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EXACTIONS AND BURDEN DISTRIBUTION IN TAKINGS LAW

CARLOS A. BALL* & LAURIE REYNOLDS**

ABSTRACT

In the last several decades, there has been a marked shift in local government financing away from the use of general revenue taxes and toward nontax revenue-raising devices such as exactions. This Article argues that the Supreme Court, in its exaction cases, missed a golden opportunity to slow this troubling trend toward the greater privatization of local government financing. In addition, it explains how the Court's exaction cases are inconsistent with the goal of burden distribution as reflected in the Court's takings jurisprudence. The

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** Professor of Law, University of Illinois. Sections of this Article were presented at a Penn State Dickinson School of Law Faculty Workshop and at the Democracy in Action: The Law and Politics of Local Government Symposium held at the University of Virginia School of Law in January 2005. We would like to thank participants at both events for their helpful comments and questions. We would also like to thank Jack Beermann for making excellent suggestions and asking hard questions after reading an earlier draft of this Article. Finally, we are indebted to Shannon Kelley (Penn State, Class of 2005) for her excellent research assistance.

Article proposes that the constitutional standard applied to exactions be reformulated to account explicitly for burden distribution. Such a reformulation will make exactions law more consistent with the purposes of the Takings Clause and will constitute an important first step in restoring a more sensible balance between tax and nontax revenue-raising devices.

TABLE OF CONTENTS

INTRODUCTION	1516
I. EXACTIONS AND THE PRIVATIZATION OF	
LOCAL GOVERNMENT FUNDING	1522
<i>A. A Brief (Critical) History of Nontax Revenue</i>	
<i>Raising by Local Governments</i>	1522
<i>B. The Court's Exaction Cases</i>	1529
II. BURDEN DISTRIBUTION AND THE TAKINGS CLAUSE	1533
<i>A. Burden Distribution in Takings Law</i>	1537
1. <i>Categorical Cases</i>	1537
<i>a. Physical Appropriations</i>	1537
<i>b. Permanent Physical Occupations</i>	1538
<i>c. Deprivation of All Economic Use</i>	1542
2. <i>Noncategorical Cases</i>	1543
<i>B. The Constitutionality of Exactions and the</i>	
<i>Wide Distribution of Their Burdens</i>	1547
1. <i>Nollan and Burden Distribution</i>	1547
2. <i>Dolan and Burden Distribution</i>	1550
3. <i>Reciprocity of Advantage in Nollan-Dolan and</i>	
<i>Burden Distribution</i>	1554
III. CURRENT DISTINCTIONS IN EXACTIONS LAW	1559
<i>A. Legislative Exactions vs. Adjudicative Exactions</i>	1561
<i>B. Land Exactions vs. Monetary Exactions</i>	1569
IV. ACCOUNTING FOR BURDEN DISTRIBUTION IN	
EXACTIONS LAW	1570
<i>A. Underinclusivity</i>	1571
<i>B. Reciprocity of Advantage and Rough Proportionality</i> ..	1577
CONCLUSION	1584

INTRODUCTION

The conditions that the government imposes when it approves development proposals put forward by property owners are known as exactions. In *Nollan v. California Coastal Commission*¹ and *Dolan v. City of Tigard*,² the Supreme Court applied a form of heightened scrutiny in assessing whether the exactions at issue constituted takings. In *Nollan*, the Court demanded an “essential nexus” between the goal pursued by the government through the imposition of the exaction and the nature of that exaction.³ In *Dolan*, the Court required a “rough proportionality” between the impact of the owner’s proposed development and the nature and extent of the exaction.⁴ If either of those two requirements is not met, the challenged exaction will constitute a taking.⁵

Nollan and *Dolan* have received a great deal of attention from commentators,⁶ who can be divided roughly into two camps. The first is enthusiastically supportive of the opinions.⁷ The second is forcefully critical of the idea of applying heightened scrutiny to exactions because it leads to (1) underregulation, as governments require less of owners than what is constitutionally permitted to

1. 483 U.S. 825 (1987).

2. 512 U.S. 374 (1994).

3. *Nollan*, 483 U.S. at 837.

4. *Dolan*, 512 U.S. at 391.

5. See *id.*; *Nollan*, 483 U.S. at 837.

6. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); J. David Breemer, *The Evolution of the “Essential Nexus”: How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373 (2002); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523 (1999); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004); Douglas T. Kendall & James E. Ryan, “Paying” for the Change: Using Eminent Domain To Secure Exactions and Sidestep Nollan and Dolan, 81 VA. L. REV. 1801 (1995); Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1648-54 (1988).

7. See, e.g., Breemer, *supra* note 6, at 395-407; Kmiec, *supra* note 6, at 1648-52.

lessen the risk of litigation;⁸ (2) overregulation, as governments have the incentive to deny development proposals altogether in order to avoid heightened scrutiny;⁹ (3) inefficient outcomes, as heightened scrutiny impairs the ability of governments and developers to reach mutually beneficial arrangements;¹⁰ and (4) the undermining of local democratic political processes.¹¹

We have elsewhere added our voices to the anti-*Nollan-Dolan* chorus by noting the ways in which the opinions encourage the trend toward greater privatization of local government funding.¹² In applying heightened scrutiny and in concluding that the exactions in both *Nollan* and *Dolan* constituted takings, the Court seems to have hoped that its decisions would encourage governments to attain their policy objectives through the use of general tax revenues, rather than through exactions.¹³ That hope has failed to materialize. Part of the explanation for this failure has little to do with the holdings and reasoning of the opinions and much to do with the powerful forces and incentives that have been encouraging local governments, for several decades now, to rely less on general revenues and more on nontax sources such as exactions.¹⁴ But the opinions themselves have, perhaps unintentionally, provided incentives for further privatization of local government funding.¹⁵

8. See Fennell, *supra* note 6, at 40-41; Fenster, *supra* note 6, at 655-58; see also Jonathan M. Davidson et al., "Where's Dolan?": *Exactions Law in 1998*, 30 URB. LAW. 683, 697 (1998) (noting that after *Dolan*, "[t]he prospect of defending a takings challenge ... may lead to increased capitulation, or perhaps to a negotiated development that is more compromising than that initially proposed by planning staff").

9. See Dana, *supra* note 6, at 1249; Fennell, *supra* note 6, at 33-40; Fenster, *supra* note 6, at 662. The Court has held that the rough proportionality test announced in *Dolan* does not apply to a denial of permission to develop. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999).

10. See Fennell, *supra* note 6, at 28-32.

11. See Fenster, *supra* note 6, at 668-78.

12. See Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sector*, 21 J.L. & POL. 451 (2005).

13. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (concluding that if the government wanted to require the plaintiffs to provide an easement, it would have to pay for it).

14. See Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373 (2004) (discussing ten factors that influence local government decisions to use nontax sources and the resulting effect); Reynolds & Ball, *supra* note 12, at 453-59.

15. See Reynolds & Ball, *supra* note 12, at 453-75.

Despite the criticisms of *Nollan* and *Dolan* that we and others have raised, we recognize that the constitutional framework established by those two cases is firmly entrenched and is unlikely to be overruled anytime soon. Furthermore, we recognize that exactions do provide governments with an opportunity to leverage their police powers in order to receive benefits from property owners without having to pay for them.¹⁶ As a result, we explore in this Article how the *Nollan-Dolan* test can be reformed, rather than argue that it should be overruled. Our goal is twofold. First, we seek to preserve the protection that *Nollan* and *Dolan* established against governmental overreaching and leveraging. Second, because our primary concern is with the further narrowing of the sources of local government funding,¹⁷ we have a particular interest in exploring how the *Nollan-Dolan* test can be modified to distribute the burdens that exactions impose on landowners more broadly.

We begin in Part I with an exploration of local governments' marked shift away from general tax revenues and toward a more privatized funding model that depends on marketlike consumer transactions for the provision of public infrastructure and services.¹⁸ We also summarize the holdings and reasoning of the Court in *Nollan* and *Dolan*.¹⁹ In Part II, we explore the prominent role that the degree of burden distribution has played in the Court's takings jurisprudence generally, and we criticize the Court for ignoring that

16. See *Nollan*, 483 U.S. at 837; see also *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922))). Under the Takings Clause, the government may reject an owner's development proposal, as long as it does not unduly interfere with the owner's reasonable investment-backed expectations. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). As a practical matter, however, the denial of one particular form of development when other, perhaps less intense, uses of the land are allowed will seldom effect a taking. The considerable leeway that the government has in denying particular development proposals, coupled with the fact that owners usually have a financial incentive to accede to the exactions in order to proceed with development, means that owners are frequently under some pressure to agree to provide the exactions. As a result, exactions raise the possibility that the government may try to exact from the landowner more than what is constitutionally permitted in the absence of just compensation.

17. See discussion *infra* Part I.A; see also Reynolds & Ball, *supra* note 12, at 453-59; Reynolds, *supra* note 14, at 430-41 (discussing the negative impact of local government reliance on nontax revenue).

18. See discussion *infra* Part I.A.

19. See discussion *infra* Part I.B.

factor in its *Nollan-Dolan* analysis.²⁰ As we explain, there is little in the *Nollan-Dolan* test that encourages governments to distribute exaction-related burdens widely, even though burden distribution is one of the primary goals of the Takings Clause.²¹ The opinions, then, lead perversely to the further concentration, rather than to the further dissipation, of those burdens.

It is therefore ironic, but not surprising, that *Nollan* and *Dolan*, although invalidating the exactions at issue in those cases, spawned more, decidedly narrower exactions than the ones that came before them.²² Local governments, seizing on language and distinctions made in the two opinions, have scrambled to find new ways to levy nontax charges that meet the Court's narrow essential nexus and rough proportionality tests.²³ To undo what we view as this problematic outcome, we urge in Part III that the Court extend *Nollan* and *Dolan* to all local government exactions, replacing the currently relevant distinctions between legislative and adjudicative exactions, and between land and monetary exactions, with an explicit analysis of the degree of burden distribution that accompanies exaction programs.²⁴

At this early stage of the Article, it is important to acknowledge that our proposed expansion of the scope of *Nollan-Dolan* is likely to encounter doctrinal and systemic criticisms. The first objection, based on the reasoning of some courts, might be that *Nollan-Dolan* should be limited to dedicatory exactions—that is, exactions that require dedication of land, rather than payment of money—because monetary exactions are somehow more “benign” than dedicatory exactions.²⁵ We concur with courts that have rejected this argument;

20. See discussion *infra* Part II.

21. U.S. CONST. amend V. (guaranteeing that “private property [shall not] be taken for public use without just compensation”).

22. One study of exactions in California in the wake of *Nollan* and *Dolan* found that, in many instances, community reliance on exactions and impact fees increased, rather than decreased. See Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 122-25 (2001). The authors found that result “surprising and counterintuitive,” *id.* at 105, because, after all, the Court invalidated the exactions challenged in both *Nollan* and *Dolan*.

23. *Id.* at 105.

24. See discussion *infra* Part III.

25. See *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997). For additional sources, see *infra* note 219.

whether the requirement be that a landowner dedicate an acre of land or pay an amount of money that equals the cost of an acre of land, the ultimate impact on her is similar.²⁶ Second, some have justified restricting the purview of *Nollan-Dolan* to so-called "adjudicative" exactions, thus excluding more broadly adopted "legislative" exactions, because of the ways in which the former provide an opportunity for government leveraging or extortion of the landowner.²⁷ Again, we believe that the logic behind this distinction comes up short; governments can exercise leveraging or extortionate behavior against a class of individuals, as well as against a single individual.²⁸ Third, to those who would criticize the further constitutionalization of local government law, we recognize that an expanded *Nollan-Dolan* standard would bring a greater number of cases under the purview of federal constitutional law, and we do not lightly conclude that state law should take a back seat to its federal big brother. As a detailed review of state law cases has shown, however, state courts have generally ignored, reformulated, or abandoned state law limits on government nontax revenue-raising devices.²⁹ The creativity shown by local governments in devising narrow, targeted, nontax finance devices has far outstripped the willingness of state courts to restore principled, limited parameters for those devices. As a result, we conclude, somewhat reluctantly, that a meaningful federal standard is the only realistic option.³⁰

26. See *Ehrlich v. City of Culver City*, 911 P.2d 429, 438-39 (Cal. 1996) (holding that the *Nollan-Dolan* test applies to monetary exactions); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 639-40 (Tex. 2004) (same).

27. See discussion *infra* Part III.

28. See discussion *infra* Part III.

29. See Reynolds, *supra* note 14, at 395-429; see also *infra* note 56 (providing examples of the unwillingness of many courts to apply traditional common law limitations on the ability of local governments to impose nontax revenue-raising devices).

30. It may seem that by rejecting the legislative-adjudicative and land-monetary distinctions, we agree with commentators who seem to want to use *Nollan-Dolan* to impede significantly the ability of governments to impose exactions. See, e.g., Breemer, *supra* note 6, at 395-407 (arguing for an expansion of the essential nexus and rough proportionality doctrines to limit all types of local government exactions). Although there is common ground between us and those commentators on the need to eliminate the distinctions, our policy goals are quite distinct. Our goal is not to make it considerably more difficult for governments to impose exactions. Instead, we seek to encourage them to impose exactions that distribute burdens widely, while discouraging them from imposing exactions on increasingly narrow

We conclude the Article in Part IV with a discussion of the specific ways in which the degree of burden distribution can be incorporated into the constitutional analysis. Under our proposed modification of the *Nollan-Dolan* test, courts would have to inquire whether the exaction program in question is underinclusive, that is, whether owners who are similarly situated to the plaintiff owner are required to provide similar exactions.³¹ We also propose that the benefits that accrue to owners from a wide distribution of the burden be accounted for in the application of *Dolan's* rough proportionality test.³²

In the end, the choice is not between the current land use regulation landscape, where exactions are common, and a different landscape where exactions are never or infrequently imposed. Instead, the question is whether the *Nollan-Dolan* test, as currently understood and applied, gives courts the necessary analytical tools to distinguish between appropriate and inappropriate exactions. We believe that the answer to that question is "no," which is why we propose that the test be modified to account explicitly for the degree of burden distribution that accompanies exactions.³³

Our proposal here is part of a larger agenda—to restore a more sensible balance between tax and nontax revenue-raising devices used by local governments. Our proposed modification of the *Nollan-Dolan* test takes an important first step in that direction—it seeks to counter the privatizing forces of *Nollan-Dolan*, thus returning us to a world where exactions, which are only one of many nontax devices that are currently employed by governments at all levels,³⁴ are based on a broader distribution of the burden across a larger section of the population. From that point, we can then seek to restore the balance between tax and nontax revenue-raising devices more generally, a shift that will never happen, we argue, unless local governments are required to turn away from their overreliance on narrowly targeted revenue devices and return to distributing the costs of government more broadly.

sections of the population.

31. See discussion *infra* Part IV.A.

32. See discussion *infra* Part IV.B.

33. See discussion *infra* Part IV.

34. See Reynolds, *supra* note 14, at 397-429.

I. EXACTIONS AND THE PRIVATIZATION OF LOCAL GOVERNMENT FUNDING

One of the primary purposes of the Takings Clause, as we explain in Part II, is to distribute the property-related burdens imposed by government regulations as widely as possible.³⁵ The trend in local government financing over the last thirty years, however, has been to narrow, or privatize, rather than to broaden, or collectivize, the revenue sources needed to pay for infrastructure and services.³⁶ This change has occurred primarily because local governments have reduced their reliance on general revenue taxes, which distribute the obligation to pay for infrastructure and services as broadly as possible, while they have simultaneously increased their use of narrowly targeted revenue-raising devices such as exactions.³⁷

There is some tension, therefore, between the Takings Clause's goal of distributing property-related burdens broadly and local governments' growing use of nontax sources of revenue. We argue later in this Article that the Court should have addressed this tension in *Nollan* and *Dolan* by assessing the constitutionality of exactions partly in light of the degree to which they distribute burdens among similarly situated owners.³⁸ In this Part, we lay the foundation for that argument.

A. A Brief (Critical) History of Nontax Revenue Raising by Local Governments

In the first half of the nineteenth century, communities in the United States began, with some frequency, to levy special assessments to recoup the costs of providing street improvements adjacent to properties that they had recently annexed.³⁹ In a sense, then,

35. See discussion *infra* Part II.A.

36. See generally Reynolds, *supra* note 14, at 379-85 (discussing the rise of narrowly targeted revenue-raising devices).

37. *Id.*

38. See discussion *infra* Part II.B.

39. A special assessment is a charge levied on property that will uniquely benefit from particular government improvements, such as sidewalks, street lights, or sanitary sewers. Judicially created tests and statutes typically require that the amount assessed be limited to

special assessments were the earliest forms of exactions, imposed by localities on a lot-by-lot basis as they grew in slow increments. Once that "entrance fee" was paid, however, general revenues funded further municipal improvements.⁴⁰

As the pattern of residential construction changed from single-lot developments to multilot subdivisions, and as the scope of municipal infrastructure extended far beyond the provision of street improvements, community regulation changed as well. Exactions as we know them today grew out of local subdivision ordinances enacted in the early twentieth century.⁴¹ As originally conceived, subdivision regulations served the primary purpose of making the recordation of land titles more efficient.⁴² Subsequently, with the publication of the Standard City Planning Enabling Act⁴³ in 1928, the regulations expanded to include the concept of requiring the subdivider to provide internal improvements, such as streets and open spaces.⁴⁴ The vast increase in demand for housing after World War II,⁴⁵ and the accompanying explosive growth of residential subdivisions, led local governments to expand the scope of regulations even further by requiring subdividers to contribute to off-site improvements such as parks, roads, and schools.⁴⁶

Local governments, then, have long used individualized, property-specific charges to meet infrastructure needs created by land development and growth. Until the 1970s, however, the use of

the value of the special benefit enjoyed by the burdened property. See Reynolds, *supra* note 14, at 397-402. For a history of the use of special assessments in the United States in the nineteenth century, see Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. LEGAL STUD. 201 (1983).

40. See Diamond, *supra* note 39, at 238. Diamond notes that "[o]nce that entrance fee into the municipal general tax pool had been paid, public financing of additional improvements would follow; the further distribution of costs and benefits would in the aggregate be assumed to be fair." *Id.*

41. See ROBERT H. FREILICH & MICHAEL M. SHULTZ, MODEL SUBDIVISION REGULATIONS: PLANNING AND LAW 1 (2d ed. 1995).

42. See *id.*

43. ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928), available at <http://www.planning.org/growingsmart/pdf/CPEnablingAct1928.pdf>.

44. FREILICH & SHULTZ, *supra* note 41, at 2.

45. For a description of the ways in which the housing market responded to a shortage of approximately six million housing units in 1947, see KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 231-45 (1985).

46. See FREILICH & SHULTZ, *supra* note 41, at 2-3.

nontax financing techniques was limited to a small percentage of overall municipal revenues.⁴⁷ The vast majority of revenues derived locally came from general taxes, levied uniformly on the entire taxpaying population.⁴⁸ During the two decades before the Supreme Court articulated its *Nollan-Dolan* test, however, there was a marked increase in the use of nontax charges by local governments to pay for the provision of basic municipal infrastructure and services.⁴⁹

In the particular realm of exactions, the post-1970 increase in the use of nontax revenue-raising devices led to yet another expansion of subdivision regulations, requiring more extensive subdivider contributions to a wider range of capital infrastructure projects and services.⁵⁰ In addition, municipalities began to impose "social exactions" that required subdividers, for example, to provide, or help pay for, affordable housing.⁵¹ The result of all of this was that "[a] virtual revolution in exaction utilization took place in the 1970s and 1980s."⁵²

Although there are multiple explanations for the dramatic increase in the use of nontax charges such as exactions, three are

47. See ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ WITH ARNOLD M. HOWITT, *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS* 18-19 (1993).

48. *Id.* at 8.

49. In 1957, approximately eighty percent of total locally derived revenues came from taxes, with only twenty percent resulting from charges, assessments, and other fees. See U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, 1957 CENSUS OF GOVERNMENTS, VOL. 4, NO. 3, *HISTORICAL SUMMARY OF GOVERNMENTAL FINANCES IN THE UNITED STATES* 22 tbl.6 (1958). By 1997 the use of nontax revenues had increased to thirty-eight percent. See U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, 2002 CENSUS OF GOVERNMENTS, VOL. 4, NO. 5, *COMPENDIUM OF GOVERNMENT FINANCES* 2 tbl.2 (2005). The figures mask the much greater real reduction in tax funding that is represented by the enormous growth in special districts, most of which rely heavily, if not exclusively, on nontax techniques. Between 1952 and 1997, the number of special purpose governments nearly tripled. See U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, 1997 CENSUS OF GOVERNMENTS, VOL. 1, NO. 1, *GOVERNMENT ORGANIZATION* 6 tbl.5 (1999) [hereinafter 1997 CENSUS OF GOVERNMENTS]. In addition, the municipal revenue figures do not include in-kind developer contributions of streets, sidewalks, and other basic infrastructure. See ALTSHULER ET AL., *supra* note 47, at 16.

50. See ALTSHULER ET AL., *supra* note 47, at 35-41; see also FREILICH & SHULTZ, *supra* note 41, at 6 ("The concept of making development pay its own way now goes beyond the mere dedication of parkland and school sites. It includes contribution to the cost of providing all publicly produced benefits—roads, police and fire services, medical services, water and sewer services, libraries, and more." (footnote omitted)).

51. See ALTSHULER ET AL., *supra* note 47, at 42-46.

52. *Id.* at 34.

particularly salient. First, beginning in California with the passage of Proposition XIII in 1978,⁵³ numerous taxpayer revolts imposed stringent tax limits on government at all levels.⁵⁴ Second, the public's attitude toward growth experienced a significant shift. The emerging antigrowth movement saw development as burdensome to the community, creating political pressure on municipalities to increase the contributions required of developers.⁵⁵ Finally, state courts became more willing to ignore traditional common law limitations on the ability of local governments to implement revenue-raising devices such as special assessments, user fees, and other individualized nontax charges.⁵⁶ As a result, with taxing powers severely limited, communities clamoring for growth to "pay its own way,"⁵⁷ and growing judicial unwillingness to limit the ability of governments to use nontax financing techniques, local

53. CAL. CONST. art. XIII A.

54. Within several years of California's adoption of Proposition XIII, forty-three states adopted new limits on government's taxation powers. See generally RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 595-600 (6th ed. 2004) (discussing tax and expenditure limits in different states).

55. See ALTSCHULER ET AL., *supra* note 47, at 18-20.

56. Although judicial tests traditionally limited special assessments to one-time charges for infrastructure that both created a special benefit for the property assessed and were calculated to recoup no more than the value of the special benefit, special assessments are now used to fund general community-wide services and system improvements. See, e.g., *Knox v. City of Orland*, 841 P.2d 144, 152 (Cal. 1992) (upholding a special assessment for maintenance of existing public parks); *Sossoman v. Bd. of County Comm'rs*, 630 P.2d 1154, 1159 (Kan. 1981) (upholding use of a special assessment and rejecting the argument that the method improperly ignored the special benefit criterion); *Purdy v. City of York*, 500 N.W.2d 841, 845 (Neb. 1993) (upholding a special assessment for benefits "including enhanced fire protection, lower insurance rates, enhanced water quality, economical water service, and enhanced property values"). Furthermore, voluntariness, a requirement that views fees as payments by those who willingly use government services, has frequently been ignored. See, e.g., *Hochstedler v. St. Joseph County Solid Waste Mgmt. Dist.*, 770 N.E.2d 910, 916 (Ind. Ct. App. 2002) (approving a mandatory recycling charge as a permissible fee, despite plaintiff's nonparticipation in the recycling program); *Rogers v. Oktibbeha County Bd. of Supervisors*, 749 So. 2d 966, 969 (Miss. 1999) (upholding mandatory garbage disposal fees levied on those who did not use system). Similarly, although traditional judge-created tests require, for instance, that fees provide a "special benefit" to the payer, some courts have allowed municipalities to use the special assessment technique to generate revenues for general municipal services such as fire and flood protection. See, e.g., *Dean v. Town of Addison*, 534 S.E.2d 403, 407-08 (W. Va. 2000) (upholding user fees for provision of fire services); *City of Clarksburg v. Grandeotto, Inc.*, 513 S.E.2d 177, 182 (W. Va. 1998) (upholding municipal fire and flood protection fees). For elaboration on the evolution of the judicial tests, see Reynolds, *supra* note 14, at 399-402 (discussing special assessments), 409-15 (discussing user fees).

57. Reynolds, *supra* note 14, at 395.

governments increasingly turned to those techniques for greater portions of their revenues.⁵⁸ These trends coincided with a decrease in federal government aid as a percentage of local budgets,⁵⁹ a substantial reduction in the proportion of core infrastructure expenses funded at the federal level,⁶⁰ an increase in state and federal mandates for local government provision of services and infrastructure,⁶¹ and years of deferred maintenance accumulating at the local level.⁶² It is no surprise, therefore, that local governments seized the opportunity to fund budget shortfalls with revenue sources that went beyond traditional taxes.

The changes in local government financing are significant because they represent a move away from a system in which the costs of government are paid by most of the community through general taxation. This more collectivized financing system engenders communal responsibility and allocates government revenues through the give-and-take of the municipal budgeting process. In its stead, the shift to nontax financing has ushered in a more privatized system for the provision of infrastructure and services, one in which individual citizens contribute revenues according to their consumption or the burdens that their activities impose on the community.

Governments' increasing reliance on nontax revenue-raising devices has had numerous negative policy consequences. Three such consequences are objective and capable of measurement; others are far less tangible, but are, we argue, at least as problematic. First, the increase in nontax financing has led to an inevitable increase in spending on the types of projects that can be funded by

58. For elaboration on these factors, see *id.* at 392-96.

59. Between 1976 and 1997, federal government aid to local governments decreased from eight percent of total municipal budgets to about four percent. Compare U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, 1977 CENSUS OF GOVERNMENTS, VOL. 4, NO. 5, COMPENDIUM OF GOVERNMENT FINANCES 23 tbl.2, with 1997 CENSUS OF GOVERNMENTS, *supra* note 49, at 5 tbl.5.

60. In the mid-1960s, the federal government paid for one-half of core infrastructure expenses nationwide, including highways, transportation, water, and sewer. By the end of the 1980s, that figure had declined to one-sixth. See ALTSHULER ET AL., *supra* note 47, at 128.

61. See *id.* at 31-32.

62. Although the decline in infrastructure spending began in the 1960s, the deterioration did not reach crisis proportions until the mid-1980s because high-quality capital improvements can withstand a fair amount of neglect. See *id.* at 26-31.

nontax revenue-raising techniques, producing an emphasis on "things" at the expense of "people."⁶³ Local government spending, in other words, has shifted toward large capital improvements and infrastructure, such as major transportation expenditures and water and sewer facilities, while spending on social services has decreased.⁶⁴

Second, and relatedly, when nontax funds are earmarked and segregated from general municipal revenues, they consume a greater percentage of total available dollars than if the projects formed part of the municipal budget because they are not subject to the give-and-take of the general budgeting process.⁶⁵ In the increasingly privatized world of local government financing, revenue streams are segregated, and no general community debate establishes priorities for all expenditures or makes the hard choices between, for instance, whether the government should modernize its sewage treatment plant or, alternatively, fund a promising innovative treatment program for juvenile offenders. With nontax revenues constituting a large share of the budget, that debate does not take place, and no local official is put in the position of having to choose between the two. If the sewage plant is built, it will inevitably be financed through many nontax sources, with its revenues removed from the general municipal budget and pledged specifically to that project. As the big-ticket items of local government spending are financed through increasingly privatized sources, what is left for the general revenues budget debate is the allocation of money for social services and important, but limited, public goods such as police and fire services.

Finally, because nontax devices are individualized charges computed by an assessment of usage or cost imposed by the payer, they tend toward an increase in service inequality because those

63. Henry Cisneros, the former Secretary of the U.S. Department of Housing and Urban Development, made the same observation in a different context, noting how regional cooperation efforts often focus on "things-regionalism" when what is really needed is a focus on "people-regionalism." HENRY G. CISNEROS, *REGIONALISM: THE NEW GEOGRAPHY OF OPPORTUNITY* 8-9 (1995).

64. See KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* 222-24 (1997) (noting that as reliance on targeted funding increases, spending on social welfare decreases).

65. For an elaboration on this phenomenon, see *id.* at 189-214.

with higher levels of wealth can afford higher levels of government services. The government, in turn, must either accept this inequality or find alternative ways to subsidize the usage of government services by those who are unable to pay.

Although these trends are worrisome by themselves, we believe that other, more ephemeral, consequences of the shift in funding are at least as problematic because they affect the very fabric of local governments and their relationships with their citizens. As governments increase the number of fees and other nontax devices that they levy, citizens are bombarded by new charges at every turn. And as citizens pay those bills, as they pay for everything else, they begin to feel like consumers participating in a market economy, with consequent subtle attitudinal shifts. Increasingly, citizens apply the same scrutiny to their payments to the government that they use to evaluate potential purchases of commodities in the marketplace; they expect, in other words, to "get what they pay for." Although it is not unreasonable to expect that the government provide services efficiently and competently, it is quite another matter to equate government services with private consumer purchases.⁶⁶ When that happens, the government ceases to be the conduit through which basic services are provided to all and paid for by the contributions of all who are able. Instead, the government becomes a provider of services for only those who can afford them.

66. From the taxpayer's vantage point, the long and growing list of nontax charges for which she pays may create the sense that she has "paid her own way." In reality, however, few government services are funded entirely by operating revenues; they typically depend on a significant investment of general government revenues, particularly in the start-up phase involving acquisition of land and construction of infrastructure. For elaboration on this "myth of self sufficiency," see Reynolds, *supra* note 14, at 437-38.

Nontax devices are also incapable of fully accounting for all of the costs of growth and new development, including environmental and aesthetic impacts, reduction in open space, incrementally longer commutes to work, and the social isolation and economic segregation caused by the divide between city and suburb. See Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 143 (1999); Nick Rosenberg, Comment, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641, 647-49 (2003). Although these costs are "often undervalued or even ignored," the mathematical formula on which the fees are based may create the impression that a precise quid pro quo has been levied. Douglas R. Porter, *Reinventing Growth Management for the 21st Century*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 705, 711 (1999) (discussing the "hidden costs" of growth).

Furthermore, the proliferation of nontax devices may have the unintended consequence of exacerbating the antitax attitudes that encouraged the government to levy nontax charges in the first place. As citizens increasingly perceive that they pay directly for the services that they use through a long list of fees and other charges, they begin to assume that taxes are only meant to fund services for those who cannot pay for them. This leads to a shift in perspective on the part of the citizenry, from an "all in it together" to a "what's in it for me" mentality, with a corresponding decrease in the citizens' willingness to contribute, through taxes, to a broad range of infrastructure and services.⁶⁷

B. The Court's Exaction Cases

Given the marked increase in the use of exactions beginning in the 1970s, it was only a matter of time before the Supreme Court agreed to review constitutional challenges to them, as it did in *Nollan v. California Coastal Commission*⁶⁸ and *Dolan v. City of Tigard*.⁶⁹ The exactions at issue in those cases are examples of the general trend noted in the previous subpart: the governments attempted to attain otherwise legitimate public purposes, such as providing public access to beaches⁷⁰ and addressing problems associated with flooding and traffic congestion,⁷¹ not through the expenditure of general tax revenues, but instead through the imposition of conditions on individual property owners that had to be met before development could proceed.

The property owners in *Nollan* submitted a development proposal to the California Coastal Commission to increase the size of the

67. Others have noted the strength and breadth of the antitax sentiment. See, e.g., Reynolds, *supra* note 14, at 438-39 (discussing how nontax revenue-raising devices increase antitax sentiments); Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case In Point*, 35 U. MICH. J.L. REFORM 511, 521-27 (2002) (discussing tax reform efforts and taxpayer reaction); Kirk J. Stark, *The Right To Vote on Taxes*, 96 NW. U. L. REV. 191, 197-203 (2001) (discussing the property tax revolt in California and its relation to direct democracy).

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

69. 512 U.S. 374 (1994).

70. *Nollan*, 483 U.S. at 828.

71. *Dolan*, 512 U.S. at 379-80.

dwelling located on their beachfront property.⁷² The Commission was concerned that the new and larger house on the Nollans' property would contribute to the formation of "a 'wall' of residential structures" that would create a psychological barrier between members of the public and the beach areas that they were entitled to visit.⁷³ The Commission was also concerned that the larger house would lead to greater private use of the public beachfront.⁷⁴ In order to address both of these issues, the Commission approved the development proposal, conditioned on the Nollans' willingness to provide the public with the right to walk along the part of their property located between their seawall and the mean high tide mark.⁷⁵

The Court concluded that the exaction demanded by the Commission constituted a taking because there was no "essential nexus" between the state's goals and the nature of the exaction.⁷⁶ As a result, the exaction constituted nothing more than an attempt by the government to acquire an easement without having to pay for it.⁷⁷ The Court noted that when a condition on development does not serve the purpose that the government claims, the condition becomes nothing more than "an out-and-out plan of extortion."⁷⁸ The Court reasoned that it needed to be "particularly careful" in cases where the government requires conveyance of a property interest as a condition for approval of the development proposal.⁷⁹ In these types of cases, "there is heightened risk that the [government's] purpose is avoidance of the compensation requirement, rather than

72. *Nollan*, 483 U.S. at 828.

73. *Id.* at 828-29 (internal quotation marks omitted).

74. *Id.* at 829.

75. *Id.* at 828-29.

76. *Id.* at 837.

77. *Id.* at 839-41. The Court assumed for purposes of its decision that the government's interests in preventing the formation of a psychological barrier to beach access, as well as in reducing congestion caused by greater private use of the public beachfront, were legitimate. *Id.* at 835. The Court concluded, however, that "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838. The Court also reasoned that the easement required of the Nollans did not "help[] to remedy any additional congestion ... caused by construction of the Nollans' new house." *Id.* at 838-39.

78. *Id.* at 837 (internal quotation marks and citation omitted).

79. *Id.* at 841.

the stated police-power objective."⁸⁰ Although California was free to pursue its goal of promoting public access to beaches, it had to pay the Nollans for the easement.⁸¹

Dolan v. City of Tigard,⁸² the Court's second major exaction case, was decided seven years after *Nollan*. The property owner in *Dolan* requested permission to increase the size of her hardware store, located in the central business district of Tigard, Oregon.⁸³ The city conditioned its approval of the project on two requirements: first, it asked that Dolan dedicate a strip of land located in the floodplain to facilitate municipal improvement of the storm drainage system;⁸⁴ second, the city required her to provide an additional strip of land for use as a pedestrian/bicycle pathway to reduce vehicular traffic in the central section of the city.⁸⁵ Dolan sued the city, arguing that the exactions constituted takings.⁸⁶

The Court began its analysis by noting the difference between land use regulations that "involve[] essentially legislative determinations classifying entire areas of the city" and the type of "adjudicative decision" reached by the city in *Dolan* "to condition [the owner's] application for a building permit on an individual parcel."⁸⁷ By drawing this distinction, the Court suggested that adjudicative exactions are more suspect than legislative land use regulations because the former involve decisions made by the government as they relate to only one parcel.⁸⁸

The Court then noted that the facts met *Nollan*'s essential nexus test.⁸⁹ The analysis did not end there, however, because the Court

80. *Id.*

81. *Id.* at 841-42.

82. 512 U.S. 374 (1994).

83. *See id.* at 379.

84. *Id.* at 380-81.

85. *Id.* at 381-82.

86. *See id.* at 382-83.

87. *Id.* at 385.

88. *See id.* For a full discussion of the Court's distinction between legislative land use regulations and adjudicative exactions, see *infra* Part III.A.

89. *Dolan*, 512 U.S. at 387. Specifically, Dolan's proposed redevelopment would have increased the likelihood of flooding because it would have led to an increase in the size of impervious surfaces. *Id.* As a result, the Court concluded that an essential nexus existed between the city's goal of preventing flooding along the creek that ran through Dolan's property and the floodplain easement required of her. *Id.* The Court also noted that Dolan's larger hardware store, by accommodating more merchandise and customers, would have led

proceeded to require that the city show a "rough proportionality" between the impact of Dolan's redevelopment and the easements required of her.⁹⁰ This meant that "the city must make some sort of individualized determination that the required dedication[s] [are] related in both nature and extent to the impact of the proposed development."⁹¹

The exaction involving the floodplain easement failed to satisfy this level of scrutiny because the city's flood-prevention objectives were attainable by simply prohibiting development in the floodplain area.⁹² It was not necessary to add the further requirement that Dolan dedicate an easement to the city—a requirement that deprived her of the important right to exclude.⁹³ In the end, the Court concluded that "[t]he city ... never said why a public greenway, as opposed to a private one, was required in the interest of flood control."⁹⁴

As for the pedestrian/bicycle pathway, the city's finding that the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion" was constitutionally insufficient.⁹⁵ Although the Court made it clear that "[n]o precise mathematical calculation is required," some effort to quantify both the proposed

to an increase in vehicular traffic. *Id.* at 395. There was, therefore, a sufficient nexus between the goal of reducing traffic congestion in the central business district and the easement required of Dolan for use as a pedestrian/bicycle pathway. *Id.*

90. *Id.* at 391. The Court explicitly placed "the burden on the city to justify the required dedication." *Id.* at 391 n.8.

91. *Id.* at 391. The Court arrived at the rough proportionality test after reviewing the ways in which state courts had previously assessed the constitutionality of exactions. *See id.* at 389-91. It noted that "[i]n some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice," while in others a much more "exacting correspondence, described as the 'specific and uniquely attributable' test," is required. *Id.* at 389 (alteration in original) (quoting *Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect*, 176 N.E. 2d 799, 802 (Ill. 1961)). The first standard was "too lax" and the second was too "exacting." *Id.* at 389-90. The Court preferred the approach taken by a third group of jurisdictions, which "require[d] the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development." *Id.* at 390. The Court, however, preferred to articulate the standard as one calling for a "rough proportionality" rather than a "reasonable relationship," in order to avoid confusing the test required under the Takings Clause with the highly deferential rational basis test applied under the Equal Protection Clause. *See id.* at 391.

92. *See id.* at 392-93.

93. *Id.* at 393.

94. *Id.*

95. *Id.* at 395 (omission in original) (emphasis added).

development's impact on traffic and the offsetting benefits of the pathway was necessary.⁹⁶

Our criticism of *Nollan* and *Dolan* in this Article is not based on what the Court did, but rather on what it failed to do. We do not, in other words, take issue here with the Court's adoption of the essential nexus and rough proportionality tests. Instead, we believe that the Court should have also explicitly addressed the issue of burden distribution in assessing the constitutionality of the challenged exactions. From a policy perspective, the Court's opinions failed to account for the effects of the marked shift in local government funding away from sources that distribute burdens widely, such as general revenue taxes, and toward other sources that seek to privatize and narrow the burdens, such as exactions.⁹⁷ From a doctrinal perspective, the Court's constitutional analysis improperly ignored the need to distribute burdens widely, which is one of the primary goals of the Takings Clause.

II. BURDEN DISTRIBUTION AND THE TAKINGS CLAUSE

Takings law generally seeks to balance the benefits that government regulations confer on the public against the burdens that they impose on property owners. Although the Court has not done so explicitly, we believe it is helpful to distinguish between the verticality and horizontality of those burdens.⁹⁸ A burden's verticality speaks to its severity; its horizontality speaks to the degree to which the burden is distributed among property owners. The vertical analysis, in other words, focuses on how any given owner is individually affected by the regulation at issue. The horizontal analysis, on the other hand, focuses on how any given owner is burdened *relative to* other similarly situated landowners.⁹⁹

96. *Id.* at 395-96.

97. See discussion *supra* Part I.A.

98. The Court in the recent case of *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2084 (2005), noted for the first time what we refer to in this Article as the distinction between the verticality and the horizontality of the burden imposed on property owners by regulations. For a discussion of *Lingle*, see *infra* notes 165, 176.

99. Another way of conceptualizing the distinction between the vertical and horizontal analyses is by thinking of the former as capturing the component of takings law that is more like a substantive due process analysis because it looks to the degree of governmental interference with the underlying right. In contrast, the latter is akin to an equal protection

The horizontal analysis, in short, adds a crucial relational component to takings law.¹⁰⁰

The Takings Clause is meant, in part, to distribute the burdens imposed on owners by governmental regulations as broadly as possible. The Court made this point most succinctly and famously forty-five years ago in *Armstrong v. United States*,¹⁰¹ where it noted that one of the primary purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁰² This language, which is known as the *Armstrong* principle,¹⁰³ has been endorsed in almost every important takings opinion of the last thirty years, both by Justices who contended that the regulations before the Court amounted to takings, as well as by those who disagreed.¹⁰⁴ In fact, it is fair to say that the *Armstrong*

analysis because it compares the government's regulation of the plaintiff to its regulation of similarly situated individuals.

100. Professor John Fee argues that property rights under the Takings Clause are best understood as comparative rights. See John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1007 (2003). He argues, in effect, that the Takings Clause is an equality or antidiscrimination provision. *Id.* As Fee puts it, "[t]he proper role of the Takings Clause is to require compensation in those circumstances where the government legitimately targets merely one or a few owners to bear a unique legal burden for the benefit of the general community." *Id.* We are sympathetic to Fee's understanding of the Takings Clause. It is not our position in this Article, however, that burden distribution is the *only* purpose of the Clause. Instead, we argue that burden distribution is *one* of its primary goals.

101. 364 U.S. 40 (1960).

102. *Id.* at 49.

103. See William Michael Treanor, *The Armstrong Principle, the Narrative of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153 (1997).

104. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2080 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 303-04 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999); *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992) (Stevens, J., dissenting); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *id.* at 19 (Scalia, J., concurring in part and dissenting in part); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987); *Bowen v. Gilliard*, 483 U.S. 587, 608 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512-13 (1987) (Rehnquist, C.J., dissenting); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); *id.* at 140 (Rehnquist, J., dissenting).

principle is one of the few concepts associated with takings law on which there seems to be a strong and ongoing agreement among members of the Court.

The degree to which the burden imposed by land use regulations is distributed among property owners is important for at least three reasons. First, and most obviously, if the government imposes a burden on one owner, or on a small number of owners, then it is more likely that it is unfairly asking a few to pay for benefits conferred on many.

Second, demanding that the burden be distributed as widely as possible makes it less likely that the government will act in an arbitrary manner. It makes it less likely, in other words, that the government will single out one owner, or a small number of owners, for illegitimate reasons.¹⁰⁵ The importance of widely distributing the burdens imposed on owners by land use regulations is reflected, for example, in the prohibition against "reverse spot zoning."¹⁰⁶ Such zoning impermissibly "singles out a particular parcel for different, less favorable treatment than the neighboring ones."¹⁰⁷

Third, it is more likely that owners of burdened lands will enjoy the benefits of a land use regulation when the government distributes the burdens broadly. For example, when an area of a municipality is zoned for residential purposes only, all of the owners

105. See, e.g., *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 151 (Pa. 2002). Saul Levmore has argued that burden distribution is important because the greater the distribution, the more likely that the affected owners will be able to protect their interests through participation in the political process, reducing the need for judicial intervention. Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 308-14 (1990).

106. See DANIEL R. MANDELKER, *LAND USE LAW* 246 (4th ed. 1997) (internal quotation marks omitted).

107. *Penn Cent.*, 438 U.S. at 132. For cases in which courts have found the differential treatment of similarly situated owners to constitute reverse spot zoning, see, for example, *In re City of Miami Beach v. Robbins*, 702 So. 2d 1329, 1330 (Fla. Dist. Ct. App. 1997); *City Comm'n of Miami v. Woodlawn Park Cemetery Co.*, 553 So. 2d 1227, 1234-35 (Fla. Dist. Ct. App. 1989); and *Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 730-32 (Pa. 2003). Some courts have held that reverse spot zoning effects a taking. See, e.g., *Woodlawn Park*, 553 So. 2d at 1235. Under the U.S. Constitution, the same is true of spot zoning, which impermissibly singles out a particular parcel of land for preferential, as opposed to unfavorable, treatment. See *Lucas*, 505 U.S. at 1073 (Stevens, J., dissenting) (concluding that "spot zoning is ... likely to constitute a taking") (internal quotation marks omitted); *Buckles v. King County*, 191 F.3d 1127, 1137-38 (9th Cir. 1999) (holding that a spot zoning claim must be analyzed as a takings claim, rather than as a substantive due process claim).

in the district are burdened to the extent that they will no longer have the opportunity to use their properties for commercial or industrial purposes. Those same burdened owners, however, will enjoy corresponding benefits that result from the fact that their neighbors are similarly burdened.¹⁰⁸ The relationship between burdens and benefits that accompany land use regulations, referred to by the Court as the "average reciprocity of advantage," makes it likely that a wider distribution of the burden will translate into some offsetting benefits for affected owners.¹⁰⁹

In Part II.A below, we explore more specifically the role that the degree of burden distribution has played in cases in which the Court has applied a categorical takings rule, as well as in cases in which it has preferred an explicitly ad hoc analysis. In doing so, we seek to separate analytically the questions related to the horizontality of the burden from those related to its verticality. In Part II.B, we return to the *Nollan-Dolan* framework and criticize it for ignoring the issue of burden distribution.

108. For example, the area will be free of busy shopping centers that attract scores of visitors and of factories that emit noise and soot pollution.

109. As the Court has noted, "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Keystone*, 480 U.S. at 491; see also *Cochran v. Preston*, 70 A. 113, 114-15 (Md. 1908) (discussing how a zoning ordinance that limits the height of buildings confers reciprocal benefits on affected owners); *State ex. rel. Carter v. Harper*, 196 N.W. 451, 453 (Wis. 1923) (reasoning that the owner "who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor").

The term "average reciprocity of advantage" comes from Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Professor John Fee has noted that "[t]he reciprocity of advantage concept suggests that the regulatory takings doctrine is focused on discriminatory governmental action." Fee, *supra* note 100, at 1040. He adds that "[l]aws of sufficient general applicability do not require compensation because the legal burdens are shared among a community of landowners for their collective benefit." *Id.* We elaborate on the reciprocity of advantage concept as it relates to the degree of burden distribution that is part of exaction programs in the discussion *infra* Parts II.B.3 and IV.B.

*A. Burden Distribution in Takings Law**1. Categorical Cases*

In three types of cases, the Court has created a categorical rule that mandates the finding of a taking. Under current doctrine, a taking always occurs when the government (1) physically appropriates property, (2) physically occupies property in a permanent fashion, or (3) deprives property of all of its economic value. The degree of burden distribution is relevant in all three types of cases.

a. Physical Appropriations

When the state exercises its eminent domain powers, it usually singles out one or several owners and imposes a burden on them that it does not impose on other owners. Thus, for example, when the government takes land to build a library or a school, it targets only one or a handful of owners and requires them to make their properties available for public use and benefit.

The same can be true when the scale of the government project is much larger—for example, when it builds a road or highway. While in those cases, the *total* number of affected properties is not always small, the *percentage* of affected properties, when compared to the total number of nearby properties that benefit from the road or highway, is typically quite small. The fact that the exercise of the state's eminent domain powers usually requires the singling out of some owners for the imposition of a burden in order to benefit others is an important factor in supporting the well-settled notion that such an exercise always constitutes a taking.

The Supreme Court's eminent domain cases have highlighted the lack of burden distribution that typically accompanies the government's exercise of its condemnation power. The Court's opinion in the 1893 case of *Monongahela Navigation Co. v. United States*,¹¹⁰ for example, noted that the Takings Clause

prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when

110. 148 U.S. 312 (1893).

he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.¹¹¹

Seventy years later, the Court's famous articulation of the *Armstrong* principle also emerged from an eminent domain case.¹¹² Of course, the verticality of the burden on a landowner caused by condemnation is always quite severe, independent of how other similarly situated owners are treated. A broader distribution of the burden, in other words, is unlikely to save a condemnation from constituting a taking. Nevertheless, the Court has made it clear that the narrow degree of burden distribution that is usually present in eminent domain cases is an additional important factor in understanding why the state's exercise of its eminent domain powers constitutes a per se taking.

b. Permanent Physical Occupations

The Supreme Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*¹¹³ that when the government permanently occupies private property, it effects a per se taking.¹¹⁴ The Court in *Loretto* emphasized that when the government occupies property in a permanent fashion, the vertical burden on the landowner is almost as severe as when the government physically takes property from the owner.¹¹⁵ In permanent occupation cases, the owner is deprived of the right to possess, use, and sell the occupied parts of the property as a result of the state action.¹¹⁶ The destruction of the right to possess, the Court added, means that the owner also loses the right to exclude.¹¹⁷ As a result, the Court reasoned that a

111. *Id.* at 325.

112. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (holding that the government's exercise of contractual rights to take title to boats did not remove its obligation to pay just compensation for liens asserted against the boats).

113. 458 U.S. 419 (1982).

114. *Id.* at 434-35. The rule also applies to permanent physical occupations by a third party acting pursuant to government authority. *See id.*

115. *Id.* at 435-36.

116. *Id.* The Court explained that although the owner retains "the bare legal right to dispose of the occupied space by transfer or sale," such a right lacks any real value given that "the purchaser will also be unable to make any use of the property." *Id.* at 436.

117. *Id.* at 435-36. The Court noted that the right to exclude "has traditionally been

permanent physical occupation constitutes a taking, regardless of the extent of that occupation or the public benefits that might flow from it.¹¹⁸

Perhaps due to the severity of the vertical burden that is usually present, the Court in physical invasion cases has rarely addressed matters related to the horizontal distribution of the burden. However, the same narrow distribution of the burden that is usually present in eminent domain cases is also typically present in physical invasion cases.

The owner in *Portsmouth Harbor Land & Hotel Co. v. United States*,¹¹⁹ for example, operated a beachfront hotel on property that was adjacent to a fort owned by the military.¹²⁰ The owner based its takings claim on the fact that the government fired large guns over the plaintiff's property several times a year and that, in addition, the government established fire control operations on the owner's property.¹²¹ The Supreme Court upheld the owner's claim, emphasizing the verticality of the burden that the government's actions imposed on the private landowner.¹²²

Although the Court did not state so, the principle that it announced thirty years earlier in *Monongahela Navigation*—namely, that the Takings Clause prohibits the government from singling out one owner and imposing burdens on it in order to benefit the public¹²³—was also applicable in *Portsmouth Harbor*. From the facts stated in the opinion, it appears that the plaintiff's land was the only property subjected to a physical invasion by the government.¹²⁴ The owner in *Portsmouth Harbor* was subjected to a unique burden that was not shared by others, and that alone should have made the government action suspect under the Takings Clause.¹²⁵

considered one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)).

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

119. 260 U.S. 327 (1922).

120. *Id.* at 328.

121. *Id.* at 329.

122. *Id.* The Court noted that "[t]here is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns." *Id.*

123. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

124. *See Portsmouth Harbor*, 260 U.S. at 328.

125. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that government should not force some owners to bear the public's burden); *Monongahela Navigation*, 148 U.S.

The same can be said of the government's actions in *United States v. Causby*.¹²⁶ The plaintiff in *Causby* lived and operated a chicken farm on land located next to a runway that the U.S. government leased for military flights.¹²⁷ The noise from the low-flying airplanes so frightened and upset the chickens that the plaintiff was required to close his business.¹²⁸ Again, the Court concluded that the government's actions constituted a taking because of the vertical degree of the burden, that is, because of the severe impact of those actions on the owner's use of his land.¹²⁹

As in *Portsmouth Harbor*, the Court in *Causby* did not emphasize the unique burden placed on the plaintiff owner compared to other owners in the area. *Causby*, like *Portsmouth Harbor*, however, is a case where one owner was burdened by the government in ways that his neighbors were not. The military airplanes undoubtedly flew over the properties of nearby owners in order to land at the airport in question. Yet, because of its proximity to the runway, *Causby's* property experienced a unique burden as compared to his neighbors' properties. Thus, although the Court chose to focus on the severity of the vertical burden imposed by the government's action on the landowners, the facts of both *Portsmouth Harbor* and *Causby* reveal that the government in those cases singled out the plaintiffs for a burden that it did not impose on nearby owners.¹³⁰

at 325 (stating that one individual cannot be forced to bear "more than his just share of the burdens of government").

126. 328 U.S. 256 (1946).

127. *Id.* at 258.

128. *Id.* at 259.

129. *See id.* (holding that the government had destroyed the land's value and taken an easement over the property).

130. Although the issue of burden distribution frequently goes unnoticed in physical occupation cases, the Court did explicitly address the issue in *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). The plaintiff in *Richards* owned property adjacent to tracks owned by a railroad company and next to the entrance to a railroad tunnel. *Id.* at 548-49. Congress granted the defendant railroad company the power of eminent domain to acquire land for its facilities. *Id.* at 550-52. Contending that the operation of the railroad near his property constituted a "nuisance," the plaintiff sued the railroad company. *Id.* at 548. The Supreme Court distinguished the smoke, dust, cinders, and vibrations caused by the operation of the railroad from the gasses and smoke that wafted onto the plaintiff's property as a result of the ventilation system in the tunnel. *Id.* at 554-57. As to the former, there could be no claim because of the well-established rule that railroads were not liable for the effects of their operations on nearby owners in the absence of negligence. *Id.* at 554-55. The Court added that [a]ny diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the *common burden* of incidental damages arising from

In the end, takings cases that involve physical invasions usually reflect the same type of narrow distribution of the burden that is typically present in eminent domain cases.¹³¹ The concerns behind the *Armstrong* principle, in other words, are as applicable in physical invasion cases as they are in cases involving the physical taking of property.¹³²

the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are *shared generally by property owners* whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad.

Id. at 554 (emphases added). For the Court, however, it was a different matter altogether when it came to those damages that were unique to the plaintiff property owner. *Id.* at 553-57. The burden suffered by the owner as a result of the gasses and smoke emitted from the tunnel was not shared widely by other owners in the area; instead, the burden was a form of "special and peculiar damage to the plaintiff as a property owner in close proximity to the portal." *Id.* at 557. The Court concluded that "the acts of Congress in the light of the Fifth Amendment ... [could not be construed to] authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him." *Id.*

Admittedly, the Court in *Richards* did not view the case as one involving the physical invasion of the plaintiff's property. But what is interesting, for our purposes, about the Court's holding and reasoning is that the Court placed a great deal of weight on the degree of burden distribution. Activities related to the operation of the railroad, as authorized by Congress, that led to harms "shared generally by property owners," did not give rise to a takings claim. *Id.* at 554. In contrast, railroad activities that imposed "special and peculiar" burdens on the plaintiff's property did rise to the level of a taking. *Id.* at 557. For a further discussion of *Richards* from a burden distribution perspective, see Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law* (forthcoming 2007) (on file with the authors).

131. *Loretto* seems to be an exception. *Loretto*, who owned an apartment building in New York City, was required by a state statute to allow the defendant cable company to place cable equipment on her property in order to enable her tenants to access cable services from their apartments. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982). The statute at issue applied to *all* owners of residential rental property in the state. *Id.* at 423 n.3 (reproducing the statute requiring that "[n]o landlord shall ... interfere with the installation of cable television facilities upon his property"). Given that the statute in *Loretto* applied to thousands of owners across the state, it seems difficult to argue persuasively that the plaintiff was burdened in a special or unique way. *Loretto*, therefore, seems to be a case where, despite the government's wide horizontal distribution of the burden, the magnitude or verticality of that burden led the Court to find a taking. Nevertheless, *Loretto* is sometimes used to support the idea that the application of a land use regulation to a narrow class of owners constitutes a taking. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1073 (1992) (Stevens, J., dissenting); Fee, *supra* note 100, at 1064-65.

132. See *Lucas*, 505 U.S. at 1073 (Stevens, J., dissenting) ("The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with [the *Armstrong*] principle. A physical taking entails a certain amount of 'singling out.'").

c. Deprivation of All Economic Use

In *Lucas v. South Carolina Coastal Council*, the Court held that a regulation that deprives property of "all economically beneficial or productive use" constitutes a per se taking, unless the regulation is consistent with background property and nuisance common law principles.¹³³ A South Carolina statute, enacted after Lucas purchased the lots at issue in the case, prohibited the construction of permanent structures on undeveloped coastal properties in order to avoid the hazards associated with further beach erosion.¹³⁴ In explaining its categorical rule, the Court emphasized the severe burden placed on owners by regulations that prohibit development altogether.¹³⁵ The Court noted that the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."¹³⁶ The Court added that

in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned.¹³⁷

Although the Court's opinion in *Lucas* focused primarily on the verticality of the burden, the horizontality of the burden made it into the opinion in two ways. First, the Court noted that when "regulations ... leave the owner of land without economically beneficial or productive options for its use ... [they] carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."¹³⁸ The Court suggested, in other words, that regulations that deprive owners of all economically beneficial use of their lands

133. *Id.* at 1015 (majority opinion).

134. *See id.* at 1008-09.

135. *See id.* at 1017.

136. *Id.*

137. *Id.* at 1017-18 (internal quotation marks and citations omitted).

138. *Id.* at 1018. The Court noted in its summary of the facts that Lucas intended to use his property "to do what the owners of the immediately adjacent parcels had already done: erect single-family residences." *Id.* at 1008.

usually single out those owners for the imposition of a burden that benefits others.¹³⁹ Second, the Court looked to the degree of burden distribution to determine whether the regulation was consistent with background property and nuisance common law principles, which would have exempted it from the application of the categorical takings rule.¹⁴⁰ The fact that “other landowners, similarly situated, [were] permitted to continue the use denied to the claimant” suggested that the regulation was not a codification of common law principles, but was instead a new type of land use restriction that required the government to compensate the owner.¹⁴¹

At the same time, however, the Court made it clear that a regulation is not immunized from a takings challenge simply “by plundering landowners generally.”¹⁴² The government, in other words, cannot protect itself against a takings claim involving a regulation that imposes a severe vertical burden simply by spreading that severity horizontally.¹⁴³ Nevertheless, as *Lucas* illustrates, the Court’s takings opinions frequently note the issue of burden distribution in determining whether governmental action constitutes a taking.

2. Noncategorical Cases

The degree of burden distribution has also played a role in cases where the Court has refused to apply a categorical takings rule, but has instead called for an ad hoc analysis. The two most important such cases are *Penn Central Transportation Co. v. City of New*

139. See *id.* at 1018; see also Fee, *supra* note 100, at 1061 (“[T]he *Lucas* rule works as an effective proxy for determining if some owners have been singled out to sacrifice property usage rights for the benefit of others.”). In his dissent, Justice Stevens “agree[d] that the risks [associated with being] sing[led] out are of central concern in takings law,” but questioned the majority’s suggestion that there is a correlation between regulations that deprive owners of all economically viable uses of their properties and regulations that impermissibly single out some owners. See *Lucas*, 505 U.S. at 1067 (Stevens, J., dissenting).

140. See *Lucas*, 505 U.S. at 1030-31.

141. *Id.* at 1031.

142. *Id.* at 1027 n.14.

143. Although in this Article we emphasize the importance of burden distribution in takings law generally and exactions law in particular, it is not our position that a regulation’s wide distribution of the burden, by itself, immunizes it from a takings challenge.

*York*¹⁴⁴ and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.¹⁴⁵ In discussing both of these cases below, we focus on the parts of the opinions that addressed the degree of burden distribution that accompanied the challenged regulations.

The property owner in *Penn Central* argued, inter alia, that the landmark legislation at issue in the case, which prevented it from building a skyscraper on top of Grand Central Station in New York City, constituted a taking because the legislation imposed a unique and distinct burden on its property.¹⁴⁶ As such, the owner argued, the landmark legislation differed from zoning ordinances and historic-district legislation, which apply to many owners throughout specifically delineated districts.¹⁴⁷ The owner complained, in essence, that the government was singling it out and imposing a special and unique burden on it in order to benefit the rest of New York City's residents.¹⁴⁸

The Court rejected the owner's argument, noting that more than four hundred different sites in the city had been designated as landmarks.¹⁴⁹ This meant, the Court concluded, that the plaintiff was not, in fact, being singled out unfairly.¹⁵⁰ The owners of those other landmarks were under the same obligations to protect the historical and aesthetic values of their properties.¹⁵¹ In addition, the city's thirty-one historical districts applied similar restrictions to all properties within their borders.¹⁵² In the end, the Court believed that the wide distribution of the burden "to a large number of parcels in the city" provided the necessary "assurances against [government] arbitrariness."¹⁵³

144. 438 U.S. 104 (1978).

145. 535 U.S. 302 (2002).

146. *Penn Cent.*, 438 U.S. at 119, 131.

147. *Id.* at 131.

148. *See id.*

149. *Id.* at 134.

150. *See id.*

151. *See id.* at 132-35.

152. *Id.* at 132-34.

153. *Id.* at 135 n.32. The Court acknowledged that such assurances are usually provided by the imposition of the same burden to an entire zoning area or district. *Id.* It concluded, however, that given the large number of parcels that were subject to the landmark legislation, the assurance against governmental arbitrariness was "comparable, if not identical." *Id.*

Like the majority opinion, then Justice Rehnquist's dissent paid a great deal of attention to the question of whether the landmark legislation sufficiently distributed the burden.¹⁵⁴ In contrast to the majority, however, Justice Rehnquist concluded that the degree of burden distribution was patently insufficient.¹⁵⁵ For example, he noted that the government imposed the burden "on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people."¹⁵⁶ He added that if all city residents had to pay for the cost of preserving Grand Central Station, the per capita charge would be only a few cents.¹⁵⁷ Emphasizing that the landmark preservation burden had not been sufficiently distributed, Justice Rehnquist concluded that the city's landmark scheme resulted in "precisely [the] sort of discrimination that the Fifth Amendment prohibits."¹⁵⁸

Although the majority and the dissent in *Penn Central* clearly disagreed on whether the degree of burden distribution that accompanied the challenged legislation was sufficient to pass constitutional muster, the issue played a crucial role in both opinions. The same is true of the Court's opinion in *Tahoe-Sierra Preservation Council*. In that case, the plaintiffs argued that the imposition of a thirty-two month moratorium on the development of hundreds of environmentally sensitive lots in the Lake Tahoe Basin deprived their properties of all economically viable use, thus constituting a per se taking under the rule announced in *Lucas*.¹⁵⁹

The Court disagreed, noting that *Lucas* involved a permanent deprivation of all economically viable use, while the Lake Tahoe regulation was only temporary.¹⁶⁰ The Court did not stop there, however. It also emphasized the important role that a temporary moratorium can play in shaping the land use regulations that are ultimately adopted upon its expiration.¹⁶¹ The Court reasoned that the wide distribution of the burden that accompanies a temporary

154. See *id.* at 138-53 (Rehnquist, J., dissenting).

155. See *id.* at 147-49.

156. *Id.* at 147.

157. *Id.* at 148-49.

158. *Id.* at 149.

159. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306, 316 (2002). For a discussion of *Lucas*, see *supra* Part II.A.1.c.

160. See *Tahoe-Sierra*, 535 U.S. at 329-30.

161. *Id.* at 337-40.

moratorium, such as the one at issue in *Tahoe-Sierra*, helps assure that the government will not act arbitrarily by imposing burdens on only a few selected owners.¹⁶² The Court noted that temporary moratoria applicable to many lots, unlike decisions regarding whether to issue “a permit for a single parcel,” give the government an opportunity to study, deliberate, and plan in a comprehensive fashion, while affording affected owners and the public the opportunity to be heard.¹⁶³ As such, “with a temporary ban on development there is a lesser risk that individual landowners will be ‘singled out’ to bear a special burden that should be shared by the public as a whole.”¹⁶⁴

As we have shown in this section, one of the primary purposes of the Takings Clause is to distribute the property-related burdens imposed by government regulations as broadly as possible. This primary purpose is reflected in the reasoning of several of the Court’s most important takings opinions, from early eminent domain cases to later regulatory takings cases such as *Penn Central* and *Tahoe-Sierra*.¹⁶⁵ Our principal critique of the constitutional

162. See *id.* at 340-41.

163. *Id.* at 340.

164. *Id.* at 341 (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 835 (1987)).

165. The Court also emphasized the importance of burden distribution in its recent opinion in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005). The issue in *Lingle* was the continued relevance of the standard announced twenty-five years earlier in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that a government regulation “effects a taking if [it] does not substantially advance legitimate state interests.” *Id.* at 260. The *Lingle* Court held that the *Agins* standard was an inappropriate takings test because it addressed neither the verticality nor the horizontality of the burden. As the Court explained, “the ‘substantially advances’ inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners.” *Lingle*, 125 S. Ct. at 2084. The takings analysis, the Court added, demands an assessment of the actual burden imposed on the property owner and of whether considerations of “justice might require that the burden be spread among taxpayers through the payment of compensation.” *Id.* The “substantially advances” inquiry, on the other hand, tells us nothing about the degree to which the regulation at issue singles out particular property owners. As the Court noted,

[t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation.... Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners.

Id.

standard of review set forth in *Nollan* and *Dolan* is that it ignores the degree of burden distribution associated with exactions.

B. The Constitutionality of Exactions and the Wide Distribution of Their Burdens

The Court in *Nollan* and *Dolan* was concerned about the possibility that the government might improperly leverage its police powers to receive benefits from property owners without having to pay for them.¹⁶⁶ By requiring an essential nexus between the governmental purpose and the exaction, and by demanding a rough proportionality between the impact of the development and the nature and extent of the exaction, the Court sought to prevent the government from using its authority to impose conditions on development as a way of avoiding its obligation to compensate owners under the Takings Clause.

As we explore in this section, the *Nollan-Dolan* framework, by focusing exclusively on the essential nexus and rough proportionality tests, does little to prevent the government from singling out one or several landowners for differential treatment. The ability of the government to choose among owners who are seeking to develop their properties and impose exactions that are not imposed on similarly situated owners makes it more likely that the government will engage in improper leveraging. Furthermore, the government's exercise of this type of discretion leads to the concentration, rather than the dissipation, of the burdens associated with exactions, which is precisely the opposite of what the Takings Clause is intended to achieve.

1. Nollan and Burden Distribution

In *Nollan*, all of the owners of beachfront properties in the tract of land that included the Nollans' property were required by the California Coastal Commission to provide a lateral access easement

166. See *Nollan*, 483 U.S. at 837; see also *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (alteration in original) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922))).

as a condition of development.¹⁶⁷ In fact, the Commission required forty-three other owners in the tract to provide the same easement that it required of the Nollans.¹⁶⁸ The Court, however, did not find the degree of burden distribution relevant to the Nollans' claim that there was no relationship between the exaction and the attainment of the government's goal.¹⁶⁹

The Court's conclusion that the issue of burden distribution was irrelevant to an assessment of the Nollans' takings claim may seem reasonable at first. It can be argued, for example, that no amount of burden distribution can make up for an insufficient nexus between the state's ends and the means it chooses to reach them. What the Court failed to appreciate, however, is that the degree of burden distribution in exaction cases is an important criterion in assessing whether the government has overreached by improperly leveraging its police powers. This failure is surprising, given that the Court placed a great deal of emphasis in *Nollan* on the need to deter the government from improperly leveraging its authority.¹⁷⁰

The government is more likely to engage in improper leveraging when it imposes exactions on some owners and not on others, even though the impact of the property development of both groups is similar. In fact, it is reasonable to infer that when the government chooses among similarly situated owners and requires exactions of some, but not others, its goal is not to achieve a legitimate public purpose, but is instead to leverage its authority to receive benefits from the burdened owners without having to pay for them. If the purpose of the exaction program is truly to mitigate a particular type of community impact that accompanies development, then it is reasonable to expect that the government will burden all owners whose developments have similar impacts with similar conditions. When the government picks and chooses among owners and imposes exactions on only some of them, it acts arbitrarily. As a result, the degree of burden distribution that accompanies an exaction program is highly relevant to the question of whether the government has overreached.

167. *Nollan*, 483 U.S. at 829.

168. *Id.*

169. *See id.* at 835 n.4.

170. *Id.* at 837 & n.5.

The test that the Court adopted in *Nollan* only requires a certain relationship—an essential nexus—between the government's goals and the nature of the exaction.¹⁷¹ To pass constitutional muster under the *Nollan* test, the government does not have to distribute exaction-related burdens widely among similarly situated owners; it only must be certain that there is a sufficient nexus between its means and ends.¹⁷² The constitutional standard announced in *Nollan*, therefore, can only go so far in deterring the government from arbitrarily imposing improper exactions.

An example provided by the *Nollan* Court itself illustrates this point. The Court posited that if the Commission had demanded a viewing spot on the Nollans' property in order to offset their new, larger house's contribution to the creation of a psychological barrier to beach access, such an exaction would have passed constitutional muster because there would have been an essential nexus between what the government was trying to achieve and the nature of the exaction.¹⁷³ This is especially true if we assume, as the Court did, that the Commission could have prohibited the Nollans' new development altogether in order to promote its goal of preventing the formation of a psychological barrier to beach access.¹⁷⁴ The important point for our purposes is that the viewing-spot exaction would have been constitutional under the *Nollan* test *even if the Nollans were the only property owners in the area required to provide the exaction*. In order to strike down the viewing-spot exaction in the hypothetical, the Court would have to rely on either the *Armstrong* principle or the Equal Protection Clause rather than on the test announced in *Nollan*.¹⁷⁵ In short, there is nothing in *Nollan*'s articulation of the essential nexus test that requires the government to spread the burden of exactions as widely as possible.¹⁷⁶

171. *Id.* at 837.

172. *See id.*

173. *Id.* at 836. The Court in *Dolan* confirmed this view when it stated that the hypothetical exaction posited in *Nollan* "would have been constitutional," even if it required the owners to provide a viewing spot to be used by the public. *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994).

174. *See Nollan*, 483 U.S. at 836-37.

175. *See id.* at 835 n.4. For a discussion of the difference in the degree of burden distribution required by the Equal Protection Clause as compared to the Takings Clause, see *infra* note 280.

176. The Court in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2085 (2005), recently noted the inadvisability of incorporating another means/ends test into a takings analysis. As

It could be argued that the Court in *Nollan* did, in fact, seek to encourage the further distribution of exaction-related burdens. The Court, after all, stated in the last sentence of the opinion that, although California was free to pursue its comprehensive program of promoting public access to beaches, it had to pay the Nollans for their easement.¹⁷⁷ The Court appeared to encourage governments to use general revenues to pay for public benefits that they had heretofore acquired through exactions. This suggestion, however, ignores the powerful forces and incentives that, by the time *Nollan* was decided, were already pushing local governments away from general taxes and toward nontax sources of revenues.¹⁷⁸ The lesson for local governments coming out of *Nollan*, then, was not to distribute burdens more broadly. Rather, the incentive was to establish a closer link between their policy goals and the nature of their exactions.

2. Dolan and Burden Distribution

The rough proportionality test that the Court announced in *Dolan* also ignores the degree of burden distribution that accompanies an exaction. Instead, that test looks only to the relationship between the impact of the development and the nature and extent of the exaction.¹⁷⁹ The *Dolan* standard, like the *Nollan* test, does not compare how the government regulates the plaintiff owner with the way in which it treats similarly situated owners.¹⁸⁰ As a result, it is not necessary for an exaction program to distribute burdens widely among owners to pass constitutional muster under the rough proportionality test.¹⁸¹

already mentioned, see *supra* note 165, the issue in *Lingle* was the continued relevance of the standard announced in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that a government regulation "effects a taking if it does not substantially advance legitimate state interests," *id.* at 260. The *Lingle* Court noted that the *Agins* "test ... tells us nothing about ... how th[e] burden is allocated [and it therefore] cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle*, 125 S. Ct. at 2084. Interestingly, the same criticism can be made of the *Nollan* means/ends test.

177. See *Nollan*, 483 U.S. at 841-42.

178. See discussion *supra* Part I.A.

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

180. See *id.* (emphasizing an individualized determination).

181. See *id.*

Rather than focus on the degree of burden distribution, the Court in *Dolan* emphasized the distinction between legislative regulations and adjudicative exactions.¹⁸² The Court was troubled by the fact that the exactions at issue in *Dolan* did not involve a legislative classification of an "entire area[] of the city," but instead involved "an adjudicative decision to condition [the owner's] application for a building permit on an individual parcel."¹⁸³ Although the Court did not elaborate on the distinction, it did suggest that adjudicative exactions are more suspect than legislative land use regulations because the former relate to only one parcel.¹⁸⁴

It is possible, at first glance, to believe that the legislative-adjudicative distinction can serve as an effective proxy for the degree of burden distribution that accompanies an exaction program. It would seem, in other words, that legislative exactions should do a better job of distributing burdens among owners than adjudicative exactions. The latter ostensibly give greater discretion to the government to impose conditions on development, thus increasing the risk that the government will subject individual landowners to greater burdens than similarly situated owners.

The record in *Dolan*, however, demonstrates why the legislative-adjudicative distinction is a poor proxy for the degree of burden distribution. The city, despite what the Court took to be the adjudicative nature of its exactions, distributed the exaction-related burdens widely. In fact, although the plaintiff owner argued that she was "singled out" by the city for exaction purposes,¹⁸⁵ the record suggests otherwise.

In the 1970s, the city developed a comprehensive plan that addressed many land use issues, including those related to flood control, flood prevention, and the creation of a pedestrian/bicycle pathway to help alleviate traffic congestion.¹⁸⁶ The city codified the

182. *Id.* at 385.

183. *Id.* The Court made the same point later in the opinion when it explained that its decision placed the burden on the government to show the existence of rough proportionality. *See id.* at 391 n.8.

184. *See id.* at 385.

185. Brief for Petitioner at 14, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (No. 93-518), reprinted in 229 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1993 TERM SUPPLEMENT 83, 103 (Philip B. Kirland & Gerhard Casper eds., 1995) [hereinafter LANDMARK BRIEFS].

186. *See* Brief for Respondent at 6, 11, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (No. 93-

comprehensive plan through zoning ordinances contained in its Community Development Code (CDC).¹⁸⁷ On the issue of flood control and prevention, the CDC stated that "[w]here ... development is allowed within and adjacent to the 100-year floodplain, the City *shall* require the dedication of sufficient open land area for greenway adjoining and within the floodplain."¹⁸⁸ A section of Dolan's property was on the 100-year floodplain of a creek.¹⁸⁹ The easement demanded of her was the same demanded of all "those owning property along the creek ... when they sought approval of land use permits"¹⁹⁰ Although Dolan argued that she was singled out by the city, she was in fact regulated in precisely the same way as all other owners along the creek. Just as important, she was also regulated in the same way as all others who owned properties in floodplain areas.¹⁹¹ There was nothing in the record, in other words, to suggest that Dolan was treated differently from other similarly situated owners.

The city also distributed the burden widely when implementing its plan for a pedestrian/bicycle pathway. Dolan's property was included in the original plan for the pathway, years before she submitted the redevelopment proposal that was at issue in the case.¹⁹² The CDC stated that "[d]evelopments adjoining proposed bikeways identified on the adopted pedestrian/bikeway plan *shall* include provisions for the future extension of such bikeways through the dedication of easements or rights-of-way."¹⁹³ The CDC also required *all* owners of property in and adjacent to floodplains

518), reprinted in LANDMARK BRIEFS, *supra* note 185, at 127, 145, 150.

187. *Dolan*, 512 U.S. at 377.

188. *Id.* at 379-80 (emphasis added) (citing CDC § 18.120.180.A.8).

189. *See id.* at 379.

190. Brief for Petitioner, *supra* note 185, at 6.

191. *See id.*; *see also* Brief for Respondent, *supra* note 186, app. B at B-27 (citing CDC §18.84.040.A.7, which states that "[w]here land form alterations and/or development are allowed within and adjacent to the 100-year floodplain, the City *shall* require the dedication of sufficient open land area within and adjacent to the floodplain in accordance with the comprehensive plan" (emphasis added)); *id.* app. B at B-62 (citing CDC § 18.164.100.B.1, which states that "[w]here a subdivision is traversed by a watercourse, drainageway, channel or stream, there *shall* be provided a storm water easement or drainage right-of-way conforming substantially with the lines of such watercourse and such further width as will be adequate for conveyance and maintenance" (emphasis added)).

192. *See* Brief for Respondent, *supra* note 186, at 11-12.

193. *Id.* app. B at B-63 (emphasis added) (citing CDC § 18.164.110.A).

to dedicate easements for purposes of the bicycle/pedestrian pathway.¹⁹⁴ Once again, far from being singled out, Dolan was subjected to precisely the same exaction requirements that applied to all other owners in the city whose properties were within and adjacent to floodplain areas.¹⁹⁵

In the end, even though the Court labeled the city's exactions as adjudicative, the city distributed the burdens widely among similarly situated owners. The legislative-adjudicative distinction, then, does not necessarily correlate with the degree of burden distribution. Adjudicative exactions, such as the ones at issue in *Dolan* (and *Nollan*) can be quite effective in widely distributing burdens.¹⁹⁶

The Court's focus on the legislative-adjudicative distinction, rather than on the degree of burden distribution, means that the latter is essentially irrelevant to the *Dolan* analysis. It also means that, after *Dolan*, governments that create and implement exaction

194. *Dolan*, 512 U.S. at 379-80 (citing CDC § 18.120.180.A.8, which states that "the dedication of sufficient open land area for greenway adjoining and within the floodplain ... shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan" (emphasis added)); see also Brief for Respondent, *supra* note 186, app. B at B-27 (citing CDC § 18.84.040.A.7).

195. Dolan argued before the Supreme Court that the government improperly demanded of her something "which [is] not required from the public at large." *Dolan*, 512 U.S. at 386. If the Court were to apply that standard, however, it would have to conclude that all land use regulations constitute takings because they all, to some extent, impose burdens on some owners that are not imposed on the public at large.

It could also be argued that the exactions in *Nollan* and *Dolan* impermissibly singled out those owners who wanted to develop their properties by treating them differently from other owners. That is always the case with exactions, however. The Court in *Nollan* and *Dolan* did not prohibit the use of exactions; instead, it simply required governments to pay for exactions that fail the essential nexus and rough proportionality tests. It is generally proper to treat owners who want to intensify the use of their lands differently from those who do not because the former will impose harms on the community that the latter will not. See Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 515 (1995). As Justice Scalia, the author of *Nollan*, noted in a subsequent opinion, if "there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy ... it cannot be said that [the owner] has been singled out unfairly." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part); see also Been, *supra* note 6, at 489 (arguing that exactions "serve an important and legitimate purpose by ... forcing developers to consider [the costs of their development to the community] in determining how much to develop").

196. There is also no guarantee that legislative exactions will distribute burdens widely. See *infra* note 247.

programs have little incentive to distribute the burdens that accompany those programs widely. This leads perversely to the further concentration, rather than the further dissipation, of exaction-related burdens, which is inconsistent with one of the primary goals of the Takings Clause.

3. Reciprocity of Advantage in Nollan-Dolan and Burden Distribution

In this subpart of the Article, we have argued that the Court in *Nollan* should not have ignored the issue of burden distribution.¹⁹⁷ We have also argued that the Court in *Dolan* focused on the legislative-adjudicative distinction when it should have focused on the degree of burden distribution.¹⁹⁸ Our third argument is that the *Nollan-Dolan* test also fails to encourage the wide distribution of the burden in exactions law because it ignores the benefits to owners that accompany that distribution.

The relationship between a regulation's burdens and benefits is referred to in takings law as the reciprocity of advantage.¹⁹⁹ The idea is that the benefits that accrue to a burdened landowner from a land use regulation should be taken into account in determining whether the regulation effects a taking. The existence of such benefits generally makes a finding of a taking less likely, while the absence of benefits generally makes it more likely that a taking has occurred.²⁰⁰

The scope of the reciprocity of advantage principle remains unsettled in the legal literature.²⁰¹ There is little agreement, for example, on which landowner benefits should be relevant to the takings analysis. We do not enter into that general debate;²⁰²

197. See discussion *supra* Part II.B.1.

198. See discussion *supra* Part II.B.2.

199. See, e.g., Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990); Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449 (1997); Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1 (2004).

200. See Coletta, *supra* note 199, at 301-02.

201. See *id.*

202. Two important areas of disagreement on the issue of benefit typology as it relates to the principle of reciprocity of advantage are beyond the scope of this Article. The first applies

to any challenged land use regulation and involves whether the benefit that arises from the regulation, in order to be a legitimate part of the reciprocity of advantage analysis, must be unique to the owner, or whether benefits that the owner shares with members of the public count as well. There has been wide disagreement on this question among members of the Court. Justice Brennan was the strongest proponent of the view that reciprocity requirements are met when the burdened landowner shares the benefits arising from the challenged regulation with members of the public. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 134-35 (1978) (arguing that sufficient reciprocity is established when the challenged regulation benefits all citizens and structures); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 856 (1987) (Brennan, J., dissenting) (arguing that the challenged exaction benefited the property owners "both as private landowners and as members of the public" (emphasis added)). Justice Powell made a similar argument in *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980), when, in writing for the Court, he stated that restrictive zoning ordinances "benefit the [property owners] as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas." For his part, then Justice Rehnquist's dissent in *Penn Central* rejected the notion that the benefits that the owner shared with members of the public as a result of the challenged landmarks legislation was enough to offset the burden imposed by it. *See Penn Cent.*, 438 U.S. at 147 (Rehnquist, J., dissenting) ("Here ... a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other 'landmarks' in New York City."). Commentators also disagree on this point. *Compare Fee*, *supra* note 100, at 1055-57 (arguing that the concept of reciprocity of advantage should only apply when the burdened owners are the primary beneficiaries of the challenged regulation), and *Oswald*, *supra* note 199, at 1514 (criticizing an "expansive social view of average reciprocity of advantage" that accounts for benefits shared by burdened landowners with the community as a whole), *with Coletta*, *supra* note 199, at 303 (arguing that "rather than requiring that direct individualized benefits accrue to the burdened individual, reciprocity defenses [sh]ould focus on the benefits gained by the community at large"), and *Schwartz*, *supra* note 199, at 63 (arguing that "[j]udicial deference to the policy decisions of legislatures necessarily requires a conclusive presumption that economic regulations other than categorical takings achieve an average reciprocity of advantage").

The second area of disagreement is specific to exactions law and involves whether the benefits that accompany the conditional approval of development proposals should be relevant in assessing whether the conditions constitute takings. The Court in *Nollan* concluded that development-related benefits should not be part of the analysis of whether an exaction effects a taking. The Court stated that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan*, 483 U.S. at 833 n.2. Justice Brennan took the opposite view in his dissent. He argued that the Nollans, by receiving the government's permission to intensify their land use, enjoyed the benefit of the added value to their property provided by the bigger house. *See id.* at 856 (Brennan, J., dissenting). This was, according to Brennan, "a classic instance of government action that produces a 'reciprocity of advantage.'" *Id.*

The Court in *Dolan* also ignored the benefits that accrue to the owner as a result of the approval, albeit with conditions, of the development proposal. Justice Stevens noted in his dissent that "the Court ignores the state courts' willingness to consider what the property owner gains from the exchange in question." *Dolan v. City of Tigard*, 512 U.S. at 374, 399 (1994) (Stevens, J., dissenting). He added that "the Court should not isolate the burden associated with the loss of the power to exclude from an evaluation of the benefit to be derived

instead, we focus specifically on the benefits that accrue to owners *as a result* of the government's wide distribution of the burden. The Court ignored this issue in *Nollan* and *Dolan*, and commentators have paid little attention to it.

In exaction cases, courts should look to the relationship between the degree of burden distribution and the existence of offsetting benefits in the same way that the Supreme Court did in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.²⁰³ In *Tahoe-Sierra*, the Court reasoned that the wide distribution of the burden that accompanies a land use moratorium provided burdened owners with "a clear 'reciprocity of advantage' because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted."²⁰⁴ The wide applicability of the burden, in other words, helps to ensure that burdened owners enjoy corresponding benefits.²⁰⁵ If the owners of undeveloped lands in environmentally sensitive areas around Lake Tahoe could not be guaranteed that similarly situated owners would not be allowed to develop their land in ways that were inconsistent with the land use regulations ultimately adopted, then the burdened owners would not receive the benefits that would have resulted from restrictions placed on their neighbors' use of their lands.²⁰⁶ At the same time, the neighboring owners who were not subject to the temporary restrictions would enjoy the benefits of the reduced development that result from the restrictions imposed on *some* of the environmentally sensitive lots in the area, without sharing any of the burdens.²⁰⁷

from the permit to enlarge the store and the parking lot." *Id.* at 402-03. The Court's position on this point has been criticized by some commentators. See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 570 (2001); Kendall & Ryan, *supra* note 6, at 1825-28. But see Oswald, *supra* note 199, at 1514 ("[P]ermitting the landowners to develop their own property, a use to which they were already entitled, can hardly be termed a benefit that offsets any loss incurred as a result of the regulation.").

203. 535 U.S. 302, 341 (2002).

204. *Id.* at 341 (citation omitted).

205. As the Court noted, property values in the Lake Tahoe Basin were likely to increase as a result of the moratorium because of "the added assurance that Lake Tahoe will remain in its pristine state." *Id.*

206. *Id.*

207. See *id.*

The same causal relationship between wide distribution of the burden and offsetting benefits for burdened property owners can exist in exaction cases, as both *Nollan* and *Dolan* illustrate. In *Nollan*, as Justice Brennan noted in his dissent, the Commission's general program of requiring owners in the area to provide lateral access easements afforded the plaintiffs the important benefit of being able to walk along the full length of the beach.²⁰⁸ The Nollans were able to enjoy the benefit of having access to large sections of the shorefront near their home because the Commission required a lateral access easement of all owners in the area who sought to develop their properties.²⁰⁹ In the absence of a wide distribution of the burden—or, in other words, in the absence of a comprehensive program on the part of the government aimed at providing public access to beaches—the Nollans would not have benefited from the state's exaction decisions.

The same is true in *Dolan*. The fact that the government required all of Dolan's floodplain neighbors to dedicate easements in return for permission to develop worked to her benefit. The restrictions placed on her neighbors' ability to develop the parts of their properties that fell within the floodplain area made it less likely that Dolan's property would be flooded. At the same time, the restrictions placed on her land benefited her lot as well as her neighbors' properties.²¹⁰

The same type of reciprocity of advantage existed in *Dolan* on the issue of the pedestrian/bicycle pathway. The pathway plan sought to reduce traffic congestion in the city's central business district.²¹¹ The ability of the plan to attain that goal depended on the degree to which it distributed the burden; the plan's effectiveness would have been considerably undermined if only some of the owners in the area were required to dedicate an easement for pathway purposes as a condition of new development. The effective reduction in traffic

208. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 856 (1987) (Brennan, J., dissenting).

209. *See id.* at 829.

210. Justice Stevens noted in his dissent that "[a]s the United States pointed out at oral argument, the improvement that the city's drainage plan contemplates would widen the channel and reinforce the slopes to increase the carrying capacity during serious floods, confer[ing] considerable benefits on the property owners immediately adjacent to the creek." *Dolan v. City of Tigard*, 512 U.S. 374, 400 (1994) (Stevens, J., dissenting) (alteration in original) (internal quotation marks omitted).

211. *Id.* at 387.

congestion was dependent on the pathway crossing a relatively large section of the city, so as to encourage residents to take some trips on foot or by bicycle, rather than by car.²¹² A pathway of limited length, or one with many gaps where owners retain unfettered rights to exclude, would be considerably less effective in its ability to reduce traffic congestion. The ability of Dolan and other owners and residents in the area to benefit from the reduced traffic congestion, in other words, depended on the city's willingness to distribute the easement-related burdens widely. As we have already noted, that is precisely what the city did.²¹³

We do not claim that the reciprocity of advantage enjoyed by the owners in *Nollan* and *Dolan* was necessarily significant enough to deny the plaintiffs' takings claims in those cases. We are suggesting, however, that the Court should have paid greater attention to the relationship between burden distribution and reciprocity of advantage. The wide distribution of the burden not only makes sense because it avoids the problems created whenever the government singles out and burdens only a few property owners,²¹⁴ but also because it can provide landowners with benefits that offset that burden.²¹⁵ The horizontal distribution of the burden among many owners, in other words, can diminish its verticality, or severity, as it affects any given owner. If the applicable constitutional test allows the government to use the benefits to owners that accompany the wide distribution of exaction-related burdens to defend the constitutionality of its exactions, it will have a greater incentive to distribute the burdens as widely as possible. This, in turn, will make the imposition of exactions by the government more consistent with one of the primary purposes of the Takings Clause.²¹⁶

In the end, our critique of the *Nollan-Dolan* test is based on the Court's insistence on focusing solely on the claimant's property to determine whether the requisite essential nexus and rough proportionality exist. We believe that the constitutional analysis should be broader than that; it should also include the nature of the exaction *program* that led to the imposition of the exaction that is

212. See Brief for Respondent, *supra* note 186, at 11.

213. See *supra* notes 192-95 and accompanying text.

214. See *supra* notes 105-07 and accompanying text.

215. See *supra* notes 108-09 and accompanying text.

216. See discussion *supra* Part II.A.

subject to challenge. It should, in other words, look not only to the verticality of the burden, but also to its horizontality by explicitly asking how the claimant owner was burdened *in relation* to other similarly situated owners. By also focusing on the exaction program and its effects on properties other than the claimant's, a court can determine the extent to which the exaction-related burdens are distributed among similarly situated owners.²¹⁷ The court can also determine the benefits, if any, that accrue to the takings claimant as a result of the degree of burden distribution that accompanies the exaction in question.²¹⁸

III. CURRENT DISTINCTIONS IN EXACTIONS LAW

Much of the post-*Nollan-Dolan* litigation has involved the issues of whether the *Nollan-Dolan* test applies to legislative exactions and whether it applies to monetary exactions, also known as impact fees. Lower courts have disagreed widely on these matters. Some have held that the test only applies to the types of exactions that were at issue in the two Supreme Court cases—namely, adjudicatively imposed requirements of land dedications.²¹⁹ Other courts have

217. We elaborate on this idea in the discussion *infra* Part IV.A.

218. We elaborate on this idea in the discussion *infra* Part IV.B.

219. See *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 692-98 (Colo. 2001) (en banc); *Parking Ass'n of Ga. v. City of Atlanta*, 450 S.E.2d 200, 203 n.3 (Ga. 1994); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994); see also *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998) (expressing doubt that *Nollan* and *Dolan* "apply outside the context of physical invasions" of property); *Tex. Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996) (concluding that *Nollan* did not apply because the challenged regulation "applies evenhandedly to entire areas of the City" and because it "does not 'extract benefits' from [the owner] in the *Nollan* sense of requiring some dedication ... to the city"); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (concluding that the essential nexus and rough proportionality tests "are limited to the context of development exactions where there is a physical taking or its equivalent"); *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994) (concluding that *Dolan* did not apply to land use restrictions that are "legislative rather than adjudicative" and that "do not impose upon plaintiffs the obligation to deed portions of their land to the local governments or any other affirmative obligation"); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (concluding that *Dolan* does not apply to impact fees); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (holding that *Dolan*'s rough proportionality test does not apply to a fee imposed by a "citywide, legislative land use regulation"); *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1219 (N.Y. 2004) (holding that *Nollan* and *Dolan* are inapplicable to conditions that do not require property dedication); *Wis.*

applied the test to impact fees that are adjudicatively, as opposed to legislatively, imposed.²²⁰ A third group has applied the test to impact fees without distinguishing between legislative and adjudicative exactions.²²¹

Commentators have also disagreed on which types of exactions should be covered by the *Nollan-Dolan* test. Those who support the idea of applying heightened scrutiny to exactions argue for a broad reading of *Nollan* and *Dolan* so as to include all exactions within the scope of the test.²²² In contrast, those who are critical of the application of heightened scrutiny to exactions argue for a narrow interpretation that will limit the application of the *Nollan-Dolan* test to adjudicatively imposed land-dedication exactions.²²³

In our estimation, the time has come for the law of exactions to move beyond the legislative-adjudicative and land-monetary distinctions. The distinctions are primarily meant to serve as proxies for the likelihood that the government overreached in imposing exactions by leveraging its authority to deny approval of development proposals in order to receive benefits from owners without having to pay for them. Those who argue for a broad understanding of *Nollan-Dolan*, in other words, believe that the *risk* of leveraging is present regardless of the type and nature of the

Builders Ass'n v. Wis. Dep't of Transp., 702 N.W.2d 433, 447-48 (Wis. Ct. App. 2005) (refusing to apply *Nollan* and *Dolan* to a facial challenge to a setback regulation).

220. See *Ehrlich v. City of Culver City*, 911 P.2d 429, 464-65 (Cal. 1996); see also *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 105-06 (Cal. 2002) (refusing to apply *Nollan-Dolan* to a legislative impact fee); *Rogers Mach., Inc. v. Washington County*, 45 P.3d 966, 982 (Or. Ct. App. 2002) (same).

221. See N. Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384, 388-89 (Ill. 1995); *Home Builders Ass'n v. City of Beavercreek*, 729 N.E.2d 349, 354-56 (Ohio 2000); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 189-90 (Wash. 1994); *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172, 173-75 (Wash. Ct. App. 2000), *aff'd on other grounds*, 49 P.3d 860 (Wash. 2002); see also *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 640-41 (Tex. 2004) (holding that *Dolan* applies to both "a dedication of property to the public and a requirement that property already owned by the public be improved" while expressing skepticism of the position that it only applies to adjudicative exactions).

222. See, e.g., *Bremer*, *supra* note 6, at 395-408; *Callies*, *supra* note 6, at 571-75; *Cordes*, *supra* note 195, at 539-43.

223. See, e.g., Julian C. Juergensmeyer & James C. Nichols, *Impact Fees Should Not Be Subjected to Takings Analysis*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 357 (Thomas E. Roberts ed., 2002); Sam D. Starritt & John H. McClanahan, Comment, *Land Use Planning and Takings: The Viability of Conditional Exactions To Conserve Open Space in the Rocky Mountain West After Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), 30 LAND & WATER L. REV. 415, 453-55, 459-62 (1995).

exaction,²²⁴ while those who argue for a narrow understanding believe that the *risk* of leveraging is limited to land exactions that are adjudicatively imposed.²²⁵ For the reasons articulated below, we believe that the degree of burden distribution is a better indicator of whether the government *actually* engaged in improper leveraging when imposing an exaction.

Our proposal to subject all government exactions to a *Nollan-Dolan* analysis is not intended to make it generally more difficult for governments to impose exactions. Rather, it is meant to help identify appropriate exaction programs by distinguishing between exactions that distribute burdens widely and those that do not. In doing so, we hope to encourage governments to adopt exactions that are more consistent with important principles of takings law.

A. Legislative Exactions vs. Adjudicative Exactions

The prominence of the legislative-adjudicative distinction has its origins in the *Dolan* Court's contrast between "essentially legislative determinations classifying entire areas of the city [and] an adjudicative decision to condition [an] application for a building permit on an individual parcel."²²⁶ Many post-*Dolan* courts have relied on this distinction. Most have held that the heightened scrutiny called for by the *Nollan-Dolan* test does not apply to legislative exactions because such exactions do not present the same kind of risk of government leveraging as do adjudicative

224. See Breemer, *supra* note 6, at 397-405.

225. See sources cited *supra* note 219; *infra* note 227 and accompanying text.

226. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

exactions.²²⁷ Other courts have disagreed,²²⁸ as have two Supreme Court Justices.²²⁹

It is possible to criticize the continued constitutional relevance of the legislative-adjudicative distinction in exactions law on the ground that it is frequently nebulous and imprecise. This is because the marked division of governmental functions that is constitutionally required at the federal and state levels is often absent at the local level. Legislative bodies at the local level, for example, frequently make administrative or adjudicative decisions.²³⁰ As a result, as the Texas Supreme Court noted in a recent exactions case, a "workable distinction ... between actions denominated adjudicative and legislative" may be impossible at the local level.²³¹

The Supreme Court's analysis of the contrast between legislative and adjudicative exactions in *Dolan* provided lower courts with little

227. See, e.g., *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (concluding that "[t]he risk ... of leveraging does not exist when the exaction is embodied in a generally applicable legislative decision"); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996) (concluding that a lesser standard of scrutiny applies to "legislatively formulated development assessments ... because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present"); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001) (reasoning that "[o]ne critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system"); *Dudek v. Umatilla County*, 69 P.3d 751, 756 (Or. Ct. App. 2003). In *Dudek*, the court reasoned that when an

ordinance requires a sorting out of the individual circumstances affecting the applicant in deciding how the ordinance operates ... there appears to be a risk of leveraging or singling out of the applicant for concessions as a condition of development approval—a risk not present in widely applicable legislative enactments that do not require the exercise of meaningful discretion in applying the ordinance.

Id. (citation omitted).

228. See, e.g., *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1996); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004).

229. See *Parking Ass'n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas & O'Connor, JJ., dissenting from denial of certiorari).

230. See, e.g., *Northfield Dev. Co. v. City of Burlington*, 599 S.E.2d 921, 923 (N.C. Ct. App. 2004) (describing a city council's action in an administrative matter); see also *Lacy St. Hospitality Serv., Inc. v. City of Los Angeles*, 22 Cal. Rptr. 3d 805, 809 (Ct. App. 2004) (depublished) (noting that the Los Angeles City Council "was sitting in a quasi-judicial role [when it] adjudicat[ed] the administrative appeal of constituents"). Furthermore, nonlegislative bodies at the local level frequently take "legislative" actions. See *Krupp*, 19 P.3d at 694 (applying a legislative label and presumption of validity to fee adopted by a single purpose special district providing sewage treatment services).

231. *Flower Mound*, 135 S.W.3d at 641.

guidance. The Court gave a rather broad scope to the adjudicative label, suggesting that it was the city's decision to apply the exactions "on an individual parcel"²³² that triggered the heightened scrutiny and rough proportionality requirements.²³³ This type of reasoning is problematic because all land use regulations ultimately must apply to individual parcels. Furthermore, the conditions imposed by the city that gave rise to the *Dolan* test were "legislative" to the extent that they were part of the city's development code, which had been adopted by the city council.²³⁴ In fact, the city's exaction formula in *Dolan* appears no more "adjudicative" than the typical formulas labeled as "legislative" by lower courts, and thus, beyond the scope of *Nollan-Dolan*.²³⁵ If the *Nollan-Dolan* standard

232. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

233. Although the *Dolan* Court did not refer to it, the legislative-adjudicative debate has a long history in state court opinions involving legal challenges to local land use regulations. In 1973, the Oregon Supreme Court's widely cited opinion in *Fasano v. Board of County Commissioners* limited the deferential judicial presumption of validity to those "legislative" land use actions "laying down general policies without regard to a specific piece of property." 507 P.2d 23, 26 (Or. 1973). More searching review and heightened procedural protections should be available, in the *Fasano* court's view, in land use cases involving "the application of a general rule or policy to specific individuals, interests, or situations." *Id.* at 27 (quoting Comment, *Zoning Amendment—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 137 (1972)). In the years since the Oregon court's decision, many state courts have considered the *Fasano* rule, but only a few have adopted it. *See, e.g.*, *Bd. of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 471-74 (Fla. 1993); *Cooper v. Bd. of County Comm'rs of Ada County*, 614 P.2d 947, 949-50 (Idaho 1980). A greater number of courts has refused to follow the case, resulting in the vast majority of state courts treating all land use decisions adopted by local legislative bodies as legislative and well within the traditional presumption of deference. *See, e.g.*, *Consol. Rock Prods. Co. v. City of Los Angeles*, 370 P.2d 342, 346-47 (Cal. 1962); *Parks v. Planning & Zoning Comm'n of the Town of Southington*, 425 A.2d 100, 102 (Conn. 1979); *Save Sunset Beach Coal. v. City of Honolulu*, 78 P.3d 1, 9 (Haw. 2003); *Quinlan v. City of Dover*, 614 A.2d 1057, 1060 (N.H. 1992); *Bow & Arrow Manor, Inc. v. Town of West Orange*, 307 A.2d 563, 567 (N.J. 1973); *Hampton v. Richland County*, 357 S.E.2d 463, 466-67 (S.C. Ct. App. 1987); *Quinn v. Town of Dodgeville*, 364 N.W.2d 149, 154-56 (Wis. 1985). It is worth noting that the Supreme Court in *Dolan* did not rely on the rich state court precedent in the area, nor did it define the term "adjudicative" with any degree of specificity.

234. *See* discussion *supra* Part II.B.2.

235. *Compare, e.g., Dolan*, 512 U.S. at 395 n.9 (stating that the city of Tigard based its requirement of landowner dedication of land for bicycle and pedestrian paths on a formula projecting 53.21 additional trips generated per one thousand square feet of additional commercial space), *with Krupp*, 19 P.3d at 691 (stating that the Breckenridge Sanitation District computed a "plant investment fee" by calculating average peak single family effluent flow and multiplying that amount by the number of "single family equivalent" units in any particular residential development). As the Illinois Supreme Court has noted, most impact fee ordinances are based on averages and not a particularized assessment of a development's

applies every time a general ordinance is applied to an individual parcel, or if the presence of relief-granting discretionary waivers or variances is the key,²³⁶ then the legislative-adjudicative distinction becomes rather meaningless.²³⁷

Our principal criticism of the legislative-adjudicative distinction in this Article, however, is not based on the lack of certainty or predictability that accompanies its application. More fundamentally, our argument is that the distinction serves as a poor proxy for the existence of improper leveraging on the part of the government.

The legislative-adjudicative distinction assumes that the government's exercise of discretion in the application of its exactions programs will work to the detriment of the property owner. That assumption, however, is problematic, and more than a little ironic, because courts have traditionally viewed local discretionary devices, such as subdivision waivers and zoning ordinance variances, as

actual impact. See *N. Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 391 (Ill. 1995).

236. It may be that Dolan's request for a variance was what made the application of "legislative" enactments sufficiently individualized to fall within the Court's understanding of the adjudicative label. In *Dolan*, the particularized inquiry was triggered when the landowner sought a variance from the city's legislatively adopted Community Development Code. 512 U.S. at 380. Provisions of that local law required dedication of pedestrian/bicycle paths for landowners who redeveloped downtown properties. *Id.* at 377-78. In addition, the Code required owner dedication of open land adjacent to or within the central city floodplain. *Id.* at 378-79.

237. Principles of ripeness may actually *require* an owner of property to seek a waiver or variance before the decision will be considered sufficiently final for purposes of judicial review. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Supreme Court held that judicial review was premature because

[t]here is no indication in the record that [the owners] have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance ... or a waiver If [the owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached ..., thereby obviating any need to address the constitutional questions.

Id. at 297. More recently, the Court described its ripeness doctrine as follows:

Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 339-40 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001)). If seeking a waiver is sufficient to bring a case within the adjudicative label, all landowner challenges to exactions are likely to fall within the scope of *Nollan-Dolan*.

ways of *preserving* the constitutionality of land use regulations, the strict enforcement of which would otherwise be arbitrary and capricious.²³⁸ Consistent with this understanding, a regulation's provision for discretionary adjustment, pursuant to either a variance or an exception, has been found to save the ordinance from a facial takings claim.²³⁹

The courts' application of heightened scrutiny to exactions that they deem adjudicative makes the government's exercise of discretion constitutionally suspect. The more discretion the government exercises, in other words, the more likely it is to run afoul of *Nollan-Dolan*. The question, however, should not be *whether* the government exercises discretion; instead, the question should be *how* the government exercises its discretion.²⁴⁰ Under the current constitutional regime applied to exactions, governments are encouraged to avoid exercising discretion in order to immunize their exactions from *Nollan-Dolan* review. The result has not been fewer

238. See, e.g., *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles*, 522 P.2d 12, 14 (Cal. 1974) (indicating that the legislature allows variances to insulate zoning laws from constitutional attack).

239. See *Home Builders Ass'n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60, 64 (Ct. App. 2001); *Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 588 S.E.2d 694, 697 & n.13 (Ga. 2003) (citing *Lake Nacimiento Rancho Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987)). Moreover, to the extent that the waiver and variance processes have been criticized, local governments have been faulted for being too lenient in granting discretionary relief to owners, rather than overly demanding. See David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 295-99 (2004).

240. Furthermore, the distinction between legislative and adjudicative exactions does not always correlate with the presence or absence of governmental discretion. It is possible, in other words, for so-called legislative exactions to give the government considerable discretion in their application. See Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 266 (2000) ("[T]he discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction."). As a result, some courts further refine the legislative-adjudicative distinction by differentiating between legislative exactions with little or no governmental discretion and legislative exactions that allow the government to exercise significant discretion, applying *Nollan-Dolan's* heightened scrutiny only to the latter. The court in *Dudek v. Umatilla County*, 69 P.3d 751 (Or. Ct. App. 2003), for example, applied *Dolan's* rough proportionality test to an ordinance that impacted a broad class of property owners because it "requires a significant exercise of discretion" on the part of the government. *Id.* at 756. In doing so, the court distinguished the ordinance at issue from ordinances that require a "mechanical and nondiscretionary process" for their implementation. *Id.*

exactions; instead, the result has been more legislative exactions that impose fees based on "mechanical and nondiscretionary" formulas.²⁴¹ This trend has led not to the greater collectivization of exaction-related burdens, but rather to their greater privatization, as governments are encouraged to apply increasingly rigid and detailed mathematical formulas on increasingly narrow segments of the population in order to try to avoid a takings finding under *Nollan-Dolan*.²⁴²

The evil to be remedied, then, is not governmental discretion as such, because the state can exercise it in ways that either increase or decrease exaction-related burdens.²⁴³ Instead, the evil is the singling out of one or several owners for the imposition of a burden that should be distributed more widely.²⁴⁴

Although the goal of *Nollan-Dolan* is to prevent government overreaching, the legislative-adjudicative distinction is both

241. See *Dudek*, 69 P.3d at 756. On the increase of legislative impact fees since *Nollan* and *Dolan*, see Carlson & Pollak, *supra* note 22, at 116-25.

242. See generally Reynolds & Ball, *supra* note 12 (exploring the shift in local government finance from collectivized to privatized financing of infrastructure and services).

243. See *Ehrlich v. City of Culver City*, 911 P.2d 429, 460 (Cal. 1996) (Mosk, J., concurring) (noting that individualized assessments may be preferable, "for reasons of fairness and accuracy, to fees that are completely predetermined according to rigid legislative formulae, and it would be illogical to impose on them more formidable constitutional hurdles"); see also Fenster, *supra* note 6, at 675 (arguing that "[b]argaining over individualized exactions is consistent with the open norms necessary to successful mediation because it provides an appropriate, flexible package of conditions and entitlements that respond to the particular concerns of property owners, government officials, and interested members of the community"); Reznik, *supra* note 240, at 270 (arguing that "[i]f legislative decisions are shielded from the 'rough proportionality' standard and adjudicative decisions are subjected to it, the result may be that extortionate behavior is granted deference, while fair processes are overly scrutinized").

244. The California Supreme Court's opinion in *Ehrlich* has become the leading case in support of the proposition that adjudicative exactions are subject to the *Nollan-Dolan* test, while legislative exactions are not. The owner in *Ehrlich* wanted to change the land use on his property from recreational to residential. *Ehrlich*, 911 P.2d at 434. The city approved the change but required the owner to pay \$280,000 to help replace the recreational facility. *Id.* at 434-35. Although there was no majority opinion in *Ehrlich*, the court unanimously decided that *Nollan-Dolan* applies to monetary exactions that are adjudicative and that the recreational fee at issue in the case constituted a taking. See *id.* at 443-47; *id.* at 459-61 (Mosk, J., concurring); *id.* at 464-65 (Kennard, J., concurring in part and dissenting in part); *id.* at 468 (Werdegar, J., concurring in part and dissenting in part). In our estimation, the fundamental problem with the exaction in *Ehrlich* was not that it was adjudicative, as opposed to legislative. The fundamental problem was that the city council, in demanding the fee, singled out one owner and imposed on him a burden not imposed on anyone else.

overinclusive and underinclusive. It is overinclusive because the discretion present in an adjudicative context may produce less, rather than more, hardship on the owner. Conversely, it is underinclusive because the lack of discretion present in a legislative context may produce greater, rather than less, hardship on the owner.²⁴⁵ The distinction is also underinclusive because it fails to account for the fact that the government can act with antilandowner animus in the adoption of inflexible fees, just as it can in the application of a fee to a particular landowner.²⁴⁶

If courts, as we propose, were to look explicitly to the degree of burden distribution, the judicial process would focus on the nature of the government's conduct—that is, whether it overreached—rather than on the nature of its decision—that is, whether it was legislative or adjudicative.²⁴⁷ In contrast to the way in which the

245. See Breemer, *supra* note 6, at 403-04 (“[A]s the branch most accountable, and thus most responsive, to the majority, the legislature may be especially prone to extort disproportionate amounts of property from under-represented groups.”); Reznik, *supra* note 240, at 267 (“The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context.”).

246. See *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004).

While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could “gang up” on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.

Id.

247. *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996), provides an example in which the court was more interested in the nature of the government's decision than in the nature of its conduct. At issue in *Arcadia* was a city ordinance that required owners of mobile home parks who wanted to close them to pay for the relocation costs of displaced residents. *Id.* at 284. Mobile home park owners challenged the ordinance, alleging that it constituted a taking. *See id.* at 285. In assessing the takings claim, the court held that “[b]ecause this case involves a challenge to a citywide, legislative land use regulation, *Dolan's* ‘rough proportionality’ test does not apply.” *Id.* at 286. The court instead applied a more deferential form of review and upheld the ordinance because protecting the interests of residents of mobile home parks was a legitimate state interest, and there was a nexus between the attainment of that goal and the imposition of the fee. *Id.* at 287.

In our estimation, the court in *Arcadia* failed to grapple sufficiently with the owners' argument that the exaction effected a taking “because the ordinance unfairly ‘singles out’ or places the burden of solving the City's housing problems on the shoulders of a few property owners.” *Id.* The *Arcadia* opinion is an example of a judicial decision that uses the legislative-adjudicative distinction as a proxy for the risk of improper leveraging, when an assessment of the degree of burden distribution present in the case would have been a better indicator of

legislative-adjudicative distinction currently serves as a proxy for the *risk* that the government improperly leveraged its authority, the degree of burden distribution goes directly to the issue of whether the government *actually* engaged in improper leveraging.²⁴⁸

As we argued earlier, it is reasonable to infer that when the government chooses among similarly situated owners and requires exactions of some but not of others, its goal is not to achieve a legitimate public purpose, but is instead to leverage its authority to receive benefits from the burdened owners without having to pay for them.²⁴⁹ Evidence that the government treats some owners differently from similarly situated owners when imposing an exaction has greater probative value on the question of leveraging than does evidence related to the question of whether the exaction qualifies as legislative or adjudicative. Only the former constitutes actual proof of arbitrary action on the part of the government.

actual government overreaching.

Arcadia is also an example of a case involving a legislative exaction that only affected a handful of owners. Although it is not possible to determine from the opinion precisely how many owners were impacted by the exaction program, it is likely to have been only a handful. See *Levmore*, *supra* note 105, at 312-13 (noting that ordinances regulating mobile park homes usually burden only a few owners). This observation suggests that just because an exaction program is legislative does not necessarily mean that it distributes the burden widely.

248. Judicial adoption of the burden distribution inquiry would change the nature of evidence brought before the court in an exactions dispute. Under our proposal, it would be much less likely that an appellate court would be confronted with the record with which the Oregon Court of Appeals was confronted in *Dudek v. Umatilla County*, 69 P.3d 751 (Or. Ct. App. 2003). At issue in that case was the constitutionality of an exaction that would have required the owner to purchase an easement from neighbors in order to widen an existing right-of-way. *Id.* at 752-53. The lawsuit in *Dudek* was brought by owners challenging the failure of the local government to impose an exaction on one of their neighbors. *Id.* at 753. The main question throughout the litigation, which included two different opinions by the Land Use Board of Appeals (LUBA), was whether the exaction at issue was legislative or adjudicative because that, in turn, partially determined whether the *Nollan-Dolan* test was applicable. *Id.* at 753-56. The parties and the courts focused on what was essentially a legal determination of whether the exaction was legislative or adjudicative. As a result, the factual record made it impossible for the court of appeals to determine whether similar exactions had been demanded of nearby owners. See *id.* at 756 n.7. Rather than focusing so intently on the legislative-adjudicative distinction, as the court of appeals and the LUBA did, the judicial review process would have been better served if the parties had an incentive to introduce evidence relating to the degree of burden distribution present in the case.

249. See *supra* notes 170-76 and accompanying text.

B. Land Exactions vs. Monetary Exactions

Courts have also used the land-monetary distinction as a proxy for the risk that the government improperly leveraged its authority in imposing exactions. The courts that have refused to apply *Nollan-Dolan* to impact fees have concluded that the government is much more likely to engage in leveraging or extortion when it demands land than when it demands money.²⁵⁰ As one court reasoned, "a fee [is] a considerably more benign form of regulation" than is a land-dedication requirement.²⁵¹ Another added that "the risk of leveraging or extortion on the part of the government is virtually nonexistent in a [legislatively based] fee system."²⁵²

As with the legislative-adjudicative distinction, we do not believe that the land-monetary distinction serves as an effective proxy for the likelihood that the government overreached in imposing an exaction. Regardless of whether the exaction requires land or money, the owner must provide what the government requires in order to receive the necessary approval to develop. Thus, both types of exactions raise the possibility that the government may improperly leverage its police power in order to receive benefits from the owner without paying compensation.²⁵³ In addition, it is not always the case that impact fees will be less burdensome than land exactions. A large fee, for example, can impose a greater cost on an owner than a requirement that she dedicate a small portion of her property to the public.²⁵⁴

In the end, therefore, courts should focus directly on the degree of burden distribution that accompanies the challenged exaction,

250. See *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995).

251. *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 1000.

252. *Krupp*, 19 P.3d at 696.

253. See *supra* note 16 and accompanying text.

254. There is also no assurance that impact fees will distribute their burdens among a large number of property owners. It is likely, for example, that the tenant relocation fee at issue in *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996), only affected a handful of owners. For a discussion of *Arcadia*, see *supra* note 247. *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), is another case where the fact that the exaction involved money and not land did not correlate with a wide distribution of the burden. In fact, it appears that the city applied the recreational fee at issue only to the plaintiff. See *id.* at 434-35. For a discussion of *Ehrlich*, see *supra* note 244.

rather than on whether the exaction meets some definition of adjudicative versus legislative or dedicatory versus monetary. This shift in judicial inquiry would allow courts to assess how the government actually implemented an exaction program, rather than using the nature of the exaction to reach generalized conclusions about when there is a significant risk of improper leveraging by the government.

IV. ACCOUNTING FOR BURDEN DISTRIBUTION IN EXACTIONS LAW

In the previous Part, we criticized the ways in which many post-*Nollan-Dolan* courts have responded to landowners' challenges to exactions. It is now incumbent on us to articulate more specifically how our proposed alternative, which would require courts to look to the degree of burden distribution that accompanies the challenged exaction, can be incorporated into the analysis of whether an exaction effects a taking.

Although we have—in this Article and elsewhere—criticized the shift by local governments away from using general tax revenues and toward a more privatized funding model that increasingly depends on nontax sources of revenue (such as exactions),²⁵⁵ we are also aware that this trend is unlikely to be reversed in the foreseeable future. As a result, our priority here is not to propose how best to do away with exactions, or even how to reduce their use significantly; instead, our goal is to suggest a modification of the applicable constitutional standard of review to encourage governments to distribute exaction-related burdens as widely as possible.

The most effective mechanism for distributing burdens widely is the use of general taxes to pay for public infrastructure and services. Nontax sources of revenue, by definition, single out some owners and impose burdens on them, based on the impact of their land use on the community.²⁵⁶ We do not suggest, however, that nontax sources of revenue, such as exactions, are unconstitutional because they do not distribute burdens as widely as general taxes.

255. See Reynolds & Ball, *supra* note 12; Reynolds, *supra* note 14, at 430-41; discussion *supra* Part I.A.

256. See discussion *supra* Part I.A.

The issue instead is: once the government decides to fund infrastructure and services through the use of exactions, how far must it go in distributing burdens? We aim to provide some answers to that question in this final part of the Article.

A. *Underinclusivity*

In both *Nollan* and *Dolan*, the Court agreed with the landowners' claims that the exactions at issue constituted takings, ignoring the government's ample evidence that it had distributed the burden widely among similarly situated landowners.²⁵⁷ The Court's failure to consider this important evidence resulted in rules that have had two significant negative effects. First, although the Court invalidated the exactions before it, the test it announced has provided incentives for the government to impose more, not fewer, exactions.²⁵⁸ Second, because the test does not require that the exactions apply broadly to similarly situated landowners, the post-*Nollan-Dolan* exactions are more individualized and more privatized than the previous ones. By making irrelevant the extent to which exactions spread the burden widely among similarly situated landowners, the *Nollan-Dolan* standard removes an incentive for the government to seek broader distribution. The result is a trend toward underinclusivity in government exactions, producing charges and fees that would be more fairly borne by broader segments of the community.

One way in which the degree of burden distribution can be accounted for in an exaction case is by asking whether the exaction program in question is underinclusive—that is, whether owners who are similarly situated to the plaintiff owner are required to provide similar exactions. We believe that underinclusivity should be as constitutionally problematic under the heightened scrutiny called for by *Nollan-Dolan* as it is under the heightened scrutiny applied pursuant to the Equal Protection Clause.²⁵⁹ Courts should be more

257. See discussion *supra* Part II.B.1-2.

258. See *supra* note 22 and accompanying text.

259. See *Craig v. Boren*, 429 U.S. 190, 203-04 (1976). The Oklahoma statute at issue in *Craig*, which allowed young women but not young men to buy 3.2% alcohol content beer, was held unconstitutional, in part, because it was underinclusive. Applying intermediate scrutiny under the Equal Protection Clause to the state's sex classification, the Court concluded that

skeptical of exaction programs that do not treat similarly situated owners alike.²⁶⁰ Adding consideration of the extent of the government's burden distribution in exactions to the judicial evaluation would reflect the Supreme Court's longstanding emphasis on that criterion in its takings analysis.

The irrelevance of burden distribution in the current exactions analysis makes it possible for the government to impose narrow charges that, we believe, should be constitutionally suspect. Two cases illustrate our concern with underinclusivity. Although the exactions challenged in both of these cases would likely meet the *Nollan-Dolan* test, we believe that the government's failure to distribute the burden more broadly should be constitutionally suspect and that *Nollan-Dolan* should be reformulated to include that factor.

Oklahoma failed to show that the risk of drinking and driving was substantially higher among young men, meaning that the statute was underinclusive because it did not regulate the beer consumption of young women. *See id.*

Underinclusivity is also problematic in equal protection cases where the Court has applied a form of heightened rational basis review. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449-50 (1985) (holding that the denial of a special use permit sought by a home for disabled individuals was unconstitutional because the government did not require a special permit for the operation of nursing homes, boarding houses, and fraternities, even though those uses raised similar safety and density concerns). In contrast, underinclusivity is not problematic under the traditional rational basis test. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976). At issue in *Murgia* was a rule that required all uniformed state police officers to retire by the age of fifty. *See id.* The Court, applying rational basis review, upheld the rule, *see id.*, even though "[t]he challengers were able to show that [it] was substantially overinclusive, dismissing many officers well able to discharge their physical duties, and somewhat underinclusive, allowing many physically less able people to serve." William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2262 (2002); *see also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.2, at 213 (3d. ed. 1999) (noting that the "key factor" in determining whether underinclusivity is problematic under the Equal Protection Clause is "the standard under which the justices will review the permissibility of the government ends and the degree of relationship between the classification and these ends").

260. The question of underinclusivity must be distinguished from that of the total number of affected property owners. What should be most relevant to the constitutional analysis is not whether the number of affected owners is small or large, but rather whether the government is distributing the exaction-related burdens widely among similarly situated owners. If the number of burdened owners, however, is very small, that should be enough to establish a *prima facie* case of underinclusivity.

The first example is the Arizona Supreme Court's opinion in *Home Builders Ass'n of Central Arizona v. City of Scottsdale*.²⁶¹ In that case, land developers filed a legal challenge to a municipal "water resources development fee" that was adopted to generate revenue to fund the search for new supplies of water and new systems to transport that water.²⁶² State law required the city to demonstrate the availability of sufficient water to meet its needs for the next one hundred years.²⁶³ Unable to do so, and having identified several possible, but costly, sources of water,²⁶⁴ the city imposed an impact fee on new development to fund the search.²⁶⁵ The formula for the impact fee was straightforward. The city first calculated the expected capital cost of bringing new water to Scottsdale at approximately \$2000 per acre-foot.²⁶⁶ It then computed the average historical annual water consumption for various types of uses, determining that single family residences consumed about one-half of an acre-foot per year, while apartment usage averaged three-tenths of an acre-foot per year.²⁶⁷ Based on these figures, the city charged \$1000 for each new single family residence and assessed new apartments a charge of \$600 per unit.²⁶⁸ The amount levied, then, corresponded to the projected yearly usage of each new type of development.

In our estimation, Scottsdale's water resource fee program raises underinclusivity concerns because it did not apply to prior and current users of water. Those users, no less than new users, contributed to the city's water scarcity. The scarcity, in fact, existed long before the city attempted to remedy it with its narrowly targeted fee on new development.²⁶⁹ It is not clear why Scottsdale

261. 930 P.2d 993 (Ariz. 1997).

262. *Id.* at 994.

263. *Id.* (citing ARIZ. REV. STAT. § 45-576(E)).

264. The possibilities were wide ranging, including building a canal system to bring in water from a source already owned by the city, constructing a treatment plant that would produce potable water from sewage effluent, and obtaining water from Native American tribes in the region. *See id.* at 994-95.

265. *Id.* at 995.

266. *See id.* at 999.

267. *See id.*

268. *See id.*

269. In 1985, years before the fee was adopted, and before the arrival of the growth on which the fee was assessed, the city commissioned a water resources study that "concluded that Scottsdale clearly lacks sufficient water for the future." *Id.* at 994.

should be allowed to single out one narrow segment of the community when the city's entire population has contributed to the need for a new water source. In fact, without the extensive development in Scottsdale prior to the imposition of the fee, it is likely that there would have been no need for the fee in the first place, or alternatively, that the need would not have arisen for many more years.²⁷⁰

We also believe that the facts of *San Remo Hotel L.P. v. City of San Francisco*²⁷¹ suggest similar problems of underinclusivity. The ordinance at issue in that case required that owners of residential hotels pay a fee before converting rooms that were available to long-term residents to rooms available only to tourists and other daily users.²⁷² The fee program, which sought to ameliorate the city's severe affordable housing crisis, applied only to the owners of residential hotels.²⁷³ Singling out a narrow segment of the community to fund a solution to a problem with wide-ranging causes appears substantially underinclusive. Other groups of owners, after all, likely impacted the affordable housing crisis in San Francisco in similar ways.²⁷⁴ As a result, the city's failure to distribute the exaction-related burden more widely should be constitutionally problematic.²⁷⁵

270. The underinclusivity of the Scottsdale water resource fee also raises concerns about efficiency and conservation. If the city had applied the fee more broadly to all water users, all Scottsdale residents would have had a greater incentive to conserve water. By narrowly defining the group of users subject to the fee, the community missed an opportunity to assume greater responsibility for its own water consumption patterns. When the cost of finding new water is placed on new development, the existing community does not feel the sting of depleted resources and is thus less likely to conserve water than if the cost for remedying the depletion is shared by all water users.

271. 41 P.3d 87 (Cal. 2002).

272. *See id.* at 92.

273. *See id.*

274. For example, developers of new hotels who chose to use all of their rooms to serve tourists and other daily users, rather than long-term residents, also contributed to the problem that the city was trying to address through its room conversion fee.

275. In contrast, consider the exaction program in *San Remo* compared to the one at issue in *Home Builders Ass'n of Northern California v. City of Napa*, 108 Cal. Rptr. 2d 60 (Ct. App. 2001). In the latter case, all new developers of residential property were required to either set aside ten percent of the units for low- and moderate-income housing, or pay an in-lieu fee to be used for that purpose elsewhere in the municipality. *Id.* at 62. Developers also had the option of dedicating land or building new units of affordable housing off-site. *Id.* In *City of Napa*, in other words, the burden for providing affordable housing was distributed among a wider class of owners, namely, all residential developers.

For those who support impact fees with the argument that it is fair for government to impose a cost on those who impose a burden on the community through their land development, the exactions described above may seem reasonable at first glance.²⁷⁶ In the case of the *Scottsdale* fee, after all, the city had a severe water shortage, new development could not proceed without water, and the fee was closely tied to the new developments' projected consumption of water. Moreover, the water impact fee seems to pass constitutional muster under both *Nollan's* essential nexus test and *Dolan's* requirement of rough proportionality.²⁷⁷ The fee was directly tied to the city's legitimate, indeed essential, public purpose of finding new water, and it was calculated to levy on the new development a charge that represented no more than the burden it would impose on the water supply.

Similarly, the *San Remo* fee seems to meet both constitutional requirements. The city's fee was linked to the important public goal of providing affordable housing. Moreover, the computation of the exaction seemed roughly proportional to the impact caused by the conversion—for each residential unit the owner removed from the market, eighty percent of a replacement unit must be funded.²⁷⁸

We believe, however, that both exactions illustrate the troubling trend that *Nollan* and *Dolan* have facilitated. The exactions are narrowly tailored, presumably to offset the negative impact of the activities that led to the imposition of the fees. Yet the fees ignore

276. Although we are also sympathetic to the argument that growth should pay its own way and that suburban sprawl has negatively affected our environment and our lives, we believe that the incentives provided by *Nollan-Dolan* actually exacerbate the negative impacts of sprawl. In fact, we argue elsewhere that the proliferation of exactions and impact fees provides sprawling development with a certain legitimacy because it has been "bought and paid for." This facilitates more, rather than less, sprawl. See Reynolds & Ball, *supra* note 12, at 471. When developers are willing and able to pay for some of the costs of development in outer areas, the government has a reduced incentive to require more compact or infill development. In the end, the community tolerates growth that it might not have allowed in the absence of exactions. See *id.*

277. Neither the *Scottsdale* court nor the *San Remo* court applied the *Nollan-Dolan* test to the exactions at issue because they concluded that the legislative, nondiscretionary exactions at issue in those cases were beyond the scope of the test. *San Remo*, 41 P.3d at 105; *Homebuilders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 933, 999 (Ariz. 1997). Our proposal would alter the analysis in both cases in two important ways. First, it would apply *Nollan-Dolan* to all exactions. Second, it would expand the constitutional analysis to include the issue of underinclusivity.

278. *San Remo*, 41 P.3d at 92 n.3.

the wider communal responsibility for the serious problems that the government is trying to address. They allow the government to single out a relatively small segment of the community for the purpose of finding a solution to problems with causes that extend well beyond that narrow segment. As currently formulated, the *Nollan-Dolan* standard does not require the government to take steps toward ensuring broader community responsibility. By failing to account for the horizontal degree of burden distribution, the test ignores a crucial inquiry related to the ultimate fairness of the exaction program that is subject to challenge.²⁷⁹ Our proposal would reverse the shift toward increasingly narrow exactions by invalidating government attempts to target one small segment of the community when a broader swath can be identified as similarly contributing to the problems that the exactions seek to address.²⁸⁰

279. As a practical matter, if the *Nollan-Dolan* test were sensitive to notions of underinclusivity by requiring that similarly situated owners be treated similarly, it would mean that the burden on any particular individual owner would be reduced significantly. If, for example, Scottsdale had been required to impose a fee on all water users to pay for the cost of finding a new source of water, the amount of the fee imposed on any given owner would have been significantly less than the fee actually charged. Once again, this difference in the magnitude of the burden points to the crucial relationship between the degree of horizontal distribution of the burden and the degree of the vertical burden experienced by any given individual owner.

The fairness concern behind the underinclusivity of some exactions is not limited to the intramunicipal realm. It also has an intermunicipal component. Exactions and impact fees are not realistic sources of funds for communities that are not experiencing growth. Thus, the beneficiaries of these nontax sources of revenue tend to track socioeconomic lines, with wealthier communities able to fund infrastructure by imposing costs on developers, an alternative not available to poorer communities. See Carlson & Pollak, *supra* note 22, at 122-25 (noting how the *Nollan-Dolan* test has the "potential to exacerbate the urban/suburban divide"); see also PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* 172 (1998) (describing how inner cities are unable to turn to exactions to fund new schools, resulting in gross inequality in facilities). Although the argument about intermunicipal inequality is beyond the scope of this Article, it is an additional indicator of how exactions and fees can exacerbate urban/suburban inequality.

280. It could be argued that the Equal Protection Clause already prevents the government from improperly singling out landowners for differential treatment and that it is therefore unnecessary to modify the *Nollan-Dolan* takings analysis so as to explicitly account for the degree of burden distribution. The Equal Protection Clause does prevent the government from arbitrarily and capriciously singling out an owner and imposing on her requirements that are not imposed on others. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (holding that an owner raised an equal protection question when he alleged that the local government required him to provide a thirty-three-foot easement in order to be connected to the municipal water supply, while only requiring a fifteen-foot easement of other property owners). Thus, for example, to return to a point noted earlier, if the California Coastal Commission had acted

B. Reciprocity of Advantage and Rough Proportionality

To enhance the overall fairness of exactions, we have argued that the government should be required to distribute burdens broadly, and that its failure to do so should result in the invalidation of exactions.²⁸¹ From the other side of the equation, we now argue that fairness would similarly be enhanced if the constitutional test included an assessment of the way in which the plaintiff owners are benefited by the burdens imposed on similarly situated owners pursuant to the exactions program. We argue, in other words, that the reciprocity of advantage principle should be incorporated into the rough proportionality test. This incorporation makes sense because the test looks to the relationship between the burden on the owner that results from the exaction and the impact of the development.²⁸² To the extent that an owner benefits from the wide distribution of the burden that is part of the challenged exaction program, it lessens the severity of the exaction-related burden imposed on her.²⁸³

so arbitrarily as to impose a viewing spot requirement only on the Nollans, the Commission would have in all likelihood violated the Equal Protection Clause. *See supra* notes 173-76 and accompanying text.

Equal protection doctrine, however, cannot promote the same degree of burden distribution as would our proposed modification of the *Nollan-Dolan* standard, which would require courts to address questions of underinclusivity. This is the case because, in the absence of improper motivation by the government on the basis of, for example, race or sex, a government's land use regulation or decision will be upheld under equal protection doctrine unless the owner can show that it is "irrational and wholly arbitrary." *Olech*, 528 U.S. at 565. Under the highly deferential rational basis test that is generally applicable to equal protection challenges to economic regulations, in other words, the government will be able to defend its differential treatment of one or several owners in the vast majority of cases. As we have already noted, the type of judicial review that we think is appropriate when applying heightened scrutiny under the Takings Clause is similar to heightened scrutiny review under the Equal Protection Clause. *See supra* note 259 and accompanying text.

281. *See supra* Part IV.A.

282. *See supra* notes 90-96 and accompanying text.

283. In this Article, we limit our proposal to the idea that the benefits resulting from the government's broad distribution of the burden be incorporated into the constitutional standard. In some situations, a different type of benefit will also accrue to the burdened landowner, that is, when an exaction provides a direct benefit to the burdened property itself. A required road construction, for instance, may assist in the provision of public services, such as water, sewer, and storm drainage, to a subdivision. We take no position on the relevance of this benefit to the rough proportionality analysis, but we note that at least one court has suggested that it should be relevant. *See Art Piculell Group v. Clackamas County*, 922 P.2d 1227, 1234 (Or. Ct. App. 1996).

Our proposal would account for the fact that the burden of exactions on owners is frequently diminished, often to a substantial extent, by the benefits they receive from the government's wide distribution of the burden. We have already noted the importance of reciprocity of advantage to the Supreme Court's takings analysis.²⁸⁴ Incorporating the same consideration into the takings standard applied to exactions would add another crucial factor to the constitutional assessment. In our estimation, the fairness of an exaction frequently depends on the extent to which the exactions program benefits the burdened property owner through its wide application.

To illustrate how a court would apply our reformulation of the *Dolan* standard, suppose that a municipality requires subdivision developers either to dedicate a portion of their property for the construction of new roads or to pay an in-lieu fee.²⁸⁵ If a property owner challenges the exaction as lacking rough proportionality, the argument will be that the burden imposed is not roughly proportional to the impact of the development, and thus, the exaction constitutes a taking under *Dolan*. In assessing the degree of that burden, the court should not limit itself to looking at the cost of the land dedication or fee in relation to the impact of the owner's development. Rather, the court should account for the benefits enjoyed by the owner that result from the imposition of similar exaction obligations on neighboring subdivisions. Those benefits are likely to be significant if the exaction program's wide distribution of the burden has resulted in the improved availability and sufficiency of roadways in the area.²⁸⁶

284. See *supra* notes 108-09 and accompanying text; *supra* Part II.B.3.

285. Under our proposed application of the *Nollan-Dolan* test, it would not matter whether the exaction is imposed legislatively or adjudicatively, nor would it matter whether the owner or the government chooses the land dedication or fee option. See *supra* Part III.

286. As we have argued, the horizontal distribution of the burden among many owners can diminish the verticality or severity of that burden as it affects individual owners. See *supra* Part II.B.3. The facts in both *Nollan* and *Dolan* illustrate how wide distribution of the burden that accompanies an exaction program can lessen the individual burden on any given owner by providing a reciprocal benefit to that owner. The owners in *Nollan* received the benefit of access to the sections of their neighbors' properties immediately adjacent to the beach as a result of the California Coastal Commission's requirement that all beachfront owners in the area who sought to develop their properties provide a lateral access easement to the public. See *supra* notes 208-09 and accompanying text. This benefit to the Nollans somewhat mitigated the burden that accompanied the easement that the Commission required of them.

Dolan's rough proportionality test does not require a "precise mathematical calculation."²⁸⁷ Our modified rough proportionality inquiry should be subject to a similar standard, such that a court would not require a precise value of the benefit to the owner that results from the wide distribution of the exaction-related burden. The government, which has the burden to show the existence of rough proportionality under *Dolan*, however, would still be required to undertake an "individualized determination" to estimate the benefit.²⁸⁸ If the government can do so, then it should be allowed to rely on that benefit to help meet its constitutional obligation under the rough proportionality test.²⁸⁹ The current test's failure to include consideration of the average reciprocity of advantage can lead to the invalidation of exactions whose burdens on the owner have been substantially reduced by the benefits created by the exactions' broad applicability.²⁹⁰

Similarly, the owner in *Dolan* received the benefits of a more effective flood prevention and control program, as well as of reduced traffic congestion, both of which resulted from the city's requirement that her neighbors provide easements to address problems associated with flooding and vehicular traffic. See *supra* notes 210-13 and accompanying text. These benefits lessened the burdens that accompanied the easements that the city required of her. We believe that these types of benefits should be included in the constitutional analysis.

287. *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994).

288. *Id.* at 391.

289. Another way of thinking about our proposal is that we suggest that courts focus on the *net* rather than the *gross* exaction-related burden when the difference between the two is the result of the government's wide distribution of the burden. In this way, our proposal differs from Professor David Dana's suggestion that the component of the rough proportionality analysis relating to the development's impact on the community should account for the benefits to the community of that development. See Dana, *supra* note 6, at 1277. In other words, Dana posits that the *Dolan* test should look to the net, rather than the gross, burden to the *community*, while we argue that it should look to the net, rather than gross, burden to the *owner*. As explained previously, however, we are limiting our analysis in this Article to offsetting benefits that accompany the wide distribution of the burden. See *supra* note 283. In this way, our proposal also differs from that of Professors Douglas Kendall and James Ryan, who argue that *all* regulation-related benefits to the owner, including those that arise from the permission to develop, should be accounted for in the application of the *Dolan* test. See Kendall & Ryan, *supra* note 6, at 1825-28.

Although the *Dolan* rough proportionality test does not explicitly call for a consideration of the average reciprocity of advantage, at least one state supreme court appears to have factored it into its decision to uphold a road impact fee. See *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (holding that there must be a reasonable relationship between an impact fee used for the construction of roads "and the benefits accruing to the developer from the construction of new roadways" (citing with comparison *Dolan*, 512 U.S. at 391)).

290. Some lower courts have invalidated sidewalk exactions on the ground that the local

In a recent case, the government raised the type of reciprocity of advantage argument that we propose courts should take into account in applying the rough proportionality test. In *Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*,²⁹¹ the owner of a parcel of land located between a residential subdivision and a commercial area relied on *Dolan* to challenge the city's requirement that it construct and dedicate a sidewalk across its property.²⁹² Rough proportionality was lacking, the owner argued, because its seventeen employees would not impose an impact proportional to the cost of six blocks of sidewalk.²⁹³ Moreover, because the path's main purpose was to connect the residential area on one side with the commercial area on the other,²⁹⁴ the primary benefit of the exaction would redound to people other than the owner and occupants of its building. Both of these facts suggested a lack of rough proportionality under *Dolan*.

The city responded to the owner's challenge with the types of arguments that we propose should be relevant to the constitutional analysis. First, it pointed to the fact that the plaintiff was one of many nearby owners who was burdened by sidewalk requirements,²⁹⁵ thus asserting the relevance of the exaction program's inclusiveness. Second, the city noted that the plaintiff's employees

government did not establish that the development being asked to provide the sidewalk would generate a sufficient impact on the pedestrian system. In none of the cases did the court consider whether the burden on the developer had been offset by the average reciprocity of advantage received from other developers' similar contributions. See, e.g., *McClure v. City of Springfield*, 28 P.3d 1222, 1226-27 (Or. Ct. App. 2001); *Benchmark Land Co. v. City of Battle Ground*, 972 P.2d 944, 948-51 (Wash. Ct. App. 1999); *Burton v. Clark County*, 958 P.2d 343, 350-57 (Wash. Ct. App. 1998). The landowners and courts involved in these cases appeared not to have heeded the Supreme Court's suggestion in *Dolan* that "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions." 512 U.S. at 395. In fairness, however, the narrow strictures of the *Dolan* rough proportionality test encourage precisely the type of challenges raised in these cases. Sidewalk and road improvement exactions are rarely proportional to the impact of the development being assessed. Their longstanding validity has always rested on judicial recognition of the public welfare being furthered by imposition of the exactions, as well as the benefit provided to the burdened property by the exaction itself. See, e.g., *Brous v. Smith*, 106 N.E.2d 503, 506-07 (N.Y. 1952) (noting the "essential" value of roadways and holding that a town's requirement that a builder improve an adjacent road was "reasonable and valid").

291. 88 P.3d 284 (Or. Ct. App. 2004).

292. *Id.* at 285.

293. *Id.* at 288.

294. *Id.* at 289.

295. *Id.* at 288-89.

could be expected to benefit from the "public pathway system,"²⁹⁶ thus pointing to the reciprocity of advantage created by the sidewalk contributions of other owners. The city, in other words, suggested that whether the burden placed on the plaintiff was roughly proportional to the impact of the development could not be determined by looking at its property in isolation from nearby properties. Instead, it argued that the analysis should also evaluate the degree of burden distribution that accompanied the exaction program by comparing the plaintiff's burden with those of similarly situated owners.²⁹⁷ The city's argument suggested that the constitutional standard should account for the benefits that accrue to owners as a result of the wide distribution of exaction-related burdens. We believe these types of considerations are relevant to the fairness of an exaction because they are crucial to an accurate assessment of the ultimate burden imposed on an owner. For that reason, they would be important factors under the test that we propose. They are, however, irrelevant under the current constitutional standard.²⁹⁸

Potentially more significant in its impact is the Texas Supreme Court's recent holding in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*.²⁹⁹ In that case, the court held that a town's road exaction program constituted a taking under *Dolan* because the cost of the improvement of the adjacent arterial was not roughly proportional to the estimated impact of the subdivision.³⁰⁰ This was the case because the subdivision's contribution to the traffic on that segment of the road was expected to constitute a mere eighteen percent of the total traffic.³⁰¹ Although the court recognized that *Dolan*'s rough proportionality test would allow the town to assess the landowner for the subdivision's impact on the town's entire roadway system,³⁰² it did not agree that the owner's burden could be

296. *Id.* at 288.

297. *Id.* at 288-89.

298. The court in *Hallmark Inns* upheld the exaction because it concluded that the city properly relied on a reasonably projected increase in use of the property in estimating the impact of the development for purposes of the rough proportionality test. *See id.* at 291-92. In doing so, it did not specifically comment on the city's reciprocity of advantage argument.

299. 135 S.W.3d 620 (Tex. 2004).

300. *Id.* at 644.

301. *Id.*

302. *Id.*; see also Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 STETSON L. REV. 675 (2000).

offset by the reciprocal benefit it received from all other owners' contributions of paved roads to the town's overall system.³⁰³ As a result, the court invalidated the exaction on rough proportionality grounds.³⁰⁴

If the rough proportionality test were reformulated along the lines we suggest, the Texas court's analysis would have been significantly broader. Under our proposal, the judicial inquiry would have first asked whether the town's road improvement program was widely imposed on all new development in the community, invalidating any exaction found to be underinclusive. Subsequently, and in addition to the traditional *Dolan* rough proportionality analysis, the court would have inquired whether, and to what extent, the residents of the subdivision would enjoy the use of a road system constructed by the exactions imposed on other development.

Faus shows how a municipality's assessment of a development's impact can be broadened to include its effect, not merely on the road that it is being asked to improve, but on the town's entire roadway system. *See id.* at 689-93. Presumably, this new calculation would satisfy *Dolan*'s rough proportionality test. *See id.* at 691-93. The shortcomings of this approach include the inherently costly nature of the consultants' studies and reports necessary to come up with that computation, as well as the way in which it forces municipalities to resort to more mechanical, inflexible formulas whose precision is more myth than reality. *See Reynolds & Ball, supra* note 12, at 459-63. Moreover, the *Flower Mound* court's suggestion that it is proper to account for the new development's impact on the town's entire roadway system encourages the government to assess a contribution from new development that represents the impact it will have on existing infrastructure, even though that infrastructure was already financed by general revenues and the contributions of other development. It is not immediately clear how a local government could justify a double charge for the same infrastructure, unless it plans to refund the payments made by those who funded the initial construction. This type of cost recoupment is out of step with the view of economists "that marginal costs are the most relevant measure of the costs development places on a community." ALTSCHULER ET AL., *supra* note 47, at 79.

303. *See Flower Mound*, 135 S.W.3d at 644-45. The negative impact on the town's finances resulting from the invalidation of the exaction was compounded by the fact that the city had offset the owner's impact fees by an amount roughly equal to the cost of repairing the adjacent road. The town, in other words, applied its road impact fee to calculate that the subdivision should pay \$879,234. *See id.* at 626. Subsequently, the town reduced the fee to \$281,580 and argued in court that the discount of approximately \$600,000 was intended to offset the cost of the invalidated road improvement exaction. *See id.* The Texas Court of Appeals concluded that the city could not have properly considered the cost of the disputed repaving in adjusting its impact fee because the road at issue was not on the city's capital improvement plan. *See id.* The court did not, however, reinstate the \$800,000 impact fee, even though that figure presumably reflected the town's computation of the development's overall impact on the existing roadway system, which the court specifically indicated the city was authorized to collect. *See id.* at 626-27.

304. *Id.* at 644-45.

Depending on the benefits derived from the broader imposition of the exaction burdens, the court might have concluded that, although the cost of the arterial improvement was high when compared to the subdivision's projected use of that specific section of the road, the exaction met *Dolan's* rough proportionality standard when accounting for the benefits received by the subdivision from a "system of reciprocal subdivision exactions."³⁰⁵ The average reciprocity of advantage enjoyed by the subdivision from the exactions imposed on others should be an important factor in the constitutional analysis because it is both an important indicator of the fairness of the government's program and a more accurate computation of the real burden imposed on the landowner.³⁰⁶

Under our proposed reform of the *Nollan-Dolan* test, judicial scrutiny would go beyond a means/ends analysis, as well as beyond the narrow evaluation of the relationship between the cost or burden imposed by the development and the amount of the exaction. We argue that the *Nollan-Dolan* analysis should expand to include two broader considerations. The constitutionality of exactions should depend on the degree of the government's burden distribution and on the reciprocity of advantage that the plaintiff owner receives from the burdens imposed on similar properties. Thus, we

305. *Id.* at 644. The town in *Flower Mound* made a vague argument about the average reciprocity of advantage in the town's roadway exactions program, but the court ignored it as too "abstract." *Id.* at 645. We have already noted that our modification of *Dolan's* rough proportionality test would require an individualized assessment of the benefit received. See *supra* notes 288-90 and accompanying text. In fairness to both the town and the court, neither can be faulted for failing to articulate an argument that is currently irrelevant under the Supreme Court's test.

306. In *Art Piculell Group v. Clackamas County*, 922 P.2d 1227 (Or. Ct. App. 1996), the hearing officer below made similar observations about inclusivity and average reciprocity of advantage to uphold a county road improvement exaction. *Id.* at 1235-36. With regard to the extent of burden distribution, the officer noted that the county's ordinance "require[d] that all new development ... provide additional right-of-way and make road improvements." *Id.* at 1233. In an implicit reference to the average reciprocity of advantage, the officer argued that "[t]he residents of this subdivision will utilize the road system constructed by other developments at no cost to these residents." *Id.* The appellate court ruled that both of those additional bits of evidence were irrelevant, concluding that *Dolan's* standard required only a computation of "the relationship between the impacts of the development and the approval conditions." *Id.* at 1236. Because the subdivision was projected to increase traffic by only 2.6% on the street that it was asked to improve, the court found that the government could not require the developer to pay for the entire improvement. See *id.* at 1235-36. By limiting the analysis to the narrow confines of the rough proportionality inquiry, the court ignored important evidence relevant to a more complete assessment of the exaction's fairness.

would supplement the current narrow inquiry with a broader analysis that is more nuanced, more complete, and, ultimately, more fair.

CONCLUSION

For the last several decades, significant shifts in local government financing techniques have been working at counter purposes with the Takings Clause. While the Clause requires that governments distribute property-related burdens as widely as possible, local governments have been moving in the opposite direction by further narrowing their sources of revenue. The "exactions revolution" that has taken place in the last thirty-five years is one of the most important examples of this growing dependence on narrowly targeted revenue-raising mechanisms to pay for infrastructure and services.

Nollan and *Dolan* presented the Court with an opportunity to bring local government exactions into greater compliance with the purpose of the Takings Clause. Although the Court in both cases seemed generally skeptical of exactions and their use, the constitutional analysis that it announced did little to encourage local governments to distribute exaction-related burdens more widely. For that to happen effectively, we believe that the constitutional analysis must pay considerably more attention to the ways in which exaction programs distribute burdens among similarly situated owners.

The beneficial effects of our proposed modification of the constitutional analysis applicable in exaction cases are twofold. First, our proposal will further collectivize, rather than further privatize, the burdens associated with paying for local infrastructure and services. Second, it will allow courts to police the implementation of exactions more effectively by distinguishing between improper exactions that entail the government's leveraging of its police powers and exactions that, in a fair and just manner, seek to attain legitimate public purposes.

The imposition of general taxes represents the best way of collectivizing the burden of paying for public infrastructure and services. By definition, nontax revenue-raising mechanisms do not apply to as broad a class as general taxes. It is unlikely, however, that we will return to the period in local government financing when

general taxes constituted the only important source of locally derived revenue. Even if nontax sources of revenue are here to stay, it is nonetheless necessary, for the constitutional and policy reasons outlined in this Article, that courts require local governments to impose nontax obligations on property owners in ways that distribute burdens as widely as possible.