TAXES, FEES, ASSESSMENTS, DUES, AND THE “GET WHAT YOU PAY FOR” MODEL OF LOCAL GOVERNMENT

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I. INTRODUCTION

The economic gap between affluent suburbia and the central city has recently received widespread attention in the state and local government law literature. Articles by prominent scholars representing a broad range of doctrinal approaches have coalesced around a consensus that the current concentration of wealth and resources in metropolitan areas is unacceptable, and that the allocation of local government powers has helped to preserve, and indeed enhance, the schism between the “favored quarter”\(^1\) and the inner urban core. Though the underlying normative arguments rest on very different rationales, their common goal of reducing regional disparities has made the scholarly dialogue a dispute over how, rather than whether, to stimulate a more equitable distribution of wealth, services, and opportunities in major metropolitan regions.\(^2\)

For some, like Professor Clayton Gillette, reformists of local government structure should tinker as little as possible with the existing system, in which municipal governments exercise substantial autonomy, and fragmented and overlapping single purpose government units continue to increase at a rapid pace.\(^3\) Others, like Professors Gerald Frug and Richard Thompson Ford, similarly champion the preservation of local power, but support radical reformulation of the ways local governments currently exercise that power.\(^4\) Still others, like Professors Richard Briffault and Sheryll Cashin, have argued strenuously for the creation of

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1. Myron Orfield, a Minnesota state legislator, used the term “favored quarter” to refer to the small segment of metropolitan areas with wealthy, high tax-base suburbs. MYRON ORFIELD, METROPOLICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 5 (1997). According to Orfield, all major metropolitan regions display a remarkably similar distribution of population and wealth: “20-40 percent of the people live in central cities, 25-30 percent in older declining suburbs, and 10-15 percent in low tax-base suburbs.” Myron Orfield, Conflict or Consensus? Forty Years of Minnesota Metropolitan Politics, BROOKINGS REV., Fall 1998, at 34. The remainder comprises the favored quarter. Id. at 31. Orfield seeks to promote natural political alliances between central city and older suburbs, many of which face similar problems with aging infrastructure, high social service needs, increasing poverty, and declining tax bases. ORFIELD, METROPOLICS, supra, at 13. He recommends joint legislative efforts to seek the imposition of regional fair housing obligations, property tax sharing, and a redirection of government infrastructure spending from urban fringes to the central city and inner suburban ring. Id. at 114-21.


a general purpose elected regional unit of government, which would assume control over region-wide issues and work with existing local government units to accomplish a more equitable distribution of resources in metropolitan areas. Though their proposals diverge, the work of all of these scholars focuses on ways the current legal system has made it possible for affluent suburbs to capture wealth and impose costs on other parts of metropolitan areas, most importantly through the exercise of zoning powers, taxation powers, and school funding systems.

In general, current regionalist scholarship highlights inter-municipal disparities and evaluates proposals for redistribution through the lens of the existing rules of local government formation. The commentators recognize, for instance, that the state statutory procedures for local government incorporation and annexation provide a strong incentive for affluent groups to form a local government whose residents have roughly equal amounts of wealth and, just as important, substantially similar service needs and desires. By taking advantage of the autonomy and power offered to municipal governments under the laws of most states, and the protection against annexation it provides, affluent, homogeneous enclaves are able to capture the wealth within their borders and tax it only to serve the needs of their similarly situated neighbors. In the resulting financial picture, residents view their local government as a vehicle for providing services that everyone in the community desires, creating what Professor Frug has called the “consumer-oriented vision” of local government. Moreover, if taxes are used to provide the same services for taxpayers of similar wealth and service needs, they lose their redistributive impact and become, again in Professor Frug’s words, more like country club dues.

In Frug’s view, the negative consequences of the consumer approach to local government are threefold. First, it “replac[es] the one-person, one-vote principle associated with democracy with the one-dollar, one-vote rule


7. See Laurie Reynolds, Rethinking Municipal Annexation Powers, 24 URB. L. AW. 247 (1992), for an analysis and critique of state statutory procedures that restrict municipal annexation power.

8. See sources cited supra note 6.


10. Id. at 29-30. Professor Lee Anne Fennell describes work in “club theory” that makes the same analogy. See Lee Anne Fennell, Homes Rule, 112 YALE L.J. 617, 625 & n.33 (2002) (reviewing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001)).
Second, he argues, it “perpetuates a pervasive, but false, justification for the radical differences that now exist between the quality of city services available in different parts of America’s metropolitan regions.” Finally, and most fundamentally, it trivializes and denigrates the “values commonly associated with democracy—notions of equality, of the importance of collective deliberation and compromise, [and] of the existence of a public interest not reducible to personal economic concerns . . . .”

This Article looks at the consumer view of local government from an intra- rather than inter-municipal vantage point. Focusing on revenue raising powers, this Article explores how the “dues mentality” pervades many aspects of local governments’ never-ending quest to raise more money. In particular, this Article evaluates how special assessments, fees, and the formation of business improvement districts have overtaken general taxation as the preeminent revenue raising device. As later Parts will show, the use of these techniques further exacerbates and cements the dues mentality in the minds of the citizenry, as taxpayers become accustomed to finely tuned tax-like charges that are levied in exchange for a growing number of government services. Though local government incentives to resort to these devices may have nothing to do with regionalism, the result is anti-regional nonetheless. Citizens who are repeatedly asked to pay a specific charge or assessment for a new government service are likely to develop the mindset that they are paying for what they get. In turn, this “get what you pay for” mentality may produce widespread opposition to the use of general tax dollars for

11. Frug, supra note 9, at 31.
12. Id.
13. Id. at 32. In a recent monograph, Professor Lizabeth Cohen traces the development of what she dubs the “‘consumerization of the republic.’” LIZABETH COHEN, A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 344 (2003). Beginning with the Depression and continuing up through the present, Professor Cohen shows how mass consumption radically altered the economy, national politics, and our culture. See id. Most fundamentally for this Article, Professor Cohen describes how the use of sophisticated advertising techniques converted national elections from a debate over the general public welfare to an appeal to the narrow self-interest of numerous demographic and racial groups. Id. at 331-44. And because campaigns now appeal to voter self-interest, she argues, it is logical to expect that voters bring those market expectations to their analysis of government, judging it by the personal benefits they derive from any particular policy or proposed legislation. See id. at 293-344. The “market expectations” Professor Cohen describes, id. at 344, are the “dues mentality” I use in this Article.
14. Several of my students have described this phenomenon more colorfully as the “pay for play” approach to local government law. Either term accurately describes the thesis explored in this Article.
15. See Richard Briffault, The Rise of Sublocal Structures in Urban Governance, 82 MINN. L. REV. 503 (1997), for a discussion of incentives that lead local governments to create a range of sub-local units.
redistributive purposes and, more fundamentally, taxation efforts in
general.\footnote{16}{See Reynolds, supra note 2, at 146.}

These observations have serious implications for the future of
regionalism reforms. If, in fact, the dues mentality is firmly ingrained at
the local and sub-local level, it is not immediately apparent that current
regionalist proposals would do much to alter the metropolitan landscape.
That is, even a general purpose regional government, if it continues to
operate with familiar devices like assessments, fees, and special districts,
might preserve the same regional inequality as the more narrowly banded
local government predecessor; only the level at which the inequality is
produced will change.\footnote{17}{In a recent article, Professor Clayton
Gillette articulated a similar argument to justify his opposition to
consolidated, general purpose regional legislatures: “If we simply reassemble
self-interested residents within common boundaries, we risk displacing
interlocal conflicts with conflicts among residents of equally artificial
neighborhood boundaries within a larger metropolis.” Gillette, supra
note 3, at 203. Some evidence, however, suggests that more highly
regionalized entities do engage in more redistribution. See Cashin, supra
note 5, at 2034-35 (discussing the distribution of public resources and
regional burdens brought about by the adoption of regionwide tax sharing in
the Minneapolis metropolitan area).}

Thus, this Article concludes, regionalism’s call for
formulation of the existing legal rules needs to extend more broadly to
include reassessment of revenue raising techniques at the municipal level;
otherwise, not even major regional reforms will move us toward the
regionalists’ goal of more equitable resource distribution across the
metropolitan area.

II. LOCAL GOVERNMENT REVENUE RAISING POWERS

To provide the many local services that most U.S. residents depend on
and have come to expect, local governments raise billions of dollars
annually.\footnote{18}{In 1997, local governments (including counties,
municipalities, townships, special districts, and school districts) raised over
$460 billion in own-source revenues. 4 U.S. Census Bureau, U.S. Dep’t
of Commerce, 1997 Census of Governments: Compendium of
Government Finances tbl.2 (2000) [hereinafter 1997 Census of
Government Finances]. That figure excludes money received from
intergovernmental transfers, principally from state and federal
government sources. Id.}

In fact, notwithstanding frequent and repeated arguments about
ever greater limitations on local revenue raising powers, the amount of
locally raised revenue has increased steadily and continually over the past
five decades.\footnote{19}{In 1957, local government own-source revenue
totaled almost $18 billion. 4 U.S. Census Bureau, U.S. Dep’t of
Commerce, 1957 Census of Governments: Compendium of
Government Finances tbl.6 (1959) [hereinafter 1957 Census of
Government Finances]. By 1967, the figure had more than doubled, to
$38 billion. 4 U.S. Census Bureau, U.S. Dep’t of Commerce, 1967
Census of Governments: Compendium of Government Finances tbl.3
(1969). By 1977, the amount had again more than doubled, totaling $102 billion. 4 U.S. Census...}
funds is a similarly rapid increase in the number of local government units with revenue raising powers.\textsuperscript{20} As a result, and not surprisingly, the range and extent of local government powers to raise money for the provision of services and infrastructure are almost dizzying in their complexity, their variety, and in their sheer volume.

When a local government decides to provide a service, improve or construct infrastructure, or regulate private activity, the question of how to pay will generally be an important consideration. In simple terms, the first, most fundamental decision the government must make is whether to resort to taxation powers or to use a more narrowly targeted revenue device. For purposes of simplicity, I designate this latter option “dues.” This Part first explores the basic differences between taxes and dues; it then describes the numerous factors that influence the local government’s choice of one approach over the other; and it concludes with an evaluation of the many dues techniques that are currently prevalent in local government finance.

\textsuperscript{20} Although the number of general purpose local governments, like cities and villages, has remained relatively constant, special or single purpose local government units have increased dramatically. Between 1952 and 1997, the number of special district governments nearly tripled, rising from 12,340 to 34,683. 1 U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 1997 CENSUS OF GOVERNMENTS: GOVERNMENT ORGANIZATION tbl.5 (1999). Over that same time period, sub-county general purpose local governments increased from 34,009 to 36,001. Id. tbl.4. In comparison to other units of local government, the proportion of spending by special districts has increased two to three times more quickly. See KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT 3 (1997).

\textsuperscript{21} The term “local government” refers to a wide number of government entities, ranging from general purpose municipalities to single purpose special districts and public authorities. This Article’s assessment of local government revenue raising is applicable to all of those entities. Although the breadth of special districts’ revenue raising power is generally more limited, their choice between dues and taxes will have the same impact on the increasing dues mentality in local finance. In many instances, however, the analysis of special districts will be more complicated because the explosive growth in special districts is itself evidence of the increasing dues mentality in state and local government finance. Because of the district’s narrowly drawn and extremely limited powers, any revenue raising, whether accomplished through dues or taxation, will necessarily be tied to that limited mandate. Thus, in a sense, the mere existence of numerous special districts enhances the consumer mentality in local government. Each of these units acts to further its own narrow purpose and then extracts payments from citizens to accomplish that purpose, establishing a quid pro quo in exchange for the service provided. In some ways, then, even those special districts that exercise taxation powers may contribute to the enhancement of the dues mentality in local government.
A. Dues vs. Taxes: What’s the Difference?

Local taxes, like taxes levied at the state and federal level, are general charges to raise revenue for the operational costs of government; they are assessed against all who are within the scope of the government’s taxing authority. Though they differ widely with regard to the way in which the tax rate is set and the extent to which a particular tax may be regressive or progressive, taxes are levied without consideration of whether the individual taxpayer will benefit from the services to be funded by the tax. Thus, taxes collectivize the cost of service and spread it across the taxpaying population, either at a flat rate or prorated on the basis of ability to pay or other indicia of wealth. Moreover, according to urban economists, taxation promotes communal responsibility for the provision of government services and ensures that services compete against each other in the local political process for a share of the general tax revenue pie. At the local level, the predominant form of taxation is the property tax, which is levied as a percentage rate against the assessed value of each

22. For an extensive discussion of the many legal aspects of state and local taxation, see, for example, 4 C. DALLAS SANDS ET AL., LOCAL GOVERNMENT LAW ch. 23 (Supp. 1996); and 16 EUGENE McQUILLIN, LAW OF MUNICIPAL CORPORATIONS §§ 44.01-44.198 (3d ed., rev. vol. 1994).

23. In general terms, the distinction between progressivity and regressivity in taxation is straightforward: “A progressive revenue source requires poor households to pay a smaller share of their income than rich households, while a regressive revenue source asks the poor to pay a larger portion of their income than the rich.” ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE 107 (1993). At the local level, the main source of taxation revenue is the property tax. See id. Because the percentage of income spent on housing decreases as income increases, the property tax is somewhat regressive. Id. at 135; see also WILLIAM G. COlMAN, NAT’L ACAD. OF PUB. ADMIN., A QUIET REVOLUTION IN LOCAL GOVERNMENT FINANCE: POLICY AND ADMINISTRATIVE CHALLENGES IN EXPANDING THE ROLE OF USER CHARGES IN FINANCING STATE AND LOCAL GOVERNMENT 13 (1983). Sales taxes are also regressive, because consumption expenses constitute a higher percentage of total lower incomes. See ALTSHULER & GÓMEZ-IBÁÑEZ, supra, at 106.

24. The Supreme Court of Missouri offered the following definition: “Taxes are ‘proportional contributions imposed by the state upon individuals for the support of government and for all public needs.’ Taxes are not payments for a special privilege or a special service rendered.” Leggett v. Mo. State Life Ins. Co., 342 S.W.2d 833, 875 (Mo. 1961) (en banc) (citations omitted); see also Gunby v. Yates, 102 S.E.2d 548, 550 (Ga. 1958); Stewart v. Verde River Irrigation & Power Dist., 68 P.2d 329, 334-35 (Ariz. 1937).

25. See FOSTER, supra note 20, at 107.

26. Id.

27. See id. at 189-217, for a full explanation of the way the phenomenon known as “full-line forcing” operates in local government finance allocation. According to Professor Foster, services that are funded with protected revenue streams capture a bigger slice of the budget than when those same services compete for revenues in a local government’s general purpose revenue debate. See id. See also COLMAN, supra note 23, at 10-13, where the author describes the political impact of increased local government user charges. He notes that user fees create a protected stream of revenue that is not “unbundled” at general revenue and budget sessions. Id.
parcel of land (and its improvements) located within the taxing unit’s territorial jurisdiction. To a much lesser extent, and depending on the scope of state enabling authority, some local governments levy sales taxes, use taxes, and/or income taxes. The property tax, however, is by far the taxation device most commonly used by local governments.

In fundamental contrast to taxes, local government dues crucially depend on the relationship between the payer and the purpose for which the revenue raised will be spent. That is, by calculating the charge with a computation of the benefit received by the payer or to offset the cost imposed on the general population by the payer’s activity, dues treat government activities just like any other market transaction in a consumer economy. As a result, dues have a privatizing effect on government services.

In addition, if they are levied on all users equally, dues may be more regressive in their impact than taxes.

28. See, e.g., Williams v. City of Fayetteville, 76 S.W.3d 235, 240 (Ark. 2002) (upholding use of local sales tax revenue for construction of city center). Just like the property tax, the sales tax is somewhat regressive; consumption constitutes a higher percentage of annual income for lower income families. See Altshuler & Gómez-Ibáñez, supra note 23, at 107. That regressivity may be offset by excluding from the sales tax levy basic needs like food and clothing. Id. The local component of the sales tax, however, is generally minimal in comparison to the overall sales tax rate, which is often levied at the state level.

29. See, e.g., H & R Roofing of S.D., Inc. v. Dep’t of Revenue, 623 N.W.2d 508, 510 (S.D. 2001) (upholding imposition of municipal use tax levied on building materials bought elsewhere and used within municipality).


32. Foster, supra note 20, at 107. In general, dues techniques are regressive in their effect. User charges for basic infrastructure, for instance, tend to be constant across income level. One study of impact fees and other exactions on development concluded that they shift wealth from older to younger and from poorer to more affluent home buyers. See Altshuler & Gómez-Ibáñez, supra note 23.

33. In general, dues are more regressive than property taxes. That is, their burden falls more heavily on the poorer segments of a community. For many government services, consumption levels do not vary with income; thus, the poor pay a higher percentage of their income than the affluent. In a study of land use exactions and impact fees, the authors concluded that user fees are more regressive than property taxes, but considerably less regressive than the current common practice
Local governments have a wide range of dues techniques at their disposal. These include: fees to use government-owned facilities, like a public transit system;\textsuperscript{34} assessments levied against property owners to pay for a locale-specific capital improvement, like sidewalks or street lights;\textsuperscript{35} regulatory fees designed to offset the negative impact of private sector activity, like a fee imposed on paint producers to counteract the effects of lead poisoning;\textsuperscript{36} or charges based on consumption of a government-provided service, like garbage collection or local utility service.\textsuperscript{37} Though they employ a wide variety of implementation techniques and computation formulae, and though their validity depends on a number of device-specific legal tests, the underlying premise is the same for all dues techniques: dues can be levied so long as the person or property being charged stands in direct and substantial relationship to the reason for which the charge has been assessed. Thus, dues are legitimate when the party assessed directly benefits from the government action being funded,\textsuperscript{38} when the charge recoups the costs of the payer’s use of government property or services,\textsuperscript{39} or when the cost is levied to offset the negative impact of the activity

\textsuperscript{34} See, e.g., N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1034 (2d Cir. 1995); see also LCM Enters. v. Town of Dartmouth, 14 F.3d 675, 680-81 (1st Cir. 1994) (local fee for use of town harbor); Bd. of Supervisors v. Massey, 173 S.E.2d 869, 870-71 (Va. 1970); Bd. of Supervisors v. Massey, 169 S.E.2d 556, 559-60 (Va. 1969) (both cases describing the complex financing scheme for the construction and operation of the Washington, D.C. metropolitan subway system).


\textsuperscript{36} See, e.g., Sinclair Paint Co. v. State Bd. of Equalization, 937 P.2d 1350, 1357 (Cal. 1997); see also Hager v. City of W. Peoria, 84 F.3d 865, 873-74 (7th Cir. 1996) (approving a fee charged by the city for issuing a permit to regulate truck weight because of the additional burden on streets attributable to heavy trucks).

\textsuperscript{37} See, e.g., City of New Smyrna Beach v. Fish, 384 So. 2d 1272, 1276 ( Fla. 1980) (upholding the validity of a special assessment for mandatory garbage disposal system); Raab v. Town of Schererville, 766 N.E.2d 790, 793-94 (Ind. Ct. App. 2002) (upholding town’s flat fee for garbage collection regardless of whether individual residents used a different means of disposal); J.K. Constr., Inc. v. W. Carolina Reg’l Sewer Auth., 519 S.E.2d 561, 564 (S.C. 1999) (upholding a fee for sewer service).

\textsuperscript{38} See, e.g., Blaser v. East Bay Township, 617 N.W.2d 742, 744 (Mich. Ct. App. 2000) (finding that undeveloped wetlands that would not benefit from a sewer system could not be assessed to fund it); 2nd Roc-Jersey Assocs. v. Town of Morristown, 731 A.2d 1, 10-11 (N.J. 1999) (upholding charge on downtown properties providing the benefit of funding enhanced services).

subject to the charge. Other traditionally mentioned indicia of dues techniques are that the charge must be commensurate with the benefit received or with the impact being offset; that some dues techniques, unlike taxes, are voluntarily assumed obligations, in the sense that the payer has chosen to engage in the activity for which the charge is assessed; and that dues revenues must be segregated to pay only for the activities for which the charges are levied. In short, and in fundamental contrast to taxpayers, those who pay dues are legally entitled to benefit from their payment, and the government is required to account to the payer in ways that do not apply when taxes are involved.

This Article’s evaluation of local government dues is based on a generalized two-part categorization of local government finance powers, in which all local revenue raising devices can be labeled as either dues or taxes. Of the many state and federal limits on local taxation powers, the


41. See, e.g., S & P Enters. v. City of Memphis, 672 S.W.2d 213, 215 (Tenn. Ct. App. 1984) (noting that a true license fee should be fixed to cover the expense of issuing it).

42. See, e.g., City of Miami v. Quik Cash Jewelry & Pawn, Inc., 811 So. 2d 756, 758 (Fla. Dist. Ct. App. 2002) (fees, as distinguished from taxes, are paid by choice); Graham v. Township of Kochville, 599 N.W.2d 793, 801 (Mich. Ct. App. 1999) (one of the criteria of a fee is voluntariness).

43. See, e.g., City of Marion v. Baioni, 850 S.W.2d 1, 2-3 (Ark. 1993); Loomis v. City of Hailey, 807 P.2d 1272, 1277 (Idaho 1991).

44. Local governments are generally confined in their abilities to levy taxes by limited or nonexistent enabling authority. See, e.g., Margola Assocs. v. City of Seattle, 854 P.2d 23, 29 (Wash. 1993) (en banc) (stating that the “authority to tax cannot be implied from a local government’s general powers,” and that “local governments may tax only pursuant to specific legislative or constitutional authority”). Local governments are further limited by the common state constitutional “public purpose” requirement, which mandates that benefits of taxation be in common and not for the primary benefit of particular persons or interests. See, e.g., City of Lexington v. Hager, 337 S.W.2d 27, 28 (Ky. Ct. App. 1960) (explaining that the plain meaning of the state constitution’s public purpose clause is that “taxes may be levied and collected only for a public purpose of the particular tax levying unit”).

45. Federal limits on state and local taxation involve equal protection, due process, and the Commerce Clause. The Equal Protection Clause limits a local government’s ability to differentiate between classes of individuals for the purpose of taxation. See Nordlinger v. Hahn, 505 U.S. 1, 11 (1992); Allegheny Pittsburgh Coal Co. v. County Comm’n, 488 U.S. 336, 343 (1989). The Due Process Clause requires that an individual have connections with the taxing government that are substantial enough to justify its exercise of taxing power. See Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 306 (1992). The Commerce Clause prohibits local taxes that operate to discriminate against interstate commerce. See, e.g., Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977); M & Assocs. v. City of Irondale, 723 So. 2d 592, 597 (Ala. 1998) (holding that local taxation of a nonresident company doing business within city borders discriminates against interstate commerce when imposition of similar taxes by other local governments would result in
nearly universal state law requirement of uniformity of taxation is perhaps the most important in establishing the boundaries between the two classifications I have suggested. Although a detailed analysis of the legal parameters of local taxation powers is beyond the scope of this Article, a brief review of the uniformity principle is crucial to understanding the key differences between dues and taxes in local government finance.

B. Uniformity of Taxation

Whether it is articulated in a separate constitutional provision or incorporated within the state judiciary’s interpretation of another constitutional clause, the uniformity principle establishes the fundamental norms that classifications of taxpayers must be reasonable and that treatment of taxpayers within classes must be equal. It does not, of
course, guarantee that all taxpayers will pay the same number or total amount of taxes. Rather, the uniformity principle focuses on the relationships between the parties to be taxed and the distinctions between those taxed and those not taxed; it limits the government’s flexibility in establishing the source of tax revenue, but it has no bearing on the government’s ultimate use of tax revenue.\textsuperscript{50}

As a result of this extremely broad discretion, an important corollary of the uniformity principle is the legal irrelevancy of the taxpayer’s assertion that he or she will receive no benefit from the service being funded by taxes. Taxpayers, for instance, state no claim for relief from local taxes by showing that they have no children in the schools funded by those taxes.\textsuperscript{51} Although that bright line has eroded with the relatively recent ascension of very narrowly drawn tax classifications and the spread of so-called “benefit”\textsuperscript{52} or “special”\textsuperscript{53} taxes, uniformity has traditionally been a guarantee that taxpayers will be treated reasonably when asked to make a financial contribution to the enhancement of the general welfare, not that taxpayers will receive individual benefits from general tax levies.

\textsuperscript{50} The goals of local taxation must meet the standards set in state constitutional public purpose clauses, that taxes be “levied and collected for public purposes only.” See, e.g., WASH. CONST. art. VII, § 1; see also ALASKA CONST. art. IX, § 6 (“No tax shall be levied . . . except for a public purpose”); N.C. CONST. art. V, § 2(1) (“the power of taxation shall be exercised . . . for public purposes only . . . .”); TEX. CONST. art. VIII, § 3 (“Taxes shall be levied and collected by general laws and for public purposes only.”).

\textsuperscript{51} See, e.g., Swanson v. State Dep’ t of Educ., 544 N.W.2d 333, 339 (Neb. 1996) (holding that having no children in school district is not a valid basis for exemption from school taxes); Davis v. County of Greenville, 443 S.E.2d 383, 386 (S.C. 1994) (rejecting city taxpayer’s claim that county unlawfully levied taxes within city to provide services outside of city but within county); Kendall, 820 P.2d at 503 (rejecting claim that uniformity clause guarantees that taxpayers will receive “equivalent cost benefit ratios” between tax and benefit).

\textsuperscript{52} The erosion of this dividing line has resulted in an increasingly dues-like benefit standard in judicial evaluation of some local taxation devices. For judicial evaluation of benefit taxes, see, e.g., Allegro Services Ltd. v. Metropolitan Pier & Exposition Authority, 665 N.E.2d 1246 (Ill. 1996); Geja’s Cafe v. Metropolitan Pier & Exposition Authority, 606 N.E.2d 1212, 1218 (Ill. 1992). The Illinois Supreme Court’s opinions repeatedly mention the degree of taxpayer benefit from the challenged taxes.

\textsuperscript{53} See, e.g., Leonard v. Thornburgh, 489 A.2d 1349, 1352 (Pa. 1985), where the court upheld a tax classification that distinguished residents from non-residents on the basis of its observation that these two groups receive different levels of local services in exchange for those services. To the extent that the courts incorporate a consideration of benefit into their analysis of the uniformity of the tax, the line between tax and dues becomes less clear. For a detailed discussion of benefit taxes and special taxes, see discussion infra Part II.D.5.
C. Dues vs. Taxes: How Does the Government Decide?

Though local government funding decisions undoubtedly rest on a variety of case-specific considerations, some generalizations are possible. At least ten factors may be important to a local government’s choice between dues and taxes in any situation.\(^{54}\) Prior to 1970, the primary considerations tended to derive from the first six factors listed below. Up until that time, local governments typically used a mixture of dues and taxes, but resorted to dues relatively infrequently.\(^ {55}\) Beyond the application of whatever legal restrictions were imposed on the use of dues, their popularity appears to have been limited by a broad community consensus that the cost of many government services should be borne equally by all taxpayers.\(^ {56}\)

Over the past thirty years, however, that attitude has changed and a number of additional considerations now factor into the government’s choice between dues and taxes, described in factors seven through ten. Though this compilation is undoubtedly neither complete nor predictive of every specific case, it encapsulates the major forces at work in most local government financing decisions. In any given situation, different factors may be in conflict; several may argue for adopting a dues technique, while several others push towards a taxing mechanism. The ultimate balance struck will depend on a community’s assessment of the competing factors and may result in a compromise between taxes and dues. For instance, the government may believe that user fees would properly reduce consumption of a scarce resource, but at the same time not want to allocate the resource solely on the ability to pay. In that case, the government may choose to subsidize usage by the poor or to establish income-sensitive sliding scales for fee rates.\(^ {57}\) Thus, the following discussion does not purport to be a predictive guide to the local government’s decision, but rather a suggestion

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54. In any particular case, of course, local government may choose to combine both dues and taxation techniques. For instance, the government may fund the necessary infrastructure from tax revenue and impose user fees to cover operating costs. See Colman, supra note 23, at 17. The factors listed here are likely to apply in the government’s determination of the overall allocation between the two devices.

55. Some dues techniques, specifically special assessments, have been used since colonial times. Althuler & Gómez-Ibáñez, supra note 23, at 17. Prior to 1970, however, the use of dues was limited because of the prevalent community attitude that when new infrastructure and services were needed, “government should simply adopt broad-based taxes and get on with the job.” Id. at 12. Dues techniques were used sparingly when the government concluded that “property owners, over and above paying normal taxes, should in some cases bear the cost of new infrastructure traceable to their activities.” Id. at 17.

56. See id. at 12.

57. See Colman, supra note 23, at 20 (noting that if a service provides a significant general community benefit, fees can be used so long as the low income segment of the community is protected, either with a sliding scale charge or total subsidization of the cost of service).
of a multiplicity of often competing considerations likely to be relevant to the ultimate choice of financing technique. What is noteworthy or unusual about the listing of factors is not that the range of important considerations has increased over the past three decades, but rather how the more recent factors so completely weigh in on the side of dues. Thus, in the early years of the twenty-first century, it is no surprise that dues are becoming the financing mechanism of choice for local governments.\footnote{Between 1957 and 1997, the increase in local government reliance on dues was quite marked. In 1957 approximately 80% of total local own-source revenues came from taxes, with only 20% derived from charges, assessments, and other fees; in 1997, those figures had changed to approximately 62% coming from local taxes and 38% from local government dues techniques. 1957 \textit{Census of Government Finances}, supra note 19, tbl.6; 1997 \textit{Census of Government Finances}, supra note 18, tbl.2; see also \textit{Altshuler & Gómez-Ibáñez}, supra note 23, at 18-33 (describing the increase in developer fees and the profound shift in community attitudes about growth that occurred during the 1970s). Moreover, the statistics do not tell the whole story. Most communities require, as a condition of development approval, extensive in-kind contributions by the developer, like streets, sidewalks, and other basic infrastructure. The value of these improvements does not show up in the computations of government revenue described above. \textit{Id.} at 17; see also discussion infra Part II.D.4. One study notes how user charges are no longer limited to big cities and a few traditional functions, like utilities, public transit, and parking. \textit{Colman}, supra note 23, at 6. Recently, many smaller municipalities have adopted dues techniques. \textit{Id.} Moreover, the range of services funded has expanded well beyond that original core, to include libraries, public health, fire protection, emergency rescue services, and special police protection, all of which were previously funded through general taxation revenues. \textit{See id.}}

1. Congruence Between Users and Tax Base

In general, the greater the congruence between user base and tax base, the greater the likelihood that taxation will be used to finance the government undertaking. Conversely, as the disparity between these two groups increases, it becomes more likely that the local government will resort to a dues technique. Lack of congruence may arise in one of two ways. First, it occurs if a government service is used by many individuals who are not subject to the local government’s taxation powers; for example, when non-residents avail themselves of city services\footnote{See, e.g., \textit{City of Texarkana v. Wiggins}, 246 S.W.2d 622, 628 (Tex. 1952) (finding city could properly charge nonresident users of municipally-owned water and sewer systems at higher rates provided city showed a reasonable basis for the difference); \textit{see also City of Philadelphia v. Kenny}, 369 A.2d 1343, 1353-54 (Pa. 1977) (stating that the Philadelphia Wage Tax withstands constitutional challenge by nonresident federal employees who work within the city and use services provided by the city); \textit{Platt v. Town of Torrey}, 949 P.2d 325, 332-33 (Utah 1997) (upholding higher charge to non-residents for use of municipal water system). Local government fees may also differentiate residents from non-residents. \textit{See LCM Enters. v. Town of Dartmouth}, 14 F.3d 675, 682-83 (1st Cir. 1994) (upholding harbor usage fees that distinguished resident from nonresident boaters).} or when the taxing jurisdiction has tax-exempt property within its borders.\footnote{Tax-exempt properties are generally not exempt from properly levied dues techniques.}
Second, lack of congruence occurs if a government service is provided to a well-defined and narrow subset of the government’s taxing population—for example, when the government offers adult education courses to its residents. In both cases, use of local tax dollars may be seen as unfairly providing a special benefit, and dues techniques may be an attractive way to recoup the costs of a service that is provided to a group that is not coterminous with the local government’s taxing territory.

2. General Welfare Concerns

Though local government decisions to provide infrastructure or services will undoubtedly be the result of a complicated balancing of many competing policy considerations, general social policy concerns are usually salient in the local government’s decision whether to use taxes or dues. Most fundamentally, if the service or infrastructure is deemed to provide an important benefit to the general welfare, dues will be an inappropriate revenue raising technique. This general welfare factor may come from an independent state constitutional clause—like a guarantee of free public schools—or an equal protection or due process

See, e.g., Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 184 (Fla. 1996) (holding religious organizations subject to stormwater management service assessment); Town of Winthrop v. Winthrop Housing Auth., 541 N.E.2d 582, 583-84 (Mass. App. Ct. 1989) (finding that public housing authority must pay annual sewer system fee); Sch. Dist. No. 1, Lewis and Clark County v. City of Helena, 287 P. 164, 166 (Mont. 1930) (holding a school district, though exempt from local property taxes, subject to assessment for streets and sewers); Kent County Water Auth. v. State (Dep’t of Health), 723 A.2d 1132, 1136-37 (R.I. 1999) (county government agency is subject to state fee for public water supply system); King County Fire Prot. Dist. 16, 36, & 40 v. Housing Auth., 872 P.2d 516, 524 (Wash. 1994) (finding local special district subject to county benefit charges for fire protection); City of Clarksburg v. Grandeotto, Inc., 513 S.E.2d 177, 182 (W. Va. 1998) (finding religious educational institution subject to municipal service fee for fire and flood protection).

61. See COLMAN, supra note 23, at 10.

62. Though taxation is generally a revenue raising device, numerous policy considerations factor into the decisions about classifications. See, e.g., Medlock v. Leathers, 842 S.W.2d 428, 431 (Ark. 1992) (finding government’s decision to tax cable television providers while exempting satellite providers from same tax reflects state’s policy determination to encourage satellite providers to enter rural areas). Thus, when the government decides to tax one use of property at a different rate than another, it has made a policy judgment about favoring one use over another, such as when it establishes preferential tax rates for homeowners or farmland. The point made in the text refers more narrowly to the principal policy factors relevant to the government’s choice between dues and taxes.

In general, though, commonly accepted values about the government’s obligation to provide essential services and deeply held convictions about the public benefit of those services will operate to restrain the zeal with which local government seeks to recoup the cost of some services from the user. In those cases, wealth or disposable income is seen as an unacceptable criterion for allocation of the service.

3. Efficiency and Conservation

An important consideration in the provision of local services may be the extent to which the government desires to limit consumption of resources. This may be based on: (1) general efficiency concerns about enhancing its ability to provide the best service at the lowest cost; (2) environmentally based goals to conserve resources and limit consumption; or (3) a more general aim to reduce the government’s need to expand its service capacity. If the cost of a service is directly related to usage, the government can reasonably expect to see greater self-imposed limits on consumption than would occur if the service were financed through general tax revenues and provided “free of charge” to the public. In theory, user charges and other dues devices should be more efficient than taxation techniques, because they guarantee that those who place the highest value on the service will be the ones to use it. Although the appropriateness of using market principles in the allocation of government services is subject

not violate the state constitution’s guarantee of free common schools because transportation is not an essential element of school activity).

64. See, e.g., Dep’t of Mental Hygiene v. Kirchner, 388 P.2d 720, 722-24 (Cal. 1964) (en banc), vacated on other grounds, 380 U.S. 194 (1965), aff’d on remand, 400 P.2d 312 (Cal. 1965) (en banc) (holding state requirement that parents pay cost of child’s involuntary confinement in state mental institution violates state equal protection guarantee, noting that “the purpose[s] of confinement and treatment or care . . . encompass the protection of society from the confined person”); Dep’t of Mental Hygiene v. Hawley, 379 P.2d 22, 28 (Cal. 1963).

65. See, e.g., State v. Medeiros, 973 P.2d 736, 745 (Haw. 1999) (invalidating use of service fee to recoup cost of prosecution, noting that “[e]ven assuming, arguendo, that a convicted person receives some benefit from his experience with the guiding hand of the law, clearly the principal purpose of the penal system is to benefit society, not those who break the law”).

66. Professor Frug refers to “admission to public schools or public parks” as examples of services that cannot be based on ability to pay, just as “voting rights, jury duty, and military service” are public commodities that cannot be sold to the highest bidder. See Frug, supra note 9, at 31; see also ALTSHULER & GÓMEZ-IBAÑEZ, supra note 23, at 113 (stating that societal consensus about the importance of services likely factors into choice between dues and taxes).

67. Conversely, of course, if the service is likely to be used by upper income users, tax financing may be unacceptable because it would result in subsidization of higher income groups by lower income taxpayers. See COLMAN, supra note 23, at iv.

68. Depending on the sophistication of the fee structure, user fees may both reduce overall consumption on an absolute basis and reallocate consumption by reducing congestion during peak usage periods. See id. at 6.
to considerable scholarly debate,\(^{69}\) use of a dues technique is likely to result in a lower level of consumption of a service or use of a government product than will occur if the government uses general tax revenues.

4. Local History

The way a local government has funded services in the past will have a bearing on the perceived fairness of its choice between taxation and dues.\(^{70}\) For instance, if the cost of new sidewalks has always been borne directly by the neighborhood property owners abutting the improvement, shifting to tax financing will likely be seen as unfair to the property owners who have paid for their own sidewalks in the past and who would now have to contribute to others’ sidewalks through general tax revenues. Conversely, if a particular public improvement has long been financed out of general tax revenues, a government decision to shift to some more narrowly targeted dues technique will raise the objection that the service user, who has paid for other users in the past through tax payments, is now unfairly being asked to bear a burden that the general community had previously assumed.\(^{71}\)

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69. That approach originated with the publication of Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956). Since that time, however, commentators have questioned whether local government services should be allocated according to market principles and whether it is accurate to say that those most able to pay for a service are necessarily the ones who give it the highest value. Some scholars reject the model of city-as-service-provider and contend that local governments should serve citizens’ need “to participate actively in the basic societal decisions that affect one’s life.” Gerald E. Frug, The City As a Legal Concept, 93 HARV. L. REV. 1059, 1068 (1980). As Professor Frug has noted, “[p]eople who live in unsafe neighborhoods or send their children to inadequate schools don’t do so because they have taste for them. . . . If they had a choice . . ., they would prefer better schools and less crime.” See Frug, supra note 9, at 31 (internal citations omitted). For a full critique of Tiebout’s analysis of local governments, see Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 COLUM. L. REV. 346, 399-435 (1990). For additional discussion of the localist debate, see Reynolds, supra note 2, at 100-19.

70. This factor is a “venerable one.” See Stephen Diamond, The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America, 12 J. LEGAL STUD. 201, 238 & n.163 (1983) (quoting documents from pre-Civil War New York and noting that “fairness required that the costs of the . . . improvement be imposed on abutting landowners, because that was how such improvements had been financed before”).

71. Although the court in Heavens v. King County Rural Library District, 404 P.2d 453, 454-55 (Wash. 1965), invalidated the use of dues to finance a public library on general policy grounds, the opinion did note that the challenged legislation authorized a shift from tax funding to a narrower, property-based fee. Although the inertia of local practice may be an important consideration, radical shifts in government financing patterns do occur. The enormous increase in locally imposed development fees and exactions, for instance, dramatically changed the way the costs of growth are allocated. See ALTSHULER & GÓMEZ-IBÁÑEZ, supra note 23, at 19-33, 123-25. Up until approximately 1970, the costs of growth were often borne by the community, with infrastructure funded out of general taxation revenues. See id. Since that time, the shift to dues
5. Potential for Specialization

Tax revenues are usually deposited into the general revenues fund, meaning they are not earmarked or collected with a commitment to allocate them to any particular use. A dues technique offers several possibilities for specialization not available when general purpose governments collect general-tax revenues. It may, for instance, allow the government to establish a separate, single purpose government unit, like a special district or public authority, whose powers are carefully limited to the provision of the service. Or it may simply provide a predictable revenue stream that can be explicitly earmarked to pay the costs of the service or infrastructure. Specialization may be particularly attractive, for instance, if the natural market for a service does not reflect the political boundaries of the taxing authority or if a protected revenue stream is needed to secure market financing.72

6. Political Incentives

At least two longstanding purely political incentives have been a factor in local government decisions about financing a new service or building a new infrastructure. First is the pressure not to redistribute that comes from high tax-paying members of the community.73 This incentive is particularly acute for local governments that rely extensively on the property tax revenue of businesses, which, in general, have high assessed values and low service needs. In this instance, the local government will undoubtedly feel pressure not to use tax financing for services unlikely to be seen as a benefit by the business property owner. Moreover, businesses may often use the threat of relocation to a local government with a lower tax rate to encourage less government reliance on general taxes.74

In addition, the realities of political representation will undoubtedly provide an incentive for local government to seek a way to impose costs techniques like fees has squarely placed the cost of growth on the developer, who ultimately passes that cost on to the home buyer. See id.72. See COLMAN, supra note 23, at 15-17; FOSTER, supra note 20, at 97, 107. But see Kent County Water Auth. v. State (Dep’t of Health), 723 A.2d 1132, 1136 (R.I. 1999) (stating that simply because funds are deposited into general treasury does not convert them into taxes).

73. See Briffault, supra note 69, at 408.

74. Id. at 407-09 (“Contemporary cities, as a rule, do not engage in innovative redistributive programs, not because they lack the legal authority, but rather because they fear that initiating such programs would cause residential and commercial taxpayers to depart.”); see also COLMAN, supra note 23, at 15 (noting that businesses oppose dues less than taxes and claiming that high tax rates have a substantial negative impact on the attractiveness of a community for businesses seeking to relocate). Professor Frug claims that this incentive has produced a municipal rush-to-the-bottom to entice businesses with greater tax breaks. See Frug, supra note 9, at 33-34.
on those who have no voice in its political process. Thus, proposals to charge outsiders or transients are unlikely to create as effective a public opposition as taxing residents who can use the political process to voice their displeasure with the actions of their local representatives. Whether this is merely a politically expedient way for a local government to raise additional revenue or whether it reasonably responds to the reality that the government needs to receive a contribution from those who use its services but are immune from most of its taxation powers depends, of course, on the eye of the beholder.

75. This point is related to, but distinct from, the issue of congruence discussed supra in the text and accompanying notes 57-59. It focuses more exclusively on the ways in which sheer political power may constitute an independent incentive for the government to over-charge those who have no political voice in their jurisdiction. Airport car rental taxes and hotel taxes are based on a reasoned decision that non-residents who rent cars in airports or stay in city hotels create more demand for services and are more likely an expedient choice of target.

76. California’s Proposition 13, adopted by voter initiative to severely limit the growth of property taxes for existing homeowners, illustrates the expediency of taxing outsiders. Upholding the sharp distinctions in tax burden between existing homeowners and new entrants in the market, the Court described the initiative as reflecting a “welcome stranger” attitude. See Nordlinger v. Hahn, 505 U.S. 1, 6 (1992). A local government may have very limited ability to impose taxes on non-residents who utilize its services. These limitations are discussed infra at note 79. For a discussion of the Supreme Court’s narrow standard for judging whether taxes discriminate against outsiders, see Daniel N. Shaviro, An Economic and Political Look at Federalism in Taxation, 90 Mich. L. Rev. 895, 948 (1992).


78. In some cases, residents’ own economic self-interest will be an adequate substitute for the non-residents’ interest. For instance, hotel owners’ opposition to a city hotel tax may guarantee that the local political process indirectly protects the non-residents. See Gillette, supra note 3, at 210; see also Kirk J. Stark, The Right to Vote on Taxes, 96 Nw. U. L. Rev. 191, 216-36 (2001) (describing how the incidence of local taxes may not be limited to those within the taxing jurisdiction’s territory).

79. Perhaps because of the perceived unfairness of taxing people with no political voice, many state laws impose strict limits on local governments’ abilities to tax the income of non-residents. For instance, in 1968, the California Legislature enacted Government Code section 50026, prohibiting local governments from taxing nonresident employees unless a resident employee is taxed at the same rate. See County of Alameda v. City & County of San Francisco, 97
7. Tax Limits

Since the 1970s, and originating in California with Proposition 13, a fairly large number of states have imposed stringent limits on their local governments’ ability to raise revenue. The restrictions are expressed in a number of ways: in some states, government taxing powers are limited to a particular dollar amount or percentage, and in others, no new taxes can be imposed without a super-majority vote of the legislature or vote of the taxpayers themselves. Despite the wide variation in the actual technique employed, the common underlying motivation of these taxpayer “revolts” is the rejection of the argument that limits in government spending should be achieved during legislative budgeting sessions. By putting the spending and taxation limits in state statutes and constitutions, the voters have tied the hands of politicians and implicitly asserted the inadequacy of political checks as the proper response to governmental financial excesses. Government’s response to the caps, however, has been characterized by increased creativity in looking for ways to raise revenue without taxing; in nearly all states, fees and other dues techniques are not subject to the tax caps. Predictably, local governments have resorted to

Cal. Rptr. 175, 179 (Cal. Ct. App. 1971). The California Court of Appeal questioned the legislature’s power to prohibit the city from exercising its inherent power of municipal taxation, but invalidated the practice nevertheless on the grounds that it denies non-residents equal protection of the law. Id. at 79-80; see also Igoe v. Pataki, 696 N.Y.S.2d 355, 362 (N.Y. Sup. Ct. 1999) (invalidating city commuter income tax); Leonard v. Thornburgh, 489 A.2d 1349, 1353 (Pa. 1985) (noting that the state legislature capped the nonresident wage tax rate to avoid abuse of unrepresented taxpayers).

80. See ALTSHULER & GÓMEZ-IBAÑEZ, supra note 23; COLMAN, supra note 23; Stark, supra note 78, at 197-206.

81. See, e.g., ALASKA STAT. § 29.45.080(b) (Michie 2001) (limiting the amount of revenue from the total municipal property tax to $1,500 per year for each person residing in its boundaries).

82. See, e.g., FLA. CONST. art. VII, § 9(b) (placing millage limits on ad valorem taxes at different rates for municipal, school, water management, and other special district purposes); MICH. CONST. art. IX, § 6 (limiting total amount of general ad valorem taxes imposed on real and tangible personal property in any one year to “15 mills on each dollar of the assessed valuation of property”).

83. See, e.g., LA. CONST. art. VII, § 2 (requiring two-thirds vote of legislature for the “levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption”).

84. See, e.g., CAL. CONST. art. XIIIa, § 4 (requiring two-thirds vote of the qualified electors of the district to impose special taxes); MO. CONST. art. X, § 22(a) (requiring voter approval of any local government adoption or increase of “tax, license or fees”).


86. See COLMAN, supra note 23, at 10.

87. California’s Proposition 218 is an exception to this general rule, requiring voter approval for charges or fees that are imposed upon a parcel of land or upon the owner as an incident of property ownership or for property-related service. See CAL. CONST. art. XIIID, § 6(c). Thus, a fee
a number of “non-tax taxes”\textsuperscript{88} to raise revenue without running afoul of the applicable restrictions on local taxation.

8. Financial Pressures

Although the total dollar amount of federal government aid to local governments has continued to rise, federal aid has steadily decreased when expressed as a percentage of total local government general revenue. In 1976, around the high-water mark of federal aid to local governments, federal grants constituted more than 8% of local government income;\textsuperscript{89} by 1997, that percentage had decreased to less than 4%.\textsuperscript{90} According to one study, in 1960 the federal government paid for one-half of the total investment nationwide in core infrastructure (including highways, transportation, water, and sewer); by the end of the 1980s, its share had decreased to one-sixth.\textsuperscript{91} Coupled with this declining federal support, over those same decades local governments saw a tremendous increase in the number and scope of externally imposed legal obligations, many mandating that local governments provide a service or improved infrastructure, but which did not provide funding to help pay for the improvements.\textsuperscript{92}

\textsuperscript{88} That term comes from a recently published casebook and was coined by Richard Briffault. \textit{See William D. Valente et al., Cases and Materials on State and Local Government Law} 540 (5th ed. 2001).

\textsuperscript{89} \textit{1977 Census of Government Finances, supra note 19, tbl.2.}

\textsuperscript{90} \textit{1997 Census of Government Finances, supra note 18, tbl.2.}

\textsuperscript{91} \textit{See Altschuler & Gómez-Ibáñez, supra note 23, at 128.}

\textsuperscript{92} \textit{See id. at 31-32, 63; see also, Pietro S. Nivola, Laws of the Landscape: How Policies Shape Cities in Europe and America 80 (1999) (showing the $150 billion gap between the cost to governments of implementing federal regulation and the amount of federal budget outlays to meet those costs). The costs of federal mandates are frequently recognized in the caselaw. See, e.g., Coalition Against Columbus Ctr. v. City of New York, 967 F.2d 764, 768 (2d Cir. 1992) (describing citizen suit maintained under the Clean Air Act to enforce city’s implementation plan to mitigate carbon monoxide pollution); Bolt v. City of Lansing, 587 N.W.2d 264, 266 (Mich. 1998) (describing federally imposed mandates under Clean Water Act and the National Pollutant Discharge Elimination Standards); Smith Chapel Baptist Church v. City of Durham, 517 S.E.2d 874, 876-77 (N.C. 1999) (describing federal mandates under the Water Quality Act, and noting the absence of federal funding to support the development of comprehensive storm-water management systems).}
At the same time, the internal backlog of demand for repair and upgrade to existing infrastructure to maintain the status quo increased at a rapid rate. This backlog can be traced to a shift in priorities in state and national policies that began in the mid 1960s—away from physical infrastructure, and instead favoring an increase in spending on social programs in the defense budget. Because high quality infrastructure can tolerate a fairly substantial amount of deterioration before a crisis arises, the country was able to tolerate the substantial decrease in infrastructure spending for nearly two decades. By the mid-1980s, however, numerous local governments were faced with infrastructure crises.

Of course, neither of these two financial pressures necessarily compels a government decision to use dues over taxes. Governments could have used general tax revenues to replace lost federal funds or to fulfill mandates from higher levels of government. When coupled with the growing prevalence of tax limits, however, the increasingly dramatic need for more revenues (coming from the local, state, and federal level) further pushes local governments to adopt more and more dues to fund new infrastructure.

9. Make Growth Pay Its Own Way

Before 1970, growth, development, and increased population were generally seen as a stimulus to economic improvement and an enhancement of overall local prosperity. As a result, it seemed fair and proper to use general tax revenues to fund the infrastructure requirements programs required under that act); Cloverdale Foods Co. v. City of Mandan, 364 N.W.2d 56, 58 (N.D. 1985) (describing federal environmental mandates requiring substantial improvement in sewer system).

Some states have constitutional reimbursement provisions to deal with the problems of unfunded state mandates on local governments, but these provisions have met with varying success in the courts. See, e.g., County of Los Angeles v. State, 729 P.2d 202, 203 (Cal. 1987) (concluding that the state is not required to fund costs associated with state laws increasing the amounts which local governments as employers must pay in workers’ compensation benefits); Town of Wells v. Town of Ogunquit, 775 A.2d 1174, 1176-77 (Me. 2001) (finding state’s revised school funding formula did not constitute an unfunded mandate since the state did not require the town to raise taxes or expand or modify its activities). But cf. Orr v. Edgar, 670 N.E.2d 1243, 1251 (Ill. App. Ct. 1996) (holding state-initiated two-tier system of voter registration constituted an unfunded state mandate); Durant v. State, 563 N.W.2d 646, 647 (Mich. 1997) (requiring state to pay its share of the necessary costs of special education services and activities as required by state law). For a discussion of the burdens placed on local governments by unfunded mandates and the history of legislative efforts to curb mandates, see VALENTE ET AL., supra note 88, at 246-47; Robert M. Shaffer, Comment, Unfunded State Mandates and Local Governments, 64 U. CIN. L. REV. 1057, 1065-74 (1996).

94. See id. at 26-31.
95. See id. at 1.
of new developments. Spreading the cost of growth across the entire community rested on the consensus that the entire community was the ultimate beneficiary of that growth. Starting with the 1970s, however, community attitudes shifted markedly; growth came to be seen as a deterrent, rather than a contributor, to a community’s high quality of life.\(^{96}\)

If growth imposes a cost on the community, the reasoning goes, it is only fair to assess the source of the growth with the costs it imposes. To single out those responsible for growth necessarily means that dues, rather than taxes, become the revenue raising mechanism for new development.\(^{97}\) Using a wide variety of subdivision regulations, impact fees, hook-up charges, and other targeted charges, communities have sought to offset what they perceive as the negative impact of unwanted development.\(^{98}\) Whether growth actually imposes unreimbursed costs on the community or whether the growth tends to pay for itself as a fully functional taxpaying component of the local government where it is located remains hotly contested.\(^{99}\) In any event, irrespective of whether local governments unfairly exact unwarranted costs from those who develop within their borders, the attitude that growth should pay its own way has spread, and local dues techniques have continued to multiply over the last three decades.

### 10. Judicial Leniency

Though much of the responsibility for the enormous increase in dues techniques must be placed at the doorstep of the local governments themselves, the state judiciary has often been willing to facilitate this profound shift in local government finance. In numerous judicial opinions,\(^{100}\) the courts have bent, stretched, or ignored the traditional

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96. See id. at 1-2.
97. See infra Part II.D.4, for a discussion of exactions and impact fees.
98. ALTSHULER \& GÓMEZ-IBÁÑEZ, supra note 23, at 2-4.
99. The empirical evidence seems ambiguous at best. See id. at 105-07. For one thing, it is difficult to separate out the causes of increased infrastructure and service demands. See id. Rises in the general community standard of living, deterioration of existing facilities, and lifestyle changes are but three ways enhanced-service demands may not be traceable exclusively to new development. See id. The authors conclude, however, that the level of anti-growth dues techniques currently in use far exceeds the real cost of growth’s impact on the community. See id. at 106. As a result, dues techniques have the regressive effect of transferring wealth from poor to rich and from old to young. See id.
100. Recent opinions written by the Supreme Courts of Iowa, Michigan, and Washington constitute exceptions to that trend, revealing a rather rare judicial willingness to resist local governments’ attempts to push the envelope of raising revenues through dues. See Home Builders Ass’n v. City of West Des Moines, 644 N.W.2d 339, 350 (Iowa 2002) (including park dedication fee as impermissible tax); City of Hawarden v. U.S. W. Communications, Inc., 590 N.W.2d 504, 505-06 (Iowa 1999) (holding city’s regulatory powers over public streets do not grant authority to
delineations between taxation and dues. For example, in some cases courts have weakened the requirement that dues provide a special benefit to the payer, authorizing the use of fees for general municipal services such as fire and flood protection. 101 Similarly, some courts have disregarded the voluntariness criterion that traditionally applied to some dues techniques and have upheld compulsory charges as permissible fees. 102 Segregation of revenues may no longer be a basic requirement for legitimate dues financing in some jurisdictions, 103 and the closely monitored connection between charges and the cost of providing services has weakened. 104 Dues, of course, are not generally subject to uniformity limits or state tax caps; thus, by categorizing charges that bear increasing similarity to taxes as fees or other non-tax charges, courts provide a convenient way for local governments to raise general revenues without having to worry about anti-tax strictures. 105

101. See, e.g., Knox v. City of Orland, 841 P.2d 144, 145 (Cal. 1992) (en banc) (affirming special assessment to residents of four school districts for maintenance of five existing public parks); Pennell v. City of San Jose, 721 P.2d 1111 (Cal. 1986) (en banc) (Mosk, J., dissenting) (criticizing majority’s willingness to let local government impose cost for public benefit on private parties); Dean v. Town of Addison, 534 S.E.2d 403, 408 (W. Va. 2000) (upholding user fees for provision of fire services); City of Clarksburg v. Grandeotto, 513 S.E.2d 177, 182 (W. Va. 1998) (Maynard, J., dissenting) (strenuously chiding the majority for allowing the local government to impose fees to recoup the costs of fire service, which he described as “a very basic and historical government service”).

102. See infra Part II.D.3; see also State v. Medeiros, 973 P.2d 736, 741-42 (Haw. 1999) (abandoning voluntariness requirement and surveying other jurisdictions where courts have reached similar results); Hochstedler v. St. Joseph County Solid Waste Mgmt. Dist., 770 N.E.2d 910, 916 (Ind. Ct. App. 2002) (upholding user fee for mandatory recycling); Rogers v. Okibbeha County Bd. of Supervisors, 749 So. 2d 966, 969 (Miss. 1999) (upholding garbage disposal fees assessed by county on residents who did not use the system).

103. See Kent County Water Auth. v. State (Dep’t of Health), 723 A.2d 1132, 1136 (R.I. 1999).

104. Though mathematical precision has never been a requirement, courts seem more willing to tolerate increases in general government revenues as an “ancillary consequence” of the fee system. See id. Similarly, in Mt. View Ltd. Partnership v. City of Clifton Forge, 504 S.E.2d 371, 376 (Va. 1998) the court rejected a challenge to a substantial increase in the local garbage collection fee, concluding that the $615,000 surplus it generated did not constitute an impermissible profit. Moreover, the court deferred to the city’s choice of accounting methodology and approved its decision to maintain a large surplus for future expenses. Id.

105. Undoubtedly, the courts’ increasing willingness to classify a revenue device as a permitted dues technique, rather than invalidate it as an impermissible tax, has been a tremendously powerful incentive for local governments. In some ways, perhaps, this judicial attitude can be understood as reflecting a reluctance to let local governments fall into financial crisis and, in a way,
D. Dues in Local Government Finance

Most local governments have a number of dues techniques at their disposal. Notwithstanding a fair amount of state specific variation, generalizations about their legal parameters and their impacts are fairly easy to draw. This Part describes the principal types of dues employed by local government and evaluates how their prevalence and scope have undergone substantial expansion over recent decades.

1. Special Assessments

Of longstanding vintage, the special assessment allows local governments to provide an improvement to some residents or property owners and then send them the bill for it. One authority traces its use back to seventeenth-century America, and others note the pre-colonial British origin of the practice. Early judicial opinions routinely upheld special assessments as deriving from government powers of taxation but not bound by state uniformity requirements. The rationale behind the practice is quite straightforward. In some instances, the government, or residents themselves, seeks to install or construct an improvement for which the benefitted group can be narrowly and precisely drawn. If, for instance, one neighborhood requires new sidewalks or if a group of property owners petitions for neighborhood street lights, the government may decide that using general tax revenues would unfairly single out one subset of the taxpaying population for preferential treatment. A special assessment allows the government to recoup the cost of some government projects directly from those who benefit, leaving general tax revenues to be spent for the community welfare.

As the special assessment became well established in local government law by the end of the nineteenth century, it was most commonly used to finance municipal street improvements for newly developed property. Once that community “entrance fee” was paid, to bring the assessed

saving the people from the results of their own self-imposed tax caps. See, e.g., Carman v. Alvord, 644 P.2d 192, 194 (Cal. 1982) (en banc) (refusing to apply Proposition 13 to ad valorem taxes or special assessments to pay interest and redemption charges on any indebtedness previously approved by voters); see also cases cited supra note 87.

106. See Altshuler & Gómez-Ibáñez, supra note 23, at 17.

107. See Reams v. City of Grand Junction, 676 P.2d 1189, 1193 (Colo. 1984) (en banc). One study, however, in providing an historical analysis of the practice, suggested that the claimed English origin of special assessments is dubious. See Diamond, supra note 70, at 203-10.

108. See, e.g., Burnett v. Mayor & Common Council of Sacramento, 12 Cal. 76, 82-83 (1859); Gould v. Mayor & City Council of Baltimore, 59 Md. 378, 380-81 (1883); Hill v. Higdon, 5 Ohio St. 243, 247-49 (1855); Weeks v. City of Milwaukee, 10 Wis. 242, 259-61 (1860).

109. See Diamond, supra note 70, at 238.
property’s infrastructure up to the norm of existing development in the municipality, general tax revenues took over as the standard source of funds for additional improvements. Thus, the special assessment was the nineteenth century’s original version of a “make growth pay its own way” technique. In the twenty-first century, however, where land development generally occurs in large subdivisions rather than on a lot by lot basis, local governments have adopted different dues techniques and more extensive infrastructure requirements as the current “entrance fee.” At the same time, though, the special assessment has retained its popularity as a local government financing technique; in fact, the scope of its use has increased tremendously.

In most jurisdictions, special assessments must satisfy two court-imposed criteria. First, they must provide a special benefit to the property assessed, which is typically interpreted to mean that the assessed property will be “benefited by the improvement over and above the ordinary benefit which the community in general derive from the expenditure of the money.” Second, the amount of the assessment imposed can be no greater than the value of that special benefit to the payer. Courts have consistently applied these standards to prohibit the use of special assessments when the improvement’s benefit redounded to the community as a whole rather than to individual landowners, and to restrain municipal zeal to impose on abutting landowners the full cost of improvements that also have a general community benefit.

110. See id. at 238-39.
111. See discussion infra Part II.D.4.
114. See, e.g., Rogers v. City of St. Paul, 22 Minn. 494, 508 (1876).
116. See, e.g., Collier County v. State, 733 So. 2d 1012, 1018 (Fla. 1999) (invalidating a special assessment charged to new properties to fund the same general services the County provided to all residents, including sheriff services, libraries, parks, elections services, public health services, and public works); Dixon Rd. Group v. City of Novi, 395 N.W.2d 211, 217 (Mich. 1986) (invalidating assessment that was 2.6 times greater than value of property enhancement); Quality Homes, Inc. v. Village of New Brighton, 183 N.W.2d 555, 559-60 (Minn. 1971) (invalidating a special assessment on properties immediately served by a trunk sewer that was designed to also serve non-assessed property).
Over the years, and with a few noteworthy exceptions,\textsuperscript{117} that two-part judicial test has remained constant. Yet the nature of the device itself has changed dramatically. Review of the modern case law suggests at least three major departures from its initially limited parameters. First, and most fundamentally, the special assessment is now used to finance a much wider variety of local government improvements and infrastructure. The expansion, however, was incremental and gradual. The first change occurred when municipalities began to use the assessment not only for the initial provision of the infrastructure, but again when the time came to resurface, remodel, or renovate the improvement. Thus, the special assessment changed from an “entrance fee” to an ongoing cost of community membership.\textsuperscript{118} The next step was to include in the assessment not only the cost of building the infrastructure, but also a charge for the service the infrastructure would provide. With that development, the special assessment underwent a double modification—it was no longer limited to physical infrastructure and no longer used exclusively for a one-time fixed charge.\textsuperscript{119} From there, it was but one more incremental step to the use of the special assessment as a means of financing the ongoing provision of public services, with no underlying infrastructure improvement attached. For instance, recent judicial opinions have upheld the use of the special assessments for funding fire protection services,\textsuperscript{120}

\textsuperscript{117} The Florida Supreme Court has significantly weakened the special benefit requirement, holding that although special assessments typically are imposed to benefit a specific area or class of property owners, “this does not mean that the cost of services can never be levied throughout a community as a whole.” Sarasota County v. Sarasota Church of Christ, Inc. 667 So. 2d 180, 183 (Fla. 1995). The dissent argued that this pronouncement “makes the distinction between a special assessment and a tax illusory.” Id. at 187 (Wells, J., dissenting); see also Harris v. Wilson, 693 So. 2d 945, 948 (Fla. 1997) (upholding special assessment on all unincorporated residential property in the county for solid waste disposal because, unlike other classes of property, the county was otherwise unable to adequately obtain payment).

\textsuperscript{118} The courts may have acquiesced to this change because they lacked a legal principal to overcome the apparent logic of the expansion. See Blount v. City of Janesville, 31 Wis. 648, 661 (1872) (“The conclusion is inevitable that if a special assessment can be made upon the adjoining lots for paving the street in the first instance, it can be made for repaving the street . . . .”).

\textsuperscript{119} See, e.g., Roberts v. City of Los Angeles, 61 P.2d 323, 328 (Cal. 1936) (“[T]here is no doubt that the furnishing of electric current comes within the classification of public improvements, in the same sense as does a permanent building or anything else of a permanent nature used in public utility construction.”); see also Reinken v. Fuehring, 30 N.E. 414, 416 (Ind. 1892) (upholding special assessment for the cost of street sweeping); Ankeny v. City of Spokane, 159 P. 806, 809 (Wash. 1916) (approving special assessment for provision of electric energy to street lamps).

storm water management services,121 maintenance of existing public parks,122 and general aesthetic improvements for a residential subdivision.123

Second, the method used by the government to compute the assessment has undergone major revision. Originally, the calculation of the assessed amount on each parcel required application of an individualized formula that approximated the presumed benefit accruing to the property.124 In many modern instances, in contrast, the special assessment is calculated using the property’s assessed valuation, which is, of course, the figure used for property tax purposes.125 Finally, courts have loosened limits on the ways government can define the territory subject to the assessment. While originally a special assessment could only be levied against a subset of the taxing body’s population,126 modern examples frequently involve assessments across the entire jurisdiction.127

121. See, e.g., Sarasota Church of Christ, Inc., 667 So. 2d at 182.
122. See, e.g., Knox v. City of Orland, 841 P.2d 144, 152 (Cal. 1992) (en banc) (“[M]aintenance of a physical improvement may operate to renew and preserve the special benefit attributable to the improvement.”).
123. See, e.g., City of Winter Springs v. State, 776 So. 2d 255, 257, 262 (Fla. 2001).
124. See, e.g., Mobil Oil Corp. v. Town of Westport, 438 A.2d 768, 772 (Conn. 1980) (stating that the formula used to apportion the cost of a parking facility calculated the “current assessed valuation of the subject property adjusted to take into account the proximity of the property to the parking facility and a factor reflecting the number of parking spaces needed by the property”); Schwarz Farm Corp. v. Bd. of Supervisors, 196 N.W.2d 571, 577 (Iowa 1972) (stating that the formula used to calculate the cost of improvements and repairs in a drainage district involved visiting each tract assessed to assign each fractional part a “‘wet factor’ and a “‘proximity factor’ based upon elevation and distance from the improvement involved”).
125. See, e.g., Sossoman v. Bd. of County Comm’rs, 630 P.2d 1154, 1159 (Kan. 1981) (holding “special assessment against the value of the land with improvements” is “within the power of the legislature”); Pub. Serv. Co., 675 P.2d at 142 (holding “apportionment of special assessment based on the assessed value is not impermissible”). But see Crittenton v. Reed, 932 S.W.2d 403, 405 (Mo. 1996) (en banc) (charge on lineal footage unrelated to actual cost of maintenance, repair, and improvements was not a special assessment, but rather general taxation).
126. See Diamond, supra note 70, at 201.
127. See, e.g., Harris v. Wilson, 693 So. 2d 945, 947 (Fla. 1997) (approving special assessment levied throughout the entire taxing district); Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 182 (Fla. 1995) (upholding special assessment imposed on all developed property throughout county); Sossoman, 630 P.2d at 1155 (approving special assessment levied on all real property in four sewer districts).

In many instances, the general purpose local government will form a sub-district solely for purposes of the assessment. See, e.g., S. Cal. Rapid Transit Dist. v. Bolen, 822 P.2d 875, 877-78 (Cal. 1992) (en banc) (creation of rapid transit district); Cloverdale Foods Co. v. City of Mandan, 364 N.W.2d 56, 57-58 (N.D. 1985) (creation of Sanitary Sewer Improvement District); Bellevue Plaza, Inc. v. City of Bellevue, 851 P.2d 662, 663 (Wash. 1993) (en banc) (Local Improvement District created for street and sidewalk improvements). Perhaps the most noted example of this practice is the increasing use of business improvement districts (BIDs), in which the government levies assessments against commercial properties for downtown services. These districts are discussed separately in Part II.D.2, infra.
Change and evolution in government financing practices are, of course, to be expected. What is notable about the evolution of the special assessment, however, is the apparent lack of a meaningful underlying policy rationale for the change. In nearly all cases, the wider use appears to reflect not an evolving consensus about the best way to finance local government improvements, but rather the strength of the post-1970 dues incentives discussed earlier.\(^\text{128}\) As the local governments continue to seek ways to fund improvements without running afoul of tax limitations, the lines between special assessment and tax will continue to be blurred. Currently, only the most attentive and sophisticated local government citizen will accurately distinguish taxes from this increasingly widespread special assessment technique.

A few dissenting state court justices have spoken out in opposition to local governments’ increasing reliance on special assessments.\(^\text{129}\) For the most part, they propose a tightening of the special benefit standard as an antidote to what they see as assessments run wild. Their concerns are well articulated: these few justices fear the use of assessments to fund “garden variety”\(^\text{130}\) community-wide services and system improvements, which were once the exclusive province of general tax revenues. As one court noted, refusing to expand the special benefit standard: “If everything is special, then nothing is special.”\(^\text{131}\) Though judges may have well-founded concerns about the expanded use of special assessments, the increasing

\(^{128}\) Courts frequently note the government’s incentive to resort to fees as a way around tax limitations. See, e.g., Horgan v. Dauphin Island Water & Sewer Auth., 409 So. 2d 1359, 1367 ( Ala. 1982) (finding levies for drainage improvements are special assessments, and therefore not subject to constitutional limitations on power to levy taxes on private associations); Knox v. City of Orland, 841 P.2d 144, 148 (Cal. 1992) (en banc) (holding levy for maintenance of existing parks is a special assessment and thus not subject to Proposition 13’s restriction on special taxes); 2nd Roc-Jersey Assocs. v. Town of Morristown, 731 A.2d 1, 11 (N.J. 1999) (finding levies to fund a Special Improvement District are special assessments and therefore not subject to state constitutional uniformity and exemption clauses).

\(^{129}\) See, e.g., Bloom v. City of Fort Collins, 784 P.2d 304, 313-14 (Colo. 1989) (en banc) (Lohr, J., dissenting) (“Road maintenance expenditures are traditional governmental expenditures that benefit the public at large. . . . The majority’s approach seems to allow any government service to be financed by a fee that bears some relationship to the benefit produced by the service.”); Harris, 693 So. 2d at 949 (Wells, J., dissenting) (“When there is nothing special about an ‘assessment,’ logic and common sense dictate that the assessment is a tax.”); Water Oak Mgmt. Corp. v. Lake County, 673 So. 2d 135, 137 & n.6 (Fla. Dist. Ct. App. 1996), quashed in part, 695 So. 2d 667 (Fla. 1997) (“[T]he improvements here have begun to speak in terms of benefit to a particular ‘class of property owners.’ If this change has substance, the implication for expansion of the use of special assessments is huge.”) (internal citation omitted); Zahner v. City of Perryville, 813 S.W.2d 855, 861 (Mo. 1991) (en banc) (Rendlen, J., dissenting) (“[T]he improvements here are by the city upon its own property for use by the public.”).

\(^{130}\) The term comes from Justice Wells’ dissenting opinion in Harris, 693 So. 2d at 950 (Wells, J., dissenting) (quoting Water Oak Mgmt. Corp., 673 So. 2d at 138).

\(^{131}\) Ventura Group Ventures, Inc. v. Ventura Port Dist., 16 P.3d 717, 727 (Cal. 2001).
breadth of the device fits quite well within the original parameters of the nineteenth-century definitions. It is of course undeniable that a wide variety of government expenditures more directly and specially benefit one subset of the community than another. In fact, it is hard to think of too many government services or infrastructure projects that do not provide a special benefit to some group.\textsuperscript{132} Although as a matter of logic, the extension of the definition of special benefit may be unassailable, the results for local government finance are profound. What used to be a device for providing a few basic capital improvements to a neighborhood as it entered the community has become a way of raising revenue for general local government services. This has occurred without much fanfare, perhaps because the change in standards, though extensive, has produced results that are neither spectacular nor monumental. Local governments have generally not used special assessments to fund sports stadiums, airports, or convention centers. Rather, in a more mundane relentlessness, the changes have been incremental and subtle, as governments turn increasingly to the use of dues to finance more and more of their basic infrastructure and services.

2. Business Improvement Districts (BIDs)\textsuperscript{133}

Municipalities and other general purpose local governments—counties, villages, and towns—are not the only local government units with wide-

\textsuperscript{132} Even those improvements that courts typically invalidate as special assessment funding, like libraries and convention centers, provide definable and quantifiable benefits to some subset of the taxing district’s total property. Thus, residences in walking distance of a public library might show a slight property value boost; similarly, commercial properties near a convention center are likely to enjoy enhanced business transactions because of the increase in traffic caused by the presence of the center. Perhaps it is more accurate to say that courts have not found an identifiable benefit in the library and convention center cases, but that the opinions reflect an unstated conclusion about the fairness or appropriateness of using a dues technique to provide important services that should benefit the broader community as well. See Ruel v. Rapid City, 167 N.W.2d 541, 546 (S.D. 1969) (finding special assessment for convention center funding is improper); Heavens v. King County Rural Library Dist., 404 P.2d 453, 458 (Wash. 1965) (en banc) (invalidating special assessment for library construction).

\textsuperscript{133} More broadly, this evaluation of BIDs is applicable to other municipally created, sub-local single purpose governmental units. See, for example, State Farm Mutual Automobile Insurance Co. v. City of Lakewood, 788 P.2d 808, 810 (Colo. 1990) (en banc), where the court evaluated the creation of a special district in a residential area, whose purpose was to provide services like “sanitation services, parks and recreational services, street improvements and traffic safety controls, and transportation services and facilities.” Because the district had general property taxing power, it does not specifically qualify as a dues technique. Nevertheless, the facts that the district consisted of one neighborhood of a municipality and that it was based upon a quid pro quo of the narrowly drawn relationship between tax and service, \textit{id.}, place this special district in the dues rather than tax category. Many special districts, in fact, even those that exercise only taxing authority, are properly seen as part of the dues phenomenon.
ranging revenue raising powers. Special districts and public authorities, which are typically single or limited purpose governments, are also authorized to engage in some money raising activities. Though many are limited to dues techniques like imposing special assessments, user fees, or other kinds of charges, some have the power to levy property, sales, or other types of taxes. Some special districts are regional in scope (thus encompassing the territory of various municipal governments), some are co-terminous with general purpose governments like a county or municipality, and still others comprise a subset of one of those units. BIDs fall into the last category. Along with other municipally created local improvement districts, the BID’s territory is carved out of the municipality in which it is located, generally for the purpose of stimulating economic revival for deteriorating central business areas.

Though they may be authorized to raise funds with both taxes and with dues, BIDs deserve special mention as an important phenomenon in local governments’ increasing reliance on dues. Irrespective of which label more accurately describes their revenue raising powers in any given case, BIDs are a clear reflection of the local government dues mentality. Indeed, their existence is expressly premised on the “get what you pay for” rationale—they charge a premium to one segment of their population in order to provide a type and level of service not available to those who only pay general taxes. Thus, BIDs allow central urban core business areas, neighborhoods, or other special sub-districts of the municipality, to

134. See supra notes 20-21.
135. For a general description of special districts and the many ways in which they vary from state to state, see Reynolds, supra note 2, at 137-49. See generally Foster, supra note 20, for analysis of the creation and financing of single purpose governments.
136. Similar entities include special service areas (SSAs) and redevelopment authorities. See, e.g., Grais v. City of Chicago, 601 N.E.2d 745, 747 (Ill. 1992) (special service area to fund new mass transit system); Downtown Rutland Special Tax Challengers v. City of Rutland, 617 A.2d 129, 130 (Vt. 1992) (special district for promotion of downtown area). Though the terminology may vary, the underlying concept is identical: They are sub-local government single purpose units created to provide supplemental services to particular districts, most usually downtown commercial areas.
137. See, e.g., Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 603 (Ct. App. 1992) (Downtown San Jose Business Improvement District); Jensen v. City & County of Denver, 806 P.2d 381, 383 (Colo. 1991) (en banc) (Colfax on the Hill Business Improvement District); Foote Clinic, Inc. v. City of Hastings, 580 N.W.2d 81, 82 (Neb. 1998) (Hastings Downtown Business Improvement District).
impose a charge on themselves and have the government collect the money, which the payers will then decide how to spend on themselves.

BIDs are typically formed by the owners of the property that comprise its territory filing a petition with the city council for approval.140 They are also created by direct city council action, but opportunity for owner protest141 ensures that BIDs will have the support of a majority of the owners in the district. Irrespective of statutory procedural requirements, BIDs are rarely, if ever, formed over the objection of a majority of the property owners.142 Once established, owners of the property within the BID usually elect their own directors, who in turn are responsible for implementing a budget and supervising the enterprise. Though state law again shows wide variation in the scope of regulatory powers they exercise and services they provide, BIDs are generally authorized to provide a fairly wide range of common services and infrastructure.143 While their revenue
downtown area, but also all those thought to benefit from the huge government investment in the renovation of Chicago’s McCormick Place convention facility); Village of Lake Barrington v. Hogan, 649 N.E.2d 1366, 1371 (Ill. App. Ct. 1995) (special service area in Lake Barrington Industrial Park); Spradlin v. City of Fulton, 924 S.W.2d 259, 261-62 (Mo. 1996) (en banc) (“neighborhood improvement district” consisting of a proposed golf course owned by a single entity).

140. See, e.g., State Farm Mut. Auto. Ins. Co., 788 P.2d at 812 (mandating that a petition to organize a special district must be submitted for approval by both a local governing body and the district court); Iverson v. City of North Platte, 500 N.W.2d 574, 577 (Neb. 1993) (“Under the petition method, a street improvement district be created if the owners of three-fourths of the property fronting the street petition for such improvement.”); City of Seattle v. Rogers Clothing For Men, Inc., 787 P.2d 39, 41 (Wash. 1990) (en banc) (stating that city may establish a business improvement area “after a petition is submitted by the businesses responsible for 60% of the assessments within the area”).

141. See, e.g., Evans, 4 Cal. Rptr. 2d at 602 (stating that while the City Council is authorized to establish a BID, the BID may not be established if the City Council receives written protest from businesses that would account for the majority of proposed charges); Serenko v. City of Wilton, 593 N.W.2d 368, 371 (N.D. 1999) (finding the City Commission authorized to establish an improvement district, but the project may not proceed if a majority of property owners in the district file written protest within thirty days); Pappas v. Richfield City, 962 P.2d 63, 65-66 (Utah 1998) (stating that while the City is authorized to create a service improvement district, statutes require the governing body to abandon the district if protests are filed comprising one half of the front footage to be assessed).


143. For instance, New York statutes authorize legislative bodies to make physical improvements to enhance the business climate in BIDs and to provide enhanced security and sanitation services. See N.Y. GEN. MUN. LAW § 980-C (McKinney 2003). The Grand Central BID was authorized to construct improvements that included “the renovation of sidewalks and crosswalks; the planting of trees; the installation of new lighting, street signs, bus shelters, news kiosks, and trash receptacles; contributions to the renovation of Grand Central Terminal; and ‘the creation of a restaurant . . . .’” See Kessler v. Grand Cent. Dist. Mgmt. Ass’n, 158 F.3d 92, 95 (2d Cir. 1998). The BID was also authorized to provide “any services required for the enjoyment and
raising powers may fit within well-established categories of local taxation or dues techniques, in some cases the lines are so blurred as to make categorization difficult. Though BIDs are used by a large number of municipalities and their popularity appears to be growing, the case law contains only a handful of reported judicial decisions regarding BIDs. In most of the cases, the courts upheld the legality of the BID, rejecting challenges based on the one person, one vote doctrine, uniformity of taxation, the Takings Clause, the Equal Protection Clause, and a variety of state statutory arguments.

As both Judge Jack Weinstein and Professor Richard Briffault have observed, BIDs pose a number of difficult questions about accountability, equality, and fairness in local government. For one thing, the typical BID structure does not correspond to one person, one vote principles. As a result, it creates the potential for unchecked intra-BID disparity in treatment and runs counter to well-established notions about democratic protection of the public,” including “security[,] . . . sanitation[,] . . . special maintenance and repair[,] . . . public events[,] . . . [and] retail improvements.” Id.

144. See, e.g., Grais v. City of Chicago, 601 N.E.2d 745, 755 (Ill. 1992); Jarvill v. City of Eugene, 613 P.2d 1 (Or. 1980) (en banc). The courts in both cases rejected uniformity challenges, concluding that the districts were based on reasonable classifications.

145. See, e.g., Evans, 4 Cal. Rptr. 2d at 607 & n.6 (finding that BID assessment is “not a true special assessment” despite its legislative designation, “in light of the realities underlying its adoption and the probable object and effect . . . to avoid the sweep of Proposition 13”); see also Kessler, 158 F.3d at 94. (recognizing that because only nonexempt properties were assessed for the BID, the assessment was much more like a tax). Professor Briffault has described the ways BIDs combine elements of the financing technique of the special assessment and the physicality of a special district’s territory. See Briffault, supra note 142, at 414-20.

146. See Briffault, supra note 142, at 366-67, for a description of how BIDs are used.

147. Cf. Downtown Rutland Special Tax Challengers v. City of Rutland, 617 A.2d 129, 131 (Vt. 1992) (invalidating only one of the redevelopment authority’s special assessments because of procedural deficiencies).

148. See Kessler, 158 F.3d at 97-100; Grais, 601 N.E.2d at 754; 2nd Roc-Jersey Assocs. v. Town of Morristown, 731 A.2d 1, 9-10 (N.J. 1999); Jarvill, 613 P.2d at 14-15.

149. See 2nd Roc-Jersey Assocs., 731 A.2d at 5-10.

150. See id. at 11-12.


152. See Grais, 601 N.E.2d at 756-58 (rejecting statutory challenges alleging map and notice deficiencies); Rogers Clothing For Men, Inc., 787 P.2d at 43-46 (rejecting an argument that the city exceeded its authority granted by the enabling statute and a challenge based on the statutory requirement that property be benefitted to be subject to special assessment). But see Bellevue Plaza, Inc. v. City of Bellevue, 851 P.2d 662, 673 (Wash. 1993) (en banc) (rejecting an assessment based on a statutory provision that calls for nullification of an assessment adopted on a “fundamentally wrong basis” and another provision requiring that all properties within an LID be assessed the same percentage of the special benefits they receive).

153. See Kessler, 153 F.3d at 128-32 (Weinstein, J., dissenting); see also Briffault, supra note 142, at 373.
representation at the local level. Moreover, its very existence establishes unequal levels of service across the municipality; only those who are willing to pay extra are entitled to the “supplemental” services that BIDs provide. BID supporters note that the results are instrumental in the revival of urban business areas, that BIDs may in some ways stem the exodus of downtown businesses to suburban locations, and that the overall percentage of local revenues BIDs control is still very small. Nevertheless, the broader systemic implications of the phenomenon are troubling. First, BIDs’ use of special assessments has helped to cement the complete transformation of the special assessment itself. Released from the longstanding limitations described in the previous Part, the BID funds services for developed property in established areas, frequently levies assessments by using the ad valorem property tax method, is self-administered, and has shifted its goal away from major infrastructure construction to a more general enhancement of the neighborhood’s ambiance. By contributing to the erosion of traditional limits on special assessments, BIDs have facilitated local government implementation of the dues mentality. In fact, residents find BIDs attractive precisely because “every penny collected for the BID goes back into the BID.”

154. See Kessler, 158 F.3d at 121-31 (Weinstein, J., dissenting). Judge Weinstein noted that while the BID provided a wide range of governmental services affecting the residents in the BID, the voting scheme excluded most residents from meaningful participation in the GCDMA. Id. Criticizing the scheme’s exclusion of non-property owners, Judge Weinstein added that “[t]he possibility that property owners may contribute more to the municipal coffers than tenants does not entitle the property owners to a greater electoral voice in the governance of the district which directly affects the lives of so many residents.” Id. at 127.

155. Problems with intra-local inequality are especially likely to arise, or be perceived, when BID funds are used to enhance services already provided by the municipality. It may be difficult to determine whether BIDs affect the level of services funded from the general budget, but cities “may be able to stretch scarce resources by quietly cutting back on trash pickups or street cleaning in an area if it knows that a BID exists to pick up the slack.” Briffault, supra note 142, at 400-01. In other cases, districts may receive enhanced service above that actually paid for by the BID. Id. at 401.

156. See id. at 465; see also id. at 425-29 (discussing the “effort of urban downtowns to meet the challenge posed by their great nemesis—the suburban shopping mall”).

157. BIDs are considered self-financing—i.e., they usually rely on assessments imposed on property or businesses in the district. Id. at 391-92. Generally, assessments range less than 10% of local property taxes. Id. at 390. Some BIDs receive appropriations from their city or county’s general government funds, which typically amounts to less than 10% of the BID’s revenue, although some districts receive more. Id. at 392.

158. See discussion supra Part II.D.1.

159. See Briffault, supra note 142, at 369.

160. See id.

161. See id. at 372.

162. See id. at 421-22, 424.

163. See id. at 370 & n.12 (quoting a prominent BID supporter).
Second, by imposing on downtown the costs of its own rejuvenation and revival, BIDs exempt other segments of the community from participation in this important project with its widespread community benefits. Presumably, all residents and all nonresident visitors benefit from the presence of a more vibrant, attractive, and safe central business district. The quid pro quo underlying the BID’s creation, however, implies that both the responsibility for downtown decline and the benefits of its elimination can be narrowly tied to one small subset of the community. Somewhat perversely, then, the BID releases from responsibility many others who have benefitted from downtown decay and the broader community that would benefit from its revitalization. Finally, BIDs may have a significant anti-regional impact on the distribution of resources across the metropolitan areas. By capturing revenues at a sub-local level for sub-local purposes, they exclude funds from the broader revenue distribution process. It is not apparent that any level above the sub-local BID territory would ever choose to distribute government revenues by singling out the BID properties for special treatment. That debate will never occur, however, so long as sub-local districts can use government power to charge themselves and use the money to improve their own areas. Those who champion regionalization should consider whether the subdivision of general purpose governments into ever more narrowly drawn districts can be consistent with their calls for more equitable distribution of metropolitan area wealth.

3. User Fees and Regulatory Fees

Fees have long been a part of local government finance. As a general matter, they fall into two categories: user fees or regulatory fees. User fees consist of charges levied by the government in exchange for citizen use of government services or property. Regulatory fees, which include licensing and inspection fees, are based more broadly on the government’s police powers and are imposed on a regulated individual, entity, property, or business in order to offset the cost of the regulation. As is the case for


165. A third category of fees, commonly known as “impact fees,” is included in the later discussion of development exactions. See discussion infra Part II.D.4.


167. See id. at 353-54. Regulatory fees seem to have originated with the concept of licensing and inspection fees. In Sprout, 277 U.S. at 169, the Court described how licensing fees are based on the government’s regulatory powers as an appropriate means of “insuring the public safety and
the other dues techniques described in this Part, the breadth and frequency of local fees have increased substantially since their early days. From typical nineteenth-century user fees for publicly owned facilities and licensing fees for the privilege of operating a business within city borders, the parameters have expanded enormously. Recently, user fees have been extended to levy charges for the residential use of local streets or fire and flood protection. Similarly, regulatory fees have been imposed on an increasing number of activities—for example, on apartment owners to fund a rent control mediation system and on paint producers to promote a broad governmental effort to treat and prevent lead poisoning.

The classification of fees is more than an academic exercise. For one thing, some single purpose local government units have no taxing power and are only authorized to raise revenue through fees. In other contexts, the distinction between fees and taxes is crucial because the local government’s taxation power is strictly limited or requires additional layers of voter approval, whereas fees can be imposed directly by the local government itself. Sometimes the state taxation principle of uniformity is key: though a particular charge would be invalid as a non-uniform tax, the fee label makes uniformity irrelevant. Other times—whether for purposes of determining the scope of another entity’s convenience, so long as the fee is “no larger in amount than is reasonably required to defray the expense of administering the regulations.” Inspection fees similarly emanate from the state’s police power and can be imposed “to defray the expense incident to the inspection.” Id.


172. Pennell v. City of San Jose, 721 P.2d 1111, 1118 n.10 (Cal. 1986) (en banc).


175. In Washington, for instance, property taxes may not exceed one percent of the property’s value. WASH. CONST. art. VII, § 2.

176. See, e.g., Kern County Farm Bureau v. County of Kern, 23 Cal. Rptr. 2d 910, 914, 917 (Cal. Ct. App. 1993) (holding local landfill charges as legitimate fees and thus exempt from Proposition 13’s requirement that all “‘special taxes’” be approved by a two-thirds vote of the electors).

177. See, e.g., Covell v. City of Seattle, 905 P.2d 324, 326 (Wash. 1995) (en banc).
exemption from the charge,\textsuperscript{178} or for determining the applicability of federal statutes—\textsuperscript{179}—the distinction is also crucial.\textsuperscript{180} For all of these issues, the breadth of judicial interpretation of fees will have a profound impact on the extent to which a local government can continue to raise revenue in the face of strict external restrictions on its taxation powers.\textsuperscript{181}

As a legal matter, courts have traditionally identified three requirements for valid fees. First, the party being charged must benefit from the governmental service being funded or the regulatory program being implemented.\textsuperscript{182} Second, fees are voluntary.\textsuperscript{183} And third, the charges must correspond to the cost of the governmental activity being funded rather than reflect a general government desire to raise revenue.\textsuperscript{184} Although each of these criteria has been expanded, rejected, or restricted by some state


\textsuperscript{179} See, e.g., Folio v. City of Clarksburg, 134 F.3d 1211, 1214-17 (4th Cir. 1998) (holding that local fee for municipal services constitutes a tax for purposes of federal Tax Injunction Act, thus barring federal court jurisdiction over the challenge); cf. San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n, 967 F.2d 683, 684-85 (1st Cir. 1992) (deeming a 3% periodic charge on gross revenue a fee, thus exempting it from federal Butler Act, a statute similar to the Tax Injunction Act).

\textsuperscript{180} Much less frequently, the distinction between fees and special assessments will be dispositive. For instance, in some state statutory schemes, government property is exempt from taxes and special assessments, but subject to fees. See Town of Winthrop v. Winthrop Hous. Auth., 541 N.E.2d 582, 583 (Mass. App. Ct. 1989) (applying MASS. GEN. LAWS ch. 121B § 16 (1989)).

\textsuperscript{181} Sometimes even more definitional splicing is required than a simple fee-versus-tax distinction. In other words, state law may only apply to some kinds of fees. For instance, California’s recently adopted Proposition 218 requires voter approval of any fee, defined as “any levy . . . imposed . . . as an incident of property ownership, including a user fee or charge for a property-related service.” CAL. CONST. art. XIIID, § 2(e). In Apartment Ass’n of Los Angeles County, Inc. v. City of Los Angeles, 14 P.3d 930, 933-35 (Cal. 2001), the court held that a fee on residential rental property, adopted to fund a program for removal of substandard housing, was not subject to the voter requirement. The court concluded that the fee was not imposed on the property owner as an incident of property ownership, but rather on the property owner as a participant in the business of rental housing. Id. at 935.

Similarly, the Hancock Amendment to the Missouri Constitution requires voter approval of a levy or increase in “any tax, license or fees,” MO. CONST. art. X, § 22. In Keller v. Marion County Ambulance Dist., 820 S.W.2d 301, 303 (Mo. 1991), the court announced that not all fees are “fees” for purposes of the Hancock Amendment. Thus, Missouri courts must apply the Keller test to determine which fees are exempt from the scope of the voter approval requirement. Id. at 304 n.10. For a description of the courts’ attempts to apply that test, see generally Joanne L. Graham, Comment, Toward a Workable Definition of “Tax, License or Fees”: Local Governments in Missouri and the Hancock Amendment, 62 UMKC L. REV. 821 (1994).

\textsuperscript{182} See, e.g., Emerson Coll. v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984).

\textsuperscript{183} Id.

\textsuperscript{184} Id.
court opinions, in their totality they outline the general parameters within which fees are analyzed by state judiciaries.\textsuperscript{185}

Although the benefit criterion is remarkably similar to one of the requirements typically used in the judicial analysis of special assessments, the breadth of the government activity to which it applies creates an even larger potential scope in the context of fees.\textsuperscript{186} If fees may be levied to recoup the cost of a government service or to pay for the implementation of a governmental regulatory program, it is not clear that much local government activity falls beyond the reach of fees. After all, what does local government do besides provide services and regulate activity? Moreover, because the range of permissible local government regulation has increased substantially with the abolition of Dillon’s Rule\textsuperscript{187} and the narrow limits it imposed on local government activity, the potential targets of government fees are further increased.\textsuperscript{188}

\begin{footnotesize}
\begin{enumerate}
\item[185.] See generally 16 M\textsc{c}Q\textsc{u}llan, supra note 22, § 44.62.20.
\item[186.] In fact, in at least one state, the court interpreted applicable state statutes as requiring only a general benefit for local fees; the local police power was deemed broad enough to uphold the imposition of fees without a showing of special benefit. See Morse v. Wise, 226 P.2d 214, 216 (Wash. 1951) (upholding fee for sewer system, even though the complaining fee-payers established that the sewer system would benefit only new users, because court concluded that no benefit was legally required); accord Teter v. Clark County, 704 P.2d 1171, 1176 (Wash. 1985) (en banc).
\item[187.] Dillon’s Rule, articulated in the late nineteenth century by Chief Justice John F. Dillon of the Iowa Supreme Court, provides:

\begin{quote}
[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.
\end{quote}

\begin{footnotesize}Merriam v. Moody’s Ex’r, 25 Iowa 163, 170 (1868). Under the Rule, state courts have held, for example, that cities have no authority to adopt ordinances not “necessarily related” or “reasonably necessary” to effectuate the purpose of state enabling statutes. See, e.g., Early Estates, Inc. v. Hous. Bd. of Review, 174 A.2d 117, 119 (R.I. 1961) (invalidating an ordinance requiring installation of hot water in all kitchens and bathrooms under a state law authorizing the city to adopt an ordinance for minimum standards for dwellings); Arlington County v. White, 528 S.E.2d 706, 712-13 (Va. 2000) (invalidating a city’s action extending coverage under its self-funded health insurance plan to unmarried domestic partners of employees, despite specific authorization by the General Assembly for a local government to provide health benefit programs).
\item[188.] See, e.g., Creedmor Maha Water Supply Corp. v. Barton Springs-Edwards Aquifer Conservation Dist., 784 S.W.2d 79, 82 (Tex. Ct. App. 1989) (finding special district has statutory authority to “provide for the conservation, preservation, protection, recharging, and prevention of waste of the underground water . . . [and] to control subsidence caused by withdrawal of water” (quoting Tex. W\textsc{a}ter C\textsc{o}de A\textsc{n}n. § 52.021 (Vernon 1989) (repealed 1995))).
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As applied to user fees, the benefit criterion is fairly straightforward, though capable of the same broad interpretation it has received in the courts’ special assessments analyses. Any challenge to a user fee’s benefit will depend on whether the government can show either that the fee payer directly uses the services being funded by the fee or that the government service or product enhances the fee-payer’s ability to enjoy a higher standard or quality of service within the community.\(^\text{189}\)

As the benefits become more generalized and less direct, courts become less willing to uphold the fees.\(^\text{190}\) With regulatory fees, however, the analysis becomes a bit more complicated. In many cases, the government will impose a regulatory fee in order to recoup the benefit the fee payer derives from governmental regulation, like when an owner pays a fee for participation in the development’s permit approval process. In other cases, though, the fee is imposed not to recoup the value of a government granted benefit, but to offset the burden imposed by the activity subject to the fee.\(^\text{191}\) In that case, the fee will be upheld if it is levied in “reasonable relationship to the social or economic ‘burdens’ that [the fee-payer’s] operations generated.”\(^\text{192}\)

Thus, at least in the context of regulatory fees, the relationship between fee and fee-payer has been expanded well beyond its original requirement that the fee-payer receive a direct benefit from the operation funded by the fee. “[A] causal connection or nexus,”\(^\text{193}\) however, is still required.\(^\text{194}\)

\(^{189}\) See, for example, Alamo Rent-A-Car, Inc. v. Board of Supervisors, 272 Cal. Rptr. 19, 20, 25-26 (Ct. App. 1990), where the court ordered the trial court to reconsider a 9% off-airport car rental fee, which had been assessed on all rentals made by off-airport firms to airport customers. The fee would be valid, the court concluded, if the lower court determined that the fee constituted a “‘fair and reasonable’ approximation of the overall commercial benefit each [rental company] derives from its exploitation of the presence of the Airport.” For a similarly broad definition of benefit, see Helmerick Drive-It-Yourself, Inc. v. Erie Municipal Airport Authority, 612 A.2d 562, 565 (Pa. Commw. Ct. 1989).

\(^{190}\) See, e.g., Samis Land Co. v. City of Soap Lake, 23 P.3d 477, 485 (Wash. 2001) (en banc) (stating that if there is no “‘direct relationship’” between the fee charged and either a service received by fee-payers or a burden to which they contribute, then “the charge is probably a tax in fee’s clothing”); see also State v. City of Port Orange, 650 So. 2d 1, 3-4 (Fla. 1994) (invalidating a user fee to finance local roads where the ordinance did not require that roads be in close proximity to property charged or provide a special benefit different from that provided to the community as a whole); Bolt v. City of Lansing, 587 N.W.2d 264, 271 (Mich. 1998) (“Lack of correspondence between the charges and the benefit conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public.”).

\(^{191}\) See cases cited supra note 40.


\(^{193}\) Id. at 1356.

\(^{194}\) If a service is designed to benefit society generally, fees cannot be used to recoup the cost of the regulatory program. See, e.g., State v. Medeiros, 973 P.2d 736, 745 (Haw. 1999) (invalidating service fee to cover cost of prosecution, noting that the public at large is the primary beneficiary of the justice system); Samis Land Co., 23 P.3d at 485-87 (invalidating standby sewer
Voluntariness, the second fee criterion, reflects the origin of government fees as payments by those who willingly consumed or used services or products provided by the government. Though some courts have tried to massage the voluntariness standard as applied to regulatory fees, concluding that the payer has voluntarily undertaken the activity being assessed by the fee, the definition is stretched to its logical limits when the court concludes that a fee is voluntary because the individual complainant can avoid the fee by ceasing to engage in the activity being assessed.\textsuperscript{195} By that reasoning, many taxes are likewise voluntary—to avoid income taxes, a taxpayer need only stop earning income. Other courts have simply abandoned the voluntariness criterion, noting how it has gradually faded from the judicial analysis and recognizing the relentless increase of mandatory user fees across the country.\textsuperscript{196} For some courts, though, the voluntariness criterion remains an important mechanism for restricting governmental enthusiasm for fees.\textsuperscript{197}

The third criterion requires courts to determine whether the primary purpose of the challenged charge is to raise revenue, therefore invalidating the fee as an impermissible tax.\textsuperscript{198} In contrast, if the charge is limited to recovering the cost of the government activity for which it is levied, the fee is proper.\textsuperscript{199} As with the other criteria, the distinction is by no means clear cut. All fees raise revenue; in fact, local governments strapped for cash frequently adopt fees to fund projects or provide services that were previously paid for by tax revenues. One North Carolina case, for instance, described how the city hired an accounting firm to identify the cost of regulatory services and to recommend possible fees, presumably to shift the revenue source from tax to fee.\textsuperscript{200} As a result of the study, twenty-two

\textsuperscript{195}. See, e.g., Kern County Farm Bureau v. County of Kern, 23 Cal. Rptr. 2d 910, 916 (Ct. App. 1993) (noting that property owners can avoid landfill charges by deciding not to use their property for agricultural purposes, but ultimately rejecting the voluntariness criterion).

\textsuperscript{196}. See, e.g., Bloom v. City of Fort Collins, 784 P.2d 304, 304-05 (Colo. 1989) (en banc) (approving mandatory transportation utility fee); Medeiros, 973 P.2d at 741-42 (summarizing the declining importance of voluntariness in fees in many state courts); Hochstedler v. St. Joseph County Solid Waste Mgmt. Dist., 770 N.E.2d 910, 916 (Ind. Ct. App. 2002) (approving mandatory recycling charge as a permissible fee); Rogers v. Oktibbeha County Bd. of Supervisors, 749 So. 2d 966, 967 (Miss. 1999) (upholding mandatory garbage disposal fee on residents who did not use county’s disposal system).

\textsuperscript{197}. See Bloom, 784 P.2d at 313 (Lohr, J., dissenting) (“The voluntariness distinction between taxes and fees remains relevant when determining whether a charge must meet additional requirements of a tax that do not apply to fees, such as the uniformity requirement.”); Bolt v. City of Lansing, 587 N.W.2d 264, 272 (Mich. 1998).

\textsuperscript{198}. See Covell v. City of Seattle, 905 P.2d 324, 327 (Wash. 1995) (en banc).

\textsuperscript{199}. Id.

\textsuperscript{200}. Homebuilders Ass’n of Charlotte, Inc. v. City of Charlotte, 442 S.E.2d 45, 47-48 (N.C.)
new fees were imposed, for instance, a driveway permit review fee and an erosion control review fee. Though the court upheld the fees, other courts have been less approving of fees that they characterize as blatant attempts to generate revenue in the face of anti-tax limitations.

Though many courts have more or less refused to restrain local government fee practices, some have identified workable criteria that are based, implicitly if not explicitly, on the requirement that fees cannot be adopted for the purpose of raising revenue. In fact, several principled objective indicators appear in the case law. First, the revenues derived from fees cannot greatly exceed the costs incurred for the provision of the service or implementation of the regulation; the fee must constitute “a fair and reasonable approximation of the benefit.” It is the value of the service rendered, and not the value of the benefit to the fee payer, that must be used in the computation of the fee. On that basis, a New Jersey court invalidated a sheriff’s execution levy fee that imposed a $275,000 cost for ten hours of service provided during a foreclosure sale. The second objective limit, borrowed perhaps from judicially created definitions of special assessments, requires local governments to carefully segregate fee revenues and spend the proceeds solely on the endeavor assessed for the fee. Finally, courts may invalidate user fees if the method of calculating the fee bears no reasonable relationship to the fee-payer’s use of the government service or property. In their totality, these criteria provide at least some objective principles for limiting the ways a local government can use its fee-raising powers.

Undoubtedly, the proliferation of fees is in large part motivated by local governments’ perceived need to generate revenue in the face of strict taxation limits. The judicial response to that reality is by no means uniform. Some courts have strictly construed the anti-tax measures,
resulting in generous and deferential interpretations of attempts to raise local revenue. In this approach, the courts appear sympathetic to the government’s plight and supportive of the perceived importance of the governmental purposes being funded by the revenues.\footnote{See, e.g., City & County of San Francisco v. Farrell, 648 P.2d 935, 937-38 (Cal. 1982) (declaring that the tax limitations contained in Proposition 13 should be strictly construed “so as to limit the measures to which the two-thirds [voter approval] requirement applies”). One lower California court, commenting on the strict judicial approach, explained that the state’s anti-tax initiatives were intended only to safeguard the voters themselves from taxes. Cal. Bldg. Indus. Ass’n v. Governing Bd., 253 Cal. Rptr. 497, 511 (Ct. App. 1988). Thus, the courts should be more willing to uphold charges levied on others. Id. In that view, the anti-tax sentiment is better defined as: anti-tax for me but pro-tax for you. Id.}

For other courts, the underlying tax evasion motive is seen as a somewhat disingenuous governmental practice—an end run around clearly articulated anti-tax sentiments. The result is a heightened judicial scrutiny and invalidation of many attempts to levy non-tax fees.\footnote{The history of Proposition 13 and anti-tax initiatives in California reveals an ongoing battle between the courts and the voters, producing new rounds of anti-tax initiatives. Most recently, California voters, who were explicitly frustrated with the courts’ unwillingness to interpret the anti-tax initiative broadly, adopted Proposition 218, which extended the voter approval requirement to enforce such initiatives.} Though judicial attitudes undoubtedly have a substantial impact on shaping the course of local finance, the two judicial approaches described above may be counter-productive and produce unintended responses.

On the one hand, extensive judicial deference to local governments’ attempts to raise revenues in the face of strict anti-tax limits may merely provoke additional anti-tax measures in response. The result may be an ongoing battle between the judiciary and the voters. The California experience is a good example. The California courts’ narrow interpretation of the voters’ anti-tax initiatives has encouraged at least two further anti-tax limitations.\footnote{In contrast, other state courts have upheld fees for infrastructure. See, e.g., Smith Chapel Baptist Church v. City of Durham, 517 S.E.2d 874, 879 (N.C. 1999) (holding statute authorizes city to levy storm water fee “solely for the establishment and maintenance of physical systems”); J.K. Constr., Inc. v. W. Carolina Reg’l Sewer Auth., 519 S.E.2d 561, 563-64 (S.C. 1999) (approving fee revenues used for capital projects not financed with bonded indebtedness). Similarly, the use of liens has been upheld as a valid means of securing fee payments. See Teter v. Clark County, 704 P.2d 1171, 1174-75 (Wash. 1985) (en banc) (upholding as legitimate fee water utility charge enforced through local execution of lien).}

\footnote{The Supreme Courts of Michigan and Washington are two leading proponents of stricter judicial scrutiny for local fees. See Bolt v. City of Lansing, 587 N.W.2d 264, 270-72 (Mich. 1999) (concluding that the city’s storm water service fee was actually an invalid tax because the charge was levied to pay for infrastructure, the service had previously been funded by general tax revenues, nonpayment could result in a lien on the property, and the bill for services was mailed along with property tax bills); Samis Land Co. v. City of Soap Lake, 23 P.3d 477, 480, 487 (Wash. 2001) (en banc) (invalidating standby sewer utility charge on vacant land, concluding that benefit went to community in general).}

\footnote{The history of Proposition 13 and anti-tax initiatives in California reveals an ongoing battle between the courts and the voters, producing new rounds of anti-tax initiatives. Most recently, California voters, who were explicitly frustrated with the courts’ unwillingness to interpret the anti-tax initiative broadly, adopted Proposition 218, which extended the voter approval requirement to enforce such initiatives.}
On the other hand, though a heightened judicial scrutiny of fees may produce some government reduction in revenue raising, it is equally likely that local governments will respond by resorting to increasingly narrow user or regulatory fee systems. That is, they may seek to satisfy the fee requirements by adopting ever more finely tuned accounting machinations to allocate costs and cross-subsidize among municipal departments. If, for instance, a municipality knows that a court is likely to scrutinize the fee structure adopted and strictly apply the requirements that no surplus revenue be generated and that the fee be levied only to recoup the cost of providing the service, the local government will probably be able to reallocate costs to capture the ways in which the efforts of multiple municipal departments can be allocated to the fee. Though greater precision may satisfy the court of the bona fides of the fee, the increased administrative and accounting costs may just add to the local government’s revenue deficit. At the same time, greater precision is likely to enhance the dues mentality that is becoming so firmly ingrained in the mind of the local government citizen.

4. Impact Fees and Developer Exactions

In some ways, impact fees and exactions are very similar to other dues techniques: they impose costs on property owners to offset the burden the property imposes on the community or to exact compensation for a benefit provided, use the money collected to provide service or infrastructure, and confer a special benefit on the property. In one fundamental respect, however, exactions are quite different from other dues: they are levied as a condition precedent to governmental approval of the development or

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apply to “any levy . . . imposed . . . as an incident of property ownership, including a user fee or charge for a property related service.” CAL. CONST. art. XIII D, § 2(e). In Apartment Ass’n of Los Angeles County, Inc. v. City of Los Angeles, 14 P.3d 930, 938 (Cal. 2001), the court held that a fee on residential rental property, adopted to fund a program for removal of substandard housing, was not within the scope of Proposition 218. The court concluded that the fee was not imposed on the property owner “as an incident of property ownership,” but on the property owner as a participant in the business of rental housing. Id. at 932, 938. The dissent, noting that Proposition 218 was a voter reaction to the court’s strict interpretation of Proposition 13, predicted yet another voter effort to “stop[] politicians’ end-runs.” Id. at 932 (Brown, J., dissenting) (alteration in original) (quoting promotional material indicating the rationale behind Proposition 218). For the history of Proposition 13 and its progeny, see generally Patel, supra note 85.

213. In Mountain View Ltd. Partnership v. City of Clifton Forge, 504 S.E.2d 371, 373, 376-77 (Va. 1998), the court upheld a substantial increase in garbage collection fees, noting that the city had recently assigned to its solid waste fund costs incurred by other departments in performing duties related to solid waste management. The reallocation, of course, would produce a large increase in the city’s calculation of the cost of solid waste disposal, thus ensuring that the increased fee correlated to the cost of the service and to the benefit received from the city. Id. at 376.

214. See Altshuler & Gómez-Ibáñez, supra note 23, at 3-5.
redevelopment of property, rather than imposed outright on those who undertake the activity or use the service. In both cases, of course, the economic impact on the fee-payer is the same: A sidewalk will cost the same irrespective of whether, on the one hand, the local government issues a special assessment for it or, on the other hand, the local government conditions the owner’s ability to develop property on her agreement to provide it. Exactions are different, then, not because they cost more or because they are more or less precise in their calculation than other dues techniques, but because they allow the local government to “leverag[e]” landowner contributions by conditioning development permission on the required contribution.

As a matter of historical development, exactions are also different from other dues, which tended to expand slowly and incrementally over many years. Exactions, in contrast, emerged suddenly in response to a marked shift in the community consensus about growth. Dubbed the “‘exaction revolution’” by the authors of one highly acclaimed study, the mid-1970s saw a rejection of the common wisdom that growth brought prosperity in the form of population increase, economic development, and higher local tax revenues. In its place came the anti-growth interpretation that saw development as imposing a strain on local services and infrastructure, rarely producing adequate revenue to offset the burden it created. The attitudinal shift was accompanied by a similar rethinking of local government financing: using tax revenue to finance the infrastructure needs of new development could be justified only so long as the taxpaying population as a whole benefitted from that development. With growth newly anointed as a cost-imposing interloper, local governments sought ways to extract from the supposed beneficiary of growth a proportionate share of the costs and burdens that the rest of the community would suffer. Exactions, including provision of basic subdivision specific infrastructure (such as streets, sewers, sidewalks, and lighting), more community wide amenities (such as schools, fire stations, and parks), and so-called “social exactions” (such as requiring developers to produce affordable housing),

215. Id.
217. See ALTSHULER & GÓMEZ-IBÁÑEZ, supra note 23, at 3-5.
218. See id. at 8-10.
219. See id. at 8 (recognizing that the change could be seen as gradual, but concluding it was “epochal”).
220. See id. at 8-10.
221. See id. at 1-10.
222. See id. at 4. Note also that the figures detailing local governments’ increasing reliance on dues techniques do not include the enormous costs imposed on developers through exactions.
have become an extremely common local government response to the infrastructure crisis it attributes to unacceptably rapid growth.223

Following along the lines of the other dues analyses described in earlier Parts, state courts have developed analogous inquiries to evaluate the legitimacy of exactions and impact fees. Just like other dues, municipal exactions may be stricken for lack of state enabling authority224 or as impermissible local taxes.225 Assuming local authority, state judiciaries developed similar tests for evaluating the connection between the exaction imposed and the burden caused by the development that the exaction was intended to offset; the Supreme Court’s review of state court exaction cases identified three prevalent judicial tests.226 For one group of courts, the relationship had to meet the highly precise “specifically and uniquely attributable” standard.227 A second, more moderate level of scrutiny is reflected in the “reasonable relationship” standard:228 the courts inquired whether the exaction imposed was reasonably related to the impact of the proposed development.229 For a third group of state courts, no precise standard was articulated; exactions were upheld on the basis of generalized statements about the connection between the exaction and the burden created by the development.230

supra note 58. Thus, the statistics significantly understate the total amount of infrastructure and other public amenities that are funded by dues techniques.


224. See, e.g., Home Builders Ass’n v. City of West Des Moines, 644 N.W.2d 339, 350 (Iowa 2002).

225. See, e.g., Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193, 195-96 (Wash. 1982) (en banc) (invalidating development fees that the court found were “intended to raise money rather than regulate residential developments”).


227. Applying this standard, for instance, the Illinois Supreme Court invalidated a municipality’s requirement that the developer of a proposed 250-unit residential subdivision dedicate nearly seven acres of land for a new school. Pioneer Trust & Sav. Bank v. Village of Mount Pleasant, 176 N.E.2d 799, 800-03 (Ill. 1961). Because the need for the new school was not solely attributable to his development, the exaction could not stand. Id. at 802-03. For examples of other courts following the stringent Illinois test, see J. E. D. Associates v. Town of Atkinson, 432 A.2d 12, 15 (N.H. 1981); Divan Builders, Inc. v. Planning Board, 334 A.2d 30, 40 (N.J. 1975); McKain v. Toledo City Plan Commission, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971); Frank Ansunt, Inc. v. City of Cranston, 264 A.2d 910, 913 (R.I. 1970).

228. Dolan, 512 U.S. at 390.

229. For example, the Texas Supreme Court required the opponent of a park dedication ordinance to demonstrate that there was no “reasonable connection” between the increased population created by the development and the increased recreation needs of the neighborhood. See City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806-07 (Tex. 1984); see also Simpson v. City of North Platte, 292 N.W.2d 297, 301 (Neb. 1980); Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 447 (Wis. 1965) (cautioning against casting “an unreasonable burden of proof upon the municipality”).

230. See, e.g., Billings Prop., Inc. v. Yellowstone County, 394 P.2d 182, 187-88 (Mont. 1964)
Reflecting the increasing importance of the U.S. Constitution’s Takings Clause to the legitimacy of land use regulation, in the 1980s the Supreme Court issued two important opinions invalidating exactions imposed on landowners as conditions to local government permission to develop. In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Court federalized and constitutionalized the law of local government exactions, announcing the double nexus test that now applies any time the government seeks to condition development approval on developer dedication of land. As a general prefatory matter, all exactions involve three important elements: a government goal being furthered; a condition imposed on the development (the exaction itself); and an impact on government services and infrastructure caused by the development proposal. *Nollan* involved the relationship between the first two, while *Dolan* (and the state court tests described above) dealt with the latter two. The resulting double nexus test requires that the exaction have an “essential nexus” with the goal for which it is adopted and that the development’s impact be “rough[ly] proportional[ly]” to the exaction imposed.

(noting that because the legislature had already made the determination that “a subdivision of this size created the need” for parks and the “need was not merely concomitant to the natural growth of a municipality,” it was sufficient that the subdivision created the “specific need” for recreational facilities); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673, 674, 677 (N.Y. 1966) (approving a developer exaction because “the village acted within its rights in collecting these moneys from plaintiff”).

231. See U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).


233. 512 U.S. at 374.


235. *Id.* at 837; *Dolan*, 512 U.S. at 391.


237. See *Nollan*, 483 U.S. at 836-37 (An exaction is permissible “[i]f a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking;” however, “the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.”)

238. See *Dolan*, 512 U.S. at 391 (“’[R]ough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.’’). The Court explicitly concluded that, under its analysis, only the third, most lax group of states failed to meet the “rough proportionality” standard. *Id.* at 389.

239. Applying these standards, the *Nollan* Court invalidated a California Coastal Commission’s requirement that the Nollans grant the public a lateral easement along their beachfront because it determined that the exaction (lateral access) did not bear an essential nexus to the public goal (preserving visual access). *Nollan*, 483 U.S. at 841. In *Dolan*, the city had conditioned the landowner’s ability to double the density of commercial development on her land
In addition to establishing the applicability of its new federal standards to landowner exactions challenges, the *Nollan-Dolan* opinions suggested several other important changes to the contours of judicial review of exactions. In particular, the Court appeared to impose the burden of proof on the city, provoking dissents that hearkened back to well-established land use principles of deference to the legislature and the general rule that the individual challenger bore the burden of establishing the illegality of the land use regulation.\(^{240}\) Along similar lines, the majority’s heightened scrutiny of the relationship between the government’s goal and the means adopted struck some Justices as a thinly veiled and misguided attempt to revive heightened substantive due process review in the guise of takings analysis.\(^{241}\) More generally, the Court’s characterization of the exactions imposed as a “gimmick[]”\(^{242}\) or a mere “recreational easement”\(^{243}\) suggested an underlying distrust of government, rather than a desire to ensure that the cost of the exactions be spread across the community.\(^{244}\)

The *Nollan-Dolan* pair has generated much scholarly debate, analysis, and predictions of the future course of the Court’s exactions doctrine,\(^{245}\) as and pave a gravel parking lot on her willingness to comply with two separate exactions requirements: to dedicate an easement to land lying within the flood plain and to dedicate an easement to land adjacent to the flood plain for use as a public pedestrian and bicycle pathway. *Dolan*, 512 U.S. at 378-81. The first easement was intended to allow municipal improvement of a storm drainage system along the creek; the second reflected the city’s judgment that, because the new development would generate an additional 435 vehicle trips per day, contribution to the bikeway path system would be a reasonable mitigation of that increased congestion. *Id.* Although the city had based these exactions on its formally adopted Comprehensive Plan, Master Drainage Plan, and carefully documented transportation studies, the Court concluded that the exactions did not stand in “rough proportionality” to the impact Ms. Dolan’s redevelopment would impose on the central city. *Id.* at 391, 396.

\(^{240}\) See *Dolan*, 512 U.S. at 413-14 (Souter, J., dissenting); *id.* at 411 (Stevens, J., dissenting).

\(^{241}\) See *id.* at 410 (Stevens, J., dissenting) (criticizing majority for its “application of what is essentially the doctrine of substantive due process” and for confusing “the past with the present”).

\(^{242}\) See *id.* at 387 (describing the Commission’s behavior as “trying to obtain an easement through gimmickry”).

\(^{243}\) *Id.* at 394.

\(^{244}\) Justice Thomas has expressed similar sentiments about local land regulation. In *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200, 201-02 (Ga. 1994), the Georgia Supreme Court upheld an Atlanta ordinance that imposed restrictions on developers of parking lots. In his dissent from the landowner’s petition for certiorari, which alleged a *Nollan-Dolan* taking, Justice Thomas dismissively referred to the local law as “[m]otivated by a desire to improve the attractiveness of its downtown region,” ignoring the record’s description of the ordinance as an attempt to reduce the flooding caused by paving and the ways unshaded pavements contribute to increased atmospheric temperatures. *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1116 (1995) (Thomas, J., dissenting).

\(^{245}\) The implications of *Nollan-Dolan* for the Takings Clause analysis, in general, and for local land use regulation, specifically, are beyond the scope of this Article. The scholarly debate is wide-ranging. See generally, e.g., Vicki Been, “Exit as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,” 91 COLUM. L. REV. 473 (1991); Abraham
well as numerous judicial opinions applying its rules and expressing uncertainty about its scope. For purposes of this Article, however, the key questions have to do with the applicability of the double nexus test to other dues techniques, and the impact heightened federal scrutiny will have on local government finance more broadly. The key passages for these issues are found, first, in the Nollan Court’s characterization of the object of its new takings test: “We are inclined to be particularly careful . . . where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.”

Second, in Dolan, the Court stressed that the heightened review was especially appropriate when the exactions decision was not the product of a “legislative determination[],” but a particularized “adjudicative decision to condition [the landowner’s] application . . . [on the] requirement that she deed portions of the property to the city.”

Applying those observations to the parameters of local government financing techniques suggests three relevant questions for the future of local government finance. First, does the Court intend to limit the analysis to cases of required landowner dedication of property rights or will the analysis apply more broadly to other exactions like impact fees? Second, is the Nollan-Dolan test limited to costs imposed on landowners as a condition to government permit approval or does it apply generally to other government imposed costs and limitations on property’s developability? Third, is the double nexus limited to judicial review of individualized “adjudicative” decisions or does it extend to evaluate the impact of broad, legislatively adopted exactions?

Though the Court has not had the occasion to address these questions directly, some inklings can be gleaned from other cases and from lower-

246. See, e.g., Ehrlich v. City of Culver City, 911 P.2d 429, 451 (Cal. 1996) (plurality opinion) (“[T]he task of making this blitz of opinions doctrinally coherent is daunting; even the short-term direction of the court’s recent takings jurisprudence remains uncertain.”).


249. Id.
court reactions to *Nollan-Dolan*. With regard to the applicability of the test to fees, the Court’s opinions refer consistently to exactions that require landowner transfers of property and suggest that the test may not extend to impact fees and other conditions imposed through the permit approval process, such as a requirement that a landowner reserve a portion of the lot for open space.\(^\text{250}\) In one of the few cases to reach this issue, however, the Supreme Court of California concluded that the distinction between property dedication and fees was irrelevant to the underlying takings claim and applied *Nollan-Dolan* to local fees for recreation and public art imposed for permission to develop.\(^\text{251}\) The court’s logic was persuasive:

\[
\text{[I]t matters little whether the local land use permit authority demands the actual conveyance of property or the payment of a monetary exaction. In a context in which the constraints imposed by legislative and political processes are absent or substantially reduced, the risk of too elastic or diluted a takings standard—the vice of distributive injustice in the allocation of civic costs—is heightened in either case.}\]

Other lower courts have adopted similar reasoning and applied *Nollan-Dolan* to impact fees.\(^\text{253}\)

The second issue, whether *Nollan-Dolan* should extend beyond the context of conditions, finds more direct Supreme Court guidance. In fact, in a recent decision, the Court declined to extend the test beyond the context of exactions imposed in exchange for government development approval. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*\(^\text{254}\), Justice Kennedy’s majority opinion emphasized that the *Nollan-Dolan* test

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\(^{250}\) *See City of Annapolis v. Waterman, 745 A.2d 1000, 1018-19 (Md. 2000) (concluding that *Nollan-Dolan* is inapplicable to government’s conditioning development approval on landowner’s agreement to leave one of four lots undeveloped for the open space enjoyment of the residents of the dwellings to be built on the other three lots).*

\(^{251}\) *Ehrlich, 911 P.2d at 444.*

\(^{252}\) *Id.*

\(^{253}\) *See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 134 (Fla. 2000) (finding that the dual rational nexus test is not limited to the water and sewer line context); St. Johns County v. N.E. Fla. Builders Ass’n, 583 So. 2d 635, 637 (Fla. 1991) (applying the dual rational nexus test to impact fees on new residential construction to be used for new school facilities); Benchmark Land Co. v. City of Battle Ground, 972 P.2d 944, 950 (Wash. Ct. App. 1999) (applying the *Nollan-Dolan* test to fees and holding that legislative formulae are not sufficient in absence of an particularized assessment). But see Sintra, Inc. v. City of Seattle, 829 P.2d 765, 773 (Wash. 1992) (en banc) (finding *Nollan-Dolan* test not applicable to demolition fee for low income housing because the exaction was not physical); Commercial Builders v. City of Sacramento, 941 F.2d 872, 874-75 (9th Cir. 1991) (holding fee for construction of low income housing not subject to *Nollan*).*

\(^{254}\) *526 U.S. 687, 702 (1999).*
should apply only to evaluate challenges to “excessive exactions.”255 Kennedy’s language suggests that lower state courts have properly refused to apply the double nexus standard to other dues techniques256 and direct land use regulation.257 As a matter of logic, however, requiring a developer to construct a storm water detention system as a prerequisite to development approval has no different effect on the landowner than waiting until the property is developed and then assessing the owner to pay for the same improvement.258 It is possible that whatever hesitation the Court may have to extend the test beyond exactions has less to do with principled lines and more to do with its reluctance to bring all local government dues techniques within the ambit of the Federal Takings Clause.

Finally, the Court’s suggestion that the legislative-adjudicative distinction has a bearing on the applicability of Nollan-Dolan appears to draw another principled limit to its local government finance review. In a recent case, for instance, the Georgia Supreme Court refused to apply the double nexus test to a takings challenge brought by owners of surface parking lots who objected to city wide requirements that all parking lots provide landscaping on 10% of the lot and plant one tree for every eight parking spaces.259 Characterizing the ordinance as a “legislative determination,”260 because it applied across the board and was not the product of the same individualized adjudicatory-like procedures through

255. Justice Kennedy concluded that Dolan’s standard is not applicable to evaluate the city’s outright denial of development permission and that Dolan is properly limited to “the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.” Id.


257. See, e.g., Ehrlich, 911 P.2d at 451 (finding Nollan-Dolan test applies to fees); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (finding Nollan-Dolan test applicable to “generally applicable, legislatively formulated” special assessment-like fees); City of Annapolis v. Waterman, 745 A.2d 1000, 1015-19 (Md. 2000) (distinguishing a condition imposed on a subdivision approval of a reservation, or setting aside of specified land for use by those residing within the development, which is not subject to Dolan, from a condition requiring dedication of land, which is subject to Dolan). But see Manoucherian v. Lenox Hill Hosp., 643 N.E.2d 479, 483 (N.Y. 1994) (applying Nollan-Dolan to a regulatory takings challenge to a statute that required apartment building owners to renew leases to public hospital).

258. Though economists do not agree on who bears the cost of exactions, they appear to have reached a consensus that the developer does not bear the cost. See Wes Clarke & Jennifer Evans, Development Impact Fees and the Acquisition of Infrastructure, 21 J. Urb. Aff. 281, 287 (1999) (finding that developers may plan for lower levels of capital investment in cities that use impact fees); John Yinger, The Incidence of Development Fees and Special Assessments, 51 Nat’l Tax J. 23, 37 (1998) (“[T]o the extent housing construction is competitive, [development fees] do not place any burden on developers. No wonder development fees are so popular!”).

259. See Parking Ass’n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 202-03 (Ga. 1994).

260. Id. at 203 n.3.
which the Nollans and Ms. Dolan passed, the court concluded that the *Nollan-Dolan* double nexus test was inapplicable.\(^{261}\) Dissenting from the denial of certiorari, however, Justices Thomas and O’Connor argued for extending the rationale of *Nollan-Dolan* to takings arguments challenging legislative or adjudicative decisions at the local level.\(^{262}\) Whether the Court will ultimately apply the double nexus test to broad, straightforward requirements and fee formulae depends on the Court’s more general assessment of land use regulation. The heightened scrutiny that underlies the double nexus test arose because of the Court’s conclusion that the government had not engaged in a sufficiently particularized calculation of the impact of the development proposal before it.\(^{263}\) In broad, legislatively adopted fee formulae, however, there is no particularized inquiry at the outset; in fact, the general, across the board nature of the law is what defines it as legislative. By this logic, legislatively imposed exactions may appear even more suspect than the individualized negotiations that produced the exactions challenged in *Nollan-Dolan*.\(^{264}\)

For local government revenue raising techniques, the combined impact of the definitive answers to these three questions could be substantial. If, as Justice Thomas has urged, the distinction[s] used to limit *Nollan-Dolan* are merely “distinctions without a constitutional difference,”\(^{265}\) it is not fanciful to suggest that the entire area of local government dues could be subjected to the federalized takings standards that currently apply only to exactions. The underlying concern about the lack of correlation between the government imposed requirement and the extent the landowner is responsible for the problem being solved is not limited to exactions, but applies more broadly to government dues techniques. As a matter of logic, exactions are not a principled stopping point for *Nollan-Dolan*; rather, the

\(^{261}\) Id. at 203.

\(^{262}\) *Parking Ass’n of Ga., Inc.* v. City of Atlanta, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting) (“The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.”). *But see Ehrlich*, 911 P.2d at 433 (finding *Nollan-Dolan* not applicable to generalized legislative requirements); Curtis v. Town of South Thomaston, 708 A.2d 657, 660 (Me. 1998) (holding test not applicable to easement requirement deriving from legislative rule of general applicability rather than from ad hoc determination); Waters Landing Ltd. P’ship v. Montgomery County, 650 A.2d 712, 724 (Md. 1994) (finding *Nollan-Dolan* not applicable to development impact fee imposed by legislative enactment rather than adjudication).


\(^{264}\) *But see Rogers Mach., Inc.* v. Washington County, 45 P.3d 966, 982 (Or. Ct. App. 2002) (concluding that *Dolan’s* rough proportionality test was inapplicable to a traffic impact fee that applied to a broad class of property and was calculated by use of a pre-determined formula adopted by the local legislative body).

\(^{265}\) *Parking Ass’n of Ga., Inc.*, 515 U.S. at 1118 (Thomas, J., dissenting).
test would appear to extend quite easily to special assessments, BIDs, and a wide variety of local government fees.\textsuperscript{266}

Whether the Court ultimately extends the \textit{Nollan-Dolan} rationale to the entire range of local government dues or whether it continues to carve out a specialized niche for evaluating exactions of property, the Court’s reliance on the Takings Clause in those cases is likely to exert a more generalized effect on local finance practices. When viewed from the vantage point of local government finance, the Takings Clause stands in great tension with the premise that underlies all dues techniques. As the Supreme Court so frequently reminds us, the purpose of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{267} Echoing that sentiment, Justice Scalia has stressed that the essence of the Takings Clause is “simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation.”\textsuperscript{268} Thus, the Takings Clause seeks to collectivize the costs of government by shifting them to the taxing arena. Dues, of course, exert pressure in the opposite direction. By focusing on the benefit received by the individual payer, they push towards individualization of the cost of government services and infrastructure. Invalidation of a dues technique as an impermissible taking, then, should counter that trend towards individualization and encourage government redistribution of the cost across the entire population.

As a matter of logic, invalidation of a dues technique as a taking could produce one of three government reactions: the government might abandon the program entirely; it could transfer financing to general tax revenues; or it could adopt ever more finely tuned dues techniques that might satisfy the Court’s heightened two-pronged test. All things being equal, and assuming that the government is either unable or unwilling to terminate the invalidated financing program, one would expect the government to engage in the same dues versus taxation analysis described in earlier

\textsuperscript{266} One commentator, citing the work of Vicki Been and Carol Rose, urges that the legislative/adjudicative distinction not be extended. Inna Reznik, \textit{Note, The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard}, 75 N.Y.U. L. REV. 242, 257 (2000). She advocates instead for a new land use exactions standard that prevents situations that “create the potential for government overreaching,” while protecting the “components of a well-functioning exactions process.” \textit{Id.} at 247. Those components include primarily “voice,” the ability of all affected interests to participate fully, and “exit,” the ability of the landowner to leave the municipality if dissatisfied with the result of the negotiation. \textit{Id.}


\textsuperscript{268} Pennell v. City of San Jose, 485 U.S. 1, 23 (1985) (Scalia, J., dissenting).
But as that discussion suggested, the weight of the current factors exerts an overwhelmingly uni-directional, anti-tax force. Thus, when the Court’s exactions nexus test is layered over the existing anti-tax incentives, the result is even more dues.

5. Dues in Tax Clothing

Notwithstanding general assertions earlier in this Article that the primary distinction between taxes and dues rests on the legal relevance or irrelevance of the relationship between payer and benefit, some local taxes have occasionally been justified by a consideration of taxpayer benefit. In fact, some courts have upheld the legitimacy of local taxation devices with a dues-like rationale, further cementing the dues mentality in local government finance and blurring the distinctions between the two categories. The main examples of dues-like taxes are threefold. First, typically to provide services that require capital-intensive infrastructure expenses, local governments have turned increasingly to the creation of narrowly defined, single purpose governments with taxing or other revenue raising powers. Because the special district’s or public authority’s powers are limited to its central purpose, any tax levied by that entity will, by definition, be used to fund one of the district’s narrowly defined scope of permissible operations. The more that taxpayers and courts associate taxes with a particular project or service that they are paying for or with a well-defined and segregated revenue stream, the greater the likelihood that they will see taxes as a narrowly drawn quid pro quo—the “get what you pay for” model acquires greater visibility and legitimacy.

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269. See discussion supra Part II.C.

270. The authors of a recently published study have concluded, in fact, that heightened scrutiny has led to an increase in the total amount of fees and other exactions levied in California municipalities. See Ann E. Carlson & Daniel Pollak, Takings on the Ground: How the Supreme Court’s Takings Jurisprudence Affects Local Land Use Decisions, 35 U.C. DAVIS L. REV. 103, 120 (2001).

271. This heading derives from Justice Maynard’s dissent in City of Clarksburg v. Grandeotto, Inc., 513 S.E.2d 177, 182 (W. Va. 1998) (Maynard, J., dissenting), where he criticized the majority for subjecting a religious, tax-exempt land use to a “wolish tax which is cloaked in the garb of a sheepish fee.” This Part deals with the reverse of the situation Justice Maynard criticized; benefit taxes reflect a trend in local government finance to cloak taxes with many of the characteristics of dues.

272. See discussion supra Part II.C.

273. See Reynolds, supra note 2, at 137-49, for a discussion of the growing use of special districts to provide local government services. See also sources cited supra note 20.

274. See, e.g., Grais v. City of Chicago, 601 N.E.2d 745, 759 (Ill. 1992) (upholding imposition of special service area property tax because of the district’s projected disproportionate benefit from improved services funded by the tax). But see Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6, 820 P.2d 497, 503 (Wash. 1991) (en banc) (steadfastly refusing to consider taxpayer claims about disproportionate benefit, noting the “practical impossibility of
trivial way, the explosive growth in special districts itself enhances the dues mentality among the minds of the citizens who are subject to an ever increasing number of charges from limited purpose governments.

Second, and even more corrosive to the standard principle that taxpayers are not legally entitled to benefit from their financial contributions to tax revenues, is the increasing use of “benefit” or “special” taxes by general purpose local governments, where a narrowly drawn subsection of the population is chosen to bear the tax burden for a specific government project. Take, for example, the recent expansion of Chicago’s McCormick Place. Of the many funding sources for this huge financial undertaking challenges to at least two revenue raising techniques reached the Illinois Supreme Court. In one, Geja’s Cafe v. Metropolitan Pier & Exposition Authority, taxpayers challenged the way a retailer’s occupation tax classification was created with three narrowly drawn criteria. The relatively small group of taxpayers that met all three criteria, chosen to bear this tax burden because of the legislature’s conclusion that they were likely to benefit from the renovated facility, sued. First, the opponents argued that the narrow geographic areas where the tax applied did not properly distinguish benefitted taxpayers. Second, they challenged the limited class of transactions to which the tax applied, including only carryout food and beverage sales made at restaurants and full service bars. Finally, the challengers asserted that the taxing authority improperly distinguished restaurants from other retail businesses likely to benefit from the improvements to McCormick Place. The court’s response to these classification challenges was categorical: “It is well drawing the [taxing entity’s] boundaries . . . in such a way that a uniform tax rate will result in equivalent cost/benefit ratios for all inhabitants”).

275. The Metropolitan Pier and Exposition Authority Act authorized a $1 billion expansion of McCormick Place. See Tri-State Coach Lines, Inc. v. Metro. Pier & Exposition Auth., 732 N.E.2d 1137, 1140 (Ill. App. Ct. 2000). The project included construction of a new Exhibition Hall, renovation of existing facilities, construction of a concourse connecting the facilities, and construction of related infrastructure projects. See Geja’s Cafe v. Metro. Pier & Exposition Auth., 606 N.E.2d 1212, 1215 (Ill. 1992). Two hundred sixty-five million dollars of the project’s cost was to be funded through the issuance of thirty-year limited tax bonds and up to $450 million would come from state and city investment paid from 1992 World’s Fair revenues. FIN. & LEGISLATIVE TASK FORCE ON McCORMICK PLACE EXPANSION, THE 1992 WORLD’S FAIR, STATEWIDE TOURISM, DRAFT REPORT 1-8 (June 1984). Another $450 million was expected to be raised from private sector investment, including bank and corporate loans and cash contributions from individuals, corporations, and civic groups. Id. The remainder of the costs were to be met with revenues raised by an increase in the statewide hotel/motel tax, Cook County World’s Fair Tax, metropolitan Chicago restaurant tax, horse racing tax funds, and annual Columbus Day Lotto Game proceeds. Id.

276. 606 N.E.2d at 1214.
277. Id. at 1216.
278. Id. at 1218.
settled that a municipality is able to limit the class of persons taxed to those likely to benefit directly from a particular project while exempting those who will benefit only indirectly.”

In the second case, Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority, plaintiffs challenged another McCormick Place renovation tax: an airport departure tax on providers of limousine transportation to and from O’Hare Airport. Even though a number of the companies subject to the tax were not licensed to operate within Chicago, the court upheld the tax’s legality, concluding that the taxing authority had again reasonably determined that the tax applied to those who could reasonably be expected to profit from the renovations being funded by the tax revenues.

Rejecting the taxpayers’ uniformity challenges, the opinions in both cases relied on the likely benefit to the taxpayers from the enhanced business opportunities that their tax contributions made possible. Though the court’s references to taxpayer benefit contradict the well-established wisdom about the legal irrelevancy of the relationship between taxes and taxpayer benefits, the analysis is predictable and defensible. Given the finely tuned and extremely narrow classes of taxpayers selected to bear the brunt of the taxes challenged in both cases, the uniformity question came down to whether the lines drawn between taxpayers and non-taxpayers were reasonable. That question, in turn, depended crucially on the court’s conclusion that the taxing entity had made the rational determination that taxpayers as a group (and in contrast to non-taxpayers) could reasonably be expected to benefit from the renovations being funded by the tax revenue. Thus, because the reasonableness of any taxpayer classification depends on the rationality of the lines drawn and because the lines in these cases were drawn with the purpose of saddling those who would benefit from the expenditure with the responsibility of funding it, the benefit to be provided to the taxpayers became an essential determinant of the reasonableness of the classification. Other courts have used different

279. Id. at 1218.
281. Id. at 1250.
282. Id. at 1249.
283. Id. at 1255. Similarly, in People ex rel. Canton v. Crouch, 403 N.E.2d 242, 248, 249 (Ill. 1980), the court upheld use of a tax increment finance district designation against a uniformity challenge, noting that “[t]hose taxpayers who will directly benefit from redevelopment will pay taxes to the municipality while those further removed physically from the redevelopment area will have fewer, if any, tax revenues paid over to the municipality.” Again, the court has used the likelihood of taxpayer benefit as the key factor supporting the challenged classification for purposes of a very narrowly drawn tax.
284. Geja’s Cafe, 606 N.E.2d at 1218; Allegro Servs., Ltd., 665 N.E.2d at 1255.
terminology but similar reasoning, and the result is the same: taxes are becoming more like dues. 285

Finally, a third dues-like tax technique involves the redistribution of local property taxes. Disregarding the important principle that tax revenues are not earmarked, tax increment financing (TIF) offers local governments a way to segregate property taxes and pledge them to pay the cost of improvements on the property that has paid the taxes. 286 This highly touted win-win situation involves the apparent subversion of the fundamental distinction between taxes and dues, which requires tax payments to go into general revenue funds and makes irrelevant the relationship between taxpayer payment and taxpayer benefit.

The rationale for TIF is quite straightforward and its implementation ingenious. 287 First, the government designates an area within its territory

285. See, e.g., Youngblood v. State, 388 S.E.2d 671, 673 (Ga. 1990) (rejecting uniformity challenge to hotel/motel tax because taxpayers "are businesses that will directly benefit from an increase in tourism and the provision of local government services within the district"); Leonard v. Thornburgh, 489 A.2d 1349, 1352 (Pa. 1985) (upholding lower income tax levy on non-residents and noting that "non-resident wage earners utilize services . . . to a lesser extent than do residents").

In a series of cases, the Pennsylvania Supreme Court announced that uniformity constraints required different treatment for "special taxes," defined as taxes "imposed for the sole purpose of funding one [government project]." Allegheny County v. Monzo, 500 A.2d 1096, 1102 (Pa. 1985).

In Monzo, the court invalidated a narrowly targeted accommodations tax on uniformity grounds because it did not establish a proportionality between benefit received by taxpayer and burden imposed. Id. at 1104-05. The court noted that general taxes, described as taxes levied for “general public use,” did not impose the same benefit requirement. Id. at 1102. Later cases, though continuing to apply the “special tax” standard, have found the required level of proportionality in similar fact patterns. See, e.g., Bold Corp. v. County of Lancaster, 801 A.2d 469, 474 (Pa. 2002); Torbik v. Luzerne County, 696 A.2d 1141, 1144 (Pa. 1997); Leventhal v. City of Philadelphia, 542 A.2d 1328, 1331-32 (Pa. 1988); see also Rackliffe v. Northport Vill. Corp., 711 A.2d 1282, 1284 (Me. 1998) (upholding differential tax burden between taxing districts by noting that “[i]f, however, a town, city, or smaller district receives a special benefit from a public improvement, it may be required to shoulder a greater tax burden as long as the burden is proportional to the benefit received”).

A recent opinion by the Supreme Court of Minnesota illustrates an interesting flip side to the increasing application of a benefit standard in taxation classifications. In Westling v. County of Mille Lacs, 581 N.W.2d 815, 817, 823-24 (Minn. 1998), the court rejected a uniformity challenge to the imposition of a “‘contamination tax’” on real property. While the tax did not reflect the likely benefit to be derived by the taxpayer from the tax, it logically assessed the property for the burden likely to be imposed on the community by the presence of contaminated property, including “increased health risks, . . . decreased valuations for nearby properties, and . . . abandonment or under-utilization of property, thereby contributing to community blight and economic distress. Contaminated property thereby poses a greater burden on society than uncontaminated property.” Id. at 821.


287. For a more detailed description of the mechanics of TIF, see Crouch, 403 N.E.2d at 242; and Briffault, supra note 15, at 512-14.
where property is blighted.288 Once the district is established, the assessed valuation for all property in the district is frozen for the local governments with taxing authority over the property. The government then borrows money to provide services, infrastructure, or general property redevelopment in the district. As the TIF properties’ value is enhanced by the improvements, all tax revenues generated by the incremental increases in assessment valuation are used to repay the debts incurred for the TIF improvements. All taxing units, however, can only collect the revenues generated by the pre-TIF value. When the TIF district expires (usually after twenty years) and all debts are paid off, the property is presumably greatly enhanced in value. As the improved properties come fully on line, their new assessed value provides greater revenues for the governments that have had to forego the increases over the TIF period.289

Whether TIFs are a reasonable way for government to stimulate redevelopment of blighted property, or whether it is merely a clever way to allow private owners to use government funds to improve their own property at public expense, depends on one crucial and unknowable factor: whether market forces would have stimulated the redevelopment in the absence of TIF financing. TIF supporters, of course, argue that the answer is no290 and that the short term deprivation of property tax revenues is offset by the ultimate benefit produced by the presence of more valuable property within the jurisdiction.291 For hard pressed local government units like school districts, which frequently have no voice in the establishment of a TIF district,292 the municipality’s decision that all taxing districts will forego increased property tax revenues for a twenty-year period may create an ephemeral benefit. After all, twenty years represents nearly two generations of school children, and the delayed benefit may pale in comparison to the district’s perceived immediate need for revenue. Nevertheless, state courts typically uphold TIF districts against challenges based on uniformity and public purpose provisions.293 By invading the province of local property tax revenues and pledging that the taxpaying property will benefit from the payments, TIFs further erode the distinction between taxes and dues at the local level.

289. Id.
290. See People ex rel. Canton v. Crouch, 403 N.E.2d 242, 244 (Ill. 1980).
291. Id. at 245-49.
293. See, e.g., Delogu v. State, 720 A.2d 1153, 1154 (Me. 1998); Crouch, 403 N.E.2d at 252.
III. THE METROPOLITAN LANDSCAPE IN A WORLD OF DUES

Dues have enjoyed a long history as one respected component of an overall municipal financing policy. When they constitute a modest fraction of a much wider variety of financing techniques, they help to advance the local government’s goals in a number of ways. Dues may work to implement a communal consensus about service levels, general community welfare, redistribution of resources, and the appropriateness of tying government benefits and services to the ability to pay. This Article recognizes that dues have been and will continue to be an important source of local revenues, as well they should be. My point is not to condemn dues as regressive, unfair, privatizing, and exploitative of the poor, but rather to sound caution against their overzealous use. No mathematical formula is capable of determining whether dues, taxes, or a combination of the two are preferable in any particular funding decision. So long as the range of factors applicable to local government funding decisions rested comfortably within a balancing of the six longstanding factors described earlier in this Article, dues were likely to appear on a limited number of finance proposals. The balance has been upset, however, with the more recently evolving phenomena, all pro-dues in their impact. Taken together, they frequently override the delicate balancing act that existed in prior years. It is that disproportionate weight that this Article criticizes.

The growing and increasingly exaggerated prominence of dues in local government finance has had a significant impact, not only on the ways municipalities operate, but also on citizens’ attitudes about the role of general purpose local governments. For instance, because of judicially imposed requirements that the legitimacy of dues depends on a clear correlation between the benefit received and the cost imposed, payers may develop an unrealistic perception of precision and self sufficiency. Moreover, because the trends suggest ever greater municipal reliance on non-tax revenue raising and because dues are based on the consumer vision that allocates government services on the basis of ability to pay, the implications for fairness and equality in the provision of services are troubling. And finally, as local governments increasingly turn to a more regressive form of service provision, which requires computation of cost and benefit in exchange for government charge on the citizen, they may in fact be fomenting more general anti-tax and anti-government sentiments. This Part addresses these unintended consequences.

294. See discussion supra Parts II.C.1-6.
295. See discussion supra Parts II.C.7-10.
A. Skewed Spending Priorities

Because the starting point for the local government’s initial choice between dues and taxes has been seriously skewed in favor of dues, the government’s allocation of revenue between the two devices is likely to reflect that imbalance. In other words, as a result of the current preponderance of anti-tax incentives, local governments turn to dues, not only when a reasoned policy judgment indicates that dues would most properly reflect the community’s consensus about fairness in the provision of local government services, but as the only realistic way to raise revenue in the face of substantial barriers to tax financing. In turn, the disproportionately high use of dues produces a subsequent skewing of spending priorities by influencing the government’s choice of projects and services. Since dues are more frequently and more easily used to pay for “things” than for social services for “people,” and since the government has numerous incentives to choose dues financing over taxes, it is likely to provide proportionally more “things” than it would without the heavy skewing.

Second, the essential dues characteristic that revenues be segregated has the additional effect of removing dues-funded projects from the general revenue budgeting process. Because they are not deposited into the municipality’s general revenues fund, but rather isolated and pledged to the project for which they are levied, dues are not involved in what urban economists call “full line forcing”: the give and take of the budget debate that sets spending priorities for local revenues. As a result, in today’s typical city council chambers, there is usually no debate on whether the municipality should spend its revenues to build a new sewer or, in the alternative, to provide more housing opportunities for the poor. Because of the difference in funding techniques, that debate will not take place, and no elected official will be forced to choose between them. The sewers, if they are built, are likely to involve strictly segregated charges and a pledged revenue stream, untouchable and beyond the reach of local

296. See discussion supra Part II.C.

297. Former Secretary of the Department of Housing and Urban Development, Henry Cisneros, described governments’ preference for “things-regionalism,” while ignoring “people-regionalism.” See HENRY G. CISNEROS, REGIONALISM: THE NEW GEOGRAPHY OF OPPORTUNITY 8-9 (1995). “Things-regionalism” includes “larger public works such as water and sewer facilities, flood control and irrigation systems, regional airports, major roads and highways, and mass transit systems.” Id. at 8. “People-regionalism” refers to programs that would address the “heart of America’s ‘urban problem’—the new face of poverty. . . . The most extreme poverty in America is now found in geographically isolated, economically depressed, and racially segregated inner cities and older, declining suburbs.” Id. at 9; see also Richard Briffault, Localism and Regionalism, 48 BUFF. L. REV. 1, 3-5 (2000).

298. See FOSTER, supra note 20, at 189-217, for a fuller discussion of this phenomenon. See also Reynolds, supra note 2, at 144-45.
government officials. What remains for the general revenue debate are disputes over spending between, on the one hand, public goods like police and fire services and, on the other hand, social services.

The financial impact goes even further. It appears that the things and services funded by dues capture a larger percentage of the total available revenues than they would if they formed part of the local budget debate. That is, dues are greedy and expensive. In fact, as determined in a recent study, local government services cost more when the provider is a single purpose unit of government and has a segregated revenue stream than when the multi-purpose local government provides the service with general tax revenues. When taken together, dues’ multiple effects on the local government budgeting process and revenue allocation are quite significant. In many ways, in the post-1970 pro-dues world, local government decisions about what services to provide, what programs to undertake, and what behavior to regulate, are frequently not based on a policy decision about the future of the community and the general citizen welfare. Instead, these decisions are based more on a realistic assessment that the external and internal incentives push toward dues, which in turn push toward a government preference to provide “things” and which ultimately reduce the revenue available for “people.”

**B. Inequality in Service Provision**

Because they are explicitly based on the “get what you pay for” premise that citizens should contribute to the cost of government’s business in direct proportion to the benefit they derive from those activities, dues implicitly accept inequality in municipal services. To the extent that any infrastructure, service, or regulatory program is financed through a dues

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299. The mayor of Chicago has described police and fire as the “sacred cows” of the city’s budget, noting that the two services combined consume 65% of the city’s general revenues. Gary Washburn, *Daley Gives Self an Out in No-New-Tax Budget*, Chi. Trib., Oct. 16, 2002, at 1. Professor Lee Anne Fennell has recently argued that police and fire services are not really classic public goods because of the importance of the user pool in determining their quality. Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 Tex. L. Rev. 1, 6-9 (2001). The term is used here in its non-technical sense.

300. See Foster, *supra* note 20, at 222-24 (noting that areas with greater reliance on targeted financing devices spend less on social welfare functions). I recently described this phenomenon in an analysis of the role of intergovernmental cooperative efforts in metropolitan areas. See Reynolds, *supra* note 2, at 144-45.

301. See Foster, *supra* note 20, at 190. Foster points out, however, that higher cost does not necessarily indicate less efficiency; that is, regional special districts may provide a higher level and quality of service than the general purpose government service provider. *Id.* at 184.

302. This assertion somewhat overstates the case. Local governments are free to offset the regressive impact of any particular dues technique, either by a direct subsidy to the low income user or by adopting some sort of income-based, sliding scale.
technique, the government must either tolerate the inescapable fact that low income users may have to forego the benefit or, in the alternative, guarantee some sort of government subsidy. Dues, then, are more regressive than taxes and lead to a greater concentration of wealth. ³⁰³ Tax financing, in contrast, “promotes communal responsibility for important social services and likely narrows service disparities.” ³⁰⁴

Though all dues techniques contribute to a drift toward inequality, BIDs ³⁰⁵ are perhaps the most extreme example. Like other dues, they condition receipt of a government benefit on ability to pay. Unlike other dues techniques, however, they are explicitly marketed as a cost effective way for a neighborhood or other sub-local unit to obtain supplemental ³⁰⁶ services that the general purpose government is either unable or unwilling to provide. Thus, BIDs offer a higher level of service for those segments of the community that can pay for it. By creating an alternative to government revenue redistribution for the general welfare, BIDs provide a cheaper way for a narrow segment of the community to enhance itself without contributing to similar improvements for others. This removes an important incentive for the government to raise the general level of municipal services: If those who can pay for a better level of services are content, the pressure to enhance service across the municipality is greatly reduced. Currently, BIDs occupy a very small percentage of local budgets ³⁰⁷ and are generally limited to urban business districts ³⁰⁸ where they have been praised as an important tool for downtown revitalization. ³⁰⁹

³⁰³. See Mildred Wigfall Robinson, Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point, 35 U. MICH. J.L. REFORM 511, 568 (2002); see also Ray Boshara, Poverty is More than a Matter of Income, N.Y. TIMES, Sept. 29, 2002, § 4, at 13. Between 1993 and 1998, asset poverty rose 14%. Id. Currently, the top 20% of the population earns 56% of the income and holds 83% of the wealth. Id.; see also COHEN, supra note 13, at 395-96 (noting that between 1980 and 2000, the income of the nation’s top 5% of families increased from 14.6% to 20.8% of the total national income); ROBERT H. FRANK, LUXURY FEVER 45 (1999) (noting that earnings of the bottom 20% have declined by more than 10% since 1979).

³⁰⁴. See FOSTER, supra note 20, at 107.

³⁰⁵. See discussion supra Part II.D.2.

³⁰⁶. BID services are usually described as supplemental. Briffault, supra note 142, at 376 (“BID services supplement city-provided services, while non-BID neighborhoods continue to receive preexisting levels of services.”). However, some argue that they may ultimately replace city-funded services. See id. at 399-400.

³⁰⁷. In New York, the city with the largest BID program in the country, BIDs consume less than two-tenths of one percent of the city’s budget. See Briffault, supra note 142, at 464 (”In fiscal 1997, BID assessments in New York . . . come to less than $50 million . . . of the city’s $34 billion budget.”).

³⁰⁸. See id. at 466-67. The BID phenomenon has been tried in the residential setting. See State Farm Mut. Auto. Ins. Co. v. City of Lakewood, 788 P.2d 808, 810 (Colo. 1990) (en banc); see also Briffault, supra note 142, at 467-48.

³⁰⁹. See Briffault, supra note 142, at 399.
Nevertheless, even BID proponents recognize the troubling implications raised by local government adoption of techniques that explicitly limit access to municipal services on the basis of ability to pay.\(^{310}\)

Though BIDs may be the primary example of how dues push toward inequality in municipal service provision, all dues techniques have that potential. Consider, for example, the special assessment.\(^{311}\) On one level, using a special assessment to fund neighborhood-specific improvements like sidewalks, lighting, and street paving may reflect the consensus that spending general tax revenues for these neighborhood improvements would unfairly provide a special benefit to a small segment of the community. What happens, though, to the neighborhoods where property values are low and special assessments are not a practical alternative? One of two results is possible. First, the government may choose to use other revenues, including general tax revenues or funds from another governmental source—like state or federal aid—to fund those improvements. This practice segments the community into the “haves” and the “have nots,” creating a two-track system whereby affluent local residents “pay twice”: once directly for their own improvement and then again through general tax levies for those who cannot pay. The second possible result is that the government may simply accept the disparity in services, leaving the residents of poorer areas without the services that other neighborhoods pay for.\(^{312}\) The constitutionality of that practice may be a closed issue under current Supreme Court doctrine;\(^ {313}\) nevertheless,

\(^{310}\) See id. at 462-69.

\(^{311}\) See discussion supra Part ILD.1.

\(^{312}\) In fact, providing services and infrastructure by dues techniques appears to have allowed municipal governments to avoid liability for racially disparate impacts caused by the inequality of local services. In Hadnott v. City of Prattville, 309 F. Supp. 967, 970 (M.D. Ala. 1970), the plaintiffs challenged the local government’s practice of providing street paving only when property owners indicated a willingness to pay an assessment to cover the cost. As a result, 97% of white residents, but only 65% of black residents, lived on paved streets. Id. Though the discrimination inherent in the use of the special assessment and other dues techniques may be beyond the reach of federal constitutional protection, the discriminatory use of those techniques will be enjoined. See, e.g., Ammons v. Dade City, Florida 783 F.2d 982, 983 (11th Cir. 1986) (invalidating special assessments upon finding that city had imposed different requirements on residents of predominantly black areas).

\(^{313}\) Arguments about a legally enforceable right to equal municipal services have generally disappeared from the state and federal courts. See Charles M. Haar & Daniel W. Fessler, The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality 53 (1986). Although prevailing standards resulted in findings of unconstitutionality for provisions of municipal services on the basis of municipal negligence or inaction combined with discriminatory effects, subsequent Supreme Court rulings made clear that equal protection challenges require a showing of discriminatory intent. See Clayton P. Gillette, Equality and Variety in the Delivery of Municipal Services, 100 Harv. L. Rev. 946, 950 (1987) (reviewing Haar & Fessler, supra). Furthermore, the Court excluded wealth-based discrimination from the list of suspect classifications for the purpose of equal protection
municipalities themselves might be troubled by the relentless push towards service inequality that special assessments and other dues techniques provide.\textsuperscript{314}

C. New Urban Legends

1. The Myth of Precision

To withstand judicial scrutiny, dues must be based on a careful calculation of the impact imposed by the payer and the benefit the payer will derive. For all of the techniques discussed in earlier Parts, judicially created tests force the government to correlate the charge imposed with the benefit received by the payer; in the absence of a substantial connection or correlation, the charge will be invalidated. The air of precision surrounding the calculation, however, is likely to be illusory. First, it ignores the multitude of reasons why new services or infrastructure are required. This point can be made most strongly in the context of impact fees and exactions, where numerous economic studies have tried to determine whether the calculation of the fee properly assesses the benefit received or burden imposed by the new development.\textsuperscript{315} Although economists do not agree on who bears the ultimate cost of the fee or exaction,\textsuperscript{316} it appears clear that many fee computations improperly ignore the fact that the service or infrastructure needs are not entirely caused by new development.\textsuperscript{317}
Changes in demographics, higher state and federal standards for the construction of infrastructure, and changes in behavior on the part of existing residents are also likely to contribute to the demand.  

For instance, a need for new arterial roads in a community is probably attributable not only to the demand placed on transportation routes by those who live in new developments, but also to the fact that Americans continue to drive more and more for trips of ever shorter distances.

A recent case illustrates the phenomenon well. In *Pinellas County v. State*, the Florida Supreme Court rejected a challenge to a county fee for a new “reclaimed water service component” in its water service system. The new process was designed to make some re-treated wastewater available for non-potable purposes like irrigation. Upholding the county’s decision to charge only the properties that would have access to the new reclaimed water service, the court concluded that the special benefit standard had been met because the users, unlike other county residents, would have access to the reclaimed water. Although the fee’s computation may have satisfied the requirement that the fee-payer receive a special benefit from the service, the underlying premise of the computation is questionable. It may be the case that the need for the additional water was created by new development in the county. What is not apparent, however, is why the rest of the community, whose water usage created the shortage in the first place, ought to be exempt from paying for the new, more expensive treatment option. Nevertheless, the conclusion of the court and the county that the fee properly imposed the cost on the party creating the need for the water, represents an unexceptional application of the state courts’ special benefit tests.

Second, the aura of precision is derived from an artificially narrow view of the relationship between cost and benefit. What appears to be a precise calculation actually isolates the one moment in time the charge is assessed, ignoring the mix of financing that went before and the allocation and mixing of revenues that will come after. For instance, imposing on growth the cost of a new sewage treatment plant in 2002 seems less precisely calculated when placed in the very likely context that the existing twenty-year-old plant used by the established part of the community was funded largely by federal grants. The calculation becomes even less precise when

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318. See *Altshuler & Gómez-Ibáñez, supra* note 23, at 63-65.
319. See *id*.
320. 776 So. 2d 262, 263 (Fla. 2001).
321. *Id.* at 264.
322. *Id.* at 267-68.
323. *Id.*
subsequent financial contributions are factored in. Once the new development is complete and on line, having paid for the new treatment plant, the new development will pay user fees just like the other properties in the jurisdiction. Because user fees typically are used to fund ongoing maintenance and because the newly constructed treatment plant is unlikely to need much in the way of maintenance for the immediate short term, the user fee revenues are used disproportionately to benefit the existing properties.\textsuperscript{324}

Finally, the dues computation may ignore the more general benefit that the infrastructure will have for non-users. For instance, government funding of public transportation provides cleaner air for users and non-users alike. In addition, riders on public transit reduce road congestion for those who rely on automobiles. The vagueness and generality of the non-user benefit may make the calculation impossible, but its indisputable presence emphasizes that over-reliance on dues to finance many public services unfairly penalizes the users and ignores benefits that flow to the non-user and to the community as a whole.\textsuperscript{325}

The validity of dues crucially depends on the premise that the government will charge the dues-payer an amount that corresponds to the benefit received or burden imposed. Judicial tests articulate that standard, yet the precision it appears to rest on is subject to serious question. The complexity of both the causes of the new demands and the overall financing pattern is simply too great to disentangle in a way that makes the computation of charge precise. While the dues calculation may meet the government’s goal of shifting costs away from tax funds, it is fanciful to view the result as an accurate allocation of cost in exchange for benefit received.

2. The Myth of Self Sufficiency\textsuperscript{326}

The prevalence of user fees, assessments, and other dues techniques may contribute to another myth: dues obscure the reality that most of the capital-intensive services provided by local governments require large up-front infusions of revenue, most typically covered by tax revenues or grants

\textsuperscript{324}. This situation is based on a recent sewer expansion project proposed for the Urbana-Champaign Sanitary District. See Steven C. Carter, Report to City Council: Urbana and Champaign Sanitary District Long Range Plan Issues (2001).

\textsuperscript{325}. For one case in which a court recognized the importance of these generalized non-user benefits, see New York Urban League, Inc. v. New York, 71 F.3d 1031, 1039 (2d Cir. 1995).

\textsuperscript{326}. I made this observation initially in connection with my analysis of special districts in metropolitan areas. See Reynolds, supra note 2, at 146. However, it is applicable to all types of dues techniques, where expensive infrastructure is often funded by tax revenues, with the user fees going to cover operating costs.
from other levels of government. Though the dues-payer may have the sense that she is paying her own way for the services she consumes, because of the multiplicity of user fees and service charges that are levied for many government services, the reality is likely to be more complex. Oftentimes, the dues-payer’s ability to enjoy the government service depends on substantial initial expenditures of government revenues to pay the capital costs of the “things” that the government needs to construct before it can provide the services. The fees or other dues techniques are likely to cover no more than the ongoing operating costs, while tax revenues fund the expensive infrastructure needed to provide the service.

The increasing use of dues to fund services may mask that reality and foster the citizen’s belief that the dues she pays cover the cost of the services she consumes.

D. Increased Anti-Tax Sentiment

The strength of anti-tax sentiment is evident nationwide, articulated over the past several decades in the form of numerous strict limitations imposed by the voters on the government’s ability to tax. Though the entrenchment of this anti-tax mentality has a wide range of societal explanations, the two dues myths undoubtedly reinforce and contribute

327. See Foster, supra note 20, at 14.

328. Moreover, depending on the service involved, the urban core may subsidize the provision of infrastructure to the affluent suburban areas that ring it. One study of the Minneapolis metropolitan area, for instance, concluded that the central urban areas paid more than $6 million more in sewer fees than the costs they create. Orfield, supra note 1, at 71. Further, households in the growing suburban areas received subsidies from those central city users ranging from between $10 and $136 per household per year. Id. Another study concluded that corporate relocation from city to suburb creates a subsidy for low- and moderate-income minority city residents of the suburban redevelopment. Joseph Persky & Wim Wiewel, The Distribution of Costs and Benefits Due to Employment Deconcentration, in URBAN-SUBURBAN INTERDEPENDENCIES 50, 67-69 (Rosalind Greenstein & Wim Wiewel eds., 2000); see generally Cashin, supra note 5, at 2004-15.

Similar claims can be made on the funding of regional transportation services. See Kevin L. Siegel, Discrimination in the Funding of Mass Transit Systems, 4 HASTINGS W.-NW. J. ENVTL. L & POL’Y 107, 107 (1997); Richard Voith, The Determinants of Metropolitan Development Patterns: What are the Roles of Preferences, Prices and Public Policies?, in URBAN-SUBURBAN INTERDEPENDENCIES, supra, at 71-82.

329. See Robinson, supra note 303, at 533-42; Stark, supra note 78, at 197-203. One author described how, within two years of Proposition 13, forty-three states had adopted some form of property tax relief or limitation on government powers of taxation. Steven Hayward, The Tax Revolt Turns 20, POL’Y REV., July-Aug. 1998, at 9, 9.

330. One author posits two possible normative bases for anti-tax voter initiatives. See Stark, supra note 78, at 207-16. First, they may rest on the underlying premise of the consent of the governed. Id. at 207-10. In the alternative, they may reflect a libertarian anti-government attitude that views taxation as illegitimate government coercion. Id. at 211-16. Another author traces the rise of anti-tax sentiment to local abuse of the property tax. See Robinson, supra note 303, at 521-
to the phenomenon. The myth of precision has a direct impact on the ways citizens view taxes. As growing numbers of non-tax charges are assessed for increasing numbers of government services, the payer becomes accustomed to receiving a benefit in exchange for paying her dues. Thus, with targeted charges for many services and segregated revenue streams that track payment to the assessed project, separating numerous revenue items from the total bundle of overall expenses and projects, there is no longer the sense that the local budget has something for everybody. Once the payer loses sight of the important role of local government in providing a mix of services, regulations, and infrastructure appropriate to its constituency, the search for a quid pro quo may become the dominant analysis used by citizens to determine their support of government expenditures.

Similarly, the myth of self sufficiency may contribute to a hardening anti-tax resolve. As the taxpayer comes to sense that she pays for all services directly through fees, assessments, or other dues techniques, she may lose sight of the importance of general tax revenues that support the services. As a result she may be less likely to support general taxes, because she will conclude that she receives no benefit from those forced contributions. Resistance to taxation may grow because taxes are perceived as a vehicle that only redistributes wealth to the poor, while users pay their own way for all other services.

In addition, the increasing use of dues triggers an unending, counter-productive cycle: the more the voters disapprove of taxes, the more the government turns to dues, which in turn produces more anti-government cynicism. By moving towards ever broader definitions of special benefits, solely for the purpose of attaching charges to government services, the government tests the outer limits of taxpayer credulity. In addition, citizen ire increases as the government appears to be orchestrating an end-run around tax limitations. Unfortunately, the anti-tax sentiment does not

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332. I recently described that sentiment in the following terms: “If the regional services that I use are funded by fees, the reasoning goes, why should I support redistribution of my tax dollars to fund regional social services, all of which will be funded by tax revenues rather than by user fees?” Reynolds, supra note 2, at 146.

333. See Washburn, supra note 299, at 1. The author noted how Mayor Daley, while pledging no new taxes, proposed numerous increases in fees and charges, including parking fines, valet permits, driveway permits, billboard permits, fees for online payment of utility bills, and an increase in the local water and sewer fee. Id.

334. As the court noted in Ventura Group Ventures, Inc. v. Ventura Port District, 16 P.3d 717, 727 (Cal. 2001), “If everything is special, nothing is special.”

335. See Harris v. Wilson, 693 So. 2d 945, 950 (Fla. 1997) (Wells, J., dissenting) (“[T]he
produce a proportional reduction in voter expectation for government services. Citizens continue to want high quality services; they just don’t want to pay for them.\textsuperscript{336}

Evidence of the ways this dues mentality has been translated into anti-tax sentiment was brought home to me most recently in a local bond election to fund the renovation and expansion of the Champaign County Nursing Home.\textsuperscript{337} Many of the project’s passionate supporters urged voter approval by appealing to our dues mentality. They argued that citizens should vote for the bond because some day the voter or someone dear to the voter will need the facility; they encouraged the “what’s in it for me” mentality that has been reinforced by decades of dues. Largely missing from the discussion was a debate about whether the community, as an amalgam of many different individuals of different ages and with different health needs, has a responsibility to care for the elderly who need it, irrespective of whether any individual voter ever sets foot inside the doors of the nursing home. Thus, the local debate is no longer about the totality of the package—the nursing home for you, the community college for me—but rather an item-by-item dissection of cost and benefit to determine whether a majority of the community concludes that each service it is being asked to fund would further its own self interest. The redistributive function of taxes seems to have taken a back seat to the consumer attitude that seeks a benefit in every government expense.\textsuperscript{338} Though this phenomenon undoubtedly has a variety of sources and causes, the rapid increase in the use of dues techniques contributes to the sentiment by conditioning citizens to examine the relationship between cost and benefit on which every dues technique is premised.

\textsuperscript{336} See Robinson, supra note 303, at 537 n.127 (describing studies documenting taxpayer belief that reduced government revenue would not have a negative impact on services); see also John H. Bowman et al., \textit{Mobilizing Resources for Public Services: Financing Urban Governments}, 14 J. Urb. Aff. 311 (1992) (describing how taxpayers want constant or enhanced levels of government services, but voice consistent opposition to higher taxes). Recent voter initiatives in two states support these assertions. In Florida, voters approved an initiative to reduce class sizes, while California voters adopted a $400 million program for after-school care. Christopher Marquis, \textit{The 2002 Elections: Ballot Initiatives; School and Animal Welfare Measures Prove Popular, but Health Care Falters}, N.Y. TIMES, Nov. 7, 2002, at B3. Neither measure contained any funding mechanism. \textit{Id.}


\textsuperscript{338} See COHEN, supra note 13, at 343-44.
IV. CONCLUSION: DUES, FAIRNESS, AND REGIONALISM

In the debate over the impacts of dues, at least three assertions appear to enjoy general acceptance. First, as compared to local taxation, dues are more costly. They entail more administrative costs, more consulting costs, and more accounting machinations to allocate and track the use of segregated funds. 339 Second, although urban economists disagree on the important question of who ultimately bears the cost of dues, they appear to agree that land developers generally do not. 340 Some qualify the assertion to suggest that, in times of rapid and expensive growth, developers may have to absorb the costs of dues levied in the form of exactions. 341 In other circumstances, however, either the ultimate homeowner or perhaps the owner of undeveloped land is most likely to shoulder the cost of dues. 342 Third, and finally, dues are regressive—and certainly more regressive than local taxation. 343 They penalize the young and the poor at the expense of the established, older segments of the community. 344

Though these accepted facts may provide reasons to question the wisdom of dues, alone they cannot answer the question whether dues are fair. Resolution of that debate, of course, requires a definition of fairness in the provision of local government services. That task extends well beyond the scope of this Article. 345 For instance, if fairness is based on the

339. Professor Foster compared services provided by general purpose local governments with those provided by single purpose special districts and concluded that the latter are more expensive. See FOSTER, supra note 20, at 148-88. Although her study did not compare the cost impacts of dues financing versus general taxation, most of the explanations for higher costs in special district service provision apply to segregated dues financing techniques as well.

340. See FISCHTEL, supra note 10, at 67; Yinger, supra note 258, at 37 (concluding that, when the local housing market is competitive, developers do not bear the costs of development impact fees).

341. See ALTSCHULER & GÓMEZ-IBÁÑEZ, supra note 23, at 98-104.

342. See id. at 98-100; see also Yinger, supra note 258, at 41 (“The buyers of new homes will indeed become some of the burden of these fees as the benefits of infrastructure show up in the prices they pay for housing. . . . [H]owever, one-quarter or more of the burden of these fees could fall on the owners of undeveloped land.”).

343. The property tax itself is subject to substantial criticism. See, e.g., GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW 656 (3d ed. 2001) (noting that the poor pay a higher percentage of income on housing than the wealthy); Robinson, supra note 303, at 535-36 (noting that targeted relief may offset the regressivity of the property tax). Notwithstanding the ongoing debate over the local property tax’s regressivity, fees, user charges, and other dues techniques are even more regressive. See id. at 533, 538.

344. See ALTSCHULER & GÓMEZ-IBÁÑEZ, supra note 23, at 106-09.

345. H. Peyton Young describes three general theories, each of which could be used to evaluate the dues versus taxes conundrum in local government law. H. PEYTON YOUNG, EQUITY: IN THEORY AND PRACTICE 9-10 (1994). Consider the following short definitions of fairness:
premise that an individual’s receipt of benefits should be commensurate with her contribution, dues techniques may best reflect that underlying premise. If, in contrast, fairness means that society has some basic obligation to enhance the welfare of all of its citizens, dues, especially if used in large doses, are unlikely to promote that goal. In current regionalism scholarship, however, concerns over a definition of fairness have taken a back seat to an emerging, overriding consensus that local government law must be restructured to reduce the widening gap in metropolitan areas between the affluent suburban quarter and the rest of the metropolitan area: the academic debate now revolves around how, and not whether, redistribution of wealth could best eliminate that gap. Although fairness concerns clearly motivate some proposals, others embrace regionalism for quite different reasons. As a result, in the current pro-regionalist climate, the fairness of dues would appear to be less important than their impact on regionalism proposals.

Review of the literature suggests at least four distinct normative underpinnings for the current regionalism proposals: efficiency, economic interdependency, democratic participation, and equity. First, some assert that the current allocation of local government power in metropolitan governance, with its plethora of fragmented government units, creates inefficiencies by allowing local governments to impose costs on others and by allowing suburbs to maximize their own wealth at the expense of the central city they surround. Moreover, in metropolitan areas especially,

There are three general theories of justice that figure prominently in discussions about equity. The oldest and most prominent is Aristotle’s equity principle, which states that goods should be divided in proportion to each claimant’s contributions. A second theory of justice is classical utilitarianism, which asserts that goods should be distributed so as to maximize the total welfare of the claimants (the greatest good for the greatest number). A third approach to social justice is due to John Rawls. His central distributive principle may be simply stated: the least well-off group in society should be made as well off as possible.

Id. Each of those standards could apply to an evaluation of dues techniques.

346. See Reynolds, supra note 2, at 111-19.
347. See VALENTE ET AL., supra note 88, at 350-52; Richard Briffault, supra note 297, at 15-26; Cashin, supra note 5, at 2042-47.
348. See, e.g., Briffault, supra note 297, at 18-20; Cashin, supra note 5, at 2000-01. Empirical studies that have reached that conclusion include: Persky & Wiewel, supra note 328, at 69 (concluding that expansion of suburban manufacturing employment opportunities imposes substantial costs on inner city residents and represents a “subsidy from low- and moderate-income, black and Hispanic residents of the city and inner suburbs to stockholders elsewhere in the nation”); and Voith, supra note 328, at 78-80 (concluding in a study of government spending on Philadelphia transit that cities subsidize suburban transit development, leading to inefficient suburbanization and diminished opportunities for central city and a clear causal link between city and suburban
a large territorial base might better distribute the costs of infrastructure and produce a higher quality, if not less expensive, service. 349 Those who favor efficiency arguments, then, propose reforms that would reduce metropolitan disparity by achieving higher levels of efficiency in the distribution of services.

The second, closely related argument in support of regionalism is based on the asserted economic interdependence of the metropolitan region. This approach relies on recent evidence that suburban economic well-being suffers as the gap between suburb and city widens. The suggested “interdependence imperative” 350 transforms central city health into an item of intense suburban self interest and argues that suburb ignores the fate of the city to the detriment of its own prosperity. Stated simply, the claim is that healthier metropolitan regions contain more prosperous central cities. In fact, in the twenty-five metropolitan areas with the most rapid income growth, central city incomes also increased. 351

349. Professor Foster concluded that services provided by regional single purpose government units are actually more expensive than when those same services are provided by the general purpose local government unit. See FOSTER, supra note 20, at 148-88. Foster speculates that the higher cost is due to “inflationary influence of political isolation, functional specialization, and administrative and financial flexibility . . . .” Id. at 174-76. She recognizes, however, that regional special district service provision may be more expensive because it is of a higher quality. See id. at 184. In addition to evidence about the high cost of services provided by regional special districts, some question this approach to regionalism because of its clearly limited scope. As Henry Cisneros has argued, regionalism by special district results in “things-regionalism,” notably large infrastructure-intensive services, while completely neglecting “people-regionalism,” which would entail attention to regional problems like housing, employment, and social services. See CISNEROS, supra note 297, at 8-9.

350. NEAL R. PEIRCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD 131-32 (1993). In Peirce’s view, suburban prosperity requires a strong central city for six main reasons: (1) central city image is crucial to regional welfare; (2) new regional employers will rely on city markets to hire their work force; (3) failure to address inner-city social problems will come back to haunt all taxpayers in the form of higher costs for prisons and welfare; (4) inner-city crime affects the image of the entire region; (5) environmental issues can only be addressed region-wide; and (6) regional cooperation will bring enhanced political clout. Id. Anthony Downs identified similarly vital functions served by cities in metropolitan areas. See ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 52-59 (1994).

A third strand of regionalism scholarship focuses less on the economics of metropolitan areas and argues that ideals of democratic participation militate strongly in favor of metropolitan area government reform. The fact that many local governments take actions whose impacts extend far beyond their borders underscores the fundamentally anti-democratic lack of confluence between local governments’ physical territory and the scope of their powers in U.S. metropolitan regions. In that view, a regionally bounded multi-purpose government would better promote those longstanding democratic ideals.

Finally, fairness enters regionalist scholarship in local government law to make the normative claim that the current economic schism between city and suburb is morally unacceptable. The argument starts with the recognition that suburbanization and the central city decline that accompanied it was not a spontaneous, fortuitous occurrence, but rather the result of deliberate government policies that transferred large amounts of public resources from city to suburb. More broadly, though, the argument rests on the conviction that regional redistribution of wealth is “the right thing to do.” Thus, although some definitions of fairness might argue that dues are defensible and, indeed, preferable, the current regionalist debate appears united in its strong support of regional redistribution; raising revenue by dues runs fundamentally counter to that goal.

352. See Briffault, supra note 5, at 1164-70; Cashin, supra note 5, at 2035-47.
353. Metropolitan highway systems, government funding of commuter rail systems, education spending, government mortgage financing, and the privileged tax status of real property tax payments represent huge public subsidies of the suburbs at the expense of the cities. See, ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 8-15 (2000); ORFIELD, supra note 1, at 71 (finding that Minneapolis and St. Paul, in allocating the costs of regional sewage disposal, pay $6 million more in fees than they incur in costs); Cashin, supra note 5, at 2003-14 (citing various examples where the ‘‘favored quarter’’ receives a disproportionate share of public infrastructure funds for roads, highways, and expensive sanitary sewage treatment systems); Voith, supra note 328, at 78-80 (claiming that in Philadelphia, and possibly other cities, the central city subsidized public transit for suburbanites).
354. In the words of one urban economist who recently concluded that the regionalists’ economic interdependency argument is at best subject to empirical dispute:

Why is it that programs to help our neighbors pull themselves out of poverty must be justified in terms of the economic self-interest of those who provide the cash? We worry that by contributing to this literature, we have changed the terms of the debate to a positivist realm in which, if the numbers don’t come out right, metropolitan antipoverty programs will have been proven to be a “bad idea.” But a number of us believe that antipoverty programs are always a good idea, simply because they are the right thing to do.

Although the increasing importance of dues in municipal finance has negative implications for many aspects of local and regional governance, a realistic assessment leads to the conclusion that there is no easy way to change the status quo. Firmly entrenched factors at all levels of the government structure exert a large pro-dues force such that reversal of the trend appears extremely unlikely. State constitutions and laws, the state and federal judiciaries, numerous internal and external financial incentives, and firmly held beliefs about growth all play an important role in the preservation and further solidification of the dues approach to local government finance.

Moreover, as the longstanding history of many local government financing practices indicates, dues may, in fact, play an important, positive role in a community’s overall allocation of services. When the choice of dues results from a reasoned decision about the financing of a particular government project or service as but one part of the overall totality of local financing mechanisms, it is likely to reflect a consensus about the importance of the service, the general ability to pay on the part of the targeted beneficiaries, and the other mix of considerations articulated earlier in this Article. It is only when local governments are pushed to adopt them as an all purpose revenue raising device that dues exert an undue anti-regionalist influence. In those cases, they tend toward inequality and contribute to an intensified consumer vision of local government. This Article has argued that this shift has already occurred and that it has profound and negative implications for regionalism that previously have been overlooked.

Local government scholars of many doctrinal camps have come together to recognize the pressing need for regional answers to metropolitan problems. The range of solutions they propose is broad and reflects a wide range of underlying ideologies. For all of the current proposals, however, the proliferation of dues is a serious impediment. Dues provide a way for privileged segments of the community, or of the region, to preserve the very gap that regionalism seeks to reduce. Quite simply, if local government dues techniques are left untouched by the regionalists’ reforms, the current inter-municipal inequality will merely be transformed into intra-regional inequality.

355. See discussion supra Parts II.C.1-6.