

CUTTING MUNICIPAL SERVICES DURING FISCAL CRISIS: LESSONS FROM THE DENIAL OF SERVICES TO CONDOMINIUM AND HOMEOWNER ASSOCIATION OWNERS

*Gerald Korngold**

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* Professor of Law, New York Law School; Visiting Fellow, Lincoln Institute of Land Policy, Cambridge, Massachusetts. Thanks to Greg Ingram and Joan Youngman of the Lincoln Institute of Land Policy and to Doni Gewirtzman of New York Law School for their helpful suggestions—of course, opinions, errors, and omissions are mine alone.

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INTRODUCTION

Local governments face pressure from taxpayers to deliver infrastructure and services, but have limited, and often declining, resources to achieve these goals.¹ During recent years, either citizens sought, or the federal or a state government mandated, increased education, health care, security, recreation, and other services from municipalities.² Rising employee wages and salaries, pension obligations, and health care contributions also burden municipal spending. Resources have become more difficult to access as demands for funding have expanded. As a result of the taxpayers' property tax revolt beginning in the 1970s, states enacted various limitations on the ability of local

1. See DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 284–85 (7th ed. 2010); Michael Cooper, *Governments Go to Extremes, as the Downturn Wears On*, N.Y. TIMES, Aug. 7, 2010, at A11 (describing teacher furlough days, reduction of street lights, and cessation of municipal bus service in various localities across the United States).

2. In this article, the terms “local government” and “municipality” refer to cities, towns, counties, and other municipal entities that provide direct local services such as trash collection, street maintenance, snow removal, police and fire protection, and education. I am aware that in some situations the state may be responsible for providing some of these services. For simplicity, I also use “local government” or “municipality” to include those situations where state government is providing these direct citizen services. For descriptions of municipal services, see, e.g., *Hawkins v. Town of Shaw*, 437 F.2d 1286 (1971) (finding town unconstitutionally discriminated based on race in failure to pave streets and install sanitary sewers and street lights in predominately African-American neighborhood); Adrian Moore et al., *Putting Out the Trash: Measuring Municipal Service Efficiency in U.S. Cities*, 41 URBAN AFFAIRS REV. 237, 241 (2005) (listing typical municipal services).

and state government to increase property tax revenues.³ Moreover, property tax revenues in many places are decreasing as a result of the current financial crisis and the drop in real estate values. Lower property values yield lower real estate valuations, so when the tax rate is applied, revenues are decreased (unless the tax rate is raised).⁴ Shortfalls in property tax revenues, either due to recession or legislative limitations on tax increases, have a devastating effect on budgets, since property tax receipts are the major source of state and local tax revenue.⁵ State and local budgets are currently stretched in many

3. See ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS* 23–24 (1993).

4. For various examples of this phenomenon, see, e.g., CENTER FOR RESPONSIBLE LENDING, *SOARING SPILLOVERS: ACCELERATED FORECLOSURES TO COST NEIGHBORS \$502 BILLION IN 2009 ALONE; 69.5 MILLION HOMES LOSE \$7,200 ON AVERAGE* 3 (May 2009), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf>; Ryan M. Maudin, *PROPERTY TAX REVENUE DECLINE IN THE STATE OF CALIFORNIA AND THE IMPLICATIONS*, MARTIN SCHOOL OF PUBLIC POLICY, UNIV. OF KY. (Apr. 18, 2008), available at http://www.martin.uky.edu/Capstones_2008/Maudin.pdf. There is perhaps some lag in the tax decreases; see, e.g., Delen Goldberg, *County Struggles to Balance Budget as Property Tax Revenue Tanks*, LAS VEGAS SUN, Jan. 12, 2011, available at <http://www.lasvegassun.com/news/2011/jan/12/dont-get-too-excited/>; Jeff Green & Tim Jones, *Tax Appeals Swamp U.S. Cities, Towns as Property Prices Plunge*, BLOOMBERG, Dec. 8, 2010, available at <http://www.bloomberg.com/news/2010-12-08/plunging-home-prices-fuel-property-tax-appeals-swamping-u-s-cities-towns.html>. One study showed that most owners paid more property tax for the fiscal year ending June 30, 2008 than was paid the prior year. Nationally, property tax collections increased 4% while property values fell 16%. See Aaron Merchak & Gail Padgitt, *Property Tax Revenue Increased As Property Values Fell*, *Fiscal Fact No. 243*, THE TAX FOUNDATION, 1 (Aug. 31, 2010), available at <http://www.taxfoundation.org/files/ff243.pdf>. This seeming anomaly has been explained, however, by the fact that, in many jurisdictions, tax assessments are phased in over time, or reflect some type of average of prior years (where, in this case, values were still high). See Josh Barbanel, *Home Slump? Not on Tax Bill*, WALL ST. J., Oct. 2, 2010, at A17. Assuming decreased assessments, local governments would have to increase tax rates to obtain the same revenue; increasing taxes during a recession has great political, and perhaps macroeconomic, risks. See Matthew Haggman & Martha Brannigan, *In Dramatic Revolt Miami-Dade Voters Fire Mayor Carlos Alvarez Over Pay Hikes, Tax Increase*, THE MIAMI HERALD, Mar. 15, 2011.

5. In 2008, state and local governments collected more than 30% of their tax revenue from property tax payments. See Ryan Forester & Kail Padgitt, *Where Do State and Local Governments Get Their Tax Revenue?*, *Fiscal Fact No. 242*, THE TAX FOUNDATION, (Aug. 27, 2010), available at <http://www.taxfoundation.org/files/ff242.pdf>. Recession-induced decreases in sales taxes and state income taxes also exacerbate current financial pressures on municipalities. For an excellent survey of property tax regimes in the fifty states, see *Significant Features of the Property Tax*, LINCOLN INST. OF LAND POL'Y AND GEORGE WASHINGTON INST. OF PUB. POL'Y, http://www.lincolninst.edu/subcenters/significant-features-property-tax/Report_State.aspx (last visited Nov. 12, 2011). Since 2007, declines in state sales, income, and corporate taxes have exacerbated state and local revenues. See Donald J. Boyd & Luch Dadayan, *State Tax Decline in Early 2009 Was the Sharpest on Record*, THE NELSON

places to a crisis level.⁶ In response, governments have slashed budgets, cut services, and increased taxes.⁷ Recent bankruptcy filings of Harrisburg, Pennsylvania and Jefferson County, Alabama might be harbingers of future developments in other municipalities.⁸ These are challenging times for the over 85,000 local government entities across America.⁹

To achieve a better result under the expenditure and revenue calculus, local governments have been shifting costs of new infrastructure required for new developments to developers whenever possible.¹⁰ Many governments also pass the costs of services on to homeowners through various user fees rather than providing for these services through general tax revenues.¹¹

A. ROCKEFELLER INST. OF GOV'T, STATE REVENUE REPORT No. 76, 3–4 (May 2009), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf>.

6. See Michael Cooper & Mary Williams Walsh, *Mounting Debts by States Stoke Fears of Crisis*, N.Y. TIMES, Dec. 5, 2010, at A1.

7. See Michael Cooper, *Mayors See No End to Hard Choices for Cities*, N.Y. TIMES, Jan. 22, 2011, at A11 (describing *inter alia* layoff of nearly one-half of police force in Camden, N.J.); Monica Davey, *Questions Persisting as Illinois Raises Taxes*, N.Y. TIMES, Jan. 12, 2011, at A16; Monica Davey & Steven Greenhouse, *Big Budget Cuts Add Up to Rage in Wisconsin*, N.Y. TIMES, Feb. 17, 2011, at A1 (describing major protests against proposal requiring state employees to increase their pension and health insurance contributions); Connie Dougherty & Amy Merrick, *Governors Chop Spending*, WALL ST. J., Feb. 7, 2011, at A1; Michael Powell, *Higher State Taxes Would Not Fix Some Deficits*, N.Y. TIMES, Jan. 20, 2011, at A1, A3 (questioning the wisdom of tax increases during a deficit).

8. See Campbell Robertson, Michael Cooper & Mary Williams Walsh, *Bankruptcy Rarely Offers Easy Answer for Counties*, N.Y. TIMES, Nov. 10, 2011, at A15; Mary Williams Walsh, *A Path Is Sought for States To Escape Debts Burdens*, N.Y. TIMES, Jan. 21, 2011, at A1.

9. See U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS: VOL. 1, NO. 1, GOVERNMENT ORGANIZATION (2002), available at <http://www.census.gov/prod/2003pubs/gc021x1.pdf>. This figure includes some 35,000 special governmental districts that are not general local governments but provide specific services.

10. MANDELKER ET AL., *supra* note 1, at 378–79; see ARIZ. REV. STAT. § 9-463.05 (permitting assessment of development fees “to offset costs to the municipality associated with providing necessary public services to a development, including the costs of infrastructure”).

11. See, e.g., *Platt v. Town of Torrey*, 949 P.2d 325 (Utah 1997); Jen Lebron Kuhney, *City Attorney Outlines Way To Charge For Trash Collection*, SAN DIEGO UNION-TRIB., July 17, 2010, at B3 (discussing trash pickup fees); Ron Menchaca, *Group of Condo Owners Calls Waste Fee Unfair*, POST & COURIER, Nov. 1, 2008, at A1; Laurie Reynolds, *Taxes, Fees, Assessments, Dues and the “Get What You Pay For Model of Local Government”*, 56 FLA. L. REV. 373, 381–82, 392–95 (2004) (describing dues and fees techniques; the tax revolt of the 1970s and financial pressures contributed to the increased use of “fees” instead of tax increases). *But see* Helen Gao, *Discrepancies Fill 1919 Trash Pickup Law; Most Apartments, Condos Excluded*, SAN DIEGO UNION-TRIB., May 3, 2009, at B1 (indicating that trash pickup is still funded by general revenues). For an illustration of perverse incentives when an

As another measure, governments deny municipal services to certain types of owners that are usually available to all landowners and funded by general revenues. Local governments withhold services generally provided without extra charges to other residential owners¹² from owners in common interest communities, such as condominiums and homeowner association (HOA) communities.¹³ These denied services often include trash pickup, recycling, and snow removal, but may also encompass street maintenance, street lighting, and fire hydrants.¹⁴ Condominiums and HOAs must contract with private service

owner did not pay the firefighting fee, *see* Jason Hibbs, *Firefighters Watch as Home Burns to the Ground*, WPSD-TV, Sept. 29, 2010, available at <http://www.wpsdlocal6.com/news/local/Firefighters-watch-as-home-burns-to-the-ground-104052668.html>.

12. *See, e.g.*, Pheasant Run Condo. Homes Ass'n v. City of Brookfield, 580 F.Supp.2d 735 (E.D. Wis. 2008) (withholding snow removal and street maintenance); Hall Manor Owner's Ass'n v. City of West Haven, 561 A.2d 1373 (Conn. 1989) (withholding refuse collection); Szcurek v. City of Park Ridge, 422 N.E.2d 907 (Ill. 1981) (withholding garbage removal). Some local governments also deny these services to multi-tenant rental apartments. *See, e.g.*, Aaron Applegate, *Beach is Cracking Down on Trash; Some Will See the End of Free Service*, VIRGINIAN-PILOT, July 16, 2009, at B1; Gao, *supra* note 11; Jonathan Phelps, *Multifamily Trash and Pickup Debate Continues*, EAGLE-TRIB. (North Andover, MA) June 18, 2010, available at <http://www.eagletribune.com/local/x383274203/Multifamily-trash-and-pickup-debate-continues>.

13. Condominiums are created pursuant to a state statute. *See, e.g.*, N.Y. REAL PROP. LAW § 339-d (McKinney 2010). Homeowners' association communities do not require statutory authorization. Rather, the developer imposes easements and covenants that prescribe reciprocal rights and obligations among the homeowners and sets up an organization of owners to administer common facilities and services. *See* Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination*, 1990 WIS. L. REV. 513, 513–15. For examples in the no-service context, *see* Goldstein v. City of Chicago, 504 F.2d 989 (7th Cir. 1974) (involving condominiums); *Pheasant Run*, 580 F.Supp.2d at 735 (involving "subdivision-style condominiums"); Hall Manor Owner's Ass'n v. City of West Haven, 561 A.2d 1373 (Conn. 1989) (involving covenant community with multiple multi-occupancy buildings); Applebaum v. Town of Oyster Bay, 609 N.E.2d 118 (N.Y. 1992) (involving development with homeowners association); Landmark Colony at Oyster Bay Homeowners' Ass'n v. Town of Oyster Bay, 536 N.Y.S.2d 96 (App. Div. 1988) (involving condominium comprised of thirty-four, *single-family* units).

14. *See, e.g.*, MD. CODE ANN., Art. 23A, § 49(c) (West 2011) (involving snow removal, road lighting and maintenance of lighting, collection of leaves, recyclables, garbage, and roadway maintenance); *Pheasant Run*, 580 F.Supp.2d at 735 (involving roads); Beacon Hill Condo. Ass'n v. Town of Beacon Falls, 675 A.2d 909 (Conn. App. Ct. 1996) (involving trash removal, snow plowing, and street repair); Gao, *supra* note 11 (trash pickup); Kevin Landrigan, *New Hampshire Residents Seek Property Tax Credit to Offset Maintenance Costs*, THE TELEGRAPH, Feb. 12, 2009, available at <http://www.allbusiness.com/transportation/road-transportation-trucking-road/12142598-1.html> (snow plowing, fire hydrant, and street light maintenance); Jonathan Phelps, *Multifamily Trash and Pickup Debate Continues*, EAGLE-TRIB., June 18, 2010, available at <http://www.eagletribune.com/local/x383274203/Multifamily-trash-and-pickup-debate-continues> (involving trash removal and recycling).

providers, and these costs are passed on to their members in the form of association dues.¹⁵

Condominium and HOA owners feel that the denial of services yields a double-taxation or double-payment effect on them. They pay property taxes based on the same valuation system and tax rates (i.e., “the same taxes”) as owners of single-family homes but receive no governmental services and have to pay again to get them. One condominium president stated: “We pay taxes and we should have trash pickup.”¹⁶ A unit owner recently explained that “[w]e are paying for a service that we are not receiving.”¹⁷ Yet another opined, “[I]f it’s free for one person, it should be free for everybody.”¹⁸ These statements resonate with the fundamental American value of fair and equal treatment of people by government. The condominium and HOA owners also complain about the income redistribution aspect of the denial of municipal services to them as taxpayers. One owner stated: “[T]he residents on these private roads pay the exact same portion of road maintenance taxes as their compatriots who do enjoy snowplowing and road maintenance. This cost shifting is not acceptable.”¹⁹

The Community Association Institute estimates that in 2010 there were 24.8 million housing units in the United States governed by a condominium association or HOA, housing 62 million people. Service delivery to associations is therefore an important issue, as almost twenty percent of Americans could be affected.²⁰ This article will analyze the denial of local government services to condominium and HOA owners from a public policy and legal perspective. This article will argue that various policies and commonly held values demonstrate that it is poor public policy for local government to place the

15. See Joyce Miles, *Condo Group Seeks Relief*, LOCKPORT UNION-SUN & J., May 27, 2010 (street paving and plowing, water and sewer maintenance, and groundskeeping included in dues). See generally Benjamin D. Lambert, Jr., *Municipal Services Equalization: Pot of Gold or Pandora’s Box*, 11 PROB. & PROP., Mar.–Apr. 1997, at 58 (noting that when a municipality is relieved from providing certain municipal services the community residents are forced to contract for those services with a private actor).

16. Applegate, *supra* note 12. See also Goldstein v. City of Chicago, 504 F.2d 989, 990 (7th Cir. 1974) (The plaintiffs claimed that they “pay property tax to cover the expense of the garbage removal, but do not receive it [and] are forced to hire private scavengers.”); Szczurek v. City of Park Ridge, 422 N.E.2d 907, 911 (Ill. App. 1981) (“necessitating that [plaintiff] expend personal resources to provide her own” services).

17. Menchaca, *supra* note 11.

18. Gao, *supra* note 11.

19. Landrigan, *supra* note 14.

20. See *Industry Data*, CMTY. ASS’NS INST., <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Nov. 12, 2011).

burden of service cutbacks on only one segment of residential property taxpayers. Legislatures should reject service denial proposals (“no-service” laws) because such programs compromise powerful societal goals including efficiency, fairness, shared sacrifice, notice to buyers, and community building. If local governments enact service denials, condominium and HOA owners might challenge them in the courts under takings, equal protection, and substantive due process theories.

While I offer a plausible equal protection argument against service denials, I do so reluctantly, since courts generally should not intervene in state and local regulatory matters. Legislatures need the flexibility to enact municipal programs and judicial intrusion would frustrate the goals of separation of powers, judicial economy, and experimentation under federalism. The case of service denials, however, where the majority transfers all costs and burdens of a cutback to a smaller segment of society, and where there is no plausible distinction between the owners in the majority and minority, might be the rare case where judicial intervention is necessary. One would hope, though, that legislatures do not act unwisely in the first place by enacting no-service laws.

I further argue that my analysis of the issues involved in condominium and HOA service denials should inform policy makers and the courts during the current municipal fiscal crisis and ensuing service cuts. The fundamental questions in the debates over municipal service denials and fiscal cutbacks are the same: Which citizens should have their services reduced? Should the pain of cutbacks be shared equally? And who—whether legislatures or courts—should make these decisions? The clashing choices and resolutions of the debate over denial of municipal services to condominium and HOA owners provide important guidance when redefining general fiscal goals and obligations of state and local governments.

I.

THE COMPETING POLICY CONSIDERATIONS

A. *Framing the Debate*

To evaluate the owners’ claims and the underlying policy considerations that legislatures and courts should consider with service denials, we must first determine whether the owners are truly losing any interests to which they have a legitimate claim. To help in this exploration, we can posit two standard scenarios that raise different factual, policy, and legal issues that will be further explored in this article.

Scenario 1: Fearing that the building of a proposed condominium or HOA project will increase ongoing service costs and headaches, the local government conditions its approval (zoning, subdivision, permits, etc.) of the project on the developer's execution of an agreement waiving the right for the developer and successor owners to receive city services.²¹ This agreement is put in place before any unit owners purchase and may or may not be recorded.

Scenario 1-A: This is a variation on *Scenario 1*, where legislation—rather than an agreement—denying service to condominiums and HOAs is in effect when the (initial or subsequent) unit owner buys. Thus, both *Scenario 1* and *Scenario 1-A* address the case where the no-service protocol is already in place at the time that a purchaser or subsequent purchaser considers buying a unit in the development. In these scenarios, the assumption is that the unit owners are being charged property taxes equivalent to those of other residential owners who do receive the services.

Scenario 2: Facing revenue shortfalls and increasing service demands throughout the community, the local government cuts costs by adopting legislation or a regulation denying services to condominium and HOA owners, including owners in existing developments.²² This no-service regulation applies to current owners of units. Under the municipality's plan, the unit owners would continue to pay the same property taxes as before the service reduction.

21. See, e.g., *City of Mayfield Heights v. Woodhawk Club Condo. Owners Ass'n*, 205 F.3d 1339 (6th Cir. 2000) (unpublished opinion); *Applebaum v. Town of Oyster Bay*, 609 N.E.2d 118 (N.Y. 1992); *Landmark Colony at Oyster Bay Homeowners' Ass'n, Inc. v. Town of Oyster Bay*, 536 N.Y.S.2d 96 (App. Div. 1988); see also *Ramapo River Reserve Homeowners Ass'n v. Borough of Oakland*, 896 A.2d 459 (N.J. 2006) (holding that under a statute requiring municipal services, an agreement by developer with municipality to waive services is valid until developer terminates control over the homeowners association).

22. See, e.g., *City of Riviera Beach v. Martinique 2 Owners Ass'n*, 596 So. 2d 1164 (Fla. App. 1992) (permitting city to adjust trash collection rates); *Property Owners & Managers Ass'n v. Mayor & Town Council of Parsippany-Troy Hills*, 624 A.2d 1381 (N.J. App. Div. 1993) (involving a city policy ceasing trash collections to large apartment buildings); *Carpenter v. Comm'r. of Public Works*, 339 N.W.2d 608 (Wis. Ct. App. 1983) (discussing ordinance denying solid waste collection to buildings over five units); see also Applegate, *supra* note 12 (involving existing ordinance which city began enforcing). The conversion of a rental project to a planned unit development (including multi-family) owned by unit owners can also trigger a municipality's enactment of an ordinance denying services. See *Hall Manor Owner's Ass'n v. City of West Haven*, 561 A.2d 1373 (Conn. 1989) (describing ordinance limiting trash pickup to "private dwelling units" passed one month after the declaration of planned unit development was filed).

In *Scenario 1*, efficiency and fairness considerations and notice of pre-existing no-service arrangements weaken the argument for equal services. This contrasts with condominium and HOA owners in *Scenario 2*, who lose benefits they have come to expect. Tax equity concerns are offended by placing service cuts only on condominium and HOA owners and not on other residential owners. The importance and preference for democratically elected local governance, however, would suggest that there should be great deference to legislative decisions in *Scenario 1* and *Scenario 2*. In both scenarios, there is the potential for a corrosive effect on community relationships by denying services to condominium and HOA owners. This supports greater service equity, especially in *Scenario 2*. Legislatures and courts should consider these competing policy analyses when deciding on no-service arrangements.

Unless specifically noted, this article examines only those situations where the payment required by the local government from the condominium or HOA unit owner is part of the general property tax payment required of all real estate owners, rather than a specific user charge or fee for the service (e.g., a trash collection fee).²³ Moreover, it assumes that the municipality provides the services in question to other homeowners with the exception of condominium and HOA unit owners, rather than requiring all citizens to contract for these services individually.²⁴

B. Efficiency and Fairness

Legislative and judicial decisions regarding the denial of municipal services should effectuate the most efficient allocation of citizen and local government resources as well as satisfy common notions of

23. When a condominium owner is denied services and is still required to pay a trash collection fee, fair treatment argues strongly for the invalidity of the fee. See *Landmark Colony*, 536 N.Y.S.2d at 96 (refunding garbage collection tax when condos were not given service); *Barclay Townhouse at Merrick II Corp. v. Town of Hempstead*, 734 N.Y.S.2d 870 (App. Div. 2001). This article focuses on the (tougher) situation of no-service agreements and legislation when there is one non-earmarked payment of property taxes by owners; in this situation, the town's failure to deliver on the "deal" is less clear than when an owner pays a special fee for a service but government does not provide it. For the distinction between user fees and general taxes, see MANDELKER ET AL, *supra* note 1, at 370–71. See also Reynolds, *supra* note 11, at 379–83.

24. For example, if the town provides no trash services to any residents, and all must purchase private service, a condo owner is not receiving disparate treatment from other residential owners. This paper focuses on the conflict that arises when some residences, but not all, receive municipal services.

fairness.²⁵ Efficiency concerns are necessary to prevent skewing incentives toward development, and consideration of fairness prevents wealth transfers through hidden shifting of burdens. As will be demonstrated, the unit owners' case for challenging property tax payments when there are no municipal services is far stronger in Scenario 2 than in Scenario 1.

1. *Infrastructure Exactions as Cost Internalization*

A basic premise of efficiency theory is that people should internalize the costs of their activities and not project these costs on other unwilling participants.²⁶ This provides the basic justification for infrastructure exactions. Exactions are imposed by local government on a developer in exchange for granting approval of a project under land use regulations. They typically require the developer to install facilities to serve the development and prevent it from consuming extant municipal amenities.²⁷

Since the developer will increase the value of his land by building a housing development, and this added value will be monetized via sales of units to purchasers, he should be responsible for building the needed infrastructure. For example, if the project will cause traffic jams on the abutting public road, cost internalization requires that the developer absorb that cost by building additional lanes for that road on the property.²⁸ The cost internalization model should apply to any other negative externalities created by the project as well, such as school crowding and shortage of recreation areas. This logic also justifies the alternative rationale for impact fees; that is, the developer is required to pay the city in order to defray the increased financial costs and crowding caused by the development as well as to allow the city

25. See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 12 (2002) (“[A]part from economic efficiency, the social value that has traditionally been given weight in tax design is fairness.”).

26. For more information about efficiency theory, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 15-20, 342-45 (8th ed. 2011).

27. See DANIEL R. MANDELKER, *LAND USE LAW* § 9.11 (5th ed. 2003).

28. See *Upton v. Town of Hopkinton*, 945 A.2d 670 (N.H. 2008) (assessing one-third of the cost of improvement was proper since residents and emergency vehicles required better access, even if the road needed improvement before development); see also Richard A. Epstein, *How to Solve (Or Avoid) the Exactions Problem*, 72 *MO. L. REV.* 973, 986-88 (2007). On exactions generally, see Vicki Been, *Exit As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 *COLUM. L. REV.* 473 (1991); David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 *IDAHO L. REV.* 351 (2006-07).

to build the necessary infrastructure to remedy the problems caused by the increased development.²⁹

In the previous example, without such an exaction the rest of the community would have to pay for the acquisition and building of the road addition. This gives the developer a windfall and places the burden on the other community property owners who would subsidize the developer. The resulting transfer of wealth from the community property owners to the developer violates notions of fairness and also skews incentives towards overdevelopment.³⁰ There may be times when society decides to subsidize an activity, such as the building of affordable housing, by assuming costs that the developer would otherwise internalize, but that should be the result of a careful policy choice and transparent public action.

2. *Service Funding Through Property Taxes*

Property tax payments, while not a formal contract, represent a contribution by the landowner toward a bundle of services provided by the local government.³¹ Assuming that a municipality is acting rationally, it should be collecting sufficient revenue via property taxation and other sources to pay for the services that it provides to citizens. Unlike the federal government, state and local governments are typically prohibited by statute or state constitutions from running deficits and must balance their budgets.³² Thus, municipality expenses must match revenue; if they do not, the city will have to cut expenses (e.g., reduce services, lay-off employees, etc.) or increase revenue.³³

29. See *Home Builders Ass'n of Central Ariz. v. City of Goodyear*, 221 P.3d 384 (Ariz. Ct. App. 2009) (holding that city offset fee by contributions towards future capital improvements included in property taxes).

30. Developers have recently attempted to recover the cost of infrastructure installation by retaining a right to receive a portion of the price of unit re-sales for an extended period of time, perhaps 99 years. See Janet Morrissey, *A Fee that Only Developers Could Love*, N.Y. TIMES, Sept. 12, 2010 at B1.

31. Some municipalities have not shifted to an across-the-board trash pickup fee, but continue to provide this and other services financed out of general revenues (with the bulk coming from property tax collection). Gao, *supra* note 11.

32. MANDELKER ET AL., *supra* note 1, at 284; see also, N.J. CONST. art. VIII, § II, para. 2.

33. See Joyce Miles, *Condo Group Seeks Relief*, LOCKPORT UNION-SUN & J., May 27, 2010 (quoting one alderman: "If we reduce taxes for [condominium owners], the cost is redistributed to everyone else . . . Those taxes need to be paid at the end of the day.").

a. *Scenarios 1 and 1-A: Service Denials Pre-purchase*

If unit purchasers have notice of a no-service agreement before committing to purchase, they ideally should decrease their purchase price by an amount equal to the present value of the estimated cost of private replacement services over the term of their ownership.³⁴ Unit owners in *Scenario 1* would therefore pay full property taxes even though they are not receiving public trash services—they are not “paying twice” since they will direct their savings on the unit purchase price to payment for private trash collection.³⁵ The choice to reside in a condominium or HOA setting should not allow unit owners to avoid paying general property tax when they are not being penalized by double payment for services. Under *Scenario 1*, and given these assumptions, the unit owners would be made whole using this approach. The result would be similar in *Scenario 1-A*, as the law presumes that all citizens have knowledge of existing governmental regulations, such as no-service laws. Therefore buyers in *Scenario 1-A* should also discount the unit purchase price.³⁶

The loss in *Scenarios 1* and *1-A* falls on the original developer who will receive a lower sale price from unit buyers because of the no-service agreement. The developer will not be able to extract all of the value out of the property. This is a fate that developers typically suffer when faced with governmental regulations, such as no-service laws, that limit the size, scope, and density of a development.³⁷ Courts have sustained these regulatory restraints as long as they pass constitutional muster.

When compared to exactions for infrastructure, however, the practice of requiring no-service agreements in exchange for govern-

34. The presence of notice is a key assumption in this analysis. See *infra* Part II.B.

35. The replacement services might be contracted for by the association and passed on to the owners via association dues and fees. See *City of Mayfield Heights v. Woodhawk Club Condo. Owners Ass’n*, 205 F.3d 1339 at *2, *5 (6th Cir. 2000) (unpublished opinion) (emphasizing that documents given to owners before purchasing “show that garbage removal is part of the unit owners’ financial responsibility” and that “acceptance of these items was part of the bargain that every unit owner struck with the developer”).

36. If service is subsequently provided by the town, either by new ordinance or successful legal challenge by that buyer or others, that buyer will essentially receive a windfall: buying at a discounted price but now receiving services. Note that an owner can challenge the tax system even though it was in place at the time of purchase. Even retroactive taxes may be constitutional. See, e.g., *Moran Towing Corp. v. Urbach*, 768 N.Y.S.2d 33 (N.Y. App. Div. 2003); *Alderson v. County of Allegheny*, 585 S.E.2d 795 (Va. 2003); *Tesoro Ref. & Mktg. Co. v. State*, 246 P.3d 211 (Wash. Ct. App. 2010). For the principle that buyers take title subject to existing ordinances and regulations, see *Josefowicz v. Porter*, 108 A.2d 865 (N.J. Super. Ct. App. Div. 1954).

37. See *infra* Part III.A.1.

mental approvals, such as zoning changes, subdivision permission, or issuance of building permits, raises troubling questions. Infrastructure exactions are justifiable because they force the developer to internalize the costs of development. But it is difficult to justify no-service agreements based on cost internalization theory. Using trash collection as an example, exaction theory would approve requiring the developer to pay for expansion of the city recycling plant and landfill to accommodate the new unit owners. Assume, though, that there is no need for such (or other) capital investment. In an efficient profit-maximizing world, one would expect that the annual property tax imposed on the unit owners should include adequate cash flow to pay for ongoing trash pickup (just as it does for traditional single-family homeowners).³⁸ The developer is not causing any negative externality by putting in a condominium or HOA project that has trash pickup—those unit owners would be using the service on a “pay as you go” basis through their tax payments.³⁹ Denying trash services to the development and forcing the developer to lower the sales price to unit buyers as a result will cause an uncompensated loss to the developer. Whether that loss is tolerable under constitutional analysis will be examined in Section IV below.

In conclusion, when first and subsequent condominium and HOA unit buyers have notice of no-service agreements or regulations before purchasing, the denial of services is consistent with efficiency and fairness considerations. When notice is given, the unit buyers can protect themselves against “paying twice” for the services. Any loss resulting from denial of services will fall on the developer who cannot offer his land for sale with current municipal services included.

b. Scenario 2: Service Denials to Current Owners

Scenario 2 causes a loss in property value to the owners of condominium and HOA units at the time the decrease in services is implemented. When the service deprivation is imposed, the current condominium and HOA owners are forced to take on an additional cost and pay for outside services. This lowers the value and utility of

38. Or perhaps property tax receipts are inadequate to pay for this service, and the government is trying to shed as many consumers of public services as possible. That would explain a desire to deny services. See *supra* note 5, indicating some of the other sources of municipal tax revenue.

39. This assumes that the trash collection costs for HOA and condominium owners are the same as for *single-family* residents. For a discussion of what happens if this is not the case, see *infra* Part II.A.3.

the property to the owners.⁴⁰ When they sell their properties, their immediate successors will pay a lower price for the residence because these successors will be aware of the need to buy outside services, and the sales price will be discounted accordingly. Thus, the current condominium and HOA owners will suffer a loss of property value at the time of imposition of the service cutback that they will not be able to recapture.⁴¹

3. *Tax Equity Concerns*

When government reduces services to condominium and HOA owners but maintains their property tax levels, it creates a wealth transfer from these owners to the rest of the community. Condominium and HOA owners are paying taxes to support services to other residential owners without receiving services themselves. If trash pickups at the condominium are made in the same manner as at other residences (e.g., using the same trucks and crews), then presumably the condominium owners' annual property taxes (along with other local government revenues) would cover this service just like that of single-family residence owners.

No-service arrangements are hardly an effective or even rational way to achieve consistent progressive or regressive tax goals.⁴² The wealth transfer from condominium and HOA owners to others is exacerbated when a condominium or townhouse unit is less valuable or occupied by a less affluent owner than single-family homes, resulting in regressive taxation. If condominiums or HOA units are generally more valuable than single-family residences, denial of services would have a progressive tax effect. Within a single town, no-service legislation could therefore have either a regressive or progressive effect, depending on the value of each particular unit. This variable effect

40. There is an additional important caveat: legislation and regulations denying services to condominium and HOA owners can always be amended by the legislature to grant such service. *See, e.g.*, N.J. STAT. ANN. 40:66-1.3, 40:67-23.3 (West 1992). If the legislature does so, this will be a windfall to the unit owners whose property values will increase because of the service.

41. Once the current owner (*A*) sells to the immediate successor (*B*) at a discounted price, when *B* resells to the future purchaser (*C*) it will be at the discounted price (assuming all other factors are stable). So *B* will not suffer a loss from the services deprivation.

42. The IRS explains that a regressive tax "takes a larger percentage of income from low-income groups than from high-income groups" while a progressive tax "takes a larger percentage of income from high-income groups than from low-income groups." *Worksheet Solutions: Comparing Regressive, Progressive, and Proportional Taxes*, IRS, http://www.irs.gov/app/understandingTaxes/whys/thm03/les05/media/ws_ans_thm03_les05.pdf (last visited Oct. 1, 2011).

makes no-service regulation a poor tool to achieve either regressive or progressive tax goals. It is clear, however, that no-service rules do shift income from one owner to another. This perverse effect is clearest when comparing condominium units and single-family dwellings of equal value.

There have been conflicting views of local government and its use of taxation. Under Charles Tiebout's theory, consumers choose where to live as part of a market transaction, in which they weigh a community's services and their cost in purchase decisions.⁴³ Tiebout's critics oppose the "consumer-oriented vision" of local government where taxpayers view local government as providing services in exchange for tax payments because this ignores the redistributive goals and looks more like club dues.⁴⁴ In my view, both positions are correct. There is evidence that homebuyers do see a market-type transaction in their exchange of taxes for services as a means of maximizing their welfare, and markets will become inefficient unless these expectations are considered.⁴⁵ At the same time, the government justifiably engages in redistribution for both ethical and practical reasons.⁴⁶ The burden of redistribution, however, should not fall solely on one segment of society (here condominium and HOA unit owners) when there is no legitimate means to distinguish these units from other residential properties.

For example, if there were a budget shortfall for trash collections, the efficient and equitable solution would either be an across-the-board tax increase for all owners, or a uniform service decrease. Power politics, however, may prevent these salutary solutions if legislators cave to majority demands and balance the budget by denying services only to condominium and HOA owners. The failure of other owners to internalize the costs of their homes places an unfair burden on a small group, skews the market by reducing values of condominiums and increasing values of private residences, and thus creates inefficiencies in the housing market.

43. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECO. 416 (1956); Wallace E. Oates, *Local Government: An Economic Perspective*, 9, 11 in *THE PROPERTY TAX AND LOCAL AUTONOMY* (Michael E. Bell, David Brunori & Joan Youngman, eds., 2010).

44. See Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 30–31 (1998). Reynolds refers to this as a "pay for play." Reynolds, *supra* note 11 at 376, n.14. For an excellent discussion of the conflicting views of local government, see *id.* at 374–76.

45. See *supra* notes 1–5 and accompanying text discussing home purchaser concerns.

46. Consider, for example, inclusionary zoning requirements. See Ngai Pindell, *Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements*, 42 WAKE FOREST L. REV. 419 (2007).

Consider a situation where government provides services at the outset of the operation of the condominium or HOA project. Now, however, it seeks to cut services because trash pickup, for example, is more expensive at such projects (e.g., different trucks are required at multistory buildings to load large containers or smaller trucks are needed to negotiate narrower lanes in HOAs).⁴⁷ This would require the city to expend additional funds to purchase new trucks (and replacements on an ongoing basis), pay to train collection and maintenance workers on their use, and suffer the loss of the benefit of a uniform fleet (for maintenance, parts, interchangeability of workforce, etc.). Forcing the condominium owners to internalize these costs would be justified—their choice of lifestyle should not be projected on to the rest of the town.

Therefore, it would be rational under this analysis for local governments to increase tax charges on condominium and HOA properties by the amount necessary to offset this additional expense. Alternatively, it would be acceptable for the city to deny services to condominium or HOA owners, but only if it gave them a credit against their property taxes for the fair value of the lost services.⁴⁸ In this scenario, however, complete denial of services is an improper response as it forces a small group of homeowners to subsidize another segment of the population. This would not serve efficiency goals since this approach undervalues the true cost of trash removal for single-family homes. Fairness issues would also arise, since no-service legislation would shift the cost of trash service of other residential properties to condominium and HOA properties.

To be sure, the calculation of the fair value of lost services may not always be easy and is subject to debate, but some communities already do this calculation.⁴⁹ In recognition of the potential adminis-

47. Planned unit developments, with closer grouping of homes, could actually reduce fuel costs of trash collection. For a discussion of the benefits of “new urbanism” in planned unit developments, see ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 115–33.

48. See Jacob Lammers, *Willowick, Ohio Condo Owners Will Still Receive Trash Reimbursement*, NEWS-HERALD, July 8, 2009, available at <http://www.news-herald.com/articles/2009/07/08/news/nh1143215.txt> (retaining a reimbursement to condominium owners for privately contracted trash services); Kevin Landrigan, *New Hampshire Residents Seek Property Tax Credit to Offset Maintenance Costs*, THE TELEGRAPH, Feb. 12, 2009, available at <http://www.allbusiness.com/transportation/road-transportation-trucking-road/12142598-1.html> (condominium owners seeking state legislation for \$500 property tax credit for maintenance fees).

49. See, e.g., Applegate, *supra* note 12 (municipality calculating that trash pickup costs \$18 per month per household); Menchaca, *supra* note 11 (\$99 fee for *single-family* trash pickup).

trative costs and the historical deference of courts to legislative and executive decisions, the judiciary should overrule fair value determinations only if they were not made in good faith or lack a reasonable basis.⁵⁰ The burden would be on the challenger to show that the government's calculation is improper.⁵¹

C. Notice of Pre-Existing No-Service Arrangements

The efficiency and fairness analysis hinges on the unit purchasers and subsequent re-purchasers having notice of existing municipal service restrictions at the time that they buy their condominium and HOA units. This section will explore the importance of such notice and how such notice might be obtained in *Scenario 1* (where the developer signs a no-service agreement) and *Scenario 1-A* (where service is denied by pre-existing legislation or regulation).

1. Agreements Waiving Services

A fundamental principle of real property law is that a subsequent purchaser of real estate is not bound by a prior interest in the property unless the subsequent purchaser had notice of the prior interest before entering into a binding agreement to buy.⁵² Notice is essential since buyers will refuse to purchase if they learn that someone other than the seller has superior title to the property.⁵³ Moreover, if the seller has title but the buyer has notice of an encumbrance limiting the value of the property (such as a restrictive covenant controlling building activities), the buyer may reduce the price accordingly.⁵⁴ If buyers were

50. See *infra* Part IV.B.

51. In contrast to condominium and HOA unit owners, owners of residential investment properties (such as a rental apartment building) will not likely be as disadvantaged when a service cut is instituted as the individual condominium or HOA owner. If the municipality passes a service reduction to existing apartment buildings, the landlord, typically operating with short-term leases, can increase the rents charged to new tenants after the service cut to pay for outside services, and thus be made whole. See, e.g., Gao, *supra* note 11 (landlord charging tenant \$6.87 per month to cover private trash hauling).

52. See GERALD KORNGOLD & PAUL GOLDSTEIN, REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE 256–57 (5th ed. 2009). These principles are currently reflected in the various recording acts applicable in the states. See, e.g., CAL. CIVIL CODE § 1214 (a “race-notice” type statute); MASS. GEN. STAT. ANN. ch. 183, § 4 (a “notice” type statute); N.C. GEN. STAT. § 47-18 (a “race” type statute).

53. See *Regan v. Lanze*, 354 N.E.2d 818, 822 (N.Y. 1976) (“A marketable title has been defined as one that may be freely made the subject of resale.”).

54. Courts sometimes operationalize this theory when they award the buyer specific performance but abate the contract price for defects in the title. See, e.g., *Merritz v. Circelli*, 64 A.2d 796 (Pa. 1949).

bound by a prior interest without having notice, they might hesitate to enter into market transactions for fear of losing their investment.⁵⁵ This fear would reduce the exchanges of land and development of property. Additionally, it would defeat the goal of having an efficient market of land where resources are allocated via market transactions to those that value them and will utilize them.⁵⁶

As discussed in Section II.B. above, the binding of unit purchasers and re-purchasers to an agreement executed by the developer under *Scenario 1* is only rational if both parties have notice prior to purchase so they may reduce their unit price to account for their need to acquire private services.⁵⁷ Such notice can be obtained if buyers receive actual notice by way of disclosure from the seller (either the developer or the unit owner above them in the chain)⁵⁸ or if the agreement is recorded before initial purchases in a declaration or restrictive covenant agreement.⁵⁹ There may be an argument for inquiry notice under certain facts as well; for example, a purchaser that sees a private trash contractor serving the project while viewing the property might be found to have inquiry notice of a lack of municipal services.

2. *Legislative Denial of Services*

It is similarly important that purchasers know about a no-service legislation or regulation in *Scenario 1-A* situations (prior to initial or

55. A buyer can receive notice of a prior restriction or interest against the property in one of three ways. The buyer can receive "actual notice," where the seller informs the buyer of the issue. *See Metro. Nat'l Bank v. United States*, 901 F.2d 1297 (5th Cir. 1990) (involving actual notice of improperly recorded deed that was actually found by title searcher); KORNGOLD & GOLDSTEIN, *supra* note 52, at 271-85. The buyer is considered to have "record notice" (or "constructive notice") of documents recorded by the holders of prior interests in the property. The buyer will be attributed this knowledge whether or not the buyer actually searches the office of the recorder and discovers the documents. *See Corwin W. Johnson, Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 238-43 (1962). Finally, the buyer is considered to have the knowledge about prior competing claims that would have been revealed by a reasonable inspection of the property and inquiry about outstanding property interests raised by the inspection; one might be attributed such "inquiry notice" of a prior transferee if that person was living on the property.

56. *See Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925) (discussing inquiry notice from residential nature of other properties); *Kinch v. Fluke*, 166 A. 905 (Pa. 1933) (discussing inquiry notice from contract purchaser's possession); KORNGOLD & GOLDSTEIN, *supra* note 52, at 283-85.

57. No-service agreements between owners and governmental entities have been considered to be "restrictive covenants," a recordable interest. *See Applebaum v. Town of Oyster Bay*, 609 N.E.2d 118, 120 (N.Y. 1992).

58. A developer might include this in marketing materials.

59. *See, e.g., Applebaum*, 609 N.E.2d at 118 (N.Y. 1992); *Landmark Colony at Oyster Bay Homeowners' Ass'n, Inc. v. Town of Oyster Bay*, 536 N.Y.S.2d 96 (App. Div. 1988).

subsequent purchasers buying their units). These purchasers also need to reduce their purchase prices based on the lack of services. The implied warranty of marketable title will not help a buyer who purchases a property that is covered by no-service legislation, since the warranty is not breached by the presence of a governmental regulation or legislation affecting the property.⁶⁰ All citizens are expected to be cognizant of the law; all have equal access to information about governmental actions, while the selling owner should know specific title matters about the seller's property. The law of marketable title had developed centuries before the advent of full-scale governmental regulation and did not contemplate coverage of regulatory issues. Thus, the seller (whether the developer or re-seller) would not be in breach of the marketable title obligation due to the existence of a no-services regulation.

A buyer might also claim that a seller violates a legal duty if she does not disclose no-service legislation binding the property. Over the past thirty years most jurisdictions have reversed the classic rule of *caveat emptor* in real estate transactions.⁶¹ Courts now require sellers to disclose material defects in the property that the buyer could not have discovered in the course of a reasonable inspection.

It is doubtful, however, that the failure to disclose either a no-service regulation or agreement will be actionable. First, some legislatures and courts limit the extent of the disclosure obligation to physical conditions or on-site issues only.⁶² Moreover, a no-service agreement arguably causes only a small financial loss and is thus unlikely to be material.⁶³ Finally, the buyer arguably should have discovered the regulation with a reasonable search of publicly available information.⁶⁴ These limitations on the disclosure duty are sensible—the seller is likely to remember information about material defects in

60. See, e.g., *Dover Pool & Racquet Club, Inc. v. Brooking*, 322 N.E.2d 168 (Mass. 1975); *Josefowicz v. Porter*, 108 A.2d 865 (N.J. Super. Ct. App. Div. 1954); Michael J. Garrison & J. David Reitzel, *Zoning Restrictions and Marketability of Title*, 35 REAL EST. L.J. 257 (2006). The warranty is breached not by the presence of public regulation but by private interests, such as liens, mortgages, and easements, attached to the property. See KORNGOLD & GOLDSTEIN, *supra* note 52, at 99–109, 121–23.

61. See, e.g., CAL. CIVIL CODE §§ 1102 et seq.; *Ollerman v. O'Rourke*, 288 N.W.2d 95 (Wis. 1980); Stephanie Stern, *Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing*, 2005 UTAH L. REV. 57 (2005).

62. See, e.g., N.J. STAT. ANN. 46:3C-1 to -12 (barring actions for off-site problems); *Nobrega v. Edison Glen Assocs.*, 772 A.2d 368 (N.J. 2001).

63. See, e.g., *Thacker v. Tyree*, 297 S.E.2d 885, 888 (W. Va. 1982) (finding that a material loss must “substantially affect the value or the habitability of the property”).

64. See *McMullen v. Joldersma*, 435 N.W.2d 428 (Mich. Ct. App. 1988) (holding that there was no duty to disclose that proposed highway project would divert traffic from store for several years).

the seller's own home, thus adding little or no cost to the seller to disclose it. Also, a seller is unlikely to retain information about minor defects or matters outside of the property, so requiring the seller to retain and disclose that information places undue costs on the seller that should just as well be on the buyer.⁶⁵ Thus, while it is important for a condominium or HOA buyer to be aware of legislation or a regulation denying local government services, there is likely no duty on the seller to provide this information or liability for failure to do so. The buyer will have to perform due diligence to discover the state of governmental rules and make his offer accordingly.

D. *Preserving Local Initiative*

There are over 85,000 local government entities across America.⁶⁶ These local governments provide public goods and services to the population. While there are strong factors supporting deference to local legislative decisions, there are negative ramifications that require attention.

1. *Benefits of Local Control*

Our decentralized system of local government and fiscal operations allows local authorities to tailor the provision of public goods and services to the particular needs and costs of the specific town.⁶⁷ This localized system yields a higher social welfare than a centralized system that determines the goods and services required for all localities.⁶⁸ Moreover, the experiments having different localities provide services are part of the "laboratory of federalism" where different ideas are attempted and the successful ones adopted by other jurisdictions.⁶⁹

Local governments need freedom to develop and innovate successful means to provide public goods and services, especially in times of economic shortage. The democratic process of transparency, public hearings, and comment, as well as the prospect of re-election campaigns help to keep the government responsive to the public. It would be costly and inefficient if the government had to justify in a

65. See Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

66. See CENSUS BUREAU, *supra* note 9. This figure includes some 35,000 special governmental districts that are not general local governments but provide specific services.

67. See Oates, *supra* note 43, at 10.

68. See *id.*

69. *Id.* at 20–21 (citing tax increment financing districts as an example).

judicial proceeding the wisdom, efficacy, and efficiency of every decision it made. The government would be distracted and funds would be dissipated on legal representation instead of services. Under our constitutional system of separation of powers and judicial deference to the other branches of government, second-guessing should be done through the ballot box, not the courts.⁷⁰

Legislatures are faced with difficult choices, even in situations where all people supposedly agree on the principle that should guide the decision-making.⁷¹ Assume, for example, that all stakeholders believe that the government should provide “equal” public services within its borders.⁷² Equality can have numerous meanings: equal payment for equal services received, so that beneficiaries of a service should be equally charged; equal results for all in the community, such as assigning ambulances to neighborhoods to achieve the same response times throughout the city, even though that means an unequal assignment of ambulances to different neighborhoods; equal inputs, where each neighborhood gets the same amount of services, even though some neighborhoods with smaller populations will be better off with the standard allocation of ambulances than other larger neighborhoods; or equal satisfaction of demand, such as assigning equal ambulances per numbers of ambulance calls.⁷³ Moreover, municipalities may choose different concepts under our federalist system that give local legislatures the latitude to find the appropriate solutions for their locality, based on the views and interests of their citizenry. It is even harder for legislatures to choose courses of actions when there are competing underlying visions, and their judgment should generally be respected by the judiciary.

2. *Occasional Concerns: Rent Seeking, Power Politics, and Externalities*

There are, however, reasons to consider limitations on the latitude of local government decision-makers in some situations. There is

70. The exception is where fundamental rights or suspect classifications are involved. See *infra* Part IV.B.

71. This is obviously not always the case where localities are split on fundamental assumptions. The example chosen here, equity in provision of public services, is not universally agreed upon. See ALTSHULER & GOMEZ-IBANEZ, *supra* note 3 (describing equity debate about imposing infrastructure obligations that might result in preventing the building of affordable housing).

72. Analysts of public services focus not only on the efficiency and effectiveness of their delivery but also on the equity of service performance—the “fairness, impartiality, or equality of service.” See E.S. Savas, *On Equity in Providing Public Services*, 24 MGMT. SCI. 800, 802 (1978).

73. See *id.* at 803–06.

always the opportunity for the tyranny of the majority when a larger group of citizens can use the governmental apparatus to its advantage over a smaller group. Rent-seeking political power plays by the majority may push the burden of decreased municipal services or increased taxes on to a particular segment of the community (i.e., condominium and HOA unit owners).⁷⁴ This result is odious when both the winners and the losers have the same interests and investments in the issue at hand. HOA and condominium owners resemble single-family homeowners in terms of both their need and desire for municipal services and their contribution and cost to the local government. The ballot box does not provide a solution for the protection of minority interests.

Moreover, while many public officials serve with great dedication and selflessness, public choice theory cautions that officials may be influenced by forces other than the public interest: "The Public Choice School forcefully stresses that there was no empirical basis for assuming that governments would always and everywhere operate in a benevolent way. Instead, public choice argues that public sector officials, like all economic agents, respond to incentives associated with the environment they operate in."⁷⁵ Officials may make decisions about no-service legislation based on re-election considerations and the need to garner voter support rather than on maximizing social welfare.⁷⁶

Finally, there is a risk that decisions in the best interest of the locality and its citizens might create negative externalities for other towns and people. For example, a city might wish to exclude people who will generate additional expenses for services when the tax revenue from newcomers will be insufficient to cover these demands.⁷⁷ Communities may attempt large-lot zoning to keep out denser, afford-

74. Rent-seeking describes the extraction of profits by manipulating the political process or market system, rather than by adding value to the good or service in question. Rent-seeking activity in the public sector might include seeking legislation to suppress one's competitors. In the private arena, rent-seeking may include theft of intellectual property or abusive use of the litigation process. See Kevin M. Murphy et al., *Why is Rent-Seeking So Costly to Growth?*, 83 AM. ECON. REV. PAPERS & PROC. 409, 412 (1993).

75. Antonio Alfonso & Vitor Gaspar, *Dupuit, Pigou and the Cost of Inefficiency in Public Services Provision*, 132 PUB. CHOICE 485, 486 (2007).

76. See James M. Buchanan, *Constraints on Political Action*, in PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE 107-128 (James M. Buchanan & Richard Musgrave eds., 1999) (reviewing public choice theory and pressures on politicians).

77. See ALTSHULER & GOMEZ-IBANEZ, *supra* note 3; H. CHERWICK & A. RESCHOVSKY, *Lost in the Balance: How State Policies Affect the Fiscal Health of Cities* 3 (2001).

able housing developments that will strain demand on social services, libraries, recreational programs, etc.

E. *The Threat to Community Building*

In addition to the ethos of individualism in American history and culture, there has been a strong emphasis on community and the voluntary, mutually beneficial coming together of citizens.⁷⁸ These important values can be compromised when community burdens are not equally shared and one subgroup is required to bear all the costs of addressing a social challenge. This notion of shared responsibility deserves consideration by legislatures contemplating no-service rules.

Community life in all cultures throughout history has included shared responsibility.⁷⁹ In the American experience, these community relationships may have been particularly important, perhaps reflecting the need of European settlers to come together as they established holdings in a large, unknown environment while often facing—understandably so—resistance from indigenous people.⁸⁰ In the earlier American communities “[t]here was a strong belief in mutual support and community responsibility.”⁸¹ The early practice of barn raising, in which the community came together to build a barn or home for a community member, serves as a vivid example of this sense of shared responsibility.⁸²

This strong sense of community has weakened in a modernized, industrialized, and urbanized society.⁸³ People, however, still remain connected with their geographic communities. Modern researchers maintain that even though other support relationships develop in urbanized U.S. society, “sharing a common territory continues to be the most important basis of commonality.”⁸⁴ A city is a defined territory

78. See generally Helmut K. Anheier & Lester M. Salamon, *The Nonprofit Sector in Comparative Perspective*, in *THE NONPROFIT SECTOR, A RESEARCH HANDBOOK* 89, 97 (Walter W. Powell & Richard Steinberg eds., 2006) (describing the U.S. nonprofit sector as a particular blend of volunteerism and individual action).

79. See ROBERT M. MORONEY, *SHARED RESPONSIBILITY: FAMILIES AND SOCIAL POLICY* 20 (1986).

80. See PETER SILVER, *OUR SAVAGE NEIGHBORS: HOW INDIAN WAR TRANSFORMED EARLY AMERICA* xviii-xxv (2008) (describing how hatred and fear of native Americans served to unite European Americans from different countries and backgrounds).

81. Moroney, *supra* note 79 at 20.

82. See *id.*

83. See *id.* at 17–24.

84. Monica Colombo et al., *Sense of Community and Participation in Urban Contexts*, 11 J. CMTY. & APPLIED SOC. PSYCHOL. 457, 458 (2001).

in which “the residents develop ties and attachment to places and they identify themselves with common myths and symbols.”⁸⁵

Moreover, advocates of shared responsibility urge that Americans strengthen community relationships to benefit both individuals and society at large.⁸⁶ Community cooperation and responsibility remain important values today, with social scientists studying the factors that contribute to sense of community⁸⁷ and the benefits that emerge from such collaboration.⁸⁸ Thus, current proponents of shared responsibility in cities and towns have recommended the “barn raising” model of democratic governance, “where people focus . . . on what they can achieve collectively, both through government and by working together in their communities.”⁸⁹ For example, this view is reflected in the prohibition against exclusionary zoning that can open the path for affordable housing within a town.⁹⁰

To be successful, shared responsibility requires mutual interdependence and reciprocity, with both parties perceiving that the exchange goes two ways. “Resentment and stigma surface when givers

85. *Id.* at 459.

86. See, e.g., AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY* (1993) (describing the “communitarian” platform and the interrelation of social responsibilities and rights). Etzioni and his fellow “communitarians” have provoked a spirited debate as to the nature of these communities, the rights of the individual versus the community, etc. For a small sampling of the literature, see *COMMUNITARIANISM AND ITS CRITICS* (Daniel Bell ed., Clarendon Press 1993) (elaborating the communitarian position and defending it against liberalist criticisms); STEPHEN MULHALL & ADAM SWIFT, *LIBERALS AND COMMUNITARIANS* (2d ed. 1996) (exploring the relationship between liberalism and communitarianism as philosophical positions); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985) (identifying philosophical shortcomings in liberalism and arguing communitarian morals and improvements on the theory); cf. Frug, *supra* note 44 (arguing for equality in services within cities from a legal perspective).

87. See, e.g., Sharon Kingston et al., *Sense of Community in Neighborhoods as a Multi-Level Construct*, 27 AM. J. CMTY. PSYCHOL. 681, 682–83 (1999); N. Andrew Peterson et al., *Validation of a Brief Sense of Community Scale: Confirmation of the Principal Theory of Sense of Community*, 36 AM. J. CMTY. PSYCHOL. 61, 62 (2008).

88. For example, sense of community for the place one lives has been postulated as a factor underlying a willingness to vote for local school (i.e., property) tax increases proposed for the municipality. See William B. Davidson & Patrick R. Cotter, *Psychological Sense of Community and Support for Public School Taxes*, 21 AM. J. CMTY. PSYCHOL. 59, 60–61 (1993).

89. Donald J. Borut et al., *Governing Economies in the Twenty-First Century*, NAT’L CIVIC REVIEW, 31, 32 (2009), available at <http://www.ncl.org/publications/ncl/98-2/Borut.pdf>.

90. See *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 724 (N.J. 1975). But cf. James S. Burling, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397 (2009) (criticizing inclusionary zoning, one means of increasing affordable housing, as an unconstitutional taking).

begin to view the exchange as one-way, or when recipients feel they cannot reciprocate any time in the future.”⁹¹ A sense of shared burden and equitable apportionment of responsibilities within communities is essential. Placing extra burdens on one subset of homeowners within a town is corrosive to a sense of communal cohesion, common purpose, and shared burden. Moreover, perceived unfairness in tax burdens can undermine support for taxation in general for community needs.⁹²

Legislation in *Scenario 2*⁹³ requiring all residential owners to pay the same property tax but now denying services to one subgroup (i.e. condominium and HOA owners) without any plausible justification is, therefore, bad policy. Legislatures would be wise not to adopt such ordinances. If passed, such statutes might also be struck down by courts as violating enabling statutes and the U.S. Constitution in certain circumstances, as I suggest below.⁹⁴

Several situations are distinguishable from the withholding services from condominium and HOA owners. First, some residential owners may protest that while a large portion of their property tax payments go to schools, they do not use the schools (e.g. owners that have no children, or owners that send their children to private schools). In this situation, however, all owners have the opportunity and right to use the public schools that they support, whereas condominium and HOA owners do not have the same opportunity as other owners with respect to trash disposal and similar services. Second, commercial property owners may be denied municipal services such as trash collection. There are reasons for differentiating between commercial and residential services because, as a class, commercial properties have different requirements, and the government can draw lines in planning for the community.⁹⁵ This is a distinction between two types of property, and there would be no similar corrosive effect

91. Dennis L. Poole, *Beyond the Rhetoric: Shared Responsibility Versus the Social Contract*, 20 HEALTH & SOC. WORK 83 (1995).

92. “[V]ariations in efficiency [of delivery of public services] may lead to unequal quality of services and a consequent perception of unfairness. Manifest inefficiency and unfairness may undermine the public’s support for tax funding of public services.” Peter C. Smith & Andrew Street, *Measuring the Efficiency of Public Services: The Limits of Analysis*, 168 J. ROYAL STAT. SOC’Y 401, 402 (2005).

93. See *supra* Part I.B.

94. See *infra* Part IV.B.

95. Lower taxes and incentives from other municipalities for businesses to relocate will create pressure on a town government to avoid excessive tax burdens on commercial property. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VOTERS INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 163 (2001).

on community cohesion if the government singled out one segment of residential owners to subsidize other homeowners.

F. The Legislative Imperative

Policy considerations therefore compel legislatures to provide the same public services to condominium and HOA owners as they provide to other residential owners. Concerns over efficiency, fairness, and tyranny of the majority, as well as the values of shared sacrifice and community building, support such legislative rejection of a no-service regime. A legislature's assertion of pure political power that places an unequal burden on a small segment of the population will likely have a corrosive effect on the public fabric and increase cynicism about the political process. It is hard to reconcile the payment of the same property taxes and the receipt of fewer services with these notions.

II.

LEGISLATIVE RESPONSES TO "NO TAXATION WITHOUT SANITATION"

Municipal and state governments are faced on a daily basis with the difficulty of limited resources and strong demand for essential public services. This tension is heightened in the current environment of distressed state and local budgets. The resolution of the resources versus demand equation should not, however, be resolved at the expense of one group in the community while other segments of the population are given a free pass. For state and local entities cutting back on the provision of local services (e.g., education, recreation facilities), the story of unequal service denials to condominium and HOA owners provides a powerful lesson of how *not* to reduce government expenditures. In order to preserve the principles of legislative supremacy to enact regulations, it is necessary to preserve the flexibility of local government to experiment, the system of representative democracy, and separations of power. This is an issue that responsible legislatures should tackle, rather than punt to the courts.

A small number of state and local⁹⁶ legislatures have enacted laws to prohibit or alleviate discrimination in services provided to

96. See, e.g., *Hall Manor Owner's Ass'n v. City of West Haven*, 561 A.2d 1373, 1375 (Conn. 1989) (describing local ordinance); *Council of City of Philadelphia v. Street*, 856 A.2d 893, 895–96 (Pa. Commw. Ct. 2004) (granting judgment for city council in mandamus action against mayor, thus requiring mayor to order trash crews to remove trash from condominiums and cooperatives according to ordinance requiring service to such owners).

condominium and HOA owners. There are different approaches to the issue, with some framed in terms of “equality” notions⁹⁷ and others based on the retributive concept of “if you pay for it, you are entitled to receive it.”⁹⁸ Some statutes require that the local government provide condominiums and HOAs with the same level of services as other residences.⁹⁹ Other legislation requires a rebate to the unit owners for the cost of the services not supplied by the locality,¹⁰⁰ or gives a flat tax rebate if the municipality does not provide services.¹⁰¹ There are also reports of governmental officials applying assessment rules to lower valuations for condominium units to reflect the lack of services.¹⁰²

New Jersey has enacted legislation that requires the governing body of a municipality to either provide the same solid waste and recyclables collection, snow removal, or road lighting services to a private community (e.g., condominiums and HOAs)¹⁰³ as they do to the rest of the community, or to reimburse the private community for that service.¹⁰⁴ The governmental entity, however, does not have to reimburse more than the amount it would have paid for the services.¹⁰⁵ Furthermore, the local government cannot choose to not provide such

97. See, e.g., WIS. STAT. ANN. § 703.27 (West 2001) (“No provision of a state or local building code may be applied differently to a building in a condominium than it would be applied to a building of similar structure or occupancy . . . [and] [n]o county, city, or other jurisdiction may . . . impose a burden or restriction on a condominium that is not imposed on all other property of similar character . . .”).

98. See, e.g., MISS. CODE ANN. § 19-5-21(1)(a) (West 1999) (“[N]o property shall be subject to this [garbage collection] levy unless that property is within an areas served by a county’s garbage or rubbish collection or disposal system.”).

99. See, e.g., WIS. STAT. ANN. § 703.27; *Hall Manor Owner’s Ass’n*, 561 A.2d at 1375 (ordinance limiting trash removal to “private dwellings” was amended to include condominium units).

100. See, e.g., MD. CODE ANN., CORPS & ASS’NS, § 23A-50 (LexisNexis 2005) (requiring services to be provided or reimbursement to the association equal to the cost that would be incurred by the municipality in providing the services).

101. See, e.g., D.C. CODE §§ 47-871-877 (providing for a sixty dollar flat fee credit, to be increased by an escalator).

102. See, e.g., *Beacon Hill Condo. Ass’n v. Town of Beacon Falls*, 675 A.2d 909, 910–12 (Conn. App. Ct. 1996) (finding statute does not permit this practice if the assessment is unjust).

103. See N.J. STAT. ANN. § 40:67-23.2 (West 1992).

104. See *id.*; see also *N.J. State League of Municipalities v. N.J.*, 608 A.2d 965 (1992) (upholding the statute in the face of challenges by a group of cities raising equal protection challenges).

105. See N.J. STAT. ANN. §§ 40:67-23.3 to 23.5. Up to that cap, the municipality must reimburse the private community for 100% of its costs. See § 40:67-23.6. See also *Stonehill Prop. Owners Ass’n v. Twp. of Vernon*, 711 A.2d 346, 350 (N.J. Super. Ct. App. Div. 1998) (applying qualification phrase “in the same fashion as the municipality provides these services on public roads and streets” to how municipalities are to calculate reimbursement figures).

services to residents, but instead must either maintain or provide a means for obtaining them.¹⁰⁶

These statutes generally provide a more efficient, fair, and socially beneficial approach to the balancing of costs and demands for municipal services. Other jurisdictions in our laboratory of federalism would benefit from following the lead of these innovative states.

III.

LEGAL CHALLENGES TO NO-SERVICE REGULATIONS

Homeowners have brought various legal challenges against the withholding of services by local government with mixed results. Cases challenging the denial of public services to condominium and HOA owners began appearing in significant numbers in the 1970s. There are likely two reasons for this. First, condominium ownership became widespread during that time due to the passage of state statutes recognizing condominiums as a valid legal entity.¹⁰⁷ Second, the pressure on local governments to provide services in light of limited revenue caused by property tax limitations was increasing.¹⁰⁸

Before developing legal arguments that a court might adopt to assist owners who are disadvantaged by no-service decisions, I must make an important caveat. This article argues that legislatures should not discriminate in services against condominium and HOA unit owners because that would run counter to fairness, efficiency, and other public policy concerns. Under our representative democracy, an elected accountable legislative body is best equipped to make budget and service decisions.

If, however, legislatures do adopt discriminatory no-service policies, owners can seek relief from the courts. Some courts might find that no-service rules violate the Fifth and the Fourteenth Amendments of the United States Constitution. At the same time, I have concerns about the “constitutionalization” of disputes over no-service legislation and agreements. Local legislatures need to be able to act based on their view of how to maximize the welfare of the community without courts challenging the wisdom of their decisions under expanded con-

106. See § 40:67-23.1.

107. See KORNGOLD & GOLDSTEIN, *supra* note 52, at 589–90; Julia Lave-Johnston & Kimberly Johnston-Dodds, *Common Interest Developments: Housing At Risk?*, CAL. RESEARCH BUREAU, 11 (Aug. 2002), available at <http://www.library.ca.gov/crb/02/12/02-012.pdf> (last visited Nov. 12, 2011).

108. See Gao, *supra* note 11 (discussing 1986 ballot measure that excluded new multi-tenant homes from free city trash pickup); see also *supra* note 15 and accompanying text.

stitutional theory.¹⁰⁹ If the citizens do not like the legislature's preference, they can vote the representatives out of office. In general, this is a superior solution to allowing federal courts and constitutional doctrine to intrude into routine local governance matters.¹¹⁰

A condominium or HOA owner might prevail upon a judge to adopt a robust view of the takings, equal protection, or due process clauses to void a no-service rule in *Scenarios 1, 1-A, or 2*. Despite my general preference for deference to the legislature (unless fundamental rights or suspected class discrimination is involved), there are special factors in no-service practices that make these cases particularly attractive to judicial intervention. There is a risk, however, that a successful challenge to no-service rules would open the door to constant supervision of local decisions by the courts on a full range of municipal choices made by the elected government. The potential threat of such an outcome may temper the appetite for judicial relief in the no-service area and would, at a minimum, require careful opinions distinguishing no-service contests from the usual challenge to local government action (where substantial deference to legislative action should continue).

A. *Takings Challenges to No-Service Arrangements*

The “loser” in *Scenario 1* is the developer who must sign a no-service agreement to obtain various governmental permits. The developer will likely have to sell the units at a discounted value because of the lack of municipal services. A developer could assert that the action of the government was an invalid taking of property rights under the Constitution.¹¹¹ The developer could raise analogous claims under *Scenario 1-A*, claiming that existing no-service legislation also re-

109. See *Braunagel v. City of Devils Lake*, 629 N.W.2d 567, 572 (N.D. 2001) (finding that a “[c]ity, acting through its police powers, has broad authority to enact land-use regulations without compensating the landowner for the restrictions placed upon the use of the property.”); *Berk Cohen Assocs. at Rustic Village, LLC v. Borough of Clayton*, 972 A.2d 1141, 1146 (N.J. 2009) (holding that a municipality may “provide trash removal services as a function of its police power . . .”).

110. In contrast, the courts should take an active role where fundamental constitutional rights are threatened by government action, such as decisions improperly based on race, religion, suppression of speech, and others. See, e.g., *Moore v. East Cleveland*, 431 U.S. 494 (1977) (striking ordinance restricting number of related individuals who could reside together).

111. The fact that the developer “agreed” to the denial of service does not preclude the claim: parties can challenge unconstitutional conditions on their receipt of governmental actions. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546–47 (2005); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 587–88 (2009).

duced the value of the property and the sale price to purchasers. Similarly, owners under *Scenario 2* would argue that no-service legislation—like zoning and land use regulations—amounts to an uncompensated taking of their property rights.

1. *Diminution of Value*

Courts have found that a governmental regulation limiting the use of land can rise to the level of a regulatory taking under the Fifth Amendment.¹¹² In such a situation, the government must pay compensation to the landowner, or the courts will strike down the regulation. The courts have not articulated a bright line test for determining when a legislative act crosses the line from an acceptable exertion of the police power by government to a regulatory taking. Rather, the Supreme Court has indicated that when government regulation “reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation paid.”¹¹³

A developer or unit owner would face several hurdles that make a regulatory takings challenge difficult and likely unsuccessful in *Scenarios 1, 1-A, and 2*. First, most takings cases involve regulations that limit the *use* of land by the owner. For example, in *Penn Central*, the designation of the property as a landmark barred the property owner from fully developing airspace over Grand Central Station, and in *Lucas*, a regulation barred building on a lot.¹¹⁴ In contrast, the developer in *Scenario 1* is only signing a contract waiving municipal services, and *Scenarios 1-A and 2* involve only legislation denying services. The developer or unit owner is not losing the right to use her land, but is just deprived of certain conveniences that government might provide in connection with that use. Moreover, government is not compelled to provide services such as trash pickup to its citizens, and could require all of them to seek private collections.¹¹⁵ While there might be takings of property rights other than land, a landowner does

112. For an excellent discussion of regulatory takings of land, see Mandelker, *supra* note 27 §§ 2.01–2.38.

113. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Given that, at most, only a small portion of the owner’s use of the property is compromised by a denial of services, it seems that there could be no claim for a “per se” taking under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (2002) (finding a “categorical” taking when all economically beneficial use of land is denied to the owner by regulation).

114. *See Lucas*, 505 U.S. at 1007; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 117 (1978).

115. *See, e.g.,* *WHS Realty Co. v. Town of Morristown*, 733 A.2d 1206, 1210 (N.J. Super. Ct. App. Div. 1999) (finding that a “municipality is not mandated to provide for municipal garbage removal.”).

not hold a “property right” in local government services for the purposes of a takings challenge.¹¹⁶

Thus, it appears doubtful that a property right has been compromised when a no-service agreement has been signed. Indeed, many courts refuse to apply takings analysis to impact fees where cities require cash payments from developers in order to help the city deal with the infrastructure demands created by new projects.¹¹⁷ Courts frequently limit application of the takings doctrine to land exactions only, such as when a portion of the developer’s land is actually used for required infrastructure, and do not extend the doctrine’s applicability to fee requirements.¹¹⁸ If a court follows this analysis, it will be difficult to bring a takings claim for a no-service agreement.

Moreover, even if that hurdle can be overcome, the property deprivation to the developer will not likely be sufficiently large enough to rise to the level of a regulatory taking. Under the *Penn Central* test, restated in *Lingle*,¹¹⁹ the court will weigh the “economic impact of the regulation on the claimant” and the “extent to which the regulation has interfered with distinct investment-backed expectations”¹²⁰ Courts have refused to find a sufficient deprivation to support a tak-

116. See, e.g., *Laidlaw Waste Sys., Inc. v. City of Phoenix*, 815 P.2d 932, 936 (Ariz. Ct. App. 1991) (finding the city’s actions in providing trash collection did not constitute a taking); *Carroll Elec. Coop. Corp. v. City of Bentonville*, 815 S.W.2d 944 (Ark. 1991) (finding no taking when annexing city allowed residents to switch to municipal power from private provider); *Murphy v. City of Detroit*, 506 N.W.2d 5, 7 (Mich. Ct. App. 1993) (holding that plaintiffs had no property right when their customers were re-routed by an urban development project, so there was no taking); *Bingham v. Roosevelt City Corp.*, 235 P.3d 730, 736 (Utah 2010) (establishing that there is no taking when city diverted groundwater beneath owner’s land since no property interest in soil saturation).

117. See *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 702–03 (1999); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001); *Sea Cabins on the Ocean IV Homeowners Ass’n, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595, 604 (S.C. 2001). But see *Ehrlich v. City of Culver*, 922 P.2d 429, 438 (Cal. 1996) (applying the *Dolan/Nollan* takings test to exaction made by the city); *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 645 (Tex. 2004) (finding that the *Dolan/Nollan* analysis is not limited to dedications of land and that the exaction was a taking). Impact fees must comply with statutory requirements. See ARIZ. REV. STAT. ANN. § 9-463.05 (2008); *Home Builders Ass’n of Central Ariz. v. City of Goodyear*, 221 P.3d 384, 387 (Ariz. Ct. App. 2009) (upholding the impact fee legislation finding that “municipalities must comply with statutory requirements,” and further establishing that the requirement that fees bear a “reasonable relationship” to the burden of development is similar to the rough proportionality test of *Dolan*).

118. See *supra* note 116.

119. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538–39 (2005).

120. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). As a third part of the test, the court is required to examine “the character of the government action.” *Id.*

ings claim even when the governmental action reduced the value of the property by 91 percent¹²¹ or 95 percent.¹²² The total loss to the developer due to the discounts by the unit buyers is likely to be a small fraction of the overall value of the property and the value increase that will inure to the developer due to the development. Unless a court adopts the unlikely position that *any* deprivation of property, no matter how little, constitutes a regulatory taking, it is doubtful that a no-service agreement would meet the standard in *Scenarios 1, 1-A, or 2*.¹²³

2. *The Nexus Requirement*

The Supreme Court in *Nollan* and *Dolan* held that the government may impose a land exaction only if it is designed to address an externality created by the development that negatively affects the community.¹²⁴ Government may not use zoning, subdivision, or the approval process to extract concessions from the developer that are unrelated to addressing harms caused by the project. Rather, *Nollan* requires a nexus between the regulation and the harm caused by the development. *Dolan* notes that there must be a “rough proportionality” between the harm and the exaction level.¹²⁵ In *Scenarios 1* and *1-A* it will be difficult for the government to show the necessary nexus

121. See *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001) (holding that there is no categorical taking even when coal that could be taken was reduced to 9% of original amount).

122. See *Haas v. City of San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979) (finding no taking even when there was a diminution from \$2 million to \$100,000).

123. In *Penn Central*, the court said the loss should be compared to the value of the whole property. 438 U.S. at 130–31. *Accord* *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So. 2d 988, 997 (Dist. Ct. App. 4th Dist. 2006). *Palazzolo*, however, raised the question of whether in future decisions any deprivation of property value should be considered a taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

124. See *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 839 (1987); WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exaction and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859 (1995). As *Scenario 2* does not involve an exaction placed on a developer as a condition of development, the regulation and harm nexus discussion is not germane.

125. MANDELKER ET AL., *supra* note 1, at 380; see, e.g., *St. Clair County Home Builders Ass’n v. Pell City*, 61 So. 3d 992, 1009 (Ala. 2010) (finding fees imposed on builder for improvements to municipal sewer and water systems not a taking since the builder received the benefit of water and sewage services, and fee was not in excess of the benefit bestowed on the builders). For analyses of exactions under principles of Henry George, see ROBERT ELLICKSON & VICKI BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 652–56 (2005); Carlos A. Ball & Laurie Reynolds, *Exactions and*

between a harm caused by the new development and the exaction of a no-service arrangement.

The government may have difficulty in showing the nexus between a no-service agreement and supposed negative community fallout when the local government requires the agreement in exchange for granting the developer zoning or permit approval in *Scenario 1*. As discussed above, assuming that the municipality is not losing money on its trash collection activities, it is hard to see how additional tax-paying customers would cause a revenue loss to the town.¹²⁶ Without a clear showing of harm, it is difficult to even reach the question of whether that harm has a nexus to the government's no-service decision. Moreover, even if it could be shown that service to the new units would cost more than service to other citizens, it is illogical for the governmental unit to *totally* deny services or refuse a trash credit since the owners' property tax payments include some component for regular trash collection. Therefore, there is no clear nexus between the presumed marginal increase in service costs for the new units (i.e., the harm) and a total denial of municipal services (i.e., the municipal "exaction"). One would expect that the solution would include the requirement of a special assessment or fee on those units, not the total denial of service. Still, it is unclear whether courts will find an absence of nexus as long as the service denial is part of an overall trash removal regulatory program, rather than a burden placed randomly on one developer.¹²⁷

3. *Dissonance with Efficiency and Fairness Concepts*

As discussed earlier,¹²⁸ a purchaser of a condominium or HOA unit subject to a contractual or legislative no-service regime should reduce the price paid to the seller to compensate for the loss of public services, but still pay full property taxes (which include payment for such services). If the no-service regime terminates under the law of covenants or pursuant to new legislation restoring services, the unit owner will receive a windfall—having received a discount for giving up services, the owner now has the services as well as the discount.¹²⁹

Burden Distribution in Takings Law, 47 WM. & MARY L. REV. 1513 (2006); Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731 (1988).

126. See *supra* Part II.A.3.

127. See *Leroy Land Co. v. Tahoe Reg'l Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991) (finding exaction was part of overall environmental mitigation program).

128. See *supra* Part II.A.2.

129. A covenant might be unenforceable if, for example, a subsequent buyer had no notice of it. See *supra* Part II.B. For other defenses to covenant enforcement, see

Windfalls are inefficient, as they distort market incentives and smack of unfairness.

The Supreme Court, however, has indicated that a purchaser who buys in *Scenario 1-A* (and arguably by analogy in *Scenario 1*) may bring an action challenging a regulation that was in effect before the sale as an improper regulatory taking.¹³⁰ The Court explained that a contrary rule would prevent the courts from vindicating constitutional principles and insulate the government from overreaching to the detriment of citizens merely because the property in question had been sold.¹³¹ While this principle may be sensible as a constitutional and public policy, it creates the possibility of a windfall for a unit buyer in *Scenarios 1* and *1-A*.

4. Conclusion

Therefore, a government is in a strong position to defeat a takings claim by a developer in *Scenarios 1, 1-A, and 2*, as it is unclear whether courts will recognize the denial of municipal services to be the taking of a property interest, and the developer is not losing land to the government. Even if courts find an infringement on a property interest, it is likely to be too small to rise to the level of a regulatory taking. Without the finding of a taking of a compensable property interest, the developer may be unable to assert her best argument—that there was no nexus between the “taking” and the harm caused by the development. Thus, a takings attack by the developer has limited likelihood of success.

B. Equal Protection Challenges to No-Service Arrangements

When a local government enacts legislation or a regulation that removes services from condominium or HOA unit owners while retaining them for other residential properties, as in *Scenario 2*, owners can bring an equal protection challenge. Developers in *Scenario 1* can claim a denial of equal protection as the potential and initial owner of all of the units in a condominium and HOA, since these units are treated differently than single-family homes. The fact that the developer agreed in *Scenario 1* to the limitation of services should not prevent the raising of equal protection claims under the unconstitutional

GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS AND EQUITABLE SERVITUDES §§ 11.01–.13 (2d ed. 2004).

130. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001). Buying with knowledge of a restrictive land use regulation may, however, diminish investment-backed expectations in the takings formula. See *id.*

131. *Id.*

conditions doctrine.¹³² Finally, the developer could also attempt an Equal Protection Clause claim in *Scenario 1-A* against pre-existing no-service legislation for condominium and HOA units, since knowledge of such regulations before purchase does not bar challenges.¹³³

1. Elements of the Equal Protection Claim

Condominium and HOA unit owners in *Scenarios 1, 1-A*, and 2 can raise an equal protection argument by claiming that government's denial of service treats them differently than other homeowners. The unit owners would assert that they are similarly situated taxpayers to other residential owners, and that government is creating a false classification to deny them services to which they are entitled.

While this may be an appealing populist argument,¹³⁴ courts require more to strike down a government regulation on equal protection grounds. The government often makes distinctions between groups of people. The Supreme Court explains, however, that being a member of the less optimal group does not in itself violate the Equal Protection Clause of the Constitution. The Court states: “[M]ost laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike.”¹³⁵

Denial of service to condominium and HOA unit owners will be scrutinized by the courts under the “rational basis” test, unless a fun-

132. See *supra* note 111 discussing the unconstitutional conditions doctrine that the owner would have to assert in *Scenario 1*.

133. See, e.g., *Kropf v. City of Sterling Heights*, 215 N.W.2d 179, 184 (Mich. 1974) (“[O]ne who purchases with knowledge of zoning restrictions may nonetheless be heard to challenge the restrictions’ constitutionality. An otherwise unconstitutional ordinance . . . does not lose this character and immunize itself from attack simply by the transfer of property from one owner to another.”); *Filister v. City of Minneapolis*, 133 N.W.2d 500, 503 (Minn. 1964) (“[M]ere acquiescence, regardless of the period thereof, cannot legalize a clear usurpation of power which offends against the constitution adopted by the people.” . . . There is no logical reason why one who purchases with notice of such an ordinance but has sufficient vision and initiative to believe that the property is illegally zoned should not have the same standing he would have enjoyed had he been the owner at the time the ordinance was adopted.”); *Repicci v. Sharpe*, 465 N.Y.S.2d 352, 353 (N.Y. App. Div. 1983) (“While one who knowingly acquires property for a prohibited use cannot obtain a variance of the zoning ordinance on the ground of hardship, he is not thereby barred from testing the validity of the ordinance.”). See PATRICIA SALKIN, 2 AMERICAN LAW OF ZONING § 15.11 (5th ed.).

134. See *supra* Part I.A.

135. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). For a discussion of the theories of equal protection, see Robert C. Farrell, *Classes, Persons, Equal Protection and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367 (2003).

damental right or suspect class discrimination is involved.¹³⁶ The Supreme Court explains: “[S]tate action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it ‘rationally furthers the purpose identified by the State.’”¹³⁷ The Court describes the rational basis test and how courts should apply it:

[A] classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden “to negative every conceivable basis which might support it.” Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of “legislative facts” explaining the distinction “[o]n the record,” has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.¹³⁸

There are various constitutional and policy imperatives supporting the rational basis test and judicial deference to legislative decisions. Under our constitutional system of separation of powers, the judicial branch should defer to the legislature’s judgment on health, safety, and welfare regulation unless an individual right is being in-

136. See, e.g., *Goldstein v. City of Chicago*, 504 F.2d 989, 991–92 (7th Cir. 1974) (finding no fundamental right or suspect class is involved in denial of trash collection, making rational basis the proper test); *accord* *Rubin v. City of Wauwatosa*, 342 N.W.2d 451, 457 (Wis. App. 1983). If there is evidence, for example, of a racial intent in the legislation, the court will apply a “strict scrutiny” test which requires that government meet a higher standard, or government’s action may be subject to “intermediate scrutiny” if gender discrimination is involved. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 671–72 (3d ed. 2006). For an excellent discussion of the different equal protection standards in the land use context, see *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) (applying strict scrutiny with alleged racial motivation in refusal to rezone.); *Hayes v. City of Miami*, 52 F.3d 918, 921–22 (11th Cir. 1995) (applying and explaining rational relationship test); *Barone v. Dep’t of Human Servs.*, 526 A.2d 1055, 1060–62 (N.J. 1987); MANDELKER ET AL., *supra* note 1, at 40–42.

137. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)).

138. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–315 (1993) (finding a rational relationship in FCC regulation) (citations omitted); see CHEMERINSKY, *supra* note 136, at 672 (“The government’s objective need not be compelling or important, but just something that the government legitimately may do. The means chosen only need be a rational way to accomplish the end.”); *accord* *Szczurek v. City of Park Ridge*, 422 N.E.2d 907, 912–13 (Ill.1981) (applying both the federal and Illinois Equal Protection Clauses); *Gertsma v. Berea*, 735 N.E.2d 459, 461 (Ohio 1999) (applying federal and Ohio Equal Protection Clauses).

fringed.¹³⁹ Legislatures are subject to control by the citizenry through the election process, and poor judgments will be punished via the ballot box.¹⁴⁰ The legislature theoretically also has the resources to make a careful study of issues and to take public testimony before acting.

Moreover, the legislature needs flexibility to experiment with different approaches to maximize the general welfare.¹⁴¹ Some judgments may be better than others, but it must be able to proceed without the courts second-guessing the wisdom of its decisions, as long as the process is not defective and does not cause an impermissible violation of individual rights.¹⁴² The public purse would be depleted if the legislature had to constantly defend its actions in lawsuits brought by citizens who think they have a better idea. Especially given the current budget pressures of state and local governments,¹⁴³ legislatures need flexibility to make spending choices with their limited financial resources.

Despite the deference of the rational basis test and the comparatively few cases that hold that the legislature has not met its burden,¹⁴⁴ the test has been applied at times to protect people from baseless and

139. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (“[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.”).

140. See *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (“The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”). In addressing alleged discrimination in the setting of trash removal rates, one court stated: “The law in this state has long been that if the city has acted unfairly or unwisely in adopting this kind of ordinance, the remedy is action by the legislative body of the city, not legislative action by the courts.” *City of Riviera Beach v. Martinique 2 Owners Ass’n*, 596 So. 2d 1164, 1166 (Fla. Dist. Ct. App. 1992).

141. See *Haves v. City of Miami*, 52 F.3d 918, 923–24 (11th Cir. 1995) (“The leniency of rational-basis scrutiny provides the political branches the flexibility to address problems incrementally and to engage in the delicate line-drawing process of legislation without undue interference from the judicial branch.”).

142. See *Beach Commc’ns*, 508 U.S. at 313 (“Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

143. See *supra* notes 1–5 and accompanying text.

144. For cases rejecting claims of lack of rational relationship, see *Cnty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 171 (3d Cir. 2006); *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 290 (4th Cir. 1998). For a collection of cases, see JAMES A. KUSHNER, 1 SUBDIVISION LAW & GROWTH MGMT § 3:26.

illogical governmental decisions. For example, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that the denial of a special use permit for a group home for the mentally retarded was not linked to a legitimate public interest since other multiple dwellings were permitted in the area, and negative attitudes toward the mentally retarded were not an adequate basis for denial.¹⁴⁵

There is a two-step inquiry in applying the rational basis equal protection test. First, does the regulation serve a legitimate governmental end? Second, is there a rational basis to believe that the legislation would further the hypothesized purpose?¹⁴⁶ This two-step test would be applied in *Scenario 2*, where regulation is imposed denying municipal services (e.g., trash pickup) to condominium and HOA unit owners while other residential owners retain such services, and where the unit owners continue to pay the same property taxes (or otherwise receive no “credit” for the portion of their taxes attributable to trash collection).¹⁴⁷ As to step one, the government can argue that increasing the efficiency and decreasing the cost of municipal services are legitimate governmental goals. It is arguably not a *legitimate* government end, however, if that burden is placed entirely on one class of people who are entirely the same as others with respect to the issue at hand.¹⁴⁸ Denial of services to tall people, for example, would save the

145. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). Arguably *Cleburne* involved a somewhat higher level of scrutiny than pure rational relationship, although the court in *Bd. of Trs. v. Garrett*, 531 U.S. 356, 366 (2001) insisted that it had indeed applied rational relationship in *Cleburne*. See *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 343–44 (1989) (striking the valuation process used by the county assessor for property taxes based on sales price since properties with the same market value would have different assessments because of the timing of sales).

146. See *Haves v. City of Miami*, 52 F.3d 918, 922 (11th Cir. 1995). See CHEMERINSKY, *supra* note 136, at 674–89.

147. This analysis would also apply in *Scenarios 1* and *I-A* although some courts have ruled that even though a land purchaser may challenge a regulation that existed at the time of purchase, see *supra* note 111, knowledge of the pre-existing regulation may weaken the claim that the regulation is unreasonable as applied. See, e.g., *La Salle Nat'l Bank v. City of Evanston*, 179 N.E.2d 673 (1962) (“[A] purchaser who buys property upon which a restriction has previously been imposed is not in as favorable a position, in challenging its validity, as is one who buys prior to a rezoning and in reliance upon an existing ordinance This does not mean, however, that a purchaser may not attack the validity of a pre-existing restriction. A zoning ordinance cannot be sustained if in violation of the constitution, no matter how long or by whom it has been recognized as legal, and the fact that the purchaser or his grantor may have acquiesced in the classification will not stop him from testing its validity.”).

148. In *Village of Wildwood v. Olech*, the town intentionally refused to supply water to the plaintiff’s home unless plaintiff granted an easement not required of other owners in order to retaliate against plaintiff for previously bringing a successful suit against the town. The Court stated that it will recognize equal protection claims

government money, but there is no basis to place that burden on tall people alone. Wealth can be an appropriate reason for line drawing if there is some plausible logic behind it. For example, when the government allocates a limited pool of scholarship dollars only to students from low-income households, wealthier families are denied a benefit. That wealth distinction itself, however, serves a legitimate policy goal, i.e. providing educational opportunities to a greater number of citizens. In contrast, granting scholarships to every other home on a street is an impermissible way to allocate limited financial resources because it is not based on a legitimate distinction.

Thus, assuming that condominium and HOA unit owners are paying the same tax rate as single-family homes, and operating costs for trash removal are the same, there is no *legitimate* basis to place the burden of municipal savings and efficiency entirely on condominium and HOA owners.¹⁴⁹ Even if the recurring expense for services to condominiums and HOAs is higher than with single-family homes, it is not legitimate for the government to both deny services and yet continue to collect full property taxes, including the portion for trash removal.

There are, however, few local government and land use cases where owners have been successful in equal protection challenges.¹⁵⁰ While owners face a tough road in challenging denial of services, there is some support for their position. For example, one court held that a municipality violated the rational basis test by imposing a sewer tap-in fee (a charge imposed for connection to central sewer system) for buildings constructed after the enactment of the ordinance while exempting existing buildings that were not yet tied into the sewer system.¹⁵¹ The court observed:

In the case before us no reasonable or rational foundation has been submitted to support the exemption and classification created by the ordinance. The date January 13, 1959, seems to have been chosen simply because it was the date defendant city decided to begin raising additional revenues. It certainly was not chosen because it

“brought by a ‘class of one,’ where the plaintiff alleges there is no rational basis for the different treatment.” 528 U.S. 562, 564 (2002). *See* Campbell v. Rainbow City, 434 F.3d 1306, 1317 (6th Cir. 2006) (some courts do not require showing of bias against plaintiff but will sustain “class of one” by countering all possible reasons that support the town’s actions).

149. *See supra* Part II.A.1 for discussion of absorption of capital costs.

150. *See supra* Part I.A.

151. *See* Beauty Built Constr. Co. v. City of Warren, 134 N.W.2d 214, 218 (Mich. 1965); *see also* Kreifels v. S. Panorama Sanitary Dist., 474 N.W.2d 567, 570 (Iowa 1991). *But see* Home Builders Ass’n of Cent. Arizona, Inc. v. City of Scottsdale, 569 P.2d 282, 283–84 (Ariz. Ct. App. 1977).

formed a reasonable or rational date for establishing a division of a class.¹⁵²

Just as the court rejected a city imposing costs randomly on new builders, a court might not permit a local government to reduce overall budget expenditures by denying services to condominium and HOA owners alone rather than sharing this reduction or cost across similarly situated persons.¹⁵³ This refusal would also serve the public policy goals of efficiency, fairness, and community building.¹⁵⁴

2. *Equal Protection Cases on Service Denial*

Various courts have rejected equal protection challenges to denials of services to condominium and HOA owners.¹⁵⁵ One leading case, *Beauclerc Lakes*, decided by the United States Court of Appeals for the Eleventh Circuit, involved a class action challenge by condominium owners to an ordinance that provided solid waste collection service to residential premises except condominiums.¹⁵⁶ The court correctly noted that no “suspect” classification or “fundamental right” was involved which would require a higher level of scrutiny, and ap-

152. *Beauty Built*, 134 N.W.2d at 218.

153. Additional support may be found in cases rejecting a differential in sewer hookup fees between new homes in a development project and other new homes. *see, e.g.*, *S.S. & O. Corp. v. Twp. of Bernards Sewerage Auth.*, 301 A.2d 738, 747 (N.J. 1973), and in decisions striking “school facilities fees” that exceed the school costs generated by the new development, *see e.g.*, *Shapell Indus., Inc. v. Governing Bd. of the Milpitas Unified Sch. Dist.*, 1 Cal. Rptr. 2d 818, 827 (Ct. App. 1992). Further support may be found in opinions stating that impact fees must be “reasonably related” to burdens caused by development. *See, e.g.*, *Grupe Dev. Co. v. Superior Court*, 844 P.2d 545, 548 (Cal. 1993); *Homebuilders Ass’n of Tulare/Kings Cnty. v. City of Lemoore*, 112 Cal. Rptr. 3d 7 (Cal. Ct. App. 2010). For other successful equal protection challenges, *see Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998) (holding that an ordinance requiring lots with less than 100 feet of frontage to be clear cut of vegetation violated the rational basis test since the same dangers and problems of overgrowth were present in larger lots); *Begin v. Inhabitants of the Town of Sabattus*, 409 A.2d 1269, 1276 (Me. 1979) (striking down a cap on mobile home permits that did not apply to other types of residences); *Kirsch v. Prince George’s Cnty.*, 626 A.2d 372, 381 (Md. 1993) (holding that a special permit requirement for student dormitories violated the rational relationship test as it distinguished between occupants’ occupations away from the site).

154. *See supra* Part II.

155. *See, e.g.*, *Goldstein v. City of Chicago*, 504 F.2d 989 (7th Cir. 1974); *Pheasant Run Condo. Homes Ass’n v. City of Brookfield*, 580 F.Supp.2d 735, 740 (E.D. Wis. 2008) (finding it consistent with Equal Protection requirements that a city “disproportionately burden[ed] a certain class of taxpayers . . . [because] condominiums come with associations with the means to provide their own service . . .”); *City of Mayfield Heights v. Woodhawk Club Condo. Owners Ass’n*, 205 F.3d 1339 (6th Cir. 2000) (unpublished opinion).

156. *See Beauclerc Lakes Condo. Ass’n v. City of Jacksonville*, 115 F.3d 934, 935 (11th Cir. 1997).

plied the rational basis test.¹⁵⁷ The court found that “[e]fficient sanitation is a legitimate goal; the provision of free waste collection service to residential premises consisting of four or fewer units is rationally related to that goal.”¹⁵⁸ If sanitation is a legitimate goal, though, why draw the line at condominiums? The court offered this strange explanation:

If we assume, as Condominium contends, that all condominiums are excluded, a legislature still could believe that—because of the benefits of a larger scale—condominium owners (through their representative condominium association) generally enjoy greater bargaining power with private waste removal services. That the legislature did not articulate this presumed goal—sanitation—or the rationale for its classification—scale and bargaining power—is not important.¹⁵⁹

This reasoning is not convincing. The court does not question whether the line drawn by the city can achieve its goal of better sanitation while omitting a significant segment of the population. Instead the court inquires whether the condominium owners are being hurt by the denial of services and if they can get substitute services. Under this approach, the court would seemingly have to sustain an ordinance that denied services based on wealth of individuals or neighborhoods (since the wealthy could afford more services), or ownership of a pickup truck (since the owner could haul trash to a landfill). One district court followed this approach, upholding the denial of road services to condominiums because they “come with associations with *the means* to provide their own services.”¹⁶⁰

157. *Id.* at 935; *accord* City of Mayfield Heights, 205 F.3d 1339 at *3.

158. *Beauclerc Lakes Condo. Ass’n*, 115 F.3d at 935. Some courts have found that saving money and “conserving tax dollars” by denial of services is a legitimate governmental interest. *See, e.g.*, City of Mayfield Heights, 205 F.3d 1339 at *5; *Pheasant Run Condo. Homes Ass’n*, 580 F.Supp.2d at 739–40. If that is an acceptable goal, then it is hard to imagine that any governmental decision would fail to meet that.

159. *Beauclerc Lakes Condo. Ass’n*, 115 F.3d at 935; *see also* Goldstein, 504 F.2d at 992 (“[T]he reason for this distinction is that the owner(s) of large residential buildings with a great amount of garbage have more effective bargaining power with private scavenger services than the owner of a single unit.”); *Szczurek v. City of Park Ridge*, 422 N.E.2d 907, 914 (Ill. App. 1981) (noting that it is valid to classify multiple-family and single-family homes differently due to “the distinction between the nature and type of service needs required by multiple-family structures due to the greater amount of refuse generated by them”); *Carpenter v. Comm’r of Public Works*, 339 N.W.2d 608, 611 (Wis. Ct. App. 1983) (“[T]he Commissioner’s decision to restrict public garbage collection to multiple dwellings of less than five units . . . bears a rational relationship to the city’s legitimate public interest in providing efficient sanitation to the community as a whole.”).

160. *Pheasant Run Condo. Homes Ass’n*, 580 F. Supp. 2d at 740.

Moreover, while the *Beauclerc Lakes* court recognized that the city provided the trash service “at no cost”¹⁶¹ to the other residences, it apparently was not concerned that the unit owners were still paying full property taxes but not receiving the same services (or reimbursement) as other residential owners.¹⁶² The legislative classification results in one smaller group of citizens subsidizing the rest of the residences’ trash collection. This makes the legislature’s classification in *Beauclerc Lakes* all the more unjustifiable, resembling the impermissible random line drawing of the sewer tap-in fees of *Beauty Built*.¹⁶³ The city in *Beauclerc Lakes* should either provide trash services or a tax credit to the unit owners equal to the cost of the services rendered to other residences. It is true that the legislators who passed the existing rule could be thrown out of office in an election, but it is unclear that the advantaged majority of citizens would be motivated to do so. Because the ballot box is an inadequate protection, the Equal Protection Clause should be available to reinforce economically efficient behavior, prevent cost shifting by the majority to the minority, and preserve community cohesion.¹⁶⁴

The Court in *Ramsgate Court Townhome Association v. West Chester Borough*¹⁶⁵ reached a similar conclusion to *Beauclerc* on the merits by using analogous reasoning. The *Ramsgate* court recognized that “[m]embers of the class are assessed real estate taxes on the same basis as other residential property owners in the Borough, but they receive no waste removal services from the Borough.”¹⁶⁶ Moreover, the court found that this did not violate the Equal Protection Clause:

The district court recognized that the Borough’s limits on waste removal are based on economic considerations. As the district court

161. *Beauclerc Lakes Condo. Ass’n*, 115 F.3d at 936.

162. From 1988 through 1989, the city rebated unit owners \$50 from taxes in lieu of garbage collection. See Reply Brief for Appellant at 3, *Beauclerc Lakes Condo. Ass’n v. City of Jacksonville*, 115 F.3d 934 (11th Cir. 1997) (No. 96-2778), 1997 WL 33621696, at *3. However, the city stopped this practice as of January 1, 1990 pursuant to a new ordinance. See *id.*

163. See *supra* notes 151–152 and accompanying text.

164. In *City of Houston v. Glenshannon Townhouse Community Ass’n*, 607 S.W.2d 930, 931 (Tex. Civ. App. 1980), owners of *single-family*, attached townhouses challenged an ordinance that provided a reimbursement program for trash pickup to owners of detached, single-family homes but denied the program to the attached townhouses. The court applied the rational relationship test to this equal protection claim but avoided the issue of whether the classification was proper. See *id.* at 934. Instead it found that the classification was improperly applied as the governmental authority permitted two other attached townhouse communities to join the program. See *id.*

165. 313 F.3d 157 (3d Cir. 2002).

166. *Id.* at 159.

stated, “[t]he challenged classifications . . . are based on the quantity of waste and nothing else The differences in the way property owners are treated under the ordinance are clearly based on economic considerations. Providing free trash collection costs money.” [The district court] noted that the Borough is forced to divide its finite budget among various expenditures. By limiting this service, the Borough is able to spend its tax dollars elsewhere.¹⁶⁷

This reasoning also is subject to question. First, while the district court is correct that there is a difference in the “quantity of waste” between a multi-tenant building (rental or condominium), there is usually no difference between condominium and single-family units. The court’s explanation is illogical and thus irrational—the comparison must be between residential units as far as quantity of refuse. Moreover, the court seems to ignore the belief of taxpayers that their payments are somehow linked—albeit imperfectly—to the reciprocal provision of municipal services. The court sanctions placing economic burdens unequally across residential owners, by having condominium unit owners subsidize potentially wealthier single-family properties. Under that theory of majoritarian dictatorship, why not also deprive some residential taxpayers access to recreation facilities or other municipal goods?

Condominium and HOA unit owners may be able to convince a court to accept this critique of the equal protection theory of *Beauclerc Lakes* and provide relief. Yet, as noted above,¹⁶⁸ such a decision is a potential Pandora’s Box, as it could lead to court intervention in a wide range of local government decisions through the rational basis test. Indeed, the rational basis test and its usual deference to legislatures can be viewed as necessary restraint on the judiciary and prevention of second-guessing by the courts as to the wisdom of particular statutes.

C. *Substantive Due Process Challenges to Service Denials*

Legislation can be challenged under the Fourteenth Amendment of the United States Constitution based on a deprivation of substantive due process.¹⁶⁹ Legislation will survive a substantive due process challenge as long as it serves a legitimate governmental purpose.¹⁷⁰

167. *Id.* at 160.

168. *See supra* Part IV (on the dangers of subjecting routine legislative decisions to judicial review).

169. *See* CHEMERINSKY, *supra* note 136, at 608–29.

170. MANDELKER ET AL., *supra* note 1, at 42–43; *accord* *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937) (requiring only a relational relationship between the

As interpreted by the Supreme Court since the 1930s, there is not much bite in substantive due process scrutiny.¹⁷¹ As long as there is “[a]ny conceivable purpose” to the statute, the legislation will be upheld, even if the legislature had not relied on that purpose in enacting the legislation.¹⁷² The Supreme Court has been indulgent of legislation in the economic and commercial areas, intervening only when a specific constitutional right is impacted by the statute.¹⁷³ Some state courts apply a more rigorous standard of review under the due process clauses of their respective state constitutions, leading to the striking down of some commercial regulation.¹⁷⁴ But given the deference principle, courts have generally rejected challenges to no-service legislation based on substantive due process.¹⁷⁵ The judicial bias against substantive due process arguments would apply in *Scenarios 1, 1-A, and 2*.

There may be some comfort in *Berk Cohen Associates at Rustic Village, LLC v. Borough of Clayton*, a case involving a relevant matter.¹⁷⁶ In that case, decided in 2009, the New Jersey Supreme Court found a violation of the Due Process Clause where a municipality, operating under legislation requiring equal treatment of condominium and HOA owners, attempted to require condominium owners to place their refuse at curbside just as owners of single-family dwellings do, rather than using dumpsters. The court relied on the trial court’s finding that the curbside pickup in the condominium’s case was “unhealthful, unsanitary, utterly inefficient, unsightly and unreasonable” to conclude that the municipal scheme undermined the goals that it was designed to serve (i.e. the public health and welfare), and was thus unreasonable. The *Berk Cohen* court was willing to carefully

legislative object and means); *Berk Cohen Assocs. at Rustic Vill., LLC v. Borough of Clayton*, 972 A.2d 1141, 1146 (N.J. 2009) (same).

171. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“[T]he existence of facts supporting the legislative judgment is to be presumed.”).

172. CHEMERINSKY, *supra* note 136, at 625 (emphasis added).

173. MANDELKER ET AL., *supra* note 1, at 43 (quoting *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949)); *see also Upton v. Town of Hopkinton*, 945 A.2d 670, 675 (N.H. 2008) (finding that an assessment of one third of a municipality’s cost to improve a road to petitioner was reasonably related to petitioner’s residential development, as more residents and emergency vehicles would require improved access); CHEMERINSKY, *supra* note 136, at 624 (providing examples of the Court upholding legislation using lenient rational basis review).

174. MANDELKER ET AL., *supra* note 1, at 43–44.

175. *See, e.g., Goldstein v. City of Chicago*, 504 F.2d 989, 992 (7th Cir. 1974); *Pheasant Run Condo. Homes Ass’n v. City of Brookfield*, 580 F.Supp.2d 735, 740 (E.D. Wis. 2008). *But see Berk Cohen*, 972 A.2d at 1150 (N.J. 2009) (invalidating ordinance because means undermined rather than furthered health and safety goals).

176. *Berk Cohen*, 972 A.2d 1141.

scrutinize the logic of the regulation and its implementation rather than merely deferring to the municipal authorities. While this case involved a different issue than no-service arrangements, unit owners might convince other courts to adopt this skeptical attitude of the *Berk Cohen* court to strike down illogical and inequitable no-service rules.

D. Statutory Attacks on Denials of Service

Owners have challenged the denial of municipal services based on the language of state enabling acts and local no-service ordinances, with mixed results.¹⁷⁷ These cases are of limited precedential value because of each statute's idiosyncratic language, but they may indicate a jurisdiction's general judicial attitude toward refusal of service to taxpaying residents. For example, in one case an ordinance required trash pickup for "condominiums" and "private dwellings."¹⁷⁸ The court strictly construed these terms to deny service to a multi-structure, privately owned, multi-family planned unit development that did not fully comply with the state's condominium statute. By using strict construction, rather than a broader interpretative method, the court protected the municipality's budget rather than support the individual owners.

Other courts, however, have relied on state tax legislation to strike down certain local denials of service.¹⁷⁹ New York courts, for example, have held that special ad valorem levies for garbage collection are invalid if the condominium owner does not receive the services.¹⁸⁰ The New York Court of Appeals noted that "[b]ecause the plaintiffs do not receive the pertinent benefit, no basis exists in these circumstances for the imposition of this ad valorem garbage collection levy."¹⁸¹ This statement begs the question of whether that same rea-

177. See, e.g., *Pheasant Run Condo. Homes Ass'n*, 580 F.Supp.2d at 741 (declining to supplemental jurisdiction over statutory claim as it presented novel state law issue); *Berk Cohen*, 972 A.2d at 1150.

178. *Hall Manor Owner's Ass'n v. City of West Haven*, 561 A.2d 1373, 1375 (Conn. 1989).

179. Cf. *Szczurek v. City of Park Ridge*, 422 N.E.2d 907, 914 (Ill. App. Ct. 1981) (refusing to decide whether statute requiring that condominiums be "assessed on the same basis as single-family residences" barred discrimination in services since the issue was not raised below).

180. See, e.g., *Applebaum v. Town of Oyster Bay*, 609 N.E.2d 118 (N.Y. 1992); *Barclay Townhouse at Merrick II Corp. v. Town of Hempstead*, 734 N.Y.S.2d 870 (App. Div. 2001); *Landmark Colony at Oyster Bay Homeowners' Ass'n, Inc. v. Town of Oyster Bay*, 536 N.Y.S.2d 96, 98 (App. Div. 1988). But see *Harbor View at Port Washington Home Owners Ass'n, Inc. v. Town of North Hempstead*, No. 04377-07, 2008 WL 3982696, at *5 (N.Y. Sup. Ct. 2008).

181. *Applebaum*, 609 N.E.2d at 120.

soning applies when government sets property tax rates based on budgeted residential trash expenses but denies services to taxpaying condominium and HOA unit owners. Why should the fact that government breaks out its general tax revenue levies to support services into separate levies for particular services matter on the issue of whether plaintiffs received “the pertinent benefit?” To uphold that distinction would seem to favor form over substance.

E. Summary of Legal Options

Unit owners and developers in *Scenarios 1, 1-A, and 2* might be successful in showing that no-service regulations are improper takings without a nexus between the governmental action and the regulation. The great hurdles, however, will be whether the amount of the diminution rises to the level of a taking and whether the taking of services rather than land supports such a claim. Equal protection theory might support a successful claim by unit owners—whether consumer purchasers in *Scenario 2* or the developer who still owns the land in *Scenarios 1 and 1-A*. Arguments based on the resulting wealth transfer of no-service regimes under the tyranny of the majority may overcome traditional judicial deference to legislatures in equal protection challenges. Substantive due process attacks offer the least likely path to a winning challenge to no-service rules in all three scenarios because of the very low showing necessary to sustain governmental regulations in these cases.

CONCLUSION

State and local governments currently face tough expenditure and taxation choices that will have significant social, economic, and political ramifications. The case of condominium and HOA service denials provide a cautionary tale for local governments attempting to balance current revenue declines with increased demand for civic services. Strong public policies—efficiency, fairness, shared sacrifice, and community building—are eroded by legislation denying services to condominium and HOA unit owners because these owners are indistinguishable for service purposes from other taxpaying homeowners. This article recommends that legislatures should not adopt laws that make such meaningless and pernicious distinctions, both in the condominium/HOA service situation and in other cutbacks to municipal goods and services that governments are currently forced to make.

If, however, legislatures do adopt no-service regimes, this article develops support for a judicial finding that condominium and HOA service denials are impermissible on constitutional and statutory

grounds. Though resorting to litigation might be a route to addressing unequal services, judicial intervention is not the preferred route, as it would undermine the values of local control and experimentation, representative democracy, and separation of powers. The best course of action is for legislatures to see the wisdom of shared sacrifice, and thus refuse to balance the municipal books on the backs of a minority of homeowners.