 acres of land to the village. The 6.7 acres of land required was going to be used as the location for a new elementary school and playground. *See id.* Upon the plaintiff's refusal to dedicate the land, the Commission refused to approve the subdivision proposal. *See id.* The plaintiff brought suit claiming that the section of the ordinance requiring the land dedication amounted to a taking without just compensation.

In deciding this case, the Illinois Supreme Court noted that a municipality under development must consider present and future needs for schools and recreational facilities. *See id.* at 802. The Court states:

> Neither the plaintiffs nor the defendants in this case take the negative side of the question as to the desirability either of education or recreation. The question is not one of the desirability of education or recreation, nor of the desirability to improve the public condition, but, rather, the question presented here is one of determining who shall pay for such improvements.

Id.

The Court found, however, that the record did not establish that Mount Prospect's need for such facilities was specifically and uniquely attributable to the plaintiff's development. *See id.* at 802. The problem of overcrowded schools in Mount Prospect was due to the development of the entire Mount Prospect community. *See id.*

> The agreed statement of facts shows that the present school facilities of Mount Prospect are near capacity. This is a result of the total development of the community. If this whole community had not developed to such an extent or if the existing school facilities were greater, the purported need supposedly would not be present.

Id.

The plaintiff's proposal of an additional 250 homes did not create the problem, it only added to a pre-existing municipal concern. The Court states, "Therefore, on the record in this case the school problem which allegedly exists here is one which the subdivider should not be obliged to pay the total cost of remedying, and to so construe the statute would amount to an exercise of the power of eminent domain without compensation." *Id.*

83. *See* McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio 1971). The Court of Appeals of Ohio applied the standard when evaluating a land dedication requirement for an off-site road improvement. The Planning Commission sought a strip of land in order to repair a road that was 700 feet from the development sight and "totally unrelated to the proposed subdivision." *See id.* at 374. The plaintiff

Most recently, the Illinois Supreme Court reaffirmed the use of the "specifically and uniquely attributable" test in its first regulatory takings case since the United States Supreme Court's decision in *Dolan*.[84] In *Northern Illinois Home Builders Ass'n Inc. v. The County of Du Page*,[85] the Illinois Supreme Court applied this standard when analyzing two state-enabling statutes permitting counties to impose transportation impact fees on new developments.[86]

In deciding the case, the *Northern Illinois* Court used the first prong of the *Dolan* test and established that an essential nexus existed between preventing further traffic congestion and improving roads.[87] When it applied the second prong of the analysis, however, the Court used a higher level of scrutiny in determining whether the exaction imposed was related enough to the potential impact of the new development. Instead of using *Dolan's* "rough proportionality" standard, the Illinois Supreme Court used the "specifically and uniquely attributable" test[88] and held that Du

owned a single parcel of land, 3.71 acres in size. *See id.* at 372. The city demanded a 30-foot strip along one side of the parcel in order to widen an existing roadway. *See id.* at 373.

In deciding the takings issue in the case, the Court agreed that a municipality may require a developer to dedicate land if the proposed development creates such a need. *See id.* at 374. These needs however, must be specifically and uniquely attributable to the developer's activities. *See id.* If this is not the case, the regulation is in "contravention of constitutional prohibitions" and is therefore forbidden. *See id.* The Court found that the need to repair a road 700 feet from the proposed development sight, and completely unrelated to the subdivision, did not satisfy the "specifically and uniquely attributable" standard. *See id.*; *see also* Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970) (holding that a city ordinance requiring a fixed percentage of the developer's land will inevitably lead to inequities, and may not always meet the "specifically and uniquely attributable" test).

84. Dolan v. City of Tigard, 512 U.S. 374 (1994).

85. 649 N.E.2d 384 (Ill. 1995).

86. *See id.* at 387. Although the state legislature had replaced the first enabling statute with the second, DuPage had enacted local ordinances under both and therefore both statutes required review. *See id.* Under the first enabling act, DuPage County passed an ordinance which called for the collection of impact fees in order "[T]o ensure that the new development pays a fair share of the costs of transportation improvements needed to serve new development." *See id.* at 388.

A year and a half later, the state legislature repealed the first enabling act and passed the Road Improvement Impact Fee Law. (605 ILCS 5/5-901 et seq. (West 1992)) *See id.* This second enabling act included the language, "[a]n impact fee payable by a developer shall not exceed a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee." *Id.* DuPage County subsequently amended its impact fee ordinances to reflect a number of changes. The new ordinances reflected changes in the previous ordinance's impact fee schedules as well as in changes in fuel and property taxes. *See id.*

87. *See id.* at 389.

88. *See id.* The opinion states:

Page would impose impact fees only for road improvements made necessary by the new development.[89] Moreover, the new development paying the fee must receive a "direct and material benefit" from the improvements the fee had financed.[90]

III. Where Do We Go from Here: A Resolution to the Question of Judicial Scrutiny in Takings Law

While the Supreme Court has refined its approach to the takings issue, state and lower courts continue to grapple with the question of how and when to apply the *Nollan/Dolan* standard.[91] It is time courts adopt a unified interpretation.

A. Interpreting the Scope and Application of *Nollan* and *Dolan*

The United States Supreme Court's decision in *Nollan*,[92] establishing the "essential nexus" requirement,[93] has had several effects on the regulatory takings issue. First, the Supreme Court made it clear that municipalities would no longer be permitted to trade development rights for exactions that were unrelated to the projected impact of the development, and thus courts would be forced to look closely at the proffered reasons for the condition imposed.[94]

> The appellate court correctly found, and the parties agree, that Pioneer Trust sets forth the standard applicable in this case. Thus, "in order for the impact fee to pass constitutional muster the need for road improvement impact fees must be 'specifically and uniquely attributable' to the new development paying the fee."

Id. (quoting Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)). In completing its analysis of this issue, the Court found that only the second of the two enabling acts met the strict requirements of the "specifically and uniquely attributable" standard. *See id.* at 389. The majority reasoned that because this enabling act contained the phrase "specifically and uniquely attributable" it expressly mandated the required degree of connection between the exaction and the development. *See id.* The Court also relied on the fact that the second enabling act provided a clear definition of what "specifically and uniquely attributable" means. *See id.* The act states in its definitional section:

> Specifically and uniquely attributable means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement. Each new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with impact fees paid.

Id. at 389-90 (quoting the definitional section of 605 ILCS 5/5-903 (West 1992)).

89. *See id.* at 390.
90. *See id.*
91. *See supra* notes 43-44 and accompanying text.
92. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
93. *See supra* note 40 and accompanying text.
94. *See Nollan*, 483 U.S. at 837.

Nollan also was an indication that the Court was preparing to reinvestigate the role of the Takings Clause in protecting private property rights and limiting land use regulations.[95]

In *Dolan*,[96] the Supreme Court added the "rough proportionality" prong, and thus determined the required degree of connection between the exactions imposed and the projected impacts of the proposed development.[97] The Court did not, however, clarify the scope of *Dolan's* application.[98] It remains unclear whether the "rough proportionality" standard should be applied only to regulations that require a physical dedication of land, or if its scope is broader.

The *Dolan* standard clearly applies to exactions that require physical dedications of property because the Court's decision specifically relies on the fact that Tigard's restriction required a dedication of Dolan's property.[99] In *Dolan*, the Court also noted its traditional concern for government actions that focus on individual citizens as opposed to society as a whole.[100] Moreover, most conditions requiring physical dedications involve particular parcels of land and individual landowners, and thus are almost always subject to the *Dolan* test.

It is unclear, however, whether *Dolan* applies to the imposition of impact fees. The day after the *Dolan* decision was announced, the Supreme Court remanded a California Supreme Court case for reconsideration in light of its decision in *Dolan*.[101] The California case, *Ehrlich v. City of Culver*,[102] did not involve a physical dedication of land, but rather a landowner who was required to pay a $280,000 impact fee in order to get his project approved.[103] The Supreme Court's instruction to review the case under *Dolan* strongly suggests that it intended the *Dolan* standard to apply to impact fees as well as physical dedications when such conditions were imposed on an individual basis.[104]

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95. *See* DAVID A. SCHULTZ, PROPERTY, POWER, AND AMERICAN DEMOCRACY 128 (Transactions Books eds., 1992).

96. Dolan v. City of Tigard, 512 U.S. 374 (1994).

97. *See supra* note 54 and accompanying text.

98. *See* Cordes, *supra* note 43, at 538.

99. *See Dolan*, 512 U.S. at 385-86; *see supra* note 56 and accompanying text.

100. *See Dolan* 512 U.S. at 385-86.

101. *See* Murphy, *supra* note 2, at 246.

102. 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993).

103. *See id.* at 471.

104. *See* Murphy, *supra* note 2, at 248. ("By vacating this decision one day after deciding Dolan, with instructions to the lower court to reconsider their holding specifically in light of Dolan, the Supreme Court impliedly suggested that impact fees

The *Nollan/Dolan* standard should be applied to impact fees because the Supreme Court, in both opinions, continually used the phrase "permit condition" as opposed to "land exaction" or "physical dedication."[105] In both cases, however, the condition imposed by the municipality required a physical dedication of land.[106] If the Court's intent was to limit the standards to only physical exactions, it consistently would have referred to these types of conditions. Instead, the Court referred to the municipality's requirements as "permit conditions,"[107] and therefore revealed its intent to apply the *Dolan* standard to impact fees as well.

Moreover, *Nollan* and *Dolan* should apply to impact fees because the Supreme Court, in both opinions, demonstrated its commitment to strengthen the proection of the Fifth Amendment's Taking Clause and reassert the importance of protecting individual property rights under the Clause.[108] A narrow reading of these cases would unnecessarily weaken the Court's clear intent.[109]

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should be judicially evaluated by the same standards.") (footnote omitted); *see also* R.S. Radford, *Rent Control and Regulatory Takings, in Inverse Condemnation and Related Government Liability* 473 (A.L.I.-A.B.A. Course of Study No. C997, 1995) ("By vacating and remanding for reconsideration under the Dolan analysis, the Supreme Court eliminated any doubt that it intends the heightened standards of Nollan and Dolan to apply to regulations not involving a physical interference with land.").

105. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987). "The Commission argues that a *permit condition* that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Id.* (emphasis added). "We therefore find that the Commission's imposition of the *permit condition* cannot be treated as an exercise of its land-use power for any of these purposes." *Id.* at 839 (emphasis added). *See Dolan*, 512 U.S. at 386. "In evaluating petitioner's claim, we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the *permit condition* exacted by the city." *Id.* (emphasis added). "The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's *permit conditions* bears the required relationship to the projected impact of petitioner's proposed development." *Id.* at 388 (emphasis added).

106. *See supra* notes 38, 49, 50 and accompanying text.

107. *See supra* note 105 and accompanying text.

108. *See Nollan*, 483 U.S. at 841 ("We view the Fifth Amendment's Property Clause to be more than a pleading requirement."); *Dolan*, 512 U.S. at 392 ("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."); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding land use regulation which deprives owner of all economic value of land constitutes a taking); First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) (holding that government must pay compensation for temporary regulatory taking).

109. *See* Murphy, *supra* note 2, at 252 (footnote omitted).

Whether *Dolan* applies to land use regulations based on broad legislative decisions is also a matter of debate. Language in the opinion suggests that the *Dolan* standard does not apply to such broad legislative acts.[110] For example, zoning ordinances which restrict land use in a specific section of a city are not subject to the *Dolan* standard because the burden of the state interest being advanced is placed on the community as a whole.[111] *Dolan's* two-prong test should apply only when the cost of a benefit to society is being disproportionately placed on an individual landowner, not to broad legislative acts.

B. The Protection of Property Rights

Conditioning an individual's permit approval on the dedication of land or the payment of a fee is a different exercise of power than the government's power to pass regulations that effect society as a whole. In *Dolan* the Supreme Court attempted to ensure that the exercise of this power does not result in an unfair burden placed on an individual.[112] In deciding *Dolan*, however, the Supreme Court adopted only an intermediate level of scrutiny,[113] and thus failed to resolve the confusion and potential for government abuse surrounding the regulatory takings issue. Therefore, the Supreme Court should adopt one bright line, strict scrutiny test, in order to protect the private property rights of individuals singled out by the government for regulatory takings.

1. The Ineffectiveness of the "Judicial Deference" Standard

The inherent shortcomings of the "judicial deference" standard are clear because the municipality imposing the exaction is the branch of government that determines the nexus between the exaction and the projected harm. Therefore, under this standard, the exactions imposed are constitutional if the municipality says they are.[114] Allowing the municipality to make these determinations

110. *See Dolan*, 512 U.S. at 384. In the opinion, the Court acknowledges the importance and necessity of allowing state and local governments to engage in land use planning and points out the traditional power of governments to do so. *See id.*; *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

111. *See* Cordes, *supra* note 43, at 538.

112. *See infra* note 125.

113. *See Dolan*, 512 U.S. at 390.

114. *See Jenad*, 218 N.E.2d at 677. The dissent states, "The principle of decision in this case would constitutionally allow municipal officers to prohibit real estate development in cities, towns and villages unless the newcomers pay whatever sums of

without a high level of judicial scrutiny creates the potential for abuse of a municipality's police power. In jurisdictions using the "judicial deference" standard, conditions imposed by municipalities are almost always constitutional.[115]

2. *The "Rational Nexus" Standard: Not Strict Enough*

Despite its popularity in state courts, the "rational nexus" standard is simply not strict enough when used to analyze required exactions, because a "reasonableness" standard does not require a direct correlation between the alleged public need and the proposed development.[116] Instead, it allows a municipality to present evidence to show that any one of a number of municipal concerns exist and that the required exaction will help alleviate one of those concerns.[117]

For instance, concern for a growing population or overcrowded schools is likely a concern for a municipality at all times. Why should the developer pay to alleviate a pre-existing problem that the local government has been concerned with all along? Courts should force municipalities to prove that a new development specifically exacerbates a pre-existing problem, and hold the developer liable only for the cost of the aggravation and not the entire problem.

If the developer dedicates land or pays a fee, then the people who live in the immediate area or who will live in that development should benefit from the exaction. The "rational nexus" standard does not guarantee that the specific harm cited will be alleviated by the exaction because the standard does not require a direct correlation between the harm cited and the exaction imposed. Thus, it is time for the judiciary to challenge the abuse of development exactions in local government by increasing the level of scrutiny applied in deciding land use cases.[118]

C. The "Specifically and Uniquely Attributable" Standard: A Call for Strict Scrutiny

The use of the "specifically and uniquely attributable" standard by the Illinois Supreme Court has been controversial since the

money the local public authorities may decide arbitrarily to impose upon them . . . without relation to special benefits or assessed valuation." *Id.*

115. *See supra* note 62 and accompanying text.

116. *See* Morosoff, *supra* note 12, at 869.

117. *See supra* note 74 and accompanying text.

118. *See* Murphy, *supra* note 2, at 254.

United States Supreme Court decided *Dolan*.[119] The reaffirmance of this test is important not only to the builders in Illinois, but also to private property owners nationwide. It exemplifies a judicial movement to restore private property rights and level the playing field on which developers and local governments interact.

1. Curbing Government Abuse of Power

In drafting the Fifth Amendment, one of Madison's intentions in protecting private property was to ensure citizens a more extensive domain of liberty.[120] Thus, property is not only a right, but also performs the function of maintaining independence so that other individual rights may be protected from the majority.[121] When property rights are threatened, the danger of losing other civil rights exists because the sphere of protection that private property provides is weakened.[122] In a constitutional democracy, such as in the United States, the right to property defines the areas in which the majority must yield to the minority.[123] Therefore, such rights need to be protected with nothing less than the judiciary's strictest level of scrutiny.

Advocates of heightened scrutiny argue that only rigorous judicial review will protect against the overreaching and abuse of government power.[124] Allowing municipalities to package the issuance of permits with the conditions of exactions is an example of such an abuse. When this bundling of permits and exactions is allowed to

119. *See generally J. Linn Allen, Too high a price? Builders across U.S. contest impact fees,* CHI. TRIB., June 14, 1992, at 1. Local government officials argue that this standard is simply to tough for them to meet and to easy for the developer's to overcome when an exaction is imposed. *See id.* According to these officials, tax caps make it extremely hard to finance the building of schools, parks, and roads in order to accommodate community growth and impact fees and required land dedications are the only way these municipalities can do so. They had hoped the Illinois Supreme Court would abandon this standard for the two prong test used in Dolan. *See id.* Builders and developers however, are obviously pleased with the reaffirming of this standard. According to them, impact fees and land dedications make building unaffordable and significantly raise the prices of affordable homes. It is this test, the developers claim, that levels an unbalanced playing field. *See id.*

120. *See* Barros, *supra* note 21, at 1858; *see also supra* note 22 and accompanying text.

121. *See* Barros, *supra* note 21.

122. *See id.* at 1857-58.

123. *See id.*

124. *See* St. Jeanos, *supra* note 11, at 1903 (citing the Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 11-12, *Dolan* (No. 93-518)).

occur, developers are often forced to bear the burdens that the Takings Clause was designed to eliminate.[125]

As *Northern Illinois Home Builders Ass'n Inc. v. County of DuPage*[126] exemplifies, the "specifically and uniquely attributable" standard decreases the likelihood of such an injustice because it requires that the new development specifically create the need for which the exaction is imposed,[127] and assures that the development receive a material benefit from the improvement that the fee finances.[128] Local governments and municipalities, however, retain the power to consider and regulate community growth under this test. As long as the cost placed on the developer is specifically and uniquely attributable to his/her activities, there is no violation of the developer's property rights.

According to Professor Richard Epstein, "[e]rrors of overinclusion occur when the regulation sweeps wider than necessary to control the identified evil . . . ."[129] In effect, these overinclusive errors lead to individual land owners being forced to bear the costs of society because the municipality is requiring more from the individual than is needed to offset the individual's activities. The *Nollan/Dolan* standard does not prevent such an injustice because it does not guarantee that the development dedicating the land or paying the fee is, in fact, the development that will receive the material benefit from the required dedication. The "specifically and uniquely attributable" standard, however, will strike down any regulation that requires more of an exaction than is needed to offset the externalities of the proposed development.[130]

In guarding against the overreaching abuse of a local government's police power,[131] the "specifically and uniquely attributable" standard also examines the municipality's incentive for using this

125. The United States Supreme Court has stated, "(o)ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

126. 649 N.E.2d 384 (Ill. 1995).

127. *See id.* at 389; *see also supra* note 88 and accompanying text.

128. *See id.* at 389-90; *see also supra* note 88 and accompanying text.

129. RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 127-28 (1985).

130. *See Northern Illinois Home Builders Ass'n*, 649 N.E.2d at 390-91; *see also supra* note 88 and accompanying text.

131. *See generally* Midtown Properties, Inc. v. Township of Madison, 172 A.2d 40, 47 (N.J. Super. Ct. App. Div. 1961) ("The municipality, regardless of its good intentions, may not coerce an owner to do something except through channels prescribed by law.").

power. If a municipality's power to issue development permits conditioned on exactions goes unchecked, the municipality has an enormous incentive to solve all types of problems unrelated to the development.[132] By requiring that the development be the specific cause of the impact for which the exaction is imposed, the local government no longer has such an incentive because local officials would know that their actions would be analyzed under rigorous judicial scrutiny. Therefore, under this standard, there is little room for the government to abuse its power by unfairly taking land and imposing impact fees.

2. *Balancing the Unstable Political Process*

Heightened scrutiny also is necessary because the political process is directly connected to the problems surrounding the takings issue.[133] Often, local politics create factions that discriminate against outside developers or individuals who do not have voting rights or political clout within the community.[134] Upon entering the community with a development proposal, these individuals must face local land use regulations without the aid of the political process.[135]

In addition, most land use regulations are not self-executing.[136] Instead, a broad regulation is applied and enforced by local planning boards that are influenced by the municipality's officials and insiders.[137] According to Professor Epstein, "[a]n enormous slippage thus occurs between the articulation of a general principle and its concrete application."[138] Therefore, what tends to happen is that the actual application of the regulation becomes skewed by the influence of local officials and protesters seeking to avoid the development completely or to avoid the payment of just compensation.

The "specifically and uniquely attributable" standard's strict scrutiny is necessary to balance the unstable political process that administers land use regulations.[139] By applying this test to re-

132. *See* St. Jeanos, *supra* note 11, at 1904 n.151 (citing the Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 20, *Dolan* (No. 93-518)).

133. *See* EPSTEIN, *supra* note 129, at 265.

134. *See id.* at 264.

135. *See id.* ("[W]hy should they be required to negotiate the hurdles of the local zoning procedures in order to overcome obstacles to land development that never should have been erected in the first instance?").

136. *See id.*

137. *See id.*

138. *See* EPSTEIN, *supra* note 129, at 265.

139. *See id.*

quired physical exactions and impact fees, the reviewing court will be able to: 1) directly measure the impact of the regulation; 2) sort through the political red-tape and examine the true motive of the municipality imposing the exaction; and 3) if necessary, determine the correct amount of compensation owed to the individual property owner.[140]

3. *The "Specifically and Uniquely Attributable" Standard Is Not "Too Exacting"*

Government officials and other opponents of heightened scrutiny believe that the "specifically and uniquely attributable" standard is too exacting.[141] They argue that this test requires a showing of data and information about proposed projects that is practically impossible to obtain, and that it rarely results in the finding of a sufficient nexus between the need created and the exaction imposed.[142]

This argument is flawed, however, because a municipality that has the resources to meet the intermediate standard of review also has the resources to show that the exaction is specifically and uniquely attributable to the new development. Once this burden is met, the development is guaranteed a direct and material benefit from either the land given or the fee paid. The municipality can make its necessary improvements, at the cost of the developer, without unconstitutionally limiting the latter's right to private property. Moreover, this increased burden on the municipality is justified because an individual's property rights are at stake.

4. *The "Specifically and Uniquely Attributable" Standard Does Not Prohibit Government Land Use Regulations*

Law and economics advocates also argue against the use of strict scrutiny in land use regulation cases.[143] They contend that the trade of a permit for an exaction is an efficient transfer which keeps the market competitive and thus benefits society as a

140. *See id.* at 266.

141. *See* Gerald P. Callaghan, *Illinois High Court Reaffirms Strict Test For Development Fees*, 18 CHI. LAWYER 73 (May 1995). Many of the opponents use the same reasoning as the United States Supreme Court did in *Dolan*, however the Court in that case relied on the "nature of the interests at stake." *See* Dolan v. City of Tigard, 512 U.S. 374, 3889-90 (1994).

142. *See* Murphy, *supra* note 2, at 226 (citation omitted).

143. *See* St. Jeanos, *supra* note 11, at 1904 (noting that economists argue that the swap of an exaction for a permit to develop is an efficient transfer).

whole.[144] These opponents also argue that the "Lochner Era"[145] established that courts have no authority to review governmental economic decisions, such as the financing of public roads and schools.[146]

While the economic argument presents legitimate concerns when discussing the role of courts in a municipality's business decisions, it is not persuasive when the constitutional right to property is at stake. The "specifically and uniquely attributable" test does not eliminate a municipality's right to regulate land use, a necessary function in modern day society.[147] Instead, this standard allows courts to protect landowners from municipal overreaching and abuse of power without becoming improperly involved in the municipality's decisions. Moreover, it removes the municipality's incentive to abuse its power to regulate land use. When the municipality attempts to do so, the "specifically and uniquely attributable" standard provides the courts with a bright line test to use in order to protect an individual's property rights.

Conclusion

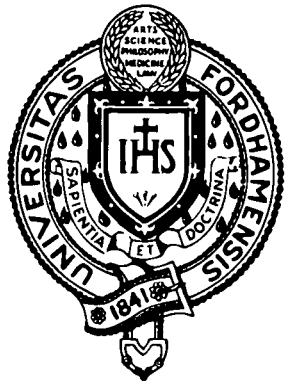
In the controversy surrounding land use exactions, the Fifth Amendment should be interpreted to permit an individual to freely develop property without bearing unfair costs imposed by a municipality. With the use of minimum or intermediate levels of review, the protection afforded by the Takings Clause is improperly reduced. By requiring that land use exactions be specifically and uniquely attributable to the projected impact of the new development, individual private property rights will be restored.

144. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 544 (1991).

145. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 829-31 (3d ed. 1996). The "Lochner-era" refers to the time period between 1905 and 1934 when the United States Supreme Court used heightened judicial scrutiny, relying on the Due Process Clause of the Fourteenth Amendment, to strike down approximately 200 economic regulations. *Id.*

146. *See* St. Jeanos, *supra* note 11, at 1905.

147. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 1994) (noting that the power of state and local governments to engage in land use regulation still exists).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