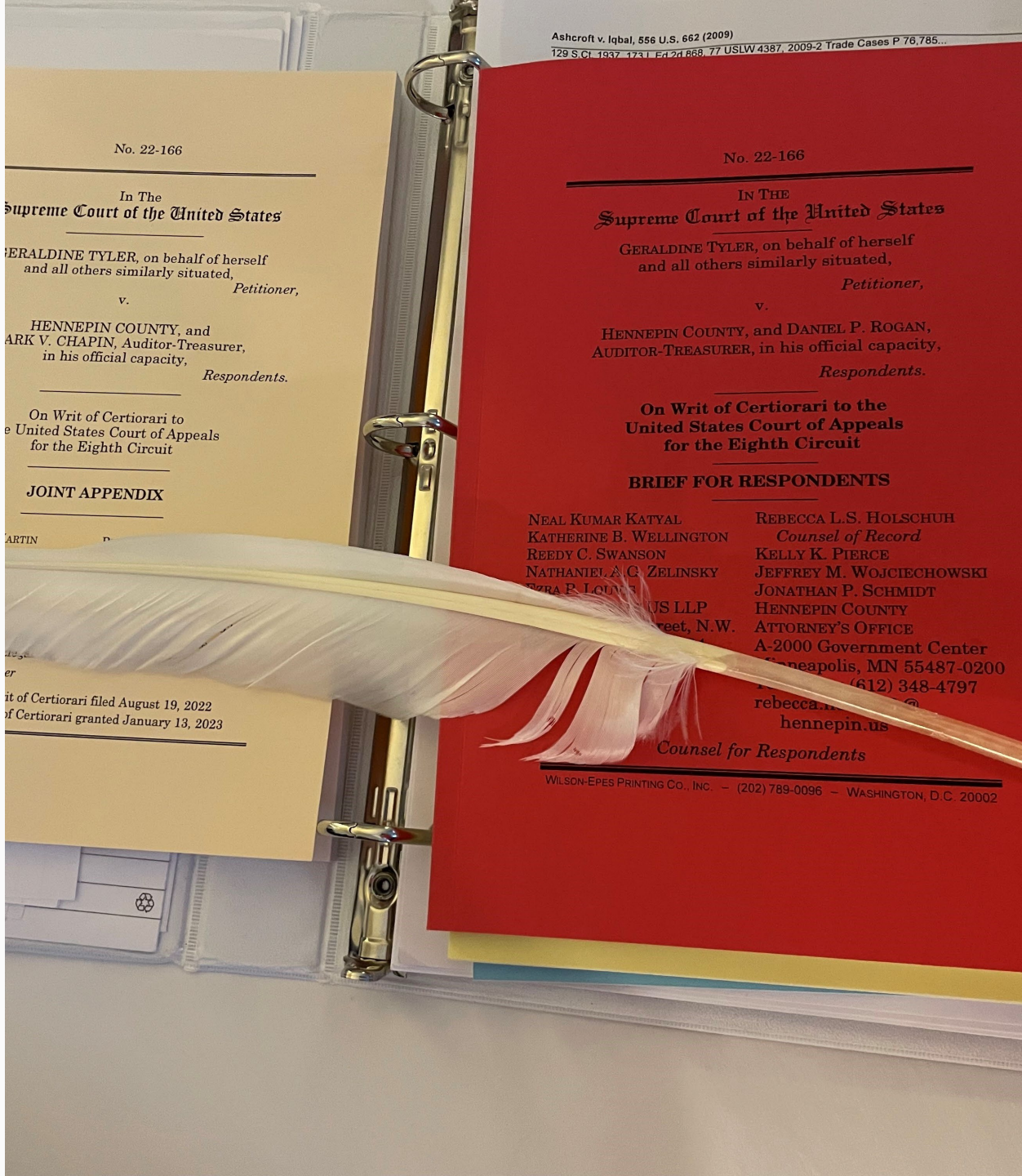
Tyler v. Hennepin County and a more robust Takings Clause

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Takings Clause of Fifth Amendment

The text: "[N]or shall private property be taken for public use, without just compensation."

"The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."

-Justice Brennan in *Penn Central*



Credit: Collection of the Supreme Court of the United States

Timeline of key takings decisions

(Not an exhaustive list.)

1922	Pennsylvania Coal Co. v. Mahon	Regulation violates Takings Clause if it “goes too far”
1960	Armstrong v. United States	Extinguishment of lien is a taking
1978	Penn Central Transp. Co. v. New York City	To analyze regulatory taking, look at “character of the action” and “nature and extent of the interference with rights”
1980	Webb’s Fabulous Pharmacies v. Beckwith	Property interests come from “independent sources” like state law but state law “may not transform private property into public property without compensation” “by ipse dixit”
1982	Loretto v. Teleprompter	Taking is per se when it is a “permanent physical occupation” which “destroys” all property rights
1985	Williamson County v. Hamilton Bank	No takings violation until compensation refused in state proceeding
1987	First English Evangelical Lutheran Church of Glendale	Owner may be entitled to compensation for temporary taking
1987	Nollan v. California Coastal Commission	Land use condition must have nexus to purpose of regulation

Timeline of key takings decisions – continued

(Not an exhaustive list.)

1992	Lucas v. South Carolina Coastal Council	Per se taking occurs when there is no longer any “economically beneficial use”
1994	Dolan v. City of Tigard	Land use condition must have “rough proportionality” to purpose of regulation
2005	Kelo v. City of New London	Economic development can constitute public use
2013	Koontz v. St. Johns River Water Mgmt. District	Apply nexus and rough proportionality requirements to monetary exactions
2015	Horne v. Department of Agriculture	Applies Takings Clause to personal property
2019	Knick v. Township of Scott	Violation occurs when property taken; may file 1983 claim for compensation without utilizing state procedures
2021	Cedar Point Nursery v. Hassid	Allowing limited access to private property is per se physical taking
2023	Tyler v. Hennepin County	Retention of surplus following sale of property that forfeited for nonpayment of taxes is a taking

Key takings decisions: last decade

Decision	Property Owner	Government
Koontz (2013)	✓	
Horne (2015)*	✓	
Knick (2019)*	✓	
Cedar Point Nursery (2021)*	✓	
Tyler (2023)*	✓	
Sheetz (2024)	✓	

*Chief Justice Roberts' majority opinion



Chief Justice John Roberts
Credit: Collection of the Supreme Court of the United States

Where do property rights come from?

- **State law.** "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

- **Tradition**. "[S]tate law cannot be the only source" of property interests, because states could redefine them, "[s]o we also look to 'traditional property law principles" plus historical practice and this Court's precedents." *Tyler,* 598 U.S. at 638. Note this exchange at the *Tyler* argument:

  Justice Gorsuch

  So there's actually some common ground here, it seems to me, that you -- you're acknowledging it can't be pure positive law, state law that governs what is property, right?

  Neal Katyal (for Hennepin County)

  Correct.

Tyler Facts

- Plaintiff moved out of Minneapolis condo in 2010
- Payable 2011 taxes became delinquent
- Property forfeited in 2015
- Property auctioned to third party in 2016
- Alleged $15,000 tax liability and $40,000 auction price



Credit: Hennepin County

Tyler Procedural History

- 2019 putative class action filed in state court
- Hennepin County removed to federal court
- District court dismissed for failure to state a claim, applying *Nelson v. City of New York*
- Eighth Circuit Court of appeals unanimously affirmed
- SCOTUS reversed May 25, 2023



Credit: Hennepin County

Tyler Arguments

Petitioner	Respondent
Petitioner has standing because she could use surplus funds to satisfy debt	No standing because of other encumbrances on property
Property interest survives forfeiture	No property interest following forfeiture, so no taking
Constitutional law must provide opportunity to recover surplus *funds*	Ample opportunity to avoid loss of property is all that is required
Tyler did not abandon property by failing to pay tax	Payment of tax is reasonable condition of ownership

Supreme Court reverses in a 9-0 decision

- Tyler "plausibly pleaded financial harm" so has standing, even though she did not plead she still had equity in the property after taking other encumbrances into account. Tyler could use surplus to satisfy those debts.
- "[H]istory and precent" give *Tyler* a property interest in the surplus, even if Minnesota statute does not
- Tyler has a "classic" Takings claim for excess value, distinguishing *Nelson v. City of New York* (1956)
- "[R]equiring a taxpayer to sell her house to avoid a taking is not the same as providing her an opportunity to recover the excess value of her house once the State has sold it."
- Rejected theory of abandonment through failure to meet condition of ownership



Credit: Collection of the Supreme Court of the United States

Tyler Takeaways and Questions

- Monetary payment must be available for surplus when property is seized as part of collection
- Property tax collection can now be analyzed under the Takings Clause
- Is *Tyler's* holding limited to the collection of property taxes?
- Will *Nelson* remain good law?
- When can the law extinguish a property interest *without* it being a taking?

Minnesota legislature responds to *Tyler*

- Appropriation to fund statewide settlement of 3 class actions
  - Ch. 113, 2024 Minn. Laws
- New sale requirement to generate surplus
  - Art. 70, Ch. 127, 2024 Minn. Laws

Post-*Tyler* decisions: *Campo v. United States* (Court of Federal Claims)

- Plaintiffs leased Louisiana oyster beds from the government. A spillway diverted fresh water, killing the oysters
- Do Plaintiffs have a takings claim? No. Unlike *Tyler,* no existing right was transferred from private owner to government
- "Plaintiffs, whose rights in the oysters stem exclusively from their lease contracts, which obligate plaintiffs to follow Louisiana law, therefore never had the right to sue the government for a taking arising out of integrated coastal protection, meaning this right could not be 'transform[ed] ... into public property.' " (quoting *Webb's Fabulous Pharmacies)*

Post-*Tyler* decisions: *Todman v. Baltimore* (Fourth Circuit)

- Baltimore ordinance that deems abandoned any personal property left following eviction violates procedural due process
- Court pointed to *Tyler's* rejection of condition-of-ownership theory: "[W]hen operation of a confiscatory statute is triggered by something other than long periods of nonuse, it starts to look less like abandonment and more like a government-induced forfeiture."
- Ordinance "is much too poor a proxy [for abandonment] to operate without individual notice or an opportunity to contest the deprivation."
- "Were we to hold otherwise, local governments could opt out of the Due Process Clause altogether by recharacterizing any deprivation as an abandonment."

Post-*Tyler* decisions: *Biesemeyer v. Anchorage* (D. Alaska)

- City foreclosed property following failure to pay property taxes and retained substantial surplus. Property owner did not make a claim, and argued he should not have to
- State law allowed one year to redeem property and six months to claim surplus sale proceeds. This "meets the low threshold implied by *Tyler* and *Nelson*."
- Action was time-barred, but Court also said there is no takings claim because mechanism to recover surplus was adequate and "states may properly enact procedures that restrict a property owner's ability to claim that excess"

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Horne v. Department of Agriculture

- Agency order required raisin growers to set aside a portion of raisin crop for government use; growers receive any net proceeds
- Majority says this is a per se taking of personal property
- Dissent says this cannot be a per se taking because a property interest remains and because the order is effectively a regulation
- Justice Sotomayor: "Government may condition the ability to offer goods in the market on the giving-up of certain property interests without effecting a *per se* taking."

Knick v. Township of Scott

- Overturns *Williamson County*, which requires owner to utilize state procedures for compensation
- Owner may file Section 1983 action as soon as taking occurs because the taking itself is the violation, as opposed to the failure to compensate
- Dissent argues that takings are a necessary government function and do not violate the Fifth Amendment. Instead, the violation occurs when state procedure fails to provide adequate compensation
- Recognizes state courts can better analyze property interests defined by state law
- Justice Kagan: "Under cover of overruling 'only' a single decision, today's opinion smashes a hundred-plus years of legal rulings to smithereens."

Cedar Point Nursery v. Hassid

- California regulation allowed unions limited access to private agricultural property for purposes of organizing
- "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. . . . This Court agrees . . ."
- Regulation was a *per se* physical taking because it "appropriates a right to invade" private property
- Exceptions to rule that physical intrusion is a per se taking: (1) trespass, (2) "longstanding background restrictions on property rights", and (3) condition of a government benefit
- Dissent argues nothing was appropriated; this is a temporary regulatory taking

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Individual Interest vs. Common Welfare: Recent Takings Jurisprudence: *Sheetz v. El Dorado County*, Impact Fees and Exactions

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Context: Unconstitutional Conditions Doctrine- Which constitutional rights receive protection?

> Government is a monopoly provider of countless services, notably law enforcement, and we live in an age when government influence and control are pervasive in many aspects of our daily lives. Giving the government free rein to grant conditional benefits creates the **risk that the government will abuse its power** by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.

—*United States v. Scott,* 450 F.3d 863, 866 (9th Cir. 2005)

See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 Yale L. Rev. 1401 (2024) (liberty interests, such as conditions on plea deals, seem to receive less protection than free speech and property interests)

Unconstitutional Conditions Doctrine - Which constitutional rights receive protection?

"I'm thinking about all of the criminal law rights . . . where a state will condition your . . . getting a lesser recommendation . . . at sentencing, for example, with you giving up your right to a trial, giving up your right to appeal. I mean, those are really significant things. And the Court apparently doesn't ask the question, is an unconstitutional condition happening in that circumstance?"

—Justice Ketanji Brown Jackson (2022) Transcript of Oral Argument at 61, *Mallory v. Norfolk S. Ry.*, 600 U.S. 122 (2023) (No. 21-1168) (concerning the constitutionality of states requiring a company to consent to general personal jurisdiction as a condition of conducting business in the state)

Koontz at 604-05 "[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." Emphasizes benefit to government. But criminal defendants aren't vulnerable?

Unconstitutional Conditions Doctrine - Which constitutional rights receive protection?

- In contexts as diverse as **taxation, licensing, federal employment,** and **funding for reproductive care**, the Justices have considered the burdens imposed by conditional offers made by the government by referring to a **range of factors that implicate or signal coercion**. The factors include the strength of the **government's interest**, the strength of the **individual's interest**, the **germaneness** of the condition, and the **degree of proportionality** between the condition and the government's interest.
- When considering government tradeoff schemes that implicate the Fourth Amendment right to be free from **unreasonable searches**, the Fifth Amendment privilege against **self-incrimination**, the Fifth Amendment right to **substantive due process in plea deals**, and the Sixth Amendment **rights to a jury trial and to confront witnesses**, the unconstitutional conditions doctrine is nowhere to be found.

See Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 Yale L. Rev. 1401 (2024).

Unconstitutional Conditions Doctrine: Land Use 101

Private Property for Public Infrastructure

- Negotiated **Easements** for Drainage Pipes, Roads, and Other Public Purposes
- Construction of Off-Site Traffic **Improvements**, Environmental **Mitigation**
- **Donation** of Park Properties and School Sites
- **Proportionate Share** Mitigation
- **NOT** about the needs of the site – internal infrastructure and access points
- **NOT** about PUD agreements or other negotiated approvals

Unconstitutional Conditions Doctrine: Land Use 101

Pennsylvania Coal Co. v. Mahon, 260 U. S. 365 (1926)

- "**Government hardly could go on** if to some extent values incident to property could not be diminished without paying for every such change in the general law.“
- “The general rule at least is, that while property may be regulated to a certain extent, **if regulation goes too far** it will be recognized as a taking.”
- “. . . [A] **strong public desire to improve the public condition** is not enough to warrant achieving the desire by a shorter cut than the constitutional way of **paying for the change**.”

Unconstitutional Conditions Doctrine: Land Use 101

Armstrong v. United States, 364 U. S. 40, 49 (1960): One of the principal purposes of the Takings Clause is "to bar Government from **forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public** as a whole."

Penn Central Transp. Co. v. New York City, 438 U. S. 104.: A State law that merely restricts land use in a way "**reasonably necessary** to the effectuation of a substantial government purpose" is not a taking unless it saps too much of the **property's value** or frustrates the owner's **investment-backed expectations**.

Unconstitutional Conditions Doctrine: Land Use 101



Nollan v. California Coastal Comm'n (US 1987)
Coastal easement
Rational Nexus



Dolan v. City of Tigard (US 1994)
Bike path easement
Rough Proportionality



Koontz v. St. Johns River WMD (US 2013)
Wetland mitigation
Nollan/Dolan applies to **denials** and to **monetary conditions**

Unconstitutional Conditions Doctrine: Land Use 101

Nollan:

- "In short, 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."
- "If a **prohibition** designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an **alternative to that prohibition** which accomplishes the same purpose is not."
- "[I]n [the]context [where the actual conveyance of property is made a condition to the lifting of a land-use restriction] there is **heightened risk that the purpose is avoidance of the compensation** requirement, rather than the stated police-power objective."

Unconstitutional Conditions Doctrine: Land Use 101

Dolan:

- "Under the well-settled doctrine of *unconstitutional conditions*, the government may not require a person to give up a constitutional right— here the **right to receive just compensation** when property is taken for a public use—in exchange for a **discretionary benefit** conferred by the government where the benefit sought has **little or no relationship to the property**."
- "Dedications for streets, sidewalks, and other public ways are generally **reasonable exactions** to avoid excessive congestion from a proposed property use."
- "**No precise mathematical calculation** is required, but the city must make some sort of **individualized determination** that the required dedication is **related both in nature and extent** to the impact of the proposed development."
- City's burden is demonstrating that "additional number of vehicle and bicycle trips generated by petitioner's development **reasonably relate** to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."

Unconstitutional Conditions Doctrine: Land Use 101

Koontz:

- "Insisting that landowners **internalize the negative externalities** of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."
- "It is beyond dispute that "[t]axes and **user fees** . . . are not `takings.'"
- "Where a building proposal would substantially increase **traffic congestion**," the government "might condition permit approval on the owner's agreement to deed over the land needed to **widen a public road**."
- "The standard set out in *Nollan* and *Dolan* reflects the **danger of governmental coercion** in this context while accommodating the **government's legitimate need** to offset the public costs of development through land-use exactions."
- "We agree with respondent that, so long as a permitting authority offers the landowner **at least one alternative** that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition."

Unconstitutional Conditions Doctrine: Land Use 101

Koontz:

- "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they **impermissibly burden the right not to have property taken** without just compensation."
- These principles **apply to denials** because any other rule "would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval."
- "So long as the building permit is more valuable than any just compensation the owner could hope to receive . . ., the owner is likely to accede to the government's demand, no matter how unreasonable. **Extortionate demands** of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."

Unconstitutional Conditions Doctrine: Land Use 101

Koontz:

- ". . . [W]e have repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax. . . . . our cases show that teasing out the **difference between taxes and takings** is more difficult in theory than in practice."
- "In cases where there is an **excessive demand but no taking**, whether **money damages** are available is not a question of federal constitutional law but of the cause of action — whether state or federal — on which the landowner relies."

Unconstitutional Conditions Doctrine: Land Use 101

See Section 70.45, FS – the *Koontz* cause of action in Florida:

(1)(d) "Prohibited exaction" means **any condition imposed** by a governmental entity on a property **owner's proposed use of real property** that **lacks an essential nexus to a legitimate public purpose** and is **not roughly proportionate to the impacts** of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate.

(2) In addition to other remedies available in law or equity, a property owner **may bring an action** in a court of competent jurisdiction under this section **to declare a prohibited exaction invalid and recover damages** caused by a prohibited exaction. Such action may be brought by a property owner at the property owner's discretion when a prohibited exaction is **actually imposed** or when it is **required in writing as a final condition of approval** for the requested use of real property. The right to bring an action under this section may not be waived. This section **does not apply to impact fees** adopted under s. 163.31801 or non-ad valorem assessments as defined in s. 197.3632.

What are Exactions?

- An exaction is a requirement that a developer dedicate money or property in exchange for a permit, with the justification that the dedication offsets an impact from the development.
- Some are uniformly applicable to all property and development of a certain type. Others are uniquely negotiated on the facts of a particular development/property.

Exactions

For example, to obtain a permit, the property owner must:

- Comply with form-based codes requiring, as part of the development, that the owner build improvements on adjacent roadway (parallel, on-street parking; street lights; wide sidewalks; street trees; benches; etc.)
- Dedicate a portion of property for roadway or sidewalk improvements
- Build, or pay money towards building affordable housing, or contribute to other social programs
- Build offsite mitigation for impacts to wetlands/ environmental lands, or pay a fee to offset impacts
- Pay impact fees per a schedule based on location/use/amount of development (units, square footage).

What Are Impact Fees? Florida Origins Pre-*Nollan*

"The appropriate framework for determining whether an impact fee is **a regulation or a tax** is one of public policy in which a number of factors should be weighed. The **home rule powers** granted local governments in Florida, the legislative mandate that local **governments must plan** comprehensively for future growth, and the additional broad powers given them to make those plans work effectively, indicate that **properly limited impact fees** for educational or recreational purposes **should be construed as regulations**. Characterization as a regulation is particularly appropriate where an impact fee is used to complement other land use measures such as in lieu fees or dedications. If an impact fee is characterized as a regulation, its **validity should then be determined by reference to the dual rational nexi police power standard**."

Juergensmeyer and Blake. *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 Fla.St.U.L.Rev. 415, 440-41 (quoted in 1983 P.B Co. road impact fee case)

Impact Fees: Florida Followed Utah's Factors

Banberry Development Corp. v. South Jordan City, 631 P. 2d 904 (Utah 1981)

(1) **cost** of existing capital facilities, and (2) **manner of financing** them (such as user charges, special assessments, bonded indebtedness, general taxes or federal grants);

(3) relative extent to which newly developed properties and other properties in municipality have **already contributed** to cost of existing capital facilities (by such means as user charges, special assessments, or payment from proceeds of general taxes);

(4) relative extent to which newly developed properties in municipality **will contribute** to cost of existing capital facilities in future;

Impact Fees

Banberry factors continued :

(5) extent to which newly developed properties are **entitled to a credit** because municipality is requiring developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by municipality and **financed through general taxation** or other means (apart from user fees) in other parts of the municipality;

(6) **extraordinary costs**, if any, in servicing newly developed properties; and

(7) **time-price differential** inherent in fair comparisons of amounts paid at different times.

Impact Fees

- Impact fees in Florida were home rule creations, validated by caselaw long before *Nollan* and *Dolan*, and before Florida had a statute.
- The cases always required dual rational nexus –

  "The local government must demonstrate a reasonable connection, or rational nexus, between the **need for additional capital facilities and the growth** in population **generated** by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the **expenditures of the funds collected and the benefits accruing** to the subdivision. In order to satisfy this latter requirement, the ordinance must **specifically earmark the funds** collected for use in acquiring capital facilities to benefit the new residents."

  Hollywood, Inc. v. Broward County, 431 So.2d 606, 611-12 (Fla. 4th DCA), *review denied*, 440 So.2d 352 (Fla. 1983)

Impact Fees

- Impact fees pay for **growth and expansion** of the system, not operation and maintenance, and are based on the choice to develop or connect and thereby create impact. Not for deficiencies.
- Fees for expansion of **water and sewer** facilities were first upheld: *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976) (where the growth patterns are such that an existing water or sewer system will have to be expanded in the near future, a municipality may properly charge for the privilege of connecting to the system a fee which is in excess of the physical cost of connection, if this fee does not exceed a proportionate part of the amount reasonably necessary to finance the expansion and is earmarked for that purpose, and necessary restrictions are placed on the use of the fund.)

Impact Fees

- **Road** and **park** impact fees were later upheld:
  - *Home Builders & Contractors Ass'n v. Bd. of Co. Comm'rs of Palm Beach Co.*, 446 So. 2d 140 (Fla. 4th DCA 1983) (road impact fees upheld)
  - *Hollywood, Inc. v. Broward Co.*, 431 So. 2d 606 (Fla. 4th DCA 1983) (park impact fees upheld)
- **School** impact fees were also upheld later, as long as they apply to substantially all of the county, and allowed exemptions for 55+ housing prohibiting minors: *St. Johns Co. v. NE Fla. Builders Ass'n, Inc.*, 583 So. 2d 635 (Fla. 1991); *Volusia Co. v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000); *Bd. of Cty. Comm'rs Santa Rosa Co. v. Home Builders*, 325 So. 3d 981 (Fla. 1st DCA 2021).

Impact Fees are User Fees, Not Taxes

- User fees are fees that are "charged **in exchange for a particular governmental service** which benefits the party paying the fee in a manner **not shared** by other members of society," and "the party paying the fee has the **option of not utilizing** the governmental service and thereby avoiding the charge." *State v. City of Port Orange,* 650 So. 2d 1 (Fla. 1994)
- Fees determined to be taxes: Transportation utility fee on developed property, for the capital costs of **operating, maintaining and improving** arterial and collector roads, was a tax, not a valid user fee. *Port Orange*

Sheetz v. El Dorado County

Facts

- El Dorado County's legislation required developers to pay **traffic impact fee** as condition of receiving building permit, and County used proceeds from these fees to fund improvements to its road system.
- Sheetz paid the **$23,420** traffic impact fee to obtain permit to build a home, under protest, and sued in state court, claiming fee was unlawful "exaction" of money in violation of the Takings Clause (*Nollan* and *Dolan*)
- Fee amount was not based on the costs of traffic impacts specifically attributable to Sheetz's particular project, but rather was assessed according to a **rate schedule** based on type of development and its location within the County

History

- Trial court rejected Sheetz's claim, and the Cal. Court of Appeal affirmed, relying on Cal. Sup. Ct. precedent:
  - *Nollan/Dolan* applies only to permit conditions imposed "on an individual and discretionary basis."
  - *Nollan/Dolan* does not apply to fees imposed on "a broad class of property owners through legislative action."
- The California Supreme Court denied review.
- The U.S. Supreme Court granted certiorari to decide "whether the Takings Clause recognizes a **distinction between legislative and administrative conditions in land-use permits**," noting a split in state court jurisprudence.
- A variety of amici parties filed briefs.

Issues as framed by the Pacific Legal Foundation

- The government can't hold the right to use your property hostage in order to extract exorbitant fees. That's akin to extortion.
- **Permit fees must be proportional to the public costs imposed** by new development. Otherwise, the government may leverage the permit process to take property it is not entitled to, skirting the Constitution's Fifth Amendment prohibition against taking private property without just compensation.
- **Singling out some property owners to pay a disproportionate share** of the cost of public amenities that are used by everyone is **unfair**, and the Supreme Court has repeatedly said it's unconstitutional.
- California's and some other courts have evaded Supreme Court precedent by allowing legislative bodies, like city councils, to charge excessive permit fees that would be plainly unconstitutional if charged by land use bureaucrats. We're asking the Supreme Court to reaffirm that **property rights don't get less protection depending on which branch of government violates them**.

Issues as framed by national local gov't interests

- Local governments have broad, elastic police powers to address burdensome community impacts created by new development.
  - Legislatively enacted, generally applicable development impact fees are **ubiquitous and necessary tool** of responsible land use planning.
  - Impact fees **do not require "special application"** of the unconstitutional conditions doctrine.
  - **State enabling statutes** provide an additional, independent check on land use permitting fees.
  - **Nexus studies** establish the **reasonable relationship** between impact fees and new development: they are robust objective economic studies that provide substantial evidence of the relationship between new development and the need for new or improved public facilities, and they account for unique local needs and conditions.

Issues as framed by national local govt interests

- Additional **procedural safeguards** protect new development from excessive fees.
- Expanding the requirements of heightened scrutiny to development impact fees would turn the reasoning of *Nollan* and *Dolan* on its head, and **shift the financial burden of development onto local communities**.

Issues as framed by California local governments

Reading *Nollan* and its progeny to limit the contribution of new development to public infrastructure would **unfairly burden the taxpayers, who already provide the infrastructure** on which real estate developers rely to profit from their development projects

- In contemporary society, all property owners reap the advantages of significant **governmental "givings**."
- Private developers enjoy a disproportionate share of the benefits associated with taxpayer funded givings.
- Conditioning development approval on payment of legislative **impact fees is a critical mechanism for recouping** some—though by no means all—of the costs associated with givings
- Uncompensated givings implicate the exact same **fairness concerns** that have animated the Court's takings doctrine
- For much of its history, this Court acknowledged that **average reciprocity of advantage**, which accounts for both givings and takings, must inform its analysis of regulatory takings to uphold representative democracy

Issues as framed by California local governments

- Legislative development impact fees are **not the functional equivalent of eminent domain** and, accordingly, cannot constitute regulatory takings under *Nollan* or any other regulatory takings test.
  - A regulation can be deemed a taking only if it is the functional equivalent of eminent domain
  - Legislative development impact fees do not meet the functional equivalency test for takings

Issues, as framed by planners

- Planners, developers, and general public have **long relied on** legislatively adopted development exactions to provide necessary public goods
- Legislatively adopted exactions **vindicate private property rights by making development possible**, and provide much-needed **certainty** in the real-estate development process
- **Existing law protects property owners** from excessive exactions

Issues, as framed by planners

- If legislatively adopted exactions are subjected to heightened scrutiny, the court should clarify three questions of great practical importance to planners, regulators, and landowners:
  - What must a governmental defendant show to satisfy the **evidentiary burden** of heightened scrutiny?
  - What does "**rough proportionality**" actually require?
  - If legislatively adopted development conditions are subject to heightened scrutiny, **what types of land-use regulations fall outside the unconstitutional-conditions doctrine**?

Sheetz v. El Dorado County 601 U.S. 267 (2024)

So what did the US Supreme Court decide? Not much as to most typical impact fees, such as in Florida.

- The Takings Clause "does not distinguish between legislative and administrative permit conditions" - it "**prohibits legislatures and agencies alike** from imposing unconstitutional conditions on land-use permits."
- **Parties agreed at oral argument that conditions on building permits are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislative body imposed them**.
- **Open issue**: Whether a permit condition imposed on a class of properties must be **tailored with the same degree of specificity** as a permit condition that targets a particular development is an issue **for the state courts** to consider in the first instance, **if** properly preserved by Sheetz.

Sheetz v. El Dorado County

***Nollan/Dolan* test applies** regardless of which branch of government imposed the permit condition.

- Takings Clause focuses on the **prohibited act**, not the **identity of the actor** who performs it
- No special exemption for legislatively imposed exactions historically
- Court's **physical-takings cases** apply a per se rule requiring payment of just compensation to takings effected by legislation and administrative action alike
- Court's **regulatory-takings cases** do not distinguish between legislative and agency action

Justice Barrett's humor: "The Takings Clause's right to just compensation coexists with the States' police power to engage in land-use planning. (Though at times the two seem more like in-laws than soulmates.)"

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Justice Barrett's typology of takings

Per se taking: "The right to compensation is triggered if [government] "**physically appropriat[es]**" property or otherwise interfere[s] with the owner's **right to exclude** others from it." *Cedar Point Nursery v. Hassid, Loretto*

Use restriction: Fifth Amendment is violated when land-use regulation "does **not substantially advance** legitimate state interests or **denies an owner economically viable use** of his land." *Penn Central, Lucas*

Permit conditions: Whether it is money or a property interest, a condition must bear an **essential (rational) nexus** to a **legitimate** police power purpose and be **roughly proportional** to the **impact** of the development. *Nollan*, *Dolan*, *Koontz*

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- California courts wrongly declined to apply *Nollan* and *Dolan* analysis to this legislatively prescribed monetary fee.
- There is "**no textual justification** for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Stop the Beach Renourishment, Inc. v. Florida DEP.* **Precedent and history agree**.
- Legislative bodies generally exercise eminent domain and are subject to takings clause, so why not legislative fees?
  - *But by their very nature, condemnations target individual properties in a different manner than impact fees do, which apply to everyone evenhandedly based on average assessments of cost and impact for type and size of use?*

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Sotomayor/Jackson concurrence:

- **Conditions on building permits are "not exempt from scrutiny under *Nollan* and *Dolan* just because a legislature imposed them**."
- To be resolved on **remand**, and not addressed by us: "The question presented in this case did not include that antecedent question: **whether the traffic impact fee would be a compensable taking if imposed outside the permitting context** and therefore could trigger *Nollan/Dolan* scrutiny."

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Gorsuch concurrence:

- County essentially confesses error, and the Court corrects the state courts' mistake
- Fails to see **why *Nollan/Dolan* test should operate differently** when an alleged taking affects **a "class of properties" rather than "a particular development."**
  - *Nollan* condition was individualized, but pursuant to a comprehensive program
  - *Dolan* condition was individualized, but resulted from a comprehensive land use plan
- The Takings Clause, the Court stresses, is no "`poor relation' to other constitutional rights."

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Kavanaugh/Kagan/Jackson concurrence:

- Emphasizing that the Court has **not** previously decided—and today explicitly declines to decide—whether "a permit condition imposed on a class of properties must be **tailored with the same degree of specificity** as a permit condition that targets a particular development."
- This opinion does **not** address/**prohibit** permit conditions, such as **impact fees**, that are **levied on new developments through reasonable formulas or schedules that assess the impact of classes of development**, rather than the impact of specific parcels of property (and no prior decision has done so either).

Sheetz v. El Dorado County – Bottom Line

To withstand Takings Clause scrutiny, **all** exactions of money or property, must:

- Have an "essential nexus" to a legitimate government interest; and
- Be "roughly proportionate" to the impacts of the proposed development on that government interest.

Sheetz, 601 U.S. at 275-76.

Questions *Sheetz* Left Unanswered

- Whether, for purposes of establishing rough proportionality, "a permit condition imposed on a class of properties[such as an impact fee] must be tailored with the **same degree of specificity** as a permit condition that targets a specific development." *Sheetz*, 601 U.S. 267, 280 (2024); Id. at 284 (Kavanaugh, J., concurring).
- Whether an impact fee "would be a compensable taking if imposed outside the permitting context" – a necessary pre-requisite to triggering scrutiny under the essential nexus/rough proportionality test. Id. at 280-281 (Sotomayor, J., concurring).

WHAT CHANGED POST-*SHEETZ*

Pre-*Sheetz*

Whether the essential nexus/rough proportionality test was applicable to exactions imposed by laws of general application was still up for argument. *See Dolan v. City of Tigard*, 512 U.S. 374, 392 n. 8 (1994) ("Justice STEVENS' . . . is correct in arguing that in evaluating most **generally applicable** zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. . . Here, by contrast, the city made an **adjudicative** decision to condition petitioner's application for a building permit on an **individual parcel**. In this situation, the burden properly rests on the city."); *Koontz v. St. John's Water Mngmt. Dist.*, 570 U.S. 595, 619 (2013) (finding that individual permit applicants are particularly vulnerable to "extortionate demands for money")

Post-*Sheetz*

SCOTUS definitively said that laws of general application are not *per se* exempt from the test.

WHAT CHANGED POST-*SHEETZ* (Cont.)

Pre-*Sheetz*

- Impact Fees – most States required proportionality to development impacts, but not *individualized* proportionality. *Dolan*, 512 U.S. 374, 391 (1994) ("[T]he city must make some sort of **individualized** determination that the required dedication is related both in nature and extent to the impact of the proposed development.").
- Other Types of Exactions – uncertainty informing government actions.

Post-*Sheetz*

- Impact Fees - It is unclear whether an individualized proportionality will be required. *Sheetz*, 601 U.S. 267, 280 (2024); *Id. at 284* (Kavanaugh, J., concurring); *but see id.* at 282 (Gorsuch, J., *dissenting*).
- Other Types of Exactions – now we know and can govern ourselves accordingly, in the legislative enactment of exactions.

Potential Implications of *Sheetz*

- *Sheetz* has little practical impact on Florida fees because:
  - Florida's statutory and caselaw framework already provides the protections that the USSC is looking for in relation to impact fees and mobility fees
  - Most fee systems in the state were created following these principles
  - Florida already created a cause of action for unconstitutional conditions
- It may have a greater impact under other state fee systems that lack equivalent assurances.
- If Sheetz preserved his rights, litigates the remanded issue in state court, and takes it back up to the USSC, that could result in precedent requiring changes to how legislative fees are enacted, even in Florida

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Thank you.

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