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The Impact of a Federal Takings Norm on Fashioning a Means-Ends Fit under Takings Provisions of State Constitutions

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Articles

The Impact of a Federal Takings Norm on Fashioning a Means-Ends Fit Under Takings Provisions of State Constitutions*

James E. Holloway** & Donald C. Guy***

* There is a companion paper titled *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities.* This article examines the impact of federal takings analysis on the use of development impact exactions such as impact fees and linkage programs to implement municipal social welfare goals, such as affordable housing and recreation. This article will be published in an upcoming edition of the DICKINSON JOURNAL OF ENVIRONMENTAL LAW AND POLICY.

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APPENDIX A: CONTINUUM FOR TAKINGS STANDARDS OF REVIEW

I. Introduction

The means-ends fit[1] between development impact exactions[2] and their declared public purposes and related policy justifications[3]

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1. *See infra* notes 150-212 and accompanying text.
2. *See infra* notes 106-149 and accompanying text.
3. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 1635-37 (1999); Dolan v. City of Tigard, 512 U.S. 374, 386 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987). *See also infra* notes 150-212 and accompanying text (examining the development of the means-ends fit between development impact exactions and government regulatory purposes and policy justifications).

In *Del Monte Dunes,* the United States Supreme Court granted a *writ of certiorari* to the United States Court of Appeals for the Ninth Circuit for the City of Monterey v. Del Monte Dunes at Monterey, Ltd., 95 F.3d 1422 (9th Cir. 1996), *reh'g denied*, 127 F.3d 1149 (9th Cir. 1997), *cert. granted*, 523 U.S. 1045 (1998), *aff'd*, 119 S. Ct. 1624 (1999), to decide two issues. The City of Monterey, petitioner, denied the respondent a site development permit after it made several applications over a period 5 years. *See Del Monte Dunes*, 119 S. Ct. at 1632-33. Respondent brought a Section 1983, 42 U.S.C. § 1983, claim, alleging that it had been denied the right to receive just compensation in violation of the Federal Takings Clause. *See* U.S. CONST. amend V. *See Del Monte Dunes*, 119 S. Ct. at 1633. The United States District Court for the Northern District of California submitted the regulatory taking claim to a jury and awarded respondent $1.45 million in damages for a denial of right to receive just compensation caused by the long delay in refusing to grant the site development permit. *See id.* at 1634. The Ninth Circuit affirmed the judgment of the district court. *See id.* The Ninth Circuit concluded that respondent's claim was a question of fact and thus entitled to be decided by jury. *See id.* It also concluded that a relationship or connection between the denial of the permit and proffered justifications was lacking under the Court's precedents. *See id.* at 1634.

The Court granted *certiorari* to decide whether *Nollan* and *Dolan* apply to a regulatory taking claim where the landowner alleged an insufficient connection between the denial of a site development permit and the proffered policy justifications of the City of Monterey. *See Del Monte Dunes*, 119 S. Ct. at 1634. The Court concluded that *Nollan* and *Dolan* do not apply to regulatory taking claims that challenge the validity of a regulatory denial for site development permit. *See id.* at 1635. The Court concluded that the reasonably related test was the standard of review for zoning decisions, such as regulatory denials. *Id.* at 1635-36. Most importantly, the Court stated that *Dolan*'s rough proportionality applies to exactions, *Id.* at 1635, but did not state whether they had to be adjudicative actions or legislative determinations.

The Court also granted *certiorari* to decide whether a regulatory taking claim brought under Section 1983, 42 U.S.C. § 1983, for deprivation of the right to receive just compensation under the federal takings clause is a question of law for the court or question of fact for the jury. *See Del Monte Dunes*, 119 S. Ct. at 1637. The Court concluded that a regulatory taking claim brought under Section 1983 to recover damages for deprivation of the right to receive just compensation when the City of Monterey refused to grant a development permit over a protracted period of time is a question of fact for the jury. *See id.* at 1644-45. *Del Monte Dunes* offers no substantive guidance to change our understanding on and analysis of the impact of the federal takings analysis on the interpretations of state takings provi-

under state regulatory taking claims[4] is a vagary of standards of review[5] that had remained well-settled under interpretations of state takings provisions[6] for almost 30 years.[7] Establishing this means-ends fit under state and federal takings provisions requires that exactions directly advance a legitimate public purpose and that exactions also be directly supported by policy justifications based on the impact of development. A stringent standard of judicial review imposes a means-ends fit that prevents local and state governments from demanding uncompensated public benefits by imposing exactions. During these thirty years, each state's highest court had established for state and federal regulatory taking claims, which arise under federal and state takings provisions, the same standard of review.[8] Although the state appellate courts adopted several different means-ends fits, the diversity among these standards or fits for regulatory taking claims arising under the federal takings clause[9] creates certainty within each state's takings analysis and norm.

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sions. Applying the reasonably related test to ad hoc zoning decisions does not effect our analysis or conclusions. Of course, we *are still inclined to conclude* that the *Nollan-Dolan* means-ends analysis should apply to extortive exactions other than land dedication conditions. Likewise, we are inclined to think that the Court would be wise to apply *Dolan* to legislative determinations that impose *excessive* exactions on development solely to avoid heightened scrutiny under the takings clause.

4. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-15 (1922); *infra* notes 150-212 and accompanying text. In *Pennsylvania Coal*, the Court created the federal regulatory taking doctrine by concluding that land use regulations and other exercises of police power authority may impose an unreasonable burden and thus take property rights in violation of the Takings Clause of the United States Constitution. *See* U.S. CONST. amend. V. *Pennsylvania Coal*, 260 U.S. at 413-15. State courts have adopted the regulatory taking doctrine under takings provisions of state constitutions. *See Dolan*, 512 U.S. at 389-91; *see infra* notes 220-228 and accompanying text. They have also applied the federal takings doctrine in disputes that raised regulatory taking claims under both federal and state takings provisions. *Dolan*, 512 U.S. at 389-91.

5. *See Dolan*, 512 U.S. at 389-92.

6. *E.g.*, ORE. CONST. art. I, § 18; N. J. CONST. art. IV, § VI, para. 3; NEB. CONST. art. I, § 21; N. D. CONST. art I, § 16; CONN. CONST. art. I, § 11; MO. CONST. art. I, § 26; MD. CONST. art. III, § 40; WASH. CONST. art. I, § 16 (amend 9); CAL. CONST. art. I, § 19; ARK. CONST. art. 2, § 22; N. H. CONST. pt. I, art. XII; MICH. CONST. art. X, § 2; IDAHO CONST. art. I, S. 14; UTAH CONST. art. I, § 22.

7. *See Dolan*, 512 U.S. at 389; *see also Nollan*, 483 U.S. at 836-37; David Skover, *Powers of and Restraints on "Our Federalism": State Authority under the Federal Constitution*, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVE at 21 (ed. Advisory Commission on Intergovernmental Relations), July 1989.

8. *See Dolan*, 512 U.S. at 389-92; *infra* notes 224-228 and accompanying text.

9. *See* U.S. CONST. amend. V.

Under the federal takings clause, either diversity or certainty goes too far. The United States Supreme Court established a uniform means-ends fit, starting in 1987, to ensure greater protection for the federal right to receive just compensation as a forceful limitation on states' authority and powers to impose land dedication conditions and perhaps other exactions.[10] The Court underpins the uniform means-ends fit with forceful doctrine[11] and procedural shifts[12] to effect heightened scrutiny of regulatory taking claims

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10. *See Dolan*, 512 U.S. at 390-91; *infra* notes 195-199 and accompanying text.

11. *See Dolan*, 512 U.S. at 383-84. In *Dolan*, the Court applied the unconstitutional conditions doctrine to protect the right to receive just compensation. *See Dolan*, 512 U.S. at 385. It applied the unconstitutional conditions doctrine to determine whether regulatory taking claims that challenge the constitutional validity of land dedication conditions should be subject to heightened scrutiny. *Id.* The Court concluded that these claims challenging land dedication conditions should be subject to heightened scrutiny. *See id.* at 391. The Court stated that:

> The government may not require 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 property sought has little or no relationship to the benefit.

See id. at 385. Commentators have found the unconstitutional conditions doctrine confusing and frustrating. *See, e.g.,* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 13 (1988); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 781-84 (1988).

12. *See Dolan*, 512 U.S. at 391-92 & 391 n.8. *See also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999) (*Del Monte Dunes* adds another consideration in the federal judicial process to resolve a few regulatory takings claims by requiring a jury trial.). For the pertinent facts and most relevant issues of *Del Monte Dunes* in our analysis, *see supra* note 3 and accompanying text.

In *Dolan*, the Court found that the burden of proof for regulatory taking claims challenging land dedication condition rests with municipal governments. *See Dolan*, 512 U.S. at 391 n.8. The Court also concluded that the strong presumption of validity bestowed on legislative determinations did not necessarily apply to land dedication conditions. *See id.* at 391-92. The Court did not explicitly state that a land dedication condition was not presumptively valid. It however refused to accept Justice Stevens' proposition that the "city's conditional demand for part of petitioner's property are 'species of business regulation that heretofore warranted a strong presumption of constitutional validity.'" *See id.* at 392 (citing *Dolan*, 512 U.S. at 402 (Stevens, J., dissenting)). The Court noted that conditional demands, though business regulation, is not "immunize[d] . . . from constitutional challenge . . . . " *Id.* It observed that business regulation was subject to challenge under the First Amendment, U.S. CONST. amend. I, and Fourth Amendment, U.S. CONST. amend. IV, and thus saw no reason to relegate the Takings Clause of the Fifth Amendment, U.S. CONST. amend. V, to a lesser status. *Dolan*, 512 U.S. at 392. One could easily conclude that conditional demands possess a severely weakened presumption of validity or no presumption of validity at all. We conclude for the time being that with the burden of proof resting on municipal governments, conditional demands generally do not possess a presumption of validity enjoyed by zoning and other legislative determinations. This lack of or

that challenge the validity of state and local impact exactions.[13] This national uniformity eliminates diversity among federal standards established by state courts that had generally applied one of three standards of review to federal and state regulatory taking claims. The elimination of diversity among state-created federal means-ends fits requires state courts to interpret state takings provisions whose standards are inconsistent with or repugnant to the federal takings analysis and norm.[14] Such interpretations raise the issue whether states' highest courts will adopt and follow the federal analysis or develop an independent state analysis and norms for regulatory taking claims challenging the validity of land dedication conditions and other exactions. State courts may give the right to receive just compensation of state takings provisions protection equal or greater than the protection the Court gives the

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severely weakened presumption effects intermediate scrutiny that makes the right to receive just compensation a more forceful limitation on the exercise of police power authority. Several commentators examined the effects of shifting the burden of proof and presumption of validity in land use disputes that raised regulatory taking, rezoning and other land use claims. *See, e.g.,* Marshall S. Sprung, Note, *Taking Sides: The Burden of Proof Switch in Dolan*, 71 N.Y. U. L. REV. 1301 (1996); *see also* Allison B. Waters, *Constitutional Law-Takings-City Planners Must Bear the Burden of Rough Proportionality in Exactions and Land Use Regulation, Dolan v. City of Tigard* 114 S. Ct. 2309, 37 S. TEX. L.J. 267 (1996); Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301 (1996); Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hopperton*, 24 B.C. ENVTL. AFF. L. REV. 103 (1996); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW 1 (1992) (hereinafter Mandelker and Tarlock (2)).

Some commentators have discussed the impact of *Dolan* on regulatory taking claims. *See, e.g.,* David A. Dana, *Land Use Regulations in the Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1253-1261 (1997); *see also* Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE *DOLAN* ERA at 145-146 & 145 n.221. (Robert H. Freilich & David W. Bushek, eds., 1995); Robert H. Freilich & David W. Bushek, *Public Improvements and the Nexus Factor: The Takings Equation after Dolan v. City of Tigard,* EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE *DOLAN* ERA at 3,13. (Robert H. Freilich & David W. Bushek, eds., 1995); Dwight W. Merrian & Jeffrey Lyman, *Dealing with Dolan, Practically and Jurisprudentially*, ZON. & PLAN. L. RPT., Sept. 1994, at 57. Generally, they agree that the shifts in burden of proof and presumption of validity could have the greatest impact on determining whether a land dedication condition is a regulatory taking in violation of the federal takings clause. Such impact should extend to state takings provisions that must not violate the minimum federal standard.

13. *See supra* notes 11-12 and accompanying text.
14. *See infra* notes 64-67 and accompanying text.

federal right to receive just compensation.

The paper recognizes that the federal uniform means-ends fit will eventually result in interpretations of state takings provisions to establish state means-ends fits between exactions and their public purposes and policy justifications. Federal uniformity most likely leaves more than a few state means-ends fits or standards of review inconsistent with the federal means-ends fit for federal regulatory taking claims.[15] The paper analyzes three states' judicial decisions that establish means-ends fits under state takings provisions in light of the federal fit or standard. These means-ends fits are representative of the means-ends fits that have been applied by state courts. For more than 30 years, state means-ends fits established an equitable balance between public and private interests in land development and its effects on the community. Adjusting these means-ends fits may not be enough in that more forceful constitutional doctrine and process are needed to implement heightened scrutiny to protect the federal right to receive just compensation. State courts cannot summarily dismiss or totally ignore this doctrine or process in establishing an independent state means-ends fits under state takings provisions.[16] Heightened scrutiny treats the right to receive just compensation as a forceful limitation on local authority to design and implement impact exactions. The paper is not an exhaustive analysis of each state standard of review and thus only covers the means-ends fit of three states. But as stated immediately above, these standards are representative of those standards applied by state courts, and any interpretations by the three state courts must, as a minimum, indicate how other state courts that must interpret similar or identical standards will likely interpret their state takings provisions. The paper discusses the most likely impacts of federal taking analysis on the interpretation of state takings provisions to establish a state means-ends fit. Such impacts are adopting the uniform federal analysis, establishing an independent state takings analysis, or maintaining the present state takings analysis.

Parts II and III explain constitutional jurisprudence regarding divergence in federal and state constitutional analyses and also examine federal constitutional analysis and norms of the takings clause. Part II explains differences in federal and state takings provisions, discusses uniformity and diversity in constitutional

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15. *See id.*
16. *See Dolan*, 512 U.S. at 396.

analyses and identifies limitations on state authority in our federalism. Part III discusses the exercise of police power authority by municipal governments to impose impact exactions. It examines the federal takings analysis and norms established to ascertain the means-ends fit between an exaction and its public purposes and development impacts. These analysis and norms also include the application of old constitutional doctrines and new constitutional processes to underpin the federal means-ends fit that taken together protect the federal right to receive just compensation by effecting heightened scrutiny. Parts II and III are necessary in that an unnecessary presence by the Federal Judiciary in purely state fields of law and public policy is no more acceptable under federalism than an unnecessary presence by Congress under its legislative authority.

Parts IV through VI set forth state constitutional analyses and norms under state takings provisions. These parts examine three states' judicial decisions that determine the appropriate state means-ends fit between exactions and development impacts in light of the federal means-ends fit. Part IV examines the nature of the reasonable relationship test that is the standard of review for state regulatory taking claims in a majority of states. It explains that a type of reasonable relationship test is the federal norm, but it was given a new name to show greater protection, actually heightened scrutiny, for the right to receive just compensation. It analyzes decisions of the Oregon appellate courts that refashion their deferential reasonable relationship test to establish a means-ends fit under the Oregon takings provision in light of the federal norm and its forceful doctrine and procedural shifts. Next, Part V examines the nature of the reasonableness test that is the standard of review for regulatory taking claims of a minority of states. It explains that the reasonableness test establishes a means-ends fit that raises a substantial question regarding the constitutionality of its level of scrutiny under the federal norm and its doctrine and procedural measures. It analyzes the seminal decision of California appellate courts that are refashioning the highly deferential reasonableness test under the California takings provision in light of the federal norm. Part VI examines the nature of the specifically and uniquely attributable test that is the standard of review for regulatory taking claims of a few states. It recognizes that the specifically and uniquely attributable test is a higher level of scrutiny than the federal standard of review. However, the higher level of scrutiny is effected by more forceful federal doctrine and procedural shifts that require consideration of the influence of these shifts on the

means-ends fit established under the Illinois standard.

Part VI and the conclusion address public policy, legal and political risks to state land use and property laws that are jointly affected by the development of the federal takings analysis and norms. Part VI points out the implications of tying state constitutional interpretations too closely to an undeveloped federal analysis and unsettled federal norms that directly affect well-established state fields of law. It points out the potential for a partial federalization of land use policy and real property law in the application of the federal takings norm and procedural shifts to local land use disputes and policies that reflect local policy choices best resolved by local debates and politics. Finally, the conclusion finds that state courts that gave similar interpretations to parallel federal and state takings provisions probably cannot avoid making or at least considering some constitutional interpretations in light of the federal norm and procedural shifts. The conclusion states that a few state courts must refashion one or more standards of review and that all courts need to consider the impact of federal doctrinal and procedural shifts on old and new standards. Such constitutional analysis leads state courts to delve in the uncertainty and confusion of the federal takings analysis and its changing doctrine and process.

II. State Constitutional Analysis and Norms Under Federalism

Uncertainty and confusion now affect federalism and states' rights because states' highest courts adopted the same standard of review for federal and state regulatory taking claims whose resolution greatly affects the development and stability of local land use and state property laws. Land use and property laws are state fields of law that have never been federalized by Congress or the Court. Federalization of these fields should not be incidental to protecting the federal right to receive just compensation because federal takings law is mostly ad hoc decisional law that mandates a uniform national standard of review. If this standard holds true to past federal takings law, it will be known more for its confusion than the enlightened wisdom and guidance needed for political and social progress among the states.

A. Parallel Constitutional Provisions, Norms and Analyses

Parallel takings provisions of federal and state constitutions require government to pay just compensation for land and property

rights that are taken for public use by eminent domain and regulation.[17] On one hand, the federal takings clause establishes a minimum guarantee against federal, state and local exercises of eminent domain and regulatory powers.[18] The federal takings clause states that "nor shall private property be taken for public use, without just compensation."[19] The takings clause prohibits state and local "[g]overnments from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[20] The Court applies takings law to decide whether developers and landowners bear unreasonable burdens in conforming to and complying with local land use and

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17. *See supra* note 6 and accompanying text; *see also infra* notes 18-26 and accompanying text. Federal and state constitutions include takings provisions that protect private property from unreasonable use restrictions and other means imposed by local, state and federal governments to further public interests. Societal relationships may change at the local level when the federal standard of review provides heightened scrutiny and gives more protection to the right to receive just compensation, and this imposes a greater limit on local and state exercises of police and other powers. *See infra* notes 106-149 and accompanying text. Such a change demands an examination of the long-term impact of the federal takings analysis on municipal social policy-making for social welfare and other programs that have been funded partially by exactions. *See* James E. Halloway & Donald C. Guy, *A Limitation on Development Impact Exactions as a Means to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, forthcoming. Professors Guy and Holloway believe that federal takings analysis may have that kind of a limiting effect on some social welfare policies unless state courts limit the United States Supreme Court's interpretation of the takings clause. State courts do not always follow the Court's constitutional theory, though they must follow the Court's precedents. *See infra* notes 68-80, 454-457, and accompanying text.

Much commentary has been written on the relationship between federal and state constitutional analyses and interpretations of analogous provisions under the federal Bill of Rights and state constitutions. *See, e.g.*, ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (1990); Advisory Commission on Intergovernmental Relations (ed.), STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVE, Washington, DC, (July 1989); *see also* Advisory Commission on Intergovernmental Relations (ed.), STATE CONSTITUTIONAL LAW: CASES AND MATERIALS, Washington, DC, (1988); Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959, 959-76 (1985); Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 165-200 (1985); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 459, 459-504 (1977).

18. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 236 (1897). The Takings Clause of the Fifth Amendment, U.S. CONST. amend. V, applies to the states through the Due Process Clause of Fourteenth Amendment. *See* U.S. CONST. amend. XIV. *See also Chicago, B. & Q. R. Co.*, 166 U.S. at 236.

19. U.S. CONST. amend. V.

20. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

other regulations.[21] The Court applies an "ad hoc, factual inquir[y]"[22] approach that focuses on three factors to determine whether exactions and other land use regulations are regulatory takings that take private property in violation of the takings clause.[23] On the other hand, state takings provisions establish guarantees against state and local exercises of eminent domain, police, and other powers, though these provisions are subject to restraints imposed under federalism.[24] The state requirements of public use and just compensation promote several state objectives: "an expenditure of public monies should secure a public gain, and not merely benefit a politically powerful interest group; . . . moreover, a public good should not be extorted from any discrete and identifiable individuals, but financed by the public at large."[25] State courts interpret state and federal takings provisions in regulatory taking claims that challenge the constitutional validity of impact exactions and other regulations that allegedly deny the right to receive just compensation by imposing an unreasonable burden on the exercise of property rights.[26]

Regulatory taking claims have been, and still are, raised in mostly local disputes that challenge the means-ends fit between exactions and development impacts and thus have required interpretations of state takings provisions to establish a standard of review.[27] These interpretations cannot deny, limit or diminish the federal means-ends fit that is a guarantee of the federal takings clause.[28] These interpretations of state takings provisions can grant greater protection to the state right to receive just compensation than exists under the federal minimum standard and thus provide even greater scrutiny of exercises of police power authority by local governments and state agencies.[29] The federal means-

21. *See* United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

22. *Penn Central Transp. Co.*, 438 U.S. at 124.

23. *See id.* at 124. The Court applies three factors: (1) the nature of government action, (2) the economic impact of the regulation, and (3) the extent of interference with investment-backed expectations. *Id.*

24. *See supra* notes 17-23 and accompanying text.

25. *See* Skover, *supra* note 7, at 20.

26. *See Dolan*, 512 U.S. at 389-91; *see also Nollan*, 483 U.S. at 836-37; *supra* notes 20-23 and accompanying text.

27. *Supra* note 26 and accompanying text.

28. *See* Southeast Cass Water Resources Dist. v. Burlington Northern Railroad Co., 527 N.W.2d 884, 890 (N.D. 1995); *see also infra* notes 64-87 and accompanying text.

29. *See Dolan*, 512 U.S. at 389-90 & 389 n.7 (citing Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)); *see also infra*

ends fit provides heightened scrutiny and thus requires states' highest courts to consider the constitutional validity of less stringent state standards of review. Some state standards may not necessarily withstand muster under the federal takings analysis and its underpinning by resilient substantive doctrine and more favorable procedural shifts to landowners.[30]

Federal and state taking provisions permit landowners to challenge land use regulations that unreasonably burden the exercise of private property rights in furtherance of public interests.[31] Regulatory taking claims scrutinize the nature of government action under the takings clause[32] and thus address the question whether the means-ends fit between land use regulations and their public purposes and policy justifications denies the right to receive just compensation in violation of the takings clause.[33] One of the most contentious actions is the validity of exactions that are exercises of police power authority to acquire land, money and other assets to improve and maintain public facilities and infrastructure.[34] In reviewing challenges to the validity of exactions, state courts give similar interpretations to the federal takings clause and state takings provisions in establishing standards of review for regulatory taking claims involving mostly local regulations and policies in dispute.[35] These standards of review for regulatory

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notes 458-503 and accompanying text.

30. *Dolan*, 512 U.S. at 389-91; *see also Nollan*, 483 U.S. at 836-38.

31. *See, e.g., Dolan*, 512 .S. at 389-91; *see also* Ehrlich v. City of Culver City, 911 P.2d 429, 434-35 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996). In *Dolan*, the landowners did not raise a regulatory taking claim under the takings clause of the Oregon Constitution. *See* ORE. CONST. art. I, § 18, when they requested review of their case by the Supreme Court of Oregon. The supreme court did not interpret the Oregon takings clause. *See* Dolan v. City of Tigard, 854 P.2d 437, 438 n.2 (Or. 1993), *rev'd on other grounds*; *see* Dolan v. City of Tigard, 512 U.S. 374, 396 (1994), *remanded*, 877 P.2d 2318 (Or. 1994). In disputes occurring after *Dolan*, the Oregon appellate courts applied the rough proportionality test to regulatory taking claims implicating the Oregon and federal takings clauses but noted that the rough proportionality was somewhat similar to Oregon's reasonable relationship test. *See infra* notes 246-367 and accompanying text.

32. *Penn Central Transp. Co.*, 438 U.S. at 124; *see also infra* notes 154-165 and accompanying text.

33. *See infra* notes 154-212 and accompanying text.

34. *E.g., Dolan*, 512 U.S. at 374 (land dedication conditions); *see also Nollan*, 483 U.S. at 825 (land dedication conditions). Other regulatory decisions affecting the issuance of development permits also cause some disputes. *E.g., Del Monte Dunes*, 119 S. Ct. at 1624 (denial of a development permit for environmental and other reasons); *see also Ehrlich*, 911 P.2d at 429 (approval of a rezoning with an exaction).

35. *E.g., Ehrlich*, 911 P.2d at 438; *see also* Sparks v. Douglas County, 904 P.2d 738, 745 (Wash. 1995).

taking claims are a means-ends analysis that ascertains the sufficiency of the connection between impact exactions and their public purposes and policy justifications.[36] The Court is slowly developing a federal means-ends fit or standard of review for federal regulatory taking claims.[37] The Court's hesitancy permitted state supreme courts to fashion primarily deferential standards to scrutinize the sufficiency of the means-ends fit under federal and state takings provisions whose interpretations by state courts are usually consistent with local regulations and policy.[38]

Federal takings clause and state takings provisions give different amounts of protection to property interests and rights.[39] One important reason for this difference may be that states differ greatly on the structure of the societal relationships between landowners and the public.[40] Such a reason can be seen in the different levels of scrutiny applied to regulatory taking claims challenging the validity of local land use regulations.[41] Obviously more deferential standards permit local governments to impose greater social and public obligations on landowners for public infrastructure and facilities.[42] However, this relationship between landowners and government is subject to change at the state and local levels when a newly fashioned federal standard of review provides heightened scrutiny to protect the right to receive just compensation as a limitation on exercises of police power authority to require development to internalize the cost of its impact on public facilities and infrastructure.[43]

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36. *See Dolan*, 512 U.S. at 386.

37. *See id.* at 386-91; *see also Del Monte Dunes*, 119 S. Ct. at 1635-37; *supra* notes 1, 34 and accompanying text.

38. *See Dolan*, 512 U.S. at 389-90. The Court concluded that government regulation that interferes with economic and property rights and some personal liberties are subject to deferential review under some provisions of the federal constitution. *See* West Coast Hotel v. Parrish, 300 U.S. 379, 398-400 (1937); *see also* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

39. *See* Mary Cornelia Porter & William Beans, *State Courts and Economic Rights*, 83-91, *in*, STATE CONSTITUTION IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INDUSTRY (ed. Advisory Commission on Intergovernmental Relations, 1989).

40. *See* Porter & Beans, *supra* note 39, at 9.

41. *See id.*

42. *See Dolan*, 512 U.S. at 389; *see also Nollan*, 483 U.S at 837-38.

43. *See* Porter & Beans, *supra* note 39, at 21.

B. *Uniformity of and Divergence from Federal Analysis and Norms*

The Court establishes standards of review to scrutinize the nature of government action in regulatory taking disputes that involve the validity of exactions under the federal takings clause.[44] Recently the Court applies heightened scrutiny that also includes more resilient doctrinal underpinning and more favorable procedural shifts to give greater protection to the federal right to receive just compensation.[45] Thus state courts must rethink state standards of review for regulatory taking claims that have been scrutinized under the same federal and state standards of review.[46] State courts may

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44. *See Dolan*, 512 U.S. at 389-91; *see also supra* note 34 and accompanying. The Court has established standards of review for the following government actions: regulatory denials and other zoning decisions; *see also Del Monte Dunes*, 119 S. Ct. at 1635 (reasonably related test); economic invasion of a property interest; *see* Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998)(rational basis test); development impacts justifying a land dedication condition, *see Dolan*, 512 U.S. at 374 (rough proportionality); legitimate public interest advanced by a land dedication condition *see* Nollan v. California Coastal Comm'n, 483 U.S. at 825 (1987) (essential nexus); denial of all economically viable use, *see* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (categorical per se taking); physical occupation by regulation, *see* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (per se taking); and land use regulations, *see* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (rational basis test).

45. *See Dolan*, 512 U.S. at 391-96; *see also supra* notes 11-12 and accompanying text.

46. Several commentators and scholars express a concern regarding the effects of the Court's takings analysis on exercises of police power in traditional fields of state law, such as land use and property. *See, e.g.*, Matthew J. Cholewa & Helen L. Edmunds, *Federalism and Land Use After Dolan: Has the Supreme Court Taken Takings from the States?*, 28 URB. LAW. 401 (1996); *see also* Daniel R. Mandelker, *Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 J. LAND USE & ENVTL. L. 285 (1993); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993); James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVTL. L. 53 (1992).

Dolan has resulted in many scholarly articles on the impact of the rough proportionality on the exercise of police power authority to impose development impact exactions and other land use regulations that interfere with the exercise of property rights. *E.g.*, James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 TEX. TECH L. REV. 73 (1996); Daniel A. Crane, Comment, *Poor Relations: Regulatory Taking After Dolan*, 63 U. CHI. L. REV. 199, 237-238 (1996); Daniel J. Curtin, Jonathan M. Davidson & Adam U. Lindgren, *Nollan and Dolan: The Emerging Wing in Regulatory Takings Analysis*, 28 URB. LAW. 789 (1996); Kristen P. Sosnosky, Note, *Dolan: The Sequel to Nollan's Essential Nexus for Regulatory Takings*, 73 N.C. L.

choose to conduct divergent constitutional analysis rather than following the federal constitutional analysis that imposes a minimum standard of review for regulatory taking claims. Several reasons exist for state courts to develop an independent state constitutional analysis. Foremost, giving greater rights or protection to citizens under state constitutions "strengthens the constitutional safeguard of fundamental liberties."[47] State constitutional analysis provides another source of protection against interference with constitutional rights.[48] Next, a divergent constitutional analysis at the federal and state levels creates "diversity of constitutional analysis."[49] Such diversity is the development of different constitutional concepts and permits state supreme courts to explore various interpretations.[50] Finally, state courts are not subject to the same limitations imposed on the Court in making interpretations "for a vastly diverse nation . . ." and for local conditions unknown to it.[51] Uniform national rules that greatly adjust the benefits and advantages of local policy choices and programs raise federalism issues and federal policy concerns, and the Court cannot readily ignore these issues and concerns.[52]

Heightened scrutiny is a limit on the exercise of police power authority and thus establishes uniformity among particular state actions. Obviously some commentators and policy-makers alike believe that heightened scrutiny under the federal standard of review "had been resurrected as a potential obstacle to uncompen-

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REV. 1677 (1995); Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. L. REV. 479 (1995); Douglas W. Kmiec, *At Last, Supreme Court Solves the Takings Puzzle*, 19 HARV. J. L. & PUB. POL'Y 147 (1995); David Schultz, Note, *Scalia, Property, and Dolan v. Tigard: The Emergence of a Post-Carolene Products Jurisprudence*, 29 AKRON L. REV. 1 (1995); Daniel Huffenus, *Dolan Meets Nollan: Towards a Workable Takings Test for Development Exactions Cases*, N.Y. U. ENVTL. L. J. 30 (1995); Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417 (1994); for scholarly books on the takings controversy, *see, e.g.*, WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECON., AND POL. (1995); RICHARD A. EPSTEIN, TAKING: PRIVATE PROP. AND THE POWER OF EMINENT DOMAIN (1985).

47. *See* WILLIAMS, *supra* note 17, at 113 (citing State v. Hunt, 450 A.2d 952 (N. J. 1982) (Pashman, J., concurring)).

48. *See id.* (citing Hunt, 450 A.2d at 952 (*quoting*, William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 459, 564 (1977))).

49. *See id.*

50. *See id.*

51. *See id.*

52. *See* WILLIAMS, *supra* note 17, at 113; *see also supra* note 46 and accompanying text (commentary on federalism and takings analysis).

sated land-use regulations . . . ."[53] One commentator describes the federal standard as a "'standard of precision,' . . . [that] far exceeds the burden of proof demanded of the state" in challenges to exercises of police power and eminent domain power.[54] Other commentators do not necessarily agree and thus find some state standards usually more precise. They suggest that some state standards of review are more stringent than the federal standard in determining the relationship between exactions and development impacts.[55] Several commentators suggest that:

> The impact fee decisions are based on state law standards controlling the collection and allocation of fees collected to offset development impact costs, which generally requires a stricter correlation between exactions and impacts than the federal *Nollan/Dolan* analysis.[56]

Such fundamental differences in the federal and state standards of review point up the fact that state courts can adopt the federal takings analysis or fashion their own takings analysis under state takings provisions.[57] These analyses and norms of state takings provisions directly influence exercises of property rights by local landowners and exercises of police power authority by local governments and thus effect land use policies and land development

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53. *See* Skover, *supra* note 7, at 21.

54. *See id.*

55. *See* Curtin, Davidson & Lindgren, *supra* note 46, at 799; *but see Dolan*, 512 U.S. at 390-91, 396 (The Court concludes that the intermediate standard is closer to the federal norm but rejects Oregon's reasonable relationship test, which is an intermediate standard of review, as too lax. The Court rejects the specifically and uniquely attributable test as too strict.).

56. Curtin, Davidson & Lindgren, *supra* note 46, at 799.

57. *See* Dolan v. City of Tigard, 512 U.S. 374, 389-91 (1994). Constitutional and public policy questions raised by the impact of *Dolan* on state standards of review for regulatory taking claims challenging development impact exactions are not novel. *See* Kushner, *supra* note 46, at 160. Professor Kushner noted that the *Nollan* had created "an unclear impact, conflict, and possible preemption of the various state exaction standards . . ." *See also* Kushner, *supra* note 46, at 160. However, the impact of *Dolan* on state standards of review appears more extensive than *Nollan*. *See Dolan*, 512 U.S. at 389-91; *infra* notes 213-245 and accompanying text. Such an impact is possible because *Dolan* establishes an intermediate standard of review that had been adopted by a majority of states in one form or another. *See Dolan*, 512 U.S. at 390-91; *see also infra* notes 195-199 and accompanying text. Unlike *Dolan* that requires heightened scrutiny, *Nollan*'s essential nexus can be easily met even though *Dolan*'s rough proportionality may not be constitutionally sufficient. *See Dolan*, 512 U.S. at 386-88. Nevertheless, *Nollan* has led some California and New York appellate courts to scrutinize California and New York rent control statutes that seem to have strayed from their legislative purpose. *See infra* note 548 and accompanying text.

within hundreds of communities.[58] Such federally mandated rethinking of state standards creates legal and political uncertainty in the development of state property rights, social policy-making and land use regulations.[59] Such uncertainty should be most noticeable where state courts have given the same interpretations to or adopted identical standards of review for federal and state taking claims.[60]

Making the political and legal uncertainty even worse is the well-settled fact that federal taking jurisprudence is confusing.[61]

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58. *See supra* notes 44-55 and accompanying text.

59. *See infra* note 62 and accompanying text.

60. *See infra* notes 246-457 and accompanying text. Federal and state takings provisions consist of similar language and thus may have the same interpretation. *See* Dana, *supra* note 12, at 1246 n.6 (citing *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9.2, at 588 n.2 (2d ed. 1988); *see also infra* notes 246-457 and accompanying text. State courts have not followed the lead of the Court in rejecting substantive due process to protect property and economic rights. *See* Peter J. Galie, *State Courts and Economic Rights*, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVE 83-95 (ed. Advisory Commission on Intergovernmental Relations July 1989). Professor Galie notes that "[s]tate supreme courts continue to rely on their due process, equal protection and, increasingly, their right-to-remedy clauses to grant greater protection to economic rights than would be forthcoming from the federal judiciary." *See* Galie, *supra*, at 88. He notes that an overwhelming number of state courts have refused to follow the Court in rejecting economic due process. *Id.*

61. *See* Donald C. Guy & James E. Holloway, *The Direction of Regulatory Taking Jurisprudence in the Post Lochner Era*, 102 DICK. L. REV. 327, 353-54 (1998). The Court's taking analysis shows several distinct stages during the last 100 years. *See id.* at 327-28. *Del Monte Dunes* perhaps clarifies in the Court's takings jurisprudence the standard of review for zoning and other legislative determinations. *See* City of Monterey v. Del Monte Dunes of Monterey, Ltd., 119 S. Ct. 1624, 1635-37 (1999); *see also supra* note 3 and accompanying text. Scholars and commentators have and still do criticize the confusion and uncertainty of federal takings jurisprudence. Professor Dana states that:

> Richard Epstein has characterized federal land use jurisprudence before *Nollan* as a "uniform line of cases . . . begin[ing] with a narrow interpretation of the police power." RICHARD A. EPSTEIN, TAKING: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 273 (1985). In his view, the cases merge "doctrinal error with an indefensible deference to local government." *Id.* Whatever one may think of Epstein's normative characterization of the case law, it clearly captures the bottom-line dynamics of land use litigation before *Nollan*: Local government won, aggrieved property owners lost.

Dana, *supra* note 12, at 1253-54. Nevertheless, other commentators and scholars believe that the Court has solved the takings puzzle and thus more certainty and less confusion are added to taking jurisprudence by *Nollan* and *Dolan*. *See* Kmiec, *supra* note 46, at 150-51. *Del Monte Dunes* adds another piece but each piece has its own attendant confusion that often extends beyond each decision's facts or dicta. We know *Dolan*'s rough proportionality applies to exactions, such as land dedication conditions. Other applications are still open to question. *See supra*

State courts bear the onerous burden of rethinking their standards of review in light of the confusion of federal taking jurisprudence, which, in turn, leaves local governments to work under legal and political uncertainty in designing land use policies that must also implement entirely new social welfare and other public policies. The *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*[62] case offers little help in unraveling the mysteries of the impact of the federal takings clause on the development of state takings law and public policy. *Del Monte Dunes* establishes more certainty in federal takings jurisprudence regarding the limited scope of heightened scrutiny and also establishes clearer use of the reasonably related test as a deferential standard of review for general zoning decisions.[63] Any rethinking by state courts to address the federal impact on state taking analysis for exactions necessarily involves an astute weighing of the requirements of the federal takings analysis in light of the fact that old constitutional doctrine and procedural shifts in judicial process purposely effect the guarantee of the Fifth Amendment and its limitation on exercises of police power authority to impose exaction in the aftermath of *Del Monte Dunes.*

C. *Federalism and Restraints on and Exercises of State Authority*

Federalism includes limitations or restraints on the exercise of state police power authority to make economic, social and other regulations and thus state courts cannot diminish or override certain limits imposed on their powers by interpretations of the federal takings clause.[64] In *Southeast Cass Water Resources Dist. v. Burlington Northern Railroad Co.*,[65] the Supreme Court of North Dakota describes the *general* scope of North Dakota and other state takings provisions[66] in light of *Dolan v. City of Tigard*[67] and

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note 3.

62. *See Del Monte Dunes,* 119 S. Ct. at 1624 (1999). Commentators and scholars have long suspected that federal takings jurisprudence creates a few problems for local and state government, notwithstanding. See e.g. Mandelker, *supra* note 46, at 287; Michelman, *supra* note 46, at 302-03; Kushner, *supra* note 46, at 160; Cholewa & Edmunds, *supra* note 46, at 401.

63. *See supra* notes 3, 44 and accompanying text.

64. *See* Southeast Cass Water Resources Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884, 890 (N.D. 1995); *see* 527 N.W.2d at 890; *infra* notes 65-74 and accompanying text.

65. *See* Southeast Cass Water Resources Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884 (N.D. 1995).

66. *See id.* at 890.

67. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

Nollan v. California Coastal Comm'n.[68] The Supreme Court of North Dakota states that the state appellate court "'cannot interpret our state constitution to grant narrower rights than guaranteed by the federal constitution.'"[69] Commentators often recognize that federalism does not permit states to exercise authority and powers in total disregard of federal powers.[70] Professor David Skover states that:

> In the stir of a much warranted enthusiasm for state constitutional law development, it must be remembered that "Our Federalism" embodies restraints on state authority as well as powers. Inherent in cooperative federalism is an expectation that the federal Constitution will furnish a "floor of security" for the interests of life, liberty, and property below which the states cannot fall in ordering their policy priorities through state law, including state constitutional law. . . .[71]

State courts cannot ignore a minimum federal standard that provides citizens limited protection against highly deferential policy-making that may be valid under state takings provisions. Such thinking prompts one court to state that:

> [S]tate courts should be sensitive to developments in federal law. Federal precedent in areas addressed by similar provisions in our state constitutions can be meaningful and instructive. *See General Assembly v. Byrne*, 90 N.J. 376, 381-384, 448 A.2d 438 (1982). These opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address.[72]

Other commentators do not find federal constitutional theory, analysis and interpretations a complete authority in the field of constitutional jurisprudence.[73] Professor Robert F. Williams states

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

69. *Southeast Cass Water Resources Dist.*, 527 N.W.2d at 890 (citing State of North Dakota v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974)).

70. *See* Skover, *supra* note 7, at 19-20.

71. *Id.* at 17.

72. Williams, *supra* note 17, at 114-15 (*quoting* Hunt, 450 A.2d at 962 (Handler, J., concurring)).

73. *See* ROBERT F. WILLIAMS, METHODOLOGY PROBLEMS IN ENFORCING STATE CONSTITUTIONAL RIGHTS, *reprinted in*, STATE CONSTITUTIONAL LAW CASES AND MATERIALS 118-123 (Advisory Commission on Intergovernmental Relations ed., October 1988) (hereinafter Williams-Methodology); *see also* Earl M. Maltz, *The Dark Side of State Court Activism*, 125, *reprinted in*, STATE CONSTITUTIONS LAW: CASES AND MATERIALS (ed. Advisory Commission on Intergovern-

that "[t]he often unstated premise that the Court's interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions is simply wrong."[74] Thus commentators and judges agree that federalism and restraints imposed by the takings clause raise questions regarding the role of state constitutional theory in federal constitutional jurisprudence.

Significant differences in the protection given property rights under federal and state takings provisions create the need for a viable state role in establishing standards of review to resolve local land use disputes. Foremost, "the constitutions of half the states contain taking clauses, which unlike the federal takings clause contain the phrase property shall not be taken 'or damaged' for public use without just compensation."[75] "[T]he addition of the 'or damaged' phrase was aimed at providing more protection than the federal equivalent, especially against legalized nuisance, which, generally, has not been interpreted as a 'taking' by federal courts."[76] In fact, "a majority of the state constitutions explicitly protect the 'inalienable right of acquiring, possessing and protecting property.'"[77] Finally, "[b]y virtue of their quantity and explicitness, property rights under state constitutional law cannot be placed in a subordinate position to personal rights, at least not on textual grounds."[78] These differences in the federal and state takings provisions exemplify the protection provided property interests under state taking provisions that govern public and private interests in communities. Therefore, states need to establish standards of review to reflect and address local and state differences in constitutional law, public policy and politics regarding property rights.

The federal standard of review applies to regulatory taking claims that involve mostly local regulations and public policy regarding land use and other public obligations. The federal standard is uniform among states and thus can limit local and state

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mental Relations), October 1988.

74. *See* WILLIAMS, *supra* note 73, at 118.

75. Galie, *supra* note 60, at 91 n.6 (citing GA. CONST., 1877, art. IV, § 2; TEX. CONST., 1869, art. I, § 18; WY. CONST., 1989, art. I, § 30; FRANK R. STRONG, Substantive Due Process of Law: A Dichotomy of Sense and Nonsense, 69-70 (1986)). *See also supra* note 6 and accompanying text (listing the takings provisions of several states).

76. Galie, *supra* note 60, at 91 (citing RICHARD F. KAHLE, JR., ed., WHY HAWAII? CONSTITUTIONAL CONVENTION STUDIES, Vol. 2 (Honolulu: Legislative Reference Bureau, 1978): 53).

77. Galie, *supra* note 60, at 89.

78. *Id.*

policy-making by forcing only one means-ends fit on public-private relationships of a plethora of communities.[79] State courts recognize and know the disadvantages of creating a uniform national standard to resolve local matters. One commentator notes that one judge believes that:

> The United States Supreme Court has also been hesitant to impose on a national level far-reaching constitutional rules binding on each and every state. The reluctance derives, first, from the nationwide jurisdiction of the Court. Once it settles a rule, experimentation with different approaches is precluded. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 43, 93 S. Ct. 1, 1278, 1302; *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1348-51 (1982). Further, the Supreme Court has adverted its lack of familiarity with local problems and conditions as a reason for hesitance. *San Antonio School District v. Rodriguez*, 411 U.S. at 41, 93 S. Ct. at 1031. Again, this applies with far less force at the state level.[80]

The Court's reluctance no longer applies to the federal takings clause when state and local governments impose land dedication conditions that may have unreasonably interfered with the federal right to receive just compensation. *Dolan*'s rough proportionality is a national standard that affects local land use policy-making, thus altering 30 years of state policy-making and landowner-community relations under state takings provisions.[81] State takings analyses balance competing community interests and landowner interests in land use policy-making and thus establish several standards of review for regulatory taking claims arising simultaneously under federal and state takings provisions but involving mostly local social and other policy issues.[82] Diversity among these standards that apply different levels of scrutiny to regulatory taking claims was the impetus in fashioning a federal constitutional norm by the *Dolan* Court.[83] In resolving local land use policy disputes, state courts

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79. *See* WILLIAMS, *supra* note 17, at 113 (citing Hunt, 450 A.2d at 958 (Pashman, J., concurring)).

80. *See id.* (*quoting* Hunt, 450 A.2d at 958 (Pashman, J., concurring)).

81. *See Dolan v. City of Tigard*, 512 U.S. at 389. *See also* City of Monterey v. Del Monte Dunes of Monterey Ltd., 119 S. Ct. 1624, 1635-37 (1999) (limiting *Dolan*'s rough proportionality to exactions but imposing the reasonably related test on zoning decisions).

82. *See id.* at 389-91; *see also infra* notes 221-228 and accompanying text.

83. *See Dolan*, 512 U.S. at 389-91; *see also infra* notes 222-228 and accompanying text. In *Dolan*, the landowner claimed that land dedication conditions

often apply both state takings law and federal takings law, which is an uniform national law.[84] The *Dolan* Court observes that issues regarding the level of scrutiny to apply to regulatory taking claims that challenge exactions under the federal and state takings provisions were not novel.[85] Its observation points out that interpretations of the federal takings clause take place mostly in state courts that are simultaneously interpreting state takings provisions. Chief Justice Rehnquist, writing for majority in *Dolan*, states that "since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them."[86] These representative decisions include three distinct levels of scrutiny for regulatory taking claims that involve challenges to the imposition of impact exactions, especially land dedication conditions and fees in lieu of dedication.[87]

III. Establishing a Federal Means-Ends Fit for Local Policies

The Court permitted state courts much latitude in their interpretations of the federal takings clause, therefore making it almost routine for state courts to fashion federal taking law that was quite consistent with state land use policy, real property law and constitutional jurisprudence.[88] The Court moves slowly to adjust the state-imposed diversity in federal taking law that permitted different levels of scrutiny to be applied to similar, if not identical, regulatory taking claims arising under the federal takings clause to review mostly local regulations.[89] The *Dolan* Court's adjustment was the continuation of the fashioning of a federal norm to review regulatory taking claims that challenged the nature of government

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imposed on her development site were a regulatory taking in violation of the Takings Clause of the Fifth Amendment. *See Dolan*, 512 U.S. at 382-83. Whether *Dolan*'s rough proportionality applies to development impact exactions other than land dedication conditions is a source of contention. *See infra* notes 457-471 and accompanying text.

84. *See infra* notes 88-98 and accompanying text.

85. *See supra* note 83 and accompanying text.

86. *Dolan*, 512 U.S. at 389.

87. *See id.* at 389-91. All commentators do not agree that the Court's representative decisions in *Dolan* are truly representative of the standards of review that state courts were applying to regulatory taking claims challenging the constitutional validity of land dedication conditions. *See also* FREILICH & BUSHEK, *supra* note 12, at 8-11.

88. *See* Cholewa & Edmunds, *supra* note 46, at 401-03.

89. *See Dolan*, 512 U.S. at 389. The United States Supreme Court waited 30 years to address substantial differences in the standards of review established by state courts in their interpretations of the federal takings clause. *See id.*; *infra* notes 222-228 and accompanying text.

action, namely land dedication conditions.[90] Chief Justice Rehnquist, writing for the majority in *Dolan*, states that:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusing similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." . . . [91]

The Nollan-Dolan means-ends fit comes in the face of 30 or more years of state courts' simultaneous interpretations of federal and state takings provisions that resulted, according to *Dolan* Court, in federal and state constitutional norms either too far from,[92] or not close enough to,[93] the federal norm.[94] During those 30 years,

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90. *See Dolan*, 512 U.S. at 386.

91. *Id.* at 390-391.

92. *See id.* at 389. Some standards of review that were established by state appellate courts were either too lax or too strict to be a federal constitutional norm for reviewing regulatory taking claims. *See id.* at 389-90; *see also infra* notes 222-228 and accompanying text.

93. *See Dolan*, 512 U.S. at 389-90. The federal norm is similar to the *reasonable relationship* test that had been adopted by a majority of the states, but it was not suitable as a federal standard of review for regulatory taking claims. *See id.* at 390-91; *see also infra* notes 247-265 and accompanying text.

94. *See Dolan*, 512 U.S. at 389; *see also* Cholewa & Edmunds, *supra* note 46, *at* 401-03 (eventually leading to federal involvement in local land use regulation). The Court's heightened scrutiny is more agreeable with those states that provide relief to their citizens from local and state regulations by requiring local and state agencies to pay just compensation or assess the impact of regulation on property rights. *See* Frank A. Victory & Barry A. Diskin, *Advances in Private Property Protection Rights: The State in the Vanguard*, 34 AM. BUS. L. J. 561, 588 (1997). Professors Victory and Diskin state that:

> [T]hese acts serve a two-fold purpose: They are designed to prevent costly litigation to the state caused by the perhaps inadvertent taking of property through governmental regulation and also to assure that private property rights are respected by the state without the landowner's having to resort to litigation in order to enforce his or her rights.

Victory & Diskin, *supra*, at 589 (citing *see, e.g.,* Developments, Private Property Protection Act, 1994 UTAH L. REV. 325, 471 (1994); *see also* TENN. CODE ANN. § 12-1-201 (1995); W. VA. CODE 22-1A-2 (1995)). In addition, several states have enacted property rights protection legislation. Victory & Diskin, *supra*, at 588-89 nn.135-169 (citing ARIZ. REV. STAT. ANN. §§ .500-13, 11-811 (West 1995); FLA. STAT. ANN. § 70.001(1) (West 1995); WASH. REV. CODE § 36.70A.370 (1995); DEL. CODE ANN. tit. 29, § 605 (1995); TENN. CODE ANN. § 12-1-201 to -204 (1995); W. VA. CODE § 22-1A-2 (1995); IND. CODE §4-22-2-32 (1995); IDAHO CODE §§ 67-8001 to 67-8004 (1995); MO. ANN. STAT. §§ 536.017, 536.018 (West 1995); CONN. STAT. ANN. § 26 (1995); VA. CODE ANN. § 9-6.14:7.1 (Supp. 1996); WYO. STAT. ANN. §§ 9-5-301 to -305 (Michie 1995); W. VA. CODE §§ 22-1A-1 to -6 (1995); UTAH CODE ANN. §§ 63-90-1 to -4, 63-90a-1 to -4 (1995); LA. REV. STAT. ANN.

state courts had interpreted their takings provisions in disputes raising both federal and state regulatory taking claims and therefore applied the same constitutional norm to both claims.[95] This diversity precludes much of the state takings analyses and norms from falling within the ambit of the uniform standard established by the *Dolan* Court. Several state takings analysis must change.

Those state appellate courts facing certain change must establish new state norms or adopt the federal norm.[96] Obviously, state courts may lose much diversity with the passing of old state

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§§ 3601, 3602(11)-(15), 3608-3612, 3621-3624 (West 1995); MISS. CODE ANN. §§ 49-33-1 to 17 (1995); TEX. GOV'T CODE ANN. § 2007.002(5) (West 1995); N.D. CENT.CODE § 28-32-02.5.3 (1995)). Some property rights and land use legislation require state courts to apply a specific standard of review to some state regulatory takings claims. *See infra* note 219 and accompanying text.

Several Senate and House members have sought to limit the impact of regulation by introducing bills to pay just compensation to or assess the impact of regulations on landowners. *See* H.R. 561, The Private Property Protection Act of 1993, 103rd Congress, 2nd Session (an assessment of the impact of regulation); S. 2410, Private Property Rights Restoration Act, 103rd Congress, 2nd Session (payment of just compensation); H.R. 925, Private Property Protection Act of 1995, 104th Congress, 1st Session (payment of just compensation).

Federal and state property rights acts have resulted in scholarly commentary. *E.g.,* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997); Thomas G. Douglass, Note, *Have They Gone "too far"? An Evaluation and Comparison of 1995 State Takings Legislation*, 30 GA. L. REV. 1061 (1996); Joseph L. Sax, *Takings Legislation: Where It Stands and What Is Next*, 23 ECOLOGY L.Q. 509 (1996); George E. Grimes, Jr., Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L. J. 557 (1996); Jerome M. Organ, Understanding State and Federal Property Rights Legislation, 48 OKLA. L. REV. 191 (1995); Bert J. Harris, Jr., *Land Use Regulation – Compensation Statutes – Florida Creates Cause of Action for Compensation of Property Owners when Regulation Imposes "Inordinate Burden*, 109 HARV. L. REV. 542, 542-47 (1995); John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994).

95. *See Dolan,* 512 U.S. at 389-90; *see also infra* notes 246-504 and accompanying text.

96. *See infra* notes 246-503 and accompanying text. Although substantive due process has been mostly discredited in the federal judiciary, some state courts apply substantive due process to address issues that are not covered by other constitutional provisions or laws. *See* Galie, *supra* note 60, at 83-88. However, state courts are applying less substantive due process while relying on the application of equal protection and other laws. *See* Galie, *supra* note 60, at 86-87. Generally, the standards of review applied by state courts in reviewing state legislation requires closer scrutiny of the means-ends fit. *See id.* at 86-88.

Arguably the application of substantive due process by state courts may limit the need for some regulatory taking claims that are based solely on economic invasion of private property interests, such as contractual and employment relationships. Such an application should not greatly affect regulatory taking claims that challenge development impact exactions demanding an interest in land or an impact fee to utilize an interest in land.

norms that had permitted a balancing of local public and private interests with a greater degree of certainty under state property law, land use regulation and public policy.[97] However, state constitutional interpretations that follow or adopt the federal takings analysis are problematic under the federal takings jurisprudence which consists of underdeveloped principles of ad hoc decisional law.

Making these interpretations even more problematic are shifts in the burden of proof and presumption of validity that effect heightened scrutiny to protect the right to receive just compensation.[98] The greater constitutional effects of *Dolan's* federal norm are these shifts that are an integral part of the guarantee of the Takings Clause of the Fifth Amendment that is no longer a poor relative to other amendments to the Bill of Rights.[99] State courts

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97. *See* Mandelker, *supra* note 46, at 324-28; *see also* Michelman, *supra* note 46, at 491-92; *supra* notes 64-87 and accompanying text. The Court permitted state court to interpret the federal takings clause. *See* Cholewa & Edmunds, *supra* note 25, at 401-03. The plethora of state standards of review leads one to conclude that state courts interpreted the federal takings clause consistent with their own public policy for economic development, land use and social progress.

There are several differences in state and federal constitutions. *See* Ellis Katz, *Introduction*, 11, *in*, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVE (ed. Advisory Commission on Intergovernmental Relations), July 1989. These differences created a divergence in state and federal standards of review for regulatory taking claims that challenge the constitutional validity of development impact exactions under state takings provisions. First, state constitutions contain limits on state and local authority that are primarily organic. *See* Katz, *supra*, at 11. Unlike the federal powers, state powers are not delegated by another government. *See id.* Thus the takings provisions of state constitutions may give more protection to property rights and thus impose greater limits on local and state authority. *See id.* at 11-12; Skover, *supra* note 7, at 89-91. Second, "[m]any state civil rights and liberties are more detailed than are their counterparts in the [United States] Constitution." *See* Katz, *supra*, at 11. A more detailed takings provision affects the interpretations of this provision by state courts applying it to local land use disputes. *See id.* at 12; Skover, *supra* note 7, at 89-91.

98. *See Dolan*, 512 U.S. at 392 & 391 n.8. *See also infra* note 521 and accompanying text (noting the potential impact of shifting the constitutional validity in state regulatory takings claims).

99. *See* U.S. CONST. amend. V. Interpretations of state constitutional provisions may give greater protection to the rights of a state's citizens than would be given under the federal constitution, and thus state supreme courts do not always treat the Court's interpretation of the federal constitution as persuasive law or guidance. *See* Williams, *supra* note 17, at 113 (citing *Hunt*, 450 A.2d at 958 (Pashman, J., concurring)). State courts find independent grounds to justify state constitutional interpretations that differ from the Court's interpretation of the federal constitution. *See id.* The New Jersey Supreme Court established in *Hunt* an analytical framework to determine whether a state court's interpretation of a state constitutional provision should differ from the Court's interpretation of a

cannot ignore these shifts that impose greater evidentiary obligations on municipalities,[100] or else the Fifth Amendment's guarantee is a hollow right that protects no one. These governments must put forth sufficient findings to demonstrate that the federal guarantee of the Fifth Amendment is not denied by exercises of police power authority to acquire public revenues and assets.[101] Chief Justice Rehnquist, writing for the majority, strongly indicates a more protective position for the takings clause by stating that "[w]e see no reasons why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[102] These shifts that now impose greater procedural obligations on municipal policymakers are an integral part of federal takings analysis that establishes heightened scrutiny to protect the right to receive just compensation and limit exercises of police power authority to effect individu-

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similar federal provision. *See id.* at 113. This framework consists of the following criteria: (1) textual language, (2) legislative history, (3) preexisting state law, (4) structural differences, (5) matters of particular state interest or local concern, (6) state traditions and (7) public attitudes. *See id.* at 115-16 (citing *Hunt*, 450 A.2d at 962) (Handler, J., concurring)). The application of these criteria determines whether there will be the same interpretation of the similar provisions of the state and federal constitutions. *See id.* at 115 (citing *Hunt*, 450 A.2d at 962) (Handler, J., concurring)). Professor Williams cautions against using these criteria to limit the development of an independent source of state constitutional law if none of these factors are present. *See id.* at 116-17.

Many of these criteria are applicable in determining whether state courts should interpret state takings provisions to provide a more stringent standard of review than is presently applied under the federal takings clause. Foremost, the textual language of federal and state takings provisions does differ significantly, as state takings provisions generally provide greater protection to property interests of landowners and developers. *See* Galie, *supra* note 60, at 91. Another significant criterion is that land use regulations are local concerns that involve mostly local private interests and public policy concerns. A national standard of review, namely a precise means-ends fit, may not prove appropriate to address purely local concerns and issues that vary from community to community and that involve unique local needs and wants. *See* Michelman, *supra* note 46, at 327. A more stringent standard of review under an interpretation of a state takings provision just might be necessary to address "matters of particular state interest or local concern." *See* Williams, *supra* note 17, at 115 (*quoting Hunt*, 450 A.2d at 962 (Handler, J., concurring)). *See also supra* note 46 and accompanying text (commentary on the impact of the Court's interpretation of the takings clause on state public policy under the doctrine of federalism).

100. *See Dolan*, 512 U.S. at 390 n.8; *see also infra* notes 235-244 and accompanying text.

101. *See Dolan*, 512 U.S. at 390 n.8.

102. *Id.* at 392.

al property rights.[103] Unlike the federal norm that does not invalidate each state's means-ends fit,[104] these shifts in the burden of proof and presumption of validity are integral parts of each state's interpretation of its takings provision and thus give a greater federal character to local land use and property disputes and perhaps making preciseness a quality of each state's means-ends fit.[105]

A. *Conditional Demands for Public Ends Attributable to Development*

The preciseness of the means-ends fit arises in regulatory takings claims that challenge exercises of police power authority to impose conditional demands on development.[106] Those demands are called development impact exactions[107] and are imposed to

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103. *See id.* at 391-92 & 390-91 n.8.

104. *See infra* notes 246-457 and accompanying text.

105. *See id.* State takings provisions reflect both the need for uniformity and diversity among the states. States are polities that make policy choices for their citizens. *See* Katz, *supra* note 97, at 8. These choices are made available through the "incompleteness of the United States Constitution." *See id.* Professor Katz states that:

> [I]f the American states are policymakers, and have the right to enact constitutions to serve as the frameworks for that policymaking process, then we would expect considerably more variation, both in terms of policy outcomes and policy processes, than we might find in federal systems which are, in effect, merely decentralized administrative systems . . . .

Id. Thus there exists among the states a diversity in policies, including land use policies that would be uniform in the federal system. "Unfortunately, there is no clear formula to instruct us on when to opt for one or the other. . . ." *Id.* at 9. Some commentators advocate diversity in constitutional analysis among federal and state constitutions but do not necessarily advocate competing interpretations. *See* Williams, *supra* note 17, at 113 (citing *Hunt*, 450 A.2d at 952). A state's adoption of a different standard of review to decide regulatory taking claims that challenge land use regulations definitely shows diversity, more so than uniformity. *See Dolan*, 512 U.S. at 389-90. This diversity is also greatly affected by state public policy, natural resources and economic development. These factors differ so greatly among states and communities that uniformity in *local land use policies* is highly improbable. Differences in social, natural and economic needs shape the balance between private interests and public interests. At times this creates differences in federal and state constitutional interpretations.

106. *See Dolan*, 512 U.S. at 380; *see also Nollan*, 483 U.S. at 828; *supra* note 34 and accompanying text (*Del Monte Dunes* involves the application of a more precise means-end fit to regulatory denials of a site development permit.); *infra* notes 247-457 and accompanying test (The more recent state cases involve the application of the rough proportionality to development impact exactions.)

107. *See* John J. Delaney, et al., *The Needs-Nexus Analysis: A Unified Test For Validating Subdivision Exactions, User Impact Fees, and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 139-140 (1987). Development impact exactions also include land dedication conditions, impact fees, linkage, and some other conditional

offset the cost of expanding and providing public facilities and infrastructure.[108] Exactions include linkage programs,[109] land dedications,[110] and impact fees[111] that have been imposed to finance public needs and wants of municipalities.[112] Exactions shift some of the financial burden for public facilities and infrastructure to real estate developers.[113] Like many other government actions, exactions are public policy choices driven by changes in public circumstances that create the public need to expand public facilities and infrastructure.[114] Undeniably land development causes changes in social, economic and environmental circumstances and thus creates the need for schools, roads, open space and other public facilities.[115] In turn, local governments impose exactions to finance public facilities and infrastructure rather than permitting development to control the allocation of public resources.[116] Imposing exactions is necessary where public capital investments do not always take place at the same pace as commercial and residen-

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demands. *See* Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission, 483 U.S. 825 (1987)*, 22 URB. LAW. 23, 24 (1990). These exactions are defined as follows:

> 1. Traditional construction, dedication, or in-lieu-fee payment for site-specific needs imposed at the time of subdivision. These improvements are usually categorized as being "minor" in scope and cost, and are typically provided on-site. Examples include subdivision streets, sidewalks, trails, utility easements, and open space.
>
> 2. Impact fees - More recent device to fund major, off-site infrastructure expansion imposed at the building permit stage. Examples include expansion or improvement of sewage treatment, facilities, landfills, primary roadways, schools, and active recreational parks.
>
> 3. Linkage - Emerging technique of off-site development impact exaction, imposed at the certificate-of-occupancy stage upon large-scale mixed use or nonresidential developments, to promote social programs or policies. Examples include low- and moderate-income housing and job training.

See Deleaney, et al., *supra*, at 139-40.

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See* James A. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 88 (1987); *see also* Julian C. Jurgensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Government's Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 418, 418-419 (1981).

113. *See* Nicholas, *supra* note 112, at 88.

114. *See id.*

115. *See id.*; *see also* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessment and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 19 n.90 (1987) (citing SAN FRANCISCO CHRONICLE, Oct. 28, 1985, at 1, col. 1.).

116. *See* Nicholas, *supra* note 112, at 88.

tial developments and their impact on public facilities.[117] Requiring developers to share the costs rather than controlling the allocation of local revenues gives local governments the discretion to finance infrastructure maintenance and expansion with public funds other than local tax revenues and federal and state assistance.[118] Many local governments recognize that public needs for public facilities and infrastructure are linked to new residential, commercial and industrial developments that result in an increase in traffic and population, the degradation of natural and environmental resources, and greater demands for public services and facilities.[119] Furthermore, local fiscal restraints and taxpayer revolts cause municipal governments to increase their demand for land dedication conditions and other exactions to improve and expand infrastructure and public facilities.[120]

Exactions require landowners and developers to take on burdens that are traditionally reserved to the public or government.[121] Municipalities require developers to share the costs of public facilities and infrastructure on-site and off-site of residential, commercial, institutional and industrial developments.[122] Examples of on-site exactions include: demands for land, money, infrastructure and public facilities on the development site.[123] Developers may be required to dedicate land or pay fees to install water systems, sewer lines, streets and parks.[124] Federal and state courts have approved many on-site dedications and impact fees because these exactions often improve or finance public needs directly attributable to the impact of the development.[125] Off-site

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117. *See id.*

118. *Id.* at 85-86. In Banberry Dev. Corp. v. South Jordan City, the Supreme Court of Utah noted that "[t]he conventional means of financing municipal facilities are tax revenues, special assessments, and bonding." *Banberry Dev. Corp.*, 631 P.2d at 902.

119. *See* Nicholas, *supra* note 112, at 88-89.

120. *See id.* at 85-86; *see also* Jurgensmeyer & Blake, *supra* note 112, at 419. Many state legislatures have imposed tax and spending limitations (TEL) on municipal, county and state governments. *See* Advisory Commission on Intergovernmental Relations & Center for Urban Policy and the Environment, Indiana University, TAX AND EXPENDITURE LIMITS ON LOCAL GOVERNMENTS, 3 (1995)-(A Staff Information Report of a study conducted by Daniel R. Mullins & Kimberly A. Cox on tax and expenditure limitations (TEL) imposed by states.).

121. *See supra* notes 107-120 and accompanying text.

122. *See* Nicholas, *supra* note 112, at 88; *see also* Crew, *supra* note 107, at 24-25; Smith, *supra* note 115, at 7-9.

123. *See supra* note 122 and accompanying text.

124. Crew, *supra* note 107, at 24; *see also* Smith, *supra* note 115, at 7.

125. *See supra* note 124 and accompanying text.

exactions on the other hand may require developers to construct, install and pay for public improvements and facilities that are situated off the development site. Off-site exactions often lead to taking disputes when developers are not entirely clear how their development projects create a public need for off-site improvements, namely in public facilities and infrastructure.[126]

Two types of off-site exactions have been recognized in making improvements in subdivisions and other development.[127] The first type of off-site exaction requires that public facilities and improvements be extended to "land bordering on the edge of the subdivision, crossing it, or extending out from it."[128] The second type of off-site exaction requires that public improvements and facilities provide capacity in excess of the needs of the development project.[129] State and local governments exercise this police power authority to impose exactions[130] to provide revenues, facilities and land.[131] Off-site dedication conditions may provide public benefits that support other kinds of growth and development within the community[132] and thus can be litigious. Courts did not routinely approve off-site exactions because they were not directly attributable to the impact of the development project.[133] Providing these community resources and assets through on- and off-site exactions still raises the question whether the public burdens, which were once borne by the public, imposed on developers in the exercise of their property rights are too great under the federal takings clause.

In addressing this question, the Court has stated that impact exactions and other land use regulations do not effect a regulatory taking if they "substantially advance legitimate state interests" and do not "den[y] an owner economically viable use of his land."[134] Most land use regulations substantially advance legitimate state

126. *See* Crew, *supra* note 107, at 25; *also see* Kushner, *supra* note 46, at 107-20; Smith, *supra* note 115, at 7-9.

127. *See* Smith, *supra* note 115, at 5-6.

128. *Id.* at 8.

129. *Id.*; *see also* Kushner, *supra* note 46, at 108 n.281-82.

130. *See* Nicholas, *supra* note 112, at 88; *see also* Smith, *supra* note 115, at 6.

131. *See supra* note 132 and accompanying text.

132. *See* Smith, *supra* note 115, at 8; *see also* Kushner, *supra* note 46, at 108 n.281-82.

133. *See* Crew, *supra* note 107, at 25; *see also* Smith, *supra* note 115, at 8; *but see* Ayres v. City Council of City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (Cal. 1949) (California courts have held that exactions for parkland and parks are valid.).

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

interests,[135] however, few regulations do not further a legitimate state interest and therefore are a regulatory taking of private property for public use.[136] One example of this is *Pennsylvania Coal Co. v. Mahon*.[137] In that case the Court held that Pennsylvania legislation that had forbidden subsurface mining, which caused subsidence of homes and cemeteries, protected only a private interest of the purchaser to an executed contract for the purchase of land.[138] More than a half century later, Pennsylvania enacted similar legislation that finds a legitimate state interest in protecting surface structures from subsidence, and the Court agrees in *Keystone Bituminous Coal Association. v. Debenedictis*[139] with the Pennsylvania state legislature.[140] The Court recognizes changes in public interests when the community and its policy-makers find that unplanned development and other land uses create public needs and cause social and other harm. Land use regulations that advance legitimate state interests are generally not takings, even if these regulations deny reasonable use or prohibit the most beneficial use.[141] But zoning and other land use regulations generally affect the community that jointly shares the burdens and benefits of these regulations.[142] Exactions do not.

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135. *See* Keystone Bituminous Coal Ass'n v. Debenedictis, 480 U.S. 470 (1987) (to prevent subsidence damages by subsurface mining operations); *see also* Agins v. City of Tiburon, 447 U.S. 255 (1980) (to preserve open space in an urban setting); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (to preserve a historic landmark); Euclid v. Ambler Realty Co, 272 U.S. 365 (1926) (to establish urban zoning).

136. *See infra* note 141 and accompanying text.

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

138. *See id.* at 413.

139. *See* Keystone Bituminous Coal Ass'n v. Debenedictis, 480 U.S. 470 (1987).

140. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 474 (holding that legislation to prevent subsidence damages by mining operations was not a regulatory taking).

141. *See Agins*, 447 U.S. at 262-63 (preserving open space); *see also Penn Central Transp. Co.*, 438 U.S. at 137-38 (requiring owners to forego the most beneficial use); *Euclid*, 272 U.S. at 396-97 (restricting use and development of the land). Land use regulations also restrict or deny existing beneficial use where the application of these regulations may even result in individualized harm to a landowner's property interest. *See* Goldblatt v. Hempstead, 369 U.S. 590 (1962); *see also* Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

142. *See Agins*, 447 U.S. at 262. For critique of the Court's application of the average reciprocity of advantages; *see* Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantages" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1447, 1489-1522 (1997). Professor Oswald concludes that the development of the average reciprocity of advantages rule by the Court makes it difficult to distinguish between valid police power actions and

Municipal and state policy-makers design exactions and other land use regulations to advance public interests that they declare to be public purposes and benefits related to development.[143] Sometimes exactions do not advance their public purposes. For example, in *Nollan v. the California Coastal Commission*[144] the Court concludes that a California land use regulation failed to advance its declared public interest and therefore was a violation of the takings clause.[145] The Court holds that the California Coastal Commission's exercise of police power authority in conditioning a rebuilding permit on the granting of a public access easement did not further or serve public purposes that had been declared to support the permit requirement.[146] Simply put, the beach access regulations did not increase access to the beach, notwithstanding the fact that it did increase lateral movement along the beach.[147] Land use regulations and other government actions must advance public interests that are the purposes of their design, and not seek some other uncompensated benefits.[148] Exactions are generally imposed on a specific site under adjudicative actions and thus are unlike traditional land use regulations, such as zoning, and therefore tend to be more extortive.[149]

B. Federal Takings Analysis and Its Means-Ends Fit

The Fifth Amendment's guarantee under the takings clause prohibits state and local " . . . [g]overnments from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[150] In determining whether landowners bear too great an obligation for public needs, the Court applies an "ad hoc, factual inquir[y]"[151] to the facts and circumstances of each case to determine whether impact

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a regulatory taking. *See* Oswald, *supra* at 1490-91.

143. *See Nollan*, 483 U.S. at 839-840; *see also supra* notes 106-133 and accompanying text.

144. *See* Nollan v. The California Coastal Comm'n, 483 U.S. 825 (1987); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (A land use regulation is a *per se* taking if it denies the owner all economically viable use of his or her land, though the government clearly demonstrates a legitimate state interest.).

145. *See Nollan*, 483 U.S. at 840-42.

146. *See id.* at 839-840.

147. *See id.* at 840-41.

148. *See id.*

149. *See Dolan*, 512 U.S. at 388.

150. Armstrong v. United States, 364 U.S. 40, 49.

151. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 125.

exactions, use restrictions and other land use regulations effect a taking in violation of the takings clause.[152] A taking analysis is conducted despite the fact that municipal or county governments never exercised eminent domain power.[153]

The Court's ad hoc approach focuses on several factors to determine whether use restrictions and other land use regulations effect a regulatory taking in violation of the takings clause.[154] These factors are as follows: (1) the nature of government action, (2) the economic impact of the regulation, and (3) the extent of interference with investment-backed expectations.[155] Federal and state courts decide whether exactions and use restrictions are an as-applied taking[156] by applying in regulatory taking claims[157] all or some of these factors to the circumstances of disputes.[158] Under the nature of government action, federal and state courts determine whether impact exactions and other regulations advance legitimate state interests and also bear sufficient connection to development impacts by scrutinizing the means-ends fit of these exactions.[159]

Dolan and *Nollan* established a standard of review to scrutinize the nature of exactions, namely land dedication conditions, that were challenged as regulatory takings in violation of the takings clause.[160] In *Nollan*, the Court decided that an essential nexus

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152. *See id.* at 124-25.

153. *See id.* at 124; *see also Armstrong*, 364 U.S. at 49; United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

154. *See Penn Central Transp. Co.*, 438 U.S. at 124-25.

155. *See id.* at 124.

156. *See* Keystone Bituminous Coal Ass'n v. DeBenedicts, 480 U.S. 470, 474, 480 U.S. at 474; *see also* Agins v. City of Tiburen, 447 U.S. 255, 260-61. Some regulatory taking claims are facial challenges that only challenge the constitutional validity of land use regulations on their face. *See Agins*, 447 U.S. at 260-61 (facial challenge). Land use and other regulations that are challenged under a facial regulatory taking claims have not been applied by the local government to a specific site. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 474; *Agins*, 447 U.S. at 260. Other takings claims are as applied taking challenges where there have been concrete applications of the land use or other regulations to the development or site. *See Penn Central Transp. Co.*, 438 U.S. at 122.

157. *See, e.g., Keystone Bituminous Coal Ass'n*, 480 U.S. at 470 (validity of legislation and its economic impact); *see also Penn Central Transp. Co.*, 438 U.S. at 104 (historic preservation); *Euclid*, 272 U.S. at 365 (validity of zoning regulation).

158. *See, e.g.,* Dolan c, City of Tigard, 512 U.S. 374 384-86 (the nature of government action); *see also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-32 (the nature of government action); *Penn Central Transp. Co.*, 438 U.S. at 124-25 (economic impact of and expectations interfered with by land use regulations).

159. *See Dolan*, 512 U.S. at 386; *see also Nollan*, 483 U.S. at 833-36.

160. *See Dolan*, 512 U.S. at 386-89.

must exist between the exaction and its purpose.[161] In *Dolan*, the Court decided that a rough proportionality must exist between the exaction and the impact of development.[162] Thus *Nollan* and *Dolan* permit state and federal courts to examine government means, namely land dedication conditions, that must further and relate to specific ends.[163] Exactions advance specific public purposes that municipalities believe are attributable to development. Landowners and developers challenge the imposition of exactions through claims that some exactions flagrantly advance public purposes other than those declared under these exactions.[164] The seminal federal case on this issue is *Nollan*.[165]

Nollan shows how the State of California declared a public purpose that could not be advanced by the application of a land dedication condition to a residential lot, though this condition would advance another legitimate state interest, therefore giving the state an uncompensated benefit. In *Nollan*, landowners leased and then purchased a beachfront lot in Ventura County, California. Landowners needed a construction permit from the California Coastal Commission (Commission) to develop the lot. The Commission issued the permit that granted the landowners approval to demolish the bungalow and construct a new house. However, it imposed on the permit a conditional demand that landowners grant a public right-of-way easement across the lot. The easement was above the high tide mark of the beach and ran parallel to the ocean. The Commission wanted the easement so that the public would have access to the ocean. The easement would not give the public access to the ocean from the highway. The easement would permit the public to move unrestricted along the beach once they were on the beach. Landowners objected to the land dedication condition, but the Commission overruled their objection, relying on the public need for access to the ocean. Landowners sued the Commission in the state trial court. They claimed that the land dedication condition requiring a deed for the grant of a right-of-way

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161. *See Nollan*, 483 U.S. at 837.

162. *See Dolan*, 512 U.S. at 390-91.

163. *See id.* at 386-91. State courts fashion state standards of review for regulatory taking claims under interpretations of state takings provisions in light of the federal takings analysis and law. These courts must also ascertain whether the impact of the federal analysis will create inconsistencies in local land use policy and state property law. However they still must follow the minimum federal standard or rule. *See infra* notes 544-564 and accompanying text.

164. *See Nollan*, 483 U.S. at 831-33.

165. *See id.* at 825.

easement on their land violated the takings clause.[166] The trial court held that the land dedication condition was a regulatory taking of private property.[167] The Court of Appeal of California reversed the trial court. It found that the public need for access was sufficient justification for the Commission to impose the conditional demand.[168] Landowners requested review by the Court.

The Court reversed the California Court of Appeal and held that the land dedication condition conditioned on issuance of a building permit was a regulatory taking.[169] The Court concluded that there was no essential nexus between the legitimate state interest and the land dedication condition imposed under the Commission's exercise of police power authority.[170] The Court concluded that beach access[171] would not be substantially advanced by this condition that was imposed on the issuance of a construction permit.[172] The Court concluded that this condition would not make the beach accessible to the public when the public could not even see the beach from the highway.[173] In *Nollan*, the Court's concern was the nature of the relationship between a land dedication condition and its declared public purpose.[174]

Although state and federal courts often conclude that the essential nexus is present, landowners and developers still claim that land dedication conditions and other exactions lack a direct relationship to the impact of development on public facilities and infrastructure. The *Dolan* Court decided whether *Nollan*'s essential nexus required heightened scrutiny between the land dedication condition and the impact of development.[175] In *Dolan*, the petitioner requested the Court to decide whether the degree of connection between a land dedication condition and the projected impact of real estate development is a less stringent or highly deferential reasonable relationship test or the more stringent or less

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166. *See id.* at 829-32.
167. *See id.* at 829.
168. *See* Nollan v. California Coastal Comm'n, 177 Cal. App.3d 719, 223 Cal. Rptr. 28 (1986).
169. *Nollan*, 483 U.S. at 841-42.
170. *See id.* at 839-40.
171. *See id.* at 834-35.
172. *See id.* at 839-41.
173. *See id.*
174. *See Nollan,* 483 U.S. at 841-42.
175. *See Dolan*, 512 U.S. at 386.

deferential substantially related test.[176] The petitioner believed that a more stringent test is most consistent with *Nollan*'s essential nexus test, thus requiring government to establish a more direct, causal connection between land dedication conditions and the impact of real estate development on infrastructure and public facilities.[177] Although the exaction advanced its declared purpose, the petitioner argued that it is necessary to establish a more precise means-ends fit between the exaction and development impacts. The Court granted a *writ of certiorari* to the Supreme Court of Oregon to decide whether a more precise means-ends fit is consistent with *Nollan*'s essential nexus.[178]

In *Dolan*, the petitioner, Ms. Florence Dolan, operated a retail electric and plumbing supply business on 1.67 acres of land within the City of Tigard, Oregon (Tigard).[179] The petitioner applied to Tigard for a permit for commercial development of her land.[180] The petitioner wanted to increase the size of the present building where she would relocate her electric and plumbing supply business.[181] The Tigard Planning Commission (Commission) granted petitioner a building permit,[182] but attached two land dedication conditions.[183] The Commission required that petitioner dedicate land lying within floodplain to improve storm drainage and dedicate land adjacent to the floodplain for a pedestrian/bicycle pathway.[184] The petitioner requested a variance from those dedications. The Commission denied the variance.[185] The Commission found that land dedications for stormwater management and pedestrian/bicycle pathway were reasonably related to petitioner's improvements to her site.[186] It found that customers and employees would use the pedestrian/bicycle pathway for transportation and recreational needs.[187] It also found that the intensified

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176. *See id.* at 383. The reasonable relationship is not the same standard applied among the state courts and thus ranges from stringent to deferential. *See* Kushner, *supra* note 46, at 160; *see also infra* notes 236, 248 and accompanying text.

177. *See Dolan*, 512 U.S. at 383.

178. *See* Dolan v. City of Tigard, 510 U.S. 989 (1993).

179. *See Dolan*, 512 U.S. at 379.

180. *See id.*

181. *See id.*

182. *See id.*

183. *See id.* at 380.

184. *See Dolan,* 512 U.S. at 380.

185. *See id.*

186. *See id.* at 381-82.

187. *See id.* at 381.

use could increase vehicular traffic and that the pathway would reduce both vehicular traffic and congestion on nearby streets.[188] Next the Commission found that expanding the building and parking lot would increase the impervious area of the site, thus increasing the stormwater flow from the site.[189] The Tigard City Council approved the denial of the variance.[190] Petitioner appealed to the Land Use Board of Adjustment (LUBA).[191] The petitioner claimed that Tigard's dedication requirements were not related to her expansion and thus constituted an uncompensated taking of private property.[192] LUBA and Court of Appeals of Oregon concluded that a reasonable relationship exists between the expansion and need for two easements and, therefore, these conditions were not a regulatory taking.[193] The Supreme Court of Oregon affirmed.[194] The Court reversed the supreme court and established the rough proportionality test as the standard of review for regulatory taking claims challenging the degree of connection between land dedication conditions and the impact of development.[195] The Court observed that the standard of review was an intermediate standard[196] and explicitly differentiated the rough proportionality test from the rational basis test, a highly deferential standard.[197]

As an intermediate standard of review that provides heightened scrutiny,[198] the rough proportionality test requires an individualized determination of development impacts that include both their nature and extent.[199] The Court noted that the degree of connection between impact exactions and development impacts need not be mathematically precise.[200] The Court strongly suggested a constitutional need to limit adjudicative actions that can be a source

188. *See id.* at 382.
189. *See Dolan,* 512 U.S. at 382.
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.* at 383; *see also Dolan v. City of Tigard,* 832 P.2d 853 (Or. App. 1992).
194. *See Dolan*, 512 U.S. at 383 (citing *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993)).
195. *See id.* at 391.
196. *See id.* at 390-91.
197. *See id.* at 391.
198. *See id.* at 390-91. For a discussion of whether the rough proportionality test applies to exactions other than land dedication conditions and fees in lieu of dedication, see *infra* notes 544-564 and accompanying text.
199. *See Dolan*, 512 U.S. at 391.
200. *See id.* at 391.

of extortive policy-making.[201] To impose this limit by applying the rough proportionality test, the Court shifted the presumption of validity from and burden of proof to government. The Court noted that land dedication conditions are not always presumptively valid because they are business regulations subject to the limitation of the takings clause.[202] Consequently, the Court either severely weakens or totally denies a presumption of constitutional validity to exactions. Even more straightforward, the Court explicitly noted that the burden of proof rests with government in adjudicative decisions that impose land dedication conditions, which require landowners to surrender the right to receive just compensation.[203]

Dolan and *Nollan* established a two prong test whose underpinning includes resilient doctrine and procedural shifts to effect heightened scrutiny as a limitation on exercises of police power authority. *Dolan* requires state courts to apply the rough proportionality test to regulatory taking claims that challenged whether exercises of police power authority to impose land dedication conditions and perhaps other impact exactions were sufficiently related to the impact of proposed development.[204] *Nollan* on the other hand requires courts to apply an essential nexus text to regulatory taking claims that challenge whether exercises of police power authority to impose land dedication conditions bear a causal nexus to the legitimate state interest of the land dedication condition.[205] Federal and state courts generally concluded that *Nollan*'s essential nexus exists between land dedication conditions and their publicly declared purpose.[206] However *Dolan*'s rough

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201. *See id.* at 391 n.8. For a discussion of how the burden of proof could affect the application of federal rough proportionality and state standards of review, *see infra* notes 235-244 and accompanying text.

202. *See Dolan*, 512 U.S. at 392. In *Del Monte Dunes*, the Court noted—in a direct response to the City of Monterey's argument – that zoning decisions are not immune from scrutiny under the takings clause. *See* City of Monterey v. Del Monte Dunes at Monterey Ltd., 119 S. Ct. 1624, 1637.

203. *See Dolan*, 512 U.S. at 391 n.8. For a discussion of whether the rough proportionality test applies to exactions that are legislative determinations, *see infra* notes 544-564 and accompanying text.

204. *See Dolan*, 512 U.S. at 391-96; *see also* Southeast Cass Water Resources Dist. v. Berlington Northern R.R. Co.,, 527 N.W.2d 884, 890; *infra* notes 544-564 and accompanying text (discussing whether the rough proportionality applies to land use regulations, such as zoning).

205. *See Nollan*, 483 U.S. at 837.

206. *E.g.,* Blue Jeans Equities West, Inc. v. City and County of San Francisco, 3 Cal. App. 4th 164 (1992), *cert. denied*, 506 U.S. 866 (1992); Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991). Some commentators believe that state and federal courts nullified *Nollan* and therefore required the Court to

proportionality that imposes a more direct connection between a land dedication condition and the impact of development is still open to interpretation by federal and state courts.[207]

As federal and state courts decide *Dolan*'s impact on federal constitutional jurisprudence, they must contend with the fact that *Dolan* shifts the burden of proof to municipalities to put forth findings to substantiate that a rough proportionality exists between an impact exaction and the impact of development.[208] Municipalities must now put forth findings that establish the nature and extent of the projected impact of development.[209] Moreover, the rough proportionality is an intermediate standard of review. When it is coupled with the burden of proof resting on municipalities to put forth more particularized findings,[210] it creates a procedural requirement for fact-intensive policy-making to justify the imposition of land dedication conditions and other exactions.[211] Therefore, *Dolan* opens local land use policy-making to regulatory takings claims if general declarations and findings appear insufficient to

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establish *Dolan*'s rough proportionality. *See* Epstein, *supra* note 46, at 492; *see also* Kmiec, *supra* note 46, at 150-51.

207. *See infra* notes 529-564 and accompanying text.

208. *See infra* notes 235-244 and accompanying text. The *Dolan* Court applies the unconstitutional conditions doctrine to underpin the right to receive just compensation and thus effects heightened scrutiny. *See Dolan,* 512 U.S. at 385-86. Commentators have described the unconstitutional conditions doctrine as unmanageable and confusing. *See supra* note 11 and accompanying text. But the United States Court of Appeals for the Sixth Circuit "conclude[s] that a degree of uncertainty in the doctrine is not a sufficient basis for resisting its application." Woodard v. Ohio Adult Parole Authority, 107 F.3d 1178, 1191 (6th Cir. 1997).

The unconstitutional conditions doctrine was also declared unruly. *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 13 (1988). In addition, it was stated to be an "elusive distinction between withholding a subsidy and imposing a penalty." *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 781-84 (1988). Finally, it was declared to be a "minefield to traversed gingerly" by another commentator. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

209. *See Dolan*, 512 U.S. at 391-92 & 391 n.8

210. *See id.*

211. *See, e.g., id.* at 393-96; *Del Monte Dunes*, 119 S. Ct. at 1644; Stearns Company, Ltd. v. United States, 34 Fed. Cl. 264, 273 (1995); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed. Cir. 1983); Brown v. United States, 30 Fed. Cl. 23, 25 (1993). However, the question of whether government has met its burden of proof in justifying an exaction is a question of law. *See* Group v. Clackamas County, 922 P.2d 1227, 1231 (Or. Ct. App. 1996).

For commentary on shifting the burden of proof and the presumption of validity to effect heightened scrutiny, *see infra* notes 235-244 and accompanying text.

justify impact exactions and perhaps a few other land use regulations.[212]

C. *The Implications and Impacts of the Federal Takings Analysis*

Development impact exactions including land dedication conditions, fees in lieu of dedication, impact fees, linkage programs, and inclusionary zoning are sources of land use disputes.[213] They have been, and still are, the crux of many disputes in state and federal courts.[214] First, such disputes should not be expected to decline so long as land dedication conditions and impact fees are sources of assets and revenues, respectively, for expanding and improving public facilities and infrastructure.[215] Second, state and federal governments are distributing fewer funds to municipal governments to build and repair infrastructure.[216] Simply, the need for local revenues drives the imposition of exactions as a means of raising nontax revenues.[217] Therefore, while exactions remain a necessary source of revenues to improve public facilities and infrastructure, the federal standard of review exerts greater influence on state standards of review that required fewer policy

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212. *See, e.g.,* Parking Ass'n of Georgia, Inc. v. City of Atlanta, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. denied,* 515 U.S. 1116 (1995); Ehrlich v. City of Culver City, 911 P.2d 429, 437-44; *infra* notes 544-564 and accompanying text. In *Parking Ass'n of Georgia,* the Court denied the *writ of certiorari,* but two justices wrote a stinging dissent that chastised the Court for permitting confusion to exist in applying a federal standard of review for regulatory taking claims. *See Parking Ass'n of Georgia,* 515 U.S. at 1118 (Thomas, J., dissenting).

213. *See Dolan* 512 U.S. at 389-91; *see also supra* note 107 and accompanying text.

214. *See infra* notes 246-503 and accompanying text.

215. *See supra* notes 106-149 and accompanying text. Evidence shows that residential and other development does not always pay the public costs for public facility and infrastructure expansions in the face of development. *See* Alan A. Altshuler & Jose A. Gomez-Ibanez, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS, 77 (1993). Moreover, many municipal and county officials are acutely aware of the adverse fiscal impact of development on these facilities and infrastructure. *See also* Kyle York Spencer, *Cary Goes into Retreat on Growth,* NEWS OBSERVER, 1A & 8A, Monday, January 12, 1998; Stuart Leavenworth & Glenna B. Musante, *Prosperity Has a Price: Johnston Finds Housing Boom Can't Pay The Bills,* NEWS OBSERVER, 1A & 6A, Sunday, September 13, 1998 (Rural county governments even recognize that economic development does not pay for itself.).

216. *See* Altshuler & Gomez-Ibanez, *supra* note 215, at 21.

217. *See supra* notes 108-133 and accompanying text. Some municipalities are imposing mitigation fees to offset the cost of administrative actions by city legislative bodies and agencies that must approve changes in land use and issue site development permits. *See Ehrlich,* 911 P.2d at 447; *see also infra* notes 219, 409-437 and accompanying text.

justifications to impose exactions.[218] Some state legislatures have already established standards of review for regulatory takings claims to limit the burden local governments and state agencies can impose by exactions on developers and landowners.[219]

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218. *See Ehrlich*, 911 P.2d at 437-38; *see also Southeast Cass Water Resources Dist.*, 527 N.W.2d at 890; *supra* notes 106-149 and accompanying text.

219. *See* CAL. GOV'T CODE, §§ 66000-66003 (1987). The Mitigation Fee Act, CAL. GOV'T CODE, §§ 66000-66003, was enacted by the California legislature because developers believed that local agencies were imposing fees and exactions unrelated to development projects. *See Ehrlich,* 911 P.2d at 436 (citing Centex Real Estate Corp. v. City of Vallejo, 19 Cal. App. 4th 1358, 1361, 24 Cal. Rptr. 2d 48 (1993); Sen. Local Gov. Com. Analysis of Assemb. Bill No. 1600-(1987-1988 Reg.Sess.) p.1; *see also* Garrick Dev. Co. v. Hayward Unified Sch. Dist. (1992) 3 Cal. App. 4th 320, 4 Cal. Rptr.2d 897.)). The Mitigation Fee Act establishes procedures for protesting the imposition of fees and other monetary exactions imposed on a development by a local agency. *See Ehrlich*, 911 P.2d at 436. The Mitigation Fee Act also establishes a standard of review for exactions imposed by local governments. *See Ehrlich*, 911 P.2d at 436. The Mitigation Fee Act requires that:

> [T]he local agency ... determine[s] "how there is a *reasonable relationship*" between the proposed use of a given exaction and both "the type of development project" and "the need for the public facility and the type of development project on which the fee is imposed." (GOV.CODE, § 66001, subd. (a)93), 94) italics added.) In addition, the local agency must determine how there is a "*reasonable relationship*" between "the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed (*Id.*, § 66001, subd, (b), italics added.)

Ehrlich, 911 P.2d at 436-37. In *Ehrlich*, the Supreme Court of California held that the reasonable relationship test set forth in the Mitigation Fee Act is consistent with *Nollan*'s essential nexus and *Dolan*'s rough proportionality to determine the connection between an exaction and its public purposes and policy justifications. *See id.* at 437-38. Many states have enacted property rights protection legislation to assess the impact of government regulations or to establish a taking for a diminution in value of the land. *See* Victory & Diskin, *supra* note 94, at 590 (citing WYO. STAT. ANN. §§ 9-5-301 to -305 (Michie 1995); UTAH CODE ANN. §§ 63-901-04, 63-90a1 to 04 (1995)). The Utah property rights protection acts requires that "if a permit is required for specific use of property, any conditions must be reasonably related to the purpose for which the permit is issued and substantially advance that purpose . . . . " *See* Victory & Diskin, *supra* note 94, at 590 n.150 (citing UTAH CODE ANN. §§ 63-90-1 to -4 (1995)). The Wyoming property rights protection act requires "that any conditions imposed on granting of permits for the use of private property must relate directly to the permit's purpose and substantially advance that purpose." *See* Victory & Diskin, *supra* note 94, at 590 n.147(citing WYO. STAT. ANN. §§ 9-5-301 to -305 (Michie 1995)). Moreover, under the Arizona property rights protection act, "any agency of a city, town, or county within the state 'shall comply with the United States Supreme Court cases of *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) . . . . '" Victory & Diskin, *supra* note 94, at 588 n.135 (citing ARIZ. REV. STAT. ANN. §§ 9-500.13, 11-811 (West 1995)). The Wyoming and Utah acts apply specifically to development impact exactions and other conditions and thus must provide a standard of review greater than or equal to *Dolan*'s rough proportionality. But the Arizona act appears on its face to be much broader in

Although *Dolan* establishes heightened scrutiny for exactions, landowners and developers still believe that exactions require them to pay more than their proportionate share of the costs of local capital improvements incurred by development projects.[220] In many disputes, state courts will decide whether a developer's burden is disproportionate to the extent of the impact of development under federal and state takings provisions.[221] Such decisions by state courts are unavoidable so long as developers' claims that land dedication conditions and other exactions are not directly related to the impact of development and give the community uncompensated public benefits.[222] Earlier decisions by state courts to establish a standard of review resulted in divergent takings analyses and standards among state courts.[223] State courts fashioned three standards:[224] (1) reasonableness test,[225] (2) reason-

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application and thus may include development impact exactions and other land use regulations.

220. *See* Smith, *supra* note 115, at 11; *see also infra* notes 246-503 and accompanying text.

221. *See infra* notes 544-564 and accompanying text.

222. *See infra* notes 529-564 and accompanying text.

223. *See Dolan*, 512 U.S. at 389-91. State supreme courts generally do not hold that land dedication conditions and fees in lieu of dedication were *ultra vires* acts and illegal taxes. Some state supreme courts have held that land dedication conditions and fees in lieu of dedication were not in excess of the authority granted to municipal governments. *See* Smith, *supra* note 115, at 10; *see also* Kushner, *supra* note 46, at 124-25 & 124 n.359. Other courts held that ordinances imposing land dedication conditions were invalid as unauthorized acts. Smith, *supra* note 115, at 10 & nn.34-37; *see also* Thomas M. Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 J. URB. & CONTEMP. L. 269, 275 (1983).

When state legislatures expressly granted municipalities the authority to mandate land dedication conditions and fees in lieu of dedication, state and federal courts generally held that these conditions and fees were not *ultra vires* acts. Any sense of relief by municipalities was short lived as developers challenged these fees in lieu of dedication as an illegal tax. *See* Smith, *supra* note 115, at 15. Many municipalities chose to impose fees in lieu of dedication when a dedication "would be to small or too poorly placed to be useful to the public." *See id.* at 14. The fees in lieu of dedication require developers to pay their fair share of the costs of paying for needed municipal improvements. State supreme courts generally agree with municipalities and held that fees in lieu of dedication are not a tax. *See id.* at 14-15 & 15 nn.58-64. However, some courts have held that the fees in lieu of dedication are "a special tax violating the uniform taxation requirement." *See id.* at 15 & nn.65-67. With careful drafting and limited use of fees in lieu of dedication, the special tax claim was avoided by municipalities. *See id.* at 15-16. It is well settled that fees in lieu of dedication are not unauthorized acts or illegal taxes.

224. *See* Smith, *supra* note 115, at 11-14; *see also* Kushner, *supra* note 46, at 152-160; Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1017-1020 (1987). One must recognize that some

able relationship test,[226] and (3) specifically and uniquely attributable test.[227] These interpretations of state takings provisions do not agree on one specific state standard.[228] Obviously, all standards of review require some degree of connection that varies from strict to highly deferential.

State courts apply *Dolan*'s rough proportionality to federal regulatory taking claims. Most significantly, they also interpret state takings provisions to establish their standards of review for state regulatory taking claims.[229] Some state courts apply a highly deferential or lax standard of review and thus the heightened scrutiny of the federal norm supersedes the lax state standard.[230]

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pre-*Dolan* standards of review indicated that states have "considerable discretion in structuring economic relationships among their citizens." *See* Katz, *supra* note 97, at 9. The Court permitted this kind discretion until *Dolan* but it now gives states less discretion in structuring economic relationships. *See id.* With less discretion under the federal constitution, states must look to their own constitutions for greater control over economic relationships. Therefore interpretations of state takings provisions are now substantial public policy concerns. *See infra* note 225 and accompanying text.

225. *See* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949). The *reasonableness or reasonably related test* is a highly deferential standard of review and thus gives municipal and county governments much discretion to impose use restrictions and other requirements. *See* Smith, *supra* note 115, at 13-14; *see also* Wegner, *supra* note 224, at 1017. For a discussion of the application of the standards of review established by the Supreme Court of California, *see infra* notes 389-457, 554-564, and accompanying text.

226. *See* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966); *see* Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971), *appeal dismissed*, 404 U.S. 868 (1971). The *rational nexus or reasonable relationship* is an intermediate standard of review and requires a direct connection between the exaction and the impact. *See* Pavelko, *supra* note 223, at 287. For a discussion of the application of the reasonable relationship by the Supreme Court of Oregon, *see infra* notes 266-367 and accompanying text.

227. *See* Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961). Courts and commentators alike agree that the *specifically and uniquely attributable* standard requires the highest level of scrutiny. *See* Smith, *supra* note 115, at 13; *see* Blake and Juergensmeyer, *supra* note 112, at 429. For a discussion of the application of the standard of review established by the Supreme Court of Illinois, *see infra* notes 458-503 and accompanying text.

228. *See* Smith, *supra* note 115, at 11; *see also* Crew, *supra* note 107, at 26; Appendix A (showing the levels of scrutiny of state standards before and after *Nollan* and *Dolan*).

229. *See infra* notes 247-503 and accompanying text.

230. *See Dolan*, 512 U.S. at 389-91; *see also Southeast Cass Water Resources Dist.*, 527 N.W.2d at 890 (citing *Matthews*, 216 N.W.2d at 99); *infra* notes 246-257 and accompanying text. In *Southeast Cass Water Resources Dist.*, the Supreme Court of North Dakota states that "'we cannot interpret our state constitution to grant narrower rights than guaranteed by the federal constitution.'" *See Southeast Cass Water Resources Dist.*, 527 N.W.2d at 980 (N.D. 1995)(citing *Matthews*, 216

The *Dolan* Court applies the rough proportionality to land dedication conditions.[231] The Court is silent on whether the rough proportionality applies to legislative determinations that impose only exactions, such as impact fees and linkage programs.[232] Although the Court adopts the rough proportionality test that is similar to Nebraska's reasonable relationship test,[233] state courts are not mandated to adopt the federal norm in their interpretations of state takings provisions and could conceivably apply a more stringent standard than the rough proportionality standard.[234] Yet there is a question regarding the amount of diversity that will exist under interpretations of state takings provisions that are subject to forceful doctrine and procedural shifts to effect heightened scrutiny as a limitation on exercises of police power authority.

The Court concludes that some types of the reasonable relationship test[235] and the reasonably related test[236] are not

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N.W.2d at 99). Therefore, state courts that have created or applied the most lax standards of review must now apply the rough proportionality test. They must also require state and local governments to bear the burden of proof to justify imposing land dedication conditions and other exactions. Therefore, *Dolan*'s rough proportionality and shifts in burden of proof and constitutional validity will impact interpretations of state takings provisions that include Oregon's less stringent and California's highly deferential standards of review.

231. *See Dolan*, 512 U.S. at 391-96.

232. *See infra* notes 544-563 and accompanying text.

233. *See Dolan*, 512 U.S. at 389-91.

234. *See id.*; *see also infra* notes 474-490 and accompanying text. The Court's rough proportionality is similar to the reasonable relationship test applied by Nebraska courts and not Oregon courts and thus leaves open for conjecture and speculation the distance and the contents on the *takings continuum* between an Oregon takings analysis and a Nebraska takings analysis. *See* Appendix A; *infra* notes 246-367 and accompanying text. Another public policy concern under the Court's judicial review for regulatory taking claims is the difference in the level of scrutiny between Oregon's reasonable relationship test and Nebraska's reasonable relationship test and eventually the impact of this difference on the development of Oregon and other states' land use policy and property rights law. *See infra* notes 246-367 and accompanying text.

235. *See Dolan*, 512 U.S. at 389-91.

236. *See id.* at 389. The reasonably related test and reasonable relationship test may be identical or similar and thus create confusion regarding the degree of connection that must exist in the application of these standards to regulatory taking claims involving the constitutional validity of exactions. *See* Kushner, *supra* note 46, at 160. Professor Kushner states that:

> The California decisions, such as *Ayres v. City Council* [, 207 P.2d 1 (Cal. 1949)] and *Associated Homebuilders v. City of Walnut Creek*[, 484 P.2d 606, *appeal dismissed*, 404 U.S. 878 (1971)] as well as the New Jersey ruling of *Longridge Builders, Inc. v. Planning Bd.* [, 245 A.2d 336, 337 (N. J. 1968)] and the Wisconsin decision of *Jordan v. Village of Menomonee Falls*[, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966)] all employ models that could be considered interchangeable.

constitutionally effective means-end fits under the federal takings clause.[237] One may also conclude that even less deferential scrutiny would not be enough to affect the takings clause limitation. Thus a more forceful constitutional doctrine and evidentiary burden underpin the rough proportionality to effect heightened scrutiny of regulatory taking claims. In fact, the impact of these shifts in evidentiary burden is no less significant though relegated to a footnote. This doctrine and process also affect the interpretation and application of state takings provisions. State courts may adopt the federal norms or higher standard of review under their takings provisions to limit the exercise of police power by local governments.[238] Any state standard is still subject to shifts in the presumption of validity and burden of proof that effect heightened scrutiny to protect the right to receive just compensation.[239] The *Dolan* Court shifts the presumption of validity to municipalities to establish that land dedication conditions are valid under the takings clause of the federal constitution.[240] In addition, the *Dolan* Court also shifts the burden of proof to municipalities to substantiate that a land dedication condition bears a rough proportionality to the impact of development.[241] Even though a municipality is also subject to a standard of review fashioned under a state takings provision, it also relies on a *weakened* presumption of constitutional validity and in addition bears the burden of proof to demonstrate the degree of connection established by the state standard of review.[242] The shifts in the presumption of validity and burden of proof are part of the constitutional guarantee that protects the right to receive just compensation of landowners, and thus effect the application of state standards of review.[243] Each state's highest court must decide or wait until the Court decides whether these shifts attach to the rough proportionality as an inherent part of the

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Kushner, *supra* note 46, at 160. Thus Professor Kushner admits that "[d]istinguishing the tests for rational nexus and reasonableness is difficult." *Id. See* Freilich & Bushek, *supra* note 12, at 6-7.

237. *See Dolan*, 512 U.S. at 389-91.

238. *See id.* at 389-90; *see also supra* note 230 and accompanying text.

239. *See Dolan*, 512 U.S. at 391-96; *see also supra* notes 98-106 and accompanying text.

240. *See Dolan*, 512 U.S. at 391-92 & 391 n.8.

241. *See id.* at 391 n.8.

242. *See id.* at 391-92 & 391 n.8.

243. *See id.* at 391. *See also supra* notes 64-87 and accompanying text (discussing the restraints imposed on state and local actions under federalism).

Fifth Amendment guarantee.[244] The Court will eventually review

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244. *See infra* notes 507-528 and accompanying text. There are three models of state constitutional analysis: primacy model, interstitial model and dual sovereignty model. *See* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1027 (1985); *see also* STATE CONSTITUTIONAL LAW: CASES AND MATERIALS, 311, (Robert F. Williams ed., 3rd ed 1993). State courts use these models to analyze and interpret state constitutional provisions that are similar to provisions of the federal constitution. *See* Utter, *supra*, at 311. The primacy "model focuses on the state constitution as an independent source of rights and relies on it as the fundamental law. Under the primacy model, the federal law and analysis are not presumptively correct. . . . " *See id.* Next "[u]nder the interstitial model, state courts recognize the federal doctrine as the floor and focus the inquiry on whether the state constitution offers a means of supplementing or amplifying federal rights. . . ." *Id.* Finally "[t]he dual sovereignty method, in some ways the original method of state constitutional analysis, analyzes both the state and federal constitutional provisions. . . . Courts applying the dual sovereignty model always evaluate both federal and state provisions in the course of their decisions, even when the decision rests firmly on state grounds." *Id.*

State of Washington Supreme Court Justice Utter notes that the dual analysis model does not necessary result in advisory opinions that are mere "dicta, unnecessary or superfluous" on the interpretation of the federal provision. *Id.* at 313. He notes that a court may choose one of two methods when it applies the dual model. STATE CONSTITUTIONAL LAW: CASES AND MATERIALS, 311 (Robert F. Williams ed., 3rd ed 1993). "A state court may render a decision under the state constitution and then determine whether an analysis under the federal law would yield the same result. Or, it can render judgment based on state constitutional grounds and explain, by engaging in an analysis under federal law, why the holding does not conflict with federal law." *Id.*

When state courts interpret state takings provisions, they vary in their reliance on the Court's interpretation of the federal takings clause. *See, e.g., Ehrlich*, 911 P.2d at 447 & 450; *see also* Southeast Cass Water Resources Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884, 896 (N.D. 1995); Sparks v. Douglas County, 904 P.2d 738, 744-45 (Wash. 1995). State courts were given greater latitude in interpreting state and federal takings provisions before *Dolan*. *See Dolan*, 512 U.S. at 389-91. However, the Court flatly recognized that the Illinois standard of review was too strict to be the federal norm. *See id.* at 390 (citing Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)). While the Court remained silent, these courts adopted middle-of-the-road interpretations, but a few courts were slightly to the left or right of the federal interpretation. *See Dolan*, 512 U.S. at 389-91; Appendix A.

In the post-*Dolan* era though it is short, some state courts demonstrate an analytical approach that gives substantial weight to the federal analysis. *See Ehrlich*, 911 P.2d at 447; *but see Southeast Cass Water Resources Dist.*, 527 N.W.2d at 896; *see also Sparks*, 904 P.2d at 744-45 (These courts did not find a need to rely on the federal takings analysis.). The Supreme Court of California adopted the federal standard of review and then narrowly construes this standard to avoid a deleterious impact on local land use policies. *See Ehrlich*, 911 P.2d at 447 (limiting this *standard* to special, discretionary permits and thus avoiding application to legislative actions). Other state courts apply the rough proportionality to legislative actions though the federal analysis is completely silent on this issue. *See* Schultz v. City of Grants Pass, 884 P.2d 569, 573-74 (Or. Ct. App. 1994); *see also* Amoco

this issue but the Court has been hesitant to address similar takings issues in the past. Thus state courts must decide this issue.

Parts IV through VI examine interpretations of state takings provisions in light of the federal takings analysis and find that state courts are addressing the need for an independent analysis. These courts are taking different judicial approachs in addressing differences in the new federal standard and old state standard. These Parts analyze seminal state court decisions that interpret state takings provisions to fashion standards of review. In these decisions, state courts have examined the means-ends fit between local development impact exactions and the impact of development. State courts interpret state takings provisions to establish a level of scrutiny that implements heightened scrutiny consistent with the federal standard of review. State courts must decide whether the state standard of review for regulatory taking claims provides the level of scrutiny required by the rough proportionality test. This test guarantees a federal right to receive just compensation as a limitation on acquiring uncompensated public benefits. State courts must conclude whether exactions that are challenged under state takings provisions should be subject to a level of scrutiny equal to or greater than the federal rough proportionality. State courts must conclude whether the evidentiary shifts attach to their respective interpretation of state takings provisions. State courts generally

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Oil Co. v. Village of Schaumburg, 661 N.E.2d 380, 390-91 (Ill. App. 1995). Many state courts are resolving regulatory taking claims on state constitutional grounds, but they are adopting the *federal analysis, with recognition that state standards were similar prior to Dolan*. *See* J. C. Reeves Corp. v. Clackamas County, 887 P.2d 360, 363 (Or. Ct. App. 1994). A few states still have stricter standards of review in the post *Dolan* era and thus are still giving their citizens greater protection. *See* Northern Illinois Home Builders Ass'n v. The County of Du Page, 621 N.E.2d 1012, (Ill. App. 1993), *aff'd*, 649 N.E.2d 384, 389 (Ill. 1995); *see also* Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380, 391 (Ill. App. 1995). State courts recognize the federal takings analysis in interpreting state takings provisions, but they still show much diversity, (*see* Appendix A, even though they adopt the federal analysis, in part). A majority of state courts follow the dual sovereign model but are giving much weight to the federal analysis. Washington Supreme Court Justice Robert F. Utter states that:

> The second method [of dual analysis] serves to further policies underlying the supremacy clause. Justice Rehnquist recently emphasized the need for such an approach when he observed that an appeal from a decision resting on a state constitutional provision is properly before the Supreme Court when challenged as a violation of a federal protected right.

Utter, *supra*, at 313. State takings provisions whose interpretations are less stringent than the federal standard of review conflict with the federal takings clause. *See id.*; *see also Southeast Cass Water Resources Dist.*, 527 N.W.2d at 890 (citing *Matthews*, 216 N.W.2d at 99).

interpret state takings provisions in taking disputes that simultaneously raise both federal and state regulatory taking claims. In earlier interpretations made before *Del Monte Dunes*, state courts did not know with certainty whether *Dolan*'s rough proportionality applied to exactions other than land dedication conditions.[245]

IV. Interpretations of State Takings Provisions Greatly Inconsistent With the Federal Norm

The majority of state courts apply one type or another of the reasonable relationship test to determine the degree of connection between land dedication conditions and the projected impact of development.[246] The reasonable relationship test is an intermediate standard of review.[247] State courts generally agree that land dedication conditions must bear a reasonable relationship to social and other needs that are created by the impact of development.[248]

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245. *See supra* note 3 and accompanying text; *see also infra* notes 544-564 and accompanying text.

246. *See Dolan*, 512 U.S. at 391 (citing *see, e.g.,* Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965); *see also* Collis v. Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976) (requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land); College Station v. Turtle Rock Corp., 680 S.W.802, 807 (Tex 1984); Call v. West Jordan, 606 P.2d 217, 220 (Utah 1979) (affirming the use of the reasonable relationship test)). Generally, state courts have agreed that a reasonable relationship must exist. *Id.* at 391 (citing *See generally, Morosoff, Take My Beach Please!: Nollan v. California Coastal Commission and a Rational – Nexus Constitutional Analysis of Development Exactions*, 69 B.U.L. REV. 823 (1989); *see also* Parks v. Watson, 716 F.2d 646, 651-653 (CA 9 1983)).

In *Dolan*, the Court stated that "some form of reasonable relationship test has been adopted in many other jurisdictions . . ." other than by the Supreme Court of Nebraska in Simpson v. North Platte, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980). *See Dolan*, 512 U.S. at 390. The Court cited cases from Minnesota, Wisconsin, Texas and Utah that had applied the reasonable relationship test to impact exactions that were imposed to improve and establish public facilities and infrastructure. *See* Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (Wis. 1965); *see also* Collis v. Bloomington, 310 Minn. 5, 246 N.W.2d 19 (Minn. 1976); College Station v. Turtle Rock Corp., 680 S.W. 802, 807 (Tex. 1984); Call v. West Jordan, 606 P.2d 217, 220 (Utah 1979). All commentators do not agree that the reasonable relationship test is heightened scrutiny in those decisions. *See supra* note 236 and accompanying text.

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

248. *See id.* at 391. One form of the reasonable relationship test is referred to as the *rational nexus* test. *See* Longridge Builders, Inc. v. Planning Board, 245 A.2d 336, 337 (N. J. 1968)(off-site improvements); *see also* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966)(impact fees for educational and recreational purposes). Some state courts also refer to the reasonable relationship test as a reasonable nexus. *See supra* note 203 and accompanying text. Blake and Juergensmeyer give an analysis of level of

For example, *Simpson v. North Platte*[249] is a typical state decision that applied a reasonable relationship test.[250] In *Simpson*, the city of North Platte requested petitioner, the landowner, to dedicate land for use as streets adjacent to the development of a site for a fast food restaurant.[251] Petitioner challenged North Platte Ordinance[252] as a regulatory taking in violation of the Nebraska Constitution.[253] The Supreme Court of Nebraska concluded that the land dedication condition must bear a reasonable relationship to the impact of the development under the takings clause[254] of the Nebraska Constitution.[255] The supreme court concluded that a reasonable relationship did not exist because the street extension was not contemplated or addressed by the North Platte ordinance, evidence was not presented that petitioner's project would increase traffic, and other owners were not required to deed land to North Platte.[256] The Supreme Court of Nebraska concluded that the land dedication condition was an unconstitutional exercise of police power authority under the takings clause of the Nebraska Constitution.[257]

The *Dolan* Court relied strongly on *Simpson* in fashioning a standard of review to determine whether an exercise of police power authority to attach a land dedication condition to the

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scrutiny of the rational nexus test that is applied by Supreme Court of Wisconsin in *Village of Menomonee Falls*. *See* Blake and Juergensmeyer, *supra* note 112, at 430-32. A few commentators either state or suggest that the reasonable relationship test commonly applied by state courts is less stringent than the Court's reasonable relationship test that is referred to as a rough proportionality. *See supra* note 236 and accompanying text.

249. *See* 206 Neb. 240, 292 N.W.2d 297 (1980).

250. *See Dolan*, 512 U.S. at 389.

251. *See* Simpson v. North Platte, 292 N.W.2d 297, 299 (Neb. 1980).

252. *See id.* In *Simpson*, the landowner, challenged North Platte Ordnance Number 1962 that had been adopted pursuant to Neb. Rev. Stat. §§ 18-1721 (Reissue 1977). *Simpson*, 292 N.W.2d at 299. The Supreme Court of Nebraska also noted that statute would also violate the takings clause. *See* NEB. CONST., art. I, § 21. *See Simpson*, 292 N.W.2d at 302.

253. *See Simpson*, 292 N.W.2d at 302.

254. *See* NEB. CONST., art. I, § 21; *see also Simpson*, 292 N.W.2d at 302.

255. *See Simpson*, 292 N.W.2d at 301.

256. *See id.* at 301. In *Simpson*, the Supreme Court of Nebraska relied heavily on a New Jersey case, 181 Incorporated v. The Salem City Planning Board, 336 A.2d 501 (N.J. 1975). *See Simpson*, 292 N.W.2d at 301. In *181 Incorporated*, the Supreme Court of New Jersey interpreted the takings provision of the New Jersey Constitution, N. J. CONST. (1947), art. IV, § VI, para. 3, to establish a standard of review for regulatory taking claims. *See 181 Incorporated*, 336 A.2d at 506. The regulatory taking claim challenged the constitutional validity of a New Jersey Statute, N.J. S. A. 40: 27-6.6(b). *See 181 Incorporated*, 336 A.2d at 503.

257. *See Simpson*, 292 N.W.2d at 301.

issuance of a building permit is a regulatory taking under the federal takings clause.[258] Chief Justice Rehnquist quotes the Supreme Court of Nebraska to show the fundamentals of the degree of connection:

> The distinction, therefore, which must be made between an appropriate exercise of police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.[259]

The Court concluded that Nebraska's reasonable relationship test was "closer to the federal norm than either of . . . other [tests]."[260] The *Dolan* Court observed that the state reasonable relationship test was an intermediate standard of review.[261] It referred to the federal reasonable relationship test as the rough proportionality.[262] The *Dolan* Court stated that the term rough proportionality avoids confusion with the rational basis test of the Equal Protection Clause of the Fourteenth Amendment.[263] It notes that the rational basis test is a highly deferential standard of review for social and economic regulation.[264] The *Dolan* Court adopted a federal norm that bears much similarity to Nebraska's reasonable relationship test and thus left the validity of the more deferential types of the reasonable relationship highly questionable.[265] Such similarity does not necessarily mean that state courts will adopt the federal standard of review if they had applied a reasonable relationship test prior to *Dolan*. Oregon moves slowly.

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258. *See Dolan*, 512 U.S. at 390 (*quoting Simpson,* 292 N.W.2d at 301).
259. *Id.*
260. *Id.* at 391.
261. *See id.* at 389.
262. *See id.* at 390-91; *see also supra* notes 195-203 and accompanying text.
263. *See* U.S. CONST. amend. XIV.
264. *See Dolan*, 512 U.S. at 391.
265. *See id.* at 391. The Maryland standard of review for regulatory taking claims that challenge the constitutionality validity of development impact exactions requires "a reasonable nexus between the exaction and the proposed subdivision." *See* Howard County v. JJM, Inc., 301 Md. 256, 282, 482 A.2d 908, 921 (1984). The Maryland standard of review appears to be a form of the reasonable relationship test that requires a close nexus or relationship between the exaction and development impacts caused by the project. *See supra* note 246 and accompanying text.

A. *Establishing a Reasonable Relationship Test in the Post-Dolan Era*

The *Dolan* Court concluded that Oregon's reasonable relationship test was not capable of providing the level of scrutiny sufficient for a federal norm.[266] In fact, Oregon's standard of review was a reasonable relationship test but apparently was not as stringent as Nebraska's standard.[267] One could conclude that Oregon's reasonable relationship test is on the lower end of the continuum of such judicial scrutiny, actually nearer to the highly deferential standard of review and thus mostly inconsistent with the federal takings norm.[268] Moreover, one could also conclude that locally imposed land dedication conditions in Oregon do not possess a strong presumption of validity and that the burden of proof rests with government.[269] Therefore, the Oregon appellate courts' interpretation of the Oregon takings provision in light of *Dolan* shows how state courts that had applied a more deferential reasonable relationship test need to interpret their takings provisions to make them consistent with the federal norm.[270]

The Oregon appellate courts are gradually making the reasonable relationship test[271] of the takings provision of the

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266. *See Dolan*, 512 U.S. at 393-96.

267. *See id.* at 390-91; *see also supra* notes 259-260 and accompanying text (The Court adopted Nebraska's form of the reasonable relationship test.).

268. *See Dolan*, 512 U.S. at 393-96 (The Court describes three standards of review that have been applied to determine the constitutional validity of land dedication conditions that were challenged under federal and state takings provisions.). *See also* Appendix A (using a continuum to illustrate the position of state and federal standards of review before and after *Dolan*).

269. *See Dolan*, 512 U.S. at 391-92 & 391 n.8.

270. At the writing of this article, the Supreme Court of Nebraska had not reviewed a regulatory taking claim that required it to reconsider *Simpson*'s reasonable relationship test, the Nebraska norm.

271. *See Dolan*, 832 P.2d at 854-55, *aff'd*, 854 P.2d 437, 442-43 (Or. 1993), *rev'd on other grounds*, 512 U.S.374 (1994). In *Dolan*, the Court of Appeals of Oregon concluded that the reasonable relationship test was both federal and state standards of review. *See id.* The court of appeals stated that:

> The city argues, and LUBA concluded, that the "reasonable relationship" test is the correct one under both constitutions. . . . Petitioners do not appear to dispute that is the correct conclusion under the Oregon Constitution, and we agree with LUBA's conclusion and its analyses of the Article I, section 18, issue. *See Hayes v. City of Albany*, 7 Or. App. 277, 490 P.2d 1018 (1971); *O'Keefe v. City of West Linn*, 14 Or. LUBA 284 (1988). The reasonable relationship test has been adopted as the correct standard under the Fifth Amendment by most courts that have addressed the question. . . .

Dolan, 832 P.2d at 854-55. Although the Oregon appellate courts concluded that

Oregon Constitution[272] more consistent with the Federal Constitution[273] in light of *Dolan*'s rough proportionality.[274] The *Dolan*

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its reasonable relationship test was an intermediate standard, the Court rejected Oregon's standard and adopted the rough proportionality test. *See Dolan*, 512 U.S. at 391, and observed that the reasonable relationship test had been adopted by a majority of states, *see id.* at 391, and noted that the rough proportionality was similar to the reasonable relationship test. *See id.* A few commentators and scholars do not agree with the Court's observation that the reasonable relationship test was an intermediate standard. *See* Freilich & Bushek, *supra* note 12, at 6. They believe that the rational nexus test was the typical intermediate standard of review. *See id.*; *see also supra* note 236.

272. *See* ORE. CONST. art. I, § 18. The Oregon standard of review for regulatory taking claims that challenge the constitutional validity of development impact exactions under the takings provision of Oregon Constitution is a reasonable relationship. *See* Dolan v. City of Tigard, 832 P.2d 853, 855 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437, 442-43 (Or. 1993), *rev'd on other grounds*, 512 U.S. 374, 393-96 (1994); *see also supra* notes 178-197 & 271 and accompanying text.

In *Dolan*, the Supreme Court of Oregon did not "address any Oregon constitutional issue," *see Dolan,* 854 P.2d at 438 n.2, rising under the Oregon takings clause. *See* ORE. CONST. art. I, § 18. *See Dolan*, 854 P.2d at 438 n.2. Thus the Court's analysis in *Dolan* did not directly address the federal constitutional validity of Oregon' reasonable relationship test as established by Oregon's highest court. *See Dolan*, 512 U.S. at 393-96; *see also infra* notes 276-277 and accompanying text.

273. *See* U.S. CONST. amend. V. The standard of review applied by the Oregon courts for regulatory taking challenges to development impact exactions under the federal takings clause was a reasonable relationship. *See Dolan*, 832 P.2d at 855, *aff'd*, 854 P.2d at 442-43 (Or. 1993), *rev'd*, 512 U.S. at 393-96; *see also supra* notes 189-97 and accompanying text.

The Court of Appeals of Minnesota applied *Dolan*'s rough proportionality but did not contrast or compare *Dolan*'s level of scrutiny with the Minnesota standard of review for reviewing a regulatory taking claim. The standard of review applied by Minnesota courts is a reasonable relationship test. *See* Collis v. City of Bloomington, 310 Minn. 5, 17-18, 246 N.W.2d 19, 26 (Minn. 1976). In Kottschade v. City of Rochester, 537 N.W.2d 301 (Minn. App. 1995), the Court of Appeals of Minnesota applied *Dolan*'s rough proportionality test to a regulatory taking claim. The landowner claimed that a land dedication imposed by the city as a condition for approval of a commercial development was a regulatory taking. *See Kottschade*, 537 N.W. at 301. The court of appeals observed that the Minnesota legislature delegated to municipalities the authority under MINN. STAT. § 462.358, subd., 2b (1994), to impose a land dedication condition on a proposed commercial development to provide land for a highway interchange right-of-way. *See id.* at 307-08. It also noted that *Collis* established a reasonable relationship test as the standard of review for a regulatory taking claim challenging a land dedication condition. *See id.* at 307. The court of appeals recognized that the city possessed the burden of proof under *Dolan*. *See id.* It did not compare or contrast the reasonable relationship and rough proportionality tests, but did distinguish the facts of *Kottschade* from those of *Dolan*. *See id.* at 308. The court of appeals concluded that the development would increase traffic and cause congestion and therefore the city was justified in imposing a land dedication condition on the approval of the development permit. *See Kottschade,* 537 N.W. at 308. The court of appeals did not state whether *Collis* remained good law under the Minnesota Constitution. Perhaps few forms of the reasonable relationship test that had been applied to

Court rejected the reasonable relationship test that had been applied by Oregon courts,[275] and thus Oregon's reasonable relationship test was not the intermediate level of scrutiny that the Court recognized in *Dolan*.[276] Later, on remand, the Supreme Court of Oregon also recognized that the Oregon standard, though not applied in *Dolan*, was too deferential to provide an intermediate level of scrutiny.[277] Thus, setting the stage for Oregon appellate courts to address issues raised by the validity of Oregon's deferential reasonable relationship test[278] and also address issues raised by the interpretation of Oregon's takings provision in light of *Dolan*'s unresolved issues.[279] The judicial efforts of the Oregon appellate courts are a reconstitution of the essential elements of Oregon's reasonable relationship test that was insufficient in light of *Dolan*'s more precise means-ends fit.

There is little doubt that a type of the reasonable relationship test remains the standard of review in Oregon and consequently

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federal and state taking claims may remain unaffected by new interpretations of state takings provisions in light of *Dolan*.

Federal courts are also struggling with *Dolan*'s uncertainty and confusion. Some federal courts of appeals are not extending the reach of *Dolan* beyond adjudicative actions. *See* Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996). In *Texas Manufacture Housing Ass'n*, the United States Court of Appeals refused to apply *Nollan* and *Dolan* to a legislative determination. *See Texas Manufactured Housing Ass'n, Inc.*, 101 F.3d at 1105. The regulation precluded "the placement of trailer coaches on any lot within city limits . . . ." *See id.* at 1098.

274. *See* Clark v. City of Albany, 904 P.2d 185 (Or. Ct. App. 1995), *rev. denied*, 912 P.2d 375 (Or. 1996); *see also* Art Piculell Group v. Clackamas County, 922 P.2d 1227 (Or. Ct. App. 1996); J. C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. Ct. App. 1994); Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994).

275. *See Dolan*, 512 U.S. at 393-96.

276. *See* Dolan v. City of Tigard, 854 P.2d 437, 438 (Or. 1993), *rev'd*, 512 U.S. 374, 396 (1994), *remanded*, 877 P.2d 1201 (1994). In *Dolan*, the Supreme Court of Oregon did not "address any Oregon constitutional issue." *See Dolan,* 854 P.2d at 438 n.2, arising under the Oregon Takings Clause, ORE. CONST. art. I, § 18. *See Dolan*, 911 P.2d at 438 n.2.

277. *See Dolan*, 877 P.2d at 1201. In a *Per Curium* opinion, the Supreme Court of Oregon remand *Dolan* to the City of Tigard for further proceeding and stated that:

> On *certiorari*, the Supreme Court of the United States reversed, holding that the City of Tigard's finding supporting the conditions did not meet the constitutional requirement of demonstrating "rough proportionality" between those conditions and the nature and extent of the impact the proposed development. 114 S. Ct. at 2322. The Court remanded the case for further proceeding consistent with its opinion. *Ibid.*

Id.

278. *See infra* notes 280-302 and accompanying text.

279. *See infra* notes 303-367 and accompanying text.

reconstituting it remains the judicial task to establish an uniquely Oregon means-ends fit. In *Dolan*, the Court of Appeals of Oregon applied the reasonable relationship test of the Oregon and federal takings provisions,[280] but petitioner's appeal to the Supreme Court of Oregon did not raise a regulatory taking issue under the Oregon takings provision.[281] The court of appeals concluded that the City of Tigard's dedication conditions were reasonably related to petitioner's expansion of her retail plumbing business and its impact on the floodway and the transportation system.[282] The court of appeals concluded that both the Oregon and federal takings provisions did not require heightened scrutiny under a reasonable relationship test.[283] The Supreme Court of Oregon affirmed the decision of the Court of Appeals of Oregon.[284] The United States Supreme Court reversed the Supreme Court of Oregon and concluded that the reasonable relationship test applied by Oregon courts did not provide the degree of connection that was required under the federal takings clause.[285] The Supreme Court of Oregon remanded *Dolan* to the City of Tigard for additional findings to determine the existence of the rough proportionality, but it noted that the Court had concluded that findings of the City of Tigard were not sufficient to establish a rough proportionality under the federal takings clause.[286] Notwithstanding the fact that the state supreme court did not address a state regulatory takings issue in *Dolan*, the reasonable relationship test was and still remains the state standard of review for land dedication conditions challenged as a regulatory taking under the Oregon takings provision.[287] Consequently reconstituting this test begins in the Court of Appeals of Oregon.

Reconstituting a reasonable relationship test requires that several elements be changed to make it consistent with the preciseness of the federal means-ends fit. Oregon appellate courts reconstitute Oregon's reasonable relationship test by requiring more particularized findings, denying the presumption of validity and by

280. *See Dolan*, 832 P.2d at 835.
281. *See Dolan*, 854 P.2d at 438 n.2.
282. *See Dolan*, 832 P.2d at 856.
283. *See id.* at 835. *See also Dolan*, 854 P.2d at 444-49 (Peterson, J., dissenting) (arguing that *Nollan* requires Oregon courts to apply heightened scrutiny).
284. *See Dolan*, 854 P.2d at 444.
285. *See Dolan*, 512 U.S. at 393-96.
286. *See Dolan*, 877 P.2d at 1201.
287. *See* Art Piculell Group v. Clackamas County, 922 P.2d 1227 (Or. Ct. App. 1996).

shifting the burden of proof under the Oregon takings provision. Several Oregon appellate court decisions give considerable insight into reconstituting a more deferential reasonable relationship test: *J. C. Reeves Corporation v. Clackamas County*,[288] *Shultz v. City Grants Pass*,[289] and *Clark v. City of Albany*.[290] As Oregon appellate courts reconstitute the standard of review, they also address issues raised by the Court's new constitutional doctrine and process, which more than likely applies to interpretations of state takings provisions. In reviewing regulatory takings claims that arise mostly under the federal takings clause, the Court of Appeals of Oregon did not consider *Dolan*'s "rough proportionality to be a radical departure"[291] from Oregon's past reasonable relationship test.[292] Oregon's past reasonable relationship test, which gave deference to municipalities and was invalidated by the Court in *Dolan*, found many development impacts sufficient to justify imposing exactions.[293] Such past deference and the present need for stability in policy-making imply that regulatory takings claims arising under the Oregon takings provision could still be subject to a reasonable relationship test that provides slightly more scrutiny than the past Oregon reasonable relationship test invalidated by *Dolan*.[294] In *Group v. Clackamas County*,[295] a developer applied for approval of a subdivision.[296] Clackamas County approved the application but imposed land dedication conditions for road improvements.[297] The developer challenged these conditions as a violation of the takings clause of fifth amendment, but LUBA affirmed the county's imposition of the conditions.[298] The court of appeals reversed and remanded the decision to the county,[299] concluding that the county's findings were not sufficient to establish a rough proportionality between these conditions and development impacts.[300] The

288. *See* J. C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. Ct. App. 1994).
289. *See* Shultz v. City Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994).
290. *See* Clark v. City of Albany, 904 P.2d 185 (Or. Ct. App. 1995).
291. *See J. C. Reeves Corp.*, 887 P.2d at 363.
292. *See id.*; *see also Art Piculell Group*, 922 P.2d at 1231.
293. *See Art Piculell Group*, 922 P.2d at 1231; *see also J. C. Reeves Corp.*, 887 P.2d at 363.
294. *See Dolan,* 512 U.S. at 393-96.
295. *See* Group v. Clackamas County, 922 P.2d 1227 (Or. Ct. App. 1996).
296. *See id.* at 1231.
297. *See id.* at 1230.
298. *See id.*
299. *See id.* at 1236.
300. *See Art Piculell Group,* 922 P.2d at 1233. In *Group*, the court of appeals concludes that the hearing officer had considered some erroneous findings

court of appeals stated that "although petitioner here argues otherwise, we adhere to our view that the legal standard in *Dolan* does not differ sharply from the one that was previously applied in this state."[301] The court of appeals leads one to conclude that any interpretation of the Oregon takings provision will provide a reasonable relationship test that does not radically change the level of scrutiny of the pre-*Dolan* reasonable relationship test.[302] Such a fundamental change in the Oregon reasonable relationship test implies that it may barely exceed the federal standard when it is fully reconstituted.

B. Constitutionally Mandated Shifts to Effect Heightened Scrutiny

Oregon appellate courts reconstitute the reasonable relationship test by instituting *Dolan*'s requirement that the burden of proof in quasi-judicial hearings rest with local governments to establish the connection between these conditions and the nature and extent of the impact of projected development.[303] States are free to adopt a reasonable relationship test that gives greater protection to landowners and developers than the protection guaranteed by the federal takings clause.[304] However, one can conclude that an

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regarding the location of facilities in making a determination of rough proportionality. *See id.* at 1233. The court of appeals refused to find that "a development cannot have impacts that could warrant improvement conditions that are system wide in scope." *See id.* at 1236. It noted that in applying the rough proportionality test, "the determinative factor must be the relationship between the impacts of the development and the approval condition, and not the extent of the public's need for road or other improvements that happen to exist at the time the particular development is approved. . . ." *Id.*

301. *See Art Piculell Group,* 922 P.2d at 1231. Assuming that Court of Appeals of Oregon is referring only to quasi-judicial proceedings that had been subject to heightened scrutiny by Oregon courts prior to *Dolan*, the court of appeals' conclusion that *Dolan* does not affect Oregon's standard of review might be correct. However, such an assumption does not appear to be the case here. *See infra* note 365 and accompanying text. Those pre *Dolan* decisions that applied heightened scrutiny to quasi-judicial proceedings dealt mostly with rezoning and did not involve land dedication conditions and other exactions. *See id.*

302. *See Art Piculell Group*, 922 P.2d. at 1231; *see also J. C. Reeves,* 887 P.2d at 363.

303. *See Dolan*, 512 U.S. at 391 n.8. Chief Justice Rehnquist, writing for the majority, stated that "[h]ere, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. *See Nollan*, 483 U.S. at 836, 107 S. Ct. at 3148. . . . " *See Dolan,* 512 U.S. at 391 n.8.

304. *See id.* at 389-91. In interpreting the federal and state takings provisions in light of *Nollan* and *Dolan*, the North Dakota Supreme Court described the relationship between the federal and state constitutions by stating that "'we cannot interpret our state constitution to grant narrower rights than guaranteed by the

interpretation of a state takings provision cannot impose the burden of proof on developers and landowners to establish a lack of a sufficient relationship.[305] The shifts of the burden of proof and presumption of validity effect heightened scrutiny and thus are an integral part of the guarantee of the federal takings clause, which protects property rights of landowners and developers, and thus cannot be diminished by interpretations of state takings provisions.[306] These interpretations of state takings provisions must shift the burden of proof and the presumption of validity in reconstituting the more deferential type of reasonable relationship test.[307] These shifts are fundamental to the Fifth Amendment's guarantee, though the *Dolan* Court shifts the burden of proof in a footnote.[308]

Oregon appellate courts must consider the nature of the burden of proof that now rests on municipalities under the reasonable relationship test. In one of the earliest Oregon appellate decisions that followed the Court's reversal of the federal standard applied by Oregon courts, the Court of Appeals of Oregon observed that shifting this burden in the application of the reasonable relationship test results in no significant change.[309] Shortly thereafter, however, the court of appeals tacitly observed the full implications of the Court's shift of the burden of proof and thus recognized its effects on local disputes when courts apply the reasonable relationship test.[310] This closer observation came in *J. C. Reeves Corp. v. Clackamas County*.[311] In *J. C. Reeves*, the developers submitted an application to develop a 21-lot subdivision, and the Clackamas County hearing officer approved the application but imposed several conditional demands on the approval of the subdivision plat by demanding street improvements and removal of a spite strip.[312] The developer requested review of the hearing officer's decision by

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federal constitution.'" *See Southeast Cass Water Resource Dist.*, 527 N.W.2d at 890 (citing *Matthews*, 216 N.W.2d at 99).

305. *See Dolan*, 512 U.S. at 391-92 & 391 n.8.

306. *See id.*

307. *See id.*

308. *See id.* We cannot say that the Court's shift of the burden of proof in an obscure footnote in *Dolan* is any less important than the famous or infamous—depending on who is talking—footnote in *Carolene Products*. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

309. *See J. C. Reeves Corp.*, 887 P.2d at 363.

310. *See infra* notes 320-321 and accompanying text.

311. *See* J. C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. Ct. App. 1994).

312. *See id.* at 362.

the Land Use Board of Appeals (LUBA), and LUBA affirmed the hearing officer's decision. The court of appeals reversed in part and affirmed in part LUBA's decision and held that the land dedication condition requiring owners to make street improvements[313] did not meet *Dolan*'s rough proportionality standard.[314] The court of appeals concluded that Clackamas County's findings to support the street improvements were not specific enough.[315] It found that Clackamas County did not compare "the traffic and other effects of subdivision" [with] the "subdivision frontage improvements that the county has required."[316] It concluded that findings on conditions other than for land dedications were specific enough and held that the condition to eliminate a spite strip and to commence building on specific boundary lines met the rough proportionality standard[317] and was not a regulatory taking in violation of the federal takings clause.[318] The court of appeals noted that the latter condition, which was not a regulatory taking, was imposed to improve accessibility to adjoining property.[319] It found that Clackamas County's findings showed that the subdivision, with its internal streets, would impact traffic and accessibility.[320] But note that the court of appeals observed that shifting the burden of proof to municipalities as required by *Dolan* would not substantially affect the outcome of some disputes brought under the Oregon takings provision. It stated that:

> Moreover, although the court spoke in terms of a "burden" resting on the body imposing the conditions rather than on the applicant, the requirement for findings under Oregon's land use decision scheme may often amount to the practical equivalent of a burden of articulation on local bodies that does not differ materially from what *Dolan* requires.[321]

Although it was applying the rough proportionality test under the

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313. *See id.* at 361.
314. *See id.* at 365.
315. *See id.*
316. *See J.C. Reeves Corp.*, 887 P.2d at 365.
317. *See d.* at 365-66.
318. *See id.* at 366.
319. *See id.* at 365.
320. *See id.*; *see also infra* notes 507-528 and accompanying text (discussing the burden of proof applied by other courts in light of *Dolan*).
321. *See J. C. Reeves*, 887 P.2d at 363. *See also Group*, 922 P.2d at 1231 (an amplification of an earlier conclusion of the Court of Appeals of Oregon on the burden of proof); *infra* notes 323-324 and accompanying text (discussion of an observation made by the Court of Appeals of Oregon in *Group*).

federal takings clause, the court of appeals observed that the post-*Dolan* burden of proof is not significantly different from the burden of proof imposed under the pre-*Dolan* reasonable relationship test of the Oregon takings provision where regulatory taking claims arose under challenges to legislative determinations and adjudicative actions that impose land use regulations.[322] Such thinking was short lived. It did not take the court of appeals long to recognize that "it is the "government's burden," not the petitioner's, to articulate the numerical and other facts necessary to demonstrate rough proportionality."[323] The court of appeals eventually recognized that the burden is closely associated with protecting the landowner's right to receive just compensation and thus its impact on municipal and county findings of fact cannot be summarily ignored by a state appellate court's interpretation of the state takings provision.[324]

The Court of Appeals of Oregon recognizes that the burden of proof resting on municipalities under the rough proportionality has an impact on the quality of findings of facts. It found that the specificity of findings to justify the imposition of an exaction under the rough proportionality is much greater than had been under the pre-*Dolan* reasonable relationship test.[325] One would certainly expect that the judicial outcome of regulatory taking claims

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322. *See J. C. Reeves*, 887 P.2d at 363; *see also Group*, 922 P.2d at 1231. *In Group*, the court of appeals concluded that mathematical analysis or quantification is relevant in applying the rough proportionality, as stated in *Dolan* itself. *See Group*, 922 P.2d at 1235.

323. *See id. In Group*, the court of appeals also noted that all information admitted to determine the rough proportionality did not have to be determinative. *See id.*

In *Group*, the court of appeals noted that its determination of whether the local government has met its burden of proof in putting forth findings to justify the exaction is a question of law, even though it includes "factual aspects." *See id.* at 1231. Furthermore, it stated that in addressing questions of law raised by decisions of "LUBA under ORS 197.850, the answer is for us to give, without applying any deferential review standard." *See id.* The court of appeals noted that "findings are used as the device for the governmental demonstration and determination of rough proportionality." *See Group*, 922 P.2d at 1231. Recently, the Court decided whether a regulatory taking claim brought under Section 1983, 42 U.S.C. § 1983, for deprivation of the right to receive just compensation under the federal takings clause is a question of fact for the jury. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999). The Court concluded in *Del Monte Dunes* that a regulatory taking claim brought under 42 U.S.C. § 1983 to recover damages for deprivation of the right to receive just compensation by refusing to grant a development permit over a protracted period of time is a question of fact for jury determination. *See Del Monte Dunes*, 119 S. Ct. at 1644-45.

324. *See Group*, 922 P.2d at 1231.

325. *See id.* (citing *J. C. Reeves*, 887 P.2d at 363).

involving land dedication conditions would be significantly different under the rough proportionality standard of review than under Oregon's more deferential reasonable relationship standard.[326] In *J. C. Reeves*, the court of appeals stated that *Dolan* created an obstacle to affirming local findings that predated *Dolan*'s rough proportionality because such findings lacked the detailed analysis required by *Dolan*.[327] In *Group*, the court of appeals offered more guidance by noting that an individualized or site-specific determination and an effort to quantify the findings must be undertaken by municipalities in establishing a rough proportionality.[328] It observed that the *Dolan* Court did not identify where "to locate the line between precise mathematical calculation and quantification . . ."[329] and thus indicates that the Court's impreciseness in drawing this line affects mostly the burden of proof and the quality of findings of facts. In *J. C. Reeves* and *Group*, the court of appeals concluded that municipalities' findings to justify some exactions were not sufficient on the existing record to survive scrutiny under the rough proportionality.[330] Assuming that Oregon appellate courts continue to follow this line of reasoning, Oregon's reasonable relationship test may still be moving slowly to the middle of a continuum on standards of review for judicial scrutiny of regulatory taking claims. The rough proportionality is in the middle, and a variety of other standards is to the left and right of the rough proportionality.[331]

C. *The Reach of the Rough Proportionality in Limiting Exactions*

Interpretations of the Oregon takings provision raise significant constitutional questions regarding the scope of *Dolan*'s rough proportionality. One such question is the application of heightened scrutiny to legislative determinations such as growth controls,

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326. *See J. C. Reeves*, 887 P.2d at 363. *See also* Appendix A (illustrating a continuum on the federal and state standards of review for regulatory taking claims).

327. *See J. C. Reeves*, 887 P.2d at 363.

328. *See Group*, 922 P.2d at 1231 (citing *Dolan*, 114 S. Ct. at 2319 & 2322).

329. *See id.* at 1231.

330. *See id.* at 1233; *see also J. C. Reeves*, 887 P.2d at 365.

331. *See Dolan*, 512 U.S. at 389-91; Appendix A. The position of the rough proportionality on the regulatory takings continuum in Appendix A includes the shifting of the burden of proof and presumption of validity. *See Dolan*, 512 U.S. at 391-92. The position of other state standards of review may not reflect these shifts that are purposely applied to effect heightened scrutiny under the federal takings clause. *See infra* notes 507-522 and accompanying text.

regulatory denials, use restrictions and other exactions.[332] Another question is the nature of conditional demands that are subject to heightened scrutiny. Developers do not share municipalities' belief that contingent conditional demands and legislative determinations are not subject to heightened scrutiny under the state or federal takings clauses. Regulatory taking questions arise when the nature of conditional demands is not ascertainable during preliminary approval of development permits and thus it is not known whether these demands are subject to heightened scrutiny. In *Clark v. City of Albany*,[333] the court of appeals interpreted the federal takings clause to decide whether certain conditional demands, which were imposed at the early stage of a site plan review for a fast food restaurant, were types of development impact exactions subject to *Dolan*'s rough proportionality.[334] The site plan review preceded the issuance or approval of "building permits and other final project approvals."[335] The City of Albany made several conditional demands that requested the developer to design street improvements, to provide financial assurance, to provide a method for making a no-drive area, to provide a storm drainage plan, to reconstruct drainage lines, to provide financial assurance or construct drainage improvements, and to widen a sidewalk.[336] The court of appeals concluded that both the conditional demands and proposed development had not assumed a near final form, unlike the conditions and development in *Dolan*.[337] It also found that the development was given preliminary approval and the conditional demands were still subject to some contingencies.[338] The court of appeals concluded that some land dedication conditions are not the only conditional demands subject to *Dolan*'s rough proportionality[339] and that such demands are also burdens on property rights.[340]

It concluded that *Dolan*'s rough proportionality applies to conditional demands that "require present or proximate future action of a reasonably defined nature in order to advance to the

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332. *See infra* notes 333-367 and accompanying text.

333. *See* Clark v. City of Albany, 904 P.2d 185, 186 (Or. Ct. App. 1995), *review denied*, 912 P.2d 375 (Or. 1996).

334. *See id.* at 186.

335. *See id.*

336. *See id.* at 187-88.

337. *See id.* at 187.

338. *See Clark*, 904 P.2d at 187.

339. *See id.* at 189.

340. *See id.* In *Del Monte Dunes*, the Court limits *Dolan*'s rough proportionality to exactions. *See Del Monte Dunes*, 119 S. Ct. at 1635.

next stage of the process to gain approval of a project whose essential contours are also defined by the site plan under review . . . ."[341] It also found that conditional demands requiring road improvements on and off the development site were merely prerequisites for developing the property but also extended benefits to the public.[342] Therefore, the court of appeals held that conditional demands requiring a design for street improvements,[343] widening of the sidewalk,[344] and providing financial assurance or constructing road improvements[345] are exactions.[346] It concluded other conditional demands[347] were merely a traffic regulation[348] or use restriction[349] and advisory comments[350] that are not subject to *Dolan* in their present state.[351] Oregon appellate courts must address the same issue under the Oregon takings provision. *Clark* provides much insight into how Oregon and other state courts might address state takings issues raised by the nature of conditional demands for assurances, insurance and other requirements that are imposed during the early stages of development, but are apparently not subject to *Dolan*'s heightened scrutiny. The *Dolan* Court's application of the rough proportionality only to adjudicative actions raises another significant taking question that the Court does not fully address in *Del Monte Dunes*. Reconstituting a deferential reasonable relationship test requires appellate courts to determine whether *Dolan*'s limit on the exercise of police power authority applies to legislative determinations that impose impact exactions.[352] In *Schultz v. City of Grants Pass*,[353] the City of Grants Pass (Grants Pass) imposed a land dedication condition that required the owner to give a 20 foot right-of-way on the approval

341. *See Clark*, 904 P.2d at 190.
342. *See id.* at 189.
343. *See id.* at 189-90.
344. *See id.* at 191.
345. *See id.* at 189-90.
346. *See Clark*, 904 P.2d at 191. For definitions of the types of development impact exactions, see *supra* note 107 and accompanying text.
347. *See Clark*, 904 P.2d at 191.
348. *See id.* at 189.
349. *See id.*
350. *See id.* at 190-91.
351. *See Clark*, 904 P.2d at 190-91.
352. *See Dolan*, 512 U.S. at 385. In *Del Monte Dunes*, the Court limits *Dolan*'s rough proportionality to exactions but did note whether these exactions include legislative determinations that impose excessive exactions on particular development. *See Del Monte Dunes,119 S. Ct. at 1635.*
353. *See* Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994).

of an application for a development permit to partition the site.[354] The owner challenged the land dedication condition as a regulatory taking.[355] Grants Pass argued that the dedication condition was imposed under an ordinance or a legislative determination that is not subject to *Dolan*'s rough proportionality but instead is subject to a presumption of constitutional validity.[356] The court of appeals rejected this argument and concluded that *Dolan* applied to legislative determinations where the nature of government action is more than a use restriction that is generally imposed by zoning regulations.[357] The court of appeals concluded that the character or nature of the restriction is most important and not its source.[358] It found that an increase in traffic of 179 trips per day[359] did not justify the dedication,[360] that the projected impacted of the development was for the future and too speculative,[361] and that the owner was asked to deed to the city 20,000 square feet of land.[362] It addressed this question under the federal takings provision but the same question must be addressed under the Oregon takings provision.[363] The court of appeals held that the land dedication condition that was a legislative determination is a regulatory taking under the federal takings clause.[364] Clearly *Del Monte Dunes* concludes that the *Nollan-Dolan* means-ends analysis applies to exactions imposed by adjudicative actions, but it is not sufficiently clear whether this means-ends analysis applies to exactions imposed

354. *See id.* at 570.

355. *See id.*

356. *See id.* at 572. In *Schultz,* the city argues that adjudicative actions that impose land dedication conditions are not presumptively valid. *See id.* The Court of Appeals of Oregon agrees. *See id.* at 572-73. Such conclusion by the court of appeals is consistent with *Dolan,* 512 U.S. at 392. However, the court of appeals observes that legislative determinations that impose exactions are presumptively valid. *See Schultz,* 884 P.2d at 572. The Court of Appeals of Oregon is moving cautiously to understand the impact of the shifts of the burden of proof and presumption of validity. *See supra* note 301 and accompanying text.

357. *See Schultz,* 884 P.2d at 573; *see also J. C. Reeves*, 887 P.2d at 365.

358. *See Shultz*, 884 P.2d at 573.

359. *See id.*

360. *See id.*

361. *See id.*

362. *See id.*

363. *See Ehrlich*, 911 P.2d at 450 (refusing to apply *Dolan* to legislative determinations that implemented traditional use restrictions); *but see* Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380, 389-390 (Ill. App. 1995) (applying *Dolan* to legislative determinations that implemented land dedication conditions and also relying heavily on *Schultz* and *Parking Ass'n of Georgia*). *See also infra* notes 544-564 and accompanying text (discussing the application of *Dolan*'s rough proportionality to legislative determinations).

364. *See Shultz*, 884 P.2d at 571.

by legislative determinations that have the potential to be extortive under some circumstances.

Assuming that the Court of Appeals of Oregon applies similar constitutional theory to interpretations of the Oregon takings provision, then its interpretation of the federal takings clause gives considerable insight into interpretations of Oregon's takings provision.[365] The court of appeals notes that the interpretation of the Oregon takings provision would be affected by *Dolan*'s requirement of more specific or particularized findings.[366] The court of appeals also recognizes that shifting the burden of proof and presumption of validity would affect the quality of findings of facts in applying Oregon's reasonable relationship test to regulatory taking claims.[367] Therefore, one could conclude that Oregon

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365. *See J. C. Reeves Corp.*, 887 P.2d at 360; *see also Schultz*, 884 P.2d at 569; *Clark*, 904 P.2d at 185; *Group*, 922 P.2d at 1231; Oregon, Department of Transportation v. Altimus, 862 P.2d 109 (Or. Ct. App 1993), *rev. denied*, 871 P.2d 122 (Or. 1993), *vacated*, 503 U.S. 801 (1994), *rev'd*, 905 P.2d 258 (Or. Ct. App. 1995).

Professors Mandelker and Tarlock believe that Oregon public policy greatly influenced the adoption of a stricter standard of review in Oregon for some claims that are resolved by quasi-judicial hearings. *See* Mandelker & Tarlock, *supra* note 12, at 109 (citing *see generally* Daniel R. Mandelker & Rodger Cunningham, PLAN. AND CONTROL OF LAND DEVELOPMENT, 871-78 (1995)). They state that "[j]udicial review in Oregon has proceeded not under Fasano [v. Board of Commissioners of Washington County, 507 P.2d 23 (Or. 1973),] but under the state planning goals of the state land-use planning act." *See* Mandelker & Tarlock, *supra* note 12, at 109. *See also infra* note 367 (discussing commentary on the federal and Oregon standards of review). Obviously, Oregon's public policy did not affect claims involving the validity of impact exactions. *See Dolan*, 512 U.S. at 393-96.

366. *See Group*, 922 P.2d at 1231.

367. *See id.* at 1231; *see also Schultz,* 884 P.2d at 572; *supra* notes 303-331 and accompanying text. For a discussion of the differences between the federal and Oregon standards of review, *see generally* Tara J. Schleicher, Comment, *A Tale of Two Courts: Differences Between Oregon's Approach and the United States Supreme Court's Approach to Fifth Amendment Takings Claims*, 31 WILLIAMETTE L. REV. 817 (1995). Ms. Schleicher notes that Oregon courts typically give great deference to local and municipal governments when they review land use decisions under Oregon's comprehensive statewide land use plan. *See* Schleicher, *supra*, at 828-30 & 837-39.

The Oregon appellate courts clearly recognize that the federal takings clause establishes a minimum standard of review. *See supra* notes 365-366 and accompanying text. However, they must consider whether past and present interpretations of the Oregon takings provision would be greatly inconsistent with interpretations of the federal takings clause. *See supra* notes 294-364 and accompanying text. In resolving these issues of inconsistency in federal and state interpretations, Oregon appellate courts appear to be applying a dual sovereignty model. *See supra* note 244. They analyze both federal and state constitutions but the Oregon court concluded that its standard provided similar protection of land-

appellate courts strongly agree that a reconstituted means-ends fit is consistent with the federal standard if the state standard includes particularized findings to demonstrate the relationship between an exaction and development impacts, shifts in the presumption of validity and burden of proof, and applies to legislative determinations that impose exactions and other definite conditional demands during all stages of development.

V. Interpretations of State Takings Provisions Totally Repugnant to Federal Norm

The highly deferential reasonableness or reasonably related test requires that a public need slightly related to development impacts must exist for a community to exact public improvements and facilities from developers.[368] The Court noted that the Supreme Court of Montana had established a reasonableness test in *Billings Properties, Inc. v. Yellowstone County*[369] and that such a standard of review was too lax or deferential to be the federal norm,[370] and is totally repugnant to the federal takings norm established in *Dolan*. In *Billings*, a landowner filed a regulatory taking claim under the United States[371] and Montana[372] Constitutions to challenge land dedication conditions imposed to acquire parks and playgrounds under a Montana statute[373] that required these conditions for approval of a subdivision plat.[374] The landowner admitted that land dedications for streets and alleys were perfectly valid but land dedications for parks and playgrounds were not valid,

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owners' rights as the federal standard. *See supra* notes 294-364 and accompanying text. These courts do not see the federal interpretation as having a broad effect on Oregon takings analysis and law because Oregon had already provided much of the federal minimum to its citizens. *See id.*

368. *See* Kushner, *supra* note 46, at 156-57.

369. *See* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964).

370. *See Dolan*, 512 U.S. at 389.

371. *See* U.S. CONST. amend. XIV.

372. *See* MONT. CONST. art. III, § 14.

373. *See* R. C. M. §§ 11-602, subd. 9 (1947). In *Billings*, the Supreme Court of Montana stated that:

> Section 11-602, subd. 9, in effect requires a person who desires to subdivide and sell his property from approved plats to dedicate a portion thereof to the public for parks and playgrounds, without compensation therefor. The language of the statute obviously contemplates that this be done pursuant to the police power of the state.

Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182, 185 (Mont. 1964).

374. *See id.*

even though legitimate needs existed for these facilities.[375] The Supreme Court of Montana observed that other standards of review[376] required that the impact of the subdivision on the surrounding community must create the need for public facilities.[377] Its interpretation of both the Montana and Federal takings provisions gave great deference to the state legislature: "[T]he question of whether or not the subdivision created the need for a park or parks is one that has been already answered by our Legislature. . . . This amounted to a legislative determination that subdivisions of this size create the need for such park or parks, and that such need was not merely concomitant to the natural growth of a municipality."[378] It concluded that the presumptions of the legislature would stand "*if there was any rational basis* on which they can be upheld . . . ."[379] (italics in original) The Montana Supreme Court held that the standard of review for land dedication conditions was a rational basis test.[380] It applied the *rational basis or reasonably related test* and concluded that land dedication conditions were not a regulatory taking under the Montana and Federal takings provisions.[381]

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375. *See id.* at 187.

376. *See id.* at 188; *see also infra* note 377 and accompanying text.

377. *See Billings*, 394 P.2d at 188. The Supreme Court of Montana also relied, among others, on Ayres v. City Counsel of the City of Los Angeles, 207 P.2d 1, 11 (Cal. 1949). The supreme court also relied on Pioneer Trust & Savings Bank v. Village Mount Prospect, 176 N.E.2d 799, 801 (Ill. 1961), which was argued by the landowner as the appropriate precedent. The supreme court however adopted the lower form of the *Ayres* standard of review, which was the highly deferential reasonableness test. *See Billings*, 394 P.2d at 188.

378. *Billings*, 394 P.2d at 188.

379. *Id*; *but see Dolan*, 512 U.S. at 389 (The Court concluded that presumption of validity does not always reside with government actions that exact an interest in land while interfering with the right to exclude others.).

380. *See Billings*, 394 P.2d at 191.

381. *See id.* The Court has developed a standard of review for each regulatory taking claim that challenges the validity of land use, employment and other government regulation under the takings clause. *See supra* note 44 and accompanying text. In Eastern Enterprises v. Apfel, Comm'r of Social Security, 118 S. Ct. 2131 (1998), the Court applies a rational basis test to the regulatory taking claim based on an economic interference with a property interest by a retroactive application of social legislation. *See Eastern Enterprises*, 118 S. Ct. at 2153. In City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999), the Court concludes that the standard of review for regulatory taking claims that challenge the validity of a regulatory denial of a site development permit is the reasonably related test. *See Del Monte Dunes*, 119 S. Ct. at 1635-36. The Court has yet to state explicitly whether its reasonably related test in *Del Monte Dunes* and its rational basis test in *Apfel* are one in the same. In *Dolan* it explicitly notes that the rough proportionality was not a rational basis test, but in *Del Monte Dunes* it did not do so. However it notes most explicitly that *Del Monte Dunes* does not open zoning

Billings establishes, according to Court, the most lax or loose test and thus possesses a substantial constitutional error.[382] The presumption that legislative declarations are sufficient to establish rough proportionality in the absence of particularized findings is *Billings'* fatal flaw. Two reasons exist for *Billings'* demise by recent federal takings analysis. First, the *Dolan* Court observed that the burden of proof rests on government to demonstrate that the impact of development was roughly proportional to the exaction and, therefore, general declarations are not sufficient to establish a rough proportionality.[383] Second, the *Dolan* Court shifts the presumption of validity from government and thus declarations and general findings carry even less weight.[384] In fact, *Billings*' is not a case of first impression for the Court on the looseness or laxity of a standard of review for regulatory taking claims that challenge the validity of a land dedication condition under the federal takings clause.[385] The *Nollan* Court observed that the California standard of review for the relationship between an exaction and its ability to further its purpose was essentially lacking.[386] In fact, the *Nollan* Court saw no need whatsoever to consider the relationship between the exaction and the public need because this California standard of review that was applied to determine the relationship between the exaction and its public purpose was too loose.[387] Thus a standard of review that cannot scrutinize the relationship between the exaction and its purpose cannot provide sufficient scrutiny to determine the relationship between an exaction and its development impacts under a state takings clause. The Court's observations in *Billings* and *Nollan* undermine the foundation of any highly

regulations and other land use policy to general challenges. *See id.* at 1636-37. Thus one could easily conclude that purely legislative determinations are still subject to highly deferential scrutiny, perhaps a rational basis test, under the federal takings clause. *See id.* at 1637. We are more certain that sufficient evidence can easily defeat a protracted, ad hoc zoning decision justified by general declarations that are inconsistent and subject to change. *See id.*; *see also infra* note 383 and accompanying text.

382. *See Dolan*, 512 U.S. at 389.

383. *See Dolan*, 512 U.S. at 391 n.8. It is questionable whether general declarations could survive *Del Monte Dunes*'s reasonably related test where landowners and developers can proffer sufficient evidence to rebut the generalities or general findings of such declarations. *See Del Monte Dunes*, 119 S. Ct. at 1637.

384. *See Dolan*, 512 U.S. at 391. Some legislative determinations are reviewed under the same standard of review as adjudicative actions in several of the states. *See supra* notes 491-503 and accompanying text.

385. *See Nollan*, 483 U.S. at 838.

386. *See id.*

387. *See id.*

deferential standard applied to determine the relationship between an exaction and the impact of development.

In light of *Dolan*, the California standard of review is equally as deferential as Montana's reasonably related test but perhaps less deferential than Oregon's reasonable relationship test, and thus the Court would not consider it to be within the federal standard of review.[388] Oregon's means-ends fit shows much inconsistency with the federal norm, but California's means-ends fit is totally repugnant and thus replacing it is the only judicial course of action. In the remainder of Part V, we examine the California takings analysis that had clearly failed to withstand muster under the federal takings analysis. We find that California's deferential standard must be replaced to provide the federal guarantee of the right to receive just compensation under the California takings provision.

A. *State Takings Provisions with the Reasonably Related Test*

The Supreme Court of California established a reasonableness test as the appropriate standard of review for regulatory taking claims that challenge the validity of land dedication conditions and fees in lieu of dedication under state and federal takings provisions.[389] The constitutional validity of the reasonably related test under federal takings analysis raises a substantial question regarding the application of this test to any exaction in light of *Nollan* and *Dolan*.[390] *Nollan* first raise significant doubt regarding the continued validity of California's reasonably related test, and *Dolan*'s rough proportionality, which the Court sought to distance from a minimal standard of review, leaves even less doubt regarding its validity. Moreover, the California legislature requires California courts to apply a reasonable relationship test to some development impact exactions.[391] Obviously *Nollan* and *Dolan* do not support the California taking analysis that includes both judicial decisions and legislative acts to establish standards of review for regulatory taking claims that arise under the California takings provision.[392] Thus heightened scrutiny required by the Court and California legislature would seem to leave the validity of California's reason-

388. *See infra* notes 389-408 and accompanying text.

389. *See* Ayres v. City Council of City of Los Angeles, 207 P.2d 1 (Cal. 1949). At the writing of this article, the Supreme Court of Montana had not reviewed the reasonableness test it established in *Billings*.

390. *See Dolan*, 512 U.S. at 389 & 391.

391. *See* Ehrlich v. City of Culver City, 911 P.2d 429, 436-37 (Cal. 1996).

392. *See id.*

ably related test well settled.[393] It is invalid.

California's highly deferential reasonably related test permits municipalities to impose land dedication conditions for off-site improvements, such as a street that runs adjacent to a subdivision.[394] The Supreme Court of California reaffirmed this interpretation of the state takings provision and thus relied strongly on a highly deferential standard of review for some types of exactions.[395] In *Associated Home Builders of the Greater East Bay, Incorporated v. City of Walnut Creek*,[396] Associated Home Builders of Greater East Bay (Associated) challenged a local ordinance that was enacted under authority of a California Code[397] that imposed land dedication conditions or a fee in lieu of dedication ("fees in lieu") for parks and recreation facilities in the local community.[398] Associated challenged the constitutionality of the Code Section and local ordinance.[399] The Supreme Court of California reaffirmed its holding in *Ayres v. City Council of the City of Los Angeles*[400] but applied a type of reasonable relationship test as required by the California Code.[401] It held that dedication conditions and fees in lieu for parks and recreation facilities were reasonably related to the need to preserve open space for natural

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393. *See Nollan*, 483 U.S. at 838; *see also Dolan*, 512 U.S. at 389-91. In *Nollan*, the Court casts considerable doubt on the constitutional validity of the standard of review applied in Grupe v. California Coastal Comm'n, 166 Cal. App.3d 148, 212 Cal. Rptr. 578 (1985). *See Nollan*, 483 U.S. at 838. The Court concluded that the standard of review applied in *Grupe* did not provide "this case . . . [, *Nollan*, with] the most untailored standards." *See id.*

394. *See Ayres*, 207 P.2d at 8.

395. *See* Associated Home Builders of the Greater East Bay, Inc., v. City of Walnut Creek, 484 P.2d 606, 608-09 (Cal. 1971). *See also Ehrlich*, 911 P.2d at 437 (The Supreme Court of California noted that *Dolan* casts considerable doubt on *Associated Home Builders.*).

396. *See Associated Home Builders*, 484 P.2d 606 (Cal. 1971).

397. *See id.* at 608-09.

398. *See id.* at 610.

399. *See id.*

400. *Ayres*, 34 Cal. 2d 31, 207 P.2d 1 (Cal. 1949). The Supreme Court of California stated that: "[w]e do not find in *Ayres* support for the principle urged by Associated that a dedication requirement may be upheld only if the particular subdivision creates the need for dedication. . . ." *See Associated Home Builders*, 484 P.2d at 610.

401. *See Associated Home Builders*, 484 P.2d at 608-09 at 608-09 (citing Cal. Gov't Code § 11546 (West's Ann. Bus. and Prof. Code)). Section 11546(e) states that:

> (e) The amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision. . . .

Id. at 609 (citing Cal. Gov't Code § 11546(e) (West's Ann. Bus. and Prof. Code)).

resources and scenic beauty.[402] It also concluded that land dedication conditions and fees in lieu imposed on a subdivision could be justified by findings that established a public need to preserve dwindling natural resources.[403] It concluded that municipalities did not need to impose exactions based solely on the recreational needs created by the impact of the subdivision.[404] *Associated Home Builders* affirmed California's deferential standard of review, but the *Nollan* Court concluded that the reasonably related test or highly similar California standard was too loose.[405] Likewise, the *Dolan* Court also concluded that the reasonably related test was too lax, thus further undermining the California standard. However, the saga of the Court and the California standard does not end with its holding in *Dolan*. There is more. The Court in a companion case to *Dolan* once again considered another California standard of review that was a highly deferential reasonably related test and thus repugnant to the federal takings norm.

While *Dolan* was pending, the Court granted *certiorari* to *Ehrlich v. City of Culver City*.[406] *Ehrlich* raised regulatory taking issues that involved the validity of adjudicative and legislative exactions and thus required California appellate courts to consider the validity of the reasonably related test under the federal and state takings provisions.[407] Immediately after deciding *Dolan*, the Court vacated the judgment in *Ehrlich* and instructed the Court of Appeal of California to apply *Dolan*'s rough proportionality test.[408] The Supreme Court of California ultimately resolved

402. *See id.* at 610-11.

403. *See id.* at 611.

404. *See id.* In *Associated Home Builders,* the Supreme Court of California criticizes *Pioneer Trust*, 176 N.E.2d at 799, for its misinterpretation of *Ayres* to establish the most stringent specifically and uniquely attributable test. *See id.* at 615 n.13.

405. *See Nollan,* 483 U.S at 838; *see also supra* note 393 and accompanying text. In *Del Monte Dunes*, the Court applies its loose standard, actually the reasonably related test, but finds an absence of the means-ends fit in its first application to a protracted zoning decision that is undersupported by specific findings of the local government. *See Del Monte Dunes*, 119 S. Ct. at 1636-37.

406. Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct 299 (1996).

407. Ehrlich v. City of Culver City, 512 U.S. 1231 (1994). One could conclude that the Court signaled the application of the rough proportionality to monetary exactions and perhaps to exactions imposed on an approval of a rezoning. *See* James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus Determining "Reasonably Related" Impacts of Real Estate Development under the Takings Clause*, 27 TEX. TECH L. REV. 73, 96 n.114 (1996).

408. *See Ehrlich*, 512 U.S. at 1231.

those issues in *Ehrlich* and revealed the precarious development of the reasonably related test under a state takings provision that maintained an independent takings analysis.

B. Maintaining and Establishing a Less Deferential Standard

It is plainly clear that the reasonably related test does not survive *Dolan*, but *Dolan*'s holding can be narrowly construed and thus would permit the reasonably related test to be applied to some exactions. In *Ehrlich,* the Supreme Court of California interprets the state takings provision and land use legislation to decide whether *Dolan*'s rough proportionality is consistent with the reasonably related test[409] established by the California legislature, but referred to as a reasonable relationship.[410] This reasonable relationship test requires local governments and agencies to show that development impact exactions are reasonably related to the impact of development.[411]

In *Ehrlich*, Culver City's exactions raised regulatory taking issues when Culver City disapproved an application for rezoning and other changes that had been requested by the petitioner, a local landowner and developer.[412] The city declared that the loss of the private recreational club reduced needed recreational facilities of the community.[413] In the meantime, the petitioner requested and received a demolition permit and demolished the club. Petitioner then donated some of the equipment to Culver City.[414] Petitioner also indicated that he would be willing to build four new tennis courts.[415] Later, Culver City agreed to approve the application for rezoning and changed its land use plans conditioned on the petitioner agreeing to pay a mitigation fee of $280,000.[416] Culver City would use the fee to replace needed recreational facilities that

409. *See Ehrlich,* 911 P.2d at 437. The Mitigation Fee Act, Cal. Gov't Code, § 66000 *et seq.*, (1996), codifies the reasonable relationship test "employed in California and elsewhere to measure the validity of required dedications of land (or fee imposed in lieu of such dedications) that are challenged under the Fifth and Fourteenth Amendments. *See Ehrlich*, 911 P.2d at 437; *see also supra* note 219 and accompanying text.

410. *See Ehrlich*, 911 P.2d at 437.

411. *See id.* at-436-37.

412. *See id.* at 434.

413. *See id.*

414. *See id.*

415. *See Ehrlich*, 911 P.2d at 434.

416. *See id.* at 434-35.

had been lost to the community by the closing of petitioner's club.[417] Petitioner challenged the mitigation fee and Arts in Public Places Program as violations of the takings clause of the United States[418] and California Constitutions.[419]

The trial court held that Culver City's mitigation fee for recreational facilities was not reasonably related to the impact of the development project and was thus a regulatory taking.[420] It held, however, that the Arts in Public Places Program was not a regulatory taking.[421] The court of appeals reversed the trial court

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417. *See id.* at 435. In *Ehrlich*, the petitioner had used the development site as a private recreational club (club). In August 1988, the petitioner closed the club because it had suffered financial losses. *See Ehrlich*, 911 P.2d at 434. The petitioner wanted to build a "30-unit condominium complex valued at $30 million." *See id.* In September 1988, the petitioner applied to the City of Culver City (Culver City) to rezone the site from commercial to residential and to change its specific and general land use plans. *See id.* Culver City considered purchasing the site and hired a consultant to study the feasibility of purchasing it. *See id.* The study determined that the club had been poorly managed and needed major capital improvements, and thus Culver City decided not to purchase the site. *See id.* In April 1989, Culver City disapproved the application for rezoning and other changes that had been requested by petitioner. *See Ehrlich,* 911 P.2d at 454. It declared that the loss of the club reduced needed recreational facilities of the community. *See id.* In the meantime, petitioner requested and received a demolition permit, demolished the club, and donated some of the club's equipment to Culver City. *See id.* The petitioner also indicated that he would be willing to build four new tennis courts. *See id.* Later, Culver City agreed to approve the application for rezoning and changing its plans conditioned on petitioner agreeing to pay a mitigation fee (one-time impact fee) of $280,000 in lieu of building the tennis courts. *See id.* at 434-35. Culver City would use the fee to replace needed recreational facilities that had been lost to the community by the closing of petitioner's club. *See Ehrlich,* 911 P.2d at 434-35.

Culver City also required developers whose development was valued in excess of $500,000 to place art on the premises of the development under its "Arts in Public Places Program (Arts in Places). *See id.* If the developer chose not to place art on the premises, the developer could pay a fee in lieu of the dedication of art. *See id.* Petitioner agreed to pay the fee, but his successors in interest agreed to place art on the premise. *See id.* Culver City also required developers to dedicate parkland or pay a fee in lieu of parkland. *See id.* at 435 n.2. The petitioner paid and did not challenge the parkland dedication and the fee in lieu of dedication. *See Ehrlich*, 911 P.2d at 435 n.2.

418. *See* U.S. CONST. amend. V. The Fifth Amendment applies to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV; *see also* Chicago, B & Q Ry. Co. v. Chicago, 166 U.S. 226 (1897). For interpretations of the federal takings clause in seminal Court decisions, *see supra* notes 150-212 and accompanying text.

419. *See* CAL. CONST. art. I, § 19. For interpretations of the Takings Clause of the California Constitution in a regulatory taking claim that challenged the validity of an impact exaction, *see supra* notes 330-364 and accompanying text.

420. *See Ehrlich*, 911 P.2d at 435.

421. *See id.*

on the mitigation fee,[422] concluding that "'[t]he mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the townhouse project and for the burden to the community resulting from the loss of the recreational facilities.'"[423] "The court of appeals found . . . [that a] "substantial nexus" . . . [existed] between the proposed condominium project and the $280,000 exaction[,]"[424] though the need for these facilities was not a result of the impact of the development project.[425] The court of appeals affirmed the trial court's holding that the Art in Public Places Program was not a taking of private property for public use.[426]

The petitioner requested the United States Supreme Court to grant a *writ of certiorari* to the Court of Appeals of California.[427] The Court simultaneously granted *certiorari* and vacated the judgment, and remanded *Ehrlich* to the court of appeal with instructions to apply *Dolan*.[428] On remand, the court of appeal concluded that the application of *Dolan* did not change the outcome of its decision, nor did it publish an opinion.[429] Petitioner then requested review by the Supreme Court of California,[430] which agreed to review the decision of the court of appeal.[431]

The Supreme Court of California affirmed in part and reversed in part the court of appeal decision.[432] The supreme court concluded that private recreation facilities possessed public value and may impact public needs when removed from use,[433] and that *Nollan*'s essential nexus and *Dolan*'s rough proportionality apply to a mitigation or monetary fee that "imposes a special, discretionary permit conditions on development by individual property owners

422. *See id.* at 435 (citing Ehrlich v. City of Culver City, 15 Cal. App. 4th 1737, 19 Cal. Rptr.2d at 468).
423. *Id.* at 436 (*quoting Ehrlich*, 15 Cal.App.4th 1750, 19 Cal. Rptr.2d at 468).
424. *Id.* at 435-36.
425. *See Ehrlich,* 911 P.2d at 436 at 436.
426. *See id.*
427. *See Ehrlich*, 512 U.S. at 1231.
428. *See id.*
429. *See Ehrlich*, 911 P.2d at 433.
430. *See id.*
431. *See id.*
432. *See id.* at 451.
433. *See id.* at 445. The Supreme Court of California found that private ownership does not preclude private property from possessing public value that can be the ground for a mitigation fee to reduce the loss of this value to the city. *See Ehrlich,* 911 P.2d at 445..

. . . ."[434] It held that Culver City's mitigation fee was not a regulatory taking under the *Nollan-Dolan* means-ends fit.[435] The supreme court, however, concluded that the loss of public value in rezoning the site of the private recreational club would not justify a mitigation fee of $280,000, which is the dollar value of recreational facilities lost by the city.[436] The supreme court concluded that Culver City could not use the loss of a private recreational facility as the lost value.[437] In interpreting the takings provision of the California Constitution, the supreme court limits heightened scrutiny to uniquely discretionary exactions and thus limits *Dolan* to the narrowest of circumstances. Therefore, the federal takings analysis, which implements a more precise means-ends fit, is a limit on the most excessive exactions that broadly apply to developers and landowners of a community.

C. *Addressing Issues Regarding the Extent of Federal Takings Analysis*

Ehrlich raises issues that the Court could not address on the facts of *Dolan*; the Supreme Court of California addressed these issues in determining the validity of the reasonably related test. Other state appellate courts must also address these issues in the interpretation of state takings provisions that are totally repugnant to the federal takings norm.[438] *Del Monte Dunes* resolves only one of the issues regarding the application of *Dolan*'s heightened scrutiny to exactions other than land dedication conditions but others still remain unresolved by the Court.[439]

In accord with the Court's conclusion in *Del Monte Dunes*, the Supreme Court of California concluded that California's reasonable relationship test, which is the same as the rough proportionality, applies to a monetary or mitigation fee that imposes a special, discretionary permit condition on development.[440] It applied the

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434. *Ehrlich*, 911 P.2d at 447. *See also Del Monte Dunes*, 119 S. Ct. at 1635 (concluding that *Dolan*'s rough proportionality applies to exactions).

435. *See Ehrlich*, 911 P.2d at 447.

436. *See id.*

437. *See id.* The Supreme Court of California established some guidelines for the trial court to follow in determining the amount of the monetary fee that could be exacted from the landowner for lost value that resulted from rezoning and changing land use plans. *See id.* at 449.

438. *See infra* notes 544-564 and accompanying text.

439. *See* Del Monte Dunes, 119 S. Ct. at 1635. *See generally infra* notes 547-549 and accompanying text (examining how some state courts decide whether *Dolan*'s rough proportionality applies to exactions other than land dedication conditions).

440. *See Ehrlich*, 911 P.2d at 447.

reasonable relationship test and concluded that the mitigation fee was not a regulatory taking of private property under the state or federal takings provision.[441]

Another issue that the supreme court considered in *Ehrich* is whether California's reasonable relationship test applies to conditional demands or exactions that are imposed as land use restrictions under traditional zoning regulations.[442] Whether the federal rough proportionality test applies to legislative determinations that impose land use regulations and impact exactions was not an issue before the Court in *Dolan*.[443] The supreme court found "that the arts in public places fee is not a development exaction of the kind subject to the *Nollan-Dolan* takings analysis."[444] The supreme court found that the arts in public places program is similar to traditional land use regulations, such as setbacks, landscaping requirements and other design conditions and thus a legislative determination.[445] The Court explicitly noted in *Dolan* that land dedication conditions are adjudicative actions that apply to individual parcels, and also noted that use restrictions are legislative determinations that "classified entire areas of the city."[446] The Supreme Court of California concluded that the art in public places program is similar to traditional legislative determinations that broadly classify entire areas[447] and normally do not leverage uncompensated benefits.[448]

Del Monte Dunes may not be the final word on this issue and thus the Supreme Court of California's conclusion may be correct under federal and state takings provisions. However we must wait and see. Consequently, its holding that the arts in public places program was not a regulatory taking of private property for public use under the state and federal takings provisions[449] appears rational for now. Strangely, the supreme court reaches the same

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441. *See id.*

442. *See id.* at 450.

443. *See generally infra* notes 544-564 and accompanying text (examining confusion in the federal and state courts regarding the application of *Dolan*'s rough proportionality to legislative determinations, such as zoning and rezoning).

444. *Ehrlich,* 911 P.2d at 450.

445. *See id.*

446. *Dolan,* 512 U.S. at 385.

447. *See Ehrlich,* 911 P.2d at 450.

448. *See id. See also Dolan,* 512 U.S. at 385 (comparing legislative determinations with adjudicative actions); *see also Del Monte Dunes*, 119 S. Ct. at 1635-36 (limiting *Dolan* to exactions but not specifying whether they must be legislative or adjudicative actions).

449. *See Ehrlich,* 911 P.2d at 450.

conclusion regardless of the standard of review it applies to conditional demands.[450] Thus its interpretation of the California takings provision confirms the presence of great deference to municipal and state policy-makers, notwithstanding heightened scrutiny under the federal rough proportionality test.

The Supreme Court of California gives much insight into the firmness of its standards of review under the California takings provision. Although the petitioner in *Ehrlich* did not challenge the $30,000 fee in lieu of dedication of parkland,[451] the supreme court notes that in *Associated Home Builders*, it concluded that land dedication conditions and fees in lieu of dedication for park and recreational facilities were legitimate exercises of police power authority by municipal governments.[452] However, it observes in *Ehrlich* that:

> *Nollan* and *Dolan* cast substantial doubt on the sufficiency of the *Associated Home Builders* standard, at least applied to cases such as this one, where the property owner challenges an individualized exaction imposed as a condition of issuance of a development permit as an uncompensated taking under the Fifth Amendment. . . .[453]

Not withstanding the supreme court still gives a narrow application to heighten scrutiny of the federal takings analysis, though it knows that *Nollan* and *Dolan* cast considerable doubt on California's highly deferential standard of review.[454] Consequently, California courts still grant great deference to municipal policy-makers under *Ehrlich*'s reasoning. This deference is contrary to the *Dolan* Court's efforts to limit exercise of police power authority to impose land dedication conditions and perhaps other exactions.[455]

Undoubtedly the reasonably related test (reasonableness test) is still the takings norm in California. It survives under a narrow application of the *Nollan-Dolan* means-ends analysis. *Dolan* only forces the Supreme Court of California to add a new standard. It does not force the court to remove the more deferential standard,

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450. *See id.*

451. *See id.* at 435 & n.2.

452. *See id.* at 448 (citing Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 94 Cal. Rptr. 630, 484 P.2d 606 (Cal. 1971)).

453. *Id.* at 437.

454. *See supra* notes 451-453 and accompanying text. *Del Monte Dunes* clearly indicates that the Court intends to apply heightened scrutiny to some exactions. Land dedication conditions under most circumstances are not exempted. *See Del Monte Dunes*, 119 S. Ct. at 1635. Uncertainty still surrounds the others.

455. *See Del Monte Dunes*, 119 S. Ct. at 1635.

which still applies to many exactions, from use by California courts. The old California standard of review still validates many exactions, including off-site improvements, parks and recreational facilities that had been justified by application of the reasonably related test of *Associated Home Builders* and *Ayres*.[456] The Supreme Court of California shields much California social policy-making by exactions from the full effects of the newly fashioned federal takings norm that supersedes highly deferential standards of review established under state takings provisions.[457]

VI. Interpretations of State Takings Provisions Exceeding the Federal Norm

Some land dedication conditions and other exactions are subject to heightened scrutiny greater than the rough proportionality and thus require greater findings to justify demands for land dedications and monetary fees.[458] Although some exactions are subject to higher standards of review, these exactions no longer possess a strong presumption of validity and municipalities now possess the burden of proof in regulatory taking claims challenging these exactions.[459] The shifts in burden of proof and presumption of validity are fundamental constitutional processes to effect heightened scrutiny of the federal means-ends fit. These shifts apply to regulatory taking claims that challenge the validity of land dedication conditions and other exactions under the federal takings clause. However, these shifts may not effect the outcome of

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456. *See Ehrlich*, 911 P.2d at 448; *see also supra* note 454 and accompanying text. The Supreme Court of California stated that: "[w]e have no doubt as to the city's legitimate authority to impose development impact fees for park and recreational purposes. (*See Associated Homebuilders, supra*, 4 Cal.3d 633, 94 Cal. Rptr. 630, 484 P.2d 606: Gov. Code, §§ 66001, 66477.)." *See Ehrlich*, 911 P.2d at 448; *but see id.* at 437 (The Supreme Court of California noted that *Nollan* and *Dolan* "cast substantial doubt on the sufficiency of *Associated Homebuilders* standard at least as applied to cases such as this one, where the property owner challenges an individual exaction imposed as a condition of issuance of development permit . . . ." *Ehrlich*. 911 P.2d at 437.).

457. *See id.* at 447. The Supreme Court of California may have circumvented the shifts in presumption of validity and burden of proof by limiting the application of the state and federal standards of review that are similar. *See id.* at 447 & 450. It acknowledged that the burden of proof rests with municipalities to put forth findings to establish California's rough proportionality or reasonable relationship test. *See id.* at 448. However, it limits the application of burden of proof by applying the rough proportionality to special, discretionary exactions, namely a few adjudicative actions that affect development. *See id.* at 447.

458. *See Dolan*, 512 U.S. at 387-90.

459. *See id.* at 391-92 & 391 n.8.

applying heightened scrutiny under an pre-*Dolan* standard if this state standard required the same or similar shifts to effect heightened scrutiny under the state takings provision.[460]

A. *Interpretations of State Takings Provisions Providing Heightened Scrutiny*

Illinois and three other states apply heightened scrutiny that is greater than the rough proportionality to determine whether exercises of police power authority to impose land dedication conditions are regulatory takings under state and federal takings provisions.[461] The specifically and uniquely attributable test[462] imposes greater scrutiny by requiring a more direct relationship between exactions and development impacts that create the need for the exaction.[463] In *Pioneer Trust and Savings Bank v. Village of Mount Prospect*,[464] the Supreme Court of Illinois concluded that land dedication conditions were subject to heightened scrutiny in determining whether a municipality imposed a land dedication condition that would require the payment of just compensation.[465] A developer challenged a local ordinance that required the dedication of one acre of land per sixty residential lots for building schools, parks and other public uses.[466] The Supreme Court of Illinois established the specifically and uniquely attributable test that still requires conditional demand to be a direct result of the particular subdivision's impact on public facilities and infrastruc-

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460. *See id.* at 391-92 & 396; *see also supra* notes 98-105 and accompanying text (discussing the application of burden of proof and presumption of validity shifts to effect heightened scrutiny).

461. *See Dolan*, 512 U.S. at 389-90 & 389 n.7 (citing J.E.D. Associates, Inc., v. Atkinson, 121 N.H. 581, 585, 432 A.2d 12, 15 (1981); *see also* Divan Builders, Inc. v Planning Bd. of Twp. of Wayne, 66 N.J. 582, 600-601, 334 A.2d 30, 40 (1975); McKain v. Toledo City Plan Comm'n, 26 Ohio App.2d 171, 176, 270 N.E.2d 370, 374 (1971); Frank Ansuini, Inc. v. Cranston, 107 R.I. 63, 69, 264 A.2d 910, 913 (1970)).

Other states apply a substantial relationship test that provides greater scrutiny than the rough proportionality but less than the specifically and uniquely attributable test and thus effects a more precise means-ends fit. *See infra* note 508 and accompanying text.

462. *See infra* note 463 and accompanying text.

463. *See* Pioneer Trust and Sav. Bank v. Villge of Mt. Prospect, 176 N.E.2d 799, 802 (Ill. 1961). The specifically and uniquely attributable test was established in *Pioneer Trust*. *Id.* The exactions imposed by the municipal government in *Pioneer Trust* were land dedications for a park and school. *See id.* at 800.

464. *Pioneer Trust* 176 N.E.2d 799 (Ill. 1961).

465. *See id.* at 802.

466. *See id.* at 800.

ture.[467] In *Dolan*, the Court rejects the specifically and uniquely attributable test as the federal takings norm to review regulatory taking claims challenging land dedication conditions.[468] Chief Justice Rehnquist, writing for the majority, states that "[w]e do not think the Federal Constitution requires such exacting scrutiny given the nature of the interests involved."[469] The Court does not find that the right to receive just compensation, which protects the right to exclude others in *Dolan*,[470] is worthy of such a strict standard of review that had long required particularized findings to justify imposing land dedication conditions.[471]

The specifically and uniquely attributable test enforces a constitutionally imposed policy choice: either an exercise of eminent domain that requires just compensation or an exercise of police power authority that requires stronger justifications for regulation. Such heightened scrutiny beyond rough proportionality makes municipalities put forth more definite or particularized findings to defend against regulatory takings claims that challenge the validity of an impact exaction. The shifts in the burden of proof and presumption of validity would only effect the nature of the proceedings regarding substantiation of the claim and not the quality or quantity of findings that should be substantially greater in proving a direct and material benefit to the development.[472] This heightened scrutiny that is most exact by requiring a *direct and material connection* must already require a fact-intensive inquiry on the issue of whether the development causes the public need.[473] *Dolan*'s shift of the burden of proof coupled with *Pioneer Trust*'s heightened scrutiny allows the takings provision of the Illinois Constitution to limit exactions where development does not receive a direct and material benefit from infrastructure and public facilities

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467. *See id.* at 802.
468. *See Dolan*, 512 U.S. at 389-90.
469. *See id.* at 389.
470. *See id.* at 389-90.
471. *See id.* at 390.
472. *See Pioneer Trust*, 176 N.E.2d at 802.
473. *See Dolan*, 512 U.S. at 390. The Court noted that "under . . . [the specifically and uniquely attributable test] if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes "a valid exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.'" *Id.* (citing *Pioneer Trust*, 176 N.E.2d at 802)).

For a discussion of a fact-intensive inquiry requirement for regulatory taking claims, *see supra* note 211 and accompanying text.

beyond the normal public expectations of owners of commercial, industrial and residential land.

B. Adhering to an Independent State Takings Analysis

Notwithstanding shifts in constitutionally mandated process, the Supreme Court of Illinois has not recently indicated that it wants to be totally rid of the specifically and uniquely attributable test. In its first opportunity to consider *Dolan*'s rough proportionality test, it applies the specifically and uniquely attributable test to resolve a regulatory taking issue arising under both the federal and state taking provisions and reaffirms its requirement for a more direct relationship between exactions and impact of development.[474] *In Northern Illinois Home Builders Ass'n v. The County of Du Page*,[475] an association of real estate and other developers challenged a transportation impact fee.[476] The association claimed that the locally imposed transportation impact fee, which was passed by Du page County and authorized by enabling acts of the Illinois state legislature,[477] was a regulatory taking in violation of takings clauses of the Illinois and Federal Constitutions.[478] The court of appeals applied the specifically and uniquely attributable test to determine whether impact fees violated the takings provisions of the Illinois Constitution.[479] The court of appeals held that the ordinance and enabling acts, which gave municipalities and counties the authority to impose the fees, did not violate these

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474. *See* Northern Illinois Home Builders Ass'n v. The County of Du Page, 649 N.E.2d 384, 389 (Ill. 1995).

475. *See id.*

476. *See id.* at 387.

477. *See id.* at 388 (citing Ill. Rev. Stat. 1987, ch. 121, par. 5-608(b), repealed by Pub. Act. 86-87, § 2, eff. July 26, 1989). The Supreme Court of Illinois described the legislation as follows:

> On July 26, 1989, the legislature repealed the first enabling act and passed the Road Improvement Impact Fee Law (605 ILCS 5/5-901 *et seq.* (West 1992), which provided a comprehensive scheme for the enactment of impact fee ordinances in counties with a population of over 40,000 and all home rule municipalities. The second enabling act included the requirement that "[a]n impact fee payable by a developer shall not exceed a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee * * *." (605 ILCS 5/5-904 (West 1992).) Du Page County subsequently passed ODT-021B-89, effective January 1, 1990, which amended the fee schedules to reflect changes in the motor fuel and property tax credits. . . .

Northern Illinois Home Builders Ass'n, 649 N.E.2d at 388.

478. *See id.* at 387.

479. *See id.* at 389.

constitutions.[480] The Supreme Court of Illinois affirmed in part the holding of the court of appeals.[481] It concluded that the second enabling act and Du Page County ordinance were not regulatory takings in violation of Illinois and Federal Constitutions.[482] The supreme court reasoned that both the Du Page County Ordinance and second enabling act provided that impact fees collected under the regulatory scheme would be used to fund road improvements that are made necessary by the increased traffic in new developments of the transportation district.[483] The supreme court found that the new development would receive a direct and material benefit from highway improvements.[484] The Supreme Court of Illinois found no need to reconsider its interpretation of the takings provision of the Illinois Constitution in light of *Dolan*.

The Court of Appeals of Illinois later concluded that an interpretation of the Illinois takings provision to establish a new standard of review was not necessary in light of *Dolan*. In *Amoco Oil Co. v. Village of Schaumburg*,[485] a corporation filed a regulatory taking claim under the federal and Illinois takings provisions.[486] This claim challenged a land dedication condition for a street right-of-way that had been attached to the approval of an application for a special use permit.[487] The court of appeals applied *Dolan*'s rough proportionality test and observed that *Dolan* was a logical progression from *Nollan* and therefore did "not represent a seismic departure from traditional takings jurisprudence"[488] in requiring scrutiny of the "degree of connection between the exaction and the

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480. *See id.*
481. *See id.*
482. *See Northern Illinois Home Builders Ass'n*, 649 N.E.2d at 389.
483. *See id.*
484. *See id.* at 389-90. The Du Page Ordinance appears to be a legislative determination. *See id.* at 388. The fees are set forth in fee tables for residential, commercial and other development in each transportation district in Du Page County. *See id.* The fees take in consideration the costs of constructing roads and motor fuel and property tax. *See Northern Illinois Home Builders Ass'n* 649 N.E.2d at 388. Developers are not charged for the cost of the impact of their development on state roads. In some districts, no fees were charged. *See id.* One could conclude that the specifically and uniquely attributable test applies to legislative determinations that impose impact fees on a community or district under a predetermined fee schedule. *See id.* at 389-90.
485. *See* Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. 1995).
486. *See id.* at 383.
487. *See id.* at 382.
488. *See id.* at 387.

impact of development."[489] In applying the rough proportionality test, the court of appeals concluded that the Village of Schaumburg ("Village") had not shown a sufficient relationship between the dedication condition demanding 20% of the owner's property and the impact of the development that was the expansion of a convenience store.[490] Therefore, the interpretation of the Illinois takings provision is not necessary in light of *Dolan* because the land dedication condition did not survive scrutiny under even the less stringent federal means-ends fit.

C. *Issues Affecting the Application of Heightened Scrutiny*

Although Illinois appellate courts find no need to interpret the Illinois' takings provision in light of the federal takings analysis, these courts have addressed regulatory taking claims that require the application of *Dolan* to legislative determinations and other impact fees. *Del Monte Dunes* is not completely clear regarding whether *Dolan*'s rough proportionality applies to legislative determinations that impose exactions and to adjudicative actions that impose exactions other than land dedication conditions. However the latter issue, which is discussed below, appears clearer. Such issues that arise in state and federal regulatory taking claims require Illinois appellate courts to decide the scope of the rough proportionality and Illinois' specifically and uniquely attributable tests. In *Amoco Oil Co.*, the court of appeals decided whether *Dolan*'s rough proportionality applies to land dedication conditions and other exactions that are imposed by legislative determinations, such as local ordinances.[491] The Village argued that its land dedication condition was a legislative determination and, therefore, not subject to *Dolan*'s rough proportionality.[492] The court of appeals examined the dissent to the Court's denial of *certiorari* in *Parking Association of Georgia v. City of Atlanta*[493] as well as several state takings cases to resolve the issue of *Dolan*'s scope.[494]

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489. *Id.*

490. *See Amoco Oil Co.,* 661 N.E.2d at 388.

491. *See id.* at 389.

492. *See id.* at 389-90.

493. *See* Parking Ass'n of Georgia v. City of Atlanta, 450 S.E.2d 200, *cert. denied*, 115 S. Ct. 2268 (1994) (Thomas, J., dissenting).

494. *See generally, Amoco Oil Co.*, 661 N.E.2d at 389-90 (citing *e.g.,* Harris v. City of Wichita, 862 F. Supp. 287 (D. Kan. 1994); Lennox Hill Hospital v. Manocherian, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); New York v. Manocherian, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995)).

In relying on the dissent in *Parking Association of Georgia*, the court of appeals concluded that municipalities should not be allowed to avoid the rough proportionality, or heightened scrutiny, by changing the source of the exaction.[495] The court found that a legislative determination was merely a change in the source and not the nature of the legislation.[496] It concluded that *Dolan*'s rough proportionality applies to legislative determinations that have the same governmental character as adjudicative actions.[497] The court of appeals concluded that the land dedication condition imposed by the Village was a regulatory taking under *Dolan*'s rough proportionality test and *Pioneer Trust*'s specifically and uniquely attributable test.[498] The court of appeals addressed an issue that eventually must be addressed by other state courts in their interpretation of state takings provisions. In fact the Court of Appeals of Illinois does not allow the Court's reticence, as stated by the dissent in *Parking Association of Georgia,* to halt the development of an independent Illinois takings jurisprudence.[499]

The Supreme Court of Illinois addressed another issue left unresolved in *Dolan,* though *Del Monte Dunes* reduces some of the confusion surrounding it. It addressed whether *Dolan*'s rough proportionality applies to development impact exactions other than land dedication conditions. In *Northern Illinois Home Builders Association,* an association of real estate and other developers challenged a transportation impact fee as a regulatory taking.[500] The supreme court concluded that the specifically and uniquely attributable test applied to an impact fee, namely a transportation

495. *See Amoco Oil Co.*, 661 N.E.2d at 390.

496. *See id.* at 390.

497. *See id.* at 390-91 (citing J. C. Reeves Corp. v. Clackamas County, 887 P.2d 360 (Or. Ct. App. 1994); *see also* Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994)); *but see* Clajon Production Corp. v Petera, 70 F.3d 1566, 1579 (10th Cir. 1995); Sprenger, Grubb & Associates v. City of Hailey, 903 P.2d 741, 747 (Idaho 1995) (*Nollan* and *Dolan* do not apply to legislative determinations.). *Del Monte Dunes* leaves the applicability or extent of *Dolan*'s rough proportionality unresolved so those decisions where courts apply *Dolan* to some legislative exactions are safe for now. *See supra* note 3 and accompanying text.

498. *See Amoco Oil Co.*, 661 N.E.2d at 391.

499. *See infra* notes 544-564 and accompanying text.

500. *See Northern Illinois Home Builders Ass'n*, 649 N.E.2d at 387. In *Northern Illinois Home Builders Ass'n*, the Supreme Court of Illinois stated that "[o]n July 26, 1989, the legislature repealed the first enabling act and passed the Road Improvement Impact Fee Law, (605 ILCS 5/5-901 *et seq.* (West 1992), which provided a comprehensive scheme for the enactment of impact fee ordinances in counties . . . ." *Northern Illinois Home Builders Ass'n*, 649 N.E.2d at 388.

impact fee.[501] It applied the specifically and uniquely attributable test to the regulatory taking claim that arose under the Illinois and federal takings provisions.[502] It also recognized that the Court had observed that a few states had applied heightened scrutiny to these taking claims arising under federal and state takings provisions.[503] The Illinois appellate courts have extended the scope of *Dolan* and *Pioneer Trust* by applying both standards of review to legislative determinations and impact fees.

Illinois appellate courts have found no need to interpret the Illinois takings provision, other than to extend its application to legislative determinations and impact fees. Illinois and other states' takings provisions, which require a more precise means-ends fit than the federal standard, already impose the greater burden on municipal governments and accord greater protection to the Illinois right to receive just compensation. The states that apply the specifically and uniquely attributable test need not change significantly the state means-ends fit in light of *Dolan*'s federal takings analysis, and thus need only to integrate the burden and presumption shifts in their independent state takings analysis.

VII. The Implications of the Shape of Federalism Under the Uniform Federal Takings Norm

Federally imposed interpretations of state takings provisions that reconstitute and replace state standards of review for regulatory taking claims greatly influence local land use policies and state property rights. Thus it strongly implicates the shape of federalism through the power of the Court to limit state police power authority.[504] These standards determine the means-ends fit between impact exactions and development impacts and thus establish the validity of local and state land use, environmental and other policy-

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501. *See id.* at 389-90.

502. *See id.* at 388-89.

503. *See id.* at 389.

504. *See infra* notes 512-527 and accompanying text. The political and legal impact of an expansive interpretation of the federal takings clause is the gradual erosion of federalism by limiting the present authority of the states to make property law and effect property rights that have long been the domain of state governments. *See* Bormann v. Kossuth County Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998) (citing Webbs's Fabulous Pharmacies, Inc., v. Beckwith, 449 U.S. 155, 161 (1980)). In *Bormann*, the Supreme Court of Iowa concluded that the right to maintain a nuisance under the Iowa right to farm law is an easement and thus subject to the requirements of the Iowa and Federal Takings Clauses. *See Bormann*, 584 N.W.2d at 316 (citing United States v. Welch, 217 U.S. 333, 339 (1910); *see also* Simkins v. City of Davenport, 232 N.W.2d 561, 566 (Iowa 1975)).

making. These standards posses distinct levels of reasonableness that include different burdens on real estate development and that permit varying demands for public facilities among the states.[505] The federal requirement of particularized findings eliminates and prevents exactions, which often have ineptly advanced alterior purposes and thinly justified policies. It also erodes the diversity among public choices of states and their local communities. Federalism and states' rights provide for distinct local land use policies and state property laws among the states, but the federal means-ends fit establishes a uniform public burden and imposes a uniform limit on municipalities that are the least bit similar in public interests.[506]

A. *Questions Regarding Changes in Public Policy and Constitutional Process*

Establishing a federal means-ends fit did not end all questions but definitely creates the need for the interpretation of state takings provisions.[507] State courts that applied a highly deferential standard prior to *Dolan* must interpret their takings provisions to conform to the federal takings analysis, but a few state courts that applied a less deferential standard can still apply their pre-*Dolan* standards of review.[508] In any event, both the highly deferential and stringent standards of review are now subject to shifts in the burden of proof and presumption of validity.[509] When states either create a new standard or apply the old standard subject to those shifts, the intergovernmental effects yield a greater federal influence on property law and land use regulations. These fields of law have long been the domain of state public policy and regulation.[510] The implications are a powerful, if not a disturbing,

505. *See supra* notes 223-228 and accompanying text.

506. *See supra* notes 44-63 and accompanying text.

507. *See infra* notes 544-564 and accompanying text.

508. *See Dolan*, 512 U.S. at 389-91; *see also, supra* notes 17-43 and accompanying text. Some commentators agree that Washington's standard of review appears stricter than the federal standard. *See* Curtin, Davidson & Lindgren, *supra* note 46, at 799 (citing [Sparks v. Douglas County,] 904 P.2d 738 (Wash. 1995), *rev'g*, Sparks v. Douglas County, 863 P.2d 142 (Wash. Ct. App. 1993)). These commentators state that "[t]he Washington Supreme Court exercised somewhat greater scrutiny in reconsideration of local practices to determine whether required land dedications met *Nollan/Dolan* standards." *See* Curtin, Davidson & Lindgren, *supra* note 46, at 799 (citing Sparks v. Douglas County, 904 P.2d 738 (Wash. 1995), *reversing*, Sparks v. Douglas County, 863 P.2d 142 (Wash. Ct. App. 1993)).

509. *See supra* notes 98-105, 472, and accompanying text.

510. *See infra* notes 512-564 and accompanying text.

federal influence on state fields of law. States' land use policy, property rights and economic development must conform to the federal taking norm and its shifts that together balance and justify the burdens and benefits of local and state policy choices. Consequently, interpretations of state takings provisions, which now conform to the federal norm, change pre-*Dolan* burdens that were imposed on landowners by exactions.[511]

The interpretation of state takings provisions by state courts cannot ignore that municipalities possess the burden of proof to substantiate their findings and declarations and a severely weakened presumption of validity to support their policy choices.[512] These shifts in the burden of proof and presumption of validity are mechanisms of this constitutional limitation on the use of adjudicative actions to impose land dedication conditions.[513] State courts that deny these mechanisms of the federal right to receive just compensation subordinate this limitation to local and state land use regulation and property law.[514] The Court of Appeals of Oregon recognizes the constitutional implications of these shifts in the burden of proof and presumption of constitutional validity.[515] In *J. C. Reeves*, a developer submitted an application to develop a 21-lot subdivision.[516] The county hearing officer approved the application and also imposed conditional demands for street improvements and removal of a spite strip.[517] The court of appeals concluded that the county's findings to substantiate the need for street improvements were not specific enough.[518] In

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511. *See infra* notes 512-522 and accompanying text. In *Southeast Cass Water Resources Dist.,* the railroad company sued the water resources district to recover payment for accommodating its tracks to local drainage improvements. *See Southeast Cass Water Resources Dist.*, 527 N.W.2d at 885. The Supreme Court of North Dakota concluded that *Nollan* and *Dolan* did not change the taking analysis that applied to legislative interpretations. *See id.* at 896. The court relied on both federal and state precedents. *See id.* at 890. It relied heavily on Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). *See Southeast Cass Water Resources Dist.*, 527 N.W.2d at 890.

512. *See Dolan,* 512 U.S. at 391-92 & 391 n.8; *see also supra* notes 98-105 and accompanying text.

513. *See Dolan,* 512 U.S. at 391-92 & 391 n.8; *see also infra* note 521 and accompanying text.

514. *See Southeast Cass Water Resources Dist.*, 527 N.W.2d at 890 (citing *Matthews*, 216 N.W.2d at 99).

515. *See J. C. Reeves*, 887 P.2d at 363; *see supra* notes 98-105 and accompanying text.

516. *See id.* at 362.

517. *See id.*

518. *See id.*

considering the burden of proof that now rests with the county, the court of appeals noted that "it is the "government's burden," not the petitioner's, to articulate the numerical and other facts necessary to demonstrate rough proportionality."[519] In an earlier decision, the court of appeals suggested that the shift in the burden of proof would have only a minimal effect,[520] but it eventually found that such a shift would affect the application of Oregon's standard of review under the Oregon takings provision.[521] Other state courts must eventually conclude that shifts in presumption of validity and burden of proof affect the application of state standards of review as these courts establish new or apply old standards of review subject to these shifts.[522]

The broader impact of the *Nollan-Dolan* means-ends analysis depends on whether regulatory contingencies, conditions and future

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519. *See id.* In *Group*, the Court of Appeals of Oregon noted that its determination of whether the local government has met its burden of proof in putting forth findings to justify the exaction is a question of law, even though it includes "factual aspects." *See* Art Piculell Group v. Clackamas County, 922 P.2d 1227, 1231 (Or. App. 1996). Furthermore, it stated that in addressing questions of law raised by decisions of "LUBA under ORS 197.850, the answer is for us to give, without applying any deferential review standard." *See id.* The court of appeals noted that "findings are used as the device for governmental demonstration and determination of rough proportionality. *See Art Piculell Group*, 922 P.2d at 1231.

520. *See J. C. Reeves*, 887 P.2d at 363.

521. *See Art Piculell Group*, 922 P.2d at 1231. In Schultz v. City of Grant Pass, 884 P.2d 569 (Or. Ct. App. 1994), the court of appeals observed that land dedication conditions are not owed the same presumption of validity as zoning and other legislative determinations. *See Schultz*, 884 P.2d at 572.

In Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995), a landowner challenged a zoning ordinance that imposed an aesthetic requirement. *See Parking Ass'n of Georgia*, 450 S.E.2d at 201-02. The Supreme Court of Georgia refused to apply *Dolan* because the zoning ordinance was a legislative determination that did not require a transfer of an interest in land. *See id.* at 203 n.3. Although *Dolan* would not affect the burden of proof, the court still concluded that the city demonstrated a rough proportionality. *See id.* However, the dissent considered the burden of proof and reasoned that the city should justify its imposition of use restrictions on parking lots. *See id.* at 204 n.5 (Sears, J., dissenting). The standard of proof for claims challenging zoning ordinances in the state of Georgia is clear and convincing proof, and the landowner bears the burden of proof. *See Parking Ass'n of Georgia,* 450 S.E.2d at 202. The zoning ordinance is presumptively valid under federal and state constitutions in Georgia courts. *See id.* This situation leads one to ask that, if *Dolan* were to apply to a zoning ordinance, would the city have this higher burden of proof that had routinely been imposed on landowners and developers. *Parking Ass'n of Georgia* is an excellent example of the dilemma that could be created when applying a federal norm that requires the municipality to bear the burden of proof. Thus state courts would have to shift to municipalities the burden of proof that had long been imposed on landowners.

522. *See supra* notes 98-105, 382-398 and accompanying text.

requirements are conditional demands that are within the Court's understanding of an exaction. Conditional demands that are subject to heightened scrutiny are not always the most useful means for policy-making; however, all conditional demands are not necessarily subject to heightened scrutiny. The nature of a conditional demand can raise the question whether a municipality has characterized an exaction as a use restriction, regulatory directive or administrative requirement. Such characterization simply avoids heightened scrutiny and the payment of just compensation. In *Clark v. City of Albany,*[523] the Court of Appeals of Oregon addressed whether certain conditional demands that had been imposed in the early stage of a site plan review were impact exactions that are subject to heightened scrutiny.[524] The court of appeals concluded that conditional demands do not always require a transfer of land[525] and that administrative and other conditional demands are burdens on the exercise of property rights and thus are subject to heightened scrutiny.[526] The court of appeals describes the nature of conditional demands subject to heightened scrutiny as "requir[ing] present or proximate future action of a reasonably defined nature in order to advance to the next stage of the process to gain approval of a project whose essential contours are also defined by the site plan under review . . . ."[527] The court of appeals distinguishes impact exactions from other administrative and regulatory conditions that are merely advisory comments, use restrictions and general regulations.[528] Interpreting state takings provisions to establish a means-ends fit requires state courts to address the nature of conditional demands that impose administrative and financial burdens on landowners. The nature of conditional demands may, in fact, determine whether heightened scrutiny applies to regulatory taking claims that challenge the validity of conditional demands under federal and state takings provisions.

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523. Clark v. City of Albany, 904 P.2d 185, 186 (Or. Ct. App. 1995), *rev. denied*, 912 P.2d 375 (Or. 1996).

524. *See id.* at 186.

525. *See id.* at 189.

526. *See id.*

527. *See id.* at 190.

528. *See Clark,* 904 P.2d at 190-91; *see also supra* notes 333-351 and accompanying text.

B. *The Impact of Particularized Findings of Dolan's Heightened Scrutiny*

The federal means-ends fit requires particularized findings to justify imposing land dedication conditions and other exactions under interpretations of state takings provisions. Particularized findings go far to establish a uniform federal policy under federalism. Several interpretations of state takings provisions require that local government produce specific findings on the impact of development to justify exactions under old and new state standards of review. In *Amoco Oil Co.*,[529] a landowner filed a regulatory taking claim under the federal and Illinois takings provisions.[530] This claim challenged the validity of a land dedication condition for a street right-of-way that had been attached to the approval of an application for a special use permit.[531] In applying the rough proportionality test, the Court of Appeals of Illinois concluded that the Village had not shown a sufficient relationship between a land dedication condition demanding 20% of an owner's property and development impacts.[532] In *J. C. Reeves*, the Court of Appeals of Oregon concluded that an individualized determination was not always sufficient to establish a lawful means-ends fit.[533] The court of appeals stated that *Dolan* created an obstacle to affirming local findings that predated *Dolan*'s rough proportionality because such findings lacked the detailed analysis required by *Dolan*.[534] In *Group*, the Court of Appeals of Oregon offered more guidance by noting that an individualized determination and an effort to quantify findings must be undertaken by municipalities in establishing the relationship between the exaction and development impacts.[535] These courts of appeals concluded that general and nonspecific findings were not sufficient on the existing record to survive scrutiny under the rough proportionality or reasonable relationship test.[536]

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529. Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380 (Ill. App. 1995).
530. *See id.* at 383.
531. *See id.* at 382.
532. *See id.* at 388.
533. *See J. C. Reeves*, 887 P.2d at 365.
534. *See id.* at 363.
535. *See Art Piculell Group*, 922 P.2d at 1231 (citing *Dolan*, 114 S. Ct. at 2319 & 2322).
536. *See, e.g., Reeves*, 887 P.2d at 365; *see also Group*, 922 P.2d at 1233; *Amoco Oil Company*, 661 N.E.2d at 388. The appellate courts in *Reeves, Group* and *Amoco Oil Company* applied the same standard of review and reached the same

Other state appellate courts alluded to the fact that the requirement of particularized findings could curtail progressive land use policies of municipalities. In *Ehrlich,* Culver City disapproved an application for rezoning and other changes that had been requested by the petitioner, the owner of a private recreational club.[537] Later, Culver City agreed to approve the application for rezoning and change to its land use plans if petitioner agreed to pay a mitigation fee (one-time impact fee) of $280,000.[538] Culver City would use the fee to replace needed recreational facilities that had been lost to the community by the closing of petitioner's club.[539] The Supreme Court of California held that Culver City's mitigation fee was not a regulatory taking but was a development impact exaction subject to *Dolan*'s rough proportionality that was also adopted by the supreme court as California's reasonable relationship test.[540] The supreme court concluded that Culver City could use the loss of public value as justification to recover some administrative fees that have been incurred in replacing the club's facilities.[541] It concluded that rezoning and demolishing the site of a private recreational club affects the availability of recreational facilities and thus would justify a mitigation fee to offset the loss of public value in this club.[542] Therefore, the evidence of the loss of public use of a private facility is specific enough to justify imposing a mitigation fee.

State courts will review findings that show the nature and extent of the impact of development under their respective standards of review. Site-specific or individualized findings, which are not evidence of community-wide needs, are specific policy justifications to impose conditional demands.[543] Oregon and

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outcome. Supra notes 529-536 and accompanying text.

Some commentators believe that Oregon's statewide land use policy greatly influences the interpretation of the federal and state takings provisions by Oregon courts. *See supra* notes 363, 365 and accompanying text.

537. *See Ehrlich v. Culver City*, 911 P.2d at 434.

538. *See id.* at 434-35.

539. *See id.* at 435.

540. *See id.* at 447.

541. *See id.*

542. *See Ehrlich*, 911 P.2d at 447.

543. *See Dolan*, 512 U.S. at 390-91. Another significant land use issue is whether *Dolan* applies to conditional demands for purposes other than to acquire an interest in land. In applying *Dolan*'s rough proportionality, courts must decide what types of conditional demands are impact exactions that would give rise to regulatory taking claims and thus be subjected to heightened scrutiny under either the federal or state takings provision. This question was raised in *Clark v. City of Albany*, 904 P.2d 185 (Or. Ct. App. 1995), *rev. denied*, 912 P.2d 375 (1996). In

California courts apply the reasonable relationship test and rough proportionality, respectively. These courts should require particularized findings to justify land dedication conditions. The California courts' shaky reliance on *Associated Home Builders* (although adopting the rough proportionality in *Ehrlich*) still means that particularized findings are less stringent under California's reasonably related and reasonable relationship tests than under Oregon's reconstituted reasonable relationship test. California and Oregon courts do not agree on the application of heightened scrutiny to the different types of exactions since California courts retain the pre-*Dolan* standard for many of the same exactions. We expect that these courts may reach different decisions on the validity of similar exactions. Such differences preserve diversity in land use policy and is evidence of an independent state takings analysis.

C. *Uncertainty Accompanying the Uniform National Means-End Fit*

An independent state takings analysis by a state judiciary, we believe, is jurisprudentially wise, as the usual uncertainty and confusion of federal takings jurisprudence flourish under the *ad hoc* approach to developing the federal takings analysis. Whether *Dolan* applies to legislative determinations that impose only impact exactions is a federal question still ripe though with less uncertainty

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Clark, the court of appeals addressed whether certain conditional demands that had been imposed on the early stage of a site plan review for a fast food restaurant were exactions subject to *Dolan*'s rough proportionality. *See Clark*, 904 P.2d at 186. The site plan review conditioned issuance of building permits on the design of street improvements, provision of financial assurance, provision of a method for making a no-drive area, provision of a storm drainage plan, reconstruction of a drainage line, and provision of financial assurance or construction of drainage improvements and sidewalks. *See id.* at 187-88. Although the conditional demands did not require a transfer of an interest in land, the court of appeals concluded that *Dolan* applied to conditional demands that "require present or proximate future action of a reasonable defined nature in order to advance to the next stage of the process to gain approval of a project whose essential contours are also defined by the site plan under review . . . ." *Id.* at 190. Therefore, the court of appeals concluded that conditional demands requiring a design for street improvements, widening of a sidewalk, and the provision of financial assurance or construction of road improvements are exactions. *See id.* at 189-191. However, it concluded that some conditions were merely traffic regulations, use restrictions, and advisory comments, and they are not subject to *Dolan* in their present state. *See Clark,* 904 P.2d at 189-191 Therefore, some conditional demands, in their present state, may not possess the coercive nature that did exist in *Dolan* and *Nollan*, according to the Court's observations.

and confusion at this time.[544] State courts have applied *Dolan*'s rough proportionality to conditional demands that include impact fees,[545] construction of traffic and street improvements[546] and legislation to impose land dedication conditions.[547] Earlier the Court had flatly refused to address whether *Dolan* applies to land use regulations that impose only general use restrictions,[548] but in

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544. *See infra* notes 545-564 and accompanying text. Some courts have refused to apply *Dolan* in regulatory taking claims challenging the constitutional validity of zoning regulations. *See* Harris v. City of Wichita, Sedgwick County, Kan., 862 F. Supp. 287 (D. Kan. 1994), *aff'd*, 74 F.3d 1249 (10th Cir. 1996). In *Harris*, land use regulations prohibit certain uses of land adjacent to the runway on an Air Force base. Landowner brought a regulatory taking claim challenging the constitutional validity of these regulations under the federal takings clause. *See Harris*, 862 F. Supp. at 289. The district court concluded that *Dolan* does not apply to legislative determinations that do not require the deeding of an interest in land where the city classified an entire area surrounding the runway. *See id.* at 293-94.

545. *See supra* notes 500-503 and accompanying text.

546. *See supra* notes 342-351 and accompanying text.

547. *See supra* notes 491-499 and accompanying text.

548. *See Parking Ass'n of Georgia*, 515 U.S. at 1116. Some courts have examined the scope of the rough proportionality to determine the extent of its application to land use regulations. New York and California courts have applied *Nollan* and perhaps would apply *Dolan* to a rent control statutes. *See* Valparaiso Associates v. City of Cotati, 65 Cal. Rptr. 2d 551 (1997); *see also* Lennox Hill Hospital v. Manocherian, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); New York v. Manocherian, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). In the two *Manocherian* cases, apartment owners sued the tenant, which is a not-for-profit hospital, to challenge the constitutional validity of the rent control statute that conferred on the hospital renewal rights and eviction rights not subject to the consent of these owners. *See Manocherian*, 643 N.E.2d at 481-82. The court of appeals applied the essential nexus test to the statute and concluded that the statute did not advance its legitimate state interest and thus violated the federal takings clause. *See Manocherian*, 643 N.E.2d at 487. The court of appeals found that the statute did not ameliorate the emergency housing shortage that had been the purpose of the rent control statute. It gives the hospital the power to evict persons who are no longer employees. *Manocherian*, 643 N.E.2d at 485. The dissent would not apply *Nollan* and *Dolan* because these precedents apply to land dedication conditions imposed on development permits. *See Manocherian* 643 N.E.2d at 494 (dissenting, Levine, J.).

In *Valparaiso Associates*, landowners brought an action against the City of Cotati (City) claiming that its rent control system was a regulatory taking under the federal and California taking provisions. The trial court granted the City summary judgment and landowners appealed. The Court of Appeal of California vacated the dismissal and stated that the landowners had stated a claim for a regulatory taking of private property. *See Valparaiso Associates*, 65 Cal. Rptr. 2d at 558-59. The court of appeal stated that *Nollan* and *Dolan* apply to regulatory taking claims that allege that a government action failed to advance the legitimate state interest. *See Valparaiso Associates*, 65 Cal. Rptr. 2d at 555. The court of appeal stated that:

> In addition, if the true purpose of rent control is indeed providing housing to the poor, then an examination of the actual results produced by such policies might be relevant to show they do not in fact substantially

Del Monte Dunes it spoke with more clarity and stated that *Dolan*'s rough proportionality does not apply to legislative determinations and ad hoc actions that impose zoning decisions.[549] Other federal and state courts had reviewed this question and split on its outcome.[550] Commentators did not agree on whether *Dolan*'s rough proportionality applies to legislative determinations that impose general land use requirements.[551] *Del Monte Dunes*

> advance this interest. If that were shown, then this might suggest such rent control policies actually serve other purposes, at the expense of property owners, who are not so numerous as tenants. . . . [W]e must examine the results produced, not simply the noble intentions, of such programs to determine their constitutional effect.

Valparaiso Associates, 65 Cal. Rptr. 2d at 557-58.

Federal courts have not been left out of the confusion created by *Dolan*'s rough proportionality. Federal courts have considered whether *Dolan*'s proportionality theory applies to federal labor legislation that was challenged as a regulatory taking by creating an unreasonable economic invasion of a business property interests. *See Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818 (W.D. Pa. 1995). In *Unity Real Estate Co.,* (the takings issue arise under Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). *See* PUB. L. 102-486, 106 STAT. 2776, 3036-56 (1992)(codified at 26 U.S.C. §§ 9701-9722 (1994 & Supp. IV 1998)). The district court held that the Coal Act "effects an uncompensated 'taking' in violation of the Fifth Amendment." *See Unity Real Estate Co.*, 889 F. Supp. at 835. The district court considered *Dolan* and stated that a "rough equivalence" needs to exist between the Coal Act and its purpose. *See id.* at 846. Another district court did not agree that the Coal Act effected a taking. *See* Templeton Coal Co., Inc. v. Shalala, 882 F. Supp. 799, 821-826 (S.D. Ind. 1995), *aff'd*, 75 F.3d 1114 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 50 (1996). The United States Supreme Court eventually resolved the regulatory taking question but did not apply a rough equivalence or rough proportionality. *See* Eastern Enterprises v. Apfel, Comm'r of Social Security, 110 F.3d 150 (10th Cir. 1997), *rev'd*, 118 S. Ct. 2131 (1998). The Court applied a rational basis test to the regulatory taking claim based on an economic interference with a property interest by a retroactive application of civil legislation. *See Eastern Enterprises*, 118 S. Ct. at 2153.

549. *See Del Monte Dunes*, 119 S. Ct. at 1635. *Parking Ass'n of Georgia had* raised that issue and Justices O'Connor and Thomas, who dissented to the Court's refusal to grant *certiorari,* suggested that the Court was causing confusion. *See Parking Ass'n of Georgia*, 515 U.S. at 1116-18 (Thomas, J., dissenting). *Del Monte Dunes* adds some clarity. However, declaring *Del Monte Dunes* the end of the confusion would be premature. *See supra* note 3.

550. *Compare*, Shultz v. City Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994); Home Builders Ass'n of Central Arizona v. City of Scottsdale, 930 P.2d 993 (Az. 1997); Valparaiso Associates v. City of Cotati, 65 Cal. Rptr. 2d 551 (1997) (*Dolan*'s rough proportionality applies to legislative determinations.), *with*, Southeast Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W. 2d 884 (N.D. 1995); Harris v. City of Wichita, Sedgwick County, Kan., 862 F. Supp. 287 (D. Kan. 1994), *aff'd*, 74 F.3d 1249 (10th Cir. 1996) (*Dolan*'s rough proportionality does not apply to legislative determinations.).

551. *Compare* Kmiec, *supra* note 46, at 156-58 (General land use regulations can cause compensable takings.), *with*, Daniel A. Crane, Comment, *Poor Relations: Regulatory Taking After Dolan*, 63 U. CHI. L. REV. 199 (1996)(*Dolan*'s rough

removes some confusion. In any event only a few commentators and courts saw *Dolan* as the dawning of a new era in limiting land use regulation.[552] But other questions and concerns still remain and are worthy of state courts' interests. Making matters worse is the fact that federal and state courts have not fully explore the nature of exactions subject to *Dolan*'s rough proportionality.[553] Although we know that *Dolan*'s rough proportionality does not apply to legislative determinations that implement general zoning requirements, it is certain that *Dolan* applies to exactions that do not take an interest in land and are legislative enactments.[554] Again, silent - not clarity – dominates state court's association with federal takings jurisprudence.

Uncertainty and confusion are enough justification for state appellate courts to establish a means-ends fit under state takings provisions to limit exercises of police power authority. But one means-ends fit for all regulation is definitely not enough. There are varieties of land use regulations with different purposes and objectives that implement different types of social, economic and other policies. As the Court reluctantly develops a *federal means-ends fit hierarchy* to examine the policy justifications for unique state actions, California typifies judicial and legislative efforts to establish a *means-ends fit hierarchy* for state regulatory taking claims arising under both federal and state takings provisions. First, *Ayres v. City Council of City of Los Angeles*[555] supports a more deferential standard of reasonableness that requires a minimum impact on the community by a proposed development.[556] *Nollan v. California Coastal Comm'n*[557] observes that one type of the California standard of review did not scrutinize government means at the most fundamental level, thus suggesting an extremely slight

proportionality is not a hurdle to land use regulations.).

552. *See* Epstein, *supra* note 46, at 491-92; *see also* Kmiec, *supra* note 46, at 156-58.

553. *See supra* notes 523-528 and accompanying text.

554. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 1635-37 (1999). For the pertinent facts and most relevant issues of *Del Monte Dunes* in our analysis, see *supra* note 3 and accompanying text.

555. *See* Ayres v. City Council of City of Los Angeles, 207 P.2d 1 (Cal. 1949).

556. *See id.* at 8. *See also Del Monte Dunes*, 119 S. Ct. at 1635-37 (The Court concludes that the reasonably related test is the federal standard of review for a regulatory taking claim that challenges the validity of a protracted zoning decision that denies a development permit.) For the pertinent facts of *Del Monte Dunes* on this issue, *see supra* note 3 and accompanying text.

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

impact under *Ayres* to justify an exaction.[558] Second, *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*[559] establishes a reasonable relationship test (though we refer to it as a reasonably related test) that supports the finding of a slight impact of development on the community.[560] Third, *Ehrlich v. City of Culver City*[561] establishes the rough proportionality test as the state standard of review but then exempts many exactions from within the scope of the rough proportionality test.[562] *Ehrlich* opens *Associated Home Builders* to some uncertainty after *Dolan*, but *Associated Home Builders* is still good law to determine the validity of exactions to provide parkland and recreational facilities.[563] California's means-ends fit hierarchy demonstrates the judicial efforts that other state courts must make until the Court makes its taking jurisprudence more certain and less confusing.[564]

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558. *See id.* at 838.

559. *See* Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971).

560. *See id.* at 610-11.

561. *See* Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct 299 (1996).

562. *See id.* at 436-37.

563. *See id.* at 437.

564. *See supra* notes 213-245 and accompanying text. The impact of the *Nollan-Dolan* means-ends fit on state taking laws has resulted in much commentary directly addressing local and state concerns. *See, e.g.,* David Spohr, *Florida's Taking Law: A Bark Worse Than Its Bite*, 16 VA. ENVTL. L. J. 313 (1997); Jonathan M. Block, Note, *Limiting the Use of Heightened Scrutiny to Land-Use Exactions*, 71 N.Y.U. L. REV. 1021 (1996); Patrick W. Maraist, Note, *A Statutory Beacon in the Land Use Ripeness Maze: the Florida Private Property Rights Protection Act*, 47 FLA. L. REV. 411 (1995); Clifford B. Olshaker, Note, *Uncertainty in the Empire State: A Reevaluation of New York's Takings Jurisprudence after Dolan v. City of Tigard*, 16 CARDOZO L. REV. 1849 (1995); Kent M. Brown, Note, *Cohen v. Larson: The Idaho Constitution and The Right of Eminent Domain*, 31 IDAHO L. REV. 623 (1995); Tara J. Schleicher, Note, *A Tale of Two Courts: Differences Between Oregon's Approach and the United States Supreme Court's Approach to Fifth Amendment Takings Claims*, 31 WILLIAMETTE L. REV. 817 (1995); Albert M. Benshoff, *Out-of-Focus: the Fuzzy Line between Regulatory "Takings" and Valid Zoning-Related "Exactions" in North Carolina and Federal Jurisprudence*, 16 CAMPBELL L. REV. 333 (1995); Stacey P. Silber, Note, *Afforestation under Maryland's Forest Conservation Act and Selected County Codes: Viability of This Land Use Regulation Pre- and Post-Dolan v. City of Tigard*, 4 U. BALT. J. ENVTL. L. 53 (1994); David W. Tufts, Note, *Taking a Look at the Modern Takings Clause Jurisprudence Finding Private Property Protection under the Federal and Utah Constitution*, 1994 BYU. L. REV. 893 (1994); William L. Brewer, Note, *Developments In Federal Regulatory Takings Jurisprudence and Its Potential Impact in Connecticut*, 13 BRIDGEPORT L. REV. 953 (1993).

VIII. Conclusion

State appellate courts are interpreting their takings provisions but are not entirely influenced by federal takings jurisprudence. These courts' conclusions and observations indicate a strong tendency to preserve diversity. Some of these courts conclude that the federal takings norm is not a radical change from their past standards of review though these standards were more deferential. They also conclude that municipal findings must be more specific to establish policy justifications for exactions that are imposed as a result of the impact of development. State courts must also contend with the underlying doctrine and process *Dolan* imposes to effect heightened scrutiny. They observe that the burden proof rests with municipal and county governments. They also observe the shift in the presumption of validity in adjudicative or quasi-judicial hearings. They generally conclude that land dedication conditions and other exactions are subject to heightened scrutiny. They follow the Court's constitutional guidance but then they go no farther. Thus their adherence to the federal takings analysis may be more in spirit than action as they preserve the diversity that underlies each state's law and public policy. Preserving diversity among state law and public policy calls for an independent takings analysis *beyond the federal minimum.*

State courts also must address some difficult questions, which were left unresolved on the facts of *Dolan*, in interpreting state takings provisions. Such questions involve the application of heightened scrutiny to impact fees and other exactions, and thus they must go even farther in their interpretations of state takings provisions. State courts have little choice but to do so. They must establish standards of review to resolve regulatory taking claims that effect state land use policy and property law. Thus far, the uncertainty and confusion of the federal takings norm do not add consistency or certainty to interpretations of state takings provisions. Inconsistency and uncertainty surrounding the interpretation of state taking provisions eventually undermine local land use policy-making and make exercises of property rights too risky.[565]

State takings provisions validate the nature and source of government actions that permit local governments to advance land use policies, that limit real estate development, and that protect property and economic interests. Uncertainty in the interpretations

565. *See supra* notes 544-564 and accompanying text.

of state takings provisions limits or curtails the use of exactions in comprehensive land use schemes that control residential, commercial and industrial development.[566] Exactions are sources of revenue for financing public needs and are losses of revenues and profits to developers of land.[567] These interpretations of state takings provisions that affect the use of exactions are critical to developers and local officials, who must also cope with political and economic uncertainties. While the Court remains reluctant, state appellate courts should develop an independent takings analysis to balance public needs and property rights in local land use and other disputes. They should not wait for the United States Supreme Court to provide a uniform, federal taking norm that is consistent with federalism and states' rights. It could be a long wait.

566. Several state courts have considered whether *Dolan* applies to regulatory taking claims that challenge the validity of upzoning and downzoning. *See, e.g.*, Steel v. Cape Corp., 677 A.2d 634 (Md. App. 1996); Sprenger, Grubb & Associates, Inc. v. City of Hailey, 903 P.2d 741 (Idaho 1995). In *Steel*, the landowner brought a regulatory taking claim for denial of rezoning of a site from open space to residential where the denial was based on the inadequacy of school facilities. *See id.* at 640. The Court of Appeals of Maryland applied *Dolan* to the denial of rezoning that did not included an exaction or conditional demand. *See id.* at 641-42. The court of appeals affirmed the trial court's holding that the denial of a rezoning was the denial of all economically viable use and thus a regulatory taking. *See id.* at 651-52. The court applied the Maryland standard of review for regulatory taking claims that challenge the validity of development impact exactions. The Maryland standard of review is a reasonable nexus or reasonable relationship test. *See* Howard County v. JJM, Inc., 482 A.2d 908, 921 (1984); *see also supra* note 265 and accompanying text.

In *Sprenger, Grubb & Associates, Inc.*, the city downzoned property that was under a development agreement between the owner and city. The property was downzoned from business to limited business. *See Sprenger, Grubb & Associates, Inc,*, 903 P.2d at 744. The court refused to apply *Dolan* because the city did not impose an exaction or require any transfer of land. *See Sprenger, Grubb & Associates, Inc.*, 903 P.2d at 747. The Idaho standard of review for land use claims challenging the validity of a rezoning is a reasonable relation test, and the burden of proof is a "clear showing." *See Sprenger, Grubb & Associates, Inc.*, 903 P.2d at 745.

567. *See supra* notes 108-120, 212-218, and accompanying text.

APPENDIX A

CONTINUUM FOR TAKINGS STANDARDS OF REVIEW UNDER THE NATURE OF GOVERNMENT ACTION OF REGULATORY TAKING ANALYSIS

Highly Deferential (Reasonably Related)	Pre *Dolan* Federal and State Means-Ends Fit **Intermediate Scrutiny** (Reasonable Relationship)	**Heightened Scrutiny** (Unique and Specifically Attributable)	(Per Se Taking)
<u>Montana</u> *Billings* Land Dedication Condition	<u>Oregon</u> *Dolan* Land Dedication Condition <u>Nebraska</u> *Simpson* Land Dedication Condition	<u>Illinois</u> *Pioneer Trust* Land Dedication Condition	
<u>California</u> *Ayres, Walnut Creek, & Ehrlich* Legislative Exactions Land Dedication Conditions	**Post *Dolan* Federal and State Means-Ends Fit** **<u>Federal Intermediate Means-Ends Fit</u>** (**Essential Nexus** (*Nollan*)) and (**Rough Proportionality** (*Dolan*)) Land Dedication Condition		<u>Federal *Per Se*</u> Physical Occupation *Kaiser Aenta* Denial of Economically Viable Use *Lucas*
<u>Federal</u> Rational Basis Test/Reasonably Related Test *Euclid, Penn Cent. Transp., Eastern Enterprise & Del Monte Dunes* Historic Preservation Zoning Economic Invasion Commercial and Residential Zoning	<u>California</u> *Ehrlich* Special, Discretionary Exactions <u>Oregon</u> *Schultz, J. C. Reeves* Land Dedication Condition and Legislative Exaction	<u>Illinois</u> *Northern Illinois Home Builders* Impact Fees and Legislative Exactions	

The continuum illustrates the state and federal standards of review before and after *Dolan*. The continuum also illustrates the obvious effects of *Dolan* on federal and state standards of review. State standards of review that were to the left of the federal constitutional norm must shift to the center or right. California and other states are applying the federal constitutional norm to a narrowly defined set of exactions such as special, discretionary exactions or purely adjudicative actions. These states then apply their old standard of review to legislative determinations, including impact fees and some other exactions. Next, Illinois and other states are applying the federal constitutional norm and state standard to a broadly defined set of exactions, which include legislative determinations. These states are using a federal reasonable relationship test or their higher standard of review. Moreover, state standards of review are subject to shifts in the burden of proof and presumption of constitutional validity. These shifts must be applied in reviewing regulatory taking claims arising under both federal and state takings provisions. Finally, the continuum illustrates the uncertainty regarding the scope of the federal standard of review in reviewing regulatory taking claims arising under the federal takings clause. Thus those states that apply a standard more deferential than the rough proportionality must wait for the Court to decide the scope of the rough proportionality before making final interpretations of their takings provisions.