EXACTING ASSESSMENTS: *SHEETZ* AND THE PROBLEM OF STATEGRAFT

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In the spring of 2024, the United States Supreme Court decided *Sheetz v. County of El Dorado*. The case resolved a long-standing question: whether the constitutional rules applying to ad hoc development exactions also apply to legislated exactions. They do. It is an important case, and one that may reconfigure the financing of municipal infrastructure. This Essay examines the case through the lens of Professor Bernadette Atuahene's concept of "stategraft," or the government illegally using its regulatory power to raise money from the poor and politically powerless. This Essay compares legislative exactions to other forms of municipal finance like special exceptions and argues that they actually provide fewer opportunities for stategraft. This Essay, therefore, concludes that legislated development exactions should not be subject to heightened constitutional review.

INTRODUCTION

In the spring of 2024, the United States Supreme Court decided *Sheetz v. County of El Dorado*.[1] George Sheetz had sought approval to build a 1,854-square-foot single-family manufactured home on his property in California.[2] El Dorado County imposed a "traffic impact mitigation fee" as a condition of any new development—a form of development exaction.[3] The traffic mitigation fee varied by location, but

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1. No. 22-1074, 2024 WL 1588707 (U.S. Apr. 12, 2024).

2. *Sheetz v. County of El Dorado,* 300 Cal. Rptr. 3d 308, 312 (Ct. App. 2022), *cert. granted*, 144 S. Ct. 477 (2023) (describing the facts).

3. *Id.* at 311. For a discussion of development exactions, see Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 473–78 (1991).

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for Mr. Sheetz it was $23,420.[4] He sued, claiming that this fee was excessive given the tiny marginal traffic impact of his new single-family home.[5] The California Court of Appeals rejected the challenge, deferring to the legislative imposition of the fee.[6] The California Supreme Court refused to hear the case and the United States Supreme Court granted certiorari.[7] The case resolved a long-standing question: whether the constitutional rules applying to ad hoc development exactions also apply to legislated exactions like the one in *Sheetz*.[8] They do. The Court held, "The Takings Clause does not distinguish between legislative and administrative permit conditions."[9] It is an important case, and one that may reconfigure the financing of municipal infrastructure.

The case is also a plausible example of what Professor Bernadette Atuahene labels "stategraft," or the government's illegal use of its regulatory power to raise money from the poor and politically powerless.[10] As the other contributions to this symposium vividly demonstrate, stategraft can create especially unjust burdens that should shock us out of our collective complacency about the nitty-gritty of local budgeting, especially when local governments are funding themselves on the backs of their most vulnerable citizens.[11] At least at first blush, it seems manifestly unjust to raise so much money from poor Mr. Sheetz as a condition of building his modest house.

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4. *Sheetz*, 300 Cal. Rptr. at 312.

5. *Id.*

6. *Id.* at 316.

7. *Sheetz v. County of El Dorado*, 144 S. Ct. 477 (2023).

8. *See* Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENV'T L. REV. 137, 138 (2016) [hereinafter *Legislative Exactions*] (discussing the difference between ad hoc and legislative exactions); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 642 (2004) (discussing the shift toward legislative exactions); Shelley Ross Saxer, *Exactions and Impact Fees*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. 77, 81–82 (2018); Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 175 (2019) [hereinafter *The State of Exactions*]; Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 487–89 (2006).

9. *Sheetz v. County of El Dorado*, No. 22-1074, 2024 WL 1588707, at *2 (U.S. Apr. 12, 2024).

10. *See* Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 2–3 (2023); Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263, 265 (2018).

11. *See, e.g.*, Sonia M. Gipson Rankin, Melanie Moses & Kathy L. Powers, *Automated Stategraft: Electronic Enforcement Technology and the Economic Predation of Black Communities*, 2024 WIS. L. REV. 665; Dick M. Carpenter II, Jamie Cavanaugh & Sam Gedge, *Are Municipal Fines and Fees Tools of Stategraft?*, 2024 WIS. L. REV. 707.

It is important not to view development exactions in isolation, however. They need to be evaluated in comparison with other ways of financing municipal infrastructure. Limiting the use of development exactions will force governments to shift financial costs elsewhere. Even though exactions can implicate stategraft—as in *Sheetz*—the alternatives are no less problematic. Or, to put it another way, the risks of illegal development exactions are no greater than the risks of illegal special assessments and other similar financing tools. This Essay, therefore, argues that legislated development exactions should not be subject to heightened constitutional review. In the process, it raises the question of how much stategraft we should tolerate to prevent even more unfair distributions of financial burdens.

Consider the problem of legislative exactions in the routine context of sidewalk development. For many visitors or transplants, Nashville, Tennessee, has a startling lack of sidewalks. The consequences are severe. "In 2018, 23 pedestrians died in the Nashville area. The next year, the area's 'pedestrian death index' reached 99.2—almost double the national average of 55.3."[12] According to recent figures, there are "a total of 4,700 miles of missing sidewalk segments across [Metro Nashville]," with seventy-one miles identified as an acute need.[13] But building sidewalks is expensive. Nashville budgets approximately $1,000 per linear foot.[14]

Consider three choices that a city (like Nashville) can use to pay for infrastructure (like sidewalks).[15] General revenue is the most familiar. This spreads the cost of infrastructure across all taxpayers in the city,

12. *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 819 (6th Cir. 2023) (citation omitted).

13. Tony Gonzalez, *Nashville Sidewalks: There Aren't Enough, and Progress Is Slow, but Some New Ideas Seek To Jumpstart Expansion*, WPLN (Feb. 7, 2020), https://wpln.org/post/nashville-sidewalks-there-arent-enough-and-progress-is-slow-but-some-new-ideas-seek-to-jumpstart-expansion/ [https://perma.cc/TN2Z-Z6QY].

14. *See* Addison Wright, *At Issue: Sidewalks*, NASHVILLE BANNER (July 10, 2023), https://nashvillebanner.com/2023/07/10/at-issue-sidewalks/ [https://perma.cc/6Y2A-LSYK].

15. *See, e.g.*, Nate Berg, *For Smaller Towns, Paying for Sidewalks Isn't Always Simple*, BLOOMBERG (Jan. 11, 2012, 8:02 AM), https://www.bloomberg.com/news/articles/2012-01-11/for-smaller-towns-paying-for-sidewalks-isn-t-always-simple (discussing plans in Missoula, Montana, to shift from special assessments to general taxation). *See also A Guide for Maintaining Pedestrian Facilities for Enhanced Safety*, FED. HIGHWAY ADMIN., https://safety.fhwa.dot.gov/ped_bike/tools_solve/fhwasa13037/chap7.cfm [https://perma.cc/NSE4-QKYL] (discussing two categories of funding strategies: "programs that are funded by abutting property owners, and programs funded by community taxes, funds and fees").

usually in the form of property taxes.[16] Development exactions are a second option. They are obligations imposed on property owners as a condition for developing their property.[17] They can take many different forms, but broadly can be either negotiated with a developer ad hoc or enacted legislatively, as in *Sheetz*.[18] Special assessments are a third. These are fees imposed on property owners who specially benefit from the new infrastructure—typically adjacent property owners who pay by linear foot frontage.[19]

In 2019, Nashville took the second approach. It adopted a legislated exaction, making property owners install new sidewalks or pay into a sidewalk fund as part of the development process.[20] The justification is straightforward. It is cheapest and easiest to build sidewalks when property is being developed or redeveloped. In fact, it is commonplace in many cities to require developers to provide sidewalks.[21] This hardly looks like stategraft. However, property owners in Nashville sued, arguing that the sidewalk fee was not proportional to the burden created by new development.[22] The Sixth Circuit agreed with the plaintiffs and invalidated the sidewalk ordinance, in a decision the Supreme Court cited approving in *Sheetz*.[23] However, the Sixth Circuit also noted—in passing—that Nashville could have levied an assessment without violating constitutional rules.[24] Implicitly, the Sixth Circuit assumed that development exactions are somehow more constitutionally suspect than special assessments. Doctrinally, that is true. But why?

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16. *See* RUSSELL PUSTEJOVSKY & JEFFREY LITTLE, U.S. CENSUS BUREAU, ANNUAL STATE AND LOCAL GOVERNMENT FINANCES SUMMARY: 2021, at 1 (2023), https://www2.census.gov/programs-surveys/gov-finances/tables/2021/2021alfinsummarybrief.pdf [https://perma.cc/ZEB3-RDX8] (noting an average of 51.6 percent of state and local government revenue comes from taxes, of which an average of 30 percent comes from property taxes).

17. Fenster, *supra* note 8, at 611 ("Exactions are the concessions local governments require of property owners as conditions for the issuance of the entitlements that enable the intensified use of real property.").

18. *Legislative Exactions*, *supra* note 8, at 138; Fenster, *supra* note 8, at 637–38.

19. ANASTASIA LOUKAITOU-SIDERIS & RENIA EHRENFEUCHT, SIDEWALKS: CONFLICT AND NEGOTIATION OVER PUBLIC SPACE 18–20 (Robert Gottlieb & Henry R. Luce eds., 2009) (discussing paying for sidewalks through special assessments).

20. *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 819 (6th Cir. 2023).

21. *See* Jennifer Evans-Cowley, *Sidewalk Planning and Policies in Small Cities*, 132 J. URB. PLAN. & DEV. 71, 72 (2006).

22. *Knight*, 67 F.4th at 836.

23. *Id.* at 836–37; *Sheetz v. County of El Dorado*, No. 22-1074, 2024 WL 1588707, at *5 (U.S. Apr. 12, 2024) (citing *Knight*, 67 F.4th at 829).

24. *See Knight*, 67 F.4th at 836.

Both exactions and assessments are tools that a government can use to compel property owners to pay for improvements. Both have the normative goal of fairly allocating costs. But surprisingly, the constitutional rules governing these two tools are completely different. Courts require that ad hoc development exactions be related to and proportional to the burden created by the development.[25] Importantly, the government bears the burden of demonstrating proportionality, and courts are fairly searching in their review.[26] Courts are much more deferential to special assessments. In theory, an assessment can be no greater than the special benefit created by the improvement.[27] But property owners bear the burden when challenging an assessment, and courts largely to defer to legislative judgments.[28]

This difference in judicial scrutiny between assessments and exactions is difficult to justify, especially when extended to legislative exactions. What's more, it actually invites a kind of regulatory arbitrage, encouraging local governments to impose costs on captive, in-place property owners instead of developers because of the more deferential constitutional review. This dynamic—largely theoretical so far—is likely to become more urgent in the coming years after the Supreme Court's decision in *Sheetz*.

The key legal question in *Sheetz* was whether the searching review of ad hoc development exactions should also apply to legislated exactions. There is already extensive academic literature pointing to important distinctions between ad hoc dealmaking and legislated conditions on development and arguing that courts should not subject legislative exactions to searching nexus and proportionality requirements.[29] This Essay argues from the other direction, examining the close analogy between legislated exactions and assessments and the problematic inconsistency in judicial review in these two contexts.

It is unfortunately easy to find examples of local governments illegally extracting money from their citizens. Professor Atuahene asks us to see the examples as part of a larger phenomenon of stategraft.[30] The hard question this raises is why and when courts should scrutinize legislative judgments about financing decisions in order to detect and police illegal assessments and exactions. The answer cannot be "always"

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25. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

26. *See infra* Part II.

27. *Norwood v. Baker*, 172 U.S. 269, 278–79 (1898).

28. *See infra* Part II.

29. *See, e.g.*, Fenster, *supra* note 8, at 637–42; Haskins, *supra* note 8, at 509; *Legislative Exactions*, *supra* note 8, at 153–54.

30. *See generally* Atuahene, *supra* note 10.

or the machinery of government would grind to a halt. If every assessment or exaction required the government to make particularized and convincing showings about the extent of government benefits (for assessments) or proportionality (for exactions), the administrative costs would render them all but unusable. The answer also cannot be "never" or situations like the tax foreclosure crisis in Detroit would not be remediable. The stategraft lens therefore requires thinking more carefully about which contexts require greater scrutiny.

The Essay examines the judicial review of special assessments and development exactions and demonstrates that courts defer much more to the former than the latter. This Essay argues that attending to the political and distributional risks provides a partial explanation of this different treatment, but one that actually demands reform by narrowing the judicial inquiry into development exactions and allowing local governments greater freedom.

I. DEVELOPMENT EXACTIONS AND SPECIAL ASSESSMENTS

A. Special Assessments

Special assessments were once a key financing mechanism for local governments. In 1913, twelve percent of municipal revenue in municipalities of over 100,000 people came from special assessments.[31] Today, that number is less than two percent.[32] Professor Vicki Been has examined this history and identified a number of reasons for special assessments' decline in popularity.[33] During the Great Depression, local governments were often unable to collect special assessments and so were left holding the bag for the costs of infrastructure they had already developed, leading to greater reliance on development exactions imposed ex ante.[34] Moreover, special assessments are generally not deductible on federal income taxes, making them less appealing than property taxes, which are.[35] Nevertheless, over $12 billion in special assessments are still

31. TAX FOUND., INC., SPECIAL ASSESSMENTS AND SERVICE CHARGES IN MUNICIPAL FINANCE 9 (1970).

32. *See 2019 State & Local Government Finance Historical Datasets and Tables*, U.S. CENSUS BUREAU, https://www.census.gov/data/datasets/2019/econ/local/public-use-datasets.html [https://perma.cc/4BLP-6PNN] (June 28, 2023) [hereinafter *2019 State & Local Government Finance*] (select "US Summary & State Estimates Tables [< 1.0 MB]" and see line 40).

33. *See* Been, *supra* note 3, at 479–80.

34. *Id.* at 479 (describing history).

35. Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 415 (1999).

levied per year.[36] In addition to sidewalks, special assessments can be used for road paving or expansion, sewer or wastewater development, and even for high-speed internet deployment.[37] The popular business improvement district is a modern species of special assessment.[38]

Special assessments assign the costs of infrastructure to immediate neighbors who specially benefit from the improvements. Importantly, they cannot be used to fund general benefits.[39] This distinction between local and general benefits can become quite fine in practice, but the idea is easy enough to see.[40] Special assessments are an appropriate financing mechanism for infrastructure and other improvements that have a geographically focused benefit and so do not benefit the jurisdiction as a whole.[41]

Since 1898, special assessments have been subject to an important constitutional limit. According to the Supreme Court, in *Norwood v. Baker,*[42] any assessment in substantial excess of the special benefits conferred by the improvement is an unconstitutional taking of property without just compensation.[43] This is the oft-repeated blackletter law.[44] The facts of *Norwood*, however, were quite unusual and raise particular concerns about stategraft.

In that case, the Village of Norwood, Ohio, sought to build a 300-foot road connecting two parallel roads.[45] The Court provided a diagram, as depicted in Figure 1.

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36. *2019 State & Local Government Finance*, *supra* note 32 (select "US Summary & State Estimates Tables [< 1.0 MB]" and see line 40).

37. Jim Rossi & Christopher Serkin, *Energy Exactions*, 104 CORNELL L. REV. 643, 656 n.43 (2019).

38. Briffault, *supra* note 35, at 414–15.

39. *See* 64 C.J.S. *Municipal Corporations* § 1427 (2023). *See also W. Tenn. Flood Control & Soil Conservation Dist. v. Wyatt*, 247 S.W.2d 56, 58 (Tenn. 1952) (stating that if assessed funds are used for more than just local benefits, the levy is a tax rather than a special assessment).

40. *See, e.g.*, *Peake v. New Orleans*, 139 U.S. 342, 349 (1891) (characterizing the distinction as "obvious and well recognized"); *Ill. Cent. R.R. Co. v. Decatur*, 147 U.S. 190, 197 (1893) (noting "there is a broad and clear line of distinction").

41. *See Municipal Corporations*, *supra* note 39, § 1426.

42. 172 U.S. 269 (1898).

43. The actual doctrinal hook for the holding was the Due Process Clause and not the Takings Clause, but this is presumably because the case predated our modern conception of regulatory takings. For more on the relationship and confusion between the Due Process Clause and the Takings Clause, see Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826 (2006).

44. *See, e.g.*, *CED Props., LLC v. City of Oshkosh*, 909 N.W.2d 136, 151–52 (Wis. 2018); *Hubbard v. City of Pierre*, 784 N.W.2d 499, 504 (S.D. 2010); *Vine St. Com. P'ship v. City of Marysville*, 989 P.2d 1238, 1242 (Wash. Ct. App. 1999).

45. *Norwood*, 172 U.S. at 276.

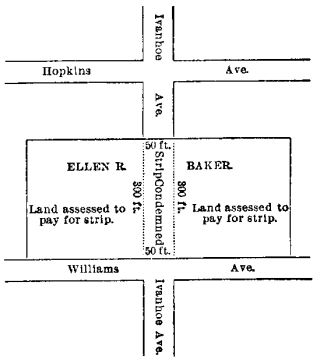

Figure 1. Baker's Condemned Property.[46]

To build the new road, Norwood exercised its power of eminent domain to condemn land from Ellen Baker.[47] The new road bisected Baker's property, and Baker was the only person whose property was taken for the road.[48] The land was valued at $2,000 for purposes of just compensation, an amount determined by a jury "irrespective of any benefit to the owner" that would result from the road.[49] The municipality incurred an additional $218.58 in administrative costs related to the condemnation proceedings.[50] Norwood then sought to levy a special assessment for the full costs of $2,218.58 on all adjacent property using a front foot measure.[51] However—and this is where the case becomes startling—Baker was the only property owner with land abutting the new road.[52] As a result, she was assessed $2,218.58 to fund the expropriation *of her own property*.[53] She was, in effect, paying her own just compensation, plus all the administrative costs involved in the proceeding. While she was initially paid the $2,000 in compensation for the land, she had to pay it all back, plus more, as a special assessment.

The Supreme Court struck down this special assessment for failing to consider the extent of the plaintiff's special benefits, because—as the Court held—any assessment "in substantial excess of the special benefits accruing to [the property owner] is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without

46. *Id.* at 275.
47. *Id.* at 274–75, 277.
48. *Id.* at 275–76.
49. *Id.* at 275.
50. *See id.* at 276.
51. *Id.*
52. *See id.*
53. *See id.*

just compensation."[54] By not considering the extent of the special benefits, Norwood had no opportunity to cap the extent of the assessment, and so the assessment was invalid.

This seems like a particularly egregious set of facts. As the Court explained, the result of this assessment, if allowed to stand, would have been "more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street."[55] While the rule announced by the Court limits the use of assessments generally by capping them at the extent of special benefits, the outcome seems obvious in light of the specific facts. Generalizing to other contexts is harder.

There are any number of ways of levying special assessments. The front-foot method is common.[56] For a road improvement or a sidewalk, the cost to be assessed is divided among abutting property owners by the length of their property's frontage on the improvement. Other approaches include *ad valorem* assessments and apportionment by superficial area.[57] A calculation of benefits might also be adjusted according to how the property is zoned and how the property might be used in the future.[58]

How special benefits are calculated matters a lot for the viability of special assessments as a financing tool. If the extent of special benefits has be to determined property by property, the administrative costs would make them practically infeasible.[59] In fact, courts have not required anything so onerous.[60] Even in *Norwood,* the Supreme Court explained that it was invalidating only special assessments in "substantial" excess of benefits conferred.[61]

While *Norwood* implied a degree of deference to the determination of special benefits, subsequent cases have gone much further in deferring explicitly to the government's chosen method of assessment, and to the calculation of special benefits. The most famous case is *Louisville &*

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54. *Id.* at 279.

55. *Id.* at 281–82.

56. EUGENE MCQUILLIN & CALLAGHAN & CO., MCQUILLIN MUNICIPAL CORPORATIONS, CUMULATIVE SUPPLEMENT § 38:135, Westlaw (database updated June 2023).

57. *Id.* §§ 38:129, 136.

58. *Id.* §§ 132, 134.

59. *See, e.g.*, *2nd Roc-Jersey Assocs. v. Town of Morristown*, 731 A.2d 1, 10 (N.J. 1999) (holding it reasonable for a city to apportion special assessments *ad valorem* because "more complex" methods would be more expensive).

60. *Cf. id.*

61. *Norwood*, 172 U.S. at 279 ("We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.").

Nashville Railroad Company v. Barber Asphalt Paving Company.[62] In that case, Louisville levied a special assessment for grading, curbing and paving part of a street.[63] The relevant state law charged the costs of "original construction" for a road on "adjoining owners," and required that they be "equally apportioned according to the number of feet owned by them."[64] In that case, the property at issue ran along a railroad track and so the Nashville Railroad Company was assessed a significant portion of the costs of the new road.[65] The company sued, arguing that it received no special benefit and, if anything, the new road *reduced* the value of its rail operations.[66]

The Supreme Court, in an opinion by Justice Oliver Wendell Holmes, rejected the plaintiff's argument. While the Court reaffirmed the basic principle that an assessment in excess of special benefits is unconstitutional, it rejected any requirement of exactness in the calculation, holding: "The amount of benefit which an improvement will confer upon particular land, indeed, whether it is a benefit at all, is a matter of forecast and estimate."[67] The Constitution requires only that the assessment be "generally fair."[68] Furthermore, even "if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things."[69] In other words, the Supreme Court rejected any searching inquiry into the extent of special benefits in any individualized way.[70]

Other courts are similarly deferential to special assessments short of an outright expropriation.[71] For example, in *Anderson v. City of Bemidji*,[72] the Minnesota Supreme Court upheld a front-foot special assessment for sewer improvements.[73] The government had calculated the total cost of the project at $358,000, with 21,878 "assemble[d] front

62. 197 U.S. 430 (1905).

63. *Id.* at 432.

64. *Id.* at 433.

65. *See id.* at 431, 434.

66. *Id.* at 432 ("[T]he plaintiff . . . pleaded that its only interest in the lot was a right of way for its main roadbed, and that neither the right of way nor the lot would or could get any benefit from the improvement, but on the contrary rather would be hurt by the increase of travel close to the defendant's tracks.").

67. *Id.* at 433.

68. *Id.* at 434.

69. *Id.*

70. *See* Marc N. Melnick, *New Avenues for Special Assessment Financing*, 25 URB. LAW. 539, 543 (1993) (describing general presumption of validity).

71. *See, e.g.*, *Fed. Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 615–16 (5th Cir. 1991); *Zipperer v. City of Fort Myers*, 41 F.3d 619, 624–25 (11th Cir. 1995) (relying on *New Iberia*).

72. 295 N.W.2d 555 (Minn. 1980).

73. *See id.* at 555–57.

feet" resulting in a $16.40 assessment per front foot.[74] One of plaintiff's lots was assessed along its short side, which ran parallel to the new sewer, for $2,574.80.[75] Plaintiff's other lot bordered the new sewer on two adjacent sides, one long and one short, and was assessed along its longer side for $14,284.40—more than five times as much as the first lot.[76] The court held that the city's choice to assess the second lot for its longer side of frontage was acceptable based on testimony that the lot could be divided along its longer side into smaller lots, each of which would have access to the sewer improvements.[77]

Likewise, in *Hawley v. City of Hot Springs*,[78] the South Dakota Supreme Court required that special assessments bear a "reasonable relationship" to the benefits conferred.[79] However, the court in that case ultimately upheld the assessment because the property owner failed to establish that the assessment lacked the requisite relationship.[80] In other words, the burden was on the plaintiff to show the absence of a reasonable relationship and not on the government to establish that one existed. In California, special assessments for approved improvements are presumptively valid.[81] Other courts focus on the legislative nature of special assessments, reviewing only for assessments that are arbitrary or capricious.[82]

In *McNally v. Township of Teaneck*,[83] the Supreme Court of New Jersey held that a court may presume that the benefits conferred on assessed properties are the same as the amount the local government spent on the improvement, and that the property owners must present "clear and convincing evidence" to rebut that presumption.[84] The burden is clearly on property owners to demonstrate that a particular improvement will *not* be a net benefit to the improved area.

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74. *Id.* at 557.

75. *Id.*

76. *Id.*

77. *Id.* at 560–61.

78. 276 N.W.2d 704 (S.D. 1979).

79. *Id.* at 707.

80. *Id.*

81. Melnick, *supra* note 70, at 542–43.

82. *See, e.g.*, *Holter v. City of Mandan*, 948 N.W.2d 858, 861–62 (N.D. 2020); *Johnson v. City of Kearney*, 763 N.W.2d 103, 110 (Neb. 2009). *See also Baglivi v. Town of Highlands*, 537 N.Y.S.2d 552, 553 (App. Div. 1989) (emphasizing that the property owner's burden is "heavy" and noting that an assessment will stand unless it is "so arbitrary as to constitute a confiscation of property").

83. 379 A.2d 446 (N.J. 1977).

84. *Id.* at 450–51 ("The cost of the new pavement and curb is evidence of its value to the abutting property owner. In the absence of any proof to the contrary the enhancement in value presumably would be equated with that cost.").

Even less deferential states are still reluctant to overturn assessments. In *Goodell v. City of Clinton*,[85] the Iowa Supreme Court upheld a lower court decision that reduced an assessment for street paving by forty percent to reflect the general as opposed to special nature of that particular benefit.[86] Nevertheless, the Iowa court reaffirmed the nature of the inquiry: "The burden is on the protesting property owner to show his assessment is excessive by evidence which includes proof of the actual benefit to his property. In the absence of such evidence, the assessment must stand."[87]

B. Development Exactions

The law governing development exactions works quite differently. An exaction, again, is a condition that the government imposes on approving a development. Conceptually, exactions have a straightforward justification. New developments—especially larger ones—inevitably impose some costs on the community. The development might strain municipal infrastructure, like water, stormwater, wastewater, or even electricity.[88] New residents may increase traffic congestions or the number of students in the local school. Exactions are a tool to force developers to internalize some or all of these costs, which otherwise would be borne by the community.[89] Where to place these costs of development is normatively contested, but it is at least legal in most places to force developers to bear their share.[90]

One risk of exactions, however, is that governments may try to go beyond mitigating these externalized costs of development and may, instead, try to extort additional benefits from developers.[91] Constitutional law then provides some protection. In a trio of well-known cases, the Supreme Court has held that exactions must be both related and proportional to the burden that the development is expected to create.[92] In other words, governments can try to force developers to provide benefits that are proportional to the burdens created by the development,

85. 193 N.W.2d 91 (Iowa 1971).

86. *Id.* at 92, 94–96.

87. *Id.* at 93.

88. *See generally* Rossi & Serkin, *supra* note 37.

89. Been, *supra* note 3, at 482.

90. *See* Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 781–82 (2020).

91. ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, LAND USE CONTROLS: CASES AND MATERIALS 595 (5th ed. 2021).

92. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837–38, 841–42 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391, 394–96 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 618–19 (2013).

but not more. The cases are well-known and so need only passing mention to demonstrate the nature of judicial review in this context.

In *Nollan v. California Coastal Commission*,[93] the plaintiffs sought permission to redevelop their beachfront lot.[94] The defendant, California Coastal Commission, conditioned the permit on the Nollans dedicating an easement over their property to create a pathway parallel to the beach that would be open to the public.[95] The Supreme Court held that this demand was unconstitutional because the government could not condition the approval on a demand that was unrelated to the reason that the government could have rejected the permit outright.[96]

In *Dolan v. City of Tigard*,[97] a property owner sought to expand her hardware store.[98] The government conditioned the approval on the plaintiff dedicating an easement for a bike path and also setting aside some green space for flood mitigation.[99] Here, the Court held that although the demands were related to the reasons the government could have denied the permit—flooding and traffic—the government had failed to demonstrate that the demands were proportional to the extent of the burden created by the store expansion.[100]

Finally, in *Koontz v. St. Johns River Water Management District*,[101] the Supreme Court clarified how and when *Nollan* and *Dolan* apply. It held that governments must meet the nexus and proportionality requirements even if the property owner rejects the demand—a so-called "failed exaction"—as well as to demands of money, instead of just interests in real property like easements.[102]

Taken together, *Nollan*, *Dolan*, and *Koontz* require that all exactions—whether monetary or in-kind—must be both related and proportional to the burdens created by the development. The nexus requirement is relatively easy for the government to meet, notwithstanding *Nollan* invalidating the California Coastal Commission's exaction on these grounds.[103] The proportionality requirement, however, is more searching. In *Dolan*, the Court held explicitly that the burden is on the government, not the property owner, to establish

93. 483 U.S. 825 (1987).
94. *Id.* at 828.
95. *Id.* at 828–29.
96. *Id.* at 838–39.
97. 512 U.S. 374 (1994).
98. *Id.* at 379.
99. *Id.* at 379–80.
100. *Id.* at 394–96.
101. 570 U.S. 595 (2013).
102. *Id.* at 606–07, 612, 618–19.
103. *See supra* notes 93–96 and accompanying text.

proportionality.[104] Typically, the government will have to produce reports, like traffic studies, demonstrating both the burden anticipated by the development and the mitigating effects of the exaction.[105]

This trio of cases has come under withering criticism in the scholarly literature. Professor John Echeverria wrote an essay entitled, "*Koontz*: The Very Worst Takings Decision Ever?"[106] In a more tempered vein, Professor Been has argued that searching constitutional review is less important for development exactions because inter-local competition will keep governments from imposing extortionate burdens on developers.[107] That underlying intuition may be different in a world of widespread NIMBY ("not in my back yard") opposition to development. Nevertheless, others have continued to argue that constitutional review of exactions is unnecessary and counterproductive.[108]

The purpose here is not to evaluate the merits of *Nollan*, *Dolan*, and *Koontz*. The point is simply that this trio of cases provides relatively searching constitutional review of these kinds of government demands. Courts require the government to show nexus and proportionality and place the burden on the government to demonstrate proportionality through reports and studies.

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104. *Dolan*, 512 U.S. at 391 & n.8.

105. *See* David L. Callies, *Public and Private Land Development Conditions: An Overview*, 52 UIC J. MARSHALL L. REV. 747, 764 (2019) (suggesting an example of a post-*Koontz* analysis of an in-lieu fee "where [a] local government charges a road-building fee as a condition for approving a residential subdivision . . ., the fee will have to be proportional to that generated need as well"); *Robson Ranch Quail Creek, LLC v. Pima County*, 161 P.3d 588, 589 (Ariz. Ct. App. 2007) (interpreting the statutory requirement that "the fee reasonably relates to the burden imposed on Pima County"); *Christison v. Bd. of Cnty. Comm'rs of Lewis & Clark Cnty.*, No. BDV-2006-348, 2011 Mont. Dist. LEXIS 5, at *11 (Mont. Dist. Ct. Jan. 25, 2011) (finding rough proportionality in the traffic impact calculation, as "[i]t is clear that the additional traffic resulting from the subdivision will negatively impact an already deficient public road causing public safety concerns").

106. John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENV'T. L.J. 1 (2014).

107. *See generally* Been, *supra* note 3.

108. *See, e.g.*, Sean F. Nolon, *Bargaining for Development Post-*Koontz*: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 211–16 (2015) (arguing that post-*Koontz*, local governments may have difficulties and limited options negotiating with developers); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 288 (arguing that the Supreme Court decisions in *Nollan*, *Dolan*, *and Koontz* "ha[ve] left land use regulation vulnerable to the creeping expansion of heightened scrutiny under the auspices of its exactions jurisprudence"); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 6, 41 (2000) (arguing that the nexus and proportionality prongs "should be replaced with more effective mechanisms" and that blocking land use bargains through judicial limits "is counterproductive on the one hand, and insufficient on the other").

The exactions in *Nollan*, *Dolan*, and *Koontz* were all negotiated ad hoc in the context of specific development plans. Often, however, exactions are enacted as legislated impact fees or other fees in lieu of dedications as a kind of price list in a local zoning ordinance.[109] For example, developments of more than a specific number of units may be required to pay $2,500 per unit towards school construction or into a transit fund.[110] These are not negotiated backroom deals.

Commentators have long argued the *Nollan* and *Dolan* framework should not apply to legislated exactions because they present fewer risks of abuse than ad hoc exactions.[111] Context matters. As the Introduction pointed out, the Sixth Circuit's decision in *Knight v. Metropolitan Government of Nashville & Davidson County*[112] recently invalidated Nashville's sidewalk ordinance.[113] But consider the case in slightly more detail. Under a 2019 ordinance, owners in prescribed circumstances were required to provide a new sidewalk on their property as a condition for a building permit.[114] For example, property owners were required to build a sidewalk if the lot to be developed was "on the side of a street with existing sidewalks."[115] If the lot did not fall within one of the categories requiring the actual construction of a sidewalk, however, property owners were given the option instead of paying into a sidewalk fund to develop sidewalks in the city's "pedestrian benefit zone."[116] The fee was calculated by measuring the length of sidewalk that the owner would otherwise have been obligated to build, and multiplying that by the average cost of sidewalk construction that year ($186 per linear foot in 2020 and 2021).[117]

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109. *See The State of Exactions*, *supra* note 8, at 191–92; Rossi & Serkin, *supra* note 36, at 655.

110. *Cf.* Rossi & Serkin, *supra* note 37, at 658 (describing typical exactions).

111. *See, e.g.*, Glen Hansen, *Let's Be Reasonable: Why Neither* Nollan/Dolan *nor* Penn Central *Should Govern Generally-Applied Legislative Exactions After* Koontz, 34 PACE ENV'T L. REV. 237, 239–42, 275 & n.176 (2017); Daniel L. Siegel, *Exactions After* Lingle*: How Basing* Nollan *and* Dolan *on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENV'T L.J. 577, 611 (2009) ("To the extent that the unconstitutional conditions doctrine is grounded on the coercive use of unequal bargaining power, distinguishing legislative and adjudicative actions makes sense.").

112. 67 F.4th 816 (6th Cir. 2023). *See also supra* notes 20–24 and accompanying text.

113. *Knight*, 67 F.4th at 818.

114. *Id.* at 819. *See also* Vanessa Casado Perez, *Reclaiming the Streets*, 106 IOWA L. REV. 2185, 2207 (2021) ("In Nashville, if there is redevelopment or construction done of a property and on a street without sidewalks, the owner can opt for installing sidewalks or an in-lieu contribution.").

115. *Knight*, 67 F.4th at 819.

116. *Id.*

117. *Id.*

Property owners challenged this sidewalk exaction for failing the "'unconstitutional-conditions' test" under *Nollan*.[118] Nashville argued that *Nollan* is centrally concerned with the risks of extortion and that risk "exists more for one-off administrative conditions imposed by unelected administrators than it does for uniform legislative conditions imposed by democratically accountable actors."[119] The Sixth Circuit rejected this reasoning, however, and invalidated the sidewalk fees because Nashville failed to demonstrate the proportionality required by *Dolan*.[120] The court even found the nexus requirement from *Nollan* difficult to satisfy on these facts.[121]

The Supreme Court's decision in *Sheetz* resolved the issue definitively.[122] The Court followed the Sixth Circuit's approach, applying *Nollan*, *Dolan*, and *Koontz* to legislative exactions. But why the constitutional scrutiny in this context instead of the deference applied to special assessments? Do exactions actually raise more serious constitutional concerns?

C. Legislated Exactions and Special Assessments Compared

The opaque dealmaking of ad hoc exactions presents particular risks that government actors will use their leverage in specific cases to try to obtain benefits that go beyond some development's externalized costs.[123] This special vulnerability may justify more searching judicial review to detect unconstitutional conditions. But legislative exactions are different. They are codified into local law and look and feel quite indistinguishable from special assessments, except that they are imposed as a condition of development instead of on in-place property owners.

The lens of stategraft asks us to consider which of these contexts raises the greater likelihood of illegal burdens, especially on vulnerable populations. This, in turn, requires asking who is likely to bear the costs of different financing mechanisms: taxes, assessments, and exactions. Ratcheting up the constitutional scrutiny of one is likely to shift the government's use to the others, and that will not have neutral distributive consequences.

Paying for infrastructure through property taxes will spread the costs over the entire tax base. Property taxes are not explicitly progressive in

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118. *Id.* at 818.

119. *Id.* at 835.

120. *Id.* at 836.

121. *See id.*

122. *Sheetz v. County of El Dorado*, No. 22-1074, 2024 WL 1588707, at *2 (U.S. Apr. 12, 2024).

123. *See Knight*, 67 F.4th at 836.

the sense that tax rates are uniform across a jurisdiction. However, they include an implicit cross-subsidy.[124] Owners of higher-valued property will pay more every year than owners of lower-valued property, absent the kind of stategraft found in Detroit.[125] Therefore, all things being equal, property taxes are at least modestly progressive.[126]

Assessments are fundamentally different because they convert infrastructure financing into a kind of benefits fee.[127] The costs are borne by the people who directly benefit from the improvement and usually in proportion to some "neutral" metric, like street frontage.[128] There is no progressivity baked into this kind of fee, either explicitly or implicitly. Of course, a crude measure like street frontage is almost certain to favor some property owners over others and, for some people, is likely to impose costs in excess of actual benefits conferred (although judicial deference to assessments means those cases will likely go undetected). Like property taxes, unpaid assessments can result in a lien on the property; they run with the land. Owners cannot escape them.[129]

Development exactions, in contrast, shift costs to developers. Instead of making developers pay in proportion to the extent of their benefits, they instead must pay to offset the costs their development will impose on the community.[130] The *absence* of an exaction will force the public to absorb the costs of the development; exactions are therefore, almost the inverse of property taxes, shielding the property tax base from the development's infrastructure burdens.

Indeed, in 1945, the chairman of the National Committee on the Housing Emergency wrote about the relative benefits of forcing developers to bear infrastructure costs instead of paying for them through special assessments:

> In cases where land-subdivision standards are well developed, the subdivider is made responsible for improving his lots to the point where they are suitable for housebuilding. . . . In other words, he is directly responsible for [infrastructure] cost, and the lot purchaser pays his share of that cost in the price he pays for his lot.

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124. Serkin, *supra* note 90, at 776–77.

125. *See* Atuahene & Hodge, *supra* note 10, at 289.

126. This progressivity is obviously undermined in a place like Detroit, where minority owners are subjected to systemic over-valuation. *See id.* at 269.

127. ELLICKSON, BEEN, HILLS & SERKIN, *supra* note 91, at 573–74.

128. MCQUILLIN & CALLAGHAN & CO., *supra* note 56, § 38:23.

129. *See* J. C. Peppin, *Priority of Tax and Special Assessment Liens*, 23 CALIF. L. REV. 264, 281–82 (1935).

130. Been, *supra* note 3, at 482.

> But in the absence of such control by the state or local government, let the purchaser beware. . . . Too many people have met up with special assessments unexpectedly, with the result that their inability to make these payments has caused them not only to be unable to go on to home ownership but even to lose the money they have put into the purchase price of the lot.[131]

Compared to both property taxes and special assessments, development exactions have an important safety valve: developers can simply walk away.[132] Illegal tax assessments resulted in widespread tax foreclosures, as Professor Atuahene has shown.[133] Illegal exactions can only result in smaller profits for developers, or at worst, projects not being built.

II. REFORMING ASSESSMENTS AND EXACTIONS

Constitutional protection should be at its highest when political protections are at their weakest. Through the lens of stategraft, the focus of constitutional review should be on who bears the cost of infrastructure improvements, whether through an assessment or an exaction.

This is not always easy to discern, even when it seems obvious. Return, first, to the quite shocking facts of *Norwood v. Baker,* where the condemnee was required to fund an eminent domain award for her own property through a special assessment.[134] In fact, that outcome is actually not quite as straightforwardly unjust as it seems, even on its own terms. While the idea of forcing a property owner to self-fund her own condemnation seems outrageous, the problem may be more procedural than substantive.

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131. DOROTHY ROSENMAN, A MILLION HOMES A YEAR 90 (1945). Rosenman continues:

> The uninformed purchaser does not always realize, when he buys a lot, that later it may be assessed with and have to pay for even the minimum paving or water or sewer connections or the like. Many a promising residential area has been thrown back, sometimes permanently, by the fact that the residents have not been able to meet these unexpected burdens.

Id. at 91 (quoting THE PRESIDENT'S CONF. ON HOME BLDG. & HOME OWNERSHIP, PLANNING FOR RESIDENTIAL DISTRICTS 16 (John M. Gries & James Ford eds., 1932)).

132. *Cf.* Been, *supra* note 3, at 476–78.

133. *See* Bernadette Atuahene, *"Our Taxes Are Too Damn High": Institutional Racism, Property Tax Assessments, and the Fair Housing Act*, 112 NW. U. L. REV. 1501, 1547 (2018).

134. *Norwood v. Baker*, 172 U.S. 269, 275–76 (1898).

When it comes to condemnation, just compensation is measured by the fair market value of the property on the date it was taken.[135] But there are potential adjustments to that measure depending on the impact of the condemnation on the condemnee's remaining property.[136] For example, a condemnee can be entitled to "severance damages" in addition to the fair market value of the property taken if the taking injured the condemnee's remaining property.[137] But the inverse is also true. If the condemnation increases the value of the condemnee's remaining property, the government is entitled to offset the extent of that increase by applying the "benefit offset test."[138] And this makes good sense. Where the government uses eminent domain for a project that dramatically increases the value of adjacent property—for example, by creating a new exit on a highway—the government need only compensate for the *net* loss in value of the property taken.[139] This is, in effect, the mirror image of severance damages.

Under the benefit offset rule, then, a government will not actually need to pay anything to a property owner where the eminent domain action produces a net benefit to the owner. Of course, benefits can only be offset up to the extent of the just compensation award. The benefits can cancel out the amount a property owner is owed, but the property owner will never be forced to give up additional money. Nevertheless, the benefits of the project can cancel out the award of just compensation for the property taken, which is not so different from the facts of *Norwood*.

Consider, then, the two different ways in which the benefits of the new road could have been introduced in *Norwood*. First, in assessing just compensation, the jury could have—but did not—consider the extent of the road's benefits on Baker's remaining property. If those benefits had been great enough, the just compensation award could have been reduced to zero. In that case, the special assessment would also have been zero. Alternatively—having paid just compensation without consideration of the benefits of the new road—the special assessment could then be levied against Baker up the value of the benefits she gained from the new road, potentially up to the full costs of the project if the benefits had been great enough. Notice, though, that the outcome would have been the same. Regardless of the approach—whether under the benefit offset rule or the special assessment—Baker may not actually have been entitled to any net

135. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 696 (2005).

136. *Id.* at 696–99.

137. *Id.* at 688 n.49.

138. *Id.* at 694–96.

139. *Id.*

compensation for the taking of her property. It is perhaps a surprising outcome but consistent with longstanding principles in computing just compensation (although at least one other case faced with a similar set of facts rejected the assessment[140]).

So where should we look for facts or contexts that trigger heightened concern? There are certain features of a special assessment that seem particularly problematic. Where assessments are used inconsistently, they create a real risk of shifting extra costs to some neighborhoods. If a government uses special assessments inconsistently, some neighborhoods will be forced to fund infrastructure development through assessments, while others will have costs spread across the entire community through property taxes.[141] This kind of inconsistency means that the people paying assessments are, in effect, forced to pay twice. They are contributing through general property taxes to infrastructure elsewhere while bearing the full cost of their own. This creates opportunities for favoritism (or discrimination).

As a result, where municipalities adopt assessments in some neighborhoods and not others, courts should demand a more particularized showing that the special benefits of the infrastructure exceed the costs of the assessment in order to prevent stategraft. This is not to say that inconsistency is always unjustifiable or problematic. A city with an active tourist area, for example, may well expect that sidewalk or other infrastructure improvements in that area—say Nashville's Lower Broadway—will benefit the entire city. However, sidewalks in more suburban neighborhoods will have more localized benefits and are therefore better funded through special assessments. The point is only that courts should not necessarily defer when local governments use assessments inconsistently.

Likewise, courts could also be more searching when assessments are imposed for infrastructure costs in especially poor neighborhoods. This is surprisingly less obvious than it seems because it runs the risk of deterring improvements in the places that may need them the most. The optimistic account is that more searching judicial review of assessments in poor neighborhoods might encourage local governments to rely on different and more progressive funding mechanisms, like general revenue, that spread the infrastructure costs more broadly. The pessimistic account is that the specter of these higher administrative costs would discourage local governments from improving infrastructure at all in poorer neighborhoods. Nevertheless, the risk of highly deferential review is that property owners in these neighborhoods face assessments

140. *See Engstrom v. City of Wichita*, 245 P. 1033, 1034 (Kan. 1926).

141. ELLICKSON, BEEN, HILLS & SERKIN, *supra* note 91, at 577.

that exceed their benefits. This is particularly harmful for homeowners facing cash-flow challenges for whom any assessment may create a significant hardship, and for whom assessments in excess of benefits seem particularly unfair.

Recalibrating judicial review to be responsive to the distributive consequences of special assessments is attentive to the concerns in Professor Atuahene's account of stategraft. Assessments in excess of benefits are illegal but often not detected because of courts' deferential review. Where they are used to finance infrastructure on the backs of a community's most vulnerable citizens, they are particularly pernicious. So, for example, imagine a city that decides to build stormwater improvements in a poor minority community and finance the improvements through special assessments. Those improvements might be desperately needed because of chronic underinvestment in infrastructure in such communities. But the assessments may have a smaller impact on property values than in a more affluent community. Property values may be driven much more by systemic discrimination, building quality, and structural neighborhood characteristics, than by the inadequate stormwater system. That is no reason to deny the community the improvements, but owners may not see meaningful economic benefits, let alone be able to afford them. Where the assessments are high, and the corresponding benefits are small or non-existent, the assessment should be illegal. Deferential judicial review, however, will leave such assessments in place. Applying more searching review to ensure the legality of the assessments—that their costs do not exceed their benefits—is a modest doctrinal change that would limit opportunities for stategraft.

Development exactions are a different matter. The likelihood of exactions burdening vulnerable populations does not depend primarily on the neighborhood in which they are imposed, nor on the identity of the developer. In fact, exactions on new development in poor neighborhoods might provide an important mechanism for redistributing some of the value created by gentrification to in-place property owners. Governments should be free to impose such exactions without searching judicial review. This is especially true of legislated exactions where developers know ahead of time what costs they will be expected to bear.

This, however, depends in part on elasticity in local housing markets. As Professor Been demonstrated, where housing markets are inelastic, the real cost of exactions will not be borne by developers but may instead be shifted to ultimate housing consumers in the form of higher costs.[142] Alternatively, if developers anticipate exactions, they

142. Been, *supra* note 3, at 540–42.

may pay less for undeveloped property, in effect including the exactions in development costs.[143] Neither housing consumers nor existing owners of undeveloped land will be able to avoid the impact of the exaction in the way a developer could by walking away.[144] But the focus of the constitutional inquiry should be on who is actually bearing the cost, and not on formalistic distinctions between exactions and assessments.

The clearest example of an inquiry along these lines would be in the context of affordable housing development. Exactions imposed on low-income housing will almost inevitably be regressive because they will either increase housing costs to the ultimate residents, or—more likely—disincentivize affordable housing by driving up development costs that cannot be priced into the housing units. These risks are particularly pernicious when exactions exceed the burdens created by the development. In other words, the nexus and proportionality requirements are especially important when the target of the exaction is affordable housing.

Notice, however, that this focus does not depend on whether the exaction is legislated or ad hoc. Either can burden affordable housing development. Ad hoc demands from local governments are the most obvious, where local officials can use exactions to deter new affordable housing development. But legislated exactions, too, can target affordable housing at least by proxy—for example, by focusing on multi-family housing with multiple bedrooms or on especially high-density development.[145] Applying the *Nollan* and *Dolan* framework in these contexts helps to ensure that these exclusionary exactions do not exceed the real burdens—distinct from the stigma—of the affordable housing development. In short, the nexus and proportionality requirements in this context help to police against stategraft.

Other exactions do not raise this same concern, however. Legislated exactions, in particular, are visible, public, and knowable by property owners ahead of time. Like special assessments, legislated exactions resemble conventional fees or taxes that are usually entitled to broad judicial deference. Recognizing the functional similarity of special assessments and legislated exactions suggests that courts should apply the same kind of review to both.

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143. *Id.*

144. *See id.* at 541–42.

145. *See* S. Mark White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations To Achieve Multiple Public Objectives*, 6 J. LAND USE & ENV'T L. 25, 26–28 (1990) (considering the possibility of exempting affordable developments from impact-fee schemes); Patricia E. Salkin, Ryan Rowberry & John Travis Marshall, § *9:9. Developer Funding of Infrastructure*, *in* LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 84, Westlaw (database updated Dec. 2023) (noting that some jurisdictions have attempted such exemptions).

CONCLUSION

When a city, like Nashville, decides to improve its sidewalks, it faces a set of fairly complex choices about how best to fund them. Choosing between general revenue, special assessments, and development exactions has real distributional consequences. No single choice is normatively superior. All have pros and cons. But that choice should not be influenced by, let alone determined by, different constitutional regimes. Now, a government will receive significant deference if it decides to impose an assessment on in-place property owners who are benefitted by the improvement, but will be subject to more searching review for exactions imposed as a condition on development. This distinction makes no sense. The choice between funding mechanisms for improvements like sidewalks should not be unduly influenced by differing constitutional regimes but should rather be guided by thoughtful consideration of distributional consequences and a commitment to equity. Focusing, instead, on the contexts that present the greatest risk of government illegally burdening its most vulnerable populations—focusing, that is, on opportunities for stategraft—provides a more principled basis for constitutional review.

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