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Escaping the Takings Maze: Impact Fees and the Limits of the Takings Clause

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I. INTRODUCTION: ARE IMPACT FEES LOST IN THE MAZE OF TAKINGS JURISPRUDENCE?

The cost of a new home in swanky Naples, Florida—home of charming shopping districts, lovely white-sand beaches,[1] and more golf holes per capita than anywhere else in America[2]—recently topped $450,000.[3] Included in this cost is a staggering $33,000 impact fee bill from the county.[4] Even amidst a meltdown in the housing industry and a severe economic slump, local politicians have refused to reconsider the high fees.[5] Impact fees are levied by local governments on new developments to pay a share of the costs of providing public infrastructure for those developments.[6] The money is used to improve sewers, roads, parks, and schools and has become increasingly important to local governments.[7] For example, Naples's high fees are due, in part, to cuts in revenue at the state level and voters' rejection of a proposed sales tax increase to cover growth-related costs.[8]

Impact fees are not governments' only tool for financing public-infrastructure improvements; governments also may use their powers of eminent domain to require land dedications or payments in lieu of

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1. WARREN R. BLAND, RETIRE IN STYLE: 60 OUTSTANDING PLACES ACROSS THE USA AND CANADA 132, 135 (2005).

2. The Greater Naples Chamber of Commerce, Fun Facts, http://www.napleschamber.org/lifestyle/naples-fun-facts.aspx (last visited Apr. 27, 2009).

3. Steve Matthews, *'Bubble City,' Workers Flee Naples, Florida's High Home Prices*, BLOOMBERG.COM, Aug. 7, 2006, http://www.bloomberg.com/apps/news?pid=20601103&sid=aHo6vBLG_XVA&refer=us.

4. Neil Hughes, *Direct Impact*, SUN-HERALD.COM, Nov. 12, 2007, http://www.impactfees.com/pdfs_all/Newsheadline2.pdf. The national average impact fee per single-family detached dwelling recently topped $11,239. CLANCY MULLEN, DUNCAN ASSOCS., NATIONAL IMPACT FEE SURVEY: 2008 (2008), *available at* http://www.impactfees.com/publications%20pdf/2008_survey.pdf.

5. *County Not Ready to Lower Impact Fees*, MSNBC.COM, Jan. 14, 2009, http://www.impactfees.com/pdfs_all/county%20not%20ready%20to%20lower%20impact.pdf.

6. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 346, 351 (2007).

7. *Id.* (stating that impact fees are also used to fund jails, libraries, and water treatment and storm water facilities); Lauren Reznick, Note, *The Death of* Nollan *and* Dolan*? Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. REV. 725, 736–37 (2007). For an argument against using impact fees to pay for the costs of development, see Charles Siemon, *Who Bears the Cost?*, 50 LAW & CONTEMP. PROBS. 115 (1987).

8. Hughes, *supra* note 4; *see also* Arthur C. Nelson, *Development Impact Fees: The Next Generation*, *in* EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE *DOLAN* ERA 87, 87–88 (Robert H. Freilich & David W. Bushek eds., 1995) [hereinafter EXACTIONS, IMPACT FEES AND DEDICATIONS] (elaborating further on the increased need for development impact fees); James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 85–86 (1987) (discussing federal and state governments' diminished role in financing improvements to deteriorating public capital stock and the shifting of the burden to user fees).

dedications.[9] Often, a government will demand, as a condition precedent to approving a development project, a "physical exaction" (referring to a land dedication)[10] or a "monetary exaction" (referring to a payment in lieu of dedication, also known as an impact fee).[11]

The Fifth Amendment guarantees that private property shall not be "taken for public use, without just compensation."[12] Supreme Court takings jurisprudence, however, is murky; as even Justice Stevens admitted, "[T]he wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[13] Indisputably, judicial review of government-required land dedications—that is, physical takings of private property—is governed by the Takings Clause of the Fifth Amendment.[14] Fee imposition does not take, condemn, or appropriate private property in any traditional sense, so it should not trigger the Takings Clause. But takings jurisprudence is not limited to the traditional understanding of taking, condemning, or appropriating property; Justice Holmes famously stated that a government *regulation* also can become a compensable taking if the regulation "goes too far."[15] Much uncertainty remains as to whether impact fees "go too far," and, more fundamentally, whether impact fees should be governed by the Takings Clause at all. Moreover, if the Fifth Amendment has an effect on impact fees, review of the fees will have to fit somewhere in the maze of takings jurisprudence.[16]

While a unanimous Supreme Court recently cleaned up its muddled takings jurisprudence in *Lingle v. Chevron U.S.A.*, the Court

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9. DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 263–64, 348–53 (2004); *see also* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 70–71 (2002) (discussing eminent domain). Land dedications refer to the actual physical surrendering of land to the government (to widen a street, for instance). JUERGENSMEYER & ROBERTS, *supra* note 6, at 269–76. Where actual physical dedications are inappropriate or not practicable, governments may instead require a payment to be made "in lieu of the dedication." *Id.* at 346.

10. Noreen A. Murphy, *The Viability of Impact Fees After* Nollan *and* Dolan, 31 NEW ENG. L. REV. 203, 203 (1996).

11. JUERGENSMEYER & ROBERTS, *supra* note 6, at 351 (stating that the impact fee is "functionally similar" to the "in lieu of" fee and the terms are "sometimes used interchangeably").

12. U.S. CONST. amend. V. The Just Compensation Clause is applied against states as incorporated by the Fourteenth Amendment. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 234 (1897).

13. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

14. JUERGENSMEYER & ROBERTS, *supra* note 6, at 409–10.

15. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

16. JUERGENSMEYER & ROBERTS, *supra* note 6, at 346–74; *see also* Thomas E. Robert, *Structure and Substance of Land Use Law*, *in* HOW TO LITIGATE A LAND USE CASE: STRATEGIES AND TRIAL TACTICS 9, 34–35 (Larry J. Smith ed., 1999) ("[W]hether the tests of *Nollan* and *Dolan* apply to development fees is an open question.").

failed to clarify the future of monetary exactions like impact fees.[17] In *Lingle*, Chevron brought a takings claim against Hawaii for passage of Hawaii's Act 257,[18] which sought to protect independent gasoline dealers by, inter alia, limiting the rent that oil companies could charge lessee-owned stations.[19] A lower court struck down the Act, reasoning that it did not "substantially advance a legitimate state interest."[20] In overturning the lower court's decision, the Supreme Court bluntly expurgated the "substantially advances" test, claiming it was a due process inquiry that had "no proper place in the Court's takings jurisprudence."[21] In so doing, the Court further clarified takings jurisprudence by endorsing four reasonably straightforward categories of takings: physical invasions, deprivations of all economically beneficial use, regulatory takings, and physical exactions.[22] Whether monetary exactions fit into any of these four categories, however, is still unclear to scholars and courts.[23]

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17. Reznick, *supra* note 7, at 745; *see also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005).

18. *Lingle*, 544 U.S. at 533.

19. *Id.* (noting that rent was limited to fifteen percent of the stations' gross profits from the sales of gasoline plus fifteen percent of the profits from the sales of non-gasoline products).

20. Lingle v. Chevron U.S.A. Inc., 363 F.3d 846, 855 (8th Cir. 2004) (ruling that the Act's practical result would actually be to reduce the number of lessee-owned stations and increase gasoline prices), *rev'd*, *Lingle*, 544 U.S. 528.

21. *Lingle*, 544 U.S. at 528. For discussions about the elimination of the "substantially advances" test, see Daniel J. Curtin, Jr., W. Andrew Gowder, Jr. & Bryan W. Wenter, *Annual Review of the Law: Recent Developments in Land Use, Planning and Zoning Law: Exactions Update: The State of Development Exactions After* Lingle v. Chevron U.S.A., Inc., 38 URB. LAW. 641, 641–44 (2006); Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371 (2006); John D. Echeverria, Lingle, *Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, [2006] 35 Envtl. L. Rep. (Envtl. Law Inst.) 10,577.

22. *Lingle*, 544 U.S. at 538–39, 547–48.

23. *See* Fred P. Bosselman, Dolan *Works*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 333, 345–46 (Thomas E. Roberts ed., 2002) [hereinafter TAKINGS SIDES ON TAKINGS ISSUES] (supporting heightened scrutiny for impact fees); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan*, and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 397 (2002) (arguing for heightened scrutiny for all impact fees, whether legislatively or adjudicatively imposed); Daniel J. Curtin, Jr. & Cecily T. Talbert, *Applying* Nollan/Dolan *to Impact Fees: A Case for the Ehrlich Approach*, *in* TAKING SIDES ON TAKINGS ISSUES, *supra*, at 333, 340–41 (supporting heightened scrutiny for impact fees imposed adjudicatively but not legislatively); Echeverria, *supra* note 21, at 10,583 (arguing that monetary exactions are "outside the scope" of *Nollan* and *Dolan*); Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of* Lingle v. Chevron U.S.A. *on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 481–82 (2006) (arguing that the "mere imposition of monetary fees for building permits will fail to evoke the heightened scrutiny of the doctrine of unconstitutional conditions"); Julian C. Juergensmeyer & James C. Nicholas, *Impact Fees Should Not Be Subjected to Takings Analysis*, *in* TAKING SIDES ON TAKINGS ISSUES, *supra*, at 357, 357–58 (arguing for the use of the dual rational nexus test and against an extension of *Nollan/Dolan*); Reznick, *supra* note 7, at 755–57 (arguing that monetary exactions

The question of which *Lingle* category, if any, should guide the analysis of impact fees is further muddled by three situations. First, in *Eastern Enterprises v. Apfel*, a majority of the Supreme Court could not agree on whether regulatory takings analysis is germane to an "ordinary liability to pay money."[24] In *Eastern Enterprises*, the liability derived not from an impact fee but from a government regulation requiring a company to pay retirement benefits to coal miners. The disparate treatment of the Takings Clause by the plurality, the dissent, and Justice Kennedy's concurrence has led commentators to conclude that the mere imposition of a monetary exaction cannot be analyzed as a taking.[25] Second, many states make a distinction between legislatively imposed impact fees and fees that are imposed on an adjudicative, ad hoc basis, and they apply different levels of scrutiny to each.[26] Commentators disagree whether bifurcation between legislative and adjudicative impact fees is beneficial or even relevant to takings jurisprudence.[27] Third, many states analyze monetary exactions using a "dual rational nexus test" that is similar to—but more rigorous than—the heightened scrutiny for physical exactions required by *Nollan* and *Dolan*.[28]

This Note addresses why the assessment of an impact fee should not be subjected to federal takings analysis but should be analyzed under the dual rational nexus test used by most state courts. Part II of this Note reviews the case history of impact fees as a subset of regulatory takings. Part III analyzes the competing approaches used to understand the relationship between impact fees and the Takings Clause. Part IV argues that impact fees have no place in takings jurisprudence and recommends that courts apply the dual rational nexus test—not the *Nollan/Dolan* heightened scrutiny analysis—to impact fees.

"regard" property and thus may be considered a compensable taking subject to heightened scrutiny).

24. 524 U.S. 498, 529, 554–55 (1998) (Breyer, J., dissenting); *see also* DANA & MERRILL, *supra* note 9, at 70–71 (stating that five Supreme Court Justices would agree that general financial liabilities "do not interfere with private property under the Takings Clause, and hence may be challenged only under the Due Process Clause").

25. Echeverria, *supra* note 21, at 10583.

26. Curtin & Talbert, *supra* note 23, at 340–41.

27. *Compare id.* (supporting bifurcation), *with* Bosselman, *supra* note 23, at 345–46 (opposing bifurcation).

28. Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 993–95 (1989).

II. BACKGROUND: FROM THE TAKINGS CLAUSE TO IMPACT FEES

Per the Fifth Amendment, governments may not take private property for public use without just compensation.[29] "Property" in the context of the Fifth Amendment includes not only chattels and parcels of land but also physical rights related to the property—riparian rights, airspace, and easements—and nonphysical rights related to the property—trade secrets, franchises, and patent rights.[30] These rights are among the "entire group of rights inhering in the citizen's [ownership]" protected by the Constitution.[31] Of course, property rights have limits; ownership does not always mean absolute dominion.[32] An individual's property rights may conflict with the state's right to govern the health, safety, and general welfare of its citizenry.[33] When government action "takes" a citizen's property right through its power of eminent domain, the Fifth Amendment demands that the citizen be compensated.[34] James Madison, the author of the Takings Clause, likely intended the clause to have narrow legal consequences: compensation would be required only where federal government action effected a direct physical taking of private

29. U.S. CONST. amend. V.

30. For a more comprehensive discussion of property and property rights, see generally David B. Sweet, *Annotation: Supreme Court's Views as to What Constitutes "Private Property" Within Meaning of Prohibition, Under Federal Constitution's Fifth Amendment, Against Taking of Private Property for Public Use Without Just Compensation*, 91 L. Ed. 2d 582 (LexisNexis 2006). *See also* RICHARD ALLEN EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 20–26 (1985) (discussing the vagueness of the terms "private property" and "possession," but concluding that the terms are sufficiently understood to allow a discussion of the constitutional implications of the Takings Clause).

31. CALLIES, FREILICH & ROBERTS, *supra* note 9, at 331 (quoting Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 83 n.6 (1980)). For a discussion of whether the Constitution protects the entire bundle of rights, each "stick" in the bundle, or only the exchangeable rights and assets, see DANA & MERRILL, *supra* note 9, at 76–81.

32. *See* DANA & MERRILL, *supra* note 9, at 76–81; *accord* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1281 (1996) (stating that "the first century and a half of private land ownership in America reveals no sign of the latter-imagined right of landowners to be left alone as long as they do not harm others").

33. *See* Mugler v. Kansas, 123 U.S. 623, 669 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."). The drafters of the Constitution never conceived that the Takings Clause established any restrictions on government's power to regulate the use of land. FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 82, 104 (1973).

34. DANA & MERRILL, *supra* note 9, at 3–4.

property.[35] The subsequent broadening of this early understanding of direct takings and the Takings Clause is examined in Section A. Section B examines the current, broader understanding of the Takings Clause, which includes regulatory takings, physical exactions and, in some states, impact fees.

A. Brief History of Regulatory Takings and Exactions

In 1880, forty years before the ratification of the Eighteenth Amendment to the Constitution, Kansas amended its own constitution to "forever prohibit" the "manufacture and sale of intoxicating liquors . . . except for medical, scientific, and mechanical purposes."[36] The next year, the state prosecuted Peter Mugler, a brewer who defied the ban by manufacturing and selling intoxicating liquors for consumption.[37] Mugler argued that he had a vested interest in continuing to manufacture and sell beer and that the amendment, which caused his brewery to drop in value from $10,000 to $2,500, constituted an unconstitutional, uncompensated taking.[38] The Kansas Supreme Court disagreed, finding no vested interest and no takings violation.[39]

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35. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708–13 (1985); *see also* DANA & MERRILL, *supra* note 9, at 77–78 (explaining that the original intent of the Takings Clause was to limit the power of eminent domain by which the State physically takes assets that can be exchanged on a stand-alone basis). *But see* EPSTEIN, *supra* note 30, at 26–29 (elaborating on the difficulties inhering in grounding a theory of the Takings Clause in the intentions of the parties who drafted or signed the document); *id.* at 16–19, 25 (stating that though colonial practice limited compensation to state action amounting to a transfer of possession or title of land, there is no "affirmative evidence suggesting that the Framers regarded the Takings Clause as being limited to physical appropriations," and none of the drafters or ratifiers of the Takings Clause—including James Madison—had "given any sustained thought to the purpose of eminent domain and the compensation requirement"). The Takings Clause itself is often referred to as the "Eminent Domain Clause," leading to an understanding that the clause was intended to govern situations where the State seeks to acquire a discrete asset for which it is possible to pay just compensation, which is consistent with early practice. *Id.* at 16–17, 71–72. For a more complete explanation of the original understanding of the Takings Clause, see *id.* at 8–16.

36. *Mugler*, 123 U.S. at 654.

37. State v. Mugler, 29 Kan. 252, 267 (1883), *aff'd*, 123 U.S. 623.

38. *Id.*

39. *Id.* at 273. The court concluded that the vested interest claim failed because Mr. Mugler had no vested right to "either manufacture or sell any kind of intoxicating liquor which had not yet been brought into existence"; the takings claim failed because:

> It may be that the defendant has suffered great loss on account of the passage of the prohibition act, but such loss is not the direct and immediate result of such act; it is simply the remote and consequential result of the act, and is wholly speculative and problematical. Such indirect and remote losses cannot render acts of the legislature unconstitutional.

Also see RICHARD F. HAMM, SHAPING THE 18TH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920, at 41 (1995), for more discussion of the *Mugler* case.

On appeal, the U.S. Supreme Court upheld the Kansas ruling and explained that a prohibition on uses of property that the state declared "to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[40] Under this early view, regulations that were reasonably related to a valid public purpose never could constitute a taking.[41]

A half-century later, the *Mugler* view was still in effect when the Supreme Court used similar language to uphold comprehensive zoning ordinances. In 1922, the Village of Euclid, Ohio, passed a zoning ordinance limiting property rights to enumerated uses in specifically zoned areas of town.[42] A realty company whose land diminished in value on account of the regulations sued to invalidate the ordinance.[43] The Court held that only provisions that are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" are unconstitutional.[44] The Court explained that it would uphold government zoning regulations so long as the government's rationale for the regulation was "fairly debatable."[45] *Euclid* further demonstrates the historical reluctance of the Supreme Court to extend

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40. *Mugler*, 123 U.S. at 668–69. *Mugler* further rationalizes the denial of a takings claim by stating:

> Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.

Id.

41. CALLIES, FREILICH, & ROBERTS, *supra* note 9, at 311. For a history of colonial republican views concerning the Takings Clause prior to *Mugler*, see BOSSELMAN, CALLIES & BANTA, *supra* note 33, at 82–118; Treanor, *supra* note 35, at 694.

42. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926). The ordinance created zones labeled U-1 to U-6. A U-1 zone, for instance, was limited to uses such as single family dwellings, public parks, water towers and farming, while sewer and garbage plants, incinerators, penal institutions and institutions for the "insane and feeble-minded" were grouped in U-6 zones. *Id.* at 380–82. This is an example of what is called "use zoning"—zoning intended to promote the general welfare by prohibiting property uses in certain areas due to their harmful effects. *See* JUERGENSMEYER & ROBERTS, *supra* note 6, at 70–92.

43. *Euclid*, 272 U.S. at 384–85.

44. *Id.* at 395; *see also* Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (upholding *Euclid* and its "substantial relation to public health, morals, safety, or welfare" reasoning).

45. *Euclid*, 272 U.S. at 388. This reflects the belief rooted in colonial republicanism that state claims can trump private ownership claims and that state legislatures, on account of their wisdom and lack of power, could be trusted to act according to the common good. *See* Treanor, *supra* note 35, at 700–01.

the Takings Clause to government acts not resulting in direct physical takings of property and a concomitant willingness on the part of the Court to grant to governments broad discretion to regulate public health, morals, and safety despite the negative impact the regulations might have on private property use and value.

Soon after *Euclid*, the Court began broadening its understanding of the Takings Clause. In the 1920s, Pennsylvania attempted to protect people from the danger of having coal mined from beneath their homes.[46] The resulting legislation, however, abrogated a contract that the Pennsylvania Coal Company had made with the plaintiffs allowing it to mine beneath their homes.[47] Thus, the legislation completely deprived the company of a valuable estate in land. Justice Holmes famously stated that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking."[48] For the first time, the Court recognized the possibility of a regulation effecting an unconstitutional taking.[49]

For nearly half a century thereafter, when faced with balancing private property rights against public interests, states were left alone to flesh out the bare-boned "goes to far" doctrine.[50] Not until *Penn*

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46. Pa. Coal Co. v. Mahon, 260 U.S. 393, 412–13 (1922).

47. *Id.* at 412, 414.

48. *Id.* at 415 (emphasis added). This reflects another early American belief that manifested first in Vermont and then grew increasingly pervasive as states gained experience with state legislatures: that state legislatures could not be trusted to secure individual property rights. *See* Treanor, *supra* note 35, at 704–05. The seeds of this "liberalism" that countered the colonial republicans' faith in legislatures referred to in *supra* note 35 can at least partly be attributed to the influence of Sir William Blackstone, a strong advocate of individual rights of property, who wrote, "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." WILLIAM BLACKSTONE, 1 COMMENTARIES *134–35.

49. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (stating that prior to *Pennsylvania Coal* "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession' " (citations omitted)).

50. MICHAEL M. BERGER, REGULATORY TAKINGS UNDER THE FIFTH AMENDMENT: A CONSTITUTIONAL PRIMER 4 (1994) (stating that after *Pennsylvania Coal* "the Supreme Court essentially entered a period of hibernation, seemingly abandoning this field of the law"). In *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), the sole Supreme Court case addressing land-use in the half century after *Pennsylvania Coal*, the Court continued to emphasize deference toward the other branches of government and a desire for the Court not to substitute its own judgments for reasonable state solutions of regulatory matters. ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 244–45 (1999). For an example of how state courts addressed the issue, see *Ayres v. City Council of Los Angeles*, 207 P.2d 1 (Cal. 1949). In *Ayers*, the City of Los Angeles required a developer to dedicate two ten-foot-wide strips of land to widen an existing, abutting boulevard and to plant trees alongside. *Id.* at 3. The developer objected, claiming that the City could only exact land to build streets within the subdivision, not to widen existing

Central Transportation Co. v. New York in 1978 did the Supreme Court reenter the Takings Clause fray by enunciating three factors for determining whether a regulatory taking "goes too far." In *Penn Central*, a New York City statute requiring the preservation of historically and aesthetically important buildings prevented Penn Central Transportation Company from constructing a fifty-five-story office tower atop Grand Central Terminal.[51] The Court upheld the statute and held that when governmental regulatory action injurious to a property owner requires just compensation, courts should consider: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and (3) whether the nature of the governmental action is a physical invasion or merely a public program adjusting the benefits and burdens of economic life in an attempt to promote the common good.[52]

The Court has since added two hard-and-fast requirements necessary to find per se takings: (a) there must be an actual, physical invasion of property, no matter the extent or economic impact on the owner;[53] and (b) the regulation must deny the landowner completely of all economically beneficial use of her property.[54] However, where there is no physical invasion and only partial deprivation of the beneficial use, *Penn Central*'s factors must be weighed.[55]

The *Penn Central* factors and the two "per se" rules guide the analysis of three of *Lingle*'s four takings categories: regulatory takings, physical invasions, and deprivations of all economically

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streets. *Id.* at 4. The California Supreme Court upheld the City's provision applying a standard very deferential to local ordinances. *Id.* at 7–8. Other states applied different standards with varying degrees of deference to local authorities for determining when a regulation "goes too far" and becomes a taking. *See* Murphy, *supra* note 10, at 216–30 (detailing application by states of the reasonable relationship test, the specific and uniquely attributable test, and the rational relationship test).

51. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 116–18 (1978). In denying the request for the addition, the Landmarks Preservation Commission, the body charged with ensuring compliance with the statute, called the balancing of a fifty-five story office tower atop "a flamboyant Beaux-Arts façade . . . nothing more than an aesthetic joke." *Id.* at 117.

52. *Id.* at 124; *see also Lucas*, 505 U.S. at 1015 (discussing the *Penn Central* factors to be considered).

53. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (finding a per se taking where there is even minimal physical invasion: state law required a landlord to attach cables on an apartment's exterior walls and a one and one-half foot box on the roof); *see also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (reaffirming the per se rule for physical invasion).

54. *Lingle*, 544 U.S. at 538 (citing *Lucas*, 505 U.S. at 1019, where the South Carolina Coastal Commission passed a statute preventing plaintiff from constructing *anything* on his beach property).

55. *Id.*

beneficial use. The Court has carved out a distinct analysis for the fourth category—physical exactions—an analysis that also has been applied by some states to monetary exactions like impact fees. [56]

B. Physical Exactions and Nollan *and* Dolan

Physical exactions are a technique employed by governments to compel developers—by regulation, negotiation, or leverage—to exchange land for permission to develop.[57] Rather than merely weighing the *Penn Central* factors, courts apply heightened scrutiny to physical exactions. For a physical exaction to be permissible, there must be an "essential nexus" between the exaction and the government interest that justifies the denial of the permit,[58] and there must be "rough proportionality" between the exaction and the impact of the proposed development.[59] Together, the essential nexus test and rough proportionality test constitute *Nollan/Dolan* heightened scrutiny.

The essential nexus test derives from *Nollan v. California Coastal Commission*. In *Nollan*, the California Coastal Commission granted permission to James and Marilyn Nollan to replace their dilapidated beachfront bungalow with a new, larger home on the condition that the Nollans grant a public easement for their private beach.[60] The Commission justified the condition by arguing that the proposed development had negative externalities: it would impede the public's ability to see the beach and would create a "psychological barrier" to using the beach.[61] The Court countered with what is termed the "essential nexus" argument: state police power may prohibit an activity and limit a constitutional right (like prohibiting a person from yelling "fire" in a crowded theater, which limits freedom of speech), but it may not allow exceptions to the prohibition based on unrelated conditions (like allowing persons who contribute $100 to state coffers to yell "fire" in crowded theaters); there must be an "essential nexus" between the condition and the prohibition.[62] The Court found no "essential nexus" between the required exaction

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56. *Id.* at 538, 545–47 (describing land-use exactions as a "special context" and analyzing them separately).

57. *See* Siemon, *supra* note 7, at 115 n.2 (describing development exactions generally).

58. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

59. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

60. *Nollan*, 483 U.S. at 828; *see also Dolan*, 512 U.S. at 387 (labeling California's ploy a "gimmick").

61. *Nollan*, 483 U.S. at 835.

62. *Id.* at 836.

(requiring a permanent public right of access to private property) and the ends advanced as the justification for the prohibition on development (improving the public's view of the ocean and diminishing the psychological barrier).[63] Thus, the dedication was an "out-and-out plan of extortion" and an unconstitutional taking.[64] *Nollan*'s essential nexus test requires physical exactions to "substantially advance the same government interest that would furnish a valid ground for denial of the permit."[65]

After *Nollan*, it was still unclear to what degree the exaction would need to address the impact of the proposed development.[66] Subsequently, the Court determined that the exaction must have a "rough proportionality" to the development impact.[67] When Florence Dolan applied for a permit to increase the size of her store and to pave a parking lot, the city approved the permit subject to two conditions: Ms. Dolan would have to dedicate a portion of the back side of her lot as a public greenway and an adjacent strip as a public pedestrian/bicycle pathway.[68] The city justified these dedications by arguing that they would improve storm drainage and reduce vehicular traffic.[69] Reiterating that the right to exclude others from private property is "one of the most essential sticks in the bundle of [property] rights," the Supreme Court explained that a private greenway could improve flood control just as well as a public greenway.[70] The Court also rejected the city's finding that the pedestrian/bicycle path theoretically *could* offset increased traffic from expanding the store; absent a finding that the path *would* or *was likely* to offset increased traffic, the demanded property dedication was unjustified.[71] Thus, the government under *Dolan* must show that there is not only an "essential nexus" between the physical exaction and the justification for permit denial but also "rough proportionality" between the impact

63. *Id.* at 837.

64. *Id.* (quoting J.E.D. Assocs., Inc. v. Atkinson, 121 N.H. 581, 584 (1981)).

65. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005). Note that this is not the same as requiring that the conditions substantially advance a legitimate governmental interest, which is a due process question. *Id.* at 540.

66. *See* Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (noting that the Court was "not required to reach [the exaction] question in *Nollan*").

67. *Id.* at 391.

68. *Id.* at 379–80.

69. *Id.* at 387.

70. *Id.* at 384–86.

71. *Id.* at 395.

of the development and the requirements of the exaction.[72] Rough proportionality essentially requires the public interest served by the exaction to be sufficient to justify the taking.[73]

As part of its analysis, the Court placed physical exactions in the well-settled doctrine of "unconstitutional conditions."[74] This doctrine prevents the government from requiring "a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[75] In cases like *Nollan* and *Dolan*, the government may not condition the approval of a building permit on the surrender of the right to exclude others from property.

The Court has acknowledged that *Nollan/Dolan* heightened scrutiny for takings questions has not been applied outside the context of physical exactions in federal courts.[76] Many state courts, however, do apply heightened scrutiny to monetary exactions.[77] These courts see little difference in the imposition of a physical exaction and a monetary exaction and use the language of *Nollan* and *Dolan* to guide the analysis of monetary exactions.[78] Other courts, however, argue that *Nollan/Dolan* heightened scrutiny is inappropriate outside the context of physical exactions of property.[79] The question remains

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72. *Id.* at 391 (explaining that the "rough proportionality" test is essentially the same as the "reasonable relationship" test adopted by the majority of states, i.e., the dedication must be reasonably related to the impact of the proposed development).

73. Daniel Pollak, *Regulatory Takings: The Supreme Court Tries to Prune* Agins *Without Stepping on* Nollan *and* Dolan, 33 ECOLOGY L.Q. 925, 930 (2006) (quoting *Dolan*, 512 U.S. at 385).

74. *Id.*

75. *Id.* (quoting *Dolan*, 512 U.S. at 385).

76. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702 (1999) (stating that the Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use").

77. *See, e.g.*, Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172, 175 (Wash. Ct. App. 2000) (applying *Nollan/Dolan* heightened scrutiny to impact fees and stating that the issues for an exaction of money are the same as for an exaction of land, and so the "test must be the same: a showing of 'nexus' and 'proportionality' "), *aff'd on nonconstitutional grounds*, 49 P.3d 860 (Wash. 2002). *But see* Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 693–94 (Colo. 2001) (refusing to apply *Nollan/Dolan* heightened scrutiny to impact fees); Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000) (applying the dual rational nexus test to impact fees, which is similar to, but is not, *Nollan/Dolan* heightened scrutiny).

78. *See* Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996).

79. *See, e.g.*, Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995); Nancy E. Stroud, *A Review of* Del Monte Dunes v. City of Monterey *and Its Implications for Local Government Exactions*, 15 J. LAND USE & ENVTL. LAW 195, 203–04 (1999) (discussing the Fifth and Tenth Circuits' treatment of *Dolan*, and treatment in various state courts); *see also* Bruce W. Bringardner, *Exactions, Impact Fees, and Dedications: National and Texas Law After* Dolan *and*

whether Supreme Court Takings Clause jurisprudence is applicable to impact fees and, if so, what analysis applies.

III. ANALYSIS: FOUR APPROACHES TO IMPACT FEES

Four positions have emerged in the debate over whether takings law applies to impact fees.[80] The first position is that *Nollan/Dolan* heightened scrutiny only applies to mandatory dedications of land and not to impact fees. Proponents of the second position argue that *Nollan/Dolan* should not apply to impact fees because virtually all states apply a more stringent common-law test—the dual rational nexus test. The third position is that *Nollan/Dolan* should not apply to generally applicable impact fees imposed by legislatures but should apply to impact fees imposed adjudicatively on individuals. The fourth position is that *Nollan/Dolan* should apply to all impact fees.[81]

A. Nollan/Dolan *Does Not Apply to Impact Fees*

The Supreme Court has made statements that limit *Nollan/Dolan* to physical exactions and that call into question the applicability of takings jurisprudence to "ordinary obligations to pay money."[82] In *Del Monte Dunes v. City of Monterey*, developers attempted to build residential units on an ocean front parcel that was also a buckwheat stand, the natural habitat of a rare butterfly.[83] Though the builder modified the development plan to meet the local planning commission's requirements, the planning commission repeatedly denied permission to develop.[84] In its analysis of *Del Monte Dunes*, the Court stated:

> We have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the *dedication of property* to public use. The rule . . . was not designed to address, and is not readily

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Del Monte Dunes, 32 URB. LAW. 561, 582 n.81 (reviewing cases in which the courts refused to apply *Nollan/Dolan* heightened scrutiny to situations that did not include development exaction).

80. JUERGENSMEYER & ROBERTS, *supra* note 6, at 368.

81. *Id.*

82. *See* Stroud, *supra* note 79, at 202 (arguing *Del Monte Dunes*'s language limits *Nollan/Dolan* to the special context of physical exactions); Reznick, *supra* note 7, at 749 (arguing that E. Enters. v. Apfel, 524 U.S. 498 (1998), should not be seen as an imposition to applying the *Nollan/Dolan* test to impact fees).

83. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 695 (1999).

84. *Id.* at 695–96.

> applicable to, the . . . questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.[85]

In *Lingle*, a unanimous Court cited this language approvingly, supporting the idea that *Nollan/Dolan* heightened scrutiny is limited to cases in which government action is so onerous that, outside the development exchange context, it would amount to a per se physical taking.[86] Because a requirement to pay a fee does not resemble a per se physical taking,[87] some courts have limited *Nollan/Dolan* heightened scrutiny to land-dedication cases.[88] Many other courts have reconsidered cases in which *Dolan* was applied to non-land-dedication situations and decided, in light of *Del Monte Dunes*, that *Dolan* was inapposite.[89]

The Supreme Court's clear statement in *Del Monte Dunes* that *Dolan*'s rough proportionality test has not been extended beyond property dedications does not necessarily mean that it cannot, or should not, be extended in an appropriate circumstance. *Del Monte Dunes* did not expressly address the extension of *Nollan* and *Dolan* to impact fees, so its ruling has limited value.[90] Likewise, though both the Fifth and the Tenth Circuits have refused to apply *Nollan* and *Dolan* to non-land-dedication situations, neither circuit has addressed impact fees directly.[91] Furthermore, some courts directly confronting the impact fee question, like the *Ehrlich* court, have determined that

85. *Id.* at 702–03 (emphasis added) (citation omitted).

86. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546–47 (2005); Pollak, *supra* note 73, at 931. *But see* Bringardner, *supra* note 79, at 582 (arguing that *Del Monte Dunes*'s statement that the Supreme Court has "not extended the *Dolan* test beyond dedications is merely an acknowledgement that the Supreme Court has not been presented with the opportunity to examine non-possessory exactions under *Dolan*," and that, as dicta, the statement should not be interpreted to mean that *Dolan* applies to land dedications only).

87. Pollak, *supra* note 73, at 931.

88. The Kansas Supreme Court, for instance, refused to apply *Nollan/Dolan* to a dispute over the imposition of a traffic impact fee because the fee did not involve the dedication of land. McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (stating that "[t]he landowners cite no authority for the critical leap which must be made from a fee to a taking of property").

89. *See* Stroud, *supra* note 79, at 205–06.

90. *See* Benchmark Land Co. v. City of Battleground, 14 P.3d 172, 175 (Wash. Ct. App. 2000) (stating that *Del Monte Dunes*'s language is inapposite because the case did not address impact fees); *see also* Bringardner, *supra* note 79, at 585 (arguing that *Del Monte Dunes* does not limit the application of *Nollan/Dolan* to land dedications and their equivalents).

91. *See* Tex. Manufactured House Ass'n v. City of Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996) (distinguishing *Nollan* on the basis that its plaintiff was required to dedicate land); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) (repeating merely that *Nollan/Dolan* are limited to development exactions where there is a physical dedication or its equivalent).

the reasons justifying heightened scrutiny in *Nollan* and *Dolan* also justify heightened scrutiny for some impact fees.[92]

The Supreme Court's split decision in *Eastern Enterprises v. Apfel* has led commentators to argue that impact fees, as ordinary liabilities to pay money, fall outside the limits of all takings jurisprudence.[93] In *Eastern Enterprises*, impact fees were analogized to a tax or a routine burden to pay money,[94] and the Court split on whether the statutory obligation to pay money ever could form the basis of a takings claim.[95] The case concerned Eastern, an energy company long since removed from the coal business, and its obligation to pay coal miners' pensions under the Coal Act.[96] The plurality opinion applied the *Penn Central* test, finding that the Coal Act effected a taking because the Act profoundly affected Eastern's business, substantially interfered with Eastern's reasonable investment-backed expectations, and was unrelated to any commitment Eastern had made or any injury it caused.[97] Justice Kennedy concurred in the judgment but found it imprecise and unwise to analyze the mere imposition of an obligation to pay a benefit under the Takings Clause.[98] He argued that application of takings jurisprudence to an "ordinary obligation to pay money" would remove a consistent limitation in regulatory takings analysis: the requirement that there be a specific property right or interest at stake.[99] Instead, Justice Kennedy applied due process analysis.[100]

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92. Ehrlich v. City of Culver City, 911 P.2d 429, 439 (Cal. 1996); *cf.* DAVID L. CALLIES, DANIEL J. CURTIN, JR. & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES 21–22 (2003) (discussing cases that have questioned limiting *Nollan/Dolan* to physical dedications).

93. Echevarria, *supra* note 21, at 10,583 & n.52; Reznick, *supra* note 7, at 749.

94. E. Enters. v. Apfel, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting). *Contra* JUERGENSMEYER & ROBERTS, *supra* note 6, at 357–58 (distinguishing impact fees from taxes). For a discussion about the differences between taxes and special assessments, see RICHARD ALLEN EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 283–89 (1985) (concluding that a rigid distinction between the two is futile and that special assessments are routinely upheld). The problem is that if impact fees are characterized as taxes they will almost always be stricken, since local governments rarely have the authority to assess taxes beyond property tax and, occasionally, sales or income tax. CALLIES, CURTIN & TAPPENDORF, *supra* note 92, at 13.

95. Reznick, *supra* note 7, at 750.

96. *E. Enters.*, 524 U.S. at 505–07, 514.

97. *Id.* at 536 (applying the *Penn Central* test for regulatory takings).

98. *Id.* at 540.

99. *Id.* at 541–42.

100. *Id.* at 547.

The dissenters, Justices Ginsburg, Breyer, Souter, and Stevens,[101] also found takings jurisprudence inapplicable, seeing no reason to torture the Takings Clause to fit a case involving an ordinary liability to pay money.[102] After all, the dissent argued, if the Takings Clause does not apply to a tax requiring A to pay the government, why should it apply when the government orders A to pay B?[103] The dissent agreed with Kennedy that due process review governed the analysis and argued that the Takings Clause was limited to instances in which the government takes specific and identifiable property rights.[104] Coupling Kennedy with the dissenters appears to create a "second majority" opposed to the extension of takings jurisprudence to impact fees.[105]

The Third Circuit agreed that *Eastern Enterprise* limits the application of the Takings Clause to takings of specific property rights. In two unrelated suits, companies subject to the Coal Act used *Eastern Enterprises* to claim that the obligation to pay benefits to coal workers effected a taking of private property.[106] In each case the Third Circuit felt "bound to follow the five-four vote against the takings claim" in *Eastern Enterprises* and applied due process analysis to

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101. *Id.* at 550, 553.

102. *Id.* at 556 (Breyer, J., dissenting).

103. *Id.*; *see also* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 233 (1986) ("[I]t cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.").

104. *See E. Enters.*, 524 U.S. at 554–55 (Breyer, J., dissenting) ("The 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property."); *id.* at 542:

> The difficulties in determining whether there is a taking or a regulation even where a property right or interest is identified ought to counsel against extending the regulatory takings doctrine to cases lacking this specificity. The existence of at least this outer boundary for application of the regulatory takings rule provides some necessary predictability for governmental entities.

(Kennedy, J., concurring in the judgment and dissenting in part); JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS § 6.02, at 6–7 (Supp. 2006) (arguing that five Justices disagreed with the plurality's opinion that property had been unconstitutionally taken). *But see* Reznick, *supra* note 7, at 751 (arguing that Justice Kennedy's concurrence cannot be clumped in with the dissenters so easily). For a discussion on how the view that takings jurisprudence is limited to instances where the State takes specific and identifiable property rights is consistent with the understanding that the clause exists to curb the State's eminent domain power, but "makes less sense" if one believes the clause exists as a type of check against unfair or inefficient government action, see DANA & MERRILL, *supra* note 9, at 71–72.

105. Echeverria, *supra* note 21, at 10,583.

106. Berwind Corp. v. Comm'r of Soc. Sec., 307 F.3d 222, 224 (3d Cir. 2002); Unity Real Estate Co. v. Hudson, 178 F.3d 649, 655–56 (3d Cir. 1999).

uphold the Act's obligations.[107] The court explained a fundamental difference between takings and substantive due process claims: "If the government pays just compensation, it may take property for public use under the Takings Clause. Due process protections, by contrast, define what the government may not require of a private party at all."[108] The Third Circuit, like the dissenters and Kennedy in *Eastern Enterprises*, determined that because the Coal Act did not involve compensation payments by the government for property taken, but instead pushed the limit of what the government may require of a private party, due process jurisprudence applies[109] Thus, one view that has emerged is that "ordinary obligations to pay money" are best reviewed under a substantive due process analysis and not a takings analysis.

B. The Dual Rational Nexus Test Obviates the Need to Apply Nollan/Dolan *to Impact Fees*

Scholars have argued that no labyrinthine takings analysis of impact fees is even necessary because states already apply the more stringent "dual rational nexus" test, which sufficiently protects property rights.[110] This common-law test demands (1) extensive calculation of the needs for infrastructure improvement created by a proposed development and (2) earmarking of the fees to benefit the development.[111] The two "rational nexuses" often are referred to as the "need" and "benefit" tests.[112]

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107. *Berwind*, 307 F.3d at 234 & n.16, 239–40; *Unity Real Estate*, 178 F.3d at 659. Both cases, however, admit that it is difficult to distill a guiding principle from *Eastern Enterprises*. *Berwind*, 307 F.3d at 231 (quoting *Unity Real Estate*, 178 F.3d at 658).

108. *Unity Real Estate*, 178 F.3d at 658–59.

109. *Id.* at 659–60. The limit pushed by Congress in the Coal Act was forcing retroactive and substantial monetary liability on companies for coal miner benefits when those companies were not even signatories to the liability-creating agreements and had long since left the mining industry. *Id.*

110. JUERGENSMEYER & ROBERTS, *supra* note 6, at 365–68; Juergensmeyer & Nicholas, *supra* note 23, at 361; *see also* Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, *in* EXACTIONS, IMPACT FEES AND DEDICATIONS, *supra* note 8, at 60, 61–62 (stating that all states, regardless of what they call the test they use, judge the reasonableness or rationality of impact fees by analyzing stringent factors).

111. Juergensmeyer & Nicholas, *supra* note 23, at 362–63; Leitner & Schoettle, *supra* note 110, at 61–62 (listing the factors weighed when analyzing impact fees).

112. Note, *supra* note 28, at 994; *see also* Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 134 (Fla. 2000) (discussing applications of the need and benefit tests); Hollywood Inc. v. Broward Co., 431 So. 2d 606, 611–12 (Fla. Dist. Ct. App. 1983) (describing the need and benefits tests):

> [R]easonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds

The initial formulation for the dual rational nexus test is attributed to *Jordan v. Village of Menomonee Falls*.[113] In *Jordan*, the city required a developer to pay a $5,000 fee in lieu of dedicating land for parks and schools to serve a proposed development.[114] In sustaining the fee, the Wisconsin Supreme Court found that a burden cast upon a developer is permissible when "specifically and uniquely attributable to his activities."[115] The *Jordan* court went further, declaring that generally it would be impossible for a city to prove that the land dedication required for a park or a school was to meet a need "*solely* attributable to the anticipated influx of people into the community to occupy *this particular* subdivision."[116] Therefore, so long as the evidence "reasonably establish[ed]" the need fulfilled by the dedication, the dedication would be upheld.[117] Thus, the first part of the dual rational nexus test requires the municipality to demonstrate that a developer's activity generates a need for new facilities.[118] Variations of the dual rational nexus test exist in the various states, but there is "virtual unanimity" that impact fees may only require a new development to pay for costs that are reasonably related to its impact.[119]

The second test, inferred from *Jordan*, requires a city to use the funds collected specifically for the enumerated benefit to the development.[120] To achieve this, a city can earmark the funds collected to benefit the new residents and demonstrate that the city's actual or

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collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents. The developer, of course, can attempt to refute the government's showing by offering additional evidence.

113. Juergensmeyer & Nicholas, *supra* note 23, at 361. The dual rational nexus test is also referred to as the "reasonable relationship" test.

114. Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442, 446 (Wis. 1965).

115. *Id.* at 447 (citing Pioneer Trust & Savings Bank v. Vill. of Mt. Prospect, 176 N.E.2d 799, 902 (Ill. 1961)).

116. *Id.* (emphasis added).

117. *Id.* at 448.

118. Juergensmeyer & Nicholas, *supra* note 23, at 361.

119. *See* CLANCY MULLEN, DUNCAN ASSOCS., STATE IMPACT FEE ENABLING ACTS (2008), *available at* www.impactfees.com/publications%20pdf/state_enabling_acts.pdf.

120. Juergensmeyer & Nicholas, *supra* note 23, at 362.

projected capital expenditures as a result of the development exceed the capital payments required of the developer.[121]

The dual rational nexus test seems similar to the heightened scrutiny required by *Nollan/Dolan*. In fact, in *Dolan* the Supreme Court relied heavily on the test used in *Jordan* in devising its rough proportionality test, changing the name principally to avoid confusion with the rational basis test of equal protection jurisprudence.[122] After discussing the unnecessarily exacting requirements of the "specifically and uniquely attributable" test and the excessively lax requirements of other states' tests, the Supreme Court noted that the dual rational nexus test "adopted by a majority of the state courts is closer to the federal constitutional norm."[123] However, the tests are not the same. The essential difference between the two tests is that the dual rational nexus test requires not merely a "roughly proportional" relationship between the burden imposed by the exaction and the impact of the development but much more detail and specificity regarding how a developer's activity creates a need for new facilities and how the city's expenditures will benefit the development.[124]

Commentators have pointed out two arguments militating against a federal adoption of the dual rational nexus test.[125] First, the Supreme Court doubts the competency of federal judges to construct detailed equations of harm and benefit—as would be required by the dual rational nexus test—in an attempt to second-guess legislative action.[126] Second, applying the dual rational nexus test to monetary exactions presumes that developers are unable to protect themselves politically, contradicting the Supreme Court's belief that the political process is ultimately self-regulating.[127] The argument, however, is not

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121. *Id.*; *see also* Nicholas, *supra* note 8, at 93–94 (stating that impact fees are valid where: (1) the new development requires expansion of capital facilities; (2) the required fee does not exceed the cost incurred by the local government; and (3) the money collected is spent for the purposes collected).

122. Dolan v. City of Tigard, 512 U.S. 374, 390–91 (1994) (citing *Jordan*, 137 N.W.2d at 448, and referring to the test as the "reasonable relationship" test).

123. *Id.*

124. *See* MELTZ, MERRIAM & FRANK, *supra* note 50, at 251–52 (discussing *Dolan* and stating that the Supreme Court "did not adopt the reasonable relationship test per se," and addressing the dissenters who point out that *Dolan's* roughly proportional test is not "anything akin" to existing state tests (quoting *Dolan*, 512 U.S. at 399 (Stevens, J., dissenting))); Note, *supra* note 28, at 993 (discussing *Nollan*). The reasonable relationship test, also called the dual rational nexus test, requires specific, detailed analysis regarding how a developer's activity creates a need for new facilities and how the city's expenditures will benefit the development. Juergensmeyer & Nicholas, *supra* note 23, at 361–62.

125. Note, *supra* note 28, at 1001–12.

126. *Id.* at 1001.

127. *Id.* at 1002.

that the Court has adopted or should adopt the dual rational nexus test into its takings analysis but that impact fees should be exempted from takings analysis altogether.[128]

Scholars argue that the dual rational nexus test actually protects property rights better than *Nollan/Dolan* heightened scrutiny.[129] Whereas *Dolan*'s "rough proportionality" does not require precise mathematical calculations—only "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"[130]—most state courts and statutes require municipalities to make considerable efforts to quantify the development's need for new capital facilities and how the required fees meet that need.[131] Thus, exempting impact fees from takings jurisprudence does not leave landowners unprotected from out-and-out plans of extortion because state action violating the more stringent requirements of the dual rational nexus test would be held invalid.[132]

Additionally, scholars argue that takings analysis is improper in its application to both impact fees and required physical dedications because both are concerned with financing the infrastructure necessary to service the land rather than restricting the use of land—the traditional subject of takings jurisprudence.[133] The traditional takings cases—*Mugler*, *Euclid*, *Penn Central*, *Nollan*, *Dolan*, and *Ehrlich*—address how a land owner can or cannot use her land.[134] Impact fees, on the other hand, address who should pay for infrastructure.[135] In summary, scholars argue that the dual rational nexus test should be applied to impact fees to avoid the "takings maze," protect property rights, and provide clearer guiding principles to local governments.[136] Thus, federal courts should only validate fees that comport with a state's dual rational nexus test.[137]

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128. Juergensmeyer & Nicholas, *supra* note 23, at 366–67.

129. JUERGENSMEYER & ROBERTS, *supra* note 6, at 364–65.

130. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

131. JUERGENSMEYER & ROBERTS, *supra* note 6, at 365. *But see* CALLIES, FREILICH & ROBERTS, *supra* note 9, at 270 (stating that precise mathematical calculations are not required so long as the fee is not substantially in excess of the cost of the proportionate cost of the new facilities).

132. Juergensmeyer & Nicholas, *supra* note 23, at 357, 360.

133. *Id.* at 358–60.

134. *See id.* at 359–60 (explaining the difference between the issue of impact fees and the issues in traditional takings cases).

135. *Id.* at 360.

136. *Id.* at 367. Juergensmeyer and Nicholas also argue that the dual rational nexus test should apply to physical dedications, but this Note does not take that stance.

137. *Id.*

C. Nollan/Dolan *Applies to Impact Fees Imposed Adjudicatively but Not to Those Imposed Legislatively*

Many courts have followed California's lead in applying heightened scrutiny to adjudicatively imposed impact fees but not to fees imposed legislatively. The California Supreme Court, in *Ehrlich v. City of Culver City*, concluded that the *Nollan/Dolan* test applies to impact fees adjudicatively imposed on an individual owner by an administrative agency but not those generally imposed by legislative ordinance.[138] In *Ehrlich*, a business owner closed his private athletic club due to financial losses and petitioned the city to rezone the parcel to allow for condominium construction.[139] Because it lacked health and fitness amenities, Culver City conditioned rezoning on payment of a $280,000 impact fee to be used for partial replacement of the lost facilities, and an additional $33,200 payment for the city's "art in public places" program.[140] On appeal, the U.S. Supreme Court remanded the case for further consideration in light of *Dolan*.[141] Ultimately, the California Supreme Court concluded that *Nollan/Dolan* heightened scrutiny applied to impact fees but only in the narrow class of land-use cases involving adjudicatively imposed fees.[142]

Since *Ehrlich*, California has bifurcated impact fee cases: impact fees imposed adjudicatively on an individual property owner by an administrative agency are subject to *Nollan/Dolan* heightened scrutiny, but impact fees imposed via legislation fall within the government's police power and are not subject to heightened scrutiny.[143] The *Ehrlich* court noted that both *Nollan* and *Dolan* discuss the government's imposition of an individual land-use condition on a discretionary basis.[144] In these ad hoc situations, land owners and regulatory agencies "bargain" for development rights and benefits, "*purportedly* offset[ting] the impact of the proposed

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138. Curtin & Talbert, *supra* note 23, at 337.

139. Ehrlich v. City of Culver City, 911 P.2d 429, 434 (Cal. 1996).

140. *Id.* at 434–35.

141. *Id.* at 436. The very fact that the Supreme Court remanded *Ehrlich* to be reconsidered in light of *Dolan* has led some to believe that the Court may be willing to apply *Dolan* to impact fees. *See* Bringardner, *supra* note 79, at 585 (noting that the remand of *Ehrlich* "make[s] no sense unless the U.S. Supreme Court believes monetary exactions may also be subject to the heightened scrutiny of *Dolan*").

142. *Ehrlich*, 911 P.2d at 439.

143. Curtin & Talbert, *supra* note 23, at 337.

144. *Ehrlich*, 911 P.2d at 439. *But see* DANA & MERRILL, *supra* note 9, at 227 (stating that the exactions at issue in *Nollan* and *Dolan* were imposed pursuant to general government practice).

development."[145] This unique context presents an inherent and heightened risk that the government will use its police power to impose dedications unrelated to legitimate ends, avoid payment of just compensation, and unfairly place the majority of the burdens on the property owner.[146] The application of *Nollan/Dolan* heightened scrutiny, the court asserted, would dispel this issue as it concerns these adjudicatively imposed impact fees by assuring a link between the ends sought and the means taken.[147]

In the more common situation of legislatively imposed impact fees, however, where the exaction is imposed pursuant to legislation or a rule of general applicability, heightened scrutiny would not apply.[148] In those situations, all similarly situated landowners are subject to the same fee schedule, reducing the risk that an individual landowner will be singled out for extraordinary concessions.[149]

Commentators have described the *Ehrlich* approach as a sensible middle ground in the impact fee debate.[150] A substantial number of states have followed *Ehrlich* in making the legislative/adjudicative distinction and now apply *Nollan/Dolan* heightened scrutiny only to legislatively imposed impact fees.[151] While these states argue that they benefit from a bright line rule,[152] the line between legislatively and adjudicatively imposed fees is often blurred.[153] Even the question of whether *Nollan* and *Dolan* involved exactions imposed adjudicatively or legislatively is debated.[154] In

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145. *Ehrlich*, 911 P.2d at 438.

146. *Id.* at 439; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 97–98 (1980) (discussing briefly that the purpose of the Fifth Amendment is to protect individuals from bearing a disproportionate cost of providing for the common good).

147. *Ehrlich*, 911 P.2d at 439.

148. CALLIES, CURTIN & TAPPENDORF, *supra* note 92, at 24; Curtin & Talbert, *supra* note 23, at 339–40.

149. Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001). For a detailed analysis of the *Krupp* decision, see Reznick, *supra* note 7, at 741–44.

150. CALLIES, CURTIN & TAPPENDORF, *supra* note 92, at 25; Curtin & Talbert, *supra* note 23, at 340.

151. *See* CALLIES, CURTIN & TAPPENDORF, *supra* note 92, at 25–28 (providing a brief overview of cases in various states following *Ehrlich* and stating that "[n]ationally, a trend has emerged in favor of the *Ehrlich* approach"); Curtin & Talbert, *supra* note 23, at 340–41 (listing Arizona, Maryland, Minnesota, Washington, and Colorado as following the *Ehrlich* trend); Reznick, *supra* note 7, at 740–41 (adding Illinois, Ohio, Oregon, and Texas to the list).

152. CALLIES, CURTIN & TAPPENDORF, *supra* note 92, at 25; Curtin & Talbert, *supra* note 23, at 340.

153. *E.g.*, B.A.M. Dev. v. Salt Lake County, 128 P.3d 1161, 1170 (2006) ("Some land-use decisions fall neatly within the legislative/adjudicative categorical framework. Most do not."); Bosselman, *supra* note 23, at 352 ("Even more difficult to define precisely is the distinction between legislatively imposed fees and fees determined on an ad hoc basis.").

154. *See supra* note 144 and accompanying text.

truth, municipal discretionary powers "exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction."[155] Even where a line can be drawn, the distinction may not be appropriate because applying different standards of review based on the adjudicative/legislative distinction is at odds with the doctrine of unconstitutional conditions, which is indifferent to the mechanism the state uses when conditioning a benefit on the surrender of a right.[156] If the doctrine of unconstitutional conditions applies, heightened scrutiny always will be appropriate, regardless of the adjudicative/legislative distinction.[157]

Additionally, having scrutiny turn on the adjudicative/legislative distinction is problematic because municipalities faced with heightened judicial scrutiny simply will shift the types of exactions imposed, often to the detriment of both the developer and the municipality.[158] For instance, instead of imposing "high-scrutiny" adjudicative impact fees, a municipality might choose simply to impose all impact fees through "low-scrutiny" legislative enactments. A municipality gains the advantage of minimized scrutiny, but imposing all impact fees legislatively eliminates the individual determinations of costs and benefits, thereby treating developers arbitrarily and possibly reducing returns to the city.[159] Both developers and governments can benefit when fees are tailored specifically to a particular project.[160]

Finally, drawing a bright-line rule may have an effect on who bears the ultimate cost of impact fees. Predictable, legislatively imposed fees that are applicable to all builders let builders know what fees to expect and whether to shift those fees either forward to buyers or backward to land sellers.[161] Where impact fees are imposed

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155. Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 266 (2000); *cf.* PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 838 (10th ed. 2003) (discussing the difficulties in distinguishing between adjudication and legislative rulemaking when deciding whether due process applies).

156. DANA & MERRILL, *supra* note 9, at 226–27; *cf.* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1433–34 (1989) (discussing cases involving the doctrine of unconstitutional conditions without regard to whether the conditions were imposed legislatively or adjudicatively).

157. *See* Sullivan, *supra* note 156, at 1421–22 (arguing that strict scrutiny should apply to state action constituting an unconstitutional condition).

158. Bosselman, *supra* note 23, at 348.

159. *Id.* at 348–49.

160. *Id.*

161. *See* Nicholas, *supra* note 8, at 96 (stating that this forward shifting can only occur where all developers bear the same exaction cost or demand is sufficiently inelastic, i.e., demand

adjudicatively in a less uniform system, the burden of paying the fees falls on builders, who lose the opportunity to shift costs.[162] This may have the unintended consequence of discouraging development and contributing to shortages.[163] However, when municipalities follow the requirement of the dual rational nexus test and make considerable efforts to quantify (1) the needs created by new development and (2) how a fee meets those needs, it seems far-fetched that "surprise" exactions will leave a developer holding the bag. Thus, adherence to the dual rational nexus test may sufficiently address the concerns faced by the *Ehrlich* court and obviate the need to distinguish between impact fees imposed adjudicatively and legislatively.

D. Nollan/Dolan *Applies to All Impact Fees*

Other scholars have argued that all forms of development exactions should be subject to heightened scrutiny equally.[164] Both developers and local governments want rules that facilitate the deal-making process, and neither is overly concerned about the form of the exaction.[165] Governments want developments that pay taxes and bring jobs and exactions that avoid complaints from residents concerning the type, quality, and cost of services they receive.[166] Developers are concerned about net cash outlays and limitations in profitability attributed to the exactions (minus the added value the exactions provide).[167] Neither is too concerned about the form of the exaction.[168] Therefore, if the *Dolan* test provides sufficient protection and reviewability for physical exactions, it should be applied to all forms of exaction.[169]

Applying heightened scrutiny to land dedications but not to impact fees would encourage cities to require fees instead of land dedications and may negatively affect both developers and cities.[170] Developers often prefer to dedicate land rather than money because

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remains constant as prices increase due to the forward shifting of impact fees); *see also* Nelson, *supra* note 8, at 93–94 (stating that in noncompetitive markets forward shifting can occur, but that generally in competitive markets builders require land sellers to internalize the fee).

162. Nicholas, *supra* note 8, at 97.

163. *Id.*

164. Bosselman, *supra* note 23, at 345.

165. *Id.* at 345–46.

166. *Id.* at 346.

167. *Id.*

168. *Id.* For a more detailed analysis of the differing objectives of governments and developers, see Leitner & Schoettle, *supra* note 110, at 73.

169. Bosselman, *supra* note 23, at 346.

170. *Id.* at 347.

developers generally have more land available than funding.[171] Also, by dedicating land the developer can ensure that the park, school, or widened street required by the municipality benefits its development, generating more profit.[172] Additionally, it is to the city's advantage to assess fees or dedications without worrying about the legal distinction between the two.[173] Generally, cities bargain for exactions to keep services high and general taxation low,[174] and they prefer to engage in the bargaining process without having to modify their behavior simply to achieve a lower standard of judicial review.[175]

IV. SOLUTION: THE DUAL RATIONAL NEXUS TEST IS BEST

Courts should not apply *Nollan/Dolan* heightened scrutiny to impact fees but should exempt impact fees altogether from takings jurisprudence. Impact fees compliant with state dual rational nexus tests should be upheld, and those that do not comply with these tests should be invalidated. Three reasons support this conclusion. First, the Supreme Court twice has reaffirmed unanimously that it will not extend *Nollan* and *Dolan* beyond the special context of physical exactions of land.[176] Second, impact fees are not a proper subject of any takings jurisprudence because no property right is "at stake." Finally, the risks associated with monetary exactions are best ameliorated by the more stringent dual rational nexus test.

A. The Supreme Court Does Not Extend Nollan *and* Dolan *Beyond the Special Context of Physical Exactions*

Twice a unanimous Supreme Court has held that *Nollan/Dolan* heightened scrutiny applies only to *physical* dedications of land exacted in exchange for the granting of a discretionary permit when, absent the exchange, the dedication would be a per se taking.[177] As this may be the clearest decree in the canon of takings law, disturbing

171. *Id.*

172. *Id.*

173. *Id.* at 347–48.

174. *See id.* at 346 (describing the city's interest in developments that contribute taxes which can be used to support the provision of additional services).

175. *See id.* at 352 (noting that "the legal fees associated with litigating the boundary lines between the various categories of exaction will penalize both developers and cities").

176. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546–47 (2005); City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702 (1999). The crucial language from *Del Monte Dunes* limiting *Nollan/Dolan* to physical dedications of land is in Part II of the opinion, which was specifically agreed to by the dissent. 526 U.S. at 733 (Souter, J., concurring in part and dissenting in part).

177. *Lingle*, 544 U.S. at 546–47; *Del Monte Dunes*, 526 U.S. at 702.

it would be lamentable. *Lingle*'s plain statement that *Nollan/Dolan* only applies to the special context of physical takings can only be confused by applying *Nollan/Dolan* to impact fees. Impact fees are not physical takings, and physical takings deserve heightened constitutional scrutiny because of the unique manner in which they infringe upon constitutionally protected liberties.

1. Physical Appropriations Deserve Heightened Constitutional Scrutiny

Physical exactions of land merit heightened scrutiny. Government action that actually appropriates private land or divests the owner of title to property is particularly burdensome on individual liberties and always has demanded just compensation.[178] As the Takings Clause has expanded over the centuries to include protection from takings by regulation, judicial scrutiny of actual physical appropriation has endured, and its *raison d'être* remains undisputed.[179] Physical exactions intrude on the use and enjoyment of land, the right to exclude others, the right to transfer property, and other protected property rights. These rights, when destroyed by government action, constitute considerable invasion and interference that warrant *Nollan/Dolan* heightened scrutiny.[180] On the other hand, impact fees do not restrict or regulate the use or enjoyment of land; impact fees leave no intrusive easements; impact fees do not burden the right to transfer property. In short, impact fees in no way cause harm similar to the harms that give rise to a *Nollan/Dolan* heightened concern. Paying the fees leaves property totally unburdened.

Commentators argue that physical and monetary exactions should be treated equally because, in a business deal between developers and the government, the form an exaction takes is inconsequential.[181] Even assuming that developers and municipalities do not care much about the form an exaction takes, it must be

178. *See* BOSSELMAN, CALLIES & BANTA, *supra* note 33, at 51, 99–103 (discussing the historical foundations of the Takings Clause).

179. *Id.* at 254.

180. *Contra* Juergensmeyer & Nicholas, *supra* note 23, at 366–67 (arguing that land dedications are just another form of financing public infrastructure improvements and therefore should be exempt from takings analysis). Justice Kennedy's list of land dedication cases, however, shows that land dedications are about much more than just financing public infrastructure. *See* E. Enters. v. Apfel, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in part and dissenting in part) (listing takings cases in which the land-use regulations were unrelated to public financing).

181. *See* Bosselman, *supra* note 23, at 346–47 (arguing that what matters is the bottom line and the benefits and burdens of the exaction).

remembered that not everyone is a developer or a municipality, and the form of the exaction can be of tremendous concern. The Nollans, for example, were not developers but owners of a single-family home who sought a discretionary permit to build a larger home on their coastal lot. Families often care a great deal about their right to exclude others from their property. Paying fees is one thing; having strangers trample through the children's sandbox is a different concern altogether. The former implicates little constitutional concern for the family seeking a remodeling permit; the latter implicates tremendous concerns. This reasoning, of course, is not limited to families. It is likely that most landowners care about who has access to their property. And developers, who have to assuage buyers' concerns about the rights running with the property they purchase, also care about the form an exaction takes. The unique nature of property and concern over government invasion of its use and enjoyment justify heightened scrutiny for physical exactions without requiring similar scrutiny of impact fees. Therefore, the Supreme Court's language in *Lingle* and *Del Monte Dunes* that treats physical takings of land differently is reasonable and should remain unmolested.

2. Impact Fees Do Not Amount to Per Se Physical Takings as Is Required for Heightened Scrutiny

Nollan and *Dolan* are limited to cases in which, if the government had acted outside the bargaining context, its actions would amount to a per se physical taking. Impact fees do not amount to per se physical takings; thus, *Nollan/Dolan* heightened scrutiny does not apply. In both *Nollan* and *Dolan*, the government had discretion whether to approve a petitioner's application for a building permit.[182] In each instance, the government approved the permit subject to the condition that a portion of the petitioner's land be dedicated as a public easement.[183] The conditions were "so onerous," said the Supreme Court, "that, outside the exaction context, they would be deemed *per se* physical takings."[184] Because the government

182. Dolan v. City of Tigard, 512 U.S. 374, 380 (1994) (involving a permit subject to denial on account of Dolan's intention to build within the one-hundred-year floodplain); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987) (involving a development conditioned upon the Nollans obtaining a coastal development permit). *But see* Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 61 (1989) (stating that *Nollan* never had to reach the question of unconstitutional conditions).

183. *Dolan*, 512 U.S. at 379–80; *Nollan*, 483 U.S. at 828.

184. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005).

could not appropriate the easements directly without paying compensation, it likewise could not condition permit approval on dedicating the easements.[185] Thus, when looking at the situation outside the exaction context, the taking would be unconstitutional.

Contrarily, when the government requires impact fees, the grant of a permit is not contingent on the landowner surrendering a right that, outside the exaction context, would be deemed a per se physical taking. Indeed, the government does not require the property owner to surrender any constitutionally protected property right at all; the government merely conditions the permit on payment of money. Only if the government demanded a fee that was so onerous that outside the exaction it would be deemed a per se physical taking could *Nollan/Dolan*'s heightened scrutiny apply.[186] Certainly ordinary fees do not rise to this level. An ordinary fee may interfere with reasonable investment-backed expectations or have an economic impact, but those concerns implicate *Penn Central* review and are insufficient to reach *Nollan/Dolan* scrutiny.

It seems the only conceivable way for an impact fee to result in a per se physical taking is to imagine an impact fee so high that it deprives an owner of all economically beneficial use of his property. This situation is similar to *Lucas v. South Carolina Coastal Council*, in which a developer was denied the right to build any permanent structure on his beachfront property.[187] The Supreme Court recognized that government regulations totally depriving owners of *all* economically beneficial use of property are per se takings.[188] However, in two situations *Lucas*'s per se rule is limited by other Supreme Court precedent: (1) total deprivation of all beneficial use on only a fraction of a parcel is not a per se taking,[189] and (2) total deprivation of all beneficial use for a temporary period is not a per se taking.[190] *Penn Central*, not *Lucas*, governs instances in which a less-than-total deprivation of all economically beneficial use is at issue.[191] Applying *Lucas* and these two *Lucas*-limiting cases to impact fees leads to a conclusion that a fee that approximates actual appropriation—a fee so

185. *Id.* at 546–47; *cf.* Sullivan, *supra* note 156, at 1415 (describing the doctrine of unconstitutional conditions).

186. *Lingle*, 544 U.S. at 546–47.

187. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008–09 (1992).

188. *Id.* at 1030–31.

189. Palazollo v. Rhode Island, 533 U.S. 606, 631 (2001).

190. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

191. *Id.* at 321 (holding that "the circumstances in this case [involving a temporary moratorium] are best analyzed within the *Penn Central* framework").

high that any and all reasonable, economically beneficial use is precluded—may be a per se taking. Such fees would have to be astronomical, however, to deny a developer *all* economically beneficial use. Anything less than a total deprivation of all economically beneficial use is merely a fractional deprivation, conceivably can be paid, and, once paid, all property rights remain. Because a less-than-astronomical fee can conceivably be paid without total deprivation of economically beneficial use, *Lucas*'s concern of per se taking of physical property mirroring physical appropriation is not an issue. Rather, impact fees appear more like total takings on a fraction of land or total takings for a temporary period: the fees may seriously hamper development but do not preclude development. Thus, if takings jurisprudence must apply, the *Penn Central* test should govern.[192]

Finally, even if a court found that an impact fee could and did deprive an owner of all reasonable, economically beneficial use of his property, the court could invalidate the fee easily under *Lucas* and avoid a contorted *Nollan/Dolan* analysis. Thus, if one forces regulatory takings jurisprudence on impact fees, either *Lucas* or *Penn Central* would govern rather than *Nollan/Dolan*. This result is unacceptable because it leaves property owners insufficiently protected: *Penn Central* applies no heightened scrutiny, and *Lucas* situations are too rare.[193]

B. No Property Right Is "at Stake" When Governments Impose Impact Fees

Impact fees do not regulate land use and, therefore, should be exempt not only from *Nollan/Dolan* scrutiny, but from all takings jurisprudence. The subject of regulatory takings jurisprudence always has been ordinances regulating land *use*,[194] such as easements, transfers in title, changes in permitted use, or other alterations in the

192. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (instructing that the pertinent test involves a consideration of the "interference with [distinct] investment-backed expectations" and the "economic impact").

193. *Lucas*, 505 U.S. at 1018 (calling per se takings "relatively rare"). This author questions whether fees denying all economically beneficial use of property can ever be involved in a development deal. *See supra* Part IV.A.ii (discussing the necessity for fees to be infinitely high for *Lucas* to apply).

194. *See* Juergensmeyer & Nicholas, *supra* note 23, at 366 ("[T]akings cases and principles should and largely do focus on *use* restrictions placed on land.").

"bundle" of rights associated with the property.[195] Further, the Supreme Court always has dismissed takings challenges when the interests in need of protection are not sufficiently bound up with reasonable expectations to constitute "property" for Fifth Amendment purposes.[196] The crux of the issue, therefore, is whether an impact fee triggers the Takings Clause because it results from government regulation measured by, applicable to, operating upon, or altering an identifiable property interest,[197] or whether the clause is not triggered because the fee is merely an attempt to adjust the benefits and burdens of economic life.[198] The latter is the better understanding. Impact fees result in no alterations of property rights. The fees do not deny uses, regulate uses, leave easements, permit invasion, condemn rights, transfer title, or alter any property interest or right. Payment of impact fees leaves all property interests—all the "sticks" in the bundle of rights—intact. The fees only make the exercise of the right to develop more expensive. Impact fees are better viewed as attempts to raise funds for infrastructure improvement and to adjust the benefits and burdens of economic life, which is not traditionally a subject of takings jurisprudence.[199] Though some commentators argue that both physical and monetary exactions share the purpose of funding infrastructure improvements and should not be subject to takings jurisprudence,[200] physical exactions also directly regulate land use and alter property rights. Thus, takings jurisprudence is appropriately applied to physical exactions and not impact fees.

Although impact fees, as Justice Kennedy would say in *Eastern Enterprises*, may "regard" and "operate upon" property, applying takings jurisprudence to every regulation that "regards" and "operates upon" property expands the reach of the Fifth Amendment too far and unreasonably blurs the line between due process and takings analyses. Takings analysis already has expanded from administering

195. *See Lucas*, 505 U.S. at 1027 (stating that takings jurisprudence has traditionally been guided by the citizens' understanding of the "bundle of rights" accompanying title to property and the state's power over those rights).

196. *Penn Cent.*, 438 U.S. at 124–25.

197. E. Enters. v. Apfel, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in part and dissenting in part) (arguing that a piece of legislation did not take property because it "d[id] not operate upon or alter an identified property interest, and it [wa]s not applicable to or measured by a property interest").

198. *Penn Cent.*, 438 U.S. at 124–25.

199. Bosselman, *supra* note 23, at 347–48; Juergensmeyer & Nicholas, *supra* note 23, at 360.

200. Juergensmeyer & Nicholas, *supra* note 23, at 358–60 (discussing cases from the mid-1970s and early 1980s and describing the "original sin" of labeling required dedications and "in lieu of" payments as land-use regulations).

only physical appropriation and divesting of title[201] to administering all land-use regulations.[202] Though now reasonably limited to land-use regulations,[203] Justice Kennedy's language, if adopted as a new test for takings analysis, would expand the Takings Clause to any government action "regarding" or "operating upon" a property right.[204] According to this interpretation, impact fees "operate upon" property and are imposed according to the size of the property and the impact of its use, thus subjecting the fees to takings analysis.[205] But to what degree of attenuation could the "regarding" and "operate upon" language be stretched? Do mining fees "operate upon" property rights? What about patent registration fees? Vehicle licensing fees? Any fee could "regard" or "operate upon" property and thus merit Takings Clause protection. Also, considering the uncertain distinction between fees and taxes,[206] it would not be inconceivable to see courts apply the Takings Clause to taxes that "operate upon" property. Softening the Takings Clause's outer limit essentially transforms the Clause from a protection against invasion of property rights and use regulations to a protection against any government action that even remotely concerns property.

Rather than limiting their focus to whether government action "operates upon" property, courts would be wise to consider Justice Kennedy's concern as to whether "a specific property right or interest [is] *at stake*."[207] Examples of "at stake" property interests in past cases include permanent public easements, total deprivation of the right to build, or denial of the right to use air space.[208] In *Lingle*, Justice Kennedy agreed in his concurrence that these cases share a common touchstone: they identify regulatory action that is functionally equivalent to the classic taking in which "government directly appropriates private property or ousts the owner from his domain."[209] Demanding large, onerous fees in exchange for a discretionary permit

201. BOSSELMAN, CALLIES & BANTA, *supra* note 33, at 106.

202. *Id.* at 141.

203. *See supra* note 194.

204. If presently there is "great uncertainty about the scope of th[e] Court's takings jurisprudence," as suggested by Justice Stevens in *Nollan*, 483 U.S. at 866, applying takings analysis to all state action "operating upon" property rights would likely add to the confusion. It is difficult to believe that Justice Kennedy, after lamenting that regulatory takings cases are some of the most "litigated and perplexing in current law," intended to open up a new category of government regulation to takings analysis. E. Enters. v. Apfel, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in part and dissenting in part).

205. Reznick, *supra* note 7, at 755.

206. *Cf.* EPSTEIN, *supra* note 94, at 283–89 (discussing takings and taxation).

207. *E. Enters.*, 524 U.S. at 541 (emphasis added).

208. *Id.* at 541–42.

209. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

does not destroy the right to build, nor is it the functional equivalent of a direct appropriation or ouster, and thus it does not put a property right "at stake."[210] Particularly onerous or arbitrarily imposed fees may compromise some other protected right but not the right to take private property for public use. Thus, the rational limit of the Takings Clause should be maintained by applying the clause only to land-use regulations when a property right is at stake and not to impact fees that seek merely to determine how public infrastructure improvements will be financed.

Additionally, impact fees do not raise the same concerns over property rights that justify review under the Takings Clause. The concern at the heart of the Takings Clause is that the state will use its eminent domain power to obtain rights in property that rightfully can be obtained only by paying just compensation.[211] This concern applies to physical exactions; thus, takings jurisprudence and heightened scrutiny prevent the government from using either condemnation or bargaining to avoid paying just compensation.[212] With impact fees, however, there is no concern that the state is trying to take property without paying just compensation; the state obtains no property interest during the process. Furthermore, applying the Takings Clause to impact fees would mean that the government could "take" an excessive fee only as long as it pays just compensation for that fee.[213] Requiring payment of just compensation for a cash demand is nonsensical.

Classifying impact fees as takings-exempt financing regulations instead of takings-governed land-use regulations is both useful and manageable. Not only will one category of government action be removed from the "takings maze," but it can be done without changing current federal takings laws, which presently do not encompass impact fees. Further, courts easily can distinguish government action regulating property use from fundraising for infrastructure improvements. Infrastructure financing regulations raise a different set of concerns than land-use regulations and thus

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210. *Cf.* Palazollo v. Rhode Island, 533 U.S. 606, 631–32 (2001) (holding against the takings claim where regulations reduced a property's developable acres from eighteen to two but where there was no total deprivation of economic use).

211. DANA & MERRILL, *supra* note 9, at 3–4.

212. *Cf.* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987) (stating that California could proceed by using its power of eminent domain, but "if it wants an easement across the Nollans' property, it must pay for it").

213. *See* Juergensmeyer & Nicholas, *supra* note 23, at 364 (explaining that the damages to a property owner for an excessive impact fee must equal the interest on the reasonable value of what had been taken).

are deserving of different treatment in the courts.[214] Whereas the constitutional concern with land-use regulation is that the government will appropriate or interfere with a property right without paying just compensation, the concern with financing regulation is that the government will impose arbitrary and abusive fees.[215] Courts can address that concern better outside takings analysis by using the dual rational nexus test.

Removing the Takings Clause analysis does not necessarily mean that impact fees would or should be subject to due process review. The due process clause of the Constitution states that citizens shall not be deprived "of life, liberty, or property, without due process of law."[216] This clause protects citizens from arbitrary and capricious government action that is fundamentally unfair[217] and "infringe[s on] fundamental principles as they have been understood by the traditions of our people and our law."[218] Courts apply strict scrutiny only when fundamental liberties are infringed, and greater deference is granted to states regulating non-fundamental liberties such as economic interests.[219] Because impact fees are devices designed to facilitate infrastructure improvement financing that implicates economic interests, it is difficult to fathom courts treating the fees with heightened scrutiny.[220] Considering the serious issues that excessive fees raise, especially regarding the fear of extortion, substantive due process review provides insufficient protection.

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214. *Id.* at 365–66.

215. *See id.* at 367 (stating the different purposes in land-use regulations and impact fees).

216. U.S. CONST. amend. V.

217. *See* E. Enters. v. Apfel, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting) (arguing that the Due Process Clause "can offer protection against" laws that are "fundamentally unfair because of [their] retroactivity").

218. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), *overruled by* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963).

219. MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S 192 (2001); *see also* Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (stating that it is for legislatures, not courts, to balance the advantages and disadvantages of economic regulations).

220. When determining whether a right is "fundamental," courts should consider "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Washington v. Glucksburg, 521 U.S. 702, 720–21 (1997). Courts also can consider that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992). Either path you take, it is hard to see how impact fees deny a fundamental liberty interest.

C. The Risks Associated with Infrastructure Financing Regulations Can Best Be Mitigated by Application of the Dual Rational Nexus Test

Courts should apply the common-law dual rational nexus test to all impact fees. The dual rational nexus test provides protection that is more stringent than that provided by the other federal takings tests. Whereas *Penn Central* merely requires a weighing of factors and *Nollan/Dolan* requires "rough proportionality" and an "essential nexus," the dual rational nexus test requires a specific analysis of the needs created by the development and the funds collected to be used to benefit the development. Thus, courts actually increase protection of private property rights by exempting impact fees from federal takings analysis.

The *Ehrlich* approach—applying *Nollan/Dolan* heightened scrutiny only to adjudicatively imposed fees—insufficiently protects against government abuse. A central reason for applying *Nollan/Dolan* heightened scrutiny to impact fees is the fear of "out-and-out plans of extortion."[221] In *Ehrlich*, for example, the court argued that applying heightened scrutiny is necessary to ensure that governments do not use their monopoly power over development permits to impose illegitimate conditions lacking logical connection to the impact of the proposed development.[222] Extortion concerns increase when political constraints on the legislative process are weak.[223] Thus, courts following *Ehrlich* apply heightened scrutiny to impact fees that are imposed adjudicatively but not to those imposed legislatively.[224] This view reflects a longstanding distrust of state legislatures' propensity to protect citizens' rights.[225] Early Americans, however, not only feared the ad hoc decisions of government officials but also mistrusted all legislative decisions.[226] Governmental abuse can occur with either type of decision. If the result is a constitutional violation, the manner through which it was imposed should not matter. The *Ehrlich* approach only increases constitutional protection from the danger of

221. Dolan v. City of Tigard, 512 U.S. 374, 387 (1994); *accord* Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996).

222. *Ehrlich*, 911 P.2d at 444.

223. *Id.*

224. *Id.* at 447.

225. Treanor, *supra* note 35, at 704–05.

226. *Id.*

an arbitrary administrative body; the threat posed by irrational, legislatively imposed fees is left undeterred.

Additionally, applying heightened scrutiny to administrative and not legislative decisions incentivizes a shift of fee decisions to legislatures that then would set the fees in generally applicable rules.[227] Generally applicable rules, because of their rigidity, may be more likely than adjudicative rules to yield unfair results[228] because they reduce the ability of developers and the government to barter.[229] Contrary to the *Ehrlich* court's belief that only the government has a strong hand at the bargaining table, local governments often want to attract development and even waive fees to attract economically beneficial land-use projects.[230] Therefore, it is possible that both parties would disfavor legislatively imposed fees.

Even if *Nollan* and *Dolan* applied to both legislatively and adjudicatively imposed impact fees, they would provide less protection from extortion than the dual rational nexus test. The dual rational nexus test demands (1) extensively calculating the impact of a proposed development on infrastructure and (2) earmarking the fees to benefit the development.[231] Though *Dolan* does require some sort of relationship between the nature and extent of the impact, no individualized mathematical calculation is required—the test only demands that the determination be "roughly proportional."[232] The "rough proportionality" language of *Dolan* is appropriate in physical dedications, where it is understandably difficult to create an exact accounting of a need for land. For example, the amount of land that needs to be dedicated to improve water drainage or the types of easements that can reduce psychological barriers to beaches are not easy to calculate. But where more exact calculations are possible, as is the case with capital financing through impact fees, rough estimates are inappropriate. Governments and developers are expertly qualified to make cost projections. Requiring detailed, specific projections of needs and benefits before imposing impact fees provides a substantial check on government extortion—even greater than would be available under *Nollan/Dolan*'s heightened scrutiny.

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227. Bosselman, *supra* note 23, at 348.

228. *Cf. id.* at 352 (explaining that "the distinction between a development exaction and a denial of development approval isn't easy to make in complex cases").

229. *Cf. id.* (noting that "[d]evelopment negotiations can be very intricate" and that "any potential land dedication creates a whole new set of decisions about fees to be paid").

230. *Id.* at 350.

231. Juergensmeyer & Nicholas, *supra* note 23, at 362–63; Leitner & Schoettle, *supra* note 110, at 61–62 (listing the factors weighed when analyzing impact fees).

232. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

Courts should not incorporate the dual rational nexus test for monetary exactions into takings jurisprudence as they did the rational relationship test for physical exactions. In addition to the special constitutional concerns of property rights and the inapplicability of the Takings Clause to impact fees, analysis of the dual rational nexus test requires review of the detailed, fact-specific calculus used to determine the benefits and burdens of the actions reviewed. State courts have managed to handle such a calculus for two decades.[233] Federal courts should exempt impact fees from federal takings analysis and review impact fees under state dual rational nexus tests. Courts can best protect against fears of extortion, avoid further muddling the Takings Clause, and leave detailed analyses of benefits to experienced state courts by refusing to apply takings analysis to monetary exactions regardless of whether the exactions are legislatively or adjudicatively imposed.[234]

V. CONCLUSION

As cities like Naples seek to fund the infrastructure improvements necessary to serve growing populations in the face of limited state and federal resource contributions, impact fees will continue to play a vital role. Builders, forced to bargain with local governmental entities holding monopoly power over the grant of building permits, are rightly concerned about impact fees that amount to little more than "out-and-out plans of extortion." Appling the dual rational nexus test to impact fees is the best way for courts to protect the rights of property owners, facilitate the collection of only necessary impact fees, and ensure that the funds generated from those fees benefit the targeted party. These benefits are not sufficiently protected under *Nollan/Dolan* heightened scrutiny. Besides these practical advantages, reviewing impact fees under the dual rational nexus test and not *Nollan/Dolan* heightened scrutiny follows unanimous decisions by the Supreme Court that reserve a distinct place in takings jurisprudence for actual appropriation, destruction, or invasion of property. Finally, exempting impact fees from takings jurisprudence maintains a definable and reasonable outer limit to the government's power under the Takings Clause—government action

233. Texas adopted the first impact fee in 1987, and now twenty-seven states have impact fee statutes. *See* MULLEN, *supra* note 119.

234. *Cf.* Note, *supra* note 28, at 1001 ("[T]he Court has expressed deep-seated doubts about the competence of judges, working from the federal Constitution alone, to construct detailed equations of harm and benefit in an effort to second-guess legislatures.").

that actually regulates the use of property and causes specific, identifiable property rights to be "at stake."

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