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Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West after *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994)

Sam D. Starritt

John H. McClanahan

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Comment

Land-use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

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We were short-cutting across old Wyoming dirt roads and hardly altered our 55-mile-an-hour pace. But the scene did not change. It was like being in a trance—traveling strenuously, but getting nowhere. So this was Wyoming, I thought, a secret, hidden world unknown to the rest of the country, serene and calm, with a slow heart beat.

—Mary O'Hara¹

INTRODUCTION

I. Rocky Mountain Growth and the Acquisition of Open Space

Wyoming and the Rocky Mountain West² are secrets no more.³ Some of Colorado's mountain communities grew four hundred and fifty percent between 1960 and 1990,⁴ and the state's overall population may surge another fifty percent by 2020.⁵ Land is so popular, and

1. PHIL ROBERTS ET AL., WYOMING ALMANAC 158 (Bruce Seivers & LaVerne Roberts, eds., 3d ed. 1994) (quoting Wyoming author Mary O'Hara).

2. For purposes of this comment, the "Rocky Mountain West" includes Colorado, Idaho, Montana, Utah and Wyoming. The authors address the concerns of towns and communities near the heart of the Rocky Mountain range, bordering national forests or public lands.

By way of example, this comment will use the Town of Jackson in Teton County, Wyoming. Between 1970 and 1990, Teton County's population increased from 4,823 to roughly 14,000. Jackson/Teton County Comprehensive Plan at 2-2 [hereinafter Plan]. With a rising population and cost of living, a housing shortage, and Wyoming's lowest unemployment rate, Teton County and Jackson "are perhaps the most dramatic examples of the explosive growth seen in parts of Wyoming since its recovery from the mineral bust in the mid-1980s." *Jackson Experiences Explosive Growth*, CASPER STAR-TRIB., Nov. 7, 1993, at B1. Jackson is particularly susceptible to growth-related problems because 97% of the land in Teton County is federally owned. Plan, *supra*, at 3-2. Jackson is not the only town in Wyoming that seeks to control growth. Michael Riley, *Story Residents Debate How to Control Growth*, CASPER STAR-TRIB., Nov. 4, 1994, at B1.

3. The authors apologize for drawing excessive attention to Wyoming's special features and excellent quality of life. In 1971, Bill Moyers recognized:

Many people in Wyoming refuse to boast about the grandeur of the state. They do not want to encourage migration of newcomers . . . They want to keep the mountains and prairies and rivers as free as possible of the excrecence of urban progress. Tourists are welcome because they come and go, gracing the state with their money and their departure. I hardly blame the natives. I even hope they succeed.

ROBERTS ET AL., *supra* note 1, at 156 (citing Bill Moyers, *Listening to America* 155 (1971)). At this point, Wyoming and the Rocky Mountain's secrets have not gone un-noticed. If nothing else, the authors hope to demonstrate the pressing need to guide growth and development in order to preserve the pristine character of many western lands and the unique charm of its towns.

4. *Jeffco Seeks Comment on Master Plan*, DENVER POST, Jan. 11, 1995, at B1. Colorado's La Plata County is growing by thirty-five percent annually. *La Plata Exceeds Expectations With 35 Percent Growth Rate*, DENVER POST, Nov. 19, 1994, at B9.

5. This is an increase of almost 1.5 million. Al Knight, *BOOM: We Wanted It. We Got It. Now What Do We Do With It?*, DENVER POST, Oct. 23, 1994, at 10A.

scarce, in Jackson, Wyoming, the average price of a single family home now exceeds half a million dollars.⁶

The western population boom has most dramatically affected small mountain communities.⁷ Historically, agriculture, ranching and mining assumed prominent roles in the West.⁸ Consequently, Rocky Mountain inhabitants have enjoyed close and unique ties with the land,⁹ making property rights extremely important and sharply contested.¹⁰

Today, Rocky Mountain property is valued for preservation as well as exploitation.¹¹ Urbanites¹² from all parts of the country are fed

6. *Home Prices Skyrocket in Jackson*, LARAMIE BOOMERANG, Oct. 23, 1994, at 10. In the first half of 1994, the average cost of one hundred single-family homes sold in Jackson was \$561,485. *Id.* See also Timothy Egan, *Housing Prices Steepen as Jackson Hole Booms*, DENVER POST, Nov. 20, 1994, at 4C. *But see Rumors of Its Death . . .*, SUMMIT PERSPECTIVES REAL EST. & DEV. IN JACKSON HOLE, Sept., 1994, at 1. At the end of the second quarter of 1994, 381 properties (single-family homes, condominiums, and residential lots) were sold in Teton County. The average price for these properties was \$330,307. *Id.*

7. See *supra* note 4 and accompanying text.

8. See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992); Stephen D. Alfors, *Accommodation or Preemption? State and Federal Control of Private Coal Lands in Wyoming*, 12 LAND & WATER L. REV. 73, 88 (1977); Sara F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND L. REV. 81, 85-88 (1993); Richard Conniff, *Federal Lands*, NAT'L GEOGRAPHIC, Feb. 1994, at 2.

9. Dean Frank J. Trelease's preface in the maiden issue of the LAND AND WATER LAW REVIEW appropriately characterized many of the factors surrounding western life and law:

The background map on the cover of the LAND AND WATER LAW REVIEW symbolizes this new journal's aims and interests. The terrain shown includes many typical features of the western United States. Man's works are there—farms, ranches, cities, highways, irrigation reservoirs, hydroelectric and steam power plants, oil and gas fields, coal, iron, and uranium mines. Underlying these are the mountains, plains, lakes, rivers and trout streams from which he derives both his wealth and his recreation. Private lands lie adjacent to the public domain and the National Forests. The LAND AND WATER LAW REVIEW will be devoted to the law of the development and conservation of these resources and the regulation of these activities.

Frank J. Trelease, *Preface*, 1 LAND & WATER L. REV. v (1966).

Although changing rapidly, the Western United States is predominantly undeveloped, and in such a place "an inseparable relationship exists between owning land and a way of life that land ownership makes possible." James B. Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land is it Anyway?*, 19 WM. MITCHELL L. REV. 331, 341 (1993).

10. Norma Williamson, *Development Permits Spark Duboi Debate: Public Response Runs Against Proposed System*, CASPER STAR-TRIB., Apr. 7, 1995, at B3. The Jackson/Teton County Comprehensive Plan passed by a nine percent margin. *Jackson Residents Favor Zoning Code*, CASPER STAR-TRIB., Feb. 2, 1995, at B3.

11. There is a shift from exploiting the land's mineral or timber resources to preserving the land for its potential to generate tourist dollars and preserve aesthetic and environmental values. See, e.g., Raymond Rasker, *Rural Development, Conservation, and Public Policy in the Greater Yellowstone Ecosystem*, 6 SOC'Y & NAT. RESOURCES 109 (1993).

12. Californians are commonly blamed for the region's growth. From 1992-93, 154,200 people left California for relocation in Arizona (20,900), Colorado (23,500), Idaho (11,300), Montana (2,000), Nevada (29,200), New Mexico (4,600), Oregon (25,400), Utah (9,400), Washington (27,100) and Wyoming (800). Paul Larmer & Ray Ring, *Can Planning Rein in a Stampede?*, HIGH COUNTRY NEWS, Sept. 5, 1994, at A6. See also Ed Quillen, *We're Threatened by Migrants, Too, So We Need Proposition 781*, DENVER POST, Nov. 20, 1994, at 4F ("The main source of our migrant problem is California.").

up with crime-ridden, congested cities and seek more serene lives in the Rockies.¹³ Low crime, low taxes, and majestic settings, such as Wyoming's Teton and Wind River mountains, have emerged as the area's most alluring attractions.¹⁴

The region's recent popularity¹⁵ brings welcome economic growth,¹⁶ but it also creates formidable complications. There are fewer affordable housing units,¹⁷ increased traffic congestion, pollution,¹⁸ depleted water resources,¹⁹ vanishing wildlife,²⁰ and disappearing open space.²¹ Affluent

13. *Time* displayed a full-page photograph of a former New York City resident talking shop on his cellular telephone with the Tetons clearly in view from his Jackson, Wyoming, deck. Jordan Bonfante, *Sky's The Limit*, *TIME*, Sept. 6, 1993, at 21; See also James M. Clash, *Jackson Hole: Playground for the 400*, *FORBES*, Oct. 17, 1994, at 356. Western perspectives were quite different in 1957. In describing the west, Powell, Wyoming-born poet Alan Swallow wrote: "As a region we suffer too greatly, still, from our common plagues: distance, isolation, colonialism of dependance upon what is the fashion outside our region, the movement of our people elsewhere." ROBERTS ET AL., *supra* note 1, at 152 (citing *A Magazine for the West* (Autumn, 1957)).

14. Early explorers recognized the awesome landscape:

[W]hen we had reached Pacific Springs, the Wind River mountains appeared in marvelous majesty. It was one of the sights of the journey. The huge purple hangings of rain-clouds in the northern sky set off their vast proportions, and gave prominence, as in a stereoscope, to their gigantic forms and their upper heights, hoar with the frosts of the ages.

SIR RICHARD BURTON, *WANDERINGS IN THREE CONTINENTS* 165 (1901). See also Kevin McCullen, *Best Place Could Be Any Place You Can Afford*, *ROCKY MOUNTAIN NEWS*, Mar. 21, 1993, at 34. But see Ellen Uzelac, *Pioneers Today Don't All Find Home on the Range*, *SACRAMENTO BEE*, May 29, 1994, at A1 (reporting some newcomers have realized that the rural western lifestyle is not suited for everyone).

15. See, e.g., Bonfante, *supra* note 13; Elliot Diringer, *Crowd on the New Frontier: Elbow Room Running Out*, *SAN FRANCISCO CHRONICLE*, Dec. 15, 1994, at A1.

16. See Tom Morton, *Report: State Enjoys Solid Growth in Jobs*, *CASPER STAR-TRIB.*, Oct. 14, 1994, at A1.

17. See Gregory Jaynes, *Down and Out in Telluride*, *TIME*, Sept. 5, 1994, at 60 (reporting that "in America's tourist boomtowns, low wages and high rents are leaving the working class out in the cold."). See also Robert Weller, *Colorado Ski Town Okays Car Camping Despite Protests*, *CASPER STAR-TRIB.*, Oct. 16, 1994, at B2. For a discussion of the problems land-use regulations can create for affordable housing see generally Timothy J. Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in Suburbs*, 82 *GEO. L.J.* 2039 (1994).

18. Mark Obmascik, *Gloomy Shapes Seen in Denver's Brown Cloud*, *DENVER POST*, Oct. 24, 1994, at A10.

19. The prior appropriation system, which governs most Rocky Mountain states, has exacerbated an already short supply of water. See generally NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* (1975); MARC REISNER, *THE CADILLAC DESERT* (1993); Mark W. Tader, Note, *Reallocating Western Water: Beneficial Use, Property, and Politics*, 1986 *U. ILL. L. REV.* 277 (1986). Wyoming was a major player in the development of Western water law. See, e.g., Mark Squillace, *One Hundred Years of Wyoming Water Law*, 26 *LAND & WATER L. REV.* 93, 94-95 (1991).

20. One author recognized that "rampant destruction of wildlife habitat has ruined entire ecosystems and helped place 796 individual species of animals and plants on endangered and threatened lists." Carole Douglas, *Images of Home*, *WILDERNESS*, Fall 1993, at 11, 12.

21. Diringer, *supra* note 15, at A16 ("open space threatened by influx"); Tom Knudson, 2 *Reformers Seeking to Preserve Scenic Beauty: Regional Solution May be Crucial*, *SACRAMENTO BEE*, Dec. 15, 1993, at A16; Gordon Oliver, *Oregonians, Others Grapple With Challenges of Growth*, *THE OREGONIAN*, Feb. 4, 1994, at B4.

seasonal homeowners²² also create a transient population that frustrates the existing sense of community and increases property values to the point of excluding long-time residents.²³

Preservation of open space helps prevent rampant development and protects western towns from urban homogenization.²⁴ Requiring developers to dedicate land, in return for a permit to subdivide or build, has become a common method to preserve valuable open space.²⁵ Such a dedication is called an exaction and requires a landowner to donate land, or money, when he or she exacerbates a public need. But, exactions strike discord with those who believe the public should bear the burden of such acquisitions. Making property regulation in the West even tougher, western politicians accuse the Clinton administration of waging a "war on the West,"²⁶ reflecting that western property owners are already weary of land controls.²⁷

State courts have been upholding the constitutionality of conditional land exactions for some time,²⁸ but the U.S. Supreme Court recently

22. Celebrities, CEOs and prominent politicians have temporary homes in the Rocky Mountain Region. *Give Me a Home Where the Celebrities Roam*, TIME, May 31, 1993, at 17. President Clinton, however, passed over Jackson as a vacation spot because the ranch of Deputy Secretary Roger C. Altman was "too far from restaurants, shopping malls and golf courses." Walter Shapiro, *The Ploys of Summer: How the Clintons Can Get a Good Vacation Cheap*, WASHINGTON POST, Aug. 15, 1993, at C4. See also Plan, *supra* note 2, at 3-1.

23. Michael Riley, *Beauty Drives up Story Land Values*, CASPER STAR-TRIB., Dec. 6, 1993, at B1; Deborah Frazier, *Ranch 'Culture' Fading Away*, CASPER STAR-TRIB., Nov. 9, 1993, at C1. One Western perspective columnist said: "We used to have funky, ramshackle towns like Salida, Aspen and Durango where the people who worked there could also afford to live there. Come the *emigres*, and these once-solid and stable communities immediately start to deteriorate." Quillen, *supra* note 12.

24. Mary George, *Open Space Growth Hailed in Boulder*, DENVER POST, Jan. 11, 1995, at B1.

25. *Jeffco Seeks Comment on Master Plan*, DENVER POST, Jan. 11, 1995, at B1 ("We're not just going to say provide open space; we're going to say provide X amount of open space in this part of the county."). See *infra* note 66.

26. Newly elected United States Senator, Craig Thomas, among others, claims that Secretary of the Interior Bruce Babbitt is waging a war on the West over control of the public lands. Local landowners resent land policy originating in Washington, D.C. See Paul Krza, *Whippin' up Wars, in Wyo & West* (editorial), CASPER STAR-TRIB., Nov. 18, 1993, at A6; Candy Moulton, *Wart: Westerners are 'learning to fear our government.'* CASPER STAR-TRIB., Nov. 19, 1993, at A1; Michael Riley, *Wallop Blasts Babbitt in Farm Bureau Visit*, CASPER STAR-TRIB., Nov. 14, 1993, at B1.

Western politicians have always played a controversial role in western resource development. In describing the Reclamation Act and its progeny, one author wrote:

Faraway bureaucracies with fabulous budgets would dictate the future of the West, and all the while Western politicians, while making rich careers out of fed-bashing, would see to it that the Bureau of Reclamation, the Army Corps of Engineers, and the federal land agencies remained true to the twin causes of urbanization and industrialization across the developing West. The results were ecocide

Donald Snow, *Wallace Stengner's "Geography of Hope,"* 24 ENVLT. L. xi, xv (1994).

27. In fact, most rural landowners are inherently skeptical of land use planning because they view it as a "urban oriented institution." Wadley & Falk, *supra* note 9, at 343-45. Park County, Wyoming's land use plan was aborted after the "guardians of private property threw a fit." Diringler, *supra* note 15, at A17.

28. See, e.g., *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo.

changed this practice by tilting the national balance in favor of private landowners.²⁹ In *Dolan v. City of Tigard*,³⁰ the Court solidified its recent positions that private property rights shall receive more meaningful protection.³¹ But in so doing, the Court imposed greater restraints on local governments and conservationists who yearn to corral Rocky Mountain development.³² *Dolan* is a momentous decision for landowners and planners alike because it applies to building and subdivision permits conditioned on exactions.³³ These exactions are used by towns seeking land for schools, parks, sewers, streets, sidewalks, and open space.

This comment introduces the practice of land-use planning using conditional land exactions. It explains the regulatory takings doctrine, and the doctrine's limitation on the power to exact, culminated by the Court's most recent foray on exactions, *Dolan v. City of Tigard*. The comment demonstrates that *Dolan* puts towns in the untenable position of proving an exaction's constitutionality, encouraging undue judicial scrutiny of

1981); *Ayres v. City Council of Los Angeles*, 207 P.2d 1, 7-8 (Cal. 1949); *Allen v. Stockwell*, 178 N.W. 27 (Mich. 1920); *Billings Properties, Inc., v. Yellowstone County*, 394 P.2d 182 (Mont. 1964); *Village of Los Ranchos de Albuquerque v. Shirley*, 791 P.2d 466 (N.M. Ct. App. 1989); *Brous v. Smith*, 106 N.E.2d 503, 506-07 (N. Y. 1952); *Banberry Dev. Corp. v. City of South Jordan*, 631 P.2d 899 (Utah 1981); *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980).

29. Many commentators will protest this new balance. See, e.g., Lawrence Walters, *The Taking Issue in the Ninth Circuit After Lucas*, 24 ENVTL. L. 1325, 1349 (1994) ("The Fifth Amendment is simply not a panacea for property owners who object to land use or natural resource regulation."). Others will rejoice. See, e.g., James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critics—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309 (1992).

30. 114 S. Ct. 2309 (1994).

31. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.3 (1987) ("our opinions do not establish that [the standard of review in takings cases] is the same as those applied to due process or equal protection claims"); *Hodel v. Irving*, 481 U.S. 704 (1987). See also Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1437 (1993) ("the cases demonstrate that the current Court takes property rights seriously"). But see Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 4 (1995) ("Those who view *Lucas* as a cataclysmic decision for environmental regulation may be in danger of reading too much into the creation of a new categorical rule based on economic value and too little into the exceptions to that rule.") (footnotes omitted).

32. In 1988, Professor Rudolph recognized that the Supreme Court had "substantially increase[d] the anxiety levels of local governing bodies." E. George Rudolph, *Let's Hear it for Due Process—An Up to Date Primer on Regulatory Takings*, 23 LAND & WATER L. REV. 355, 355 (1988).

33. In *Dolan*, Justice Stevens noted, "[t]he mountain of briefs that the case has generated nevertheless make it obvious that the pecuniary value of [Mrs. Dolan's] victory is far less important than the rule of law that this case has been used to establish. It is unquestionably an important case." *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting).

See *infra* notes 296-309 and accompanying text for a discussion of *Dolan's* applicability to money exactions. See *infra* notes 272-295 and accompanying text for a discussion of *Dolan's* application to pre-annexation agreements.

their legislative goals. The authors illustrate the practical effects of *Dolan's* holding by presenting examples of conditional land exactions used by the Town of Jackson, Wyoming, and applying *Dolan* to them. Finally, the authors assess *Dolan's* potential effect on pre-annexation agreements and money exactions, but argue that *Dolan* does not provide the proper analytical foundation to judge the constitutionality of a money exaction. The authors conclude that *Dolan* impedes the ability to preserve open space and community character in the Rocky Mountain West, when the need for that ability is most crucial.

BACKGROUND

I. Land-use Planning & Acquiring Open Space through Conditional Exactions

The U.S. Supreme Court recognizes that the state police power³⁴ gleaned from the Tenth Amendment³⁵ justifies land-use regulation.³⁶ Because the police power is notably broad,³⁷ the Court historically defers³⁸

34. The police power extends generally to matters regarding the health, safety, and welfare of the citizenry. *See, e.g.*, *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *Lawton v. Steele*, 152 U.S. 133 (1894). *See also* Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 *WASH. & LEE L. REV.* 1057 (1980).

While the police power is the exclusive domain of the state; all states, including those in the Rocky Mountain Region, have delegated to cities and counties the power to enact land-use ordinances and regulations. *See, e.g.*, *COLO. REV. STAT.* §§ 31-23-301 to -313 (1986); *IDAHO CODE* §§ 67-6501 to -6533 (1989 and Supp. 1991); *MONT. CODE ANN.* § 76-1-101 (1989); *N.M. STAT. ANN.* §§ 3-21-1 to -26 (Michie 1978 and Supp. 1989); *WYO. STAT.* § 15-1-701 (1977). *See also* PETER W. SALSICH, JR., *LAND USE REGULATION: PLANNING, ZONING, SUBDIVISION REGULATION AND ENVIRONMENTAL CONTROL*, § 1.03 (Wendy Bliss & Joan Goldsmith eds., 1991).

35. Although not specifically enumerated in the Tenth Amendment, State police power is a matter of constitutional interpretation. Before the U.S. Constitution was ratified, each state existed as a sovereign entity, fully enjoying and exercising the powers that accompany sovereign status. *ARTICLES OF CONFEDERATION*, art. II. But, when the states ratified the Constitution, they expressly delegated certain powers to the federal government and retained powers that were not delegated. *U.S. CONST. amend. X* ("The powers not delegated . . . are reserved to the States."). The Constitution does not expressly delegate the police power to the federal government. The Tenth Amendment reserves the police power to the states because, as sovereigns, the states regulated matters of internal police.

36. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). *See also* *Eubank v. City of Richmond*, 226 U.S. 137, 143 (1912); *Mugler v. Kansas*, 123 U.S. 623 (1887); *Willison v. Cooke*, 130 P. 828 (Colo. 1913); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726 (Wyo. 1985).

37. Justice William O. Douglas opined: "An attempt to define its reach or trace its outer limits is fruitless. . . ." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

38. *See infra* notes 181-83 and accompanying text.

to state property³⁹ regulations. Pursuant to this power, communities may devise a comprehensive land-use plan to guide property development.⁴⁰ A comprehensive plan is a broad scheme that supports regulations establishing the type and degree of allowable land use.⁴¹ A local planning commission drafts the plan, and a legislative body enacts it.⁴² The plan con-

39. The concept of "property" is not static because property involves numerous rights and foundations. For example, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). In addition, property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Constitutionally protected property interests are only those which society deems worthy of legal protection. *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (citing *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945) ("not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts . . . compensate for their invasion."); *Board of Regents v. Roth*, 408 U.S. 564, 571-72, 576-77 (1972). See also Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 9 (1987) (property interests created by federal statute in public resources).

Wesley N. Hohfeld postulated that property represents people's relationship to things, and the relationship is of an aggregate of rights, powers, privileges, and immunities. See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746-47 (1917). The Restatement of Property adopts this view. See, e.g., RESTATEMENT OF PROPERTY, Introduction, at 3 (1936) ("'property' . . . denote[s] legal relations between persons with respect to a thing."). Within this aggregate of rights, the Supreme Court has held "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 180-81. See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982); *Dolan*, 114 S. Ct. at 2320.

In 1689, John Locke wrote: "The labour that was mine, . . . hath fixed my Property . . ." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (Peter Laslett ed., 1988). The Court protects "reasonable investment backed expectations," indicating its recognition of Locke's concept that investment of labor or money creates property rights worthy of protection. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). See also generally Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988).

40. Plan, *supra* note 2, at 1-1.

41. John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 361-64 (1993). See also DANIEL R. MANDELKER, *LAND USE LAW*, §§ 3.01, 3.18 (3d ed. 1993). The Wyoming Legislature defines land-use planning as "the process which guides the growth and development of an area and assures the best and wisest use of that area's resources now and in the future." WYO. STAT. § 9-8-102(a)(vi) (1982).

42. See generally *Selby Realty Co. v. City of San Buenaventura*, 514 P.2d 111, 116 (Cal. 1973). The Wyoming State Legislature mandated comprehensive planning but was silent on implementation measures:

(a) All local governments shall develop a local land use plan within their jurisdiction. The plans shall be consistent with established state guidelines and be subject to review and approval by the commission.

(b) All incorporated cities and towns shall have the option to develop a land use plan in accordance with the requirements of W.S. 9-8-302(a), or cooperate with the county to develop such a plan under W.S. 9-8-302(b).

templates a community's long-term vision, character,⁴³ economics, natural resources, and geographic surroundings.⁴⁴ It is a long-term guide to physical, social, and economic development.⁴⁵ Reviewing courts prefer comprehensive planning to randomly enacted land-use regulations because the plan demonstrates judicious procedure.⁴⁶

In a separate, but integrated document, local governments assemble land-use regulations to achieve the goals and policies in the plan.⁴⁷ These may include zoning⁴⁸ and subdivision regulations,⁴⁹ building codes,⁵⁰ aesthetic controls,⁵¹ historic preservation laws,⁵² and overlay districts.⁵³

(c) All counties shall develop a countywide land-use plan which shall incorporate the land use plans of all incorporated cities and towns within the county.

WYO. STAT. § 9-8-301 (1982). Other western states also have mandated comprehensive planning. *See, e.g.*, COLO. REV. STAT. § 31-23-206 (1990 Supp.); IDAHO CODE §§ 67-6503, 6504, 6508 (1990 Supp.). For a discussion of comprehensive land use planning in the East *see generally* Robert Crespi, Comment, *Land Use Law in New York State: Playing "Hide & SEQRA" with the Elusive Comprehensive Plan*, 11 PACE ENVTL. L. REV. 835 (1994).

43. Justice Douglas said that a city could zone to create a "quiet place where yards are wide, people few, and motor vehicles restricted." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

44. The Town of Jackson's Comprehensive Plan addresses nine factors: community vision, population, economy and growth, community character, natural and scenic resources, affordable housing, commercial and resort development, community facilities, transportation, and intergovernmental coordination. Plan, *supra* note 2, at 1.

45. *Id.*

46. MANDELKER, *supra* note 41, § 3.02.

47. *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23, 27 (Or. 1973). *See also* SALSICH, *supra* note 34, § 2.04; MANDELKER, *supra* note 41, § 3.01; Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

The Jackson land use regulations state: "The purpose of these Land Development Regulations is to implement the Comprehensive Plan and to promote the health, safety, and general welfare of the present and future inhabitants of the Town." Town of Jackson Land Development Regulations, art. I, div. 1200 (1994) [hereinafter Land Development Regulations].

48. Zoning is the division of a community into districts and the regulation of the land according to its uses. *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726 (Wyo. 1985). *See also, e.g.*, COLO. STAT. ANN. §§ 24-65-101 to -106 (1970); IDAHO CODE ANN. § 67-6511 (1975); MONT. CODE ANN. §§ 76-2-101 to -402 (1993); N.M. STAT. ANN. §§ 3-21-1 to -26 (1978); UTAH CODE ANN. §§ 10-9-401 to -408 (1953); WYO. STAT. ANN. §§ 9-8-301 to -302 (1977).

49. SALSICH, *supra* note 34, § 8.01. Subdivision regulation is similar to zoning except that subdivision regulations use predetermined specifications and "performance standards" rather than territorial divisions. SALSICH, *supra* note 34, § 8.01. Subdivision regulations focus on the specific details of land development, rather than on types of use. SALSICH, *supra* note 34, § 8.01. *See also, e.g.*, COLO. STAT. ANN. §§ 24-65-101 to -106 (1970); MONT. CODE ANN. §§ 76-3-101 to -612 (1993); N.M. STAT. ANN. §§ 3-20-1 to -16 (1978); UTAH CODE ANN. §§ 10-9-801 to -811 (1953); WYO. STAT. ANN. §§ 18-5-301 to -315 (1977).

50. Building codes are laws, ordinances, or regulations setting forth standards and requirements "for the construction, maintenance, operation, occupancy, use or appearance of buildings, premises, and dwelling units." BLACK'S LAW DICTIONARY 195 (6th ed. 1990). *See Standard Mining & Dev. Corp. v. Auburn*, 510 P.2d 647 (Wash. 1973). *See also, e.g.*, COLO. STAT. ANN. §§ 24-32-701 to -717 (1970); MONT. CODE ANN. §§ 50-60-101 to -801 (1993).

To countervail the burdens on public accommodations and services caused by new development, a town also may require a land or money exaction from a developer in return for a permit to improve, develop, or subdivide his property.⁵⁴ Specifically, exactions include land dedications,⁵⁵ fees-in-lieu of land dedications,⁵⁶ impact fees,⁵⁷ and linkage fees.⁵⁸ A town allocates the cost of public services and accommodations to a developer because new development amplifies problems a town may constitutionally correct, regulate, or prevent.⁵⁹ This is justifiable because land developers benefit from developing their land.⁶⁰

51. Early courts refused to uphold aesthetic ordinances. *See generally* Comment, *Exercise of the Police Power for Aesthetic Purposes*, 30 YALE L.J. 171, 172 (1920). More recently, however, Justice Douglas stated: "It is within the power of the legislature to determine that the community should be beautiful as well as . . . carefully patrolled." *Berman*, 348 U.S. at 33. There is no longer an issue regarding whether a state may constitutionally regulate land use for aesthetic purposes. *Id.* *See also* *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

52. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *South of Second Assocs. v. Georgetown*, 580 P.2d 807 (Colo. 1978) (holding historic preservation ordinance constitutional but void for vagueness). *See also, e.g.*, COLO. STAT. ANN. §§ 12-47.1-517, 24-80.1-102 to -108 (1970); MONT. CODE ANN. §§ 50-6-101 to -801 (1993); National Historic Preservation Act of 1996, 80 Stat. 915, 16 U.S.C. § 470 (1966).

53. Overlay districts involve new regulations applied to areas with existing regulations to address special needs. *See generally* *City of Little Rock v. Pfeifer*, 887 S.W.2d 296, 298 (Ark. 1994); *Jachimek v. County of Maricopa*, 819 P.2d 487, 490 (Ariz. 1991); *Morehart v. County of Santa Barbara*, 872 P.2d 143 (Cal. 1994); *Southampton v. Equus Assocs.*, 615 N.Y.S.2d 714, 716 (N.Y. 1994); *Yamhill County v. Land Conservation and Dev. Comm'n*, 839 P.2d 238, 240-41 (Or. Ct. App. 1992); *Overlake Fund v. City of Bellvue*, 855 P.2d 706, 708 (Wash. Ct. App. 1993).

54. Much of the cost is for infrastructure expansion and improvement, including the acquisition of open space. *See generally* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5 (1987); Theodore C. Taub, *Exactions, Linkages and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 519, 528 (1988).

55. The city may require the landowner to grant an easement, or it may require the landowner to grant some land in fee. *See, e.g.*, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan*, 114 S. Ct. 2309 (1994). *See also* Taub, *supra* note 54, at 520-21.

56. In-lieu fees are appropriate when the subdivision is too small to donate land. Taub, *supra* note 54, at 521. They are available only in place of a land dedication. Taub, *supra* note 54, at 522.

57. An impact fee is appropriate when the subdivision is not primarily responsible for, but contributes to, the particular problem or need of the town. Pavelko, *supra* note 59. They are also used to generate revenue for facilities the developments necessitates. Taub, *supra* note 54, at 522. They have been used to fund a far greater number of services than land dedications or in-lieu fees. Taub, *supra* note 54, at 522.

58. Linkage fees are another off site development exaction which are commonly used to provide for low income housing. Taub, *supra* note 54, at 524. *See generally* Jerold S. Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 127 (1987). *See also infra* notes 297-309 and accompanying text for an analysis of whether *Dolan* should apply to money exactions.

59. Thomas M. Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U.J. URB. & CONTEMP. L. 269, 278 (1983). *See also* *Terminal Plaza Corp. v. City of San Francisco*, 223 Cal. Rptr. 379 (Cal. Ct. App. 1986) (holding in lieu-fee valid in exchange for the privilege of converting a resid-

Exactions must achieve a public purpose or alleviate a public harm.⁶¹ Common purposes include streets,⁶² schools,⁶³ low-income housing,⁶⁴ and parks for recreation.⁶⁵ In the face of rising population and waning public coffers, issuing building and subdivision permits conditioned on exactions has become a popular method to preserve vital open space.⁶⁶

II. Constitutional Limits on the Power to Exact: The Takings Clause and Its Judicial Interpretations

Two separate clauses within the Fifth Amendment limit a state's authority to regulate land use.⁶⁷ First, although not recently used,⁶⁸ the

ential hotel to other uses); *Grube v. California Coastal Comm'n*, 212 Cal. Rptr. 578 (Cal. Ct. App. 1985) (easement dedication requirement held not a taking but a reciprocal exchange since developer would profit from building on the land).

60. Pavelko, *supra* note 59, at 270; Ira Michael Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1121 (1964); Bernard V. Keenan & Peter A. Buchsbaum, *Report of the Subcommittee on Exactions and Impact Fees*, 23 URB. LAW. 627 (1991).

61. SALSICH, *supra* note 34, § 8.07.

62. The city may actually require a subdivider to build streets and sidewalks within the proposed subdivision before the subdivision plat will be approved. SALSICH, *supra* note 34, § 8.07.

63. *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961). See also MANDELKER, *supra* note 41, § 9.17.

64. See *supra* note 58.

65. Most courts uphold park exactions. See, e.g., *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982) (requiring dedication of ten percent of land for park); *Associated Home Builders, Inc. v. City of Walnut Creek*, 484 P.2d 606 (Cal. 1971) (liberal construction of state statute), appeal dismissed, 404 U.S. 878 (1971); *J.W. Jones Companies v. City of San Diego*, 203 Cal. Rptr. 580 (Cal. Ct. App. 1984); *Smith v. Gwinnett County*, 286 S.E.2d 739 (Ga. 1982); *Krughoff v. Naperville*, 369 N.E.2d 892 (Ill. 1977) (contribution of land or money in lieu of land for park); *Billings Properties, Inc. v. Yellowstone County*, 394 P.2d 182 (Mont. 1964); *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983) (land or payment-in-lieu of land for parks and recreation); *But see Berg Dev. Co. v. Missouri City*, 603 S.W.2d 273, 274 (Tex. Ct. App. 1980) (holding money in-lieu of land dedication invalid as appropriation without compensation because there was no requirement that cash be used to purchase park space or that parks be purchased near the plaintiff's subdivision).

66. SALSICH, *supra* note 34, § 2.09. The Jackson/Teton County Comprehensive Plan and Land Development Regulations use exactions to acquire parks and open space. Plan, *supra* note 2, at 4-21; Land Development Regulations, *supra* note 47, at art. IV, div. 49500. See also Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 924 (1993) (Washington Growth Management Act authorizes impact fees for publicly-owned parks, open space, and recreational facilities.); Anne E. Mudge, *Impact Fees for the Conversion of Agricultural Land: A Resource-Based Development Policy for California's Cities and Counties*, 19 ECOLOGY L.Q. 63, 64 (1992) (impact fees used to preserve agricultural lands); A. Dan Tarlock, *Local Government Protection of Biodiversity: What is Its Niche*, 60 U. CHI. L. REV. 555, 598-99 (1993) (impact and in-lieu fees used in conjunction with biodiversity protection, habitat reservation, and open space acquisition); Jennifer Gavin, *Managing Growth: Tools of the Trade*, DENVER POST, Oct. 26, 1994, at 22A (land dedications are a way to manage urban sprawl).

67. Justice Story said "[t]hat government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).

68. See *infra* note 91. But see *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 723, 727

Due Process Clause provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”⁶⁹ Second, the Takings Clause states that “private property [shall not] be taken for public use, without just compensation.”⁷⁰ The U.S. Supreme Court has made the Takings Clause applicable to the states through the Fourteenth Amendment,⁷¹ and the Clause has emerged as the most frequently invoked constitutional protector of private property rights.

Originally, the Takings Clause protected property owners from unlawful governmental actions⁷² which amounted to “direct appropriations” or “practi-

(Wyo. 1985) (due process analysis intermingled with takings).

69. U.S. CONST. amend. V. See *infra* note 91. Chief Justice John Marshall stated: “It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135-36 (1810).

70. U.S. CONST. amend. V. Professor Rubinfeld recently presented a trenchant interpretation of the Just Compensation Clause. See, e.g., Jed Rubinfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1179-84 (1995).

There are other limitations on the power to exact. First, the state must have sufficient enabling legislation. *Nunziato v. Planning Bd.*, 541 A.2d 1105 (N.J. Super. Ct. App. Div. 1988); Taub, *supra* note 54, at 525. In Wyoming, lack of specific enabling legislation does not automatically invalidate the imposition of a money exaction. See, e.g., *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983) (interpreting enabling authority from the “home rule” doctrine). Second, money exactions may not be a tax. Taub, *supra* note 54, at 526. The distinction between a valid money exaction and a tax is subtle, and courts use different tests to determine how the fee should be treated. *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712 (Md. 1994) (impact fee held an excise tax). Some consider whether its primary purpose is to raise general revenue; if so, the fee is a tax. See, e.g., *View Ridge Park Assoc. v. Moundlake Terrace*, 839 P.2d 343, 348 (Wash. Ct. App. 1992). Others distinguish them based on whether the fee is paid voluntarily. A tax is involuntary, and the “amount is not determined by any reference to the service which [the payor] receives from the government.” *Casa Grande v. Tucker*, 817 P.2d 947, 950 (Ariz. Ct. App. 1991). Conversely, a money exaction is always voluntary because the payor is required to pay it only when he asks for a building permit. *Id.*

71. *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). However, Justice Stevens argued in *Dolan* that *Chicago, B. & Q.* did not apply the Takings Clause to the states because that case did not mention the Takings Clause nor the Fifth Amendment. *Dolan*, 114 S. Ct. at 2327 (Stevens, J., dissenting). He cited a case decided prior to *Chicago, B. & Q.* which said the Takings Clause “is a limitation on the power of the Federal government, and not on the States.” *Id.* at 2327 n.7 (Stevens, J., dissenting) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177 (1872)). The *Dolan* majority did not consider the incorporation of the Takings Clause an issue and proceeded on the premise that is applicable to the states. *Id.* at 2316.

Curiously, Justice Stevens has been inconsistent on this issue. In *MacDonald, Sommer & Frates v. County of Yolo*, Justice Stevens wrote for the majority: “The Fifth Amendment prohibition applies against the States through the Fourteenth Amendment.” *MacDonald*, 477 U.S. 340, 342 n.1 (1986) (citing *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 236, 239, 241 (1897)). Although the Court did not conduct a full analysis in *County of Yolo*, Justice Stevens seemed to accept the incorporation of the Takings Clause. *Id.* at 349. Similarly, in *Penn Central*, Justice Stevens joined dissenting Justice Rehnquist stating that the Takings Clause applied to the states through the Fourteenth Amendment. *Penn Central*, 438 U.S. 104, 141 n.3 (1978) (Rehnquist, C.J., dissenting). For unknown reasons, Justice Stevens reversed his previous positions in *Dolan*. See, e.g., *Dolan*, 114 S. Ct. at 2327 (Stevens, J., dissenting).

72. Compare eminent domain, which is the power of a sovereign to appropriate private property for

cal ousters" of land.⁷³ Increasing urbanization prompted local governments to regulate property more stringently to ameliorate the problems associated with intense population concentrations.⁷⁴ The resulting land-use regulations devalued private property, increasing landowner opposition.⁷⁵ The Framers were well aware that property rights were profoundly important⁷⁶ but they likely did not perceive the tension that eventually would arise between property regulators and property owners.⁷⁷

In *Pennsylvania Coal Co. v. Mahon*,⁷⁸ the Court determined that a mere property regulation could amount to a "taking" absent a direct physical occupation.⁷⁹ In *Mahon*, the Court considered whether a state statute protecting advancing urban areas from the dangers of coal mining was a valid exercise of the police power.⁸⁰ In his majority opinion, Justice Oliver

a public use when it pays the landowner just compensation. BLACK'S LAW DICTIONARY 523 (6th ed. 1990).

73. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892 (1992) (citing *Legal Tender Cases*, 12 Wall. 457, 551, 120 L. Ed. 287 (1871); *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98-99 (1948); *Transportation Co. v. Chicago*, 99 U.S. 635 (1879); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (loss of water head held a taking). The Takings Clause also provided compensation in times of war. *See, e.g.*, *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871). Today, the court still recognizes a per se rule for physical invasions. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *but see FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (rule in *Loretto* is "very narrow"); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (holding loss of right to exclude effected by navigational servitude a taking). In addition, airplanes intruding on airspace present interesting physical invasion-type takings cases. *See, e.g.*, *United States v. Causby*, 328 U.S. 256 (1946) (holding continuous Air Force overflights above chicken farm taking); *Griggs v. Allegheny County*, 369 U.S. 84 (1962). *See also generally* William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); FRED BOSSELMAN, DAVID CALLIES & JOHN BANTA, *THE TAKING ISSUE* 5-104 (1973).

74. In 1922, the Court recognized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). A few years later, the Court recognized, "[b]uilding zone laws . . . began in this country about twenty-five years ago . . . with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." *Village of Euclid*, 272 U.S. at 386-87.

75. *Id.* *See also* Sax, *supra* note 34, at 37 ("in the first quarter of this century, . . . the expansion of governmental regulation yielded a proliferation of claims for compensation by aggrieved owners of private property").

76. James Madison believed property rights to be "inviolable." *Property*, NATIONAL GAZETTE, March 29, 1792, reprinted in 6 THE WRITINGS OF JAMES MADISON 101, 103 (Gailord Hunt ed., 1906).

77. Sax, *supra* note 34, at 54-60.

78. 260 U.S. 393 (1922).

79. *Id.* at 413. The regulation "[admittedly] destroy[ed] . . . rights of property and contract. The question [was] whether the police power can be stretched so far." *Id.*

80. *Mahon*, 260 U.S. at 413. *Mahon* indirectly addressed land-use regulation confronting problems of urbanization. The Kohler Act prevented coal mining which would cause damage to any nearby housing structure. *Id.* at 412-13. Pursuant to the Act, the Mahons enjoined Pennsylvania Coal from mining coal under their land. *Id.* at 412. The Court ultimately found the regulation to devalue the mining company's property interests to the extent that a taking had occurred. *Id.* at 414-15. The Act would not have been necessary but for the expansion of urban areas to rural mining districts.

Wendell Holmes found a taking and thereby launched the Takings Clause to new horizons, writing: "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."⁸¹

The "Regulatory Takings Doctrine" stems from this language,⁸² and although it is continually cited,⁸³ no court has ever conclusively defined a means to determine when a regulation has gone "too far."⁸⁴ Even Justice Holmes recognized the limitations of his rule when he wrote: "[it] is a question of degree—and therefore cannot be disposed of by general propositions."⁸⁵ Nevertheless, the doctrine invokes the Fifth Amendment compensation requirement when a land-use regulation is so burdensome it "takes" property akin to an actual physical ouster.⁸⁶ When a taking oc-

81. *Mahon*, 260 U.S. at 415. *But see* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (finding no taking with facts significantly analogous to *Mahon*.) In *Mahon*, Justice Brandeis' dissent argued that the Kohler Act should be upheld because it merely prevented a public nuisance or a noxious use. *See, e.g., Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting).

82. Justice Stevens labeled the regulatory takings doctrine as "kindled [from] dictum." *Dolan*, 114 S. Ct. at 2327 (Stevens, J., dissenting). *See also* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (1984) (the "courts have incanted his words in what Bruce Ackerman calls a 'parody of stare decisis'"); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1063 (1980).

83. For example, "[t]here is no dispute about the proposition that a regulation which goes 'too far' must be deemed a taking." *First English*, 482 U.S. at 328 (Stevens, J., dissenting). *See also* *Kirkpatrick v. City of Oceanside*, 283 Cal.Rptr. 191 (Cal. Ct. App. 1991); *Golden Cheese Co. of California v. Voss*, 281 Cal. Rptr. 602 (Cal. Ct. App. 1991); *Dept. of Health v. The Mill*, 887 P.2d 993, 999 (Colo. 1994); *State Dept. of Highway v. Interstate-Denver West*, 791 P.2d 1119, 1121 (Colo. 1990); *Meritt v. Idaho*, 742 P.2d 397, 409 (Idaho 1987); *Schnuck Markets, Inc. v. City of Bridgeton*, 1995 WL 46723 (Mo. Ct. App. 1995); *McElwain v. County of Flathead*, 811 P.2d 1267, 1272 (Mont. 1991); *Chronis v. New Mexico ex rel. Abe Rodriguez*, 670 P.2d 953, 961 (N.M. 1983); *Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1323 (Utah 1988); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 730 (Wyo. 1985).

84. It has "prove[n] to be a problem of considerable difficulty." *Penn Central*, 438 U.S. at 123. In 1986, Justice Stevens recognized: "To this day we have no 'set formula to determine where regulation ends and taking begins.'" *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349 (1986) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). *See also* *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) ("our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment").

85. *Mahon*, 260 U.S. at 416. The regulatory takings doctrine has elicited considerable response. *See generally* Douglas W. Kmiec, *Clarifying the Supreme Court's Taking Cases-An Irreverent but Otherwise Unassailable Draft Opinion in Dolan v. City of Tigard*, 71 DENV. U.L. REV. 325 (1994); Page Carroccia Dringman, Comment, *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245 (1994); Glen E. Summers, Comment, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837 (1993); Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914 (1993); Symposium, *Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1369 (1993); Symposium, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1581 (1988); Rudolph, *supra* note 32.

86. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (Court considered whether a war-time regulation preventing gold mining could be a taking).

curs,⁸⁷ the state must compensate the landowner,⁸⁸ amend the regulation, or withdraw it.⁸⁹

Of the land-use cases, *Mahon* prevails in a history of ideological meandering. Before *Mahon*, the Court declined to find that a mere regulation of property violated the Takings Clause and focused on the "noxious" character of a particular land use.⁹⁰ After *Mahon*, the Court drifted from the Takings Clause and became primarily concerned with Due Process and Equal Protection challenges to land-use regulations and ordinances.⁹¹ After recognizing

87. When a landowner believes she has suffered a taking, the landowner will claim that she is entitled to compensation through inverse condemnation. *Hunziker v. State*, 519 N.W.2d 367, 369 (Iowa 1994), cert. denied, 1994 WL 714684, 63 U.S.L.W. 3657 (U.S. Mar. 6, 1995) (No. 94-1077) (holding state law prohibiting disinterment of burial mound did not "take" landowners property when landowner purchased 59 acre tract with burial mound after the state law was in effect). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.* at 369-70 (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

88. The Fifth Amendment "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." *First English*, 482 U.S. at 305. Just compensation is "a condition precedent to the exercise of the power of eminent domain." *Chicago, B. & Q. R.R.*, 166 U.S. 226, 238 (1897) (citing *Sweet v. Rechel*, 159 U.S. 380, 398 (1880)). *But see Douglas W. Kmiec, The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1659 (1988) (discussing whether the Fifth Amendment always mandates compensation).

89. *First English*, 482 U.S. at 321.

90. Early opinions upheld economically burdensome land-use regulations that were enacted to prohibit "noxious" or "nuisance-like" activities. In 1887, the Court upheld a statute prohibiting the manufacture of alcohol which rendered the plaintiff's previously legal brewery worthless. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."). The Court in *Lucas* may have overruled this statement by holding that a state cannot simply declare a use noxious and prohibit it, without common law nuisance to support the prohibition. *See infra* notes 135-137 and accompanying text. Thirteen years after *Mugler*, Justice Peckham, joined by Justice Holmes, wrote:

We are not prepared to hold that this limitation of 80 to 100 feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is, as we think, reasonable, and is justified by the police power.

Welch v. Swasey, 214 U.S. 91, 107 (1909). *See also Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (brick mill banned in residential neighborhoods); *Miller v. Schoene*, 276 U.S. 272 (1928) (Plaintiff was ordered to destroy red cedar trees that produced a disease fatal to nearby and more worthy apple trees.); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (holding sand and gravel mining operation potential nuisance). The modern Court rationalizes the "noxious use" theory as "simply the progenitor" of the contemporary rule that a land-use regulation does not effect a taking if it substantially advances a legitimate state interest. *Lucas*, 112 S. Ct. at 2897.

91. *See, e.g., Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (upholding zoning ordinance against due process and equal protection challenges); *Zahn v. Board of Pub. Works of Los Angeles*, 274 U.S. 325 (1927) (general zoning ordinance upheld against due process and equal protection challenges); *Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding set-back ordinance under equal protection and due process challenges). In these cases, the Court refused to "substitute its judgment

that a use restriction alone can be a taking,⁹² the Supreme Court incorporated due process dogma into the regulatory takings doctrine.⁹³ Recent culminations of the doctrine exemplify this mixture.⁹⁴

A. *Agins v. City of Tiburon* and *Penn Central Transportation Co. v. New York*: Culminations of the Regulatory Takings Doctrine

*Agins v. City of Tiburon*⁹⁵ and its endorsement of *Penn Central Transportation Co. v. City of New York*⁹⁶ provide the basic takings framework leading to *Dolan*. In *Agins*, the plaintiff purchased five acres of valuable San Francisco Bay area property with the intent to develop it extensively.⁹⁷ The city subsequently re-zoned the property, allowing plaintiffs to build only five residential units.⁹⁸ Upholding the ordinance against the plaintiff's takings challenge, the Court enumerated two distinct tests extrapolated from both due process and takings cases.⁹⁹

First, the *Agins* Court cited the 1928 due process case of *Nectow v. City of Cambridge*¹⁰⁰ for the principle that a land-use regulation constitutes

for that of the legislative body." Zahn, 274 U.S. at 328 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 395 (1926)). But see *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (invalidating zoning ordinance based on due process).

92. Before the regulatory takings doctrine emerged from *Mahon*, the common challenge to land-use restrictions was the Due Process Clause, since the Takings Clause was thought only to apply to direct appropriations of property. See *supra* note 73 and accompanying text.

93. Regulatory takings cases continually cite *Village of Euclid* thereby incorporating due process language into takings standards. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 (1987); *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707 (3d Cir. 1985); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (Cl. Ct. 1988); *Kimberlin v. City of Topeka*, 710 P.2d 682 (Kan. 1985); *Fort Gratiot Charter Transp. v. Kettlewell*, 389 N.W.2d 468 (Mich. Ct. App. 1986); *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991). In *Village of Euclid*, the Court upheld a general zoning ordinance against due process and equal protection challenges. *Village of Euclid*, 272 U.S. at 365. Justice Sutherland relied on *Cusack v. City of Chicago*, 242 U.S. 526, 531 (1917) (regulating billboards held valid exercise of police power). *Id.* at 395. In *Cusack*, the Court specifically rejected application of the Takings Clause writing: "[o]bviously, claims made under the 5th amendment need not be considered . . . and there remains only the question whether the ordinance . . . would 'deprive it of its property without due process of law.'" *Cusack*, 242 U.S. at 528 (citations omitted).

94. See generally Summers, *supra* note 85.

95. 447 U.S. 255 (1980). Justice Powell wrote the opinion for a unanimous court. *Id.* Unanimous opinions are noticeably uncommon in recent takings cases. See, e.g., *Dolan*, 114 S. Ct. at 2312 (5-4 decision); *Lucas*, 112 S. Ct. at 2888 (5 in majority, 1 concurring in judgment, and 3 in dissent); *Nollan*, 483 U.S. at 826 (5-4 decision); *Penn Central*, 438 U.S. at 107 (6-3 decision); *First English*, 482 U.S. at 305 (6-3 decision).

96. 438 U.S. 104 (1978).

97. *Agins*, 447 U.S. at 257.

98. *Id.*

99. *Id.* at 260.

100. 277 U.S. 183 (1928).

a taking if the regulation does not bear a substantial relation to a legitimate state interest.¹⁰¹ Second, the Court cited *Penn Central* to state that a taking also occurs when a regulation deprives the property owner of economically viable use of his land.¹⁰²

In *Penn Central*, the Court upheld a landmark preservation law against a Fifth Amendment takings claim.¹⁰³ *Penn Central* enumerated the factors to determine whether a property regulation deprives a landowner economically viable use of his land to the point of a taking.¹⁰⁴ The Court considered the economic impact of the regulation with particular emphasis on the extent to which the regulation interfered with "distinct investment backed expectations."¹⁰⁵ The Court also considered the character of the state action to determine whether there was an actual physical invasion rather than "some public program adjusting the benefits and burdens of economic life to promote the common good."¹⁰⁶

Despite these two separate tests,¹⁰⁷ the *Agins*' Court still acknowledged

101. *Agins*, 447 U.S. at 260 (citing *Nectow*, 277 U.S. at 188-89).

In *Nectow*, the plaintiff acquired a tract of land in a predominately industrial area pursuant to a contract for sale. The city subsequently zoned the tract residential only. *Nectow*, 277 U.S. at 186-87. As a result, the buyers reneged on the contract because they intended to use the land for industrial development, which the city had prohibited. *Id.* The Court struck down the zoning ordinance based on the Due Process Clause; the plaintiffs did not assert a takings claim. *Id.* at 185. The *Nectow* Court held that the ordinance did not bear a "substantial relation to the public health, safety, morals, or general welfare." *Id.* at 188 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). The Court reasoned that as applied, the ordinance would not have benefited the inhabitants of the tract because the land was already surrounded by existing industrial development. *Id.* at 187.

In most instances not involving a conditional exaction, a claimant may likely have little success arguing that a regulation does not substantially advance a legitimate state interest. See *Keystone*, 480 U.S. at 485-86; *Loveladies I*, 15 Cl. Ct. 390 (1988).

102. *Agins*, 447 U.S. at 260.

103. *Penn Central*, 438 U.S. at 138. The landmark preservation law prevented the plaintiff from building a fifty story office building over New York City's Grand Central Terminal. *Id.* at 116-17. The plaintiffs made a series of takings challenges with respect to the air and ground space, each of which the Court rejected. *Id.* at 130-39.

104. *Id.* at 124. Although the Court enumerated these economic factors, it also upheld the law because the "restrictions imposed [were] substantially related to the promotion of the general welfare." *Id.* at 138. The Court first identified that preserving community character was an "entirely permissible governmental goal." *Id.* at 129. Secondly, the Court noted that the landmark preservation law was an appropriate means of "securing the [state's] purposes." *Id.*

105. *Id.* at 105.

106. *Id.* at 124.

107. Some observers have identified *Agins* as a "two-pronged" or even "three part" test. They say that the regulation must substantially advance a legitimate state interest *and* must not deny an owner economically viable use of his land. See, e.g., Ross A. Macfarlane, Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715, 725 (1982) (Justice Powell established a "three part test for regulatory takings."). This interpretation is misleading. *Agins* provides wholly separate grounds for establishing an unconstitutional taking. *Kaiser Aetna*, 444 U.S. at 174; *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991), cert. denied, 502 U.S. 952 (1991). In *Dolan*,

that “no precise rule determines when property has been taken.”¹⁰⁸ Lower courts must weigh the private and public interests to determine whether the public, rather than a single landowner, should shoulder an exercise of state police power.¹⁰⁹ This demonstrates the fact-specific and result-oriented nature of takings law.¹¹⁰ When confronted with an exaction, the Court required a more stringent interpretation of the substantial advancement requirement to accommodate the constitutional implications of an exaction.

B. *Nollan v. California Coastal Commission*: An Exaction Must Satisfy an “Essential Nexus” to Substantially Advance a Legitimate State Interest

In *Nollan v. California Coastal Commission*,¹¹¹ the Court refined *Agins*' substantial advancement test because the relationship between an exaction and a legitimate state interest is more attenuated than the relationship between traditional zoning laws and the state's interest.¹¹² Earlier cases did not define the degree of connection necessary for a land-use regulation to substantially advance a legitimate state interest.¹¹³ Moreover, the plaintiffs in *Nollan* stood to lose their right to exclude. The *Nollan* Court ruled that a conditional land exaction substantially advances a legitimate state interest if an “essential nexus” exists between the required exaction and the state interest.¹¹⁴

despite his use of the conjunctive “and,” Justice Rehnquist recognized the second part of the *Agins* test as a separate takings basis. *Dolan*, 114 S. Ct. at 2316 n.6. He stated the plaintiff was “assuredly . . . able to derive *some* economically viable use from her property.” *Id.* Therefore, the action would not have been a taking under that test. *Id.* at 2316 n.6. Moreover, the Court in *Lucas*, found a taking because South Carolina denied the land owner economically viable use, but the regulation may have substantially advanced a legitimate state interest. *Lucas*, 112 S. Ct. at 2901-02. See *infra* notes 126-133 and accompanying text. See also Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 URB. LAW. 301, 317 n.106 (1991).

108. *Agins*, 447 U.S. at 260-61.

109. *Id.* at 261. See also *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (holding that regulation cannot “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

110. The Court has openly recognized its “essentially ad hoc, factual inquiries” in takings jurisprudence. See, e.g., *Penn Central*, 438 U.S. at 124. The denial of economically viable use cannot be reduced to a specific standard because courts must make “ad hoc, factual inquiries.” *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

111. 483 U.S. 825 (1987). Justice Scalia wrote the opinion of the Court, joined by Rehnquist, C.J., White, Powell, and O'Connor, J.J. *Id.* Brennan, J., filed a dissenting opinion, joined by Marshall, J. *Id.* at 842. Blackmun, J., filed a separate dissent. *Id.* at 865. Stevens, J., filed a dissent, joined by Blackmun, J. *Id.* at 866.

112. *Nollan*, 483 U.S. at 841 (“there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective”).

113. Previous decisions had not determined “what type of connection between the regulation and the state interest satisfies the requirement that the former ‘substantially advance’ the latter.” *Id.* at 834. The Court did acknowledge the precedents reveal that a “broad range” of interests and means satisfy the substantial advance requirement. *Id.*

114. *Id.* at 837. Requiring a nexus “is similar to the private-law requirement that in order for

The plaintiffs in *Nollan* asked the California Coastal Commission for a permit to replace their beachfront bungalow with a larger house.¹¹⁵ The lot was located between two public beaches to the north and south.¹¹⁶ Reviewing the Nollans' request, the Commission found that the proposed house would increase private use of the beach and interfere with the public's ability to view the beach from a nearby road.¹¹⁷ To mitigate these harms, the Commission conditioned the Nollans' building permit on obtaining an exaction (a public easement) across the their property, bridging the north and south beaches.¹¹⁸

The Supreme Court found the exaction an uncompensated taking because there was no "essential nexus" between the permit condition—the exaction—and a legitimate state interest.¹¹⁹ To justify the conditional exaction the Commission argued the new house would interfere with the public's "visual access" to the beach, in turn creating a "psychological barrier" to physical access from the road.¹²⁰ Further, the Commission argued that providing lateral access between the two public beaches would off set the new house's adverse impact on visual and psychological access to the beach.¹²¹ The Court disagreed, finding no connection, or nexus, between the public's ability to walk across the Nollans' property and reducing the visual obstacles created by their new house.¹²² The conditional land exaction, substituted for a permit denial, "utterly fail[ed] to further the end advanced by the justification for the prohibition."¹²³ Therefore, no

covenants to run with the land . . . they must 'touch and concern' benefitted or burdened land." Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1766 (1988).

115. *Nollan*, 483 U.S. at 828. The Nollans had leased the bungalow but eventually wanted to purchase it. *Id.* at 827. The bungalow had fallen into a state of disrepair after a number of rental years. *Id.* Their option to purchase was conditioned on their demolition of the bungalow and replacing it with a new house. *Id.* at 828.

116. *Id.* at 827.

117. *Id.* at 828-29. The private use claim was unsubstantiated. *Id.* at 828. The Commission reasoned that if the public could not see the beach from the nearby road, they would not be as willing to use it, which they had every right to do. *Id.* at 828-29. The Commission argued that this would contribute to a "psychological barrier" to using the beach created by a developed shorefront." *Id.* at 835.

118. *Id.* at 828.

119. *Id.* at 837.

120. *Id.* at 838. The Commission offered three purposes for which it could ban development: "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." *Id.* at 835. Justice Scalia wrote that if the Nollans' new house would substantially impede any of these purposes, the Commission could "unquestionably" have denied the permit. *Id.* Justice Scalia cautioned, however, that such a denial cannot constitute a taking as well. *Id.* at 835-36 (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978)).

121. *Id.*

122. *Id.*

123. *Id.* at 837. The Court said "unless the permit condition serves the same governmental purpose as the development ban the building restriction is not a valid regulation of land use but 'an

essential nexus existed between the easement exaction and visual access.¹²⁴

C. Lucas v. South Carolina Coastal Council: Use Restriction that Denies All Economically Viable Use

The economic aspect of takings law may become an important consequence of *Dolan's* holding because *Dolan* may increase outright denials of building and subdivision permits.¹²⁵ *Lucas v. South Carolina Coastal Council*¹²⁶ is the Supreme Court's most recent exposition of the prohibition against the denial of economically viable use.¹²⁷ In *Lucas*, the Coastal Council, following South Carolina's conservation legislation, prohibited the plaintiff from building any habitable structure on his coastal property.¹²⁸ The Court held the prohibition may have been an uncompensated taking.¹²⁹ The Court affirmed the notion that a regulation may not deprive a landowner of all¹³⁰ economically viable use of his land without compensation.¹³¹ The Court noted that regulations constraining landowners to

out-and-out plan of extortion." *Id.* (citations omitted). The Commission could have constitutionally imposed height limitations, width restrictions, bans on fences, or even a public viewing spot on the Nollans' property. *Id.* at 836.

124. *Id.* at 837-38. Giving the public more lateral access along the shore would presumably have mitigated the burden on visual access created by the Nollans' new house. *Id.* This leap in logic may have worked had the Court been analyzing a due process challenge to a traditional state economic or social legislation. *See, e.g., infra* note 178.

125. *See infra* notes 250-59 and accompanying text.

126. 112 S. Ct. 2886 (1992).

127. The plaintiff in *Lucas* bought two lots in 1986 on the Isle of Palms, an island east of Charleston, South Carolina. *Id.* at 2889. Plaintiff intended to build two residential houses on the lots; but in 1988, the state enacted the Beachfront Management Act which prohibited the construction of "occupiable improvements" on plaintiff's lots. *Id.* at 2889-90. The Court accepted, without argument, that the prohibition had rendered plaintiff's property valueless. *Id.* at 2896 n.9.

128. *Id.* at 2889-90. On his own initiative, Justice Scalia queried whether preventing a landowner from building on 90% of his property is a taking of the burdened parcel or merely a diminution in value of the whole. *Id.* at 2894 n.7. The Court has yet to settle Justice Scalia's query. However, the Court of Appeals for the Federal Circuit has indicated that the Takings Clause "prohibits the uncompensated taking of private property without reference to the owner's remaining property interest." *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568-69 (Fed. Cir. 1994). *See also Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180-81 (1994).

129. *Lucas*, 112 S. Ct. at 2901-02. The Court did not decide whether the regulation was actually a taking because if the Coastal Council could show that some existing common-law doctrine would prevent the plaintiffs from building on the land, no taking would occur. *Id.* at 2901. On remand, the South Carolina Supreme Court concluded that no common-law nuisance doctrine would have prevented plaintiffs from building. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992). *See also* Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1431 (1993) ("[T]he Court could not conclude that a taking had occurred."). *See infra* note 135 and accompanying text.

130. Justice Scalia prefaced "economically viable use" with "all" in his *Lucas* opinion. *Lucas*, 112 S. Ct. at 2893. However, *Agins* did not incorporate "all" in its opinion. *Agins*, 447 U.S. at 260 (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978)).

131. *Lucas*, 112 S. Ct. at 2893 (citing *Agins*, 447 U.S. at 260). *But see infra* note 135 (if the

leave real property completely undeveloped elevate the risk that the property is forced into public service under the pretense of mitigating a public harm.¹³² South Carolina, under the guise of the police power, could not deprive a landowner of all economically viable use of his property to conserve open space without paying compensation.¹³³

The Court announced that when a state regulation denies a landowner all economically viable use of his property,¹³⁴ the state may forego its duty to compensate *only if* the regulation prohibits a use the state could have prohibited, given existing nuisance or property law when the landowner acquired the property.¹³⁵ The state's bald assertion that a use is "noxious" or a "nuisance" will not allow a prohibition of the use without compensation¹³⁶ unless it shows the "noxious" use was actually a "nuisance" pursuant to prevailing law.¹³⁷

state could have prevented the use as a nuisance when the owner took title to the property, the state could legally prevent that use without incurring compensation liability).

132. *Lucas*, 112 S. Ct. at 2894-95. The Court identified other cases in which construction on certain lands was prohibited for safety reasons, conservation of open space, and a wildlife refuge. *Id.* at 2895 (citing *Annicelli v. South Kingstown*, 463 A.2d 133, 140-41 (R.I. 1983) and *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 193 A.2d 232, 240 (N.J. 1963)). The Court's opinion in *Lucas* indicates that a building prohibition, under the guise of safety, would not be regarded favorably because a state should use its power of eminent domain instead. *Id.*

133. *Id.* See *infra* note 134 (equivalence to a physical ouster).

134. *Lucas*, 112 S. Ct. at 2899. This is a "categorical rule." *Id.* A regulation depriving an owner all economically viable use is similar to a physical ouster from the property. *Id.* at 2894. The Court said: "Where 'permanent physical occupation' of land is concerned, we have refused to allow the government [to escape the compensation requirement] no matter how weighty the asserted 'public interests' . . . We believe similar treatment must be accorded . . . regulations that prohibit all economically beneficial use of land." *Id.* at 2900.

135. *Id.* at 2899 (Takings jurisprudence is traditionally guided by the understandings of "our citizens" regarding governmental power over their property "when they obtain title to property."). See also *Preseault v. United States*, 27 Fed. Cl. 69, 87 (1992). ("*Lucas* fixes the date on which the claimant acquires his interest for determining whether he possesses a compensable property interest"). In *Lucas*, The Court remanded the case with the following admonition to the South Carolina courts:

We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses *Lucas* desires are inconsistent with the public interest . . . As we have said, a 'State, by *ipse dixit*, may not transform private property into public property without compensation. Instead, . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.

Lucas, 112 S. Ct. at 2901-02 (citation omitted). In other words, a state may not summarily declare a certain use of property to be a nuisance and escape the compensation requirement if the prohibition of that use deprives a landowner all economically viable use of his land. See also *Sax*, *supra* note 31, at 1438 ("Established common law 'principles' of nuisance and property law are not affected."). For detailed discussions of *Lucas*, see Symposium, *Lucas v. South Carolina Coastal Commission: A Tangled Web of Expectations*, 45 *STAN. L. REV.* 1369 (1993). See *supra* note 90, for cases using the noxious use theory.

136. Cf. *Preseault*, 27 Fed. Cl. at 90 (mere assertion of "general regulatory authority" insufficient). The *Lucas* Court may have pillaged the legislative function by "elevat[ing] the common law of nuisance—and the judges who define it—to a new ascendancy over legislatures' traditional land use authority." John A. Humbach, "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 *CATH. U.L. REV.* 771, 773 (1993).

In summary, the Court has identified distinct classes of takings contemplated by the Fifth Amendment. First, there are cases that involve a direct physical invasion of property. In these cases, no amount of governmental interest will relieve the state of its obligation to compensate for the taking.¹³⁸ Second, there are the purely regulatory cases, which *Mahon* engendered and *Lucas* exalts.¹³⁹ Here, the Court focuses on the regulation's economic ramifications on the landowner because these cases involve regulations that devalue property.¹⁴⁰ Third, *Nollan* represents a hybrid class of cases in which the regulation, an exaction, produces a partial physical occupation; but if the exaction substantially advances a legitimate state interest, the Court will not require compensation.¹⁴¹ *Nollan* held that a conditional land exaction must bear an essential nexus to a legitimate state end. In *Dolan*, the Court defined the necessary degree of relationship needed to satisfy the essential nexus, the hiatus *Nollan* left unfilled.¹⁴²

137. The Court said, "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Lucas*, 112 S. Ct. at 2899. The Court stressed that a "decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses." *Id.* at 2902 n.18. *But see* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926) (orthodox validity of zoning ordinance analogous to validity of state police power to abate a nuisance). *See also* John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993).

138. *See supra* note 73. In *Lucas*, the Court said, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas*, 112 S. Ct. at 2893 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

139. *Lucas*, 112 S. Ct. at 2893-94 (holding coastal protection statute possibly a taking); *Key-stone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (mining regulation held not a taking); *Penn Central*, 438 U.S. 104 (landmark preservation statute held not a taking); *Mahon*, 260 U.S. at 415-16 (mining regulation held taking); *Whitney Benefits*, 926 F.2d at 1178, *cert. denied*, 502 U.S. 952 (1991) (prohibition of coal mining on alluvial valley held a taking).

The Court also has recognized "temporary" takings as another distinct class. *See, e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("no subsequent action by government can relieve it of the duty to provide compensation for the period during which the taking was effective"). *But see Agins*, 447 U.S. at 262-63, 263 n.9 (no temporary taking on facts).

140. *See supra* note 139, *Sax, supra* note 34, at 50-60; Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984).

141. Conditional land exactions resemble physical appropriations of land because a landowner loses the right to exclude. *Nollan*, 483 U.S. at 833; *Dolan*, 114 S. Ct. at 2316. However, when challenged as a taking, the Court analyzes conditional land exactions as regulatory takings because the appropriation arises only upon the landowner's application for a development permit. *See, e.g.*, *Nollan*, 483 U.S. at 831-34. *See also* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607-09 (1988).

142. *Dolan*, 114 S. Ct. at 2317.

D. *Dolan v. City of Tigard*: An Essential Nexus Must Be Roughly Proportional

Tigard, a suburb of Portland, Oregon, completed a comprehensive land-use plan pursuant to a long-standing Oregon state mandate and revised its Community Development Code to implement the plan.¹⁴³ As revised, a developer could obtain a building permit within the Fanno Creek 100-year floodplain only if he agreed to donate land for a public greenway and a bicycle/pedestrian path.¹⁴⁴

The Dolans¹⁴⁵ own a lot in downtown Tigard where they operated a retail plumbing store.¹⁴⁶ Fanno Creek flows through the southwestern corner of their property and along the western boundary.¹⁴⁷ The Dolans applied for a building permit to raze their existing plumbing store, construct a larger one, and pave the parking lot.¹⁴⁸ Acting pursuant to its development code, Tigard's Planning Commission granted the Dolans' permit on the condition that they "deed" land located within the 100-year Fanno Creek floodplain for a public greenway and bike/pedestrian path.¹⁴⁹ The Dolans sought a variance from the conditional exaction, but the Commission denied the request.¹⁵⁰

The Dolans appealed to the Land Use Board of Appeals (LUBA), asserting that Tigard's exaction constituted an uncompensated taking.¹⁵¹

143. *Id.* at 2313. See also ORE. REV. STAT. §§ 197.005 to -.860 (1991). The plan dictated that the City should "develop a vegetative buffer along streams and drainageways." Petitioner's Brief at 5, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (No. 93-518). The city later completed a transportation study that identified traffic congestion as a particular problem. In order to combat this, the City developed a plan for a pedestrian/bicycle path to encourage alternate modes of transportation for short trips. *Dolan*, 114 S. Ct. at 2313.

144. *Dolan*, 114 S. Ct. at 2314.

145. Florence Dolan's husband, John T. Dolan, died during the pendency of their action against the City of Tigard. Petitioner's Brief at 7 n.1, *Dolan* (No. 93-518).

146. *Dolan*, 114 S. Ct. at 2313.

147. *Id.*

148. *Id.* at 2313. The store covered about 9,700 square feet of a 1.67 acre parcel of land. *Id.* The Dolans wanted to increase its size from 9,700 square feet to 17,600 square feet and pave a 39-space parking lot. *Id.* Eventually, they also wanted to construct another building and provide more parking space on the parcel. *Id.* at 2313-14.

149. *Id.* at 2314. Justice Rehnquist agreed with the Dolans' argument that Tigard had requested a fee simple interest in their property. *Id.* at 2316; Petitioner's Reply Brief at 7, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (No. 93-518). Tigard argued that the requirement was an easement. Respondent's Brief at 18 n.16, *Dolan* (No. 93-518). Tigard said the fee-title for street easements remained in the grantor and reverted to the grantor if the street were ever abandoned. *Id.* Justice Rehnquist was particularly concerned with the Dolans' loss of their right to exclude others from the dedicated portion of the property. *Dolan*, 114 S. Ct. at 2320.

150. *Dolan*, 114 S. Ct. at 2314.

151. *Id.* at 2315.

The Land Use Board of Appeals rejected the claim and found a “reasonable relationship between the [impact of the] proposed development and the requirement to dedicate land along Fanno Creek for a greenway.”¹⁵² According to the Board, the proposed development indisputably would increase runoff into Fanno Creek.¹⁵³ The Board also found a reasonable relationship between requiring the bike/pedestrian path exaction and the abatement of traffic congestion because the path “could” provide alternate modes of transportation.¹⁵⁴ Essentially, the bike/pedestrian path was a sidewalk.

Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed LUBA’s decision and upheld the exaction.¹⁵⁵ Each court rejected the Dolans’ argument that *Nollan* required heightened scrutiny¹⁵⁶ of conditional land exactions.¹⁵⁷ The Oregon Supreme Court interpreted *Nollan* to rule that an “exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve.”¹⁵⁸ The court found that Tigard’s “unchallenged factual findings” supported the conditional exaction, and that the exaction would serve the same purpose as an outright denial.¹⁵⁹

The U.S. Supreme Court reversed the Oregon Supreme Court’s decision and ruled in the Dolans’ favor.¹⁶⁰ Writing for five Justices, Chief Justice Rehnquist held that when Tigard made an adjudicative decision to condition the Dolans’ building permit on a land exaction, Tigard had to justify its decision by making an individualized determination that the na-

152. *Id.* (citing *Dolan v. City of Tigard*, LUBA 91-161 (Jan. 7, 1992)).

153. *Id.*

154. *Id.* at 2322.

155. *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992), and *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), respectively.

156. Many commentators have argued that *Nollan* elevated the level of judicial scrutiny. *See, e.g.*, Michelman, *supra* note 141, at 1605-14, 1607 (“the Court [in *Nollan*] expressly endorsed a form of semi-strict or heightened judicial scrutiny”) *But see* Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 1012 (1989) (explaining that the “hint” of closer scrutiny in *Nollan* “should remain the sensible supplement to per se takings doctrine that its facts suggest it is”).

157. *Dolan*, 114 S. Ct. at 2315.

158. *Dolan*, 854 P.2d at 443.

159. *Id.* The court deferred to Tigard’s findings that “[c]reation of a convenient, safe pedestrian/bicycle pathway system . . . could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.” *Id.* (emphasis added) (citation omitted). *See infra* notes 175-204 and accompanying text for a discussion of the how *Dolan* shifts the burden of proof to the city, thereby rendering it impossible for a city to rely on unchallenged fact findings to support a land-use exaction.

160. *Dolan*, 114 S. Ct. at 2322. Justices O’Connor, Scalia, Kennedy, and Thomas joined the Chief Justice’s majority opinion. Justice Stevens filed a dissenting opinion which Justices Blackmun and Ginsburg joined. Justice Souter filed a separate dissent. *Id.* at 2312.

ture and extent of the exaction was roughly proportional to the anticipated impacts of the Dolans' proposed development.¹⁶¹

Because Tigard failed to make this showing, the Court found the exaction was an unconstitutional taking.¹⁶² Tigard required the dedication of a public greenway within Fanno Creek's floodplain, but failed to show why a *public* greenway was roughly proportional to reducing flood problems created by the Dolans' proposed development.¹⁶³ Tigard also failed to demonstrate that a bike/pedestrian path "would" mitigate the increased downtown traffic congestion created by the Dolans' development.¹⁶⁴ Tigard's finding that a bike/pedestrian path "could" offset "some" of the traffic and mitigate the Dolans' impact on traffic congestion did not satisfy rough proportionality.¹⁶⁵

To reach its holding, the Court endorsed *Nollan's* extension of the substantial advancement test—the essential nexus.¹⁶⁶ Beyond this precept, the Court coined "rough proportionality" as the logical progeny of the essential nexus.¹⁶⁷ Justice Rehnquist accomplished this by considering "representative" state court decisions.¹⁶⁸ The Court rejected the "lax"¹⁶⁹ and "very exacting"¹⁷⁰ approaches and embraced the intermediate approach used by a majority of state courts.¹⁷¹ These "intermediate" courts typically used the words "reasonable relationship" to describe their required degree of connection between an exaction and achieving a state end.¹⁷² However, Justice Rehnquist chose the words "rough proportionality" instead because he felt those words best described the proper relationship under federal law.¹⁷³ The majority carefully chose a term that did not suggest a lower level of judicial review because it wanted a standard that would sufficiently protect private property.¹⁷⁴

161. *Dolan*, 114 S. Ct. at 2319-20.

162. *Id.* at 2322.

163. *Id.* at 2322-23.

164. *Id.* at 2321.

165. *Id.* at 2321-22.

166. *Id.* at 2317 ("we must first determine whether the 'essential nexus' exists").

167. *Id.* at 2317, 2319-20.

168. *Id.* at 2318-19. The Court did this because the states had been considering the constitutionality of land-use exactions long before the Supreme Court. *Id.* In dissent, however, Justice Stevens argued these cases "either fail to support or decidedly undermine the Court's conclusions in key respects." *Id.* at 2322 (Stevens, J., dissenting).

169. *Id.* at 2318-19 (citing *Billings Properties, Inc., v. Yellowstone County*, 394 P.2d 182 (Mont. 1964); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966)).

170. *Id.* at 2319 (citing *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961) ("specific and uniquely attributable test").

171. *Id.* (citing *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

172. *Id.*

173. *Id.*

174. *Id.* Justice Rehnquist was careful not to adopt language that might denote the rational or reasonable relationship test used to analyze equal protection claims. *Id.*

Judicial review of legislative enactments has been accepted since *Marbury v. Madison*.¹⁷⁵ However, it is axiomatic that a court will not substitute its judgment for the legislature's when reviewing economic and social legislation.¹⁷⁶ Without question, "facts supporting the legislative judgment [are] presumed."¹⁷⁷ Economic and social legislation need only be supported by some rational basis,¹⁷⁸ and legislative acts are presumptively constitutional.¹⁷⁹ Accordingly, a challenger bears the burden to prove a statute is unconstitutional.¹⁸⁰

Similarly, courts historically have reviewed land-use regulations using a rational standard of review¹⁸¹ and honored them with the traditional presumption of validity.¹⁸² The challenger consequently bears the burden of proof.¹⁸³ However, legislative agencies that "adjudicate" must present fact findings so a reviewing court can determine whether their decisions are supported by substantial evidence.¹⁸⁴ Nevertheless, the typi-

175. 5 U.S. (1 Cranch) 137 (1803).

176. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

177. *Id.*

178. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

179. Economic and social legislation not involving suspect classifications or fundamental rights carries a strong presumption of validity that cannot be overcome absent a clear showing of arbitrariness or irrationality. *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981).

180. *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 258 (1931) (Brandeis, J.). Justice Blackmun recognized the importance of deferring to the legislature in *Lucas, Lucas*, 112 S. Ct. at 2909 (Blackmun, J., dissenting) ("the State now has the burden of showing the regulation is not a taking"). See also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136 (1893) (the judiciary must respect legislative acts).

181. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning classified as economic-social legislation needed to bear only "a rational relationship to a [permissible] state objective") (citation omitted); *Associated Homebuilders, Inc. v. City of Walnut Creek*, 484 P.2d 606, (Cal. 1971), *appeal dismissed*, 404 U.S. 878 (1971); *Red Hill Coalition, Inc. v. Conservation Comm'n of Glastonbury*, 563 A.2d 1339, 1345 (Conn. 1989); *Billings Properties, Inc., v. Yellowstone County*, 394 P.2d 182 (Mont. 1964); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966); *Bird v. Colorado Springs*, 489 P.2d 324, 325-26 (Colo. 1971) ("include every intentment in favor of its validity"). See also Michelman, *supra* note 141, at 1607 ("minimal test of plausibility").

182. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("the usual presumption of constitutionality"); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (legislative judgment is "well-nigh conclusive"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity . . . be fairly debatable, the legislative judgment must be allowed to control."). See also Humbach, *supra* note 137, at 23-28.

183. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (holding that plaintiffs failed to carry their burden to prove the statute constitutes a taking).

184. See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Administrative Procedure Act* 5 U.S.C. § 706(2)(E) (1966). Rather than assuming the existence of facts to support an adjudicative decision, like the assumption regarding legislative determinations, adjudicators are held to higher evidentiary burdens. They must support their decisions with substantial evidence in the record. *Universal Camera Corp.*, 340 U.S. at 488. See also Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of*

cal substantial evidence standard permits considerable deference to the adjudicator, and a reviewing court will not overturn the decision unless there is less than a "scintilla" of supporting evidence.¹⁸⁵

Confronted with an exaction, the Supreme Court in *Dolan* essentially adopted a substantial evidence-type standard, although more demanding, by shifting the burden of proof to the city. It did so because Tigard had "adjudicated." In the following discussion, the authors demonstrate the analytical flaws in *Dolan*'s holding and illustrate its practical effects. The authors also assess *Dolan*'s applicability to pre-annexation agreements and money exactions.

DISCUSSION

I. Adjudication: The Analytical Justification for Shifting the Burden

Justice Rehnquist twice stated that Tigard had made an adjudicative decision to grant the Dolans' permit conditioned on a land exaction.¹⁸⁶ He held that in such a situation, the city has the burden to justify its decision.¹⁸⁷ However, Justice Rehnquist did not explain his

Constitutionality in Land-Use Law, 24 URB. LAW. 1, 8 (1992) ("Legislative bodies are not subject to the same evidentiary burdens as fact finders.").

185. *Universal Camera Corp.*, 340 U.S. at 477.

186. *Dolan*, 114 S. Ct. at 2316, 2320 n.8. Justice Rehnquist possibly did this to disguise the resulting scrutiny of legislative determinations. Justice Stevens argued the majority had reverted to an era when "[m]embers of [the] Court" invalidated state economic regulations they viewed as "unwise or unfair." *Id.* at 2327 (Stevens, J., dissenting). The *Nollan* Court may have first signified a shift in the burden. *See Nollan*, 483 U.S. at 834 n.3. It was not until 1994 that the Court expressly did so. *Dolan*, 114 S. Ct. at 2319-2320, 2320 n.8.

187. *Dolan*, 114 S. Ct. at 2316, 2320 n.8. Justice Rehnquist's justification for shifting the burden raises issues regarding separation of powers. That doctrine dictates that each branch of government "[should] confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, . . . must be resisted." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983); *O'Donogue v. United States*, 289 U.S. 516, 530 (1933) (the acts of each branch shall never be subject to the "coercive influence of either of the other departments"). In this respect, the judicial branch should check the legislative branch, but not usurp a legislative power. *O'Donogue*, 289 U.S. at 530. *See also* *McRay v. United States*, 195 U.S. 27, 54 (1904) (the judiciary shall not usurp power of the legislature); *Board of Sup'rs of Fairfax County v. Allman*, 211 S.E.2d 48, 55 (Va. 1975) (court should not to substitute its judgment for the legislature regarding general zoning classification). Even Justice Scalia expresses conviction for the separation of powers doctrine. *See, e.g.*, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2882 (1992) (Scalia, J., dissenting). *Dolan* shifted the burden to justify a land dedication to the local legislature. The Court justified the burden shift because it thought Tigard had made an adjudicative decision to condition the Dolans' permit on an exaction. *Dolan*, 114 S. Ct. at 2316, 2320 n.8. If Tigard's action were adjudicative, the Court would not have usurped the Town's legislative authority, since the Court and the Town each would have acted as adjudicators. In that instance, the Court could justify higher scrutiny. *See Board of Cty. Comm'rs of Brevard v. Snyder*, 627 So.2d 469, 474 (Fla. 1993) (adjudication justifies higher scrutiny). However, the distinction between legislation and adjudication can be minimal and when it is, the justification for shifting the burden fails.

conclusion that Tigard's decision was adjudicative.¹⁸⁸ His conclusion is only partially correct, making the rationale for shifting the burden vulnerable to criticism.

The distinction between legislation and adjudication can be slight, making certain aspects of Tigard's decision arguably adjudicative and others arguably legislative.¹⁸⁹ By strict definition, legislation formulates general rules or policy, and adjudication applies rule or policy to specific facts.¹⁹⁰ Discretionary interpretation of statutory mandates figures prominently in a court's determination that an act is adjudicative.¹⁹¹

Tigard's decision to condition the Dolans' building permit on their grant of the bike/pedestrian path is theoretically adjudication. Under the Community Development Code, the City Planning Commission had some discretion, albeit minimal, to determine the means to facilitate the path and decrease traffic congestion.¹⁹² The Commission could condition the permit on a land exaction if the proposed development were physically linkable to an existing path.¹⁹³ Alternatively, if the development were not linkable, the City could allocate part of the path's construction cost to the developer by requiring an impact fee.¹⁹⁴ Based on each development's circumstances, the Commission could choose between a land exaction and

188. Some may posit that Tigard had made an adjudicative decision when the Dolans applied for a variance from the conditions imposed. However, if this is the case, Justice Rehnquist did not make this clear. He merely stated "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." *Dolan*, 114 S. Ct. at 2316, 2320 n.8.

189. Carolyn M. Van Noy, Comment, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533, 540 (1986) (stating the line "is often hard to recognize").

190. See generally *Londoner v. Denver*, 210 U.S. 373, 385-86 (1908); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Cherry Hills Resort v. Cherry Hills Village*, 757 P.2d 622 (Colo. 1988); *Board of Cty. Comm'rs of Brevard v. Snyder*, 627 So.2d 469, 474 (Fla. 1993); Michael M. Shultz & Jeffrey B. Groy, *The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action*, 1988 UTAH L. REV. 569, 610-613 (1988); Van Noy, *supra* note 189, at 538-40.

191. *Home Builders Assoc. of Central Arizona v. City of Scottsdale*, No. 1 CA-CV 92-0210, 1995 WL 61490, at *4 (Ariz. Ct. App. 1995) (holding that *Dolan* was inapplicable to impact fee when town, acting pursuant to legislative mandate, lacked discretionary interpretation necessary for adjudication). See also Van Noy, *supra* note 189.

192. Tigard's Code states:

The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed [include]: (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connection cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths.

Dolan, 114 S. Ct. at 2313 n.1 (citing CDC § 18.86.040.A.1.b.).

193. *Id.*

194. *Id.*

an impact fee, giving the City some discretion to tailor an exaction to a particular set of facts.

On the other hand, the City's action is less discretionary and therefore, less adjudicative, regarding the floodplain/open space requirement.¹⁹⁵ Tigard's Development Code dictates that any development within the Fanno Creek floodplain "shall" dedicate land within the floodplain for a public greenway.¹⁹⁶ According to the Code, the Commission must determine only whether the subject property lies within the floodplain. If so, the Commission had no alternative other than to require the land exaction.¹⁹⁷ Because the floodplain requirement is virtually self-executing and non-discretionary, Tigard's decision requires no interpretation and amounts merely to enforcing a legislative mandate.

Justice Rehnquist further justified shifting the burden of proof to the town by distinguishing *Dolan* from precedent cases in which towns had legislatively zoned entire areas.¹⁹⁸ In these cases, the challenging party had the burden to show that a town had arbitrarily regulated property rights.¹⁹⁹ But in *Dolan*, the majority shifted this burden because it felt Tigard acted on the Dolans' individual parcel of land. The Dolans' parcel, however, was part of a larger class—the Fanno Creek floodplain. Tigard had legislatively classified the entire Fanno Creek area so each developer along the Creek had to provide an exaction within the floodplain.²⁰⁰ Under the Development Code mandate, Tigard treated each developer uniformly.²⁰¹ If the developer had land within the floodplain, Tigard invariably required a land exaction for the greenway. The majority's reasoning in *Dolan* is suspect because Tigard had indeed classified an entire area, precisely like a general zoning classification.²⁰²

Legislative acts are entitled to a presumption of validity,²⁰³ therefore, courts should be loathe to declare them unconstitutional.²⁰⁴ Moreover,

195. *Id.* at 2331 n.* (Souter, J., dissenting). Justice Souter thought the adjudication occurred when the Dolan's requested a variance from the permit conditions, not the decision to condition permit since Tigard's Development Code required such a condition. *Id.* The degree of discretion is a factor of adjudication. See Van Noy, *supra* note 189, at 538.

196. *Dolan*, 114 S. Ct. at 2314. However, the city did have some amount of discretion to determine precisely how much land within the greenway should be exacted. *Id.*

197. *Id.*

198. *Dolan*, 114 S. Ct. at 2316, 2320 n.8.

199. *Id.* at 2320 n.8. The Court referred to *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980). *Id.* at 2316.

200. *Id.* at 2314. Before *Dolan*, a town did not have to consider individual impacts.

201. *Id.*

202. *Id.* at 2316, 2320 n.8.

203. See *supra* note 179 and accompanying text.

204. In *Dolan*, Justice Stevens argued, "the Court has made a serious error by abandoning the tradi-

when the level of adjudication amounts only to non-discretionary statutory enforcement, the burden of proof does not properly rest with the legislature. Regardless of the analytical justification for shifting the burden, *Dolan* presents significant practical obstacles for Rocky Mountain towns using land exactions to conserve open space.

II. The Practical Effect of Dolan's Individualized Determination of Rough Proportionality: Conditional Open Space Exactions Are More Difficult to Justify

Dolan adds "rough proportionality" as a new and controversial component of the regulatory takings doctrine.²⁰⁵ Although some check is necessary to prevent a town from requiring a more extensive exaction than actually needed to mitigate development impacts,²⁰⁶ rough proportionality imposes burdensome obstacles for Rocky Mountain town planners using land exactions to obtain open space from builders and subdividers. The following examples demonstrate that the findings *Dolan* requires may be particularly difficult to demonstrate.

tional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan." *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting).

205. Justice Stevens said rough proportionality "run[s] contrary to the traditional treatment of these cases and break[s] considerable and unpropitious new ground." *Id.* at 2322 (Stevens, J., dissenting).

Although the majority specifically said mathematical precision is not necessary, it is easy to demonstrate rough proportionality using a mathematical formula. For example, suppose a city demonstrates, after diligent research and consultation with land-use experts, that one acre of land adjacent to a creek is necessary to absorb 2000 gallons of storm water run-off which is a legitimate state interest. Now comes a developer who wants to build a structure that will increase water run-off by 7000 gallons. In a purely mathematical sense, rough proportionality would require a 3.5 acre exaction of pervious open space: 7000 gal./x acre exaction = 2000 gal./1 acre.

206. *Dolan*, 114 S. Ct. 2319. The rationales espoused in *Dolan* have long been recognized. In 1958, Professor Dunham offered the following foresight:

It is unconstitutional to compel an owner to commit his land to park use in order to meet the public desire for a park, but an owner may be compelled to furnish a portion of his land for park where the need for a park results primarily from activity on other land of the owner. It is unconstitutional to compel him to use his land as a parking lot in order to obtain a parking lot for the community, but it is within constitutional power to compel an owner to provide a parking lot for the parking needs of activities on his own land.

Allison Dunham, *A Legal and Economic Basis for City Planning (Making Room for Robert Mosaes, William Zeckendorf, and a City Planner in the Same Community)*, 58 COLUM. L. REV. 650, 666-67 (1958). Professor Rubenfeld posits a similar "using" theory. Under this theory, a regulation "effectively forces a piece of property into state-dictated service, it must pay." *E.g.* Rubenfeld, *supra* note 70, at 1182.

A. Jackson's Flat Creek Exaction: The Findings Necessary to Meet *Nollan's* Essential Nexus and *Dolan's* Rough Proportionality

The Town of Jackson, Wyoming, utilizes land exactions to preserve open space.²⁰⁷ Jackson requires new subdivisions along Flat Creek to donate a ten-foot public fishing easement along the stream bank.²⁰⁸ The easement is intended to restore the stream environmentally and provide public recreation.²⁰⁹ Understandably, Jackson recognizes that a "restored and accessible Flat Creek would be a visual and recreational amenity to the entire community."²¹⁰

Before considering *Dolan*, the Flat Creek exaction must satisfy *Nollan's* essential nexus test.²¹¹ However, *Dolan* did not indicate whether the landowner or the town bears the burden of establishing an essential nexus. Justice Rehnquist discussed the burden shift only after reaching the nexus and proportionality questions.²¹² Arguably, *Dolan* requires a town to bear the burden of proving an essential nexus. In *Dolan*, the Court justified the burden shift because Tigard had adjudicated, and the Dolans relinquished their right to exclude. Both circumstances were present in *Nollan*. Given these circumstances, *Dolan* shifts the burden to prove an exaction's constitutionality to the town. Therefore, a town now may have the burden to prove both an essential nexus and rough proportionality. However, since *Dolan* was silent on the issue, the landowner still should bear the burden to show that an essential nexus is non-existent.²¹³ If the landowner proves that no nexus exists, the inquiry will end. But if a nexus does exist, the burden shifts to the town for the extra demonstration of rough proportionality.

Regardless of who bears the burden, an essential nexus entails two factors. First, the town must have the ability to deny or limit the subdivi-

207. The "residents expressed a strong desire to retain a rural western character and a sense of true community They were committed to preserving open space." Plan, *supra* note 2, at 1-3.

208. Land Development Regulations, *supra* note 47, at art. IV, div. 49500(D).

209. Flat Creek is a pristine trout stream in areas north of Town. However, the Jackson/Teton County Comprehensive Plan identifies Flat Creek in Town as the "single most prominent natural feature in need of immediate attention." Plan, *supra* note 2, at 4-19. The Plan recommends immediate restoration by designating the stream as a "special enhancement area" and further suggests that public access be provided by the use of "exactions, or as conditions of record." Plan, *supra* note 2, at 4-19, 21.

210. Plan, *supra* note 2, at 4-19.

211. *Dolan*, 114 S. Ct. at 2317 ("If we find a nexus exists, we must then decide the required degree of connection between the exaction and the projected impact of the proposed development.").

212. *Id.* at 2319, 2320 n.8.

213. *McElwain v. County of Flathead*, 811 P.2d 1267, 1270-71 (Mont. 1991) (presuming setback ordinance valid and landowner has the burden).

sion permit to achieve its goals.²¹⁴ Second, the conditional exaction, substituted for the greater power to deny, must further the same state end advanced as the justification for the denial.²¹⁵ Thus, pursuant to its police power, Jackson must be able to deny development within ten feet of Flat Creek to achieve stream restoration and recreation.²¹⁶

Denying a subdivision permit would limit the number of new residents using existing recreational facilities and help restore the Creek's environmental integrity. Likewise, the Flat Creek exaction excludes building and provides needed recreational accommodations. It substantially advances Jackson's legitimate interest in promoting convenient public recreation. Imposed as a condition to subdivide along the Creek, the exaction achieves the same result as a subdivision permit denial. Therefore, it likely satisfies an essential nexus. However, *Dolan* requires a closer inspection of the exaction.

Dolan commands courts to consider whether the "nature and extent" of an exaction are "roughly proportional" to the impact of new development.²¹⁷ Manifest from the opinion, a court must examine the impact of new development on a preventable harm, or assess how, and to what extent, new development creates the need for a public accommodation.²¹⁸ The majority's application of rough proportionality does not reveal the logistics of such a relationship.²¹⁹ Presumably, a court must examine the size, location, and ownership of an exaction to determine whether its nature and extent are roughly proportional to the anticipated impact from proposed development.²²⁰

214. Both the *Nollan* and *Dolan* Courts proceeded on the premise that the respective land-use governing bodies could have denied the landowners' building permits to achieve their goals. *Nollan*, 483 U.S. at 836; *Dolan*, 114 S. Ct. at 2318 ("[i]t seems . . . obvious that a nexus exists . . ."). Of course, the denial cannot deprive the landowner economically viable use of his land. See generally *Lucas*, 112 S. Ct. 2886 and *infra* notes 249-57 and accompanying text.

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

216. The "ability to deny" the permit contemplates only the Town's inherent ability to issue a denial pursuant to its police power. The ability to deny does not contemplate whether the Town could deny the permit without incurring takings liability. In *Nollan*, the Court assumed, for argument, that the Coastal Commission could have denied the Nollans' building permit entirely to preserve the public's view of the beach. *Nollan*, 482 U.S. at 836. The Court noted that such a denial could not deprive the Nollans economically viable use of their property without being a taking. *Id.*

217. *Dolan*, 114 S. Ct. at 2319-20.

218. In *Nollan* and *Dolan*, each plaintiff's proposed development adversely impacted a constitutionally preventable harm. In *Dolan*, the proposed plumbing store would impact, to some extent, Tigard's interest in controlling flooding and mitigating downtown traffic congestion. *Dolan*, 114 S. Ct. at 2313. In *Nollan*, the plaintiffs' new house would prevent the public from viewing the public beaches. *Nollan*, 483 U.S. at 836.

219. Justice Souter argued that the majority did not apply its new test of rough proportionality to the facts. *Dolan*, 114 S. Ct. at 2330 (Souter, J., dissenting).

220. In *Dolan*, the land dedication was public, next to a creek, and roughly seven thousand square feet. *Id.* at 2314.

Regarding its nature and extent, the Flat Creek easement is ten feet wide, publicly owned, economically burdensome to landowners,²²¹ and potentially located in residential neighborhoods.²²² Because the easement is public, the landowners along the Creek will lose their right to exclude, like the plaintiffs in *Dolan*.²²³ In *Dolan*, the Court observed that Tigard "never said why a public greenway, opposed to a private one, was required."²²⁴ Similarly, to meet rough proportionality, Jackson will need to show why a public easement, opposed to a use restriction, is roughly proportional to the impact created by new subdivisions.²²⁵ A use restriction that preserves the landowners' right to exclude protects the stream bank as effectively as a public easement and may even provide more protection for the stream.²²⁶ However, one of Jackson's asserted purposes is public recreation—unlike Tigard, whose only goal for the greenway was flood control. A public easement along Flat Creek allows public recreation and promotes Jackson's interest in providing for it.

It seems the Town wishes to create a public right to fish along the Creek by having adjacent landowners foot the bill.²²⁷ The Town can argue that new subdivisions bring more people, many of whom will pursue the popular Jackson pastime of trout fishing. Additionally, new subdivision residents create the need for more parks and recreation because they increase the use of existing recreational spots.²²⁸ But, *Dolan* may prevent the Town from legislatively declaring that a ten-foot exaction is appropriate for every subdivision along the Creek. Instead, *Dolan* contemplates

221. Land in Teton County is very valuable, especially riparian to a scenic trout stream. See *supra* note 6.

222. Flat Creek flows through both commercial and residential districts. In *Dolan*, Tigard unsuccessfully argued that the plaintiffs' "commercial" land should not enjoy the same degree of protection as the Court accorded the residential landowner in *Nollan*. *Dolan*, 114 S. Ct. at 2321. A residential landowner may be able to assert this argument with more success. Cf. *United States v. Orito*, 413 U.S. 139 (1973) ("special safeguards to the privacy of the home").

223. The right to exclude is a fundamental component of property. *Dolan*, 114 S. Ct. at 2320 (citing *Kaiser Aetna*, 444 U.S. at 176).

224. *Id.*

225. The Town could ban development within ten feet of the stream bank but allow the landowner to retain his right of exclusion. *But see infra* notes 250-57 and accompanying text.

226. See, e.g., R. Prescott Jaunich, *The Environment, The Free Market, and Property Rights: Post-Lucas Privatization of the Public Trust*, 15 PUB. LAND L. REV. 167, 192-93 (1994).

227. Jackson may face further problems because the Town desires to create an easement for which the public has no legal right. Because Wyoming law confers no public right to fish from a stream bank, the town may have considerable difficulty arguing that new development impacts a right that does not exist. See, e.g., *Day v. Armstrong*, 362 P.2d 137, 145-46 (Wyo. 1961) (holding state ownership of the water bestows the right to float on the surface allowing only incidental touching of the shore and bed). Compare *Nollan*, 483 U.S. at 828-29 (Court specifically identified public right to walk along and view the beach).

228. *National Geographic* recently recognized the increased burdens on recreation in the Grand Teton National Park area. Brian Hodgson, *Grand Teton*, NAT'L GEOGRAPHIC, Feb. 1995, at 119.

that each subdivision may oblige more or less land depending on how much space is necessary for a given number of anglers brought in by each subdivision.²²⁹ Jackson will have to demonstrate “exactly” how much land will mitigate the burdens created by new recreation-seeking residents. Therefore, the town may be able to justify only five feet when a subdivision brings in only fifty residents, and if a subdivision attracts one hundred residents, the city perhaps could justify a ten-foot easement.²³⁰ To make the showing, expensive “rough proportionality experts” may become a necessary routine.²³¹

B. The Meaning of Individualized Determination

A town must make an “individualized determination” to demonstrate that an exaction is roughly proportional to the impact created by a development.²³² In *Dolan*, the bike/pedestrian path may have been objectively desirable, but the Court required Tigard to quantify the extent to which the Dolans’ individual development created or contributed to the need for the path. Next, Tigard had to show the bike/pedestrian path actually would mitigate the increased traffic congestion.²³³

A hypothetical²³⁴ demonstrates the potential ramifications of the individualized determination requirement. Suppose a developer applies to the fictitious town of “Big Whiskey,”²³⁵ Wyoming, for a subdivision per-

229. The allowable width of the easement would depend on findings that show how much land is required for a certain number of people to stand on the bank and fish. In *Dolan*, Tigard did not demonstrate that the “additional number of vehicle and bicycle trips generated by [plaintiff’s] development [is roughly proportional] to the . . . requirement for a dedication of the pedestrian/bicycle pathway easement.” *Dolan*, 114 S. Ct. at 2321.

230. These numbers are purely arbitrary, for the sake of example only. The appropriate width will depend on sufficient findings. *Id.* at 2319-20.

231. The city might pass the cost to the developer. Interview with Gilbert F. McNeish, Partner, Grimshaw & Harring, P.C., Professor Adjunct, Planning Law, School of Architecture and Planning, University of Colo. at Denver, in Denver, Colo. (Jan. 26, 1995). The Jackson plan specifically allocates the cost of determining the appropriate amount of a fee-in-lieu to the developer. *See, e.g.*, Land Development Regulations, *supra* note 47, at art. IV, div. 49500(B).

232. *Dolan*, 114 S. Ct. at 2319-20. The Court foreshadowed this requirement in *Nollan* when Justice Scalia recapitulated that it is unfair to require individuals to pay for public improvements when they did not contribute proportionally to the need for those improvements. *Nollan*, 483 U.S. at 835 n.4. This is not a new concept in takings law. Justice Holmes, the progenitor of the regulatory takings doctrine, bolstered his opinion with the tenet that “the question at the bottom is upon whom the loss of the changes desired should fall.” *Mahon*, 260 U.S. at 416.

233. In *Dolan*, the majority required a showing that the bike path exaction “would mitigate traffic.” *Dolan*, 114 S. Ct. at 2321-22. A finding that the path “could mitigate traffic” was insufficient. *Id.*

234. The authors recognize the examples utilized throughout this comment are not precisely analogous to *Dolan*’s facts. By way of example, the authors hope to demonstrate how *Dolan* may apply to open-space dedications in the Rocky Mountain West.

235. The residents of Big Whiskey hope that impending growth will not be “unforgiving” to their pastoral village.

mit. He wants to subdivide his 640-acre ranch, which his family homesteaded in 1890. The ranch is located on a wildlife corridor that Big Whiskey's land-use plan has designated for conservation.²³⁶ The developer is particularly interested in constructing about twenty-five modest ranchettes on or near the corridor so new homeowners can view the abundant elk and deer each morning over coffee. But the ranch owner's neighbors already had developed nearby fifteen years earlier. As a result, this developer's land is the last remaining route to a critical water source.²³⁷ To protect the migrating animals, Big Whiskey could grant the permit contingent on an open-space exaction within the wildlife corridor.²³⁸ In which case, Big Whiskey will have to make an individualized determination of rough proportionality pursuant to *Dolan*.²³⁹

There are two polar interpretations of the individualized determination. At the first extreme, advanced by property rights advocates, Big Whiskey would have to consider the individual developer's historic impact on the wildlife corridor and tailor its exaction accordingly.²⁴⁰ At the other extreme, the town need only assess the individual impact of a developer's proposal, together with the cumulative impact of his neighbors,²⁴¹ and devise its exaction given the circumstances existing at the time of the application.

236. Allowing wildlife to migrate "is a preservation technique that is compatible only with wide spaces or plentiful resources, where plants and animals have an opportunity to regenerate in a condition of non-use If we want wildlife, we need to retain some portion of more or less wild habitat, even though the outlying areas are devoted to other uses." Carol A. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 17 (1994).

237. Many Rocky Mountain towns lie near critical wildlife habitats where urban sprawl is particularly devastating. It is not uncommon for homes (or proposed development) to be located on critical migration and winter habitats for moose, elk, or deer. See generally Craig A. Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1 (1991); George C. Coggins & Irma S. Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433 (1982).

238. Big Whiskey could also choose to deny the permit all together which would raise takings considerations under *Lucas*. See *infra* notes 250-57. In addition, Big Whiskey could condition the permit on obtaining an impact fee. See *infra* notes 296-308 and accompanying text for a discussion of whether *Dolan* applies to impact fees.

Further, the Town could grant the permit contingent on allowing the developer to build only outside of the corridor leaving perhaps eighty percent of his land undeveloped. This situation raises the particular issue which *Lucas*, *Nollan*, and *Dolan* did not address: the Court has yet to consider whether the ban on developing only a portion of one's property constitutes a "partial" taking. *Lucas*, 112 S. Ct. at 2894 n.7. See *supra* note 128. Of course, the Town could also condemn the land and pay compensation.

239. *Dolan*, 114 S. Ct. at 2319-20.

240. See, e.g., Letter from Alexander Dushku, Attorney, Pacific Legal Foundation, to Editorial Board of the *Land and Water Law Review* 7 (Oct. 4, 1994) (on file with the *Land and Water Law Review*). This interpretation is arguably incorrect because it ignores the language of *Dolan's* holding that an exaction must be roughly proportional to the impact of *proposed* development. See *infra* notes 246-248.

241. *Nollan*, 483 U.S. at 835 (the town can consider the developer alone or in conjunction with other construction).

The developer likely will argue for the first interpretation because his land has remained undeveloped for over a hundred years. He is not responsible for the pre-existing shortage of migratory routes. Precedents, including *Dolan*, may provide theoretical support for his argument.²⁴² In *Nollan*, the Court noted in *dicta* that the Coastal Commission could not single out landowners to “remedy [a] problem[] although they had not contributed to it more than other . . . landowners.”²⁴³ Similarly, according to the *Dolan* majority, a “principal purpose” of the Takings Clause is to ensure that a town does not force a single landowner to shoulder the costs of public improvements which should be borne by the public.²⁴⁴ An individualized determination under this reasoning could mean that Big Whiskey must realize that a burden exists on the wildlife corridor for which this developer is not “individually” responsible. Therefore, if Big Whiskey singles out the developer to remedy the animal migration problem, although he had not contributed to it more than his neighbors, anything more than a minimal exaction, if at all, may be unconstitutional.²⁴⁵

The second interpretation is more consistent with *Dolan*'s holding and favors the Town. In *Dolan*, the Court did not consider the plaintiffs' historic impact on traffic congestion and flooding. It focused on the individual impact of the Dolans' proposed development.²⁴⁶ A roughly proportional exaction would not require a landowner to bear burdens that in fairness the public should bear because the developer presently creates or exacerbates a harm the Town can constitutionally mitigate. The individualized determination language merely mandates towns to consider each applicant individually. Thus, Big Whiskey must only assess the degree of impact potentially caused by the individual development on the wildlife corridor, given the circumstances when the developer applied for the

242. The arguments proffered by property right advocates, such as the Pacific Legal Foundation, have garnered considerable support by the current Court. See, e.g., Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468, 471 (Cal. Ct. App. 1993), *petition for leave to file amicus curiae granted*, 114 S. Ct. 2731 (1994) (Blackmun, Stevens, Souter, and Ginsburg, J.J., would have denied cert.); Dolan v. City of Tigard, 854 P.2d 437 (Or. 1993), *petition for leave to file amicus curiae granted*, 114 S. Ct. 544 (1993).

243. *Nollan*, 483 U.S. at 835 n.4.

244. *Dolan*, 114 S. Ct. at 2316 (stating the government cannot “for[c]e some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The *Nollan* majority also specifically adopted this reasoning. *Nollan*, 483 U.S. at 835 n.4. See also Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obvise*, 88 COLUM. L. REV. 1630, 1665 (1988) (“the avoidance of disproportionately placed burdens is the essence of the just compensation requirement”).

245. The viability of this interpretation is questioned because the developer presumably received the benefit of increased market value for his land by leaving it undeveloped.

246. *Dolan*, 114 S. Ct. at 2320-21.

subdivision permit.²⁴⁷ That degree of impact would be great, since the developer's land is the only remaining route to a critical water source. His proposed subdivision would have a devastating effect on animal migration.²⁴⁸ Therefore, the town may be able to justify an open space land exaction to ensure wildlife protection without violating *Dolan's* holding.

C. Rough Proportionality May Encourage Outright Denials of Development Permits: A Digression to *Lucas* and *Penn Central*

Dolan's rough proportionality test escalates the difficulty of justifying conditional open space exactions because it compels towns to make difficult and potentially costly findings.²⁴⁹ Consequently, towns may choose the seemingly simpler route of denying building or subdivision permits all together.²⁵⁰ The outright denial, however, is a use restriction that will invite the full panoply of economic takings factors.²⁵¹ An outright denial may not automatically deprive a landowner *all* economically viable use, and a total deprivation is not *per se* necessary for a taking.²⁵² Hence, *Lucas* and *Penn Central* may become important corollaries of *Dolan*.

247. In oral argument, Justice Souter asked the Dolans' attorney about the potential denominator of the rough proportionality test. Oral Argument, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (No. 93-518), 1994 WL 664939, at *22 (Mar. 23, 1994). He asked whether the analysis begins with the site in its natural condition before the land was settled. *Id.* The attorney responded that the year in which the plan was adopted was the "snapshot" of the existing conditions from which to measure rough proportionality. *Id.* at *22, *23.

248. No matter how obvious the affect, Big Whiskey would still have to make findings to demonstrate proportionality; probably using a wildlife expert. Tigard had to present more findings evidencing the relation between the exaction and impact of the Dolans' development despite the fact that it was "axiomatic that increasing the amount of impervious surface [would] increase the quantity and rate of storm-water flow from petitioner's property." See, e.g., *Dolan*, 114 S. Ct. at 2320.

249. McNeish, *supra* note 231.

250. In *Nollan*, the Court assumed that the Coastal Commission could have denied the building permit entirely. *Nollan*, 483 U.S. at 836. In *Dolan*, the Court did not specifically state whether the town could only require an exaction when—and only when—the city could deny the permit in the first place. However, Justice Rehnquist asked in oral argument, "We take this case on the assumption that the City could have denied [the building permit]?" Oral Argument, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (No. 93-518), 1994 WL 664939, at *4 (Mar. 23, 1994). To which Dolans' attorney responded, "yes." *Id.* In his dissenting opinion, Justice Stevens observed that Tigard can "rightfully deny the application outright." *Dolan*, 114 S. Ct. at 2322 (Stevens, J., dissenting).

251. The Court examines factors such as the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Hodel v. Irving*, 481 U.S. 704, 713 (1987) (explaining that the character of the action is either a direct physical appropriation of property or a regulation). See also *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 495 (1987); *MacDonald, Sommer, & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 184 (1985) (developer had a reasonable investment backed expectation to complete a land development project); *Kaiser Actna v. United States*, 444 U.S. 164, 174-75 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

252. See, e.g., *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174-75 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991). The Federal Court of Appeals found a taking when a

In *Lucas*,²⁵³ the Court focused on productive uses of the land.²⁵⁴ Thus, returning to the developer in the wildlife corridor, if he still could exclude others from his land, charge hunting fees or ranch the land, a denial of his subdivision permit still allows productive uses of the land.²⁵⁵ Whether a taking occurs depends on this developer's reasonable investment backed expectations.²⁵⁶ If his expectations are such that he cannot realize a sufficient return, the requirement to leave the land undeveloped may be a taking.²⁵⁷ Hunting and ranching may not generate as much revenue as subdividing and selling expensive ranchettes. A complete denial of the subdivision permit may very well operate as a taking if this developer's economic expectations are not attainable. Allowing some development away from the corridor, such as clustered housing, could solve any takings implications. Essentially, Rocky Mountain towns may suffer a "Catch-22" between an outright denial and a conditional land exaction because each method of regulating land use can result in a taking.

Through *Dolan*, the Court expresses a policy against "disproportionate" land exactions.²⁵⁸ At the very least, it sends a message that a town

federal reclamation statute prohibited the plaintiff from coal mining despite its ability to farm 600 acres of the surface property. *Id.* at 1174. The regulation worked a "total destruction of all economically viable use." *Id.* at 1177. The plaintiff was entitled to \$60,296,000 in actual damages plus pre-judgment interest from 1977. *Id.* at 1178. See also Claire E. Sollars, Note, *Natural Resources—To Take or not to Take—Was that Question Really Worth 140 Million Dollars?* Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), *cert denied*, 112 S. Ct. 406 (1991), 27 LAND & WATER L. REV. 403 (1992).

253. See *supra* notes 126-33 and accompanying text.

254. *Lucas*, 112 S. Ct. at 2894.

255. *Id.* at 2894-95. His productive use does not have to be "the best possible use of the land." *Agins*, 447 U.S. at 262.

256. The developer has ranched his land for over a hundred years. An open space exaction will not prevent his historical uses. In *Penn Central*, the court observed:

[t]hat appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.

Penn Central, 438 U.S. at 136. See also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (reasonable investment backed expectation is more than a unilateral expectation or an abstract need).

A property rights advocate might assert that a landowner's right of alienation should allow him to leave land undeveloped to enjoy market appreciations. *But see* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 332 (1988) ("The courts' adherence to an economics-based takings doctrine imposes on our society a particular economic system that prefers unchecked growth and development over stewardship and conservation.").

257. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991).

258. Findings made to support a decision to condition a building permit on an exaction before *Dolan's* mandate of rough proportionality may still suffice. See, e.g., *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 363 (Or. Ct. App. 1994) (ruling that remand not required and town's pre-existing findings satisfied rough proportionality).

must tailor a land exaction to standards the Court believes appropriate.²⁵⁹ Importantly, the findings necessary to support the standard are difficult to establish. *Dolan* and its possible digression to *Lucas*' economic considerations impart considerable uncertainty and litigation on the goal of preserving western open space. The difficulty of establishing rough proportionality is elevated because towns now bear the burden to present findings to do so. Towns have to justify legislatively enacted exactions with findings sufficient to withstand close judicial scrutiny.

D. Rough Proportionality Promotes Undue Scrutiny of Legislatively Determined Goals

Rocky Mountain towns need ample park and recreation areas because those features generate considerable revenue²⁶⁰ and typify the Rocky Mountain atmosphere.²⁶¹ To retain this atmosphere, plans require open space exactions based on standardized ratios. For example, Jackson requires a park exaction of nine acres per one thousand people from every new subdivision.²⁶² Under this standard, a development creating one hundred new residents must provide nine-tenths of an acre of public open space.²⁶³ Despite the legislative determination that nine acres of park space per one thousand people is desirable and applies with equal force to all new developers, *Dolan* may require the Town to produce findings that such a ratio is roughly proportional to the need for park space created by each individual subdivision.²⁶⁴ When the Town applies the exaction standard to a particular developer, the Town is, by definition, adjudicating, and adjudication may trigger *Dolan's* holding, together with a change in land ownership.²⁶⁵

259. *Dolan* "require[s] considerable particularity in local government findings." *Id.* at 362.

260. Jackson's plan identified that: "Ecologically sound land use policies will protect the area's visual beauty, abundant wildlife and air and water quality, all of which are drawing cards for Teton County's tourism-based economy." Plan, *supra* note 2, at 4-2.

261. The Colorado Supreme Court noted "a city whose civic identity is associated with its connection with the mountains—preservation of the view of the mountains from a city park is within the city's police power." *Landmark Land Company, Inc. v. City and County of Denver*, 728 P.2d 1281, 1285 (Colo. 1986).

262. Jackson specifically adopts the nationally recognized standard of ten acres of park space per one thousand people, but for unknown reasons, the regulations require only nine acres. Plan, *supra* note 2, at 7-6. The exaction states: "The dedication of land area shall be nine (9.0) acres per one thousand (1,000) residents and in accordance with adopted plans and polices." Land Development Regulations, *supra* note 47, at art. IV, div. 49500(A).

263. This is demonstrated by a simple equation: 9 acres/1000 people = X acres/100 people. Solving for (X), the Town would exact .9 acres from the developer.

264. The town must make an "individualized determination." *Dolan*, 114 S. Ct. at 2319-20.

265. *Dolan*, 114 S. Ct. at 2316, 2310 n.8. *But compare* *Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. Ct. App. 1994) (rejecting argument that rough proportionality did not apply because an exaction was legislatively mandated), *with* *Home Builders Assn. of Cent. Arizona v. City of Scottsdale*, (CA-CV 92-0210), 1995 WL 61490, at *3 (holding *Dolan* inapplicable to non-discretionary interpretation of statutory mandate).

It may be difficult for the Town to prove each subdivision requires the same amount of park space for each individual subdivision.²⁶⁶ *Dolan* imposes a second examination of legislation by requiring rough proportionality between a standard exaction and an individual impact. As a result, *Dolan* may unjustifiably force a town like Jackson to conclude that a subdivision adjacent to a national forest does not create the need for as much open space as a development in the middle of the Town. A developer may argue her development's proximity to the Bridger-Teton National Forest or the Snake River provides sufficient open space to comport with town needs. The Town may argue that national forests do not provide the same localized recreational opportunities for the wide variety of users that conveniently-located town parks provide.

Excessive judicial scrutiny of state land-use regulations is certainly not a new concern,²⁶⁷ and Justice Stevens's qualms with judicial activism encouraged by *Dolan* are plausible as well.²⁶⁸ When a town undertakes to regulate

266. The Wisconsin Court recognized the relationship is a difficult one to quantify: "In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the anticipated influx of the people into the community to occupy this particular subdivision." *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 447 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966).

267. Regarding *Mahon*, one early commentator wrote "the decision may be another indication of a recent tendency to narrow the scope of legislative power." *Current Decisions*, 32 YALE L. REV. 510, 511 (1922).

In takings law, judicial activism is not precisely analogous to *Lochnerian* substantive due process. It is tied more to recent takings cases and possibly *Mahon*. The analysis historically applied in the land-use cases differs from that applied during the height of the *Lochner* era, the primary difference being the Court's determination of the right involved. In the land-use cases, the Court considered potential invasions of the specifically enumerated right to keep one's property without an uncompensated invasion by the federal government. Cf. *Dolan*, 114 S. Ct. at 2317 ("the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use"). Professor Epstein goes so far as to say that property is a fundamental right. See, e.g., Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187 (1992). But see Carol M. Rose, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 10 CONST. COMMENTARY 238 (1993). Conversely, in *Lochner*-type cases, the Court assumed the right to contract was embodied within the Due Process Clause of the Fifth and Fourteenth amendments. *Lochner v. New York*, 198 U.S. 45, 53 (1905). However, neither the Constitution nor the Fifth Amendment, specifically protects an individual's right to contract. Consequently, the resurrection of judicial activism from elements of the substantive due process cases is largely without support.

268. Justice Stevens said the Court had "made a serious error by abandoning the traditional presumption of constitutionality" for property regulations. *Dolan*, 114 S. Ct. at 2326 (Stevens, J., dissenting). Before *Dolan*, Justice Brennan said the "Court impose[d] a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century." *Nollan*, 483 U.S. at 842 (1987) (Brennan, J., dissenting). See also J. Freitag, Note, *Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid Lochner Redivivus*, 28 VAL. U. L. REV. 743, 747 (1994) (recognizing Justice Scalia's "resurrection [of] *Lochnerian* jurisprudence"); Alfred P. Levitt, Comment, *Taking on a New Approach: The Rehnquist-Scalia Approach to Regulatory Takings*, 66 TEMP. L.Q. 197 (1993) (same); Robert H. Freilich & Elizabeth A. Garvin, *Takings after Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better than*

property, it expects considerable freedom to determine and enforce land-use goals germane to its constituents.²⁶⁹ While the Court should protect individual landowners from state encroachment on constitutionally protected property rights, it should not simultaneously usurp a state's power to legislate on matters of health, safety, and welfare.²⁷⁰ The *Dolan* majority has tilted this delicate balance toward the private interest, causing undue scrutiny of legislatively determined open-space acquisition goals. *Dolan's* burden-of-proof shift borders on judicial usurpation of legislative power.²⁷¹

Though not readily apparent from the opinion, *Dolan* may have even more far-reaching effects. The holding potentially applies to other methods of obtaining open space: land exactions through pre-annexation agreements and money exactions to finance open-space acquisitions.

III. Dolan's Potential Application to Land Exactions through Annexation Agreements and Money Exactions

A. Annexation Agreements and the Unconstitutional Conditions Doctrine

In the Rocky Mountain West, development often takes place outside town limits because county ranch land is a valuable quarry for eager developers.²⁷² Conserving ranch land on town fringes can maintain open space and prevent unsightly ranchettes from destroying the gateway-community atmosphere of many Rocky Mountain towns.²⁷³

To control development in outlying county lands, a town can annex the land and bring it within its police power jurisdiction.²⁷⁴ Annexation also pr-

Before, 22 STETSON L. REV. 409, 433 (1993); Patrick C. McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process in Constitutional Law*, 17 ENVTL. L. REV. 10369 (1987).

269. In 1915, Justice McKenna said "[i]t is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable." *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (upholding zoning ordinance prohibiting brickyard within the city limits against equal protection and due process challenges).

270. See generally Thayer, *supra* note 180.

271. See *supra* note 187.

272. See generally Mudge, *supra* note 66 (demonstrating impact fees used to preserve agricultural lands); *Agricultural Land Reaches Highest Value Since 1985*, CASPER STAR-TRIB., Jan. 13, 1995, at B3.

273. In the Rocky Mountain West, people can travel across miles of unspoiled country and suddenly reach a quaint little town. "Gateway Community" usually refers to a town that borders large expanses of public land or one that provides tourist accommodations. See John G. Mitchell, *Our National Parks*, NAT'L GEOGRAPHIC, Oct. 1994, at 2, 24-25, 35-36. In Jackson, the community said: "Much of Teton County's ranchlands, with its pastures, hay meadows, and broad sweeping vistas, was [sic] zoned for development at one unit per three to six acres. Dividing a 1,000-acre ranch into three-to six-acre lots does not preserve rural character . . . or open space." Plan, *supra* note 2, at 1-2.

274. See generally COLO. REV. STAT. ANN. §§ 31-12-101 to -707 (West 1975 & 1994 Cum.).

provides public services, such as roads and sewers, that a county is not in the business of providing. Before annexation, a town and a landowner may enter a private pre-annexation agreement. This contractual agreement may contain the town's promise to annex, together with guaranteed land-use regulations, in return for infrastructure concessions by the landowner.²⁷⁵ In other words, the agreement may contain conditional exactions. Some courts view the agreement as purely contractual, making constitutional implications potentially inapplicable.²⁷⁶ Because a town usually has no obligation to annex or provide town services,²⁷⁷ it could exercise considerable leverage over a developer actively seeking annexation.²⁷⁸ A town could aggressively solicit exactions without fearing takings challenges by developers.²⁷⁹

In *Dolan*, Justice Rehnquist's controversial reliance on the "well-settled doctrine of 'unconstitutional conditions'" challenges the feasibility of exacting

Supp.); IDAHO CODE §§ 50-222 to -224 (1994); MONT. CODE ANN. §§ 7-2-4201 to -4810 (1993); WYO. STAT. §§ 15-1-401 to -421 (1977 & 1994 Cum. Supp.).

Annexation "serves to further important governmental purposes, such as the encouragement of expanding urban areas and to do so uniformly, economically, efficiently and fairly, with optimum provisions made for the establishment of land use controls and necessary municipal improvements". *Village of Orland Park v. First Federal Savings*, 481 N.E.2d 946, 950 (Ill. Ct. App. 1985) Similarly, the Utah Supreme Court said:

[T]here is a substantial difference between the relationship of the present residents to the City, who are enjoying the benefits and bearing the burdens of city government, and the non-city residents, who are attempting to adjoin and obtain the benefit of municipal services . . . The expansion of the city results in additional demands on resources and services, including water. We see nothing inequitable, unjust or unlawful about requiring the [developer] to make a reasonable contribution to the bearing of these added burdens.

Child v. City of Spanish Fork, 538 P.2d 184, 187 (Utah 1975). Developers also seek annexation because they receive the benefit of town services and some assurance of fixed zoning laws. Barbara Baran, *Illinois Annexation Agreements—Are We Behind the Times?*, 12 N. ILL. U. L. REV. 727, 730 (1992).

275. *Orland Park*, 481 N.E.2d at 950 (upholding pre-annexation agreement requiring contributions of land and money under statutory authorization and case law); *Child*, 538 P.2d at 186-87 ("generally recognized rule" permitted city to condition annexation on transfer of irrigation water rights).

276. *Colorado Springs v. Kitty Hawk Development Co.*, 392 P.2d 467, 471 (Colo. 1964). In *Kitty Hawk*, the subdivider wanted city water and other services. The city said it would annex the subdivision only if the developer paid the city "eight percent in land or value thereof in dollars." *Id.* at 468. In upholding the pre-annexation agreement against due process and takings challenges, the court, despite a lengthy dissent, said the relationship was purely contractual, and it "[found] nothing in the general law of this state or in the Constitution prohibiting the imposition of conditions by a municipality upon one seeking annexation." *Id.* at 472. See also *City of Aurora v. Andrew Land Co.*, 490 P.2d 67, 70 (Colo. 1971) ("clearly within the power of the city to require the payment of annexation fees as a condition of annexation"); *Schlarb v. North Suburban Sanitation District*, 357 P.2d 647 (Colo. 1960). *But see* *Scarlett v. Town Council, Town of Jackson, Teton County*, 463 P.2d 26, 30 (Wyo. 1969) (stating in *dicta* that subject only to constitutional limitations, the legislature may annex at will).

277. *Kitty Hawk*, 392 P.2d at 472. *But see* *In re Annexation of Territory in Olmsted Township*, 470 N.E.2d 912, 915 (Ohio Ct. App. 1984) (decision not to annex was unreasonable); *Lariccia v. Mahoning County Bd. of Comm'rs*, 310 N.E.2d 257, 259 (Ohio 1974) (ordering annexation where evidence clearly showed annexation "would benefit the subject property").

278. McNeish, *supra* note 231.

279. McNeish, *supra* note 231.

land through pre-annexation agreements.²⁸⁰ That a government may withhold a discretionary benefit implies it may exercise the lesser power of granting the benefit with certain conditions.²⁸¹ The unconstitutional conditions doctrine limits this syllogism by preventing the government from offering a discretionary benefit only upon the surrender of a constitutional right without proper justification.²⁸² By offering a discretionary benefit qualified on a condition that entails a person's relinquishment of a constitutionally protected right, the government may coerce,²⁸³ extort,²⁸⁴ or bargain²⁸⁵ a particular action when it could not constitutionally have done so in the first place.²⁸⁶

As applied in *Dolan*,²⁸⁷ the doctrine prevented Tigard from "asking" the Dolans to sacrifice their constitutional right to just compensa-

280. *Dolan*, 114 S. Ct. at 2317. But, Justice Stevens said in dissent: "[*Dolan*] inaugurates an even more recent judicial innovation than the regulatory takings doctrine: the application of the 'unconstitutional conditions' label to a mutually beneficial transaction between a property owner and a city." *Id.* at 2327 (Stevens, J., dissenting). Although Justice Stevens accepts the doctrine as being well settled regarding certain rights, he noted it has "long suffered from notoriously inconsistent application." *Id.* at 2328 n.12 (Stevens, J., dissenting).

281. *Nollan*, 483 U.S. at 836-37 (explaining that power to forbid construction of house "must surely include" the power to condition the permit to build the house on a concession of property rights); *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 345-47 (1986); *South Dakota v. Neville*, 459 U.S. 553 (1983); *Packard v. Banton*, 264 U.S. 140, 145 (1924).

282. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). *Cf. Nollan*, 483 U.S. at 837 ("The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.")

For further discussions of the doctrine see generally Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Note, *Unconstitutional Conditions* 73 HARV. L. REV. 1595 (1960).

283. Under this theory, the person has no real choice but to agree to the condition and thereby sacrifice a constitutional right. *Speiser v. Randall*, 357 U.S. 513, 519 (1958).

284. In *Nollan*, Justice Scalia's holding intimated this theory of unconstitutional conditions when he said "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14-15 (1981)). See also *Stephenson v. Binford*, 287 U.S. 251, 275 (1932)).

285. Early on, the Court recognized that the government cannot force a person to bargain away his constitutional rights. *Doyle v. Continental Insurance Co.*, 94 U.S. 535, 538 (1877). Professor Epstein argues a similar theory. See Epstein, *supra* note 282, at 15-28.

286. A state may not practice "leveraging of the police power." See *Nollan*, 483 U.S. at 837 n.5.

287. Justice Rehnquist likely discussed the unconstitutional conditions doctrine to support the majority's patronage of private property interests. Furthermore, Justice Rehnquist needed to rely on the unconstitutional conditions doctrine to support the Dolans' complaint that they had suffered an uncompensated taking. Justice Stevens appropriately posits that no taking had occurred because Tigard had not acquired any property of the Dolans. *Dolan*, 114 S. Ct. at 2328 (Stevens, J., dissenting). Without the unconstitutional conditions doctrine, the Dolans would lack a remedy since no property had changed hands.

tion in exchange for a discretionary benefit,²⁸⁸ the building permit.²⁸⁹ Tigard could not require the Dolans to donate the city property for a bike path in exchange for a building permit, unless, of course, Tigard could show proportionality between the bike path exaction and the Dolans' impact. If the bike path exaction had met rough proportionality, there would have been no "unconstitutional" condition because the exaction would have substantially advanced a legitimate state interest. Express application of the unconstitutional conditions doctrine to takings law is fresh,²⁹⁰ but corresponds with Justice Rehnquist's conviction that the Takings Clause "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should [not] be relegated to the status of a poor relation."²⁹¹

Since a landowner may have no vested right to be annexed, a town cannot grant the discretionary benefit of annexation contingent upon his giving up a constitutional right—here again, the right to compensation for losing the right to exclude. Applying the unconstitutional conditions doctrine to pre-annexation agreements assures parity with *Dolan's* holding that a town must demonstrate that a conditional land exaction is roughly proportional to the impacts created by a development.²⁹² Hence, Rocky Mountain towns might have to demon-

288. There is some question as to whether a building permit is a discretionary governmental benefit. Justice Rehnquist did not address the dicta in *Nollan* which said: "But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan*, 483 U.S. at 833 n.2. *But see Been*, *supra* note 282, at 484 n.61 (analogizing the "right to build" with a similar right subject to state regulation, the "right to market one's products").

289. *Dolan*, 114 S. Ct. at 2317 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Ed. of Township High School Dist.*, 391 U.S. 563 (1968)).

290. Justice Stevens thought reliance on the doctrine was "assuredly novel, and arguably incoherent." *Dolan*, 114 S. Ct. at 2328 (Stevens, J., dissenting). However, Professors Epstein and Sullivan observe that Justice Scalia had applied, although not by name, the unconstitutional conditions doctrine in *Nollan*. Epstein, *supra* note 282, at 61; Sullivan, *supra* note 282, at 1463-64, 1505.

291. *Dolan*, 114 S. Ct. at 2320. Justice Rehnquist may have compared the Takings Clause to the First Amendment to justify application of the unconstitutional conditions doctrine since the doctrine may only apply to "a preferred right normally protected by strict judicial review." Sullivan, *supra* note 282, at 1427. *See also Dolan*, 114 S. Ct. at 2328 n.12 (Stevens, J., dissenting) (recognizing that the doctrine is most frequently applied to First Amendment rights). Elevating the Fifth Amendment right to keep property free of uncompensated invasions may be analytically suspect. Under the Constitution, everyone in the United States can exercise certain rights; e.g., the right to free speech and free association. However, an individual cannot exercise his or her Fifth Amendment property rights until that individual acquires constitutionally protectable property, which is typically a matter of common and statutory law. Not everyone in America is born with property, but everyone in America is born with the right of free speech. Therefore, although certainly not a poor relation, the Fifth Amendment property right is fundamentally different from the First Amendment right to free speech.

292. In the case of pre-annexation agreements, the exaction is the developer's tendered consider-

strate rough proportionality, like in any other conditional permitting situation, making *Dolan* applicable to an otherwise effective alternative to regulatory exactions.²⁹³

In opposition, a town granting annexation contingent on a land exaction could argue the contractual nature of a pre-annexation agreement is a mutually beneficial transaction.²⁹⁴ In previous takings cases, the Court has considered the landowner's reciprocal advantage.²⁹⁵ A developer should realize no economic loss in an annexation agreement because he can allocate the cost of a land exaction into home prices. In fact, annexation allows the developer to offer new residents the benefit of town services. Moreover, development located near public parks and recreation usually reflects higher market values, suggesting that exactions and effective land-use planning are "givings," not takings. Land-use planning increases the value of a community by providing a better quality of life.

B. Money Exactions: *Dolan's* Holding Should Not Apply

Western towns may use money exactions to finance open space acquisitions and public services necessitated by looming growth and development.²⁹⁶ This is particularly important because smaller towns often lack the financial wherewithal to procure large tracts of open

ation, but nonetheless remains a condition to a discretionary benefit.

293. Justice Stevens was vehemently opposed to Justice Rehnquist's application of the unconstitutional conditions doctrine. *Dolan*, 114 S. Ct. at 2328 (Stevens, J., dissenting) (quoting and citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) and *Hodel v. Irving*, 481 U.S. 704, 715 (1987)). He asserted that a conditional building permit was a mutually beneficial transaction featuring an "average reciprocity of advantage." *Id.* The potential for reciprocal benefits is apparent regarding a pre-annexation agreement since the agreement is presumably an arms-length transaction. *But see Perry*, 408 U.S. at 598 (applying unconstitutional conditions doctrine to alleged non-renewal of employment contract).

Fortunately, *Dolan* should not affect other land-use regulations that can control growth and enhance community character. Western towns still can establish zoning laws that allow only certain types of architecture and building materials, building codes, landmark preservation/historical districting, and overlay districts are still viable land-use tools after *Dolan*. See *supra* notes 48-53 and accompanying text.

294. Professor Sullivan argues that the conditional building permit in *Nollan* "furnishes in-kind compensation for the easement. Acceptance by the homeowner of the trade constitutes the best evidence that the compensation is adequate. Within the particular structure of the takings clause, the condition on the permit is justified." Sullivan, *supra* note 282, at 1505. However, Professor Epstein argues that a town operates as a monopoly because it is the only entity offering a building permit. Hence, it can coerce the developer absent any market pressures. Epstein, *supra* note 282, at 90-91.

295. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 715 (1987) ("reciprocity of advantage"). In *Dolan*, Justice Stevens supported a reciprocity argument and said "we should not presume that the discretionary benefit the city has offered is less valuable than the property interests that Dolan can retain or surrender at her option." *Dolan*, 114 S. Ct. at 2328 (Stevens, J., dissenting).

296. See *supra* note 66.

space.²⁹⁷ Should rough proportionality not apply to impact fees, towns still can exact money to buy open space without having to prove rough proportionality. But if *Dolan* does apply to money exactions, lower courts will be predisposed to invalidate them pursuant *Dolan's* mandate of elevated scrutiny and rough proportionality.

It is unclear whether the Supreme Court intends *Dolan's* holding to apply to money exactions.²⁹⁸ The Court recently granted certiorari to a California impact fee case.²⁹⁹ Although the Court remanded the case for consideration in light of *Dolan*, it did so without explanation.³⁰⁰ Therefore, it is premature to conclude that this automatically signifies the Court's desire that *Dolan* apply to money exactions. While *Dolan* may appear to provide a viable standard upon which to evaluate the constitutionality of an impact fee, gauging a money exaction under rough proportionality, and its concomitant burden shift, does not correspond with *Dolan's* reasoning.

The Takings Clause has been applied to appropriations of money,³⁰¹ but courts seldom use a heightened standard of review to judge whether a taking actually occurred.³⁰² Courts apply a rational standard, rather than a strict or

297. The very small towns that are just beginning to feel the brunt of growth do not possess the tax base from which to draw significant revenue.

298. Some lower courts have applied *Nollan's* essential nexus to money exactions. See, e.g., *William J. (Jack) Jones Insurance Trust v. City of Fort Smith*, 731 F. Supp. 912 (W.D. Ark. 1990); *Leroy Land Development Corp. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399 (D. Nev. 1990). Some early observers conclude that *Dolan* does not apply to impact fees, but only to dedications of land. Robert H. Freilich, et al., *The Supreme Court and State and Local Government: Small Change for a Changing Court*, 26 URB. LAW. 623, 689 (1994).

299. *Ehrlich v. City of Culver City*, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993), *vacated and remanded*, 114 S. Ct. 2731 (1994) (Blackmun, Stevens, Souter, and Ginsburg, J.J., would have denied certiorari). In *Ehrlich*, a developer applied for a permit to build thirty "deluxe" town-homes in an area designated for recreation. *Ehrlich*, 19 Cal. Rptr. 2d at 471. The city granted the permit, but only if the developer paid a \$280,000 impact fee to mitigate the loss of the recreation area and facilities. *Id.* The trial court held the fee was a unconstitutional taking. *Id.* at 472. The Court of Appeals reversed and held that a "monetary exaction" must only be rationally related to the governmental purpose of mitigating the loss of the recreational facility. *Id.* at 475-76. The court also said the money exaction would even satisfy the heightened scrutiny test of *Nollan*. *Id.* at 476.

300. 114 S. Ct. 2731 (1994).

301. See, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980) (holding a statute authorizing retention of interest money on interpleader a taking). See also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 968 (1984) (noncorporeal trade secret); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (holding that government's refusal to validate mechanics lien effected a compensable taking).

302. In *Webb's Fabulous Pharmacies*, it is difficult to determine the level of scrutiny the Court employed because the defendant offered no police power justification for the deprivation. *Webb's Fabulous Pharmacies*, 449 U.S. at 163. However, cases have considered conditional impact fees in light of *Nollan*. These cases either refused to accept that *Nollan* mandated a stricter standard of review for conditional exactions, or they acknowledged that if *Nollan* did mandate a stricter standard, that standard was necessary only when real property changed ownership. See, e.g., *Commercial Builders v. Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) (refusing to accept that *Nollan* mandated

substantial evidence standard of review.³⁰³ In *Dolan*, Justice Rehnquist hung his hat on the fact that the Dolans would have lost their right to exclude from real property.³⁰⁴ A money exaction does not involve the loss of real property, nor does it entail losing one's right to exclude from real property.

Since a money exaction involves the "deeding" of cash, but not real property, *Dolan's* holding is inapplicable. State courts already have accepted the change in ownership of real property as a justification for invoking *Dolan's* holding.³⁰⁵ The Oregon Court of Appeals interpreted *Dolan* to mean that rough proportionality is triggered by a requirement that the owner deed real property to the city.³⁰⁶

More importantly, the Supreme Court in *Nollan* limited any type of heightened scrutiny to land exactions.³⁰⁷ Consequently, reviewing courts

strict scrutiny, then applying a rational level of review to an impact fee); *Blue Jeans Equities v. San Francisco*, 4 Cal. Rptr. 2d 114, 118 (Cal. Ct. App. 1992) (concluding "any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings").

303. *Commercial Builders*, 941 F.2d at 874; *Blue Jeans Equities*, 4 Cal. Rptr. 2d at 118. See also *infra* note 308.

304. Justice Rehnquist said "[s]uch public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan*, 114 S. Ct. at 2316 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); see also *Loretto*, 458 U.S. at 434-35 ("when the character of the governmental action is a permanent physical occupation of property, our cases have uniformly found a taking to the extent of the occupation").

305. In a cursory fashion, the Maryland Court of Appeals recently held that *Dolan* was "generally inapplicable" to a conditional impact fee situation. *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994). In *Waters Landing*, the County required a money exaction or impact fee from a developer before it would issue the developer a building permit. *Id.* at 714. The County, by special emergency legislation, changed its money exaction statute by replacing the word "fee" with "tax" and stated that the statute was now authorized by the County's taxing power. *Id.* at 715. The court rejected the developers' argument that the tax was a duplicative property tax and violated the Equal Protection Clause. *Id.* at 720-721. Instead, the court held that the impact fee ("tax") was a valid excise tax. *Id.* at 716. Addressing and distinguishing *Dolan*, the court said the County imposed the impact fee ("tax") by a legislative mandate, "not by adjudication," and said the "tax does not require landowners to deed portions of their property to the County." *Id.* at 724.

306. *Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. Ct. App. 1994). Another interesting impact fee case is currently running through the Arizona courts. An Arizona court of appeals recently held that the an impact fee was subject to the Takings Clause. *Home Builders Ass'n of Cent. Arizona v. Scottsdale*, (CA-CV 92-0210), 1995 WL 61490, at *3 (Az. Ct. App. Feb. 16, 1995). However, the court found *Dolan's* holding inapplicable to the legislatively mandated impact fee because the statute provided no adjudicative discretion. *Id.* at *4.

307. The Court specifically limited higher scrutiny to the dedication of land. Justice Scalia said: We are inclined to be particularly careful about the adjective [substantial advancing] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

Nollan, 483 U.S. at 841 (emphasis added). See also *Waters Landing*, 650 A.2d at 720-724 (holding *Dolan* inapplicable to legislatively mandated conditional impact fee "tax" not requiring a deed of land and used rational level of review to uphold imposition of fee on developer); *Karl Manheim, Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 881, 950 (1989).

should review a money exaction using the rational level of review.³⁰⁸ If the Supreme Court desires that impact fees be roughly proportional to the harms caused by an individual development, the Court should not rely on *Dolan's* facts and reasoning to do so.³⁰⁹

CONCLUSION

Not since the settlers, trappers, and gold miners of the late 1800's came West, have the Rocky Mountains experienced such a rush on the land. Little did the early emigres know that their footsteps would be retraced a hundred

308. Most states apply a rational nexus test. *See, e.g.*, *Home Builders Ass'n v. Scottsdale*, 875 P.2d 1310, 1314-15 (Ariz. Ct. App. 1993); *Associated Home Builders of Greater East Bay, Inc. v. Walnut Creek*, 484 P.2d 606 (Calif. 1971), *appeal dismissed*, 404 U.S. 878 (1971); *Middlemist v. Plymouth*, 387 N.W.2d 190 (Minn. Ct. App. 1986); *Castle Homes and Development, Inc. v. City of Brier*, 882 P.2d 1172, 1178 (Wash. Ct. App. 1994); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965). Accordingly, courts defer to a legislature's determination that the fee substantially advances a legitimate state interest.

Alternatively, courts employ an abuse of discretion standard. *See, e.g.*, *Cherry Hills Resort Development v. Cherry Hills*, 790 P.2d 827 (Colo. 1990); *City of Tarpon Springs v. Tarpon Springs Arcade Ltd.*, 585 So.2d 324 (Fla. Ct. App. 1990); *Sweet Home Water and Sewer Ass'n v. Lexington Estates, Ltd.*, 613 So.2d 864 (Miss. 1993); *Bogue Shores Homeowners Ass'n Inc. v. Town of Atlantic Beach*, 428 S.E.2d 258 (N.C. Ct. App. 1993); *Robes v. Town of Hartford*, 636 A.2d 342 (Vt. 1993). This standard also accords proper deference to legislative determinations.

309. Another potential method of protecting open space is a conservation easement, which *Dolan* will not affect. Although completely voluntary, a conservation easement has the unique ability to conserve immense tracts of spectacular land. For instance, an agricultural conservation easement in Colorado preserved an example of "the most gorgeous Colorado scenery, like a moment of the Old West frozen in time." Joanne Dittmer, *Old West Locks Up Last Dollar: Ranch's Farm Heritage Ensured by Easement*, DENVER POST, Nov. 16, 1994, at 1F.

In a private agreement, the landowner donates a non-possessory conservation easement which protects the property from development. UNIFORM CONSERVATION EASEMENT ACT, 12 U.L.A. 60 § 1 (1) (West Supp. 1988). Although hopefully not the primary motive, landowners who donate a conservation easement are eligible for attractive tax breaks. *See* 26 U.S.C. § 170 (f)(3)(B) (iii), § 170(h), § 170 (h)(4)(iii) (open space) (1994). The specificity of the requirements in the Treasury Department regulations may render the tax benefits of a conservation easement more difficult to obtain. *See* 26 C.F.R. § 1.170A-14 (1994). *See also generally* Matthew J. Kiefer, *Creating Additional Tax Benefits From Qualified Conservation Easements*, 15 REAL EST. L.J. 136 (1986). The conservation easement does not have to be granted in perpetuity; but, to reap the tax benefits, Congress requires a perpetual easement. 26 U.S.C. § 170(h)(2)(C) (1994). The Code also requires a "qualified organization" to hold the easement. 26 U.S.C. § 170(h)(3) (1994). For example, in Wyoming, the Nature Conservancy holds conservation easements on over 41,000 acres of land. Tom Mast, *Easements Protect Prime Lands Forever*, CASPER STAR-TRIB., Dec. 12, 1994, at B1. Unlike many states, Wyoming has yet to adopt enabling legislation to side-step the common law difficulties inherent in granting such an easement. *See generally* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2 (1989). Although not necessary to conserve the landscape, public access to lands subject to a conservation easement can be facilitated by recreational user statutes which discharge landowner liability in certain situations. *See generally* Cathy Hansen & Steve Duerr, *Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act*, 28 LAND & WATER L. REV. 149 (1993).

years later. Now, however, the inhabitants of the Rocky Mountain West should understand the land's unique natural attributes and should act to preserve them for future generations. While it may be too late for many Rocky Mountain towns to accommodate growth, Wyoming stands in the unique position of being the last state in the Rocky Mountain West "to be impacted by the exodus."³¹⁰ Fortunately, this position presents the State a valuable opportunity to seize the future and preserve the existing quality of life that many of its residents may take for granted.

Without open space, wildlife, and unspoiled landscapes, many small western towns will succumb to sprawling development, subdivisions and ranchettes.³¹¹ Preserving community character in these towns requires effective protection of wide open spaces, as well as smaller portions of land for parks, bike paths and flood control. Open space is the backbone of most Rocky Mountain towns because it preserves scenic vistas and secures enduring habitats for various species of wildlife.³¹² Open space and abundant wildlife in turn support valuable tourist and recreational industries which buttress the economies of many western towns.

Necessarily, these towns should manage growth and plan their future by exacting open space from developers seeking a "free ride" on existing public services and accommodations. However, *Dolan* makes exactions more costly and subject to more "exacting" scrutiny because of its mandate for individualized determinations of rough proportionality. This result may not be as menacing as it first appears and may provide an impetus for careful planning. Making a large investment now, by way of detailed land-use plans, may prove less expensive than the inevitable tax increases needed to pay for the public services compelled by new growth. Essentially, *Dolan* requires extensive findings from towns that need developers to take responsibility for the growth they help create.

310. Tom Throop, Executive Director of the Wyoming Outdoor Council, Lecture at the University of Wyoming College of Law (Mar. 16, 1995).

311. Flagstaff, Arizona has taken a progressive approach toward land-use regulation. Bruce Babbitt recognized:

[t]hat is why people come to Flagstaff—you can smell the perfume of the pine forest in the air. An extraordinary horizon is everywhere you look. It is perfectly reasonable to create habitat valleys for the benefit of the entire community to protect wildlife and the overall image of the town. Admittedly this detracts from the freedom of a landowner . . . but in the name of the overall environment of this town, there will be some restrictions on land-owners. The good residents of Flagstaff accepted that precept.

Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 360 (1994).

312. The Jackson community has identified visions such as "preserving the traditions and character of the Rocky Mountain West and Wyoming, . . . set aside for generations to come, scenic vistas and wildlife habitat." Plan, *supra* note 2, at 1-6 & 7.

Increased protection of property rights may be appropriate when a landowner stands to lose his right to exclude or when the property is forced into public service. However, state goals and findings also deserve their fair share of constitutional deference. Jackson and similar towns along the Rocky Mountain Range have spent countless dollars and years devising comprehensive plans that utilize conditional land exactions: their efforts are not unfounded nor unworthy. Unfortunately, they now are subject to more onerous federal constraints.³¹³

Rocky Mountain towns can overcome *Dolan* in several ways. They can exact money from developers to finance open space acquisitions because *Dolan's* should not apply to money exactions. *Dolan* only affects exactions that require land donations to the public. Rocky Mountain towns also should actively preserve the agricultural land and economies that distinguish many western communities.³¹⁴ Finally, they should enact comprehensive land-use plans that utilize regulations providing explicit guidelines for requiring exactions. Strict legislative mandates should provide the ultimate "adjudicator" no discretion when applying an exaction statute to an individual developer so reviewing courts will not be inclined to consider the act adjudicative, one of the prompts for applying *Dolan*. By enacting uniform exaction standards, Rocky Mountain communities may have a better chance at preserving their untrammelled character of wide open awe.

*There's only one piece of dirt highway left in Wyoming—the road over Dead Indian Pass. Soon it will be paved.*³¹⁵

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313. Although Western states relish property rights, they will assuredly abhor a "federalized code" of property law, especially one that imposes an "unfunded mandate." In fact, Wyoming recently enacted its own set of guidelines to aid in determining whether an administrative agency has effected regulatory taking. WYO. STAT. §§ 9-5-301 to -305 (1995).

314. A Washington court upheld a farm district ordinance by specifically endorsing the comprehensive plan: "Farmlands are important to the local economy The value of farmlands, however, goes beyond economic considerations. Farmlands play an important role in the protection of fragile natural environments . . . and contribute to certain wildlife habitat needs. In addition, farmlands function as a valuable scenic and open space resource." *Kentview Properties, Inc. v. City of Kent*, 795 P.2d 732, 736 (Wash. Ct. App. 1990).

315. Diring, *supra* note 15.