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Takings Challenges to Development Impact Fees

Andrew W. Schwartz*
Deputy City Attorney
San Francisco, California

*The views expressed in this paper are those of the author and not necessarily those of the City Attorney of the City and County of San Francisco.

INTRODUCTION

Government agencies commonly assess impact fees to mitigate the harmful effects of development projects and to fund public services demanded by the developments. Similar to other police power legislation, these fees have traditionally been subject to deferential judicial review. Since the United States Supreme Court introduced a means-ends test to regulatory takings in *Agins v. City of Tiburon*,[1] *Nollan v. California Coastal Commission*[2] and *Dolan v. City of Tigard*,[3] however, impact fees have been challenged as takings, with mixed success. This paper discusses the history of takings challenges to impact fees and three significant developments in the law: (1) the federal rule that the Taking Clause does not apply to fees; (2) the majority rule in the states that deferential judicial review applies to legislative fees under the Takings Clause; and (3) the split in the lower courts as to whether heightened review is limited to exactions – permit approvals conditioned on the dedication of a possessory interest in land – or applies to fees as well.

I. THE FEDERAL RULE: THE TAKINGS CLAUSE DOES NOT APPLY TO GOVERNMENTAL FEES.

The Takings Clause of the United States Constitution does not apply to fees or other obligations to pay money. In *Eastern Enterprises v. Apfel*,[4] a plurality of four justices found that a statute requiring coal mining companies to fund the health benefit plans of their former employees was a taking, applying the three *Penn Central* factors.[5] Justice Kennedy, however, concurring in the judgment, concluded that the legislation did not effect a taking, but rather violated substantive due process.[6] An obligation to pay money, Justice Kennedy wrote, is not "property" within the meaning of the Takings Clause.[7]

Justice Breyer, writing for four dissenting justices, agreed with Justice Kennedy that the Takings Clause does not apply to monetary obligations: "The 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves, not an interest in physical or intellectual property, but an ordinary liability to pay money. . . ."[8]

Relying on *Eastern Enterprises*, the Federal Circuit rejected a takings challenge to a special assessment imposed by the federal government on electric utilities for uranium enrichment decontamination services. In *Commonwealth Edison Company v. United States*,[9] the Federal Circuit held: ["F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of

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[1] 447 U.S. 255 (1980).
[2] 483 U.S. 825 (1987).
[3] 512 U.S. 374 (1994).
[4] 524 U.S. 498 (1998).
[5] *Eastern Enterprises*, 524 U.S. at 529-37. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
[6] *Id*. at 540 (Kennedy, J., concurring and dissenting).
[7] *Id*. at 540-42.
[8] *Id*. at 554 (Breyer, J., dissenting).
[9] 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002).

that majority."[10] The other lower federal courts to address the application of the Takings Clause to fees are unanimous that the Clause does not apply.[11]

Such general obligations to pay money should not be confused with government programs taking the interest on a specific fund of money owned by the claimant. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[12] the Supreme Court created an exception to the general rule that monetary obligations are not takings. *Webb's* addressed a state statute that appropriated for the government the interest income on principal held in a government created account – a specific, identifiable fund of money. The Court held: "[E]arnings of a fund are . . . property just as the fund itself is property," and found a taking of the interest, drawing an analogy between the government action and a confiscation of real property.[13]

In later cases, the Court has reaffirmed the rule that the Takings Clause applies to a government taking of interest from an identifiable fund. In *Brown v. Legal Foundation of Washington*,[14] concerning interest on lawyer trust accounts (IOLTA), the state aggregated lawyers trust accounts to generate positive interest after deduction of administrative costs, and used the interest to provide legal services for the poor. The Court found that the depositors would earn no interest without the state program, that the depositors suffered no net loss, and, therefore, that the program did not effect a taking.[15] The Court assumed that a taking of interest could amount to a taking if the depositor suffered a net loss, based on its earlier ruling in *Phillips v. Washington Legal Foundation*.[16] And in *Schneider v. California Dept. of Corrections*,[17] the Ninth Circuit found that the Takings Clause applied to a claim that the California State Department of Corrections failed to pay interest on inmates' deposits of money held by the State for purchase of goods from the prison canteen.[18]

II. TAKINGS CHALLENGES TO IMPACT FEES IN THE STATE COURTS.

The state courts have thus far declined to adopt the federal rule that the Takings Clause does not apply to impact fees or other obligations to pay money. The issue was squarely presented to the California Supreme Court in *San Remo Hotel v. City and County of San Francisco*.[19] The California high court, however, declined to consider the impact of *Eastern Enterprises* on its earlier ruling in *Ehrlich v. City of Culver City*[20] that

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[10] *Id*. at 1339-40.

[11] Unity Real Estate Co. v. Hudson, 178 F.3d 649, 658-59 (3d Cir. 1999), *cert. denied*, 528 U.S. 963 (lower courts "are bound to follow the five-four vote (in *Eastern Enterprises*) against the takings claim . . . ."); Kitt v. United States, 277 F.3d 1330, 1336-37, *mod. on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) (same); Atlas Corp. v. United States, 895 F.2d 745, 756 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 ("Requiring money to be spent is not a taking of property.").

[12] 449 U.S. 155 (1980).

[13] *Id*. at 164.

[14] 538 U.S. 216 (2003).

[15] 123 S.Ct. at 1421.

[16] 524 U.S. 156, 167 (1998) (interest on principal deposit in IOLTA belongs to depositor; reserving question as to whether IOLTA program effects a taking of interest).

[17] 345 F.3d 716 (9th Cir. 2003).

[18] The aggregate interest the State earned from pooling the inmates' funds was less than the aggregate cost to administer the fund. Accordingly, the State concluded, the inmates' funds earned no net interest. *Id*. at 720. The State did not pay interest to any inmate, but rather used the interest proceeds to pay canteen personnel. *Id*. at 719.

[19] 27 Cal.4th 643, 41 P.3d 87 (2002). *See* City's Opening Brief on the Merits filed Jan. 19, 2001, at 33-34.

[20] 12 Cal.4th 854, 876 (1996).

adjudicatory impact fees were not only subject to the Takings Clause, but should be reviewed under a heightened standard.[21] To our knowledge, the decision of the Oregon Court of Appeals in *Homebuilders Association of Metropolitan Portland v. Tualatin Hills Park and Recreation District*[22] is the only other state court to address the threshold question of the applicability of the Takings Clause following *Eastern Enterprises*.

Rather than claiming that impact fees impose a severe adverse economic impact on their property, takings claimants in state courts challenge impact fees on the ground that the fee obligation fails to advance a legitimate public purpose, or exceeds the cost to mitigate the harm directly caused by the development, or both. This test is known as a "means-ends" test. A means-ends test is concerned with the propriety of the objective of government policy – the ends – and the choice of policy to achieve that end – the means.

The crucial issue raised by takings challenges to impact fees in the state courts is the degree of deference a court must extend to a decision to impose a fee. The choice is generally between heightened scrutiny and deferential review. Most states apply deferential review to legislative fees and heightened scrutiny to adjudicatory fees.

This part begins by providing a background for the means-ends test under the Takings Clause. It discusses the questionable origins of the means-ends test and the evolution of the test in the federal courts. Finally, it reviews the state courts' application of the means-ends test to development impact fees.

A. The Origins of the Means-Ends Test for Takings.

The means-ends test under the Takings Clause owes its existence to confusion as to which branch of government determines economic policy: democratically elected legislatures or courts. *Agins v. City of Tiburon*,[23] contributed to this confusion. *Agins* held that courts are empowered to find that a regulation effects a taking of property under the Takings Clause if the regulation fails to "substantially advance legitimate state interests."[24] The substantially advances test conflicts with the plain language of the Takings Clause, which requires the payment of compensation for "taking" of private property for public use. It is difficult to discern how the failure of a regulation to fulfill a valid public purpose could "take" property. Moreover, the substantially advances test lacks any basis in takings jurisprudence. It has been used to justify judicial interference with legislative policymaking.

1. Substantive Due Process.

The substantially advance test, the illegitimate progeny of the Takings Clause, is in fact a reincarnation of a defunct doctrine under the Fifth and Fourteenth Amendments known as "substantive due process." One commentator has described substantive due process as "a peculiarly Social Darwinist-inspired version of laissez-faire."[25] A short history of the rise and fall of substantive due process reveals the ideological underpinnings of the means-ends test under the Takings Clause.

In the post-Civil War period, the Supreme Court readily deferred to the policy decisions of state legislatures. The best example of this hands-off policy is the Slaughter-

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[21] 27 Cal.4th at 672.
[22] 185 Or.App. 729, 62 P.3d 404 (2003). *See* discussion, *infra*, at pp. 22-23.
[23] 447 U.S. 255 (1980).
[24] *Id*. at 260.
[25] Neil Duxbury, PATTERNS OF AMERICAN JURISPRUDENCE 273 (1995).

House Cases,[26] in which the Court upheld Louisiana's grant of a slaughterhouse and stockyard monopoly to a single private company.[27] In response to the industrialization and urbanization of the United States in the latter half of the 19th Century, many states enacted new economic and social legislation regulating businesses to protect workers and consumers.[28] Industrial interests opposed to such regulation, invoking traditions of American economic liberty, urged courts to interpret the Substantive Due Process Clause of the Fifth and Fourteenth Amendments as an implied restriction on the police power of the states.[29] Before the turn of the Century, the Supreme Court relied primarily on the Commerce Clause to invalidate state legislation. In *Mugler v. Kansas*,[30] however, although the Court upheld a state regulation of the sale of alcoholic beverages, the Court embraced a laissez faire approach to commercial affairs, explicitly holding that the Substantive Due Process Clause limited the government's power to secure the general health, safety, and welfare to those regulations that bore a substantial relation to a valid public purpose.[31] "The substantive due process test could be easily stated: the government had to employ means (legislation) which bore some reasonable relation to a legitimate end."[32]

The Supreme Court first applied this means-ends test under the Substantive Due Process Clause to a state regulation in *Allgeyer v. Louisiana*,[33] where it struck down a Louisiana law precluding recovery of insurance proceeds for damage to property located in Louisiana from an insurance company not registered to do business in that state.[34] During the following 39 years, the Court invoked substantive due process to invalidate numerous state laws, typically on the grounds that the ends of the legislation, such as labor regulation or price controls, were not legitimate state interests.[35] The most notorious of these cases was *Lochner v. New York,*[36] where the Court struck down a state law limiting working hours for bakers. *Lochner* reveals the extent to which the Court was willing to substitute its own judgment as to the wisdom and efficacy of regulation for that of the legislature.[37]

Despite the consistency of the language used to characterize legislation that failed to advance a legitimate state purpose in the eyes of the justices of the Court, *Lochner* and other decisions from the same era suffered from the absence of any guiding principle or theory grounded in the Constitution that would provide consistency and predictability in determining which regulations violate substantive due process. The substantive due process test for unconstitutionality ultimately devolved into a subjective and ideologically driven determination that the regulation in question sought to address a problem that should properly be solved by the free market.

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[26] 83 U.S. (16 Wall.) 36 (1872).

[27] *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 560-64 (2d ed. 1988) ("*Tribe*"); Nowak and Rotunda, CONSTITUTIONAL LAW 369, 374 (5th ed. 1995) ("*Nowak*").

[28] *See Nowak* at 372.

[29] *Id*.; *see also* Munn v. Illinois, 94 U.S. (4 Otto) 113 (1876) (warning that due process clause is restriction on state regulation of economic and social activity).

[30] 123 U.S. 623 (1887).

[31] *Id*. at 661.

[32] *Nowak* at 375.

[33] 165 U.S. 578 (1897).

[34] *Id*. at 589-91.

[35] *See*, *e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating state law prohibiting anti-union activity contracts); Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U.S. 418 (1927) (invalidating state law regulating theater ticket sales); *Tribe* at 570-74; *Nowak* at 375.

[36] 198 U.S. 45 (1905).

[37] *Id*. at 56-57.

Beginning to accept the inevitability of an enlarged government role in economic affairs, the Supreme Court signaled the demise of substantive due process in *Nebbia v. New York*.[38] In *Nebbia*, the Court let stand a state regulation of milk prices, finding that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose."[39] Nevertheless, in the following two years, the Court issued a series of decisions voiding President Roosevelt's New Deal social welfare legislation on, among others, substantive due process grounds.[40]

But in 1937, the Court decided a series of cases in favor of government welfare legislation that sounded the death knell of the *Lochner* doctrine. In *West Coast Hotel Co. v. Parrish*,[41] the Court upheld a minimum wage law for women against a substantive due process challenge, overruling an earlier substantive due process decision in *Adkins v. Children's Hospital*.[42] Finally, in *United States v. Carolene Products Co.*,[43] the Court came full circle and embraced the deferential standard of judicial review of economic and social legislation that modern courts, for the most part, have adopted.[44] Refusing to second-guess Congress on regulation of interstate shipments of milk to protect public health, the Court emphatically stated:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis. . . .[45]

The *Carolene Products* Court drew a sharp distinction between ordinary economic and social legislation that should receive deferential rational basis review and regulation of fundamental rights or suspect classes that warrant a higher level of judicial inquiry.[46]

In the decades following *Carolene Products*, the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited.[47] Rather, recent jurisprudence restricts the reach of the protections of substantive due process primarily to liberties "'deeply rooted in this Nation's history and

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[38] 291 U.S. 502 (1934)

[39] *Id*. at 537.

[40] *See*, *e.g.*, Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) (striking down tax classifications); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) (invalidating minimum wage law); *see also* ALA Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (striking down regulation of competition among poultry dealers under Commerce Clause); United States v. Butler, 297 U.S. 1, 73 (1936) (invalidating regulation of farm prices); Carter v. Carter Coal Co., 298 U.S. 238, 283-84 (1936) (invalidating requirement that coal mining companies adhere to maximum labor hour contracts negotiated by miners and producers organization). After his New Deal programs met with opposition in the Supreme Court, President Roosevelt attempted to pack the Court with additional justices more sympathetic to his welfare initiatives. Although the court-packing scheme failed, it became a moot point as the Court repudiated substantive due process. *Nowak*, at 380-81.

[41] 300 U.S. 379, 397 (1937).

[42] 261 U.S. 525 (1923).

[43] 304 U.S. 144 (1938).

[44] *See Tribe* at 582; *Nowak* at 386.

[45] 304 U.S. at 152.

[46] *Id*. at 152-54 and n.4.

[47] *See generally* Gerald Gunther, CONSTITUTIONAL LAW 432-65 (12th ed. 1991).

tradition.'"[48] The Supreme Court routinely and uniformly rejected *Lochnerian* substantive due process challenges to police power legislation.[49]

2. The Rational Basis Test.

Since the New Deal and the demise of substantive due process, the United States Supreme Court has consistently applied the lowest level of scrutiny to determine whether social and economic regulation advances a legitimate government interest.[50] Like other forms of social and economic regulation, land use regulation has traditionally enjoyed a presumption of validity under the Substantive Due Process Clause. Generally, courts have reviewed land use regulation applying the deferential rational basis test. Under this test, the burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.[51]

3. The Advent of the Means-Ends Takings Test.

In *Penn Central*, the Supreme Court first suggested that a government restriction on the use of private property can constitute a taking if the regulation is "not reasonably necessary to the effectuation of a substantial public purpose."[52] In support of the novel proposition that the Takings Clause is concerned with the relationship between the means and ends of regulation, the *Penn Central* Court cited only two cases: *Nectow v. Cambridge*[53] and *Moore v. East Cleveland*[54] – both substantive due process cases applying the rational basis test. Ironically, for one of the most significant doctrinal leaps in takings jurisprudence, the Supreme Court did not rely on a single precedent decided under the Takings Clause.

Two years later, in *Agins*, the Court canonized this means-ends test for a taking, once again relying exclusively on a substantive due process case:

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[48] Armendariz v. Penman, 75 F.3d 1311, 1318-19 (9th Cir. 1996) (citation omitted). These liberties include "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," as well as with an individual's bodily integrity. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[49] *See*, *e.g.*, Phelps Dodge v. NLRB, 313 U.S. 177 (1941) (overturning *Coppage v. Kansas*, *see* n.34, *supra*); Williamson v. Lee Optical Co., 348 U.S. 483, 490 (1955) (upholding statute restricting fitting or duplication of eyeglasses by opticians because "[t]he legislature might conclude" that the law had a variety of legitimate purposes); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) ("[W]e refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours."); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (burden is on one complaining of constitutional violation to establish that regulation is arbitrary and irrational); City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 377 (1991) (judgment as to public interest is for elected legislature, rather than unelected judiciary); *see also Tribe* at 581-82; *Nowak* at 388-89.

[50] *See Carolene Products*, 304 U.S. at 152.

[51] *Euclid*, 272 U.S. at 395; *see also* Pennell v. San Jose, 485 U.S. 1 (1988) (ordinance controlling rents upheld); *Agins*, 447 U.S. at 261-62 (zoning to prevent ill effects of urbanization upheld); *Penn Central*, 438 U.S. at 129-30 (landmark preservation law upheld as valid exercise of police power); *Mahon*, 260 U.S. at 413 (great weight given to judgment of legislature); Rith Energy, Inc. v. United States, 270 F.3d 1347, 1352 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) ("[I]n a takings case we assume that the underlying governmental action was lawful . . . .").

[52] 438 U.S. at 127.

[53] 277 U.S. 183 (1928).

[54] 431 U.S. 494 (1977).

> The application of a general zoning law to particular property effects a taking if the ordinance [1] *does not substantially advance legitimate state interests*, see *Nectow v. Cambridge*, 277 U.S. 83, 188 (1928), or [2] denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n. 35 (1978).[55]

Without elaborating on the origins or meaning of the first prong of the takings standard, the *Agins* Court applied the new test by exercising the same restraint and deference to legislative judgment applied by the courts since *Village of Euclid v. Ambler Realty Co*.[56] The Court held that a zoning ordinance limiting density was a proper exercise of a town's police power to protect its residents from the harmful effects of urbanization.[57]

During the seven-year period between *Agins* and 1987, the dubious proposition that a regulation that fails a means-ends test could constitute a taking received no practical application. In 1987 in *Nollan*, the Supreme Court produced a dramatic innovation on the means-ends test. *Nollan* completed the grafting of substantive due process analysis onto the Takings Clause begun in *Penn Central*. In doing so, the Court sharpened the teeth of the requirement that a regulation "substantially advance legitimate state interests."

In *Nollan*, the Supreme Court invented the "essential nexus" takings test.[58] In order to condition approval of a land use development on the transfer of a possessory interest in land to the public, known as an "exaction," a governmental entity must show that the transfer "substantially advances a legitimate state interest."[59] A typical exaction is a condition that a subdivider dedicate a strip of its privately owned land for widening a public street adjoining the proposed development in exchange for approval of the project.

The phrase "substantially advance legitimate state interests" in the context of exactions means that a condition must "serve[] the same governmental purpose as [a] development ban."[60] The essential nexus test also shifts to the government the burden of justifying the exaction.[61] Thus, in the example above, the public agency would be required to show that additional traffic generated by the new housing development created the need to widen the street.

Dolan v. City of Tigard answered "a question left open" by *Nollan*.[62] The Court quantified the *degree* of the nexus required by *Nollan* between the impact of a development project and a mitigating condition. The essential nexus test requires "rough proportionality."[63] Again using the example above, the public agency would bear the burden to show that it did not require the dedication of more private land to widen the street than would be necessary to serve the additional traffic generated by the new development. In sum, *Nollan* and *Dolan* created a new standard of judicial review requiring a court to determine whether the means of land use regulation are justified by legitimate ends.

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[55] *Agins*, 447 U.S. at 260 (emphasis added).
[56] 272 U.S. 365 (1926).
[57] *Id*. at 261-62.
[58] 483 U.S. at 837.
[59] *Id*. at 834-37.
[60] *Id*. at 837.
[61] *Id*. at 836; *Dolan*, 512 U.S. at 391 n.8.
[62] *Dolan*, 512 U.S. at 377.
[63] *Id*. at 391.

4. The Questionable Validity of the Substantially Advances Test.

In *Nollan*, Justice Scalia, writing for the majority, began his analysis by mischaracterizing the means-ends taking test as a venerable legal precedent: "*We have long recognized* that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'" citing *Agins* and *Penn Central*.[64] *Agins*, of course, had been decided only seven years earlier, and the "substantially advance legitimate state interests" test in *Agins* had not been applied by any court in a form other than the traditional rational basis test.[65] Indeed, a year after *Nollan*, the Court of Claims commented that "no court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced."[66] Nor did Justice Scalia comment on the origins of the "substantially advance" standard in substantive due process. Nonetheless, from Justice Scalia's false premise, the Court's confused reference to substantive due process in *Penn Central* and *Agins* has become a permanent fixture of the nation's jurisprudence. Heightened scrutiny emerged from *Nollan* and *Dolan* as a takings standard co-equal with the economic impact test.

The means-ends test under the Takings Clause takes a page directly from *Lochner*. Legal authority to support it is scant and distorted. There is no evidence that the Framers intended the Takings Clause to be concerned with the relationship between the means and ends of legislation. Indeed, the Supreme Court's own decisions conflict with the notion that there is a free-standing means-ends test under the Takings Clause.[67] But moreover, a means-ends test cannot be reconciled with earlier Supreme Court pronouncements regarding takings "for public use."[68] The government cannot simultaneously act irrationally in regulating property and regulate the property for a "public use. " If the regulation is irrational, it cannot constitute a taking. In this event, remedies other than the Takings Clause, such as the Due Process Clause, would be available to the property owner.[69]

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[64] 483 U.S. at 834 (emphasis added).

[65] *See Agins*, 447 U.S. at 261-62.

[66] Loveladies Harbor v. United States, 15 Fed.Cl. 381, 390 (1988), *aff'd*, 27 F.3d 1171 (Fed. Cir. 1994).

[67] *Eastern Enterprises*, 524 U.S. at 545 (Kennedy, J., concurring and dissenting) ("Normative considerations about the wisdom of government decisions . . . [are] in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act."); *id*. at 554 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) ("[A]t the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good."); *Dolan*, 512 U.S. at 391 n.8 ("the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.").

[68] *See* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 239-45 (1984) (courts should defer to government's determination as to whether a direct condemnation is for a "public use" under the Takings Clause); *First English*, 482 U.S. at 315 (regulatory taking doctrine "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."); Frank Michelman, *Takings, 1987*, 88 COLUMBIA L.R. 1600, 1607 (1987) (takings is not about regulatory efficacy); John Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?* 29 ENVTL. LAW 853, 857-62, 866-80 (1999) ("*Echeverria*").

[69] *See Echeverria* at 861-62.

A number of lower federal and state court decisions also reject the notion that the Takings Clause supports a means-ends test outside of exactions.[70] Not surprisingly, the lower courts have labored under confusion as to the validity of the test, and one state supreme court has entreated the Supreme Court to settle the confusion.[71] Unfortunately, the Supreme Court has so far declined to address the validity of the substantially advance test.[72]

Lacking a definitive pronouncement from the Supreme Court as to the legitimacy and scope of the means-ends test under the Takings Clause, the lower courts have applied heightened scrutiny in a variety of circumstances not contemplated by the Supreme Court. Such instances include the application of heightened scrutiny to purely economic regulation, unrelated to conditions of development, reminiscent of *Lochner*. *Chevron USA, Inc. v. Bronster*[73] illustrates a court's application of the substantially advance test to usurp legislative power and subvert the democratic process. In that case, Chevron challenged Act 257, passed by the Hawaii Legislature to promote competition between the two large oil companies and their independent dealer-lessees in Hawaii's retail gasoline market. The Act limited to 15% of gross profit the amount of rent oil distributors could charge independent gasoline retailers who leased company-owned filling stations to prevent the oil companies from forcing the independents out of the market.

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[70] *See Rith Energy*, 270 F.3d at 1352 (holding that legitimacy of government's action is precondition to takings claim); Simi Investment Co. v. Harris County, 256 F.3d 323 & n.3 (5th Cir. 2001) (although the Just Compensation Clause covers many landowner complaints about intrusions on property rights, challenges to government action as "illegitimate and arbitrary" lie under Due Process Clause); Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1211 n.1 (11th Cir. 1995) ("We do not recognize [substantially advance takings claims] as distinct, viable federal constitutional claims in the zoning context."); Florida Rock Industries, Inc. v. United States, 701 F.2d 893, 898-900 (Fed. Cir. 1986) (same); Bamber v. United States, 45 Fed. Cl. 162, 165 (Fed. Cl. 1999) (claim that federal action does not substantially advance legitimate state interest states due process or tort claim, not takings claim); Pheasant Bridge Corp. v. Township of Warren, 777 A.2d 334, 343-36 (N.J. 2001) ("The Takings Clause 'is designed not to limit the governmental interference with property rights per se but rather to secure compensation in the event of otherwise property interference amounting to a taking.'"); Mission Springs Inc. v. City of Spokane, 954 P.2d 250, 258 (Wash. 1998) (claim of "arbitrary or irrational refusal or interference with processing a land use permit" not "appropriative governmental action " subject to Takings Clause); Brunelle v. Town of South Kingston, 700 A.2d 1075, 1083-84 n.5 (R.I. 1997) ("[T]he arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment takings clause."); Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 640 So.2d 54, 57-58 (Fla. 1994) (regulatory takings claim must be premised on adverse economic impact rather than reasonableness of state's action); *but* see Sheffield Development Co., Inc. v. City of Glenn Heights, Texas, 140 S.W.3d 660, 674 (Tex. 2004) (applying substantially advance test to state law: "we conclude that *Agins* remains authoritative."; applying deferential review to downzoning); State ex rel. Shemo v. City of Mayfield Heights, 765 N.E.2d 345 (Ohio 2002) (same).

[71] Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1013 (Cal. 1999) (Kennard, J., concurring) ("Outside the *Nollan*/*Dolan* context, should a means-ends test be used to determine whether a taking has occurred, or instead should means-ends testing remain within due process jurisprudence? Only the high court can resolve this question and, given the importance of this area of the law, I respectfully suggest that it do so when the opportunity next arises").

[72] Two petitions for certiorari now pending both raise the issue of the legitimacy of the substantially advance test. *See* Chevron v. Bronster, 363 F.3d 846 (9th Cir. 2004); San Remo Hotel v. City and County of San Francisco, 364 F.3d 1088 (9th Cir. 2004).

[73] Chevron USA, Inc. v. Cayetano, 224 F.3d 1030 (9th Cir. 2000) ("*Chevron* I"), *cert. denied*, 532 U.S. 942 (2001), *aff'd sub nom*, Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004) ("*Chevron II*").

The Ninth Circuit held that a trial was necessary to "predict" whether the statute would substantially advance the avowed objective of the law, namely, to maintain competition in retail gasoline sales. The Court rejected the State's argument that the validity of a price control ordinance should be evaluated under the traditional, more deferential, rational basis standard of the Due Process Clause. Instead, the court allowed an unelected judge – after hearing evidence from economists predicting the effect of the program – to apply de novo review to the Act, exercising her subjective judgment to determine whether the price controls would be effective based on a preponderance of the evidence standard.[74] The Ninth Circuit upheld the district court's "findings of fact" that the Act worked a taking because it would not be effective in achieving its purpose.[75]

On the heels of *Chevron*, in yet another extreme application of the substantially advance test to price control legislation, the Ninth Circuit decided *Cashman v. City of Cotati*.[76] In that 2-1 decision, the majority found that a mobilehome rent control ordinance effected a taking on its face. The ordinance in question controlled the rents mobilehome landlords could charge tenants, and allowed tenants to transfer title to their mobilehome at the controlled rent – known as "vacancy control." Relying on *Chevron*, where the Ninth Circuit had held that the alleged "premium" a tenant might charge a transferee to acquire a below-market leasehold defeated the purpose of controlling rents, the *Cashman* Court held:

> Unlike ordinary rent control ordinances, an ordinance that permits incumbent tenants to capture a premium based on the present value of the reduced rent fails to substantially advance a state's interest in creating or maintaining affordable housing.[77]

Thus, the majority applied heightened scrutiny to the ordinance to find that it would not achieve its purpose. In dissent, Judge William Fletcher cautioned: "We learned in the 1930's that economic regulation is generally done better by politically accountable legislators than by life-tenured judges. I regret to say that the Ninth Circuit is unlearning that painfully learned lesson."[78]

Chevron and *Cashman* vividly illustrate that allowing courts to apply heightened judicial review under the substantially advance takings test undermines the Doctrine of Separation of Powers and representative democracy.[79] On August 3, 2004, the State of Hawaii filed a petition for certiorari in *Chevron II*. On August 4, 2004, the City of Cotati filed a petition for rehearing in *Cashman*. Both are pending.

B. The Scope of the Means-Ends Test for Impact Fees.

1. The Three Levels of Means-Ends Review.

In part owing to its confused origins, the scope of the substantially advances test under the Takings Clause is uncertain. Three separate degrees of means-ends review have been proposed: (1) heightened scrutiny, where the burden is shifted to the government to make an "individualized determination" as to the nexus between the

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[74] *Chevron II*, 363 F.3d at 849.
[75] *Id*. at 857.
[76] 374 F.3d 887 (9th Cir. 2004).
[77] *Id*. at 896.
[78] *Id*. at 905 (Fletcher, J., dissenting).
[79] See Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 33-44 (2004).

means and ends of the regulation; (2) an intermediate standard that is more demanding than rational basis, but less rigorous than heightened scrutiny; and (3) deferential review, equivalent to the rational basis or arbitrariness test.

a. Heightened Scrutiny.

Heightened scrutiny generally applies to "exactions" imposed on a case-by-case basis – where the government conditions approval on the owner's dedication of land to the public to offset the impact of the proposed project.[80] Under heightened scrutiny, the government bears the burden 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."[81] Heightened scrutiny arises from the Supreme Court's concern that, in cases of unique, discretionary, adjudicatory exactions imposed on individual applications, the danger exists that the public agency might improperly leverage its police power by requiring an individual property owner to bear more than its share of responsibility for the burdens caused by the development.[82]

The Supreme Court has also found that heightened scrutiny is appropriate for administratively imposed exactions of real property interests because such regulations resemble physical takings.[83] In *City of Monterey v. Del Monte Dunes*,[84] the Court unanimously confirmed that heightened scrutiny is limited to exactions of physical interests in land: "[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."[85] Several federal and state cases decided before *Del Monte Dunes* also hold that heightened scrutiny does not apply to impact fees because the regulation does not compel the dedication of a physical interest in land.[86]

b. Intermediate Review.

No court has yet concluded that the means-ends test under the Takings Clause imposes a standard of review midway between deferential and heightened scrutiny. Advocates of expanding regulatory takings assert that the potential for a third standard arises from *Nollan*, where the Court stated: "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v.*

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[80] *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385-86.

[81] *Dolan*, 512 U.S. at 391.

[82] *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385; *see also* Texas Manufactured Hous. Ass'n v. Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996), *cert. den.*, 521 U.S. 1112 (1997) (rejecting application of *Dolan* to legislative regulation of location of manufactured homes applied "evenhandedly to entire areas of the City").

[83] *See Nollan*, 483 U.S. at 831, 841; *see also Dolan*, 512 U.S. at 385 ("The sort of land use regulations discussed in [*Euclid* and *Agins*] . . . differ in [that] 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.").

[84] 526 U.S. 687 (1999).

[85] *Id*. at 702.

[86] Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny "limited to the context of development exactions where there is a physical taking or its equivalent"); Commercial Builders of Northern Cal. v. City of Sacramento, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, 504 U.S. 931(1992) (heightened scrutiny does not apply to legislated fee imposed on commercial development for housing mitigation); McCarthy v. Leawood, 257 Kan. 566, 894 P.2d 836 (1995) (*Dolan* rough proportionality applies to compelled dedication of property, not fees).

Tiburon, 447 U.S. 255, 260 (1980), not that 'the State "*could rationally have decided*" that the measure adopted might achieve the State's objective."[87] In *San Remo Hotel v. City and County of San Francisco*,[88] dissenting justices relied on this passage in *Nollan* to suggest an intermediate standard of review.[89] And *in Homebuilders Assoc. of Metropolitan Portland v. Tualatin Hills Park and Recreation Dist*.,[90] the Court of Appeals of Oregon interpreted the majority opinion in *San Remo Hotel* as establishing a "reasonable relationship" test for legislative regulations "that is slightly more exacting than the 'rational basis' test."[91] To the contrary, the better reading of the majority in *San Remo Hotel* is that the California high court intended that rational basis apply to generally applicable regulations. The majority rejected the dissent's proposal for an intermediate test, and described the test as the "most deferential," requiring a showing of "arbitrary" governmental action.[92] The most deferential test is the rational basis test. The rational basis test equates to the "arbitrary" test.[93]

No court has endorsed this third approach, for a variety of reasons. The means-ends test has no foundation under the Takings Clause; it is based exclusively on substantive due process authority. Recognizing the shaky foundation of the takings means-ends test, most courts have been reluctant to elevate the standard of review from substantive due process rational basis merely because the means-ends test is applied under a different amendment to the Constitution. Moreover, most courts have limited *Nollan*/*Dolan* heightened review to physical exactions, where regulation implicates the right to exclude others. *Nollan*, *Dolan*, and *Del Monte Dunes* directly support this distinction.[94]

c. Deferential Review.

Stopping some distance short of a total resurrection of *Lochner*, the Supreme Court has indicated that heightened scrutiny should be reserved for conditions imposed on individual permit applications in quasi-adjudicatory proceedings. In *Nollan* and *Dolan*, the Supreme Court implicitly reasoned that classes of property owners have greater power than individual property owners to influence land use policy in the legislative process and thus require less protection from government overreaching. Conditions imposed on a broad class of property owners by legislative action do not raise

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[87] 483 U.S. at 834 n.3 (emphasis original).
[88] 27 Cal.4th 643 (2002).
[89] 27 Cal.4th at 686 (Baxter, J., concurring and dissenting).
[90] 185 Or.App. 729, 62 P.3d 404 (Or. App. 2003). This case is discussed in greater detail below at 22-23.
[91] 185 Or.App. at 740, 62 P.3d at 411.
[92] 27 Cal.4th at 668, 674 n.16, 41 P.3d at 103, 108 n.16.
[93] *See*, *e.g*., *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 15 (1976).
[94] *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385. The Court has also found that heightened scrutiny is appropriate for administratively imposed exactions of real property interests because such regulations resemble physical takings. *See Nollan*, 483 U.S. at 831, 841; *see also Dolan*, 512 U.S. at 385 ("The sort of land use regulations discussed in [*Euclid* and *Agins*] . . . differ in [that] 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."). In *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), the Supreme Court unanimously confirmed that heightened scrutiny is limited to exactions of physical interests in land: "[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." *Id*. at 702.

the same concerns regarding leveraging the police power and should not invoke heightened scrutiny.[95]

The Court also implicitly endorsed the rule that legislative regulations are not subject to heightened review when only two justices voted to grant *certiorari* in a case that squarely presented the issue.[96] And *Eastern Enterprises* and *Del Monte Dunes* reinforced the Court's implication in *Nollan* and *Dolan* that deferential review is appropriate for legislative regulations.[97] Nevertheless the Court has not directly and definitively decided this question.[98]

The lower federal courts and most state courts have followed the Supreme Court's suggestion that the application of *Nollan*/*Dolan* is limited to ad hoc, adjudicatory regulations.[99] Most state courts apply a deferential standard to generally applicable, legislatively imposed land use regulations, including developer fees, because the risk of the use of the police power to exact unconstitutional conditions is not present. [100] A

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[95] *Nollan*, 483 U.S. at 834-35; *Dolan*, 512 U.S. at 385 (courts do not apply heightened scrutiny to regulations that "involve[] 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.").

[96] *See* Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. den.*, 515 U.S. 116 (1995) (Thomas, J., dissenting, joined by O'Connor, J.) (lower court declined to apply *Nollan*/*Dolan* to legislative regulation requiring developers to provide landscaping and curbs; dissenting opinion argued that legislative/adjudicatory distinction was inconsequential to application of heightened scrutiny).

[97] *Eastern Enterprises*, 524 U.S. at 529-37; *id*. at 545-56 (Kennedy, J., concurring and dissenting), 554-58 (Breyer, J., dissenting); *Del Monte Dunes*, 526 U.S. at 702-03; *id*. at 723 (Scalia, J., concurring), 733 (Souter, J., dissenting.); *see also Echeverria* at 866-76; S. Keith Garner, *"Novel" Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause*, 88 CALIF. L. REV. 1547, 1561-64 (2000).

[98] The petition for certiorari in *Chevron v. Bronster* (*see* n. 73, *supra*) places squarely before the Supreme Court the legitimacy of the substantially advance test and the appropriate level of judicial review if the test is valid. In a petition for certiorari filed September 7, 2004, the San Remo Hotel has also requested that the High Court resolve the scope of the substantially advance test as applied to developer fees.

[99] *See*, *e.g*., South County Sand & Gravel Co., Inc. v. Town of South Kensington, 160 F.3d 834, 839 (1st Cir. 1998) (Courts do not "debate the effectiveness of municipal policy" under either substantive due process or takings jurisprudence); Bonnie Briar Syndicate v. Town of Mamaroneck, 721 N.E.2d 971, 974-75 (1999), *cert. denied*, 529 U.S. 1094 (2000) (heightened scrutiny does not apply to generally applicable zoning).

[100] Since *Eastern Enterprises*, it is evident that the Takings Clause of the 5th Amendment does not apply to fees. After *Eastern Enterprises*, no federal court has applied the Takings Clause to impact fees. Several federal and state court decisions before *Eastern Enterprises*, however, applied a deferential takings test to fees. *See*, *e.g.*, Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998) (ordinance requiring landlords to pay relocation fees to tenants was generally applicable action and did not pose heightened risk of extortion warranting heightened scrutiny); *id*. at 819-20 (Williams, J., concurring); Commercial Builders of Northern Cal. v. City of Sacramento, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (heightened scrutiny does not apply to legislated fee imposed on commercial development for housing mitigation); Home Builders Ass'n of Central Arizona v. Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997), *cert. den.*, 117 S.Ct. 2512 (rejecting application of *Dolan* to water development fee because regulation did not require dedication of land and was legislative); Ehrlich v. City of Culver City, 12 Cal.4th 854, 876-81, 911 P.2d 429, 444-47 (1996) (heightened scrutiny does not apply to "legislatively formulated development assessments imposed on a broad class of property owners;" legislatively imposed fee for public art not subject to heightened scrutiny); *id*., 12 Cal.4th at 906, 911 P.2d at 464 (Kennard, J., concurring and dissenting) (same); Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist., 45 Cal.App.4th 1256, 1271 (1996) (legislative development fees imposed on broad class subject to lesser standard of judicial scrutiny than *Nollan*/*Dolan*).

handful of state courts, however, have found that heightened scrutiny applies to legislative regulations that require payment of a fee.[101] With few exceptions, these cases applying heightened scrutiny were decided before *Eastern Enterprises* and *Del Monte Dunes*. Perhaps the Supreme Court's clear statements limiting the scope of the Takings Clause in *Eastern Enterprises* and *Del Monte Dunes* would have produced a different result in those state cases applying heightened scrutiny to legislative development impact fees.

An additional argument for the application of deferential review to development impact fees relies on the similarities between impact fees and taxes. Taxes are generally subject to rational basis review.[102] Development impact fees and taxes are both used to raise revenue for government funded infrastructure and services and to redistribute income.[103] The fact that development impact fees are ordinarily imposed on a smaller class than taxes does not undermine this similarity.[104]

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[101] *See* Northern Illinois Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384, 389 (Ill. 1995) (Dolan applicable to development fee); Trimen Development Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (applying Dolan rough proportionality to development fee). *But see* Amoco Oil Co. v. Village of Schaumburg, 277 Ill.App.3d 926, 661 N.E.2d 380 (1995) (dicta indicating that legislative exaction of real property interest would be subject to heightened scrutiny); Home Builders Assoc. of Dayton v. City of Beavercreek, 89 Ohio St.3d 121, 729 N.E.2d 349 (2000) (purporting to apply heightened scrutiny to legislative fee, but actually applying deferential review) (*see* discussion *infra*, at 15-16).

[102] Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."); Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-27 (1959) (". . . States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause . . . . But that clause imposes no iron rule of equality . . . . [States] may impose different specific taxes upon different trades and professions . . . [They are] not required to resort to close distinctions or to maintain a precise scientific uniformity with reference to composition, use or value."); *Ehrlich*, 12 Cal.4th at 892, 911 P.2d at 444-45 (Mosk, J., concurring) ("[T]he taking of money is different, under the Fifth Amendment, from the taking of real or personal property. The imposition of various monetary exactions—taxes, special assessments, and user fees—has been accorded substantial judicial deference."); *id*. 12 Cal.4th at 893, 911 P.2d at 455 (Mosk, J., concurring) ("The separation of powers doctrine dictates that courts allow states and their subdivisions considerable flexibility in the imposition of varying tax burdens on different classes of tax payers. . . . Courts will not invalidate a state taxation scheme unless the classifications used are without 'rational basis' and are 'palpably arbitrary.'").

[103] Mark Kelman, STRATEGY OR PRINCIPLE: THE CHOICE BETWEEN REGULATION AND TAXATION 60 (2002) ("*Kelman*").

[104] In his dissent in Pennell v. City of San Jose, 485 U.S. 1 (1988), Justice Scalia attempted to make the case for a contrary conclusion. Justice Scalia characterized regulation as the government's internalization of social costs of development, either by forbidding the development or by requiring mitigation of harmful effects. Taxing programs, according to Justice Scalia, are used either to provide broadly consumed goods and services or to redistribute income. Justice Scalia argues that a regulatory program is illegitimate and requires compensation from the government when owners are asked to pay more than the social costs that can be directly attributed to their activity. *Id.* at 21-22 (Scalia, J., dissenting). Scalia's argument has been criticized because a tax, similar to a regulatory impact fee, can require the taxpayer to fund a program beyond the social costs attributed to the taxpayer. *Kelman*, *supra*, fn. 102, at 60. Others have argued that regulatory fees should be subject to higher judicial scrutiny because they typically apply to smaller groups who lack the political power to influence legislative policy enjoyed by larger groups subject to taxes. This argument has also been questioned on the ground that politically powerful minorities are just as likely to victimize majorities in the democratic process as vice versa, and it ignores the possibility that the majority can single out minorities for narrow taxes or user fees. *Id*. at 72.

2. The State Courts' Application of the Means-Ends Test to Fees.

a. Arizona

In *Home Builders Assoc. of Central Arizona v. City of Scottsdale*,[105] in response to state legislation requiring cities to reduce their dependence on groundwater, the city formulated a plan to import and store water from outside the county. The city adopted an ordinance assessing fees as conditions of approval of new development to pay part of the cost of the water project.[106] The fees were $1,000 for a new single-family residence, $600 per apartment unit, and $2,000 per acre foot of estimated water consumption for other new uses.[107]

Affirming the court of appeals' decision upholding the fee against a takings challenge, the Supreme Court of Arizona invoked the well established presumption of validity of legislative actions.[108] Under Arizona law, the party challenging the fee must show that the fee bears no "reasonable relationship" to "the burden placed on the city" by the development.[109] In this case, the claimant failed to carry its burden.[110]

On remand from the Arizona Supreme Court after *Dolan*, the court of appeals reaffirmed its decision, finding that "*Dolan* did not dictate a different result."[111] On review, the Supreme Court agreed. The court held that *Dolan* did not apply for two reasons. First, the ordinance was legislative, not adjudicative, and "the risk of . . . leveraging does not exist when the exaction is embodied in a generally applicable legislative decision."[112] Second, the ordinance imposed a fee, "a considerably more benign form of regulation" than that at issue in *Dolan*.[113] In *Dolan*, the city "demanded that Mrs. Dolan cede a part of her property to the city, a particularly invasive from of land regulation."[114]

b. California.

In *Ehrlich v. City of Culver City*,[115] the California Supreme Court held that *Nollan*/*Dolan* heightened scrutiny applies to a unique, one-time recreational facilities fee imposed in an adjudicatory permitting procedure on a single developer.[116] But the court was careful to limit the application of heightened scrutiny to fees imposed by an adjudicatory body on an individual permit applicant:[117]

> It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application

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[105] 187 Ariz. 479, 486, 930 P.2d 993, *cert. denied*, 521 U.S. 1120 (1997).
[106] 930 P.2d at 994-95.
[107] *Id*. at 995.
[108] *Id*. at 996.
[109] *Id*. at 999.
[110] *Id*.
[111] *Id*.
[112] *Id*. at 1000.
[113] *Id*.
[114] *Id*.
[115] 12 Cal.4th 854, 911 P.2d 429.
[116] *Id*. at 886.
[117] 12 Cal.4th at 868-69, 876, 881, 911 P.2d at 438-39; *see id*., 12 Cal.4th at 888-92, 911 P.2d at 451-54 (Mosk, J., concurring); *id*., 12 Cal.4th at 906, 911 P.2d at 464 (Kennard, J., concurring); *id*., 12 Cal.4th at 912, 911 P.2d at 468 (Werdegar, J., concurring).

> of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.[118]

The Court held that the rational basis test, or an equivalent deferential test, applies to fees imposed on a class of development projects.[119]

In *Santa Monica Beach, Ltd. v. Superior Court*,[120] the same court rejected a means-ends takings challenge to a rent control ordinance of general application. The court found that the proper forum for means-ends review of legislative land use regulations is the "political process, through state and local legislative bodies," rather than the courts.[121]

In *San Remo Hotel v. City and County of San Francisco*,[122] the California Supreme Court held that heightened scrutiny does not apply to legislative fees on which more than 100 California public entities rely to fund infrastructure and services made necessary by development. The ordinance at issue required that hotels converting residential hotel units to permanent tourist use pay a mitigation fee to replace a portion of the lost housing.[123] The San Remo argued that the ordinance was subject to heightened scrutiny and that it failed to pass that test. The hotel further claimed that a development impact fee that is not imposed on every parcel of property in the jurisdiction unfairly singles out a class of property owners, compelling them to bear a disproportionate burden of a public program.[124] The California Supreme Court upheld San Francisco's fee and, in the process, laid out a blueprint for valid impact fees. The Court ruled that the courts must defer to legislatively imposed fees where (1) the method of imposing the fee gives no discretion to the public agency in the imposition or calculation of the fee; and (2) the ordinance is generally applicable to a class "logically subject to its strictures."[125]

In response to the property owner's argument that it was entitled to compensation in any instance where the burden of the government regulation, expressed in dollars of lost market value, exceeds the benefit in dollars of market value gained from the regulation, the Court held that, to survive challenge, the advantage from regulation need not be direct. Rather, the court held, the benefit could be as abstract and indirect as "'the advantage of living and doing business in a civilized community.'"[126]

> [T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each

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[118] 12 Cal.4th at 869, 911 P.2d 439.

[119] 12 Cal.4th at 886, 911 P.2d at 450; *see id*., 12 Cal.4th at 902, 911 P.2d at 46; at 902 (Mosk, J., concurring); *id*., 12 Cal.4th at 907, 911 P.2d at 464 (Kennard, J., concurring); *id*., 12 Cal.4th at 912, 911 P.2d at 468) (Werdegar, J., concurring); *see also* Landgate, Inc. v. California Coastal Com., 17 Cal.4th1006, 1022 (1998) ("[J]udicial review of governmental conditions imposed upon development will be more deferential when the conditions are simply restrictions on land use and not requirements that the property owner . . . pay development fees imposed on a property owner on an individual and discretionary basis . . . .").

[120] 19 Cal.4th 952, 968 P.2d 993 (1999), *cert. denied*, 526 U.S. 1311.

[121] 19 Cal.4th at 974, 968 P.2d at 1007.

[122] 27 Cal.4th 643, 41 P.2d 87 (2002).

[123] *Id*.

[124] *Id*., 27 Cal.4th at 668-69, 41 P.2d at 103-04.

[125] 27 Cal.4th at 669, 41 P.2d at 104.

[126] 27 Cal.4th at 675, 41 P.2d at 108, quoting *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting).

> also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.[127]

The *San Remo* Court found that San Francisco's ordinance "ensur[ed] affordable and available housing for those San Franciscans who would otherwise be without it, carr[ying] benefits for all the City's property owners, including those operating tourist hotels."[128] Implicit in the court's findings is the assumption that the availability of housing affordable to households of diverse incomes and backgrounds preserves the character of San Francisco as a socially and culturally diverse city. These qualities attract tourists and, indirectly, benefit tourist hotels. Thus, the *San Remo* Court chose a broad construction of the doctrine of average reciprocity of advantage.

c. Colorado.

Krupp v. Breckenridge Sanitation Dist.[129] is the leading Colorado case on development fees. There, a unanimous Colorado Supreme Court upheld a sewage plant investment fee ("PIF") against a takings challenge. The sewage district required the PIF to defray the cost of building new sewage treatment facilities. The district calculated the fee for each individual development project by applying a formula. The formula differentiated among residential units according to their impact on the need for treatment facilities in the district. It applied a lower rate to single family residences, duplexes, and mobilehomes, and a higher rate to short-term rental units. The formula stated no rate for triplexes.[130]

Krupp's project consisted of eight duplexes and three triplexes. The district manager applied the lower rate to the duplexes, and the higher rate to the triplexes. Krupp challenged the manager's application of the higher fee to the triplexes, claiming that the fee was subject to heightened scrutiny under *Nollan* and *Dolan*.[131] The Colorado Supreme Court disagreed, ruling that a rational basis test applied because the fee was legislative:[132]

> Application of the *Nollan*/*Dolan* test has been limited to the narrow set of cases where a permitting authority, through a specific discretionary adjudicative determination, conditions continued development on the exaction of private property for public use. The service fee at issue is neither the result of a discretionary adjudicative decision of this type nor an exaction of property . . . .[133]

The court emphasized that the legislative/adjudicative distinction is between "one landowner and one parcel of land" and a class of property owners.[134]

The court rejected the developer's argument that the fee was not ministerial because the city had discretion to determine the fee on a case-by-case basis:[135]

> One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging

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[127] 27 Cal.4th at 675-76, 41 P.2d at 109.
[128] 27 Cal.4th at 676, 41 P.2d at 109.
[129] 19 P.3d 687 (Colo. 2001).
[130] *Id*. at 690.
[131] *Id*. at 691-92.
[132] *Id*. at 694.
[133] *Id*. at 695.
[134] *Id*. at 695-96.
[135] *Id*. at 691, 694.

> or extortion on the part of the government is virtually nonexistent in a fee system. When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions as a condition of development. . . . ¶ . . . Neither the promulgation of the conversion schedule nor the calculation of the Krupps' PIF assessment by the assigned administrative official, constituted a discretionary adjudicative activity.[136]

Although the district manager had discretion to determine whether to apply the higher or lower fee to a triplex, the court found that this discretion was not the type that justified heightened scrutiny "as long as there are sufficient statutory and administrative safeguards to insure that administrative action will be rational and consistent, and that subsequent judicial review of the action, if necessary, will be available and effective."[137] The court went on to hold:

> Neither the promulgation of the conversion schedule, nor the calculation of the Krupps' PIF assessment by the assigned administrative official, constituted a discretionary adjudicative activity. . . . [I]n setting out rate schedules for future application, a governmental entity engages in the "balancing of many questions of judgment and discretion" that is the mark of a legislative activity.[] Unlike the landowners in *Nollan* and *Dolan*, whose conditions for development were determined on an individualized adjudicative basis, the Krupps were charged a fee that was assessed on all new development within the District. The PIF assessment on the Krupps' development, then, is different from the exactions subject to *Nollan* and *Dolan*, both in its creation and in its reach.[138]

While concluding that a legislative, non-discretionary fee is subject to deferential judicial review, the *Krupp* Court acknowledged the "possibility" that "a very narrow class of purely monetary exactions . . . stemming from adjudications particular to the landowner and parcel" may be subject to heightened scrutiny, citing, among other authorities, *Ehrlich v. City of Culver City*.[139] The court did not decide the issue, however.

d. Illinois.

Northern Illinois Home Builders Ass'n v. County of DuPage[140] involved a takings challenge to local ordinances requiring the payment of transportation impact fees for new development. The ordinances were authorized under two state enabling laws. The first state enabling act mandated that local agencies may assess impact fees that require "new development [to] pay[] a fair share of the costs of transportation improvements needed to serve the new development."[141] The local ordinance reflected that standard. The state legislature repealed the first enabling act, substituting one that required the costs paid by a mitigation fee to be "specifically and uniquely attributable to the new development

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[136] *Id*. at 696.
[137] *Id*. at 694.
[138] *Id*. at 696.
[139] 12 Cal.4th 854, 911 P.2d 429.
[140] 165 Ill.2d 25, 649 N.E.2d 384 (Ill. 1995).
[141] 649 N.E.2d at 388.

paying the fee . . ."[142] The more exacting standard contained in the second statute was consistent with Illinois caselaw, *Pioneer Trust & Savings Bank v. Mount Prospect*.[143]

The Illinois Supreme Court combined *Nollan*/*Dolan* heightened scrutiny with Pioneer's "specifically and uniquely attributable" test to find that the first enabling statute and local ordinance was invalid, and the second was not.[144] Although the fee was based on the average impact from projected areawide development, rather than on a study of the impacts of an individual development project, the enabling statute allowed the county to use "generally accepted traffic engineering practices" to calculate the fee. The court found that generally accepted practice was to base such fees on areawide averages.[145]

Although the exacting "specifically and uniquely attributable" test would apply to any fee, legislative or adjudicative, in Illinois, this case is significant nonetheless because the court applied heightened scrutiny under *Nollan* and *Dolan* to a legislative fee.

e. Iowa

In an interesting analysis of the distinction between fees and taxes, in *Home Builders Assoc. of Greater Des Moines v. City of West Des Moines*,[146] the Iowa Supreme Court determined that a park fee imposed on residential development was an excise tax, rather than a regulatory fee, because the parks to be created with the fee did not provide special benefits to the developer's property. Relying on Iowa law rather than *Nollan* and *Dolan*, the court imposed the equivalent of heightened scrutiny, requiring a close causal connection between the development and the use to which the fee would be devoted:

> [A] neighborhood park is not provided specifically to the residents of a development or even the neighborhood in which it is located. A neighborhood park is available for general public use and benefits the entire community. . . . [T]he fee is not premised on the special benefits bestowed on developers and builders nor limited to the value of those special benefits. Rather, the fee is based on the cost of building the neighborhood parks, an expense representing the general benefit to the community at large.[147]

The court found that the fee was based on need, rather than impact. Accordingly, the court concluded that the city imposed the fee to raise revenue, making it a tax. Under Iowa law, cities must be expressly authorized to impose taxes on residential development. Because no such authorization exists in Iowa law, the court invalidated the fee.[148]

Although the court invalidated the fee as an illegal tax, the court nevertheless analyzed the developer's takings challenge. Under the deferential test applicable to taxes, the court rejected the takings claim.[149]

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[142] *Id*.
[143] *Id*. at 389, citing *Pioneer*, 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961).
[144] 649 N.E.2d at 390.
[145] *Id*. at 391.
[146] 644 N.W.2d 339 (Iowa 2002).
[147] *Id*. at 348-49.
[148] *Id*. at 350.
[149] *Id*. at 351.

f. Maryland

In *Waters v. Montgomery County*,[150] the county approved a development impact tax to pay for transportation improvements. The county referred to the obligation as a tax, rather than a fee, because state law authorized counties to enact taxes, but not fees.[151] The Maryland high court upheld the tax against equal protection and due process challenges, applying the rational basis test.

Rejecting the claimant's takings claim, the court held that the Takings Clause did not apply to "special benefit assessments." The court went on, however, to find that because the ordinance was legislative and did not require dedication of a possessory interest in land, heightened scrutiny would not apply in any event.[152]

g. New York

In a confusing opinion in *Twin Lakes Development Corp. v. Town of Monroe*,[153] the New York Court of Appeals purported to apply heightened scrutiny to a developer fee, but in actuality applied a more deferential test. Under a state statute authorizing New York towns to exact parkland from residential developers or assess in lieu fees to fund parks and other recreational facilities, the Town of Monroe required the developer of a residential subdivision of five or more lots to pay an in lieu fee of $1,500 per lot for recreational facilities.[154]

The plaintiff challenged the fee as a taking on the ground that "the amount of the fee is not based on an 'individuated assessment' of the recreational needs generated by its subdivision plan and thus is not roughly proportional to those needs."[155] Although the fee was imposed legislatively and evenly to all developers, the parties nonetheless agreed that the fee was subject to heightened scrutiny under *Nollan* and *Dolan*, and the court purported to apply heightened scrutiny.[156] The Town's concession that the fee was subject to heightened scrutiny and the Court's purported application of that standard is all the more puzzling in view of the New York Court of Appeals' earlier decision in *Bonnie Briar Syndicate v. Town of Mamaroneck*, where the same Court of Appeals held that heightened scrutiny is not applicable to generally applicable legislation.[157] And even though the Court of Appeals purported to apply heightened scrutiny, it applied a more deferential standard.

To prove an essential nexus and rough proportionality between the fee and the stated purpose of the fee, the Court of Appeals found that the *plaintiff* bears a "heavy burden to rebut the presumption of constitutionality of this law," rather than imposing the burden of proof on the Town as *Nollan* and *Dolan* require.[158] And although the court claimed that the fee "reflect[s] the individualized consideration of the project's impact contemplated by *Dolan*,"[159] the opinion cites no evidence that the Town in fact made an

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[150] 337 Md. 15, 650 A.2d 712, 724 (1994).
[151] 650 A.2d at 714-15.
[152] *Id*. at 724.
[153] 801 N.E.2d 821 (N.Y. 2003).
[154] *Id*. at 822-23.
[155] *Id*. at 824.
[156] *Id*. at 825 n.1
[157] 721 N.E.2d 971, 974-75 (1999), *cert. denied*, 529 U.S. 1094 (2000) (heightened scrutiny does not apply to downzoning)
[158] 801 N.E.2d at 825.
[159] *Id*.

individualized determination, that it tailored the fee to the plaintiff's project, or that the $1,500 fee was based on an empirical study that attempted to quantify the impacts of residential development in the Town in terms of money. In sum, this decision provides meager guidance as to the proper standard of review of legislative developer fees.

h. North Dakota

In North Dakota, state statute required railroad companies to pay for alterations to the companies' bridges and culverts underneath their tracks to accommodate increased water flow caused by new development. In *Southeast Cass Water Resource Dist. v. Burlington Northern Railroad Co*.,[160] the North Dakota Supreme Court decided that the regulation was a valid exercise of the state's police power and rejected a takings challenge under *Penn Central*. The court further concluded that because the railroad's duty "arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty," *Nollan*/*Dolan* heightened scrutiny does not apply.[161]

i. Ohio

Similar to the New York Court of Appeals decision in *Twin Lakes*, the Ohio Supreme Court in *Home Builders Ass'n of Dayton v. City of Beavercreek*,[162] claimed to apply heightened scrutiny to a legislative development impact fee ordinance, but in fact applied a deferential test. The ordinance required developers of real estate to pay a fee for the city's construction of public roadways. Rather than conducting an individualized assessment of the impact of each development on the demand for roads, however, the city projected the cost of roads if the entire district subject to the fee were developed to its capacity. The city then allocated the total cost among the projected residential, office, and commercial developments based on the car trips generated by each type of development.[163]

Although the Ohio Supreme Court adopted the *Nollan*/Dolan heightened scrutiny test,[164] it applied only that element of heightened scrutiny placing the burden on the government to defend the fee.[165] The court abandoned the essential nexus, rough proportionality, and individualized determination required by *Nollan*/*Dolan*, instead imposing a mere "reasonable relationship" standard.[166] Reversing the lower court finding that the city's methodology to calculate the fee was flawed, the Ohio Supreme Court applied a deferential takings test to a facial attack on the ordinance:

> The role of a court in reviewing the constitutionality of an impact fee ordinance is not to decide which methodology provides the best results. Given that impact fee ordinances are not subject to precise mathematical formulation, choosing the best methodology is a difficult task that the legislature, not the courts, is better able to accomplish. Rather, a court must only determine whether the methodology used is reasonable based on the evidence presented.[167]

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[160] 527 N.W.2d 884 (1995).
[161] *Id*. at 896.
[162] 89 Ohio St.3d 121, 729 N.E.2d 349 (2000).
[163] 729 N.E.2d at 351.
[164] *Id*. at 356.
[165] *Id*.
[166] *Id*.
[167] *Id*. at 357.

Thus, the court determined that the city could reasonably calculate the fee by allocating the cost of roads on a district-wide basis, rather than requiring an individualized determination of the impacts and the appropriate fee for each development subject to the ordinance.[168]

j. Oregon.

In *Rogers Machinery, Inc. v. Washington County*,[169] the county assessed property developers with a traffic impact fee ("TIF") to fund improvements to city streets and arterials.[170] The county based the fee on the "extra capacity transportation improvements needed to accommodate additional traffic generated by" new development.[171] The county calculated the TIF by multiplying an amount set forth in the statute for the type of development by "the number of average weekday trips generated by the new development," *e.g.*, office, $124 per trip, industrial, $130 per trip.[172] The statute gave county officials "no significant discretion" to vary the TIF or to determine whether the TIF applied to a particular development.[173]

Finding the reasoning of the California Supreme Court in *Ehrlich* and *San Remo Hotel* "persuasive," the Oregon Court of Appeals held that the TIF was a "detailed and uniformly applied legislative assessment scheme" that is not subject to heightened scrutiny.[174] "[A]s *Ehrlich* and *San Remo Hotel* accurately observe, the two-pronged heightened scrutiny that the Court adopted in *Dolan* was animated by the Court's particular concern with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions."[175] Accordingly, the court found that "no individualized determination" as to the fit between the TIF and the plaintiff's development project was necessary.[176]

The Oregon Court of Appeals succinctly presented the argument for judicial review of fees and other monetary obligations under the Due Process Clause rather than the Takings Clause in *Homebuilders Association of Metropolitan Portland v. Tualatin Hills Park and Recreation District*.[177] There, the court upheld a fee imposed on new development for parks and recreation:

> The Takings Clause, it must be remembered, does not prohibit government from appropriating property. It requires only that, when government does so, it has to pay a fair price: Property shall not be taken "without just compensation." U.S. Const., Amend. V. Applying that command to the appropriation of money through fees or taxes yields an incoherent result: Government can take money, but only if it pays for it--that is, only if it gives the money back. An attack on legislation imposing fees or taxes does not seek compensation, just or unjust. It seeks invalidation of the legislation itself. That is an attack more appropriately couched in terms of the Due Process Clause, to the

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[168] *Id*. at 358.
[169] 181 Or.App. 369, 45 P.3d 966 (2002).
[170] 45 P.3d at 967.
[171] *Id*. at 968.
[172] *Id*. at 968-69.
[173] *Id*. at 981.
[174] *Id*. at 981-82.
[175] *Id*. at 982.
[176] *Id*.
[177] 185 Or.App. 729, 62 P.3d 404 (2003).

> extent it is appropriately a constitutional (as opposed to political) attack at all. Such a conclusion would lead to application of the "rational basis" test.[178]

The Oregon court dispensed with the argument that prior United States Supreme Court opinions had allowed takings claims involving the payment of money to the government:

> Although the United States Supreme Court has applied the Takings Clause to exactions of money, it did so in cases where the money was in an identifiable fund rather than charged as a fee for service or a tax. . . . In a more relevant context, the Court has suggested that taking money through generally applicable fees or exactions is different from taking real property. In *United States v. Sperry Corp*., 493 U.S. 52, 62 n. 9 (1989), the Court observed that "money is fungible" and announced that, if a monetary deduction from awards made by the Iran-United States Claims Tribunal in favor of United States claimants were treated the same as a "physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto* [*v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982) (holding that a regulation requiring a property owner to provide space on private property for cable television equipment was a taking)].[179]

Despite its insightful analysis of the issue, the *Tualatin* Court did not decide whether the Takings Clause should apply to fees. The court concluded that the fee would pass muster under any standard of judicial review.[180]

k. Texas

In the recent case *Town of Flower Mound v. Stafford Estates Ltd. Partnership*,[181] the Texas Supreme Court applied *Dolan* to a legislative development fee. Under the Town's ordinance, as a condition of approval of a residential development project, developers were required to demolish the existing roads adjacent to their subdivisions and bear 100% of the cost to build a replacement road.[182]

Despite the United States Supreme Court's clear indication in *Dolan* and *Del Monte Dunes* that *Dolan*'s rough proportionality requirement did not apply to conditions of approval other than dedications of land,[183] the court decided that *Dolan* applied:

> [I]n drawing this distinction between *Dolan* and use-restriction cases, the Supreme Court did not, we think, intend to suggest that all regulatory takings cases must fall into one category or the other. The requirement that a developer improve an abutting street at its own

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[178] 185 Or.App. at 740, 62 P.3d at 411.
[179] 185 Or.App. at 740-41, 62 P.3d at 411.
[180] 185 Or.App. at 741, 62 P.3d at 411.
[181] 135 S.W.3d 620 (Tex. 2004).
[182] *Id*. at 623.
[183] *Dolan*, 512 U.S. at 385 ("[T]he conditions imposed [on Dolan] were not simply a limitation on the use [she] might make of her own parcel, but a requirement that she deed portions of the property to the city."); *Del Monte Dunes*, 526 U.S. at 703 ("[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.").

> expense is in no sense a use restriction; it is much closer to a required dedication of property—that being the money to pay for the required improvement. We do not read *Dolan* even to hint that exactions should be analyzed differently than dedications in determining whether there has been a taking.[184]

Based on similar reasoning, the *Flower Mound* Court rejected the Town's argument that the distinction between exactions of possessory interests in land and denials of development permits in *Del Monte Dunes* confined heightened scrutiny to conditions requiring dedication of real property.[185]

While recognizing that the Town's decision bore some of the elements of an adjudicatory decision – the Town was authorized to grant variances and did occasionally grant them – the *Flower Mound* Court flatly ruled that the legislative/adjudicative distinction does not apply in Texas. Departing from the position staked out by the California, Colorado, North Dakota, and Arizona Supreme Courts, the Texas Supreme Court rejected the Town's claim that heightened scrutiny should not be applied to a legislative regulation:

> While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others. ¶Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative.[186]

The court would not go so far as to rule out deferential review in any circumstances, but firmly held that where a regulation affects only "the few," the burden is squarely on the government to make an individualized showing that a condition does not impose a disproportionate burden on the property owner.[187] In its discussion of the standard of review of legislative regulations, the court did not address the implications of its decision for the doctrine of separation of powers or democratic decision-making.

Applying heightened scrutiny to the street improvement requirement in question, the court found that the Town did not even contend that the required improvements were roughly proportional to the impact of the development on adjoining streets.[188] Rather, the Town argued that the impact of the development "on all of the Town's roadways must be taken into account."[189] Accepting the Town's argument in principle, the court found that the Town had nevertheless failed to measure and quantify the development's impact on the Town's roads.[190] In an attempt to show rough proportionality, the Town had offered its system for charging traffic impact fees to new development as a measure of the impact of new development on the adjoining streets. The Town suggested that it had discounted the traffic impact fees to a level below that necessary to mitigate traffic impacts with the

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[184] 135 S.W.3d at 635.
[185] *Id*. at 636.
[186] *Id*. at 641.
[187] *Id*. at 641-42.
[188] The court held that *Dolan* did not preclude a government agency from showing rough proportionality after enactment of a fee or exaction. *Id*. at 644.
[189] *Id*. at 644.
[190] *Id*.

expectation that the difference would be made up by the requirement that developers improve adjoining roadways. The court found that this reasoning was not only "abstract," but also faulty: "[I]t is just as likely that the discounts are not giveaways to developers but are themselves an admission by the Town that a particular development's impact on the roadways included in the Town's capital improvements plan is actually less than the total cost of those improvements apportioned to all new developments.[191]

Finally, invading administrative discretion even where courts have traditionally deferred to the expertise of building agency officials, the court found that the Town had failed to carry its burden to show that the impacts of the development required that the roadway be improved with concrete rather than an alternative building material.

> On this record, conditioning development on rebuilding Simmons Road with concrete and making other changes was simply a way for the Town to extract from Stafford a benefit to which the Town was not entitled. The exaction the Town imposed was a taking for which Stafford is entitled to be compensated.[192]

The court affirmed the decision of the Texas Court of Appeals to award to the developer a refund of the cost of improving the road, minus 18%, representing the proportion of the total traffic on the improved road attributable to the new development.[193]

l. Washington.

In *Sintra, Inc. v. City of Seattle*,[194] the city required payment of a housing demolition fee as a condition of the conversion of a residential hotel to a warehouse.[195] The Supreme Court of Washington en banc held that heightened scrutiny under *Nollan*/*Dolan* did not apply to the fee because "no physical invasion has been effected."[196]

But two years later, in *Trimen Development Co. v. King County*,[197] in another en banc decision, the Washington Supreme Court reached the opposite decision, without citing *Sintra*. In *Trimen*, a county ordinance required housing developers to either dedicate land for public parks or pay an in lieu fee. Without analysis, the Washington high court applied *Dolan* rough proportionality to the fee, finding that it was "reasonably necessary" and thus met the *Dolan* standard.[198] Although the court stated that a "site-specific study" would not be required to uphold the fee, the evidence demonstrated that the fee did not exceed the cost of providing the additional demand for parkland created by the individual plaintiff.[199]

In *Benchmark Land Co. v. City of Battle Ground*,[200] the city required a housing developer to improve a street adjacent to a housing development as a condition of approval. Although the condition did not require payment of a fee, the case is of interest

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[191] *Id*.
[192] *Id*. at 645.
[193] *Id*. at 626, 645.
[194] 119 Wash.2d 1, 829 P.2d 765 (Wash. 1992).
[195] *Id*. at 768.
[196] *Id*. at 773 n.7.
[197] 877 P.2d 187, 194 (Wash. 1994).
[198] *Id*. at 194.
[199] *Id*.
[200] 103 Wash.App. 721, 14 P.3d 172 (2000), *aff'd on other grounds*, 146 Wash.2d 685, 49 P.3d 860 (2002).

because the trial court and court of appeals applied heightened scrutiny to the condition. The courts did not defer to the city's traffic studies, instead reweighing the city's and the developer's conflicting traffic studies and substituting their judgment for that of the city to find that the condition was not roughly proportional.[201] On review, the Washington Supreme Court found that the condition was improper on state statutory grounds and did not reach the takings question.[202]

CONCLUSION

Under *Eastern Enterprises*, *Del Monte Dunes*, and *Commonwealth Edison*, the 5th Amendment's Takings Clause does not apply to impact fees in federal courts. Most state courts, on the other hand, assume that the Takings Clause applies to development impact fees, without specifically addressing the issue. While Arizona, California, Colorado, Maryland, New York, North Dakota, Ohio, and Oregon, apply deferential review to legislative development impact fees and heightened scrutiny to adjudicatory fees, Illinois, Texas, and perhaps Washington apply heightened scrutiny to all development impact fees. The Federal Circuit and the Eleventh Circuit and the states of New Jersey, Rhode Island, and possibly Washington conclude that heightened scrutiny does not apply to developer fees because such regulation does not require dedication of a possessory interest in property. If the Supreme Court grants certiorari in *Chevron v. Bronster*, the Court may clear up at least some of the confusion regarding the application of the Taking Clause to obligations to pay money, and resolve the conflict among the lower courts as to the proper standard of judicial review of legislative development impact fees.

[201] 103 Wash.App. at 727.
[202] 146 Wash.2d 685, 696, 49 P.3d 860, 865 (2002).