THEORETICAL TENSION AND DOCTRINAL DISCORD: ANALYZING DEVELOPMENT IMPACT FEES AS TAKINGS

MICHAEL B. KENT, JR.*

ABSTRACT

One of the lingering questions about the law of regulatory takings concerns the proper scope and application of the Supreme Court's exactions jurisprudence, known as the Nollan/Dolan *test. A recurring issue in the case law is the extent to which the* Nollan/Dolan *framework applies to takings challenges brought against development impact fees. Judicial decisions on the issue split over two primary questions. First, there is a debate about whether* Nollan/Dolan *is limited to physical exactions or whether the test might also apply to monetary exactions as well. Second, there is a difference of opinion over whether* Nollan/Dolan *applies only to exactions imposed in an ad hoc, adjudicative manner or also to exactions that are more broadly-applicable and established legislatively. These questions are important, but the primary emphasis on them has diminished the focus on other issues that also require attention. In particular, there is a need to situate impact fees within the law of local government financing—that is, determining whether they operate as fees or taxes—because the answer to that question will influence the proper level of Takings Clause scrutiny to which they should be subjected. Only after wrestling with all of these issues can one move to the ultimate query of what analytical test is most appropriate.*

This Article attempts to answer these questions, fit impact fees into the Court's current takings jurisprudence, propose a new rule of decision for impact fee cases, and demonstrate how that rule might

* © 2010 Visiting Assistant Professor, Stetson University College of Law (2009-10); Assistant Professor, Atlanta's John Marshall Law School. I am grateful to Brannon Denning, Paul Horwitz, Lance McMillian, and Dan Piar for helpful comments on an earlier draft of this paper. Additionally, I would like to thank Kristi Barbre and Greg Frayser for their valuable research assistance.

apply to basic factual situations. In addition, this Article suggests several larger questions implicated by the impact fee problem that continue to require judicial and scholarly attention.

TABLE OF CONTENTS

INTRODUCTION . . . 1836
I. ANALYTICAL FRAMEWORKS FOR REGULATORY TAKINGS . . . 1841
A. The Standard Analysis . . . 1842
B. The Exactions Analysis . . . 1843
C. Application to Impact Fees . . . 1844
II. DEFINING "EXACTION" . . . 1845
A. Relevant Supreme Court Decisions . . . 1845
1. Nollan v. California Coastal Commission . . . 1846
2. Dolan v. City of Tigard . . . 1847
3. Lingle v. Chevron U.S.A. Inc. . . . 1849
B. Only Physical Dedications? . . . 1850
1. Differences Between Land and Money . . . 1850
2. *Similarities Between Physical and Monetary Exactions* . . . 1853
C. Only Adjudicative Decisions? . . . 1859
III. CLASSIFYING IMPACT FEES . . . 1865
A. Of Taxes and Takings . . . 1866
B. Fees or Taxes? . . . 1868
IV. ARTICULATING THE APPROPRIATE TEST . . . 1875
A. Benefits of a Hybrid Approach . . . 1876
B. Mechanics of a Hybrid Approach . . . 1879
C. Applications of a Hybrid Approach . . . 1883
1. Scenario One—Both Factors Favor the Government . . . 1885
2. Scenario Two—Both Factors Favor the Challenger . . . 1887
3. Scenario Three—One Factor Favors Each Side . . . 1889
CONCLUSION . . . 1891

INTRODUCTION

One of the lingering questions about the law of regulatory takings is the proper scope and application of the Supreme Court's exactions jurisprudence. Developed in *Nollan v. California Coastal Commission*[1] and *Dolan v. City of Tigard*,[2] and unanimously reaffirmed in *Lingle v. Chevron U.S.A. Inc.*,[3] the analytical framework for exaction cases applies a form of heightened scrutiny to evaluate whether the challenged exaction constitutes a taking of private property.[4] Although much has been written on this framework by both lower courts[5] and scholars,[6] the full parameters of the framework remain uncertain. Indeed, several members of the Supreme Court have recognized the existence of issues that require the Court's further attention.[7] Among those issues is whether—and if so, how—the *Nollan/Dolan* standards should apply to takings challenges brought against development impact fees.

Impact fees are generally defined as one-time charges assessed against new development projects to help finance the cost of public improvements necessitated by those projects.[8] The fees normally are charged early in the regulatory process as a condition of develop-

---

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

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

3. 544 U.S. 528 (2005).

4. *See Dolan*, 512 U.S. at 386-96 (applying "essential nexus" and "rough proportionality" standards).

5. *See*, *e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997) (en banc); San Remo Hotel L.P. v. City & County of S.F., 41 P.3d 87 (Cal. 2002); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001) (en banc); Waters Landing Ltd. P'ship v. Montgomery County, 650 A.2d 712 (Md. 1994); Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004); B.A.M. Dev., L.L.C. v. Salt Lake County, 128 P.3d 1161 (Utah 2006); City of Olympia v. Drebick, 126 P.3d 802 (Wash. 2006) (en banc).

6. Ehrlich v. City of Culver City, 911 P.2d 429, 439 n.6 (Cal. 1996) (plurality opinion) ("Scholarly comment on the two cases is almost unmanageably large.").

7. *See*, *e.g.*, Lambert v. City & County of S.F., 529 U.S. 1045, 1046-49 (2000) (Scalia, J., joined by Kennedy & Thomas, JJ., dissenting from denial of certiorari); Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).

8. *See*, *e.g.*, Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 URB. LAW. 541, 541 (1994); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 205 (2006).

ment approval.[9] Scholars agree that impact fees evolved from the same type of exactions that were at issue in *Nollan* and *Dolan*—regulatory approval conditioned on physical dedication of land to public use.[10] Impact fees present a much more flexible financing option, however, because they need not be tied to the specific site under development in the same way as a physical dedication.[11] Whereas a dedication requirement may restrict a government from acting outside the geographical proximity of the proposed development project, impact fees can be applied more easily to improving off-site, system-wide infrastructure.[12] This feature renders impact fees more advantageous to the government, whose primary purpose in imposing exactions is to shift the cost of public improvements to the developer.[13] At the same time, "[i]t is this detachment from the actual location of land development that makes impact fees so controversial and so often subject to legal attack."[14]

It seems clear that the use of impact fees by local governments is on the rise. Measured by enabling legislation alone, in 2002 twenty-four states allowed impact fees, as compared to only three states in 1986.[15] A study published in 2000 by the General Accounting Office found that 59 percent of cities having more than 25,000 residents impose impact fees, as do 39 percent of counties in metropolitan areas.[16] These numbers support the conclusion "that impact fees are prevalent and that their use is growing."[17]

---

9. Rosenberg, *supra* note 8, at 205.

10. *Id.* at 199-204 (tracing the history of development exactions from land dedication requirements to fees in lieu of such dedication to modern impact fees); *accord* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 345-46, 351 (2d ed. 2007); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 479-80 (1991).

11. Rosenberg, *supra* note 8, at 206.

12. *Id.*; *see also* JUERGENSMEYER & ROBERTS, *supra* note 10, at 351.

13. *See* Been, *supra* note 10, at 482 (characterizing cost shifting as "main reason" that local governments impose exactions); Rosenberg, *supra* note 8, at 191 (describing "unmistakable trend ... towards a system of local government 'non-financing' through increased reliance on cost-shifting to the developer").

14. Rosenberg, *supra* note 8, at 206.

15. *Id.* at 207 n.106.

16. U.S. GEN. ACCOUNTING OFFICE, COMMUNITY DEVELOPMENT: LOCAL GROWTH ISSUES—FEDERAL OPPORTUNITIES AND CHALLENGES 33, 102 (2000), http://www.gao.gov/archive/2000/rc00178.pdf.

17. Rosenberg, *supra* note 8, at 207.

The amount of money charged for impact fees is also growing. A recent study shows that, between 2004 and 2008, the average nonutility impact fee per single family unit rose by 76 percent nationwide.[18] These numbers represent an average annual increase of approximately 15 percent over the four years in question,[19] which significantly outpaced the rate of construction cost inflation during the same period.[20] With this rate of growth, it is likely that legal challenges to impact fees also will increase.

Among these challenges, those based on the Takings Clause[21]—that is, assertions that impact fees amount to takings of private property without just compensation—have proved to be particularly bothersome analytically. The Supreme Court has not addressed the issue, but several of its pronouncements about regulatory takings generally, and exactions specifically, have fueled a nationwide debate on the matter. State courts in particular have produced a variety of ways to evaluate whether and when an impact fee amounts to a taking.[22]

The debate has principally focused on two subordinate inquiries. First, courts and commentators have questioned whether monetary payments qualify as exactions under the *Nollan/Dolan* framework or whether the test established in those decisions is limited to physical exactions only.[23] Second, assuming the Court's exactions framework might apply to payments of money, it is unsettled

---

18. DUNCAN ASSOCS., NATIONAL IMPACT FEE SURVEY: 2008, at 7 (2008), *available at* http://www.impactfees.com/publications%20pdf/2008_survey.pdf.

19. *Id.*

20. *Id.* at 11.

21. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation.").

22. *See supra* note 5.

23. *See* Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of* Lingle v. Chevron U.S.A., Inc. *on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 482 (2006) (suggesting that "monetary exactions are outside [*Nollan/Dolan*'s] sphere of applicability"); Lauren Reznick, Note, *The Death of* Nollan *and* Dolan? *Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. REV. 725, 755-57 (2007) (arguing that *Nollan/Dolan* can be applicable to monetary exactions as well as physical dedications). *Compare, e.g.*, McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (distinguishing physical dedication in *Dolan* from the payment of fees), *with* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 635 (Tex. 2004) ("We do not read *Dolan* even to hint that [monetary] exactions should be analyzed differently than dedications.").

whether that framework applies only to payments imposed in an adjudicative, ad hoc manner or to broadly-applicable, legislatively-determined fees as well.[24]

These questions are important because their answers will help define the constitutional meaning of the term "exaction" for purposes of a takings analysis. Accordingly, these questions must be addressed in any evaluation of the impact fee problem. But the primary emphasis on these two questions has, to some degree, diminished other issues that must also be confronted.

Even assuming that some monetary payments might qualify as an exaction for purposes of *Nollan/Dolan*, it remains to be seen whether impact fees should be among them. Other types of monetary obligations might more easily be viewed as exactions. For example, an "in lieu" fee imposed as a direct alternative to a required physical dedication looks like an exaction because of its inextricable connection to the dedication itself. Impact fees, on the other hand, are not linked to a would-be dedication, and they share characteristics with other types of financing mechanisms that have been viewed as less offensive to the Takings Clause. Much of what renders the analysis of impact fees so difficult is the question of how to classify them. Should impact fees be viewed as land use regulations, or similar devices rooted in the government's police power, or are they levies justified under its taxing authority? Do the fees confer special benefits, prevent unique societal harms, or finance community-wide programs that inure to the advantage of society as a whole? To what extent should the infrastructure they help finance be viewed as a general obligation of local government and to what extent should it be laid specially at the feet of new development? Only after wrestling with these questions, as well as the two previously mentioned, can one move to the ultimate query of what analytical test is most appropriate.

This Article seeks to answer these questions, and, in the process, make a worthwhile contribution to the existing literature on regulatory takings. While much has been written on exactions generally,

24. *Compare* San Remo Hotel L.P. v. City & County of S.F., 41 P.3d 87, 104-06 (Cal. 2002) (distinguishing between ad hoc and legislative fees, and applying *Nollan/Dolan* only to former), *with Town of Flower Mound*, 135 S.W.3d at 641-42 (rejecting "bright-line adjudicative/legislative distinction").

only a fraction of the previous scholarship specifically or extensively addresses the issue of impact fees. Among the literature that does address the problem of impact fees, there is a tendency to follow the courts in highlighting the physical/monetary and adjudicative/legislative distinctions, thus arguing either for or against the application of an unaltered *Nollan*/*Dolan* test based on the degree to which those distinctions seem sound.[25] The need exists for a treatment that not only addresses these distinctions but also situates impact fees within the context of municipal financing and then works out a rule of decision that takes all of these issues into account.

I hope to satisfy that need in the following manner. Part I reviews the analytical frameworks established by the Supreme Court for evaluating regulatory takings challenges. Because these frameworks are firmly entrenched in the law of takings,[26] I assume their continued vitality despite any of their inherent possible problems. Accordingly, I also assume that these frameworks, in one form or another, will provide the basis for considering challenges to impact fees, with the likelihood of a successful challenge depending on how the specific framework is configured. Part II seeks to evaluate what should qualify as an "exaction" for purposes of these frameworks, paying special attention to the distinctions between monetary and physical exactions, as well as between adjudicative and legislative decisions. Ultimately, I believe that both distinctions should be rejected to the extent they create formalistic, bright-line categories. Part III attempts to classify development impact fees, focusing particularly on how they compare to and differ from "fees" and "taxes,"

25. *See*, *e.g.*, Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 501-21 (2006) (opposing adjudicative/legislative distinction and arguing that *Nollan*/*Dolan* should apply to legislative exactions in full measure); Jacobs, *supra* note 23, at 481-82 (noting that monetary fees appear to be outside the scope of *Nollan*/*Dolan*); Jane C. Needleman, Note, *Exactions: Exploring Exactly When* Nollan *and* Dolan *Should Be Triggered*, 28 CARDOZO L. REV. 1563, 1581-90 (2006) (arguing that monetary and legislative exactions should be scrutinized under *Nollan*/*Dolan*); Reznick, *supra* note 23, at 755-57 (arguing that *Nollan*/*Dolan* can be applicable to monetary exactions as well as physical dedications).

26. *See generally* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (unanimously reaffirming tests established in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), Lucas v. S.C. Coastal Council, 505 U.S. 1803 (1992), and *Nollan*/*Dolan*).

as those terms are generally used in the context of municipal financing. This Part concludes that impact fees, in fact, share characteristics with both of these mechanisms and, therefore, are properly viewed as a doctrinal and theoretical hybrid. Drawing on the previous sections, Part IV discusses the appropriate test for evaluating claims that impact fees amount to unconstitutional takings, proposing a hybrid test that incorporates the main features of *Nollan/Dolan* into the more standard framework applicable to nonexaction takings claims. Additionally, this Part demonstrates how the test might work in practice, applying the test to three hypothetical scenarios drawn from actual cases. Finally, the Article offers concluding remarks and raises theoretical and doctrinal questions implicated by its discussion of the impact fee problem.

I. ANALYTICAL FRAMEWORKS FOR REGULATORY TAKINGS

To better appreciate the problems presented when development impact fees are challenged as unconstitutional takings, it is helpful to understand the analytical frameworks available to courts confronting the issue. Conventional wisdom has long held that the Supreme Court's regulatory takings jurisprudence is "muddled," "confused," and presents a "constitutional quagmire."[27] Although these labels have been much deserved, I have written elsewhere[28] that the Court commenced the long-overdue process of bringing some clarity to this area of the law with its 2005 decision in *Lingle v. Chevron U.S.A. Inc.*[29]

As I have explained, a strong case can be made that *Lingle* implicitly groups the Court's regulatory takings opinions into two

---

27. *See, e.g.*, D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 343 (2005) ("Regulatory takings often is considered one of the most doctrinally confused areas of constitutional law."); Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RESOURCES & ENVTL. L. 1, 1 (2006) ("Takings jurisprudence has long been and remains, in the opinion of many, a constitutional quagmire."); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205 (2004) ("Conventional wisdom teaches that the Supreme Court's takings doctrine is a muddle.").

28. *See generally* Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After* Lingle v. Chevron, 16 N.Y.U. ENVTL. L.J. 63 (2008). The following discussion is based on observations made in that article.

29. 544 U.S. 528 (2005).

analytical frameworks—the first applying to the majority of takings challenges and the second applying to the special context of land use exactions.[30] Each framework is designed to determine whether a particular regulatory action burdens an owner's core property rights—that is, the rights of exclusion, possession, use, and disposition—so onerously that it should be considered the functional equivalent of a direct appropriation of property.[31] If so, then a taking has occurred for which the owner must receive just compensation.[32]

A. The Standard Analysis

The first framework for analyzing takings claims, which I have dubbed the "standard analysis," presents three primary questions to aid in this determination. First, this framework asks whether the challenger can prove that the regulation at issue required a permanent physical invasion or occupation of his property.[33] If so, then the regulation results in a taking regardless of the amount of land occupied, the economic impact on the property owner, or the public interests served by the regulation.[34]

Where there is no permanent invasion or occupation, however, the framework asks a second question—whether the challenger can prove that the regulation deprived him of all beneficial or productive economic use of his property.[35] An affirmative answer to this second question raises the presumption that a taking has occurred, shifting the burden to the government to show that the regulation goes no further than what could be accomplished under the law of nuisance or similar "background principles" of the law of property.[36] When the government meets this burden, no compensable taking has occurred; conversely, when the government fails to make the necessary

30. *See* Kent, *supra* note 28, at 94-106.

31. *See id.* at 89.

32. *See Lingle*, 544 U.S. at 536-37.

33. *See* Kent, *supra* note 28, at 94-95.

34. *See id.*; *see also Lingle*, 544 U.S. at 538; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-38 (1982).

35. *See* Kent, *supra* note 28, at 95.

36. *See id.*; *see also Lingle*, 544 U.S. at 538; *Lucas*, 505 U.S. at 1026-32.

showing, the presumption of a taking stands and compensation is due.[37]

Finally, if the answer to both of the first two inquiries is negative, this framework asks a third question: how closely does the regulation resemble both a permanent physical invasion and a total economic deprivation?[38] The answer to this last question ultimately depends on the ad hoc balancing test established in *Penn Central Transportation Co. v. City of New York*.[39] At this stage, whether a taking has occurred depends on the court's assessment of: (1) the economic impact of the regulation in light of the owner's distinct, investment-backed expectations; and (2) the character of the governmental action.[40]

B. The Exactions Analysis

In addition to the foregoing framework, which seemingly applies to the majority of regulatory takings claims, *Lingle* endorses a second analytical framework for the special context of land use exactions. This framework, based on the Court's decisions in *Nollan* and *Dolan*, also asks three primary questions. First, the framework asks whether the government possesses a sufficient interest to deny the challenger's proposed land use altogether.[41] Although the question is asked, the Court so far has never probed for an answer, instead simply *assuming* that any interest offered by the government is sufficient to deny the challenger's proposed use in total.[42] Thus, this question really serves more as an analytical placeholder than an actual inquiry.[43]

Second, once the government's interest has been established, the framework looks to see whether an "essential nexus" exists between that interest and the exaction being requested of the property

37. *See* Kent, *supra* note 28, at 96.
38. *See id.*
39. 438 U.S. 104 (1978).
40. *See* Kent, *supra* note 28, at 96-101; *see also Lingle*, 544 U.S. at 538-39.
41. *See* Kent, *supra* note 28, at 102; *see also Lingle*, 544 U.S. at 547; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835-36 (1987).
42. *See*, *e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 387 (1994); *Nollan*, 483 U.S. at 835-36.
43. *See* Kent, *supra* note 28, at 103.

owner.[44] If not, then the exaction looks like little more than extortion, and a compensable taking has occurred.[45]

If the required nexus does exist, however, the framework moves to the final question—whether the requested exaction is "roughly proportional" to the impact of the proposed land use on whatever interest the government seeks to protect.[46] Although the Court has not defined "rough proportionality" with precision, it has made clear that the burden falls on the government to make some type of individualized, quantifiable determination that the exaction will help alleviate the public harm expected to result from the proposed land use.[47] When this heightened scrutiny can be satisfied, the exaction is not a taking of private property; when the burden is not met, a taking has occurred.

C. Application to Impact Fees

While the foregoing frameworks go a long way in providing some clarity to the law of regulatory takings, several issues remain unresolved.[48] One of these issues, which is of particular importance to this Article, is how these frameworks apply to takings challenges levied against development impact fees. The answer to this question has obvious significance. Because impact fees normally do not require a permanent physical invasion and rarely will work a total economic deprivation, applying the standard analysis to impact fees will almost always render the *Penn Central* factors of primary consequence. And since these factors, in practice, are much more deferential to the government's action than the more heightened scrutiny of the *Nollan*/*Dolan* framework, application of the standard analysis can be expected to favor a conclusion that no taking has occurred. Application of the exactions analysis, on the other hand, places a more significant burden on the government and, therefore, is likely to result in more findings favorable to the challenger. Thus, as in other areas of constitutional law, the choice of analytical test

44. *See id.* at 104; *see also Lingle,* 544 U.S. at 547; *Dolan*, 512 U.S. at 386; *Nollan*, 483 U.S. at 836-37.

45. *See* Kent, *supra* note 28, at 105-06.

46. *See id.* at 106; *see also Lingle*, 544 U.S. at 547; *Dolan*, 512 U.S. at 391.

47. *See Dolan*, 512 U.S. at 391, 395-96.

48. *See* Kent, *supra* note 28, at 107-08 (discussing issues left unanswered by *Lingle*).

and concomitant level of scrutiny can be outcome-determinative. The appropriate choice for analyzing development impact fees is the question to which the remainder of this Article devotes itself.

II. DEFINING "EXACTION"

On one level, the question of how to treat challenges to impact fees seems easily answered. If the fees qualify as exactions, then the second framework, based on *Nollan* and *Dolan*, should be utilized. Otherwise, assertions that impact fees qualify as unconstitutional takings of property should be evaluated under the standard analysis, usually meaning the *Penn Central* factors. A primary problem, however, is that it remains unclear precisely what qualifies as an "exaction" for purposes of the Takings Clause.[49]

For this reason, to determine which analytical framework more properly applies to impact fees, one must first grapple with the competing views about the appropriate meaning of "exaction." As explained above, this requires an evaluation of two issues subject to much debate: (1) whether exactions are strictly limited to physical dedications of property or might also include requirements for monetary payments; and (2) whether exactions encompass only those determinations made in an individualized, adjudicative fashion or also include broadly-applicable, legislative decisions as well.[50] This Part seeks to review the contours of the debate and provide guidance on how the questions should be answered.

A. Relevant Supreme Court Decisions

The debate over the foregoing questions has been fueled in large part by the Supreme Court's own exaction pronouncements.

49. *See* Needleman, *supra* note 25, at 1563 n.3 (listing various scholarly and judicial definitions of "exaction").

50. *See*, *e.g.*, DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 225-27 (2002) (identifying these issues as unresolved). No less than three petitions for certiorari were filed with the Supreme Court in 2009 raising one or both of these issues. *See* Petition for Writ of Certiorari at 7-16, Action Apartment Ass'n v. City of Santa Monica, No. 08-1139 (U.S. Mar. 10, 2009), 2009 WL 663951; Petition for Writ of Certiorari at 13-14, McClung v. City of Sumner, No. 08-1102 (U.S. Mar. 2, 2009), 2009 WL 559324; Petition for Writ of Certiorari at 5, Joy Builders, Inc. v. Town of Clarkston, No. 08-1099 (U.S. Feb. 27, 2009), 2009 WL 559321.

Although the Court has never decided either question, the context and language of several of its opinions—particularly *Nollan*, *Dolan*, and *Lingle*—have served as the basis for the distinctions made by some courts and commentators between physical and monetary exactions, as well as between adjudicative and legislative regulations. A review of these decisions thus proves useful.

1. Nollan v. California Coastal Commission

The Court first tackled the issue of land use exactions in *Nollan*. In that case, the California Coastal Commission conditioned the approval of a development permit on the applicants granting a lateral easement across their parcel so as to connect two public beaches that lay on either side.[51] The Commission justified this condition by asserting that the new house would obstruct the beaches from view of the road, impairing the public's "visual access" to the beaches.[52] This impairment, in turn, would create a "psychological barrier" to physical access because the obstructed view would make it more difficult for people to realize that the beaches were open to the public.[53] The applicants filed suit, asserting that the condition amounted to an unconstitutional taking of their property.

In considering the applicants' challenge, the Court assumed that the Commission's interest in overcoming the "psychological barrier" was sufficient to allow it to deny the development permit outright.[54] But the Court noted that the Commission's alternative course of action—requiring an easement as a condition for permit approval —could be upheld only if the easement bore an "essential nexus" to that interest.[55]

The connection was necessary, suggested the Court, because of the exaction's burdensome nature—that is, a permanent physical occupation of the applicants' property that normally would qualify as a taking per se.[56] The conditional, rather than mandatory, nature of the easement, however, arguably justified a different outcome. If

51. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).
52. *Id.* at 838.
53. *See id.* at 828-29, 838.
54. *Id.* at 835.
55. *Id.* at 837.
56. *Id.* at 831-32.

the Commission could deny the permit altogether, the Court acknowledged that giving the applicants a choice between denial or approval conditioned on the granting of an easement might be a valid exercise of the state's police power for which no compensation need be paid.[57]

For the state to avoid paying compensation, however, any alternative to outright denial had to serve the same interest as outright denial—in this case, protecting "visual access" and overcoming "psychological barriers" to the adjoining beaches.[58] The lateral easement sought by the government failed to serve those interests.[59] Accordingly, the Commission had not presented the property owners with a valid choice between two legitimate regulatory options. Rather, in the eyes of the Court, the Commission's action amounted to "an out-and-out plan of extortion" designed to avoid the requirement of just compensation.[60]

2. Dolan v. City of Tigard

Seven years after *Nollan*, the Court revisited the issue of land use exactions in *Dolan*.[61] As in *Nollan*, the property owner in *Dolan* applied for a development permit, which was granted by the city on the conditions that she dedicate portions of her property for improvement of the city's storm drainage system and for a pedestrian/bicycle pathway.[62] These conditions were imposed pursuant to the city's Community Development Code, which required such dedications for any development within or adjacent to the 100-year floodplain or within the city's Central Business District.[63] The city thus justified the conditions on two grounds: (1) the applicant's property fell within the floodplain, which would be adversely affected by the proposed development; and (2) the applicant's

57. *Id.* at 836-37.
58. *Id.*
59. *Id.* at 838 ("It 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.").
60. *Id.* at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).
61. Dolan v. City of Tigard, 512 U.S. 374 (1994).
62. *Id.* at 380.
63. *Id.* at 378-80.

property also fell within the city's Central Business District, which would see an increase in traffic congestion as a result of the proposed development.[64] Thus, according to the city, the dedications were necessary to alleviate both the risk of increased flooding and increased vehicular traffic caused by the applicant's project.

Again assuming that the city's stated interests were sufficient to deny the permit outright, the Supreme Court sought to explain a second time how the required dedications differed from the usual land-use regulation for which compensation normally was not due.[65] The usual regulation, the Court explained, "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."[66] Additionally, "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."[67]

These characteristics required a more exacting scrutiny like the one applied in *Nollan*. But unlike in *Nollan*, the Court agreed that the conditions here bore an "essential nexus" to the city's stated interests.[68] Even so, the Court added a second step to the analysis, explaining that the city also had to demonstrate that there was a "rough proportionality" between the easements and the likely impact of the applicant's development on flooding and traffic congestion.[69] As a result, to avoid paying compensation, the city had to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[70] Because the city had not done so, the exactions amounted to an uncompensated taking.[71]

64. *Id.* at 381-83.
65. *Id.* at 385.
66. *Id.*
67. *Id.*
68. *Id.* at 387.
69. *Id.* at 391.
70. *Id.*
71. *Id.* at 393-96.

3. Lingle v. Chevron U.S.A. Inc.

The final decision deserving of attention is the Court's unanimous opinion in *Lingle*.[72] Although that case did not involve a challenge to a land-use exaction, it did present the Court with an opportunity to elucidate its regulatory takings jurisprudence. In doing so, the Court reaffirmed both *Nollan* and *Dolan* and offered an explanation of both decisions.

In each of those cases, the Court noted, its analysis began with the proposition that the required easements would have constituted per se physical takings had the government simply demanded them.[73] The question presented by each case was whether the conditional nature of the easement changed the conclusion that a taking had occurred.[74] Thus, the Court strongly suggested that it was both the "onerous"[75] nature of the exactions involved, coupled with the unique context of "adjudicative ... demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit,"[76] that necessitated the special *Nollan/Dolan* framework.

Moreover, picking up on a theme raised in *Dolan* itself, the Court explained that this framework

> involve[s] a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[77]

72. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
73. *Id.* at 546.
74. *Id.* at 546-47.
75. *Id.* at 547.
76. *Id.* at 546; *see also id.* at 547 (noting that Court has not extended *Nollan/Dolan* framework "beyond the special context of [such] exactions" (quoting City of Monterrey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999))).
77. *Id.* at 547 (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

B. Only Physical Dedications?

Drawing on the context and language of the foregoing decisions, there has developed a split in authority, especially among the state courts, on the proper scope of the *Nollan/Dolan* framework. One of the primary issues is whether *Nollan/Dolan*'s nexus and proportionality requirements apply only to dedicatory exactions, like the ones at issue in those cases, or whether they include monetary exactions as well.[78] Although good arguments exist on both sides of the question, for the reasons given below I think the better argument is that the requirements of nexus and proportionality apply to monetary exactions as well as physical dedications.

1. Differences Between Land and Money

As an initial matter, serious arguments exist for limiting the exactions framework to physical dedications. First, there is the language of the opinions themselves. Although some courts perhaps have been too quick to create categories based on isolated statements,[79] it is beyond dispute that the Supreme Court takes the idea of physical invasion seriously in the context of exactions as well as with regulatory takings in general. Both *Nollan* and *Dolan* emphasized that the physical exaction of property is particularly trouble-

78. *Compare*, *e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (en banc) (distinguishing *Dolan* from the imposition of a fee), Krupp v. Breckinridge Sanitation Dist., 19 P.3d 687, 697 (Colo. 2001) (en banc) (holding that *Nollan/Dolan* is not applicable to development fees), McCarthy v. Leawood, 894 P.2d 836, 845 (Kan. 1995) (distinguishing *Dolan* from the imposition of a fee), Waters Landing Ltd. P'ship v. Montgomery County, 650 A.2d 712, 724 (Md. 1994) (reading *Dolan* as inapplicable to a "development impact tax"), *and* City of Olympia v. Drebick, 126 P.3d 802, 808 (Wash. 2006) (en banc) (distinguishing dedications from fees for purposes of *Nollan/Dolan*), *with* San Remo Hotel L.P. v. City & County of S.F., 41 P.3d 87, 105-06 (Cal. 2002) (acknowledging that *Nollan/Dolan* applies to some fee requirements), N. Ill. Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384, 389-90 (Ill. 1995) (applying heightened scrutiny akin to *Nollan/Dolan* to impact fees), Twin Lakes Dev. Corp. v. Town of Monroe, 801 N.E.2d 821, 825 (N.Y. 2003) (applying *Nollan/Dolan* to an in lieu fee), Home Builders Ass'n of Dayton v. City of Beavercreek, 729 N.E.2d 349, 355-56 (Ohio 2000) (applying *Nollan/Dolan* to impact fees), *and* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 639-40 (Tex. 2004) (analyzing a monetary exaction under *Nollan/Dolan*).

79. *See* Needleman, *supra* note 25, at 1577 (accusing some courts of relying on "approaches balanced precariously on bits of language extracted from the opinions of *Nollan* and *Dolan*").

some,[80] and *Lingle* underscored that the Court has not applied its exactions framework outside of this unique context.[81] I have suggested that these statements, taken at face value, "strongly indicate [the Court's intention] that the exaction analysis applies only to physical dedications and not to monetary exactions."[82] Even so, these statements should not be given too definitive a reading. Because none of the cases presented a challenge to a nondedicatory exaction, the Court had no need to carefully consider whether the *Nollan/Dolan* framework included monetary exactions. Moreover, anecdotal evidence suggests that the Court, or at least some of its members, do not view these statements as decisive of the issue.[83]

Nonetheless, the Court's pronouncements in *Nollan*, *Dolan*, and *Lingle*, when coupled with its doctrinal explanations about what constitutes a regulatory taking, provide a strong rationale for limiting exactions to physical dedications of land. *Lingle* clarified that the Court's takings jurisprudence was designed "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[84] This "functional equivalence" standard seems to focus on the burdens that the challenged regulation imposes on the owner's core property rights of exclusion, possession, use, and disposition.[85] A regulation imposing a permanent physical invasion of property, for example, qualifies as a categorical taking precisely because of the onerous effects it has on these core rights.[86]

---

80. *See Dolan*, 512 U.S. at 385 (distinguishing conditions at issue from usual land use regulations in part because conditions involved "a requirement that [the applicant] deed portions of the property to the city"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841 (1987) ("We are inclined to be particularly careful ... where the actual conveyance of property is made a condition to the lifting of a land-use restriction.").

81. *Lingle*, 544 U.S. at 547.

82. Kent, *supra* note 28, at 103.

83. *See* Ehrlich v. City of Culver City, 512 U.S. 1231, 1231 (1994) (5-4 decision) (remanding monetary exaction case for reconsideration in light of *Dolan*); *see also* Lambert v. City & County of S.F., 529 U.S. 1045, 1047-48 (2000) (Scalia, J., joined by Kennedy & Thomas, JJ., dissenting from denial of certiorari) (suggesting *Nollan/Dolan* might apply to "demand[s] for money or other property").

84. *Lingle*, 544 U.S. at 539.

85. *See* Kent, *supra* note 28, at 89-92 (discussing "functional equivalence" and its relation to core property rights).

86. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982).

Regulations that require the payment of money in connection with land use, by contrast, affect these rights less directly. Monetary obligations usually do not produce immediate restraints on an owner's rights to exclude, possess, or dispose of the property to which the obligation is connected. And although the use of the connected parcel may be limited until payment has been tendered, it will be rare that such a restriction is appreciably more arduous than what the government could accomplish via normal zoning regulations.[87] Indeed, the first analytical premise of both *Nollan* and *Dolan* is that the government could have denied the proposed land use altogether. Therefore, it is more difficult to view monetary exactions as functionally equivalent to a direct appropriation or ouster. As one court put it, the payment of money appears to be "a considerably more benign form of regulation."[88]

Related to this difficulty is the unique status enjoyed by real property in our legal system. Land has been described as "a darling of Anglo-American law" and has received special treatment vis-à-vis other types of property for a variety of reasons.[89] Unlike chattels, for example, land is "immovable and place-specific" and, along with its associated rights and obligations, historically served as a "special form of wealth."[90] In addition to these attributes, land's uniqueness flows from its individual and societal importance: "The ownership of real property changes status; it imparts personhood; it gives rise to expectations; it shapes our culture. Land is unique because once we own it, it bestows special benefits upon us and defines us in ways

---

87. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (noting that "the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.*"); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("The property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."). This, of course, assumes that the fee is not so oppressive as to deprive all economically beneficial use from the connected property. *See Lingle*, 544 U.S. at 538 (reaffirming the categorical rule from *Lucas*).

88. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (en banc). *But see infra* notes 109-11 and accompanying text (arguing that monetary exactions can impose serious burdens on property owner).

89. Nancy Perkins Spyke, *What's Land Got To Do with It? Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 BUFF. L. REV. 387, 420 (2004).

90. *Id.* at 420-21.

that personal property does not."[91] Legally speaking, dirt is different, and a rule that limited the *Nollan/Dolan* framework to physical exactions would comport with the doctrinal distinction traditionally made between realty and other types of property.[92]

Finally, such a limitation might more readily accord with *Lingle*'s description of *Nollan/Dolan* as flowing from the doctrine of unconstitutional conditions. As explained by both *Nollan* and *Dolan*, a requirement that an owner physically dedicate a portion of land to the public would normally trigger a categorical taking.[93] Thus, with a physical dedication, there is no doubt that compensation would be due the owner unless the government imposes a condition that meets the nexus and proportionality standards. By contrast, a requirement that the owner pay money would not necessarily trigger a categorical taking outside the exactions context and, accordingly, would not fit as neatly within the doctrinal description offered by *Lingle*.[94]

2. Similarities Between Physical and Monetary Exactions

In light of these arguments, any suggestion that the requirements of *Nollan/Dolan* be applied beyond the context of physical exactions should proceed cautiously. Nevertheless, despite the doctrinal differences between land and money, there also are many similarities between physical and monetary exactions. Weighing the differences and similarities is no doubt something of a subjective task, but,

---

91. *Id.* at 423.

92. *Cf.* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 637 (2004) (suggesting that extension of *Nollan/Dolan* to impact fees might reveal diminished concern "for the uniqueness and integrity of real property"). *But see* Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 232-33 (2004) (rejecting distinction between land and other forms of property for purposes of takings analysis).

93. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

94. Similar arguments have been made by several commentators. *See, e.g.*, DANA & MERRILL, *supra* note 50, at 225-26; Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 754-55 (2007); Jacobs, *supra* note 23, at 482; Daniel Pollack, *Regulatory Takings: The Supreme Court Tries To Prune* Agins *Without Stepping on* Nollan *and* Dolan, 33 ECOLOGY L.Q. 925, 930-31 (2006).

ultimately, I believe that the similarities carry the day and suggest the relevance of the *Nollan*/*Dolan* standards to monetary exactions.

Exactions of both types present special problems not found in other land use contexts. Chief among these is the problem of leveraging—that is, the government exercising its monopoly power over land use regulation to demand concessions from property owners it otherwise would not be able to obtain.[95] For example, some have observed that local officials sometimes intentionally adopt restrictive zoning classifications and development standards for the purpose of artificially strengthening their bargaining position, and then offer to waive the restrictions in exchange for some quid pro quo from developers.[96]

This type of leveraging was a primary concern for the Court in *Nollan*, providing a theoretical basis for the "essential nexus" requirement:

> One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.[97]

When leveraging results in the imposition of conditions unrelated to the interests for which the government ostensibly seeks protection, the Court noted, the condition should be viewed more as a "plan of extortion" than a valid regulation of land use.[98] *Dolan* explicitly echoed this concern in discussing the nexus requirement[99] and seemed to justify the additional proportionality requirement on

---

95. Ehrlich v. City of Culver City, 911 P.2d 429, 438-39 (Cal. 1996) (plurality opinion); Haskins, *supra* note 25, at 491.

96. ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 90 (2005); JOHN M. LEVY, CONTEMPORARY URBAN PLANNING 123, 125 (6th ed. 2003).

97. *Nollan*, 483 U.S. at 837 n.5.

98. *Id.* at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 121 N.H. 581, 584 (1981)).

99. Dolan v. City of Tigard, 512 U.S. 374, 387 (1994).

the grounds that governments should not be able to leverage property owners in a manner that avoided the constitutional obligation to compensate takings of their properties.[100]

Although *Nollan* and *Dolan* were concerned with the potentially extortionate nature of physical exactions, the problems posed by improper leveraging can exist in the context of monetary exactions as well.[101] As Professors Ball and Reynolds have explained, "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."[102] Thus, to the extent the government is apt to exercise its regulatory authority in an inappropriate manner, the distinction between physical and monetary exactions does little to curb that impulse. Indeed, it may be that monetary exactions present a more tempting scenario for governments to engage in leveraging. Because a fee is not tied geographically to the land under development, it can be used more flexibly to finance a larger number of infrastructure improvements on a system-wide basis than can the average physical exaction. These characteristics suggest an increased incentive to leverage land use approval in exchange for money, rather than in exchange for land itself.[103]

A closely related problem is ensuring that public burdens are properly distributed. The Supreme Court repeatedly has stressed that one of the primary theories underlying the Takings Clause is that it prevents the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[104] As with the risk of improper

100. *See id.* at 396 ("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))).

101. *See* Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (plurality opinion) (recognizing that some monetary exactions can pose same risk of improper leveraging as physical exactions); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 639-40 (Tex. 2004) (same).

102. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1569 (2006).

103. *See* Needleman, *supra* note 25, at 1582 (noting that fungible nature of money renders monetary exactions "an even greater threat of government abuse").

104. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)); *accord Dolan*, 512 U.S. at 384; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987). As Professors Ball and Reynolds point out, this "is one of the few

leveraging, the danger of forcing a select individual or group to bear public burdens is no less present when the government attempts to exact money than when it attempts to exact land.[105] As one court has explained, *Nollan* and *Dolan* presented a unique scenario not only because they involved dedications of real property.[106] Equally unique was that, in each case, "the conditions required the developer to make an affirmative contribution to solve a public problem that existed, at least in part, outside the developed property" and which "the development did not cause [but] at most it only aggravated."[107] This description fits most monetary exactions, as well, suggesting the presence of similar issues and the need for a similar test.[108] Indeed, by definition, monetary exactions impose burdens on one segment of society—namely, new development—to finance public infrastructure and services used by broader segments.[109] Although this characteristic by itself does not necessarily render monetary exactions improper, it does help explain why such exactions might be scrutinized similarly to physical exactions.[110]

In addition to these similarities in horizontal burdens—that is, the degree to which obligations are distributed among *various*

concepts associated with takings law on which there seems to be a strong and ongoing agreement among members of the Court." *See* Ball & Reynolds, *supra* note 102, at 1535.

105. *See Ehrlich*, 911 P.2d at 444 (linking monetary exactions to potential for "distributive injustice in the allocation of civic costs").

106. *See* Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172, 174 (Wash. Ct. App. 2000).

107. *Id.* at 174-75.

108. *Id.* at 175.

109. *See* Ball & Reynolds, *supra* note 102, at 1570 ("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."); Nelson, *supra* note 8, at 548 (acknowledging that impact fees "result in a shift in the burden of financing facilities from the public at-large to the usually narrower base of new development"); Rosenberg, *supra* note 8, at 230 (recognizing criticism that impact fees "convert zoning and land development regulation from being a harm-preventing enterprise to one that would confer financial benefits to the existing community by imposing common costs on the shoulders of the few").

110. Several cases demonstrate that monetary exactions can raise the same issues of burden distribution as physical exactions. *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 994-95 (Ariz. 1997) (en banc) (involving water resources development fee imposed only on new development to alleviate preexisting water shortages); San Remo Hotel L.P. v. City & County of S.F., 41 P.3d 87, 91-92 (Cal. 2002) (involving fee imposed on hotel operators to help remedy city-wide affordable housing shortage); *Ehrlich*, 911 P.2d at 434-35 (involving imposition of fee on single property owner to alleviate deficiency in municipal recreational facilities).

property owners—both types of exactions can impose serious vertical burdens on *individual* property owners as well.[111] To be sure, an obligation to pay money may not affect the owner's core rights as immediately, and perhaps not to the same extent, as will a physical dedication. For this reason, a monetary exaction may not as readily fit *Lingle*'s "functional equivalence" standard.[112] But monetary obligations can impose considerable burdens on a property owner, especially when those obligations are imposed as a pre-development condition of approval and the sum requested is a significant percentage of the value of the parcel under development.

Exactions of either stripe are directly tied to the government's authority to regulate *land* use.[113] Thus, what ultimately is at stake, whether the exaction is monetary or physical, is the owner's ability to move forward with a proposed use of her real property. When this ability is held hostage by arbitrary or excessive requirements to dedicate money to the public—money that the government otherwise would be unable to demand—the owner's rights in the parcel are affected.[114] This undeniable connection between the money requested and the parcel sought to be developed minimizes some of the doctrinal concerns supporting the distinction between realty and money. When a government exacts concessions from a property owner in exchange for land use approval, whether those concessions are in the form of money or physical dedications, land necessarily is at issue.

Moreover, to the extent that the appropriation of money, like the appropriation of land, can independently form the basis of a takings claim, there seems to be little reason to create a bright-line distinction between monetary and physical exactions. The applicability of the Takings Clause to money is not entirely settled, and a full exposition of this issue is beyond this Article's scope. Nonetheless, money might qualify as "property" for purposes of the Fifth Amendment, especially when it is directly linked to realty. As far

111. *See* Ball & Reynolds, *supra* note 102, at 1533 (describing vertical and horizontal burdens).

112. *See supra* notes 84-88 and accompanying text.

113. *See*, *e.g.*, Waters Landing Ltd. P'ship v. Montgomery County, 650 A.2d 712, 717 (Md. 1994) (explaining that development impact "tax" was "imposed only when the owner of land makes a particular use of the land, i.e., develops it").

114. *Cf.* Kent, *supra* note 28, at 90-92 (explaining how total economic deprivation can affect core property rights even without a physical invasion).

back as 1898, in *Village of Norwood v. Baker*, the Supreme Court applied a takings analysis to an exaction of money levied against the owner of real property.[115] In *Norwood*, the Court affirmed the enjoining of a special assessment against certain parcels, which abutted a newly improved road, for the entire cost of constructing the road.[116] Acknowledging that the special assessments were a form of taxation, the Court nevertheless held that they might come under the strictures of the Takings Clause.[117] "In our judgment," wrote the Court, "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the *extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."[118] Regardless of whether *Norwood* continues to be a good law,[119] its suggestion that some governmental actions against money might offend the Takings Clause has been reaffirmed on several occasions.[120]

As a final matter, completely exempting monetary exactions from the *Nollan*/*Dolan* requirements would create an exception that

---

115. *See* 172 U.S. 269, 279 (1898).

116. *Id.* at 293-94.

117. *Id.* at 279.

118. *Id.*

119. The precedential value of *Norwood* is anything but clear. Only three years after it decided that case, the Court placed such a limiting gloss on *Norwood* that Justice Harlan, in dissent, questioned whether *Norwood* was being overruled *sub silentio*. *See* French v. Barber Asphalt Paving Co., 181 U.S. 324, 344-45 (1901); *see also id.* at 352-53 (Harlan, J., dissenting). A few years later, without a single reference to *Norwood* or its "substantial excess" standard, the Court suggested that a similar road assessment needed only to be "generally fair" and do "as nearly equal justice as can be expected," with any resulting hardships being "borne as one of the imperfections of human things." *See* Louisville & N.R. Co. v. Barber Asphalt Paving Co., 197 U.S. 430, 434 (1905). In 1916, however, the Court cited *Norwood* approvingly and applied it to reverse a state court decision upholding an assessment that allegedly provided no benefit to the assessed property. *See* Myles Salt Co. v. Bd. of Comm'rs, 239 U.S. 478, 485 (1916).

120. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003) (acknowledging that confiscation of account interest might be subject to categorical analysis as per se taking under *Loretto*); E. Enters. v. Apfel, 524 U.S. 498, 529-37 (1998) (plurality opinion) (applying *Penn Central* balancing to legislatively imposed monetary obligation); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (holding that accrued interest on Interest on Lawyers Trust Account accounts is property for purposes of takings analysis); Webb's Fabulous Pharm., Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980) (holding that confiscation of accrued interest on interpleader funds violated Takings Clause); *cf.* United States v. Sperry Corp., 493 U.S. 52, 62-63 (1989) (implicitly recognizing that excessive and unreasonable fee unrelated to cost of government services might be a taking). *But see id.* at 62 n.9 (distinguishing money from "real or personal property" because "money is fungible").

swallows the rule. As previously mentioned, scholars agree that monetary exactions evolved from the types of physical dedications at issue in *Nollan* and *Dolan*.[121] This evolution is the result of local governments looking for flexible, nontax ways to finance public infrastructure.[122] A rule that subjects physical exactions to nexus and proportionality standards, but completely exempts monetary exactions from the same limitations, does nothing to curtail the problems identified in the Court's exactions cases. On the contrary, it creates an incentive for local governments to impose more and larger fees on new development, notwithstanding that those fees pose many of the same risks as the physical dedications from which they derive. Under such a regime, a government concerned about the prospect of having its physical exactions subjected to heightened scrutiny could simply demand an "in lieu" fee instead—that is, a monetary equivalent for the land subject to dedication. Thus, a would-be dedication might avoid heightened scrutiny for no reason other than its valuation and conversion into cash. This sort of bright-line formalism, at least in this scenario, results in a distinction without any substantive difference.[123]

C. Only Adjudicative Decisions?

In addition to the distinction between physical and monetary exactions, many courts also have distinguished between those exactions imposed on an individual basis via adjudicative decisions and those that are broadly-applicable and imposed legislatively.[124]

---

121. *See supra* note 10 and accompanying text.

122. *See* Ball & Reynolds, *supra* note 102, at 1526 (noting shift away from tax-based financing to nontax financing).

123. *Cf.* Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2211 (2004) ("The distinction between the government's demand that a citizen hand over a certain amount of money ... and the government's seizure of specific assets worth the same amount of money ... seems formalistic and arbitrary.").

124. *See*, *e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (en banc) (ruling *Nollan*/*Dolan* inapplicable to legislatively imposed fees); San Remo Hotel L.P. v. City & County of S.F., 41 P.3d 87, 105 (Cal. 2002) (limiting *Nollan*/*Dolan* to "individualized development fees"); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (en banc) (applying *Nollan*/*Dolan* to "adjudicatively imposed development exactions" but not to "generally applicable, legislatively formulated fees"); Parking Ass'n of Ga. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (describing application of *Dolan* as "misplaced" in context of "legislative determination [made] with regard to many landowners");

This distinction seems to be based primarily on two arguments. First, courts have suggested that the distinction was established by the Supreme Court itself.[125] This suggestion is rooted chiefly in *Dolan*'s language differentiating between "legislative determinations classifying entire areas of the city" and the "adjudicative decision" in that case "to condition petitioner's application for a building permit on an individual parcel."[126] Several courts have seized upon this language to exempt legislatively-imposed exactions of general applicability from the *Nollan/Dolan* requirements.[127] Second, courts have reasoned that legislative exactions present appreciably less risk of improper governmental activity than do adjudicative exactions.[128] This is so, according to at least one court, because any problems posed by widespread, legislative exactions can be managed effectively through the political process.[129]

Much of the commentary on *Nollan/Dolan* has rejected this distinction between adjudicative and legislative exactions,[130] and, in

---

Waters Landing Ltd. P'ship v. Montgomery County, 650 A.2d 712, 724 (Md. 1994) (distinguishing development impact tax from *Dolan* because tax was "imposed ... by legislative enactment").

125. *See, e.g.*, *Waters Landing*, 650 A.2d at 724.

126. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). Although it has not yet been as heavily relied on by the lower courts, *Lingle*'s similar language would also be relevant. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546 (2005) (describing *Nollan* and *Dolan* as involving "adjudicative land-use exactions").

127. *See, e.g.*, *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 1000; *Krupp*, 19 P.3d at 696; *Waters Landing*, 650 A.2d at 724.

128. *See, e.g.*, *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 1000; *San Remo Hotel*, 41 P.3d at 105; *Krupp*, 19 P.3d at 696.

129. *San Remo Hotel*, 41 P.3d at 105.

130. *See, e.g.*, DANA & MERRILL, *supra* note 50, at 226-27; Ball & Reynolds, *supra* note 102, at 1561-68; 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, 401-07 (2002); Haskins, *supra* note 25, at 501-19; Christopher T. Goodin, Comment, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference*,*"* 28 U. HAW. L. REV. 139, 142 (2005); D.S. Pensley, Note, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 CORNELL L. REV. 699, 704 (2006); Inna Reznick, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 247 (2000). *But see* Fenster, *supra* note 94, at 754-55 (arguing that applying heightened scrutiny to only individualized decisions is more consistent with *Lingle*); Benjamin S. Kingsley, *Making It Easy To Be Green: Using Impact Fees To Encourage Green Building*, 83 N.Y.U. L. REV. 532, 560-61 (2008) (asserting that "those who claim that *Nollan* and *Dolan* do not apply to legislatively imposed monetary impact fees may have the better argument").

my estimation, such a rejection is well-founded for a variety of reasons. To begin with, I believe that lower courts have read too much into *Dolan*'s explanation of the differences between adjudicative and legislative decisions. A close look at the opinion suggests that *Dolan* was not differentiating between two types of exactions. Rather, the distinction seemingly made by the Court was between exactions on the one hand and general land use regulations like zoning on the other. The relevant language is found in a portion of the opinion that sought to distinguish the exactions at issue from the context of "land use planning."[131] The latter context, the Court explained, entails "essentially legislative determinations *classifying entire areas of the city*."[132] Here, the Court seemed to have in mind governmental actions like establishing a zoning regime or creating a comprehensive plan—that is, decisions that set broad policy goals on a large-scale basis. In *Dolan*, by contrast, the Court confronted a different type of decision, one that conditioned the issuance of *a* building permit based on *an* applicant's proposal to develop *her* parcel of land.[133] The real distinction, therefore, seems not to be how the conditions are created or decided upon, but whether they apply to individual cases.

This reading of *Dolan* is buttressed by the case's own factual details. Contrary to the suggestions of many lower courts, the exactions in *Dolan* were not established ad hoc in the midst of administrative proceedings on the plaintiff's permit application. Quite the opposite, they were created as part of the city's overall development code and were already in force at the time her application was considered.[134] Moreover, rather than being limited to the plaintiff's particular parcel, similar conditions appear to have been imposed on all similarly-situated land within the city.[135] Accordingly, it seems as though the conditions confronting the Court were just the sort of widely-applicable, legislatively-established

131. *Dolan*, 512 U.S. at 384.

132. *Id.* at 385 (emphasis added).

133. *See id.*

134. *See id.* at 379-80 (noting that the city "granted petitioner's permit application subject to conditions *imposed by the city's [Commmunity Development Code]*" (emphasis added)).

135. *See id.* (quoting portion of development code that imposed same requirements generally on development "within and adjacent to the 100-year floodplain"); *see also* Ball & Reynolds, *supra* note 102, at 1552 (reviewing record and asserting that Dolan was "regulated in the same way as all others who owned properties in floodplain areas").

conditions that some lower courts have declared beyond reach of the *Nollan/Dolan* framework.[136]

Perhaps more troubling, though, is that the distinction between adjudicative and legislative exactions depends on a separation of powers theory that has no basis in the reality of land use decision making. Others have noted that local governments, unlike their federal and state counterparts, often fail to adhere to any real division between the legislative, executive, and judicial functions.[137] This is especially true in the context of land use regulation, where almost every decision tends to have both legislative and adjudicative characteristics.[138] All land use decisions are rooted ultimately in legislative authority and seek to promote legislatively-determined goals.[139] Likewise, every land use regulation ultimately must apply to individual parcels in specific factual contexts.[140] As a practical matter, the line between legislative and adjudicative actions simply cannot be drawn with precision.

This lack of precision is exemplified by a number of state court cases considering challenges to exactions. In *Krupp v. Breckenridge Sanitation District*, for example, the court formalistically labeled as legislative, and therefore exempt from *Nollan/Dolan*, a development fee established by the local governing board pursuant to a published schedule, even though the schedule did not include the type of development at issue and the fee in actuality had been calculated at the discretion of the district manager.[141] In another case, *Dudek v. Umatilla County*, the court adhered to the legislative/adjudicative distinction in reciting the relevant legal standard, but then subjected a legislatively-imposed exaction to *Nollan/Dolan* scrutiny on the grounds that the exaction's applicability depended on a number

136. *See Dolan*, 512 U.S. at 413 n.* (Souter, J., dissenting) (criticizing majority for characterizing conditions as adjudicative); Ball & Reynolds, *supra* note 102, at 1563 (commenting that "the city's exaction formula in *Dolan* appears no more 'adjudicative' than the typical formulas labeled as 'legislative' by lower courts").

137. *See, e.g.*, Ball & Reynolds, *supra* note 102, at 1562; Breemer, *supra* note 130, at 405-06; Pensley, *supra* note 130, at 709-10; Reznick, *supra* note 130, at 260.

138. *See* Breemer, *supra* note 130, at 405-06.

139. *See* PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION 3 (2d ed. 2003) (noting that "authority to regulate the use and development of land is derived from the police power"); *see also* Mugler v. Kansas, 123 U.S. 623, 661 (1887) (explaining that the exercise of police power is a legislative function).

140. Ball & Reynolds, *supra* note 102, at 1563.

141. 19 P.3d 687, 691, 696 (Colo. 2001) (en banc).

of decisions particular to each individual case.[142] Finally, in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, the court refused to adopt the distinction even though the exaction at issue was imposed legislatively because the town was authorized to, and in fact did, grant exceptions in certain circumstances.[143] These cases teach that a bright-line distinction between adjudicative and legislative exactions rarely exists in reality and, for that reason, should not determine the appropriate analytical standard.

As a final matter, the adjudicative/legislative distinction does little to alleviate concerns about leveraging, burden distribution, and unconstitutional conditions. Although some courts have suggested that there is little or no risk of these problems when an exaction is imposed legislatively,[144] this suggestion seems naïve. Many others have made the point, and it need not be belabored here, that legislative actions can pose the same threats of extortion, inappropriate allocation of burdens, and damage to property rights as adjudicative actions.[145] This possibility is magnified in local politics. Because elected officials at the local level work in much greater proximity to their constituents than do legislators at higher levels, local officials tend to reflect in larger measure the concerns and biases of those voting for them.[146] To be sure, proximity to the electorate can produce certain advantages. Inasmuch as the political units involved are generally small and localized, they have been viewed as more responsive to the needs of their constituents than the federal or state governments.[147] As explained by Professor Fischel's "homevoter hypothesis," local decision making has greater influence on home values, resulting in greater participation by homeowners in local government, which in turn produces more

142. 69 P.3d 751, 756 (Or. Ct. App. 2003).

143. 135 S.W.3d 620, 641-42 (Tex. 2004).

144. *See supra* note 128 and accompanying text.

145. *See, e.g.*, Goodin, *supra* note 130, at 162-63; Reznick, *supra* note 130, at 270; *see also* Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of certiorari) ("A city council can take property just as well as a planning commission can."). Moreover, inasmuch as no legislative action exemption has been created for other applications of the unconstitutional conditions doctrine, *see* Breemer, *supra* note 130, at 402, it is difficult to understand why such an exemption should exist under the Takings Clause.

146. *See, e.g.*, William A. Fischel, *The Political Economy of Public Use in* Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 930.

147. *See, e.g.*, *id.* at 930-31.

efficient governmental action.[148] But these very features can produce negative results as well, especially when it comes to land use policy.[149] The small and insular nature of local governments increases the potential that local prejudices may go unchecked for lack of a sufficiently strong countervailing interest. In its worst form, these shared values can turn into a majoritarian tyranny of the sort famously warned against by James Madison.[150] Thus, there exists a real danger that the political process will fail to protect against inordinate exactions, legislative as well as adjudicative, especially when those exactions are paid primarily by new development that not only is unpopular with existing residents but is sought by outsiders with little or no political voice.[151] As explained by one court, it is "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."[152] If remedying this sort of

---

148. *See id.* at 931 (summarizing the "homevoter hypothesis").

149. *See id.* at 930 ("Zoning serves the interests of a majority of local voters, most of whom are homeowners, and zoning's excesses must be laid at their doorstep.").

150. *See* THE FEDERALIST NO. 10, at 45 (James Madison) (George W. Carey & James McClellan eds., 2001) ("When a majority is included in a faction, the form of popular government ... enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens."); *see also id.* at 47-48 ("[T]he smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression."). Numerous scholars have noted the connections between Madison's arguments in *The Federalist No. 10* and local land-use regulation. *See, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: A Legal and Economic Analysis*, 86 YALE L.J. 385, 405-07 (1977); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1499 (2008); John M. Payne, *Politics, Exclusionary Zoning and Robert Wilentz*, 49 RUTGERS L. REV. 689, 706 (1997); Stewart E. Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys*, 99 NW. U. L. REV. 231, 241 (2004).

151. *See* Rosenberg, *supra* note 8, at 208-09 ("By adopting ordinances embracing development impact fee regimes, local governments simultaneously achieve a series of attractive political objectives, and they do so without having to consider any potential objections from interest groups unrepresented in the existing voting populace."). Professor Fenster argues that the entire *Nollan/Dolan* framework weakens the local political climate but suggests that this is especially true where legislative exactions are exempted from that framework. In such circumstances, "local governments have even stronger incentives to avoid bargaining and individualized conditions," relying instead on "preconstituted formulas" that "are inevitably safer and more attractive ... than are open-ended political contests, with their attendant political compromises." *See* Fenster, *supra* note 92, at 669.

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

process failure was the original purpose of the Takings Clause, as some have argued,[153] then there seems to be no reason to exempt legislative exactions from the scrutiny applied to adjudicative ones.

III. CLASSIFYING IMPACT FEES

For the reasons given above, I agree that the constitutional definition of "exaction" should "move beyond the legislative-adjudicative and land-monetary distinctions."[154] Because monetary and legislative exactions often pose the same threats as adjudicative demands for physical dedications, such formalistic, bright-line divisions seem to be misplaced. But simply doing away with those distinctions does not necessarily put development impact fees within the *Nollan/Dolan* framework. Impact fees share characteristics not only with physical exactions but also with municipal financing devices like taxes, which often are considered to be outside the bounds of, or at least not as offensive to, the Takings Clause.[155] For this reason, even if *Nollan/Dolan* applies to some types of monetary exactions, such as "in lieu" fees, that framework might be less appropriate for impact fees because of their tax-like qualities.[156] In local finance law, where labels often have decisive effect on whether a particular practice is legal,[157] it is first necessary to classify impact fees before deciding whether and how the nexus and proportionality standards should apply.

153. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 855 (1995).

154. Ball & Reynolds, *supra* note 102, at 1560.

155. *See* Peñalver, *supra* note 123, at 2217.

156. This is not to say that *only* impact fees share qualities with taxation. Professor Peñalver demonstrates that, under certain theories, even physical exactions might be considered taxes and, therefore, subjected to lower Takings Clause scrutiny. *See id.* at 2217-18. But their monetary nature and their easier use in financing system-wide infrastructure makes the similarities between impact fees and taxes more striking.

157. *See, e.g.*, Waters Landing Ltd. P'ship v. Montgomery County, 650 A.2d 712, 714-16 (Md. 1994) (affirming validity of development impact "tax" that was virtually identical to development impact "fee" invalidated four years earlier).

A. Of Taxes and Takings

Before discussing how impact fees compare with other mechanisms, however, it is important to consider some of the theoretical and doctrinal friction that exists between the law of takings and the government's power to levy taxes. On one level, there seems to be a fundamental connection between taking a citizen's property for public use and taking his money to pay for public expenses. Both takings and taxes force the citizen to part with something that belongs to him, and both do so ostensibly for the good of the commonwealth.

These parallels did not escape the attention of earlier American courts, as evidenced by several nineteenth-century decisions. One New York judge, for example, noted the difficulty in "draw[ing] the dividing line, between that taking of private property for public use which falls within the legitimate exercise of the taxing power, and that which requires a just compensation, within the meaning of the constitution."[158] A contemporary agreed, noting that "[t]he right of taxation and the right of eminent domain rest substantially on the same foundation."[159] A later Missouri court straightforwardly applied the principles of public use and just compensation as "[t]he proper construction of the constitution in regard to taxing private property."[160]

Whichever power was utilized, these courts suggested that the owner or payer had to receive some type of recompense for the forced transfer of his property. The Supreme Court of Utah explained:

> When the property is taken under the right of eminent domain the public pays the owner in money; when money is exacted by means of a special assessment the owners are compensated in special benefits to their property by public improvements made in its expenditure; and when money is exacted by a general tax the payer is compensated in the benefits received from the government in any and all of the ways that a government may benefit society. Thus the individual is compensated for the

158. Jordan v. Hyatt, 3 Barb. 275, 282 (N.Y. Gen. Term 1848).
159. People *ex rel.* Griffin v. Brooklyn, 4 N.Y. 419, 422 (1851).
160. City of St. Charles v. Nolle, 51 Mo. 122, 124 (1872).

> property he parts with, whether it consists of lands or money or other property.[161]

When viewed in this theoretical light, taxes and takings are not merely similar animals, they are "the same, as far as the [government's] power itself goes."[162]

From a doctrinal standpoint, however, taxes and takings generally are compartmentalized and run in very different analytical circles. Although several early courts applied takings principles to limit taxation,[163] several others suggested that the power of taxation largely, if not entirely, exists outside the realm of Takings Clause inquiry. In one of the earliest and most famous explications of the taxing power, Chief Justice Marshall declared that "[t]he only security against [its] abuse ... is found in the structure of the government itself."[164] Sixty years later, the Supreme Court seemingly reaffirmed this proposition, stating that "taxation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution."[165] Subsequent decisions concerning special assessments and tax districts generally reveal a similar, albeit somewhat schizophrenic, position.[166] Likewise, the Court has long upheld progressive income taxes against claims that the taxes were confiscatory, even taxes that burdened as few as 4 percent of the population to pay for widespread government services.[167] Perhaps most telling, the Court also has upheld in-kind

161. Territory v. Daniels, 22 P. 159, 162 (Utah 1889); *accord Griffin*, 4 N.Y. at 422-23.

162. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 571 (1972).

163. *See, e.g.*, Morford v. Unger, 8 Iowa 82, 95 (1859) (holding that taxes levied against land recently annexed into a city were uncompensated taking of property where city services brought no real benefit).

164. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819).

165. County of Mobile v. Kimball, 102 U.S. 691, 703 (1880).

166. *See supra* note 119; *see also* Houck v. Little River Drainage Dist., 239 U.S. 254, 265 (1915) (noting that "there is no requirement of the Federal Constitution that for every payment there must be an equal benefit," and declaring that a special assessment violates the Constitution only where "the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property").

167. *See* Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24-25 (1916). For a discussion of *Brushaber*, including the narrow application of the tax at issue, see Peñalver, *supra* note 123, at 2200-01 & n.80.

taxes, in which the government requires payment in specific property rather than in money.[168]

Courts and commentators of more recent vintage have made similar doctrinal distinctions between takings and taxes, despite the theoretical similarities between them.[169] Under this view, even if police power regulations might amount to an uncompensated taking of property, taxes ordinarily will not unless they are levied in an arbitrary or abusive manner. Thus, classifying development impact fees as taxes conceivably might insulate them from *any* meaningful scrutiny under the Takings Clause, much less the heightened scrutiny of *Nollan/Dolan*. For this reason, in the context of takings challenges, the proper classification of impact fees is of utmost significance to determine the appropriate framework.

B. Fees or Taxes?

Unfortunately, classifying impact fees is no easy task. Although they share characteristics with both of the leading categories of financing mechanisms available to local governments, they fail to fit perfectly into either category. To better understand the conundrum presented by impact fees, it proves helpful to review briefly the distinctive characteristics of these financing options and then to evaluate how impact fees match those characteristics.

When determining how to pay for projects or services, local governments generally can choose between two broad categories:

---

168. *See* Leonard v. Earle, 279 U.S. 392, 396-98 (1929); Lane County v. Oregon, 74 U.S. 71, 77-78 (1868).

169. *See, e.g.*, Rogers Mach., Inc. v. Wash. County, 45 P.3d 966, 971 (Or. Ct. App. 2002) ("Respondents are correct that, generally, the Takings Clause does not apply to taxes."); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 980-81 (2000) ("The implicit understanding has always been that the Takings Clause has no application to legislation that imposes taxes or allocates government spending."). Drawing such distinctions is by no means a universal practice, however. *See* Abram v. City of Avon Lake, 904 N.E.2d 612, 616-18 (Ohio Ct. App. 2008) (noting that levy of special assessment in excess of benefits received by property owner constitutes "unjust taking of private property for public use without compensation," and reversing summary judgment because evidence created fact issue as to excess); Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 190 (2002) ("[T]he notion that taxes are never takings is inconsistent with foundational takings law; the label 'tax' confers no immunity to the principles of the Takings Clause."); Peñalver, *supra* note 123, at 2240-51 (noting similarities and arguing that consensus about taxes should be used as framework to narrow the law of takings).

taxes or fees. A tax may be defined as an all-purpose, revenue-raising measure assessed broadly throughout the taxing jurisdiction to finance any governmental function, regardless of the connection between the charge and the benefits received by the person paying it.[170] Fees, on the other hand, usually are imposed pursuant to the police power on smaller subsets of the taxing population, and they find their justification in the relationship between the payer and the purpose for which the fee is imposed.[171] This category includes a number of different devices, such as user fees, regulatory fees, and special assessments.[172] Regardless of their exact form, fees are characterized by their imposition on persons or groups that consume particular government services, receive special government benefits, or impose unique externalities that the fees are designed to repay.[173] Thus, in simplest terms, what distinguishes a fee from a tax is that,

170. Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 379 (2004); Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 337-40 (2003); *see also* McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (describing tax as "a forced contribution to raise revenue for the maintenance of governmental services offered to the general public" (quoting Executive Aircraft Consulting, Inc. v. City of Newton, 845 P.2d 57, 62 (Kan. 1993))).

171. Reynolds, *supra* note 170, at 380. Professor Reynolds labels these devices "dues," rather than "fees." *Id.*

172. *See id.* at 381; Spitzer, *supra* note 170, at 343-51. User fees are "charges levied by the government in exchange for citizen use of government services or property," Reynolds, *supra* note 170, at 407, and include things like bridge tolls, sewer connection charges, and wastewater management rates. *See* Haw. Insurers Council v. Lingle, 201 P.3d 564, 573 (Haw. 2008). Regulatory fees, on the other hand, "are based more broadly on the government's police powers and are imposed on a regulated individual, entity, property, or business in order to offset the cost of the regulation." Reynolds, *supra* note 170, at 407. These fees traditionally are understood to cover the government's outlays in processing applications, administering licenses and permits, conducting inspections, and similar regulatory activities. *See* Spitzer, *supra* note 170, at 352. Finally, special assessments are charges "imposed on owners of property to finance improvements or services directly benefitting that property." Rogers Mach., Inc. v. Wash. County, 45 P.3d 966, 972 (Or. Ct. App. 2002) (quoting Auto. Club v. State, 840 P.2d 674, 678 (Or. 1992)). Whether special assessments are levied under the taxing power or the police power remains a source of debate. *Compare, e.g.*, *id.* (noting that special assessments traditionally are justified under the police power), *with* Collister v. Kovanda, 199 N.E. 477, 479 (Ohio Ct. App. 1935) (suggesting that special assessments are levied under the taxing authority).

173. Spitzer, *supra* note 170, at 343; *see also McCarthy*, 894 P.2d at 845 (describing fee as "a means of compensating the government for the cost of offering and regulating [a] special service, benefit, or privilege" (quoting *Executive Aircraft*, 845 P.2d at 62)).

with the former, those who pay are entitled to benefit directly from their payment in a way that nonpayers do not.[174]

As suggested, fitting impact fees into this dichotomy proves to be something of a challenge. To begin with, despite their formal appellation, impact fees fail neatly to adhere to several of the legal requirements for a "fee." Although the courts have formulated various tests to determine whether a particular charge qualifies as a fee, a review of the case law reveals several elements that receive frequent mention. Regardless of the type of fee at issue, the charge usually must: (1) be imposed on a person or thing directly benefitting in a special way from, or imposing unique burdens on, the service or project being funded; (2) bear some proportionality to the benefit being provided or the burden being abated; and (3) be used to defray the costs of conferring the benefit or minimizing the harm, rather than for general financing purposes.[175]

Measuring impact fees against these criteria yields mixed results. In fact, it is not clear that impact fees can satisfy even the first standard. Most impact fees are used to pay for improvements to public services and infrastructure, such as roads, schools, water and sewer systems, fire protection, and public safety. Because these improvements keep the system from becoming unduly congested, the fee payer clearly does receive some benefit from updated and expanded infrastructure. But unless use of the new infrastructure is limited to the new development paying for it, similar benefits accrue to all of the other residents in the jurisdiction as well. As such, it often is difficult to conclude with any legitimacy that the

---

174. Reynolds, *supra* note 170, at 382; *see also* Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 135 (Fla. 2000) (requiring that a fee confer special benefit on the payer "in a manner not shared by those not paying the fee" (quoting Collier County v. State, 733 So. 2d 1012, 1019 (Fla. 1999))).

175. *See, e.g.*, *Volusia County*, 760 So. 2d at 135 (general fee); *Haw. Insurers Council*, 201 P.3d at 578 (regulatory fee); State v. Medeiros, 973 P.2d 736, 742 (Haw. 1999) (user fee); Home Builders Ass'n of Greater Des Moines v. City of W. Des Moines, 644 N.W.2d 339, 347-48 (Iowa 2002) (general fee); *McCarthy*, 894 P.2d at 845-46 (general fee); Waters Landing Ltd. P'ship v. Montgomery County, 650 A.2d 712, 723-24 (Md. 1994) (special assessment); Emerson Coll. v. City of Boston, 462 N.E.2d 1098, 1105-06 (Mass. 1984) (general fee); Johnson v. City of Eagan, 584 N.W.2d 770, 771-72 (Minn. 1998) (special assessment); City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44, 55 (Miss. 2006) (regulatory fee); *Rogers Mach.*, 45 P.3d at 972 (special assessment); Covell v. City of Seattle, 905 P.2d 324, 327 (Wash. 1995) (general fee).

new development paying the impact fee is benefitted in a special way that is not enjoyed by nonpayers.[176]

To get around this problem, several courts have sought to uphold impact fees on the basis that new development imposes unique burdens on existing infrastructure, directly resulting in the need for additional facilities and services.[177] Under this theory, only new development need pay the fees because "the facilities would not have to expand but for new development."[178] In my estimation, this theory overstates its case. Although new development almost certainly adds some burden to governmental systems, this theory ignores the complexity underlying the causes for new services and projects.

Professor Reynolds, for example, identifies several other factors that contribute to the need for service and infrastructure improvements, such as deterioration of existing facilities, increases in the community's standard of living, demographic changes, more restrictive construction standards, and changes in resident behavior.[179] Several cases support her conclusion that local governments too often consider only new development without accounting for these other contributors.[180] Thus, whether one looks at benefits or burdens, it is not always apparent that the new development paying the impact fee is specially situated vis-à-vis the remaining community.

Many of these same problems also prevent impact fees, at least as currently configured, from easily satisfying the second criteria: a proportional connection between the charge and the benefits or burdens at issue. Obviously, the difficulty in accurately distinguishing the benefits and burdens attributable to new development makes attempts at proportionality challenging, though not impossi-

176. *See, e.g.*, *Collier County*, 733 So. 2d at 1019 (holding that governmental services fee was invalid because "the services to be funded by the fee are the same general police-power services provided to all County residents"); *Home Builders Ass'n of Greater Des Moines*, 644 N.W.2d at 348-49 (holding that impact fee for neighborhood park could not be justified on basis of special benefits provided to those paying it); *Ocean Springs*, 932 So. 2d at 55-56 (holding that impact fees used for fire protection services, park and recreation purposes, and general municipal services were invalid due to lack of special benefit to those paying fees).

177. *See, e.g.*, Loyola Marymount Univ. v. L.A. Unified Sch. Dist., 53 Cal. Rptr. 2d 424, 429-30 (Cal. Ct. App. 1996); N. Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384, 394 n.3 (Ill. 1995).

178. JUERGENSMEYER & ROBERTS, *supra* note 10, at 353.

179. Reynolds, *supra* note 170, at 395 n.99, 435-36.

180. *See supra* note 110.

ble.[181] Perhaps more troubling is that impact fees often fail to account both for past and future infusions of capital into the system. Where the original facilities were financed through generally applicable taxes or federal grants, but later facilities are financed through impact fees paid only by new development, the cost of financing the overall system falls disproportionately on new development, while existing users receive a disproportionate benefit.[182] This lack of proportionality becomes even greater when one considers that the maintenance of the system probably will be financed via user fees or general taxes, paid by *both* new development and existing residents and used initially to maintain the *older* facilities.[183]

Finally, it often is difficult to determine with confidence whether impact fees really are being used to defray the costs of conferring benefits or abating harms, as opposed to being simple revenue-raising devices. There is no doubt that new development usually imposes costs on local government, both from an administrative and level-of-service standpoint. Thus, to some degree, impact fees do help pay for the costs connected to the regulatory system governing land use. On the other hand, as noted by courts and commentators alike, the services and projects financed by impact fees are the very types of services and projects traditionally financed through general tax revenues.[184] As such, they resemble general revenue-raising measures, a characteristic that traditionally has been considered incompatible with a "fee."[185]

---

181. Note that proportionality is concerned with who uses or causes what improvements. While complex, these figures can be calculated with some degree of confidence, for example, by traffic studies demonstrating how many trips per day are generated by different land uses along different types of roads. This is a separate inquiry from whether new development receives *special* benefits or imposes *special* burdens. Indeed, it may be that the more accurate the proportionality of a fee—the more it takes into account the various users of and causes for public facilities—the less special any single user or cause will appear.

182. *See* Reynolds, *supra* note 170, at 436.

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

184. *See, e.g.*, City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44, 56 (Miss. 2006); Rosenberg, *supra* note 8, at 208.

185. *See, e.g.*, McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) ("'A fee is not a revenue measure.'" (quoting Executive Aircraft Consulting, Inc. v. City of Newton, 845 P.2d 57, 62 (Kan. 1993))); Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 686 (Minn. 1997) ("When it has been apparent that a city's true motivation was to raise revenue ... we have disregarded the fee label ... and held that the charge in question was in fact a tax.").

Thus far, impact fees do not appear to be true "fees," suggesting instead that they are more properly classified as taxes. This conclusion could have great significance for how impact fees fare when challenged under the Takings Clause, and it might very well justify treating impact fees differently than physical exactions or "in lieu" fees. The problem, however, is that impact fees do not neatly fit the legal requirements for a tax either.

To be sure, inasmuch as one of the chief purposes of impact fees is to raise revenue, they resemble taxes.[186] But they often fail to comply with one of the leading limitations on taxation, the "nearly universal state law requirement" that taxes be uniform.[187] The uniformity principle generally requires "that classifications of taxpayers must be reasonable and that treatment of taxpayers within classes must be equal."[188] The same issues that prevent easy classification of impact fees as "fees" create trouble under the uniformity principle as well. To the extent that impact fees are levied against only new development, but pay for improvements that are used by the community at large, it is difficult to say they are applied uniformly.[189] Indeed, this lack of uniformity is tacitly conceded by those asserting that new development is the "but for" cause of the improvements. Additionally, the proportionality problems resulting from the mix of past and future financing also create uniformity problems if the fee is viewed as a tax. As one judge explained in commenting on a transportation impact fee:

> Most of the existing infrastructure in [our] cities and towns was paid for by the city or town. Here, however, [the city] is attempting to force developers to pay for improvements or additions to

186. *See Country Joe*, 560 N.W.2d at 686 (concluding that a road unit connection charge was a tax rather than a fee because it was "a revenue measure"); New Castle Invs. v. City of LaCenter, 989 P.2d 569, 574 (Wash. Ct. App. 1999) (noting that the purpose of a transportation impact fee was "to finance public facilities and system improvements, in other words, to raise revenue").

187. Reynolds, *supra* note 170, at 383; *see also id.* at nn.46-48 (citing authority).

188. *Id.* at 383.

189. *See, e.g.*, Home Builders Ass'n of Cent. N.Y. v. County of Onondaga, 573 N.Y.S.2d 863, 865 (N.Y. Sup. Ct. 1991) (concluding that sewer impact fee was a nonuniform tax); Bldg. Indus. Ass'n of Cleveland v. City of Westlake, 660 N.E.2d 501, 506 (Ohio Ct. App. 1995) (holding that an impact fee used to finance improvements to existing recreational facilities was a nonuniform tax in violation of Equal Protection Clause and state constitution's uniformity clause).

> infrastructure as a *quid pro quo* for developing a site, even when the improvements or additions occur beyond the property lines of the development. This strikes me as a tax, and, since it is not applied uniformly, as an unconstitutional tax.[190]

Some courts have sought to sidestep the uniformity problem by equating impact fees with excise taxes—that is, taxes imposed on a particular occupation, use, privilege, or activity—here, the development of land.[191] Such labeling may work in some jurisdictions, where excise taxes are exempted from the uniformity requirement.[192] But labeling provides little help in jurisdictions where uniformity is required of excise taxes along with other types of taxation.[193] Moreover, the analogy between excise taxes and impact fees is not a perfect fit. Excise taxes traditionally have been calculated based on the amount of business conducted by, or the extent of the privileges conferred on, the taxpayer.[194] Impact fees, on the other hand, are levied ostensibly as compensation for services rendered and, therefore, are calculated based on the cost of additional infrastructure and services purportedly necessitated by new development.[195] A related point of distinction is that excise taxes are purely revenue-raising measures for the benefit of society generally, whereas impact fees usually are justified as police power regulations designed to alleviate societal burdens.[196] Finally, as a

---

190. Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 358-59 (Ohio 2000) (Pfeifer, J., dissenting).

191. *See, e.g.*, Wellington River Hollow, LLC v. King County, 54 P.3d 213, 220-21 (Wash. Ct. App. 2002).

192. *See id.* at 220.

193. *See, e.g.*, Lake Lanier Theatres v. Hall County, 189 S.E.2d 439, 440 (Ga. 1972) (explaining that uniformity principle applies "to subjects of taxation other than property" and requires "that if one kind of business, privilege, franchise, right, etc., is taxed, the tax shall be uniform upon all of those who engage in that business"); Saulsbury v. Bethlehem Steel Co., 196 A.2d 664, 666 (Pa. 1964) (holding that uniformity principle applies to all taxes, including excise taxes).

194. *See, e.g.*, Harbour Vill. Apartments v. City of Mukilteo, 989 P.2d 542, 546-47 (Wash. 1999) (Talmadge, J., dissenting).

195. Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 685 (Minn. 1997).

196. *See* Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches To Resolving America's Major Quality of Life Crisis*, 24 LOY. L.A. L. REV. 915, 933-34 (1991) (distinguishing impact fees and excise taxes); *see also* JUERGENSMEYER & ROBERTS, *supra* note 10, at 353 ("[R]equirements to prohibit negative externalities ... are considered to be regulatory under the police power to protect the public while requirements to create social benefits are seen as taxation to benefit the public.").

taxing measure, excise taxes must be specifically authorized.[197] Impact fees, by contrast, have been upheld in some states without express enabling legislation.[198]

To summarize, impact fees cannot definitively be labeled either "fees" or "taxes." Like fees, they usually are justified pursuant to the government's regulatory authority over land use and seek to recover, in some degree, the costs of providing services to new development. Unlike traditional fees, however, it is difficult to determine whether the payers actually receive any unique benefits or impose any special burdens with which the fees are associated. Similarly, impact fees often have a disproportionate effect in favor of existing residents, and they often pay for general services rather than services directly connected to regulation of the land under development.[199] For this reason, impact fees have a general revenue-raising quality that makes them look like taxes.[200] Unlike most taxes, however, they are not applied uniformly and are not usually justified under the jurisdiction's taxing authority. In short, impact fees possess characteristics of both a fee and a tax and, thus, have a "hybrid quality" suggestive of both devices.[201]

IV. Articulating the Appropriate Test

The foregoing discussions demonstrate why takings challenges to development impact fees pose analytical difficulties. On the one hand, as monetary exactions, impact fees do not fit as neatly within the Supreme Court's doctrinal pronouncements about regulatory takings—specifically, those related to the "functional equivalence" standard and the doctrine of unconstitutional conditions—as do physical dedications. Likewise, because they involve money, impact fees look different than regulatory actions that directly affect land and its favored status in the law. At the same time, however, impact

197. *See, e.g.*, Home Builders Ass'n of Greater Des Moines v. City of W. Des Moines, 644 N.W.2d 339, 347 (Iowa 2002).

198. *See, e.g.*, Hollywood, Inc. v. Broward County, 431 So. 2d 606, 609-10 (Fla. Dist. Ct. App. 1983) (holding impact fees implicitly authorized under county's home rule authority); Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 353 (Ohio 2000) (holding impact fees implicitly authorized under city's home rule authority).

199. *See* Reynolds, *supra* note 170, at 437.

200. *See supra* notes 170-71 and accompanying text.

201. Rogers Mach., Inc. v. Wash. County, 45 P.3d 966, 972 (Or. Ct. App. 2002).

fees are undeniably linked to the use of real property, and they pose many of the same risks of leveraging and improper burden distribution as do physical exactions. In addition to these tensions, impact fees avoid easy classification from a financing standpoint, sharing characteristics with both regulatory fees and taxes but not fitting either category with precision. Impact fees thus occupy a space at the theoretical and doctrinal crossroads of several different areas of law. They are hybrid animals that do not quite comport with the existing legal taxonomies.

For this reason, it may be best not to pigeonhole the analysis of impact fees into either of the formal frameworks established in the Court's takings jurisprudence. Because impact fees are hybrid animals, a hybrid analysis may be more appropriate. Therefore, at the risk of adding to the regulatory takings muddle, I propose that takings challenges to impact fees be analyzed under a framework that combines the factor-balancing of *Penn Central* with the nexus and proportionality standards of *Nollan*/*Dolan*.

A. Benefits of a Hybrid Approach

Before discussing the particulars of this hybrid framework, it might prove useful to examine its benefits. As an initial matter, this proposal helps to preserve *Lingle*'s doctrinal focus on "functional equivalence" and unconstitutional conditions. The analytical frameworks established by *Lingle* and its forerunners seek to identify those regulatory actions that are functionally equivalent to a direct appropriation of property by the government.[202] Primarily, that identification is based upon the effects the challenged regulation has on the owner's core property rights.[203] The two categorical examples of regulatory takings staked out by *Lingle*—that is, permanent physical invasions and total economic deprivations—receive such categorical treatment precisely because they impose severe consequences on these rights.[204] Because both *Nollan* and *Dolan* involved a regulatory demand for a permanent easement, the exactions analysis established by those cases can be viewed in the same light.

---

202. *See supra* notes 31, 84 and accompanying text.
203. *See supra* notes 31, 85 and accompanying text.
204. *See* Kent, *supra* note 28, at 89-92.

When the government fails to show that the required dedication satisfies the requirements of nexus and proportionality, we are left with a garden-variety occupation of property that categorically amounts to a taking because it operates on the owner's core rights in the same manner as does a direct appropriation.[205] For this reason, a governmental demand of this type necessarily entitles the owner to just compensation, and he may not be required to give up his entitlement simply to obtain discretionary approval for a land use project. Thus, when confined to the physical exactions at issue in those cases, the *Nollan*/*Dolan* framework fits within *Lingle*'s doctrinal pronouncements.

The same cannot be said with regard to impact fees, however. Impact fees do not require a permanent physical occupation of land, nor do they normally result in a total economic deprivation of the parcel under development. Therefore, unlike the exactions at issue in *Nollan* and *Dolan*, impact fees cannot automatically be viewed as categorical takings even absent nexus and proportionality. Nor can it be presumed that the landowner having to pay an impact fee necessarily is entitled to just compensation without nexus and proportionality being satisfied. Accordingly, applying the full *Nollan*/*Dolan* framework to impact fees would undermine some of the doctrinal consistency achieved by *Lingle*. In short, impact fees do not clearly qualify as takings in the same way as do physical exactions or total deprivations, and therefore, they need to be evaluated by how closely they resemble those two categories of regulatory action. Under *Lingle*, such an inquiry is determined not by the heightened scrutiny of *Nollan*/*Dolan* but by the balancing test established in *Penn Central*.[206]

Nonetheless, the more deferential *Penn Central* approach, at least as explained by the Court so far, does not adequately consider the dangers of improper leveraging and burden distribution that arise in the exaction context. Thus, a second advantage of a hybrid analysis—that is, one that incorporates nexus and proportionality into the balancing—is to guard property owners from the very dangers with which the Court was concerned in *Nollan* and *Dolan*.

---

205. *See* Dolan v. City of Tigard, 512 U.S. 374, 387 (1994) ("The absence of a nexus ... converted a valid regulation of land use into 'an out-and-out plan of extortion.'" (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987))).

206. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538-39 (2005).

Because these dangers might exist regardless of whether the government is demanding land or money, a hybrid framework better comports with the theoretical bases underlying *Nollan* and *Dolan* than does the *Penn Central* approach by itself.

Third, a hybrid framework better accounts for the complex nature of impact fees as a municipal financing mechanism. To the extent that impact fees resemble true regulatory fees enacted pursuant to the government's police power, they should be subjected to takings scrutiny in similar fashion to other police power regulations. This includes evaluation of nexus and proportionality, which the Court designed to ferret out improper leveraging and burden distribution in the context of land use exactions. On the other hand, to the extent they resemble general revenue taxation, it seems doctrinally fitting that impact fees receive a lower level of scrutiny than that established by *Nollan*/*Dolan*.

Finally, a framework that blends the factor-balancing of *Penn Central* with the nexus and proportionality considerations of *Nollan*/*Dolan* has the advantage of relying on established and familiar, if not entirely clear,[207] concepts. In this way, the progress made by *Lingle* toward establishing some clarity and consistency in the Court's takings jurisprudence might be preserved. This is not to say that the Court's current view of takings is completely without problems, and, admittedly, whether retention of the current concepts amounts to a virtue rests to some degree in the eye of the beholder. Takings law may well be in need of a complete overhaul. The Court's own struggles in this area, however, suggest that any such undertaking be conducted with the greatest of prudence. Moreover, for better or worse, the *Lingle* Court unanimously upheld the existing concepts, and they are known, if not completely comprehended, by practitioners and lower court judges.[208] For these reasons, in an area of the law that has seen more than its share of volatility over the past three decades, I believe that preservation of the concepts approved in *Lingle* may be the better part of valor, for the time being.

207. The Court itself has acknowledged that the *Penn Central* factors, for example, have "given rise to vexing subsidiary questions." *Id.* at 539. As intimated below, the Court has yet to provide clear answers to some of these questions. *See infra* note 213.

208. *See supra* notes 5-6.

B. Mechanics of a Hybrid Approach

Having explained some of the benefits of a hybrid analysis, we can turn our attention toward the mechanics of how this analysis might work. The foundation of this approach is the *Penn Central* factors.[209] Despite conventional wisdom, I understand *Penn Central* as establishing two, rather than three, factors for consideration. The first factor examines the regulation's economic impact on the party bringing the takings challenge, and this impact is measured in some degree by "the extent to which the regulation has interfered with [that party's] distinct investment-backed expectations."[210] Elsewhere, I have explained my belief that this factor seeks to evaluate the severity of the economic harm suffered by the property owner in light of her own subjective circumstances vis-à-vis the property in question, as well as the objective reasonableness of the remaining value of the parcel after regulation, especially the ability to turn a reasonable profit.[211] When analyzing takings challenges to impact fees, I see no reason why this factor should operate any differently. Thus, the more substantial the harm suffered by the property owner in paying the fee, considering both the unique characteristics of her particular investment and the objective consequence of the fee on value and profits, the more an impact fee will look like a taking of property. Conversely, the slighter the economic impact, so measured, the more this factor will favor the government.

Balanced alongside the economic impact of the fee is "the 'character of the governmental action'"[212]—that is, the nature of the impact fee being imposed on the property owner. It is here that my proposal produces a slight change in the way the balancing works. As currently explained by the Court, I believe that the character factor normally seeks to determine how similar the regulation is in its effects to a physical invasion or occupation of property by the

209. This assumes, of course, what has been stated already—that is, that the impact fee being challenged neither requires a permanent physical invasion nor results in a total economic deprivation. Because most impact fees will not trigger either of those categories, *Penn Central* would form the heart of the analysis under the standard framework discussed earlier in this article. *See supra* notes 33-40 and accompanying text.

210. *See Lingle*, 544 U.S. at 539 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (internal quotation marks omitted)).

211. *See* Kent, *supra* note 28, at 97-99.

212. *See Lingle*, 544 U.S. at 539 (quoting *Penn Cent.*, 438 U.S. at 124).

government.[213] When analyzing a takings challenge to impact fees, however, I think the character factor should focus chiefly on the similarities of the fee to the physical exactions at issue in *Nollan* and *Dolan*. Given that both physical and monetary exactions present a unique danger of improper leveraging and burden distribution, these dangers are the issues the analysis primarily should seek to address.

In the context of impact fees, then, the character factor of *Penn Central* should concentrate on the nexus and proportionality standards established by the Court's exaction cases. Thus, the inquiry would evaluate whether an "essential nexus" exists between the impact fee and the stated interests used by the government to justify that fee.[214] As with *Nollan/Dolan*, the legitimacy or reasonableness of the interest advanced by the government should be assumed.[215] Additionally, this inquiry would include consideration of whether the fee charged is proportional to the impact of the proposed development on whatever projects or services the government desires to protect or promote via the fee.[216] Given the foregoing discussion about proportionality,[217] this consideration ideally should include evaluation of who uses the services or infrastructure financed by the fee, what caused the need for additional or improved services or infrastructure, and how the services and infrastructure were or will be financed and maintained both historically and in the future. In short, the smaller the logical connection between the impact fee and the stated interest, or the less proportional the fee to the putative impact of the proposed development project, the closer the fee will come to qualifying as a taking. The greater the connection and the more proportional the fee, the more this factor will favor a conclusion that no taking has occurred.

Another issue that must be addressed is which party bears the burden of proof with regard to these factors. Under the usual *Penn Central* balancing test, the burden of showing that the regulation

213. *See* Kent, *supra* note 28, at 99-100. Admittedly, this interpretation is not entirely clear from the Court's cases. *See id.* at 100-01 (mentioning other views and concluding that the character factor "remains one of the more difficult issues of takings analysis").

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

215. *See supra* notes 41-43 and accompanying text.

216. *See* Dolan v. City of Tigard, 512 U.S. 374, 389-90 (1994).

217. *See supra* notes 181-83 and accompanying text.

results in a taking of property rests on the party challenging the regulation.[218] Under *Nollan/Dolan*, by contrast, the government imposing the exaction bears the burden of demonstrating that the exaction comports with the requirements of nexus and proportionality.[219] When portions of the two frameworks are combined, the question becomes whether to place the burden on the government or the challenger.

In keeping with *Lingle*'s emphasis on "functional equivalence," I think the better answer is to place the burden ultimately on the party bringing the challenge. Shifting the burden to the government makes sense when the regulatory action being challenged is a physical occupation of property, like the easements at issue in *Nollan* and *Dolan*. Because such action normally would qualify as a categorical taking, it is reasonable to demand that the government prove why no compensation should be in the offing.[220] In the context of physical exactions, that is the effect of the nexus and proportionality requirements. They can be thought of as establishing a sort of safe harbor by which the government might avoid compensation for an otherwise compensable taking. Because an impact fee normally will not trigger such categorical treatment, however, the *Nollan/Dolan* justification for shifting the burden does not exist. In sum, the two circumstances present markedly different default positions in relation to the regulations at issue. A physical dedication of land in and of itself qualifies as a taking; whether the same is true for an impact fee ultimately depends on the results of ad hoc balancing. While the government justifiably bears the burden in the former situation, in the latter, it should enjoy the ordinary position of being able to demand that the party alleging a taking actually prove its case.

218. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 522-24 (1998) (plurality opinion) (applying *Penn Central* and stating that "a party challenging governmental action as an unconstitutional taking bears a substantial burden").

219. *See, e.g.*, *Dolan*, 512 U.S. at 391 (placing burden on city to "make some sort of individualized determination that the [exaction] is related both in nature and extent to the impact of the proposed development").

220. *Cf. id.* at 391 n.8 ("[I]n evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here ... the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city." (citations omitted)).

Finally, it is useful to consider how the challenger might validly attempt to prove a taking, especially with regard to the character factor.[221] I think that this might be done in at least two ways. First, the party challenging an impact fee might demonstrate outright the absence of nexus and proportionality by producing his own evidence in relation to these issues. The more that nexus and proportionality are lacking, the more the balancing test should favor the property owner.[222] Therefore, affirmative evidence showing that nexus and proportionality are lacking will provide the strongest case that the fee qualifies as a taking.

Alternatively, because much of the data required for this inquiry often will need to be developed contemporaneously with the establishment of the fee, a challenger might proceed by demonstrating that the government failed to produce or consider any evidence of nexus or proportionality at the time the fee was imposed. Demonstrating that the government failed to take these issues into consideration, while not dispositive, ordinarily should weigh against the government to the extent it increases the inference of improper leveraging and burden distribution. Where the challenger is successful in this regard, the government should be afforded the opportunity to put on evidence that the fees charged in fact do bear a connection to the government's stated interest and are proportional to the development project under review.

It should be noted, however, that no adverse conclusion or presumption *necessarily* follows even where the government cannot show that these standards are satisfied. While a failure of the impact fee to meet the nexus and proportionality requirements should weigh strongly against the government, and an absence of evidence about these requirements in the government's own proceedings ordinarily will raise suspicion that the government acted improperly, it must be remembered that the hybrid approach utilizes the balancing test of *Penn Central*.[223] For this reason, the ultimate determination of whether a taking has occurred must depend on the totality of the circumstances, with each prong

221. As noted earlier, I believe the economic impact factor should proceed more or less the same way in impact fee cases as it does in all other challenges analyzed under *Penn Central*. *See supra* notes 209-11 and accompanying text.

222. *See supra* notes 181-83 and accompanying text.

223. *See supra* note 209 and accompanying text.

informing the other. A fee that satisfies the nexus and proportionality requirements should more easily withstand a takings challenge, even though it results in a rather considerable impact on the fee payer. Conversely, a fee not satisfying these requirements should be more suspect, even though its economic impact is less significant. But in either situation, both prongs must be viewed together.

C. Applications of a Hybrid Approach

It remains to demonstrate how the hybrid approach might apply to some basic factual situations. Because transportation impact fees are among the most prevalent type treated in the case law,[224] they provide a useful context in which to accomplish such an undertaking. Accordingly, this Section applies the hybrid approach to three scenarios involving the imposition of transportation impact fees on the development of a hypothetical 200-unit residential subdivision.

Before jumping into the analysis, however, it should be noted that the economic evaluation of these scenarios has been simplified by a few basic assumptions. First, in each scenario, I assume that the fee payer will be able to satisfy its obligation in cash, without the need for borrowing the fee amount. This assumption precludes the need to calculate the economic effect of interest or to consider the various types of financing mechanisms that might be used by a fee payer. In real litigation, of course, these facts would vary from case to case and would need to be taken into account inasmuch as they help reveal the economic effect on, and investment-backed expectations of, the payer.

Second, I have not included any figure for the lost time value of money paid by the fee payer. Because impact fees normally are paid at the beginning stages of development,[225] a developer who paid the fee out of pocket would forego the use of that money until it might be recouped through sales of the constructed units. Thus, depending on the circumstances, the issue of lost time value might be of

---

224. *See generally* Jack Estill, Benjamin Powell & Edward Stringham, *Taxing Development: The Law and Economics of Traffic Impact Fees*, 16 B.U. PUB. INT. L.J. 1, 16-17 (2006) (discussing the increased use of transportation impact fees).

225. *See* PLANNING & RESEARCH, INC., DEVELOPMENT IMPACT FEES, BEST PRACTICES PAPER NO. 3, at 17 (2002), http://www.mag.maricopa.gov/pdf/cms.resource/Development-Impact-Fees.pdf.

particular importance and would also need to be considered in real cases.

Third, and related to the issue of time value, I have assumed that the land developer paying the fee does not pass the associated costs on to third parties. Depending on a number of variables, the developer possibly could pass the fee "forward" to the homebuyer in the form of an increased sales price or "backward" to the seller of the raw land in the form of a decreased purchase price. The actual ability of a developer to pass on the costs of impact fees is debated[226] and would be a significant issue in actual litigation.

Finally, I have set each hypothetical scenario to occur in 2008, so as to make easier the dollar-for-dollar comparisons of the different impact fee regimes. Additionally, to determine the effect that each hypothetical fee would have on the payer's profits, I have assumed a per-home construction cost of $265,376.65[227] and a per-home sales price of $292,600.00.[228] I also assume that each housing unit included in the hypothetical development plan will be built and sold at these prices. Again, in actual cases, these numbers will vary greatly and should be accounted for. Moreover, because I assume that each proposed housing unit will be constructed and sold, I have avoided the need to determine what effect the impact fees may have on the developer's ability actually to build the project as planned. Because impact fees usually are assessed prior to construction,[229] however, they may in some cases preclude or significantly limit the development plan for which approval is sought. These consequences, too, where present, will affect the payer's expectations and should be taken into account.

---

226. *Compare* Nelson, *supra* note 8, at 553 (opining that, in a competitive housing market, "land developers and builders will pay impact fees out of their profit"), *with* Rosenberg, *supra* note 8, at 214 (suggesting that, in a competitive housing market, fees are shifted and "do not impose any burden on the land developer").

227. I arrived at this number based on available information about the national average cost of construction for a single family residence in early 2006, which was $105.35 per square foot. *See* Christina Almeida, *Subdivision Builders Try Life in the Big City*, SEATTLE TIMES, Jan. 29, 2006, at G1. Assuming this number remained constant through 2008, I then multiplied it by the 2008 average square footage for a new single family home, as reported by the United States Census Bureau—that is, 2519 square feet. *See* U.S. CENSUS BUREAU, HIGHLIGHTS OF ANNUAL 2008 CHARACTERISTICS OF NEW HOUSING, http://www.census.gov/const/www/highanncharac2008.html (last visited Feb. 16, 2010).

228. *See* U.S. CENSUS BUREAU, *supra* note 227.

229. *See* PLANNING & RESEARCH, INC., *supra* note 225, at 17.

1. Scenario One—Both Factors Favor the Government

In 2008, Developer, Inc. sought approval for a 200-home subdivision located within the municipal limits of City.[230] The land sought to be developed lay within a certain area along Highway 150, which City's development code defines as the "150 Corridor." After public hearings on Developer's application, City's governing authority approved the development plan subject to Developer's paying $74,716.00 in impact fees prior to receiving any building permits.

The fees were required by a City ordinance, enacted prior to Developer's application, that conditioned the issuance of any building permit for parcels located within the 150 Corridor on payment of the fees. Pursuant to the ordinance, all fees paid must be set aside for improving public roadways within the 150 Corridor. The ordinance contained a legislative finding, based on professional estimates, that new development in the 150 Corridor was expected to generate approximately 40 percent of the trips made across the improved roadways. An additional finding stated that, if all property within the 150 Corridor were developed to its highest potential, the impact fees associated with that development would pay only 30 percent of the total improvement cost.

In conjunction with the fee ordinance, City also adopted a fee schedule showing how to calculate the fee owed by each new development project. The figures listed in the schedule were categorized according to the type of land use being developed, the square footage of the structures being built, and the number of trips per day that each use and structure could be expected to generate according to professional traffic engineering manuals. Based on these variables, the schedule estimated that the average single family residence would generate approximately ten trips per day, with each trip imposing a cost equal to $37.358 on the roadways within the 150

230. This scenario is based on the impact fee at issue in *McCarthy v. City of Leawood*, 894 P.2d 836, 837-38 (Kan. 1995). The fee amount stated in that case, which I assume was in effect when the case was decided in 1995, was $264.50 per residential unit. *Id.* at 838. This amount has been converted to 2008 dollars by dividing it by a consumer price index conversion factor of 0.708. *See* ROBERT SAHR, CONSUMER PRICE INDEX (CPI) CONVERSION FACTORS 1774 TO ESTIMATED 2019 TO CONVERT TO DOLLARS OF 2008 (2009), http://oregonstate.edu/cla/polisci/faculty-research/sahr/cv2008.pdf. Thus, in 2008 dollars, the per unit fee would be approximately $373.58 ($264.50 / 0.708 = $373.58), and the total fee for the hypothetical subdivision would be $74,716.00 ($373.58 x 200 homes = $74,716.00).

Corridor. Accordingly, the schedule imposed a fee of $373.58 on each new single family residence constructed within the 150 Corridor. The amount imposed on Developer was arrived at by multiplying this figure by the 200 single family homes included in its development plan. Developer paid the fee under protest and subsequently sued City, alleging that the fee amounted to a taking of its property.

Analyzing this scenario under the hybrid approach proposed above,[231] it is difficult to find that this impact fee effects a taking. First, keeping in mind the assumptions stated earlier, the economic impact of the fee seems relatively minor, from both an objective and a subjective standpoint. At a construction cost of $265,376.65 and a sale price of $292,600.00 per home, without the impact fee Developer expected to realize a profit of $27,223.35 per home, or a total profit of $5,444,670.00 for all 200 homes. The impact fee reduces Developer's per-home profit to $26,849.77 and overall profit to $5,369,954.00, a decrease of approximately 1.5 percent. Thus, even with the fee, Developer will be able to turn an objectively reasonable profit in keeping with its own subjective expectations for the property. For this reason, the first factor weighs against Developer's takings claim and in favor of the government.

The second factor likewise favors the government. As an initial matter, the fee obviously bears a nexus to the government's stated interest in improving public roads within the 150 Corridor. Because all of the revenue generated by the fee regime will be spent on improving roads within that same geographical area, a logical connection exists between the fee and the interest the government seeks to promote.

Similarly, the fee seems roughly proportional to the impact the proposed subdivision will have on the public roads in the 150 Corridor. Although City did not consider the actual impact of the subdivision on each particular roadway to be improved, the fee nonetheless was based on some individualized quantifications. The amount of the fee, for example, was based on the residential nature of the proposed subdivision, professional estimates of the probable impact each home would have on the public roadways taken as a whole, and the number of homes to be constructed. Moreover, although there is room for improvement, the fee demonstrates some

231. *See supra* Part IV.B.

understanding of who is expected to use the improved roads and then assesses the costs of improvements roughly in corresponding measure. Remembering that the Supreme Court does not require a "precise mathematical calculation,"[232] and given the minor economic impact of the fee, nothing more should be required on these facts.

2. Scenario Two—Both Factors Favor the Challenger

Frustrated by the turn of events in City, Developer then sought to build the same 200-home subdivision in nearby Village.[233] Developer's new proposed plan situated the subdivision along a major thoroughfare called Valley Road. Although the governing authority of Village granted approval for the subdivision, that approval was conditioned on the payment of $22,598.87 per home, for a total impact fee of $4,519,774.00.

As in City, the impact fee was imposed pursuant to a previously enacted ordinance, which required that the fee be paid into a separate account to be used solely for improvements to Valley Road. The ordinance divided Valley Road into several segments, and the fee was to be imposed along each segment only after traffic congestion in that segment exceeded a specified threshold. Developer's planned project would adjoin Segment Seven, the threshold for which was already exceeded due to existing traffic and other approved but not yet constructed projects at the time Developer filed its application. Developer's project, however, was the first project along Segment Seven against which the fee was assessed. The fee

---

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

233. This scenario is loosely based on the impact fee discussed in *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 104 Cal. Rptr. 2d 326 (Cal. Ct. App. 2001). The fee in that case was adopted in 1995 and amounted to $16,000.00 per unit. *See id.* at 353. As before, this amount has been converted to 2008 dollars by dividing it by a consumer price index conversion factor of 0.708 using the formulas developed by Professor Sahr. *See* SAHR, *supra* note 230. Thus, in 2008 dollars, the per unit fee would amount to approximately $22,598.87 ($16,000 / 0.708 = $22,598.87), and the total fee for the hypothetical subdivision would be $4,519,774.00 ($22,598.87 x 200 homes = $4,519,774.00). Although I do not have the specific data, I am aware that single family residences in Monterey County, California during the mid- to late-1990s generally sold at prices well above the national average. Moreover, I understand that using national average cost and price figures in this hypothetical could tend to make the economic impact of the fee much larger than it was in the actual case. This hypothetical, however, is just that—a hypothetical—and is not intended to reflect the exact economic conditions of the case on which it is based.

amount was calculated by estimating the entire cost for all improvements along Segment Seven and then dividing that number by Developer's 200 units.

Developer filed a declaratory judgment action, seeking a declaration that the impact fees would constitute an unconstitutional taking of its property. Under the hybrid approach, Developer has a much better claim against Village than it had against City. First, the economic impact of this fee regime is draconian. As before, Developer's expected profit without the fee was $27,223.35 per home or $5,444,670.00 for the entire subdivision. The fee imposed by Village reduces that profit to just $4,624.48 per home, or an overall profit of $924,896.00, a decrease of approximately 83 percent. Such a drastic reduction certainly disregards Developer's subjective expectations for the property, and, given that Developer's plan was based on national averages, it raises serious doubts that the profit left to Developer is objectively reasonable. In sum, the economic impact of the fee is substantial, and the first factor strongly suggests that a taking has occurred.

Similarly, the fee fails to make a strong showing under the second factor. As with the impact fee in Scenario One, there is a nexus between the fee here—used to fund improvements along Segment Seven of Valley Road—and the government's stated interest in adopting the fee—to construct improvements along various portions of Valley Road as the need arose. But this fee is utterly lacking in proportionality. First, despite the fact that the specified threshold was already exceeded by existing and anticipated traffic, the entire cost of improvements was assessed against one development project without any consideration of these other users and causes. More damning, however, is the complete lack of evidence as to the impact of the subdivision on the portion of the road in question. Unlike the previous impact fee adopted by City, this fee was calculated without any seeming consideration for the nature of the development or the trips per day that it could be expected to generate. Rather, the fee amount was based entirely on the costs of constructing the improvements. The only "individualized quantification" was dividing that number by the number of units Developer chose to build. On these facts, with a severe economic impact and a complete absence of proportionality, Developer would have a good case that a taking had occurred.

3. Scenario Three—One Factor Favors Each Side

The first two scenarios presented fairly easy cases on the extremes. Scenario One involved a fee producing a minor economic impact that was more or less proportional to the development project against which it was assessed. Scenario Two, by contrast, involved a fee that resulted in drastic losses to the payer and that made no real attempt at proportionality whatsoever. Most cases, however, will likely fall somewhere in the middle of these two scenarios, and such a case is presented by my final hypothetical.

A few months after its successful lawsuit against Village, Developer decided to build the same 200-home subdivision in another nearby municipality, known as Town. As in the other two locations, Town's governing authority approved the proposed development plan subject to Developer paying a fee of $780,202.00.[234] The fee was imposed pursuant to the local development code, which required that all substandard local and collector streets abutting new subdivisions be reconstructed by the subdivision developer at no cost to Town. The term "substandard" was not defined in the development code.

The amount of the fee, which came to $3,901.01 per home, was calculated based on the cost of rebuilding Simmons Road, an asphalt road abutting the proposed subdivision, with concrete. Developer requested relief from the fee requirement on two grounds. First, Developer pointed out that Simmons Road was not currently in disrepair, a fact that Town conceded. Developer argued that this completely negated the need for any reconstruction. Second, Developer's own traffic studies indicated that the subdivision would

234. This scenario is based on the fee at issue in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 623-24 (Tex. 2004). The fee, which was paid in 1998, *see* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 71 S.W.3d 18, 25 (Tex. App. 2002), totaled $484,303.79 and was assessed against two phases of a three-phase development containing 247 homes. *See Town of Flower Mound*, 135 S.W.3d at 623-24. Because the phases were "roughly equal," *id.* at 623, the two phases subject to the fee would have contained approximately 164 homes (247 homes / 3 phases = 82.333 homes per phase x 2 phases = 164.666). Thus, the per unit fee would have been roughly $2,953.07 ($484,303.79 / 164 = $2,953.07). This amount has been converted into 2008 dollars by dividing it by a consumer price index conversion factor of 0.757. *See* SAHR, *supra* note 230. Thus, in 2008 dollars, the per unit fee would amount to approximately $3,901.01 ($2,953.07 / 0.757 = $3,901.01), and the total fee for the hypothetical subdivision would be $780,202.00 ($3,901.01 x 200 homes = $780,202.00).

increase traffic on Simmons Road by only 18 percent. Accordingly, Developer maintained that, even assuming the reconstruction was needed, Developer should not have to bear the entire cost. Town produced no traffic data of its own, but it nonetheless denied the request for relief. Developer then filed suit, asserting that the conditional approval amounted to a taking of its property.

As suggested, this scenario presents a harder case under the hybrid approach than either of the foregoing situations. As an initial matter, it is difficult to say whether the economic impact of the fee, standing alone, should be considered substantial. Once again, without the fee, Developer expects to realize a profit of $27,223.35 per home, or $5,444,670.00 for the entire subdivision. Paying the fee results in a profit of $23,322.34 per home, or $4,664,468.00 for the subdivision. Thus, the fee reduces the expected profit by approximately 15 percent. While this certainly is not an insignificant amount, it does leave Developer a respectable profit that is not exceedingly removed from its own designs. Moreover, in contexts not involving exactions, the conventional wisdom seems to be that the economic impact factor contemplates a much larger diminution than would be present here.[235]

As stated above, however, the magnitude of the economic impact must be informed to some extent by the degree to which nexus and proportionality are present.[236] Because exactions present a unique opportunity for the government to impose general costs on only one class of land development, the absence of these requirements raises serious questions about the character of the government's action.[237] When the government leverages its regulatory powers to require disproportionate funding of general municipal services, then a fee that produces even a relatively slight economic impact looks much more insidious.[238]

This scenario presents a useful example. To begin with, it is not clear that the fee bears the required nexus to the government's stated interest. The legislation imposing the fee ostensibly was

---

235. *See* Kent, *supra* note 28, at 97 & n.190 (indicating that the "functional equivalence" standard suggests a need for "near-absolute reduction in value" and listing other commentators who think similarly).

236. *See supra* Part IV.B.

237. *See supra* Part IV.B.

238. *See supra* Part IV.B.

designed to alleviate the problems caused by development abutting "substandard" roads. But the legislation contains no criteria for labeling any particular road as "substandard," and the road at issue here admittedly is not in disrepair. Thus, as in *Nollan*,[239] the fee being exacted looks more like a plan of extortion by which to garner free favors for the public than a police power regulation designed to remedy a real land use problem.

Furthermore, the fee seemingly was imposed without any consideration of the impact the subdivision might have on Simmons Road. The only evidence of an impact indicated that the subdivision would increase traffic by 18 percent. Town produced no studies showing that this increase would require any repairs to the road at all, much less that it would require the demolition of the existing asphalt road and reconstruction in concrete. Nor did Town offer any justification for placing 100 percent of the reconstruction costs at the feet of a subdivision causing at most 18 percent of the need.

Viewing the economic impact together with the lack of nexus and proportionality, this impact fee probably amounts to a taking under the hybrid analysis. Because improper leveraging appears to be at play here, the economic impact is sufficiently significant to trigger a taking, even though the same 15 percent reduction may not be sufficient on different facts.

CONCLUSION

Development impact fees present a flexible and attractive financing mechanism for local governments, and all signs suggest that their use will continue to increase.[240] With this increase, it is reasonable to expect that the number of legal challenges will grow as well, especially those based on the Takings Clause. Unfortunately, analyzing takings challenges to impact fees has proved to be particularly problematic, in large part because impact fees do not fit neatly within existing legal paradigms. Rather, they must be viewed as hybrid animals that occupy a space at the theoretical and doctrinal crossroads of takings jurisprudence,

239. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841 (1987).

240. *See* GORDON SHUFORD & RICHARD YOUNG, A REPORT ON LOCAL GOVERNMENT FUNDING: AN OVERVIEW OF NATIONAL ISSUES AND TRENDS 37 (2000), http://www.strom.clemson.edu/teams/ced/lgp-reports/Trends.pdf.

property law, and the rules applicable to local government financing. Any framework used to analyze takings challenges to impact fees must take this hybrid quality into account.

Accordingly, this Article proposes that such challenges be analyzed under a hybrid framework that combines the factor-balancing of *Penn Central* with the nexus and proportionality requirements of *Nollan/Dolan*. Such an approach avoids formalistic, bright-line distinctions, accounts for both the differences and similarities between physical and monetary exactions, protects property owners against the unique dangers posed by exactions of either type, and recognizes the complexity of impact fees as a municipal financing mechanism. Equally important, the hybrid approach comports with the Supreme Court's recent emphases on "functional equivalence" and "unconstitutional conditions,"[241] helping to preserve the progress toward clarity and consistency made by the Court in *Lingle*.

In addition to the hybrid framework, however, the foregoing discussions suggest a few larger implications. First, the problem of impact fees raises questions concerning the appropriate understanding of "property" for purposes of the Takings Clause: How broadly should we define the "property" that can be taken by government action? If limitations should be imposed on the meaning of "property," where should we draw the line? Should land enjoy a favored status in the law of takings, or should all types of "property," however defined, be treated more or less equally? How should we treat monetary obligations? Although this Article has made some attempt to answer these questions in the unique context of impact fees, more work by courts and scholars on these issues would go a long way to clarifying our understanding of what constitutes a regulatory taking in the first instance.

Very much related to these questions is the general doctrinal separation between taxes and takings. To what extent is this dichotomy sound and to what extent should it continue? Is there a good explanation of the difference between a tax and a taking, and how might courts go about determining that difference in real cases? If no secure basis exists for drawing the distinction, then how, if at all, should the law adapt? Some scholars indeed have begun tackling

241. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539, 547 (2005).

the relationship between taxes and takings, but more work is needed here as well.

Finally, at the very least, the problem of impact fees demonstrates that the law of regulatory takings continues to require refinement, even after the progress made by *Lingle*. If I am correct that *Lingle* places functional equivalence, burden distribution, and unconstitutional conditions at the heart of the takings inquiry, then how do those doctrines apply to the various types of property that conceivably might be taken? How, precisely, do those doctrines relate to one another? Is it possible to develop a single theory of takings that yields a coherent picture of these doctrines, their interrelationship, and the rules of decision that flow from them? Admittedly, I believe that *Lingle* helped to clarify the law of regulatory takings immensely. But the problem of impact fees leaves one asking to what extent more clarity might be provided.