NOTES

LIMITING THE USE OF HEIGHTENED SCRUTINY TO LAND-USE EXACTIONS

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INTRODUCTION

In 1969, the Legislature of New York City recognized the existence of a grave housing emergency and enacted a rent-stabilization law (RSL).[1] The RSL, which places limitations on rental rates and controls on evictions, was designed to "prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices."[2] In 1983, the State Legislature amended the RSL by passing the Omnibus Housing Act (OHA),[3] which mandates that to obtain the benefits of rent stabilization, the named tenant on the lease—not subtenants—must occupy the rental unit as a primary residence.[4]

Six months after enactment of the OHA, however, the Legislature, with very little debate,[5] passed chapter 940 of the New York Laws of 1984. Chapter 940 was a narrow law exempting not-for-profit hospitals from the OHA's denial of rent-stabilization privileges to subtenants.[6] Section 1 of chapter 940 provided that "where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodation by

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1 Rent Stabilization Act of 1969, Local L. No. 16, 1969 N.Y. Local Laws 176 (codified as amended at New York, N.Y., Charter & Admin. Code Ann. ch. 4, §§ 26-501 to -520 (N.Y. Legal Publishing Corp. 1992 & Supp. 1995)).

2 New York, N.Y., Charter & Admin. Code Ann. § 26-501 (N.Y. Legal Publishing Corp. 1992).

3 1983 N.Y. Laws 403.

4 § 41, 1983 N.Y. Laws 403 (codified at New York, N.Y., Charter & Admin. Code Ann. § 26-504(a)(1)(f) (N.Y. Legal Publishing Corp. 1992)).

5 Chapter 940, which originated as Senate Bill 9983 and Assembly Bill 11854, was passed by the New York State Legislature by a 59-0 vote in the Senate and by a 147-0 vote in the Assembly. See Governor's Bill Jacket to 1984 N.Y. Laws 940.

The Assembly did not hold debates on the matter, and the Senate's debates were quite cursory. See Senate Debates to 1984 N.Y. Laws 940 (on file with the *New York University Law Review*).

6 1984 N.Y. Laws 940.

such hospital shall be deemed to be tenants."[7] Without much ado, the Governor signed the bill into law.[8] As a result, nonprofit hospitals had essentially unlimited renewal rights to lease rent-stabilized apartments and sublet them to their employees.

In October of 1994, the New York Court of Appeals in *Manocherian v. Lenox Hill Hospital*[9] struck down chapter 940 as unconstitutional. The court held that the law violated the Fifth Amendment's prohibition against the taking of private property without just compensation because it did not substantially advance a legitimate state interest.[10] In so holding, the court repeatedly criticized chapter 940, characterizing it as special-interest legislation that was enacted primarily for the benefit of Lenox Hill Hospital[11] and stating that it burdened an extremely narrow group of owners.[12] In analyzing chapter 940, the court of appeals appeared to take issue not only with the governmental goals sought to be furthered by chapter 940 and the manner in which the chapter was designed to reach those goals, but also with the process by which chapter 940 was enacted. That is, the court appeared quite disturbed by the political power exerted by

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7 § 1, 1984 N.Y. Laws 940 (codified at New York, N.Y., Charter & Admin. Code Ann. § 26-504(a)(1)(h) (N.Y. Legal Publishing Corp. 1992)).

8 The Governor's Bill Jacket was a relatively short 37 pages, containing letters and memoranda both supporting and opposing the bill. The Legislature's stated justification for the passage of chapter 940 is as follows:

> Chapter 403 of the laws of 1983 made extensive amendments to the ETPA [Emergency Tenant Protection Act of 1974] and the admin[istrative] code. Among these were changes to the subletting provisions of said laws which adversely affected the ability of non-profit hospitals to house their affiliated personnel in apartments which were rented to these institutions for such purpose. This bill corrects this situation.

New York State Assembly Memorandum in Support of Legislation, Governor's Bill Jacket to 1984 N.Y. Laws 940.

The Bill Jacket also contained a memorandum in opposition to the passage of chapter 940. One of the objections proffered was that there was "no rational basis for distinguishing not-for-profit hospitals from any other charitable, religious or other institution or organization which rents a group of apartments to its affiliates, employees or officers for residential purposes as the primary residence of that person." Memorandum in Opposition to Five Day Bill, Governor's Bill Jacket to 1984 N.Y. Laws 940.

The Governor's Bill Jacket further disclosed that chapter 940 was also supported by the Commissioner of the State of New York Division of Housing and Community Renewal, the Hospital Association of New York State, Lenox Hill Hospital, and Beth Israel Medical Center. Those urging for veto of chapter 940 included Church Management Real Estate, The Real Estate Board of New York, Inc., and Michael C. Pelletier, President of the Board of Managers of the Salem House Condominium. See Governor's Bill Jacket to 1984 N.Y. Laws 940.

9 643 N.E.2d 479 (N.Y. 1994), cert. denied, 115 S. Ct. 1961 (1995).

10 Id. at 480.

11 See id. at 483 (asserting that chapter 940 secured benefits "for this privileged entity's benefit").

12 See id. (noting that burden fell on "[a] few owners").

Lenox Hill Hospital in securing chapter 940's passage, as if, in exercising such power, the hospital had somehow controverted the normal legislative process.[13]

In finding that chapter 940 did not substantially advance a legitimate state interest, the *Manocherian* court second-guessed the New York State Legislature by questioning the nexus between chapter 940 and the governmental interests (i.e., the goals of the RSL) the statute purported to serve.[14] The court followed the Supreme Court's analysis in *Nollan v. California Coastal Commission*[15] and *Dolan v. City of Tigard*[16] and employed heightened judicial scrutiny[17]—described by the *Nollan* Court as an "essential nexus"[18] and by the *Dolan* Court as "rough proportionality"[19] between the law and the goals of the legislature.

In following *Nollan*'s and *Dolan*'s use of heightened scrutiny, however, the New York Court of Appeals extended the reasoning of those cases. Although *Nollan* and *Dolan* had employed heightened scrutiny only in specific situations involving land-use exactions, the *Manocherian* court applied heightened scrutiny to a rent-stabilization regulation that involved none of the key factors present in *Nollan* and *Dolan*. This application of *Nollan* and *Dolan*, one not followed by any other court considering the issue, threatens to expand heightened judicial scrutiny of governmental regulations to a broad spectrum of cases involving economic regulations.

This Note examines the *Manocherian* court's use of heightened scrutiny and argues that application of heightened scrutiny, though perhaps justified in *Nollan* and *Dolan*, should not be applied to general regulatory takings claims. The purpose of this Note is to use *Manocherian* as an example in arguing that the use of heightened scrutiny under the Takings Clause should be limited to those situations where the Supreme Court has already applied it—land-use exaction settings—and that it should not be extended to general regulatory takings claims.

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13 See id. at 481 (asserting that Lenox Hill Hospital was principal force behind passage of chapter 940).

14 See id. at 483.

15 483 U.S. 825, 837-38 (1987) (holding that state's assertion of public interest in "visual access" to beach did not justify requiring public access along private homeowner's property).

16 114 S. Ct. 2309, 2321-22 (1994) (holding that state interest in preventing flooding and reducing traffic did not warrant dedication of land to city).

17 See *Manocherian*, 643 N.E.2d at 482 (noting that "the substantial State purpose for such legislation must be bound by a 'close causal nexus' to survive scrutiny"); id. at 483 (asserting that legislation must "substantially advanc[e] a legitimate State interest").

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

19 *Dolan*, 114 S. Ct. at 2319.

Part I of this Note provides an overview of the United States Supreme Court's takings cases and traces the development of heightened scrutiny in such cases. Part II sets forth the relevant facts and reasoning of *Manocherian*. Part III presents a more detailed view of the rationales given by the New York Court of Appeals for invalidating chapter 940 and explains that the *Manocherian* decision was driven by the court's belief that passage of chapter 940 resulted from a failure in the state's political processes. This Part argues, however, that a defect in the political process resulting in the deprivation of economic well-being generally should not be cause for courts to second-guess decisions of democratically elected legislatures.

The Supreme Court did, however, apply heightened scrutiny in *Nollan* and *Dolan* when it analyzed the constitutionality of economic legislation under the Takings Clause. In these two cases, both involving land-use exactions, the Court questioned the wisdom of economic regulation. Part IV of this Note analyzes whether *Manocherian* falls within the land-use exaction scenario. This Part maintains that, because *Manocherian* was not a land-use exaction, the New York Court of Appeals erred in applying heightened scrutiny. To this extent, Part IV.A analyzes both *Nollan* and *Dolan*, concluding that the following three critical factors, when taken together, constitute a land-use exaction: the existence of (1) a physical occupation, (2) an exaction (i.e., the granting of a building permit conditioned on the landowner giving up rights in return), and (3) an adjudicative decision by a local agency (as opposed to a state law). Part IV.B concludes that the Supreme Court did not intend heightened scrutiny to be applied to situations other than land-use exactions and that no lower federal courts or state courts have ever applied heightened scrutiny to a regulatory takings claim that did not involve at least one of the three factors. Finally, Part IV.C examines the normative reasons for requiring heightened scrutiny where the three factors are present and concludes that, because *Manocherian* involved none of these factors,[20] the New York Court of Appeals's use of heightened scrutiny in that case was improper.

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20 See Timothy L. Collins, "Fair Rents" or "Forced Subsidies" Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide, 59 Alb. L. Rev. 1293, 1300 (1996) ("*Manocherian* involved none of the critical elements present in *Nollan*, *Seawall*, and *Dolan*.").

I
A SUMMARY OF RELEVANT TAKINGS LAW

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation."[21] The Takings Clause, by its language and application, does not grant government the power to take land for public use, but instead assumes that power and limits its use to situations in which the government pays just compensation to owners of land.[22]

The government's duty to compensate has been justified from two different standpoints—efficiency and fairness. Judge Posner has espoused a rationale based upon efficiency, asserting that the compensation requirement "prevents the government from overusing the taking power. Without such a requirement, the government would have an incentive to substitute land for other inputs that were socially cheaper but more costly to the government."[23] The other rationale for just compensation is based upon the inherent unfairness of forcing individuals to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[24] Under either rationale, the Fifth Amendment's guarantee of just compensation is designed to prevent the government from using its power of eminent domain to shift the costs of a state enterprise to a few people when these costs should properly be borne by society as a whole.

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[21] U.S. Const. amend. V.

[22] See United States v. Carmack, 329 U.S. 230, 241-42 (1946) (noting that Fifth Amendment "imposes on the Federal Government the obligation to pay just compensation when it takes another's property for public use in accordance with the federal sovereign power to appropriate it").

[23] Richard A. Posner, Economic Analysis of the Law 58 (4th ed. 1992). Other scholars have similarly elaborated on the economic theory. They argue that the just-compensation requirement, in addition to forcing the government to act in a more efficient manner, can also provide proper incentives to investors. Without a just-compensation requirement, investors would be aware of the possibility that their land may be taken from them without payment and would therefore invest slightly less capital at the outset. See William A. Fischel & Perry Shapiro, Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law, 17 J. Legal Stud. 269, 269-70 (1988). The just-compensation requirement therefore both prevents the government from behaving in an inefficient manner and protects the private investor from being forced to act inefficiently due to the possibility that his property will be taken without compensation. See id.

[24] Armstrong v. United States, 364 U.S. 40, 49 (1960); see also Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967). In his influential article, Professor Michelman argued that "the only 'test' for compensability which is 'correct' in the sense of being directly responsive to society's purpose in engaging in a compensation practice is the test of fairness: is it fair to effectuate this social measure without granting this claim to compensation for private loss thereby inflicted?" Id. at 1172.

Most of the case law regarding the Takings Clause has arisen from landowners' efforts to obtain just compensation for noncompensated harms inflicted by a governmental regulation or law. Although Supreme Court jurisprudence on what sort of governmental action constitutes a taking is extremely broad and diverse, takings challenges generally can be broken down into two different types—those alleging that the governmental action perpetuated a permanent physical occupation and those alleging a regulatory taking. As the next two sections explain, the Supreme Court has developed a different test for each category.[25]

A. Permanent Physical Occupations

In 1982, the Supreme Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*,[26] which held that an ordinance giving rise to a permanent physical occupation constitutes a per se taking.[27] In holding that a New York statute permitting a cable-television company to install permanent cables on a building constituted a taking, the Court concluded that governmental action that leads to a permanent physical occupation is a taking, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[28]

B. Regulatory Takings

Landowners may also seek just compensation for regulatory takings—governmental actions that do not rise to the level of physical occupations. In *Pennsylvania Coal Co. v. Mahon*,[29] the first case to establish that regulatory actions could constitute a taking of property requiring just compensation, Justice Oliver Wendell Holmes held that

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[25] See Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (noting distinction between regulatory and physical takings and between their respective analyses). Because courts are more likely to grant just compensation when a taking involves a permanent physical invasion, some cases revolve around whether the challenged ordinance performs a physical invasion. See id.

[26] 458 U.S. 419 (1982).

[27] Id. at 441.

[28] Id. at 434-35. In so deciding, the Court drew upon a variety of cases decided in the first half of the 20th century that deemed as takings governmental actions that led to permanent occupations arising from flooding, see id. at 428 (citing Sanguinetti v. United States, 264 U.S. 146, 149 (1924); United States v. Cress, 243 U.S. 316, 327-28 (1917); Bedford v. United States, 192 U.S. 217, 225 (1904); United States v. Lynah, 188 U.S. 445, 468-70 (1903)), from the placement of telegraph lines, rails, and underground pipes, see id. at 429 (citing Western Union Tel. Co. v. Pennsylvania R.R. Co., 195 U.S. 540, 570 (1904); St. Louis v. Western Union Tel. Co., 148 U.S. 92, 98-99 (1893)), and from airplane overflights, see id. at 430-31 (citing United States v. Causby, 328 U.S. 256, 261 (1946)).

[29] 260 U.S. 393 (1922).

the Kohler Act of Pennsylvania, which limited the mining of coal to prevent the subsidence of structures on the surface of land, was an unconstitutional uncompensated taking.[30] In striking down the law as a taking, Justice Holmes uttered his famous phrase: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[31]

The Supreme Court has refined Holmes's test in *Pennsylvania Coal* by developing two different analyses to determine whether a regulation goes "too far" and thereby effects a regulatory taking without just compensation: an economic test to determine the diminution in value[32] and a means-ends test to determine the connection between the regulation and governmental purposes.[33]

1. The Economic Test—Diminution in Value

In *Penn Central Transportation Co. v. City of New York*,[34] the Supreme Court held that New York's Landmarks Preservation Law, which designated Grand Central Terminal a landmark and prevented the petitioners from building atop the terminal, was not a taking because it did not go too far.[35] In so ruling, the *Penn Central* Court asserted that a primary factor in determining whether a diminution in value is significant enough to effect a taking is "the extent to which the regulation has interfered with distinct investment-backed expectations."[36]

Although the diminution-in-value test has been present since *Pennsylvania Coal*, until recently the Supreme Court had never found a taking on purely economic terms.[37] In 1992, however, the Court in *Lucas v. South Carolina Coastal Council*[38] found a taking on pure diminution-in-value grounds. In so doing, however, it established a per se rule that is quite limited in scope, holding only that "when the owner of real property has been called upon to sacrifice *all* economi-

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30 See id. at 414 (holding that Kohler Act could not "be sustained as an exercise of the police power . . . where the right to mine . . . coal has been reserved").

31 Id. at 415.

32 See infra notes 34-39 and accompanying text.

33 See infra notes 40-60 and accompanying text.

34 438 U.S. 104 (1978).

35 Id. at 138.

36 Id. at 124. Justice Brennan, writing for the majority, formulated this test after previously recognizing that the Court had "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries" caused by governmental regulation receive just compensation. Id.

37 Jesse Dukeminier & James E. Krier, Property 1198 n.29 (3d ed. 1993).

38 505 U.S. 1003 (1992).

cally beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[39]

2. The Means-Ends Test

In addition to employing the diminution-in-value test to determine whether a challenged regulation constitutes a regulatory taking, the Supreme Court also applies a means-ends test to analyze the degree of connection (also called the nexus) between the government's goals and the legislation that has been enacted to further those goals. In *Agins v. City of Tiburon*,[40] the Supreme Court established the standard for this test, asserting that a governmental regulation would be deemed a taking if it did "not substantially advance legitimate state interests."[41]

Although the *Agins* Court upheld the zoning ordinance at issue with minimal examination,[42] in *Nollan v. California Coastal Commission*,[43] the Supreme Court's review of the nexus between the means and ends of governmental regulation took a stricter turn. The Nollans owned beachfront property in California and sought a permit to demolish a small structure on their land and replace it with a larger house.[44] In what has become known as a "land-use exaction,"[45] the California Coastal Commission recommended that the permit be granted subject to the Nollans allowing the public to cross their land by means of a lateral easement across the beach portion of the property.[46]

Justice Scalia, writing for the majority, held the Coastal Commission's action unconstitutional because it did not substantially advance a legitimate state interest.[47] The Court asserted that, had the Coastal

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[39] Id. at 1019.

[40] 447 U.S. 255 (1980).

[41] Id. at 260 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)).

[42] See id. at 261-62 (validating "exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization").

[43] 483 U.S. 825 (1987).

[44] Id. at 827-28.

[45] A land-use exaction consists of the following: (1) a governmental grant of a building permit to a landowner in return for (2) the landowner's grant of a property interest (and not just a monetary fee) to the government. This Note maintains that there was also a third important factor present in both *Nollan* and Dolan v. City of Tigard, 114 S. Ct. 2309 (1994): in each case, the challenged regulation was enacted by a state commission (*Nollan*) or a local planning board (*Dolan*) and not by the state legislature. See *Nollan*, 483 U.S. at 827 (challenging decision of California Coastal Commission); *Dolan*, 114 S. Ct. at 2317 (challenging city's condition for grant of building permit). For a detailed discussion of these three factors, see infra Part IV.

[46] *Nollan*, 483 U.S. at 828.

[47] See id. at 841. Unlike the *Agins* Court, however, Justice Scalia placed emphasis on "'*substantially*'" advancing legitimate state interests. Id. (citation omitted).

Commission required the Nollans to grant a public easement across their property, that requirement would have constituted a taking under the *Loretto* rule.[48] Because the grant of the easement was attached to the development permit, however, the Court held that the exaction of the easement in return for the development permit would be permissible—but only if the nexus between the need for the easement and the restriction on development was substantially related.[49] The Court went on to strike down the permit condition, holding that, because the "condition substituted for the prohibition utterly fail[ed] to further the end advanced as the justification for the prohibition," there was no nexus whatsoever.[50] The Court thus held the actions of the Coastal Commission to a heightened standard of scrutiny, requiring that there be a close causal nexus and that the permit condition serve the "same governmental purpose as the development ban."[51]

Seven years later, in *Dolan v. City of Tigard*,[52] the Supreme Court faced a situation remarkably similar to the *Nollan* land-use exaction. In *Dolan*, the petitioner sought a permit that would allow her to double the size of her plumbing store and build a thirty-nine-space parking lot on her property in the Central Business District of Tigard.[53] The City Planning Commission granted the permit subject to the conditions that petitioner dedicate the portion of her property falling within the floodplain of a nearby creek to improve a drainage

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48 See id. at 831-32 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).

49 See id. at 836-37.

50 Id. at 837.

51 Id. Justice Scalia, writing for the majority, and Justice Brennan, who wrote the dissenting opinion, disagreed over which level of scrutiny to apply. In footnote three of the majority opinion, Justice Scalia rejected the notion that the Court was bound to apply the same type of rational-basis scrutiny that it used to evaluate economic substantive due process and equal protection cases. Id. at 834 n.3. He asserted that, just as the standard of review for freedom of speech regulation under the First Amendment is not identical to the standard for due process challenges, the standard of review for property regulation in takings challenges is not identical to the standard for due process challenges to such regulation. Id.

Justice Brennan agreed that the factors used in evaluating takings challenges, such as those set forth in *Penn Central*, are distinct from other provisions in the Constitution. Id. at 843 n.1 (Brennan, J., dissenting) (citing Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 127 (1978)). He asserted, however, that the use of unique formulations in takings challenges is quite different from "the use of different standards of review to address the threshold issue of the rationality of government action." Id. As such, Justice Brennan argued for a less strict standard of review of the Coastal Commission's action. See id. at 843 ("It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State '*could rationally have decided*' that the measure adopted might achieve the State's objective." (citation omitted)).

52 114 S. Ct. 2309 (1994).

53 Id. at 2313.

system and that she allow another fifteen-foot strip to be used as a pedestrian/bicycle pathway.[54]

Although the *Dolan* court did find a nexus between the permit conditions and the legitimate state interest,[55] it also examined whether the nexus met the "required degree of connection between the exactions and the projected impact of the proposed development."[56] In defining the "required degree of connection," the *Dolan* Court looked to state courts for guidance, eventually settling on an intermediate degree of scrutiny or connection, called "reasonable relationship" by the states, and renamed "rough proportionality" by the Supreme Court.[57] Although the Court had some difficulty describing this test, twice noting that "[n]o precise mathematical calculation is required," it nevertheless held that the governmental entity must make some sort of individual effort to justify the nexus between the dedication conditions and the governmental purposes.[58]

Although the Court's opinions in *Nollan* and *Dolan* were extraordinarily similar in most respects, they differed in one important respect: Whereas the Supreme Court found no nexus between the property exaction and the governmental goals in *Nollan*, in *Dolan* it did find such a nexus, albeit one whose means and ends were not roughly proportionate. Like the Court in *Nollan*, the *Dolan* Court again closely inspected the connection between the land-use exaction and the governmental goals[59] and reaffirmed its extension of heightened scrutiny to land-use exactions.[60]

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54 Id. at 2314.

55 Id. at 2318.

56 Id. at 2317.

57 Id. at 2318-19.

58 Id. at 2319-20, 2322.

59 See id. at 2320.

60 See supra note 57 and accompanying text. This newly defined heightened standard of scrutiny was once again a point of intense contention between the majority, written by Justice Rehnquist, and the dissent, written by Justice Stevens. Echoing *Nollan*, the majority rejected the notion that the Commission's action represented a business regulation deserving only deferential scrutiny. It compared the Takings Clause to the Freedom of Speech Clause of the First Amendment, stating: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan*, 114 S. Ct. at 2320.

Justice Stevens asserted that the heightened scrutiny employed by the Court was reminiscent of the substantive due process analysis from Lochner v. New York, 198 U.S. 45 (1905), stating that "[b]esides having similar ancestry, both [the regulatory takings analysis employed by the majority and the substantive due process analysis] are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair." *Dolan*, 114 S. Ct. at 2327 (Stevens, J., dissenting).

This application of heightened scrutiny to land-use exactions under the Takings Clause has been a major source of scholarship since the Court's decisions in *Nollan* and *Dolan*. One significant point of debate is whether the Supreme Court intended heightened scrutiny to apply only to land-use exaction cases or whether it intended to expand such scrutiny to include regulatory takings challenges involving an exaction of money—as opposed to land—in return for a building permit.[61] The decision in *Manocherian v. Lenox Hill Hospital*[62] is a very important one in this respect because the New York Court of Appeals not only applied heightened scrutiny to a takings claim that was not a land-use exaction, but it also applied the *Dolan* test to a general regulatory takings situation, one that did not involve an exaction of *any* kind. If other courts follow this lead and analyze all regulatory takings claims with a heightened degree of scrutiny, the decision could have a serious detrimental effect on the ability of government to regulate.

The rest of this Note argues against such a broad application of heightened scrutiny. First, Part II traces the *Manocherian* court's reasoning in deciding to apply the *Dolan* test to a general takings claim. Second, Parts III and IV criticize this decision on two main grounds. Part III argues that, as a general matter, courts should review the constitutionality of economic regulation with great deference, even if such legislation appears to have been enacted in an antidemocratic manner. Part IV recognizes that the Supreme Court in *Nollan* and *Dolan* created an exception to this general rule when the challenged regulation constitutes a land-use exaction. Part IV nevertheless maintains that the compelling reasons to apply stricter scrutiny in land-use exaction cases are not present in general regulatory takings situations such as that found in *Manocherian*.

II
THE *MANOCHERIAN* DECISION

A. The Facts of the Case

Lenox Hill is a not-for-profit hospital located on the Upper East Side of Manhattan.[63] In the 1960s, before the RSL was enacted, Lenox Hill began leasing apartments in the vicinity of the hospital and subleasing them to its employees,[64] who often work midnight shifts.[65]

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61 See infra note 160 and accompanying text.

62 643 N.E.2d 479 (N.Y. 1994), cert. denied, 115 S. Ct. 1961 (1995).

63 Id. at 480.

64 Id. at 496 (Ciparick, J., dissenting).

65 Id.

The hospital subleased the apartments to its employees for the purpose of providing them with safe and moderate-cost housing for so long as they remained employed at Lenox Hill.[66] In 1964, Lenox Hill rented eighteen apartments at 420 East 79th Street in Manhattan, and, at the time of the lawsuit, it was the tenant of record for fifteen apartments, all of which were subject to rent stabilization.[67]

In 1976, the Manocherians purchased the building at 420 East 79th Street.[68] Thereafter, they regularly renewed Lenox Hill's leases and continued to do so until 1991, when six leases expired.[69] The Manocherians then served Lenox Hill and the various subtenants with notices of nonrenewal,[70] asserting that chapter 940 of the New York Laws of 1984 was unconstitutional and charging that chapter 940 effected a regulatory taking without just compensation because (1) the law "fail[ed] to substantially advance a legitimate state interest,"[71] and (2) it "abrogate[d] the owner's reversionary interest in the subject apartments."[72]

B. The Majority Opinion of the Court of Appeals

The Court of Appeals of New York agreed with the Manocherians, holding that, because chapter 940 of the New York Laws of 1984 did not substantially advance "a closely and legitimately connected State interest," it was unconstitutional as an uncompensated taking.[73] In its analysis, the court of appeals began with the general proposition that a regulation will constitute a taking "'(1) if it denies an owner economically viable use of his property, or (2) if it does not substantially advance legitimate State interests.'"[74] Specifi-

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66 Id.

67 Id.

68 Id.

69 Id. at 497 (Ciparick, J., dissenting).

70 Id.

71 Brief for Plaintiffs-Appellants at 27, *Manocherian* (No. 93/441) (on file with the *New York University Law Review*). The phrase "substantially advance legitimate state interests" refers to the regulatory taking tests set forth in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). For a more in-depth explanation of this takings analysis, see supra Part I.B.2.

72 Brief for Plaintiffs-Appellants at 52, *Manocherian* (No. 93/441). The term "reversionary interest" refers to the fact that once the nurse-subtenants of Lenox Hill ceased working at the hospital, the ability to rent the apartment would revert back to Lenox Hill and not to the Manocherians, who are the true landlords. The theory of "reversionary interests" is one component of the economics aspect of the takings analyses, which classifies a regulation as a taking if it "denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260. For an in-depth explanation of the economic analysis of the Takings Clause, see supra Part I.B.1.

73 See *Manocherian*, 643 N.E.2d at 480.

74 Id. at 482 (quoting Seawall Assocs. v. City of N.Y., 542 N.E.2d 1059, 1065 (N.Y.), cert. denied, 493 U.S. 976 (1989)).

cally, the court noted that in *Rent Stabilization Ass'n v. Higgins*,[75] the court of appeals had followed the lead of the United States Supreme Court in *Dolan v. City of Tigard*[76] and had defined the phrase "substantially advance legitimate State interests" to mean that the regulation in question must be tied by a "close causal nexus" to the state interest involved.[77] The *Manocherian* court defended its use of this heightened scrutiny by asserting that there was no indication that the Supreme Court in *Nollan v. California Coastal Commission*[78] intended to limit the test to purely physical takings.[79]

Applying the heightened scrutiny standard, the court determined that chapter 940, in and of itself, must substantially advance a legitimate state interest and could not merely serve as "an augmentation or complement to some generalized State interest found elsewhere in organic law or other statutes."[80] The court held that chapter 940 must further the goals of the RSL, and it rejected the contention of both dissenting opinions that chapter 940 could satisfy the state interest as part of the "overall umbrella" of the RSL.[81] The majority noted that the purpose of the RSL is to protect apartment dwellers from dislocation, and that chapter 940 contradicted this interest by establishing Lenox Hill as the de facto landlord with powers not limited or regulated under the RSL.[82] The court asserted that chapter 940 did not further the goals of the RSL, but was in reality a perk allowing a not-for-profit hospital to provide "fringe benefit[s]" to its employees.[83] Furthermore, the court rejected Lenox Hill's contention that chapter 940 served other legitimate state interests, such as allowing not-for-profit hospitals to provide cheaper medical care as a result of lower housing costs.[84] The health-care crisis cited by Lenox Hill, the court

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75 630 N.E.2d 626, 634 (N.Y. 1993). Although the *Manocherian* court cited *Higgins* for its acceptance of the "close causal nexus" test, it first embraced this linkage between means and ends in *Seawall*, 542 N.E.2d at 1068. In fact, the court's application of the close nexus test in *Higgins* was perfunctory and hardly characteristic of heightened scrutiny. See infra notes 214-23 and accompanying text.

76 114 S. Ct. 2309 (1994). Although the U.S. Supreme Court first used the term "close causal nexus" in *Dolan*, it has generally been accepted that the Court first applied heightened scrutiny to the linkage between legislation and governmental interest in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). See supra text accompanying notes 43-58.

77 See *Manocherian*, 643 N.E.2d at 482.

78 483 U.S. 825 (1987).

79 See *Manocherian*, 643 N.E.2d at 483.

80 Id.

81 Id. at 485-86.

82 See id. at 481. The court noted that the hospital had the power to evict its subtenants at its "whim." Id.

83 Id. at 484.

84 See id. at 485.

asserted, did not justify chapter 940 and was not connected to the RSL by a close enough nexus.[85]

C. *Judge Levine's Dissent*

In his dissenting opinion, Judge Levine attacked the majority's application of heightened scrutiny, arguing that even under heightened scrutiny, chapter 940 does substantially advance a legitimate state interest,[86] and further, that the majority's application of heightened scrutiny was an incorrect application of Supreme Court precedent.[87]

Further, Judge Levine asserted that even if the majority were correct in applying heightened scrutiny, the use of such intensified scrutiny still does not permit courts to choose one among many legitimate state interests.[88] He argued that one of the evils addressed by the RSL was the excessive profiteering of primary tenants when they subleased their rental apartments,[89] that the loss of RSL protection regarding nonprofit hospitals was an unintended consequence of the OHA in 1983,[90] and that chapter 940 was a legislative determination that the primary tenancy requirements were not applicable to a hospital that did not engage in price-gouging.[91] Judge Levine therefore concluded that the close nexus was satisfied and that chapter 940 did not exact a regulatory taking.[92]

More importantly, Judge Levine took issue with the majority's use of heightened scrutiny.[93] He asserted that the Supreme Court in *Nollan v. California Coastal Commission*[94] and *Dolan v. City of Tigard*[95] limited the use of heightened scrutiny to situations involving land-use exactions.[96] Judge Levine noted that in both *Nollan* and *Dolan*, the permit conditions alone would have constituted per se physical takings, and that the requirement of a close causal nexus between the permit conditions and the governmental purpose was lim-

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85 See id. In part IV of the majority opinion, the court addressed the economic aspect of the regulatory takings analysis. Id. at 485-87. Because this Note focuses on the means-end analysis, that part of the opinion is not discussed further.

86 See id. at 491-94 (Levine, J., dissenting).

87 See id. at 494-95 (Levine, J., dissenting).

88 See id. at 491 (Levine, J., dissenting).

89 See id. at 492 (Levine, J., dissenting).

90 See id.

91 See id.

92 See id. at 494 (Levine, J., dissenting).

93 See id.

94 483 U.S. 825 (1987).

95 114 S. Ct. 2309 (1994).

96 See *Manocherian*, 643 N.E.2d at 494-95 (Levine, J., dissenting).

ited to such a quid pro quo situation.[97] Although he felt compelled by stare decisis to apply the heightened level of scrutiny because the New York Court of Appeals had previously applied such scrutiny,[98] Judge Levine registered his belief that its use should be limited.[99]

To rebut Judge Levine's claims, the majority repeatedly asserted that the Supreme Court had ruled definitively that the close causal nexus requirement applies in all takings situations and that Judge Levine's dissent was therefore based upon a misunderstanding of both federal and state takings law.[100]

III

CHAPTER 940—A DEFECT IN THE POLITICAL PROCESS?

Part III of this Note presents a more detailed view of why the *Manocherian* court felt compelled to invalidate chapter 940. Part III.A examines why the court of appeals was so concerned about the passage of chapter 940 and concludes that the court was distressed about what it perceived to be a perversion of the political process. Part III.B responds to the court's concern, arguing that even if the political process did not work in an ideal manner, it is not the business of the courts to invalidate legislation affecting only property rights.

A. Manocherian *Explained—The Defect in the Political Process*

A thorough reading of the opinion provides one answer to the question of why the New York Court of Appeals applied heightened scrutiny to invalidate chapter 940. Although most takings claims involve some disparate economic treatment, in this case the court be-

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[97] See id. at 495 (Levine, J., dissenting).

[98] See id. at 494 (Levine, J., dissenting) (citing Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626 (N.Y. 1993); Seawall Assocs. v. City of N.Y., 542 N.E.2d 1059 (N.Y.), cert. denied, 493 U.S. 976 (1989)).

[99] See id. at 495 (Levine, J., dissenting). Although the majority seemed to hold that chapter 940 was facially unconstitutional because it failed to substantially advance a legitimate state interest, see id. at 480, the Manocherians challenged only the constitutionality of chapter 940 as it applied to their apartment building, see id. at 487; see also Brief for Plaintiffs-Appellants at 2, *Manocherian* (No. 93/441) (on file with the *New York University Law Review*); Reply Brief for Plaintiffs-Appellants at 2, *Manocherian* (No. 93/441) (on file with the *New York University Law Review*) ("The RSL, as amended by chapter 940, is unconstitutional *as applied* to the specific facts of this case.").

[100] See *Manocherian*, 643 N.E.2d at 483 ("Judge Levine's dissent discounts *Seawall* and casts unfortunate uncertainty on the governing precedents and principles."); id. ("[T]here is no basis in *Nollan* itself for concluding that the Supreme Court decided to apply different takings tests, dependent on whether the takings were purely regulatory or physical."); id. at 484 ("Functionally, [Judge Levine's] analysis undercuts the legitimate State interest and close causal connection components of the well-established test.").

lieved that such disparate treatment was due to a defect in the political process resulting from Lenox Hill's political power.[101]

On numerous occasions the court lambasted chapter 940 as narrow special-interest legislation enacted solely for the benefit of Lenox Hill and affecting only a few landlords and tenants. The majority disparaged both the passage and scope of chapter 940 by asserting that Lenox Hill was the "principal agent" behind the enactment of the rent-stabilization amendment,[102] the purpose of which was to subsidize housing for "Lenox Hill Hospital's preferential allotment."[103] The court characterized the legislation as "a one-dimensional financial award,"[104] a "fringe benefit,"[105] and a "valuable perk"[106] affecting only a "tiny number of dwelling units"[107] and enacted only for the benefit of a "privileged" institution.[108]

The court also explicitly addressed what it saw as a blatant example of political favoritism at the expense of landlords who had no such comparable political might, noting that chapter 940 "bestows a State-enacted indirect gift to a preferred supplicant, the nonoccupying prime tenant, underwritten by the improperly burdened property owners."[109] The majority feared that to let the law stand would add precedential support and "countenance a myriad of favoritism experiments or supplicant demands or preferential entitlements to special classes of entities" in lieu of more general and acceptable State interests,[110] and that it afforded the hospital "a unique and additional preference accorded no one else similarly situated."[111]

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101 Cf. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that less deference be afforded to legislation directed against "discrete and insular minorities" which may "curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

102 See *Manocherian*, 643 N.E.2d at 481 (stating that "'[t]his bill has been introduced at the request of Lenox Hill Hospital in New York City . . . [and i]ts purpose is to enable Lenox Hill to have the right to renewal leases'" (quoting Transcript of N.Y. Senate Floor Debate of June 28, 1984, at 6452, regarding S. 9983, 207th Leg. Sess. (1984))).

103 Id. at 480.

104 Id. at 484.

105 Id.

106 Id.

107 Id.

108 Id. at 483; see also id. at 484-85 ("A proffered State interest, which by definition ıould serve and protect the general populace on a fairly and uniformly applied basis, ıould not be countenanced when, as occurs here, the statute instead benefits one special ass for an essentially unrelated economic redistribution and societal relationship.").

109 Id. at 485 (noting again that "statute thus diverts and subverts [the] equal treatment gime").

110 Id.

111 Id. at 481; see also id. at 494 (Levine, J., dissenting) (suggesting that New York Legisıre, like "'[Congress,] need not control all rents or none. It can select those areas or

That the court disparaged such political favoritism was not surprising; that it feared the favoritism to such a degree that it needed to declare the economic legislation unconstitutional was. Furthermore, in declaring the economic legislation unconstitutional, the court employed a heightened scrutiny analysis reminiscent of substantive due process,[112] or equal protection,[113] in contrast to a more traditional takings analysis which is usually based upon physical invasions or loss of investment-backed expectations.

B. Problems with the Defect in Political Process Rationale

Although defects in the political process are sometimes grounds for applying more intense judicial scrutiny, courts usually apply heightened scrutiny only when the defects are the result of, for example, prejudice against minorities, restrictions on suffrage, or free-speech limitations.[114] The exercise of undue influence by a specific interest group is rarely, if ever, grounds for heightened scrutiny because courts are usually reluctant to interfere in the normal workings of the American political process.[115] Further, courts are ill prepared to apply heightened scrutiny in judging the merits of economic legislation.[116]

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those classes of property where the need seems the greatest'" (quoting Woods v. Miller Co., 333 U.S. 138, 145 (1948))).

[112] Cf. Dolan v. City of Tigard, 114 S. Ct. 2309, 2326 (1994) (Stevens, J., dissenting) (asserting that majority opinion was "resurrection of a species of substantive due process analysis that [the Court] firmly rejected decades ago"); Nollan v. California Coastal Comm'n, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting) (arguing that majority invalidated permit exaction as illegitimate exercise of police power).

[113] Cf. *Nollan*, 483 U.S. at 834 n.3 (asserting that standard for takings challenges is not same as that for equal protection claims); see also infra notes 118-27 and accompanying text.

[114] See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[115] See James E. Krier, Takings from Freund to Fischel, 84 Geo. L.J., 1895, 1902 (1996) (reviewing William A. Fischel, Regulatory Takings: Law, Economics, and Politics (1995)) (summarizing Fischel's argument that "[b]ecause courts are better at policing the processes than they are at evaluating the products of legislative deliberations, the primary judicial concern should be to make certain that political insiders are not exploiting powerless outsiders—people who, for one reason or another, lack the ability to protect themselves (and their property) by standard democratic means"). There is no evidence that landlords, as opposed to hospitals, are political outsiders who cannot protect themselves using democratic means.

[116] See Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 34-35 (1991) (rejecting arguments made by interest group theorists that presence of interest groups should lead to intensified judicial review). Elhauge does not debate that the presence of interest groups may have a disproportionately large influence on the political process; he simply argues that courts are in no better a position than are legislatures to combat this problem. See id.; cf. Rutan v. Republican Party, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (noting that "choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political con-

In his 1988 article on takings, Professor Michelman, in the course of analyzing whether Justice Scalia intended the heightened scrutiny of the essential nexus test to apply more generally, pointed out that the similarity between the essential nexus test of *Nollan* and the test used for assessing an equal protection violation could lead to confusion as to which cases "really and truly involve[ ] a takings challenge meriting intensified means-ends scrutiny."[117] In so doing, Michelman posed the following question: "What follows if we take at face value the proposition that takings claims, like free-speech claims, beget heightened scrutiny as compared with ordinary economic due process and equal protection claims?"[118]

Michelman's point is well taken. If the Supreme Court intended its *Nollan* and *Dolan* opinions to signify that heightened scrutiny must be applied to all takings claims (which, by definition, would implicate economic legislation), then application of that scrutiny would be facially similar to an equal protection analysis—judging means and ends—but in a way not permitted under the Equal Protection Clause.[119] As the Supreme Court noted in *New Orleans v. Dukes*:[120]

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude . . . . [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.[121]

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texts—is not so clear that I would be prepared . . . to chisel a single, inflexible prescription into the Constitution").

117 Frank Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1613 (1988).

118 Id. Michelman was referring to that part of *Nollan* in which the majority explicitly denied that it was equating takings claims with equal protection claims. See *Nollan*, 483 U.S. at 834 n.3.

119 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

120 427 U.S. 297 (1976).

121 Id. at 303-04 (citations omitted).

Because takings challenges implicate economic legislation, which generally involves no suspect class[122] or fundamental right,[123] courts do not subject such legislation, or the nexus between the legislation and legitimate governmental goals, to strict or intermediate scrutiny under the Equal Protection Clause.[124] Due to the similarity between the two tests, applying heightened scrutiny to evaluate the wisdom of regulation challenged under the Takings Clause is tantamount to applying heightened scrutiny to the regulation under the Equal Protection Clause, something the court has steadfastly refused to do.[125] If courts begin to apply heightened scrutiny under the Takings Clause, then "[a]ny aggrieved owner . . . would plead 'taking,' not 'deprivation without due process' or 'denial of equal protection.'"[126] Because courts seem unlikely to follow this scenario, Michelman confidently concludes that "[t]he obvious alternative is that a litigant can challenge state regulatory action 'as' a taking, and thereby obtain intensified judicial scrutiny of the regulation's instrumental merit or urgency, if and only if the challenged regulation has the effect of imposing a permanent physical occupation on an unwilling owner."[127]

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122 A "suspect class" is one defined as being "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

Suspect classifications requiring strict scrutiny include those drawn on the basis of race or nationality. See, e.g., Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (holding that "federal racial classifications, like those of a State, must serve a compelling government interest, and must be narrowly tailored to further that interest"). In addition, courts apply intermediate scrutiny when the classification is based upon sex. See Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

123 One fundamental right whose alleged abridgment requires strict scrutiny is the right to privacy. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

124 See *Dukes*, 427 U.S. at 303 ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . .").

125 See, e.g., id. at 303-04 (rejecting equal protection challenge and upholding ordinance creating "grandfather clause" exception to law preventing pushcart vendors from selling food); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) (noting that where equal protection concerns are not implicated, states have broad leeway in designing tax structure); Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) (rejecting equal protection challenge to statute limiting business of debt adjustment to lawyers); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (rejecting equal protection challenge to law prohibiting unlicensed optometrists or ophthalmologists from fitting or replacing lenses, and noting that Supreme Court no longer uses Due Process Clause to invalidate laws considered to be "unwise" or "improvident").

126 Michelman, supra note 117, at 1613.

127 Id. at 1613-14; see also supra Part I.A for a discussion of permanent physical occupations.

Although Professor Michelman may be correct about the Supreme Court's intention, the Court of Appeals of New York did not employ similar reasoning. The *Manocherian* court's decision to apply heightened scrutiny in striking down chapter 940 exemplified exactly that which Michelman feared. The court applied equal-protection-type heightened scrutiny under the Takings Clause to strike down economic legislation involving neither a fundamental right nor a suspect class[128]—a regulation that, under the Equal Protection Clause, would be subject only to a rational-basis test.[129]

Because a court would be unlikely to strike down such a law under the Equal Protection Clause, it is disingenuous for it to do so using a similar means-ends analysis, this time with heightened scrutiny, under the Takings Clause. Even if a defect in the political process existed in this case, the same rationales for limiting the scope of judicial scrutiny regarding the wisdom of economic legislation under the Due Process and Equal Protection Clauses adhere under the Takings Clause. Moreover, the Supreme Court has established separate and discrete takings analyses for regulations that amount to permanent physical occupations[130] and denials of investment-backed expectations.[131] These tests were formulated to address the specific problems that arise when the government unfairly burdens an individual when attempting to regulate for the public good.

Finally, what happened in *Manocherian* appears not to be a defect, but a very typical example of politics on a local scale in the United States. For years, hospitals, like other primary tenants, were permitted to sublet apartments while still remaining subject to rent stabilization.[132] Yet the legislature decided to put an end to this practice because many primary tenants were receiving windfalls by subletting at market rate while they rented from the owner at a below-market rate.[133] Unlike other primary tenants, however, there is no evidence in the *Manocherian* opinion to suggest that Lenox Hill (or any other nonprofit hospital) was gouging its nurse-subtenants.[134]

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128 Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 480 (N.Y. 1994) ("We conclude that this legislation suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest."), cert. denied, 115 S. Ct. 1961 (1995).

129 See *Dukes*, 427 U.S. at 303-04 (noting that rational-basis scrutiny is applied to economic regulations challenged under Equal Protection Clause).

130 See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

131 See Penn Cent. Transp. Co. v. City of N.Y., 483 U.S. 104, 124 (1978).

132 See *Manocherian*, 643 N.E.2d at 496 (Ciparick, J., dissenting).

133 See id.

134 Cf. Record on Appeal at 68, *Manocherian* (No. 93/441) (on file with the *New York University Law Review*) (indicating that as of June 1, 1989, the rent on one apartment at issue was $621.96).

The hospital, a powerful political actor on Manhattan's Upper East Side, petitioned its state senator to amend this law.[135] The senator did so, pushing the amendment through the Senate with minimal debate and through the Assembly with no debate, garnering unanimous votes in each house.[136] Landlord organizations, however, were not shut out of the picture, as they also petitioned the governor, albeit unsuccessfully, to veto the bill.[137]

These supposed defects in the political process should not give rise to equal protection arguments because that process is the way in which the political systems, both state and federal, work in the United States today. Courts thus should not invalidate the workings of the political process under the Equal Protection Clause except when the defect results from political forces that effectively deny the rights of discrete and insular minorities or deprive individuals of their fundamental rights.[138] Because no suspect class or fundamental right was implicated, the *Manocherian* court should have afforded the state legislature significant deference in scrutinizing chapter 940. Future courts should also be careful when applying heightened scrutiny under the Takings Clause because, as Professor Michelman warned, aggrieved property owners will then bring their economic claims under the Takings Clause in order to take advantage of a higher level of scrutiny than is allowable under the Equal Protection Clause.[139]

IV
MANOCHERIAN—AN OVERBROAD USE OF HEIGHTENED SCRUTINY

Although, as Part III demonstrated, courts generally apply rational-basis scrutiny when judging legislation that affects only property rights, in *Nollan v. California Coastal Commission*[140] and *Dolan v. City of Tigard*[141] the Supreme Court applied heightened scrutiny when analyzing land-use exactions, a very specific type of legislation affecting property rights. Part IV argues that although the application of heightened scrutiny may have been appropriate in the land-use

135 See *Manocherian*, 643 N.E.2d at 481 (quoting Transcript of N.Y. Senate Floor Debate of June 28, 1984, regarding S. 9983, 207th Leg. Sess. (1984)).

136 See Governor's Bill Jacket to 1984 N.Y. Laws 940.

137 See id.

138 See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

139 See Michelman, supra note 117, at 1613 (stating that "[a]ny aggrieved owner prefers intensified scrutiny and thus would plead 'taking' not 'deprivation without due process' or 'denial of equal protection'").

140 483 U.S. 825 (1987).

141 114 S. Ct. 2309 (1994).

exaction situations of *Nollan* and *Dolan*, it was not proper in *Manocherian*, a case not involving a land-use exaction.

Part IV.A examines the specific factual bases in *Nollan* and *Dolan* to determine what constitutes a land-use exaction. It argues that there were three critical factors necessary to the holdings of both cases, none of which were present in *Manocherian*. Part IV.B analyzes how the Supreme Court itself has limited heightened scrutiny to such land-use exaction scenarios and then demonstrates that lower federal courts and state appellate courts have limited their use of heightened scrutiny to land-use exactions involving at least one, if not all, of these factors.[142] This Part also examines previous New York Court of Appeals cases that have applied heightened scrutiny in situations unlike those in *Nollan* and *Dolan*, and analyzes how *Seawall*,[143] *Higgins*,[144] and *Manocherian* differ from *Nollan* and *Dolan*. Part IV.C offers normative reasons to explain why the heightened scrutiny that the Supreme Court applied in *Nollan* and *Dolan* may work well in land-use exaction cases, but is not justifiable in cases such as *Manocherian*, where a land-use exaction is not present.

A. The Critical Facts of Nollan *and* Dolan

The facts of *Nollan* and *Dolan* are remarkably similar. In both situations, the Court struck down state regulation enacted and enforced not by state legislature but by planning boards.[145] In both cases, the regulation required that the landowners physically dedicate (or allow the public to use) some portion of their land in return for the granting of a building permit.[146] In both *Nollan* and *Dolan*, the

142 See Collins, supra note 20, at 1303 (noting that *Manocherian* "was the first application of [heightened scrutiny] to a case involving a general legislative determination which required no conveyance of any previously recognized property right, no element of forced physical intrusion on the property, and which imposed no 'unconstitutional condition' on the granting of a discretionary government benefit").

143 Seawall Assocs. v. City of N.Y., 542 N.E.2d 1059 (N.Y.), cert. denied, 493 U.S. 976 (1989).

144 Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626 (N.Y. 1993).

145 In *Nollan*, the regulatory agency was the California Coastal Commission. See *Nollan*, 483 U.S. at 827. In *Dolan*, the regulatory agency was the City Planning Commission of the City of Tigard. See *Dolan*, 114 S. Ct. at 2314; see also id. at 2316 (asserting that more general land-use regulations "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel").

146 See *Dolan*, 114 S. Ct. at 2314 (noting that Commission granted Dolan's building permit subject to conditions that (1) she dedicate land within Fanno Creek floodplain to city and (2) she dedicate land for construction of pedestrian/bicycle pathway); *Nollan*, 483 U.S. at 828 (stating that Coastal Commission recommended that building permit be granted subject to condition that Nollans allow the public a lateral easement of passage across their beach).

Supreme Court noted that, had the commissions required the landowners to make outright dedications of land without conditioning the building permits on such dedications, the Court would have judged the actions to be takings because they would have involved per se physical occupations of land.[147] The *Nollan* and *Dolan* Courts assumed that the goals sought to be achieved by the respective land-use commissions were permissible and hence that the commissions could have denied the permit applications outright.[148]

In both cases, however, the Supreme Court held that, unless the nexus between the permit condition and the legitimate state interest was sufficiently close, the restriction would be invalid as a taking and would be "'an out-and-out plan of extortion.'"[149] In other words, in order to have a sufficient nexus between the means and ends, the permit condition must serve the same legitimate governmental purpose as the outright development ban that the Court assumed would not have been a taking.[150] Finally, in both cases, the Supreme Court found an insufficient nexus between the permit condition and the governmental purposes and therefore held that the permit condition constituted a taking without just compensation.[151]

In fact, the only significant difference between *Nollan* and *Dolan* was that the *Dolan* Court developed a second step to determine the extent of the required nexus between the condition and the governmental purpose. In other words, the Court held that it must "decide the required degree of connection between the exactions and the projected impact of the proposed development."[152] In *Dolan*, the Court noted that the only reason it did not reach the second step of the anal-

147 See *Dolan*, 114 S. Ct. at 2316 (declaring that "[w]ithout question," the dedication, if not attached to building permit, would have been a taking); *Nollan*, 483 U.S. at 831-32 (stating that easement was a permanent physical occupation and would have been a taking under rule set forth in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).

148 See *Dolan*, 114 S. Ct. at 2317-18 (noting that preventing flooding and reducing congestion are "[u]ndoubtedly" legitimate goals, and therefore that limiting development within floodplain would be permissible); *Nollan*, 483 U.S. at 835 (assuming that Coastal Commission could legitimately protect ability of public to see beach and prevent congestion at beach and could therefore deny building permit if new house impeded those purposes).

149 *Dolan*, 114 S. Ct. at 2317 (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)); *Nollan*, 483 U.S. at 837 (same).

150 See *Nollan*, 483 U.S. at 837.

151 See *Dolan*, 114 S. Ct. at 2321 (holding that Commission's findings "do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building"); *Nollan*, 483 U.S. at 839 (holding that "imposition of the permit condition cannot be treated as an exercise of [the Commission's] land-use power").

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

ysis in *Nollan* was because, in that case, "the connection did not meet even the loosest standard."[153]

The facts of the *Nollan* and *Dolan* cases, therefore, are remarkably similar: In both instances the Court employed heightened scrutiny in analyzing takings claims that arose in an extremely specific fact scenario known as a land-use exaction. Forming the basis of the land-use exaction are three specific factors: (1) the existence of an exaction (i.e., the granting of a permit to build conditioned on the landowner giving up property rights) (2) requiring the land owner to grant either land or an easement, and not just to pay a fee, pursuant to (3) a regulation that is the product of an executive agency's adjudicative decision rather than a legislature's enactment of a law.[154] In the absence of these three facts, the Supreme Court has never applied heightened scrutiny to find that a regulation constituted a taking without just compensation. In addition, as discussed in the next section, although some lower courts have held (and some members of the Supreme Court have hinted) that the rough proportionality standard of *Dolan* may apply when not all of these conditions are met, no court except *Manocherian* has applied the *Dolan* standard when *none* of these conditions were present.[155]

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153 Id. The *Nollan* Court noted that "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Nollan*, 483 U.S. at 838.

Although the Supreme Court treated the second step it created in *Dolan* as self-evident (and inherent in the *Nollan* opinion), the Justices did not all agree that the second step necessarily followed from the *Nollan* decision. See *Dolan*, 114 S. Ct. at 2330-31 (Souter, J., dissenting) ("The Court treats this case as raising a further question, not about the nature, but about the degree, of connection required between such an exaction and the adverse effects of development. . . . [O]n my reading, the Court's conclusions about the city's vulnerability carry the Court no further than *Nollan* has gone already, and I do not view this case as a suitable vehicle for taking the law beyond that point.").

154 See Robert H. Freilich & David W. Bushek, Thou Shalt Not Take Title Without Adequate Planning: The Takings Equation After *Dolan v. City of Tigard*, 27 Urb. Law. 187, 201 (1995) (analyzing whether *Dolan* applies to all dedications or only to dedications of land); James H. Freis, Jr. & Stefan V. Reyniak, Putting Takings Back into the Fifth Amendment: Land Use Planning After *Dolan v. City of Tigard*, 21 Colum. J. Envtl. L. 103, 130 (1996) (observing that the facts of *Dolan* differed from those of Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), and Penn Central Transportation Co. v. City of New York, 483 U.S. 104 (1978), because *Dolan* involved adjudicative decision and because permit conditions in *Dolan* required that landowner "deed portions of [her] property to the city"); Catherine B. Lehmann, Note, *Dolan v. City of Tigard*: A Heightened Scrutiny of the Takings Clause of the Fifth Amendment, 32 Hous. L. Rev. 1153, 1175, 1181-85 (1995) (analyzing importance of factors such as legislative versus adjudicative decisionmaking and dedications of land versus monetary fees).

155 See Collins, supra note 20, at 1303.

B. Federal and State Precedent

As Part IV.A has demonstrated, there were three critical factors underlying the Supreme Court's decisions to apply heightened scrutiny in *Nollan* and *Dolan*. Part IV.B analyzes Supreme Court, lower federal, and state takings cases to determine whether the Supreme Court has indicated any intent to expand heightened scrutiny and whether lower courts have applied such scrutiny in cases not involving the three aforementioned factors.

1. Supreme Court Precedent

There have been indications that some members of the Supreme Court intend to apply *Dolan*-type scrutiny to all exactions, not just to those involving land. Nonetheless, no Supreme Court case has suggested expanding the use of heightened scrutiny to all regulatory takings situations.

On June 27, 1994, three days after the *Dolan* decision, the Supreme Court vacated and remanded the case of *Ehrlich v. City of Culver City*[156] "for further consideration in light of *Dolan v. City of Tigard*."[157] Unlike *Nollan* and *Dolan*, *Ehrlich* involved monetary exactions. In that case, Culver City, California, had voted to approve the landowner's application to build condominiums in exchange for payments of $280,000 (to be used for city recreational facilities) and $33,220 (to be used for condominium artwork).[158] The California Court of Appeal initially upheld the exactions on the ground that *Nollan* did not apply to impact fees, and therefore monetary exactions need only be rationally related to the governmental interest at stake.[159] By vacating and remanding *Ehrlich* in light of *Dolan*, however, the Supreme Court, albeit by a bare majority, "may have signaled its intent" to apply the rough proportionality test of *Dolan* to monetary fees in addition to physical exactions.[160]

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156 19 Cal. Rptr. 2d 468 (Ct. App. 1993), vacated and remanded, 114 S. Ct. 2731 (1994).

157 Ehrlich v. City of Culver City, 114 S. Ct. 2731, 2731 (1994). Justices Blackmun, Stevens, Souter, and Ginsburg, the four dissenters in *Dolan*, also voted to deny certiorari in *Ehrlich*. Id.

158 *Ehrlich*, 19 Cal. Rptr. 2d at 471-72.

159 See id. at 475-76.

160 Freis & Reyniak, supra note 154, at 133; see also John J. Delaney, What Does It Take to Make a Take? A Post-*Dolan* Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court, 27 Urb. Law. 55, 68 (1995) (asserting that, based upon *Ehrlich*, "there is reason to believe that the *Nollan*/*Dolan* . . . heightened scrutiny will be applied to other forms of land-use exactions, including development fees"); Michael B. Dowling & A. Joseph Fadrowsky III, Note, Dolan v. City of Tigard: Individual Property Rights v. Land Management Systems, 17 U. Haw. L. Rev. 193, 243 (1995) ("A second appeal [of *Ehrlich*] to the Supreme Court would surely afford the Court the opportunity to draw a brighter line in how far the reasoning in *Dolan* might be extended.").

While the decision in *Ehrlich* may arguably have indicated that the Supreme Court intends to expand *Dolan*'s use of heightened scrutiny to monetary exactions, the Court has since declined an opportunity to broaden the use of heightened scrutiny to legislative enactments.[161] Through a denial of certiorari in *Parking Ass'n v. City of Atlanta*, the Court refused to review a Georgia Supreme Court decision upholding an ordinance on grounds that *Dolan* did not apply to legislative enactments.[162]

Pennell v. City of San Jose[163] is another example of a case in which the Supreme Court did not extend the rough proportionality test to a rent-control ordinance not involving an exaction. In *Pennell*, the Supreme Court analyzed a takings challenge brought by a homeowner who contested the tenant-hardship provision of a San Jose rent-control ordinance. The ordinance in question authorized a rent-control hearing officer to consider the "hardship to a tenant" as one factor in determining whether to approve an increase in rental rate.[164] Justice Rehnquist, writing for the majority, refused to consider the takings claim, asserting that there was no evidence in the record that the tenant-hardship provision had ever been relied upon in reducing a rent increase.[165] The Court stated that it did not have before it "a sufficiently concrete factual situation" to address the takings claim.[166]

The interesting part of *Pennell* was the interplay between Justice Rehnquist's majority opinion and Justice Scalia's dissent, which was joined only by Justice O'Connor. Justice Scalia, relying on the close causal nexus test of *Nollan*, argued that, because there was no "cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy," the regulation constituted an unconstitutional uncompensated taking.[167] Justice Scalia would have invalidated the tenant-hardship provision, arguing that the ordinance, which permitted a hearing officer to look

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161 See Parking Ass'n v. City of Atlanta, 115 S. Ct. 2268 (1995).

162 Id. (Thomas, J., dissenting from the denial of certiorari). In his dissent from denial of certiorari, Justice Thomas, joined by Justice O'Connor, noted that the Supreme Court of Georgia had distinguished *Dolan* on the ground that *Dolan* does not apply to legislative acts. Id. (citing Parking Ass'n v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994)). He asserted that the Supreme Court should have granted certiorari because lower courts are divided on the issue of whether *Dolan* applies to legislative acts. Id. at 2269 (Thomas, J., dissenting from denial of certiorari).

For a statement regarding the persuasiveness of a denial of certiorari, see infra note 174.

163 485 U.S. 1 (1988).

164 Id. at 4.

165 See id. at 10.

166 Id.

167 See id. at 20 (Scalia, J., concurring in part and dissenting in part).

at the hardship to a tenant in determining whether to allow the rental increase, was not sufficiently related to the admittedly legitimate governmental interest in preventing landlords from charging excessive rents.[168]

The dissenting opinion of Justices Scalia and O'Connor[169] illustrates two important facts. First, two Supreme Court justices are willing to extend the heightened means-ends scrutiny of *Nollan* to a situation not involving a land-use or monetary exaction.[170] Second, and more pertinent to this discussion, a majority of the Court, including two justices who previously applied heightened scrutiny in *Nollan*,[171] studiously avoided doing the same in *Pennell* by refusing to consider the takings claim because of the lack of a specific factual setting. Moreover, as Justice Scalia was quick to point out,[172] the majority's insistence on avoiding the substantive takings claim was based on shaky precedent, providing further evidence that the Court was attempting to avoid applying heightened scrutiny in situations other than *Nollan*-type exactions.[173]

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168 See id. at 21 (Scalia, J., concurring in part and dissenting in part).

169 For commentary on this interplay, see, e.g., Douglas W. Kmiec, The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse, 88 Colum. L. Rev. 1630, 1652-54 (1988) (arguing that Scalia's position was closest to that of framers); J. Freitag, Note, Takings 1992: Scalia's Jurisprudence and a Fifth Amendment Doctrine to Avoid *Lochner Redivivus*, 28 Val. U. L. Rev. 743, 760-63 (1994) (discussing *Pennell* dissent in context of comparing Scalia's insistence on higher scrutiny for takings cases to *Lochner* jurisprudence).

170 See Rachel M. Janutis, Note, *Nollan* and *Dolan*: "Taking" a Link Out of the Development Chain, 1994 U. Ill. L. Rev. 981, 1001 ("Justice Scalia's dissent in *Pennell v. San Jose* clarifies his position that essential nexus analysis should apply to regulatory takings as well as possessory takings." (footnote omitted)).

171 Justices Rehnquist and White were part of the majority in both *Pennell*, 485 U.S. at 1, which avoided applying heightened scrutiny, and *Nollan*, 483 U.S. at 826, which did apply such close causal scrutiny. In *Pennell*, the majority consisted of Justices Rehnquist, White, Brennan, Marshall, Blackmun, and Stevens; the dissent consisted of Justices Scalia and O'Connor; and Justice Kennedy took no part in the consideration or decision of the case. *Pennell*, 485 U.S. at 1. In *Nollan*, the majority was composed of Justices Scalia, Rehnquist, Powell, White, and O'Connor; Justices Marshall, Brennan, Stevens, and Blackmun dissented. *Nollan*, 483 U.S. at 826.

172 See *Pennell*, 485 U.S. at 16-19 (Scalia, J., concurring in part and dissenting in part) (arguing that Supreme Court has considered takings challenges which involved both facial challenges and as-applied challenges in specific factual settings).

173 The *Pennell* majority's decision to avoid the substantive takings claim by (1) refusing to allow a facial challenge to the rent-control ordinance, and (2) declaring that the record was insufficient to support the as-applied takings claim, see id. at 10, has little precedential support. The Court, in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (decided two months before *Nollan*), allowed a facial challenge to the validity of a Pennsylvania statute requiring coal companies to leave enough coal in the ground to prevent subsidence despite there being "'no concrete controversy regarding the application of the specific provision and regulations.'" Id. at 493 (quoting district court opinion, Keystone Bituminous Coal Ass'n v. DeBenedictis, 581 F. Supp. 511, 513 (W.D. Pa. 1984)).

Because *Ehrlich*, *Parking Ass'n*, and *Pennell* were not decisions on the merits, but were instead decisions to vacate and remand, to deny certiorari, and to avoid deciding on the merits, respectively, it is necessary to proceed with caution before asserting that the Supreme Court truly intends to limit the use of heightened scrutiny to adjudicative land-use exaction cases.[174] Nonetheless, the fact that the Court has never actually applied heightened scrutiny in a non-land-use exaction case lends further support to the conclusion that the *Manocherian* court misinterpreted the Supreme Court's position on takings law.[175] Moreover, the Supreme Court has faced numerous other takings challenges since *Nollan* was decided in 1987, and, aside from *Dolan*, has not evaluated any takings claim on the grounds that the regulation does not substantially advance a legitimate state interest.[176]

2. *Lower Federal Court and State Court Decisions*

In addition, lower federal courts and state courts have almost uniformly recognized the significance of the three conditions precedent in *Nollan* and *Dolan*, and have applied the rough proportionality test only where at least one of the three conditions has been satisfied. Indeed, most courts have refused to apply the rough proportionality test

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Although the *Keystone* Court noted that "[p]etitioners thus face an uphill battle in making a facial attack on the Act as a taking," id. at 495, as Justice Scalia noted in *Pennell*, it nevertheless allowed them to challenge the statute. The Court thus resolved the case on the merits, although it did not find a taking. Id. at 501-02. The *Pennell* Court's refusal to analyze the facial validity of the rent-control regulation therefore contradicts the reasoning of Keystone. See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981) (allowing facial takings challenge to Surface Mining Act); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (deciding whether a zoning law as enacted was a taking despite absence of specific factual controversy).

174 Such decisions quite obviously do not have the same precedential effect as opinions and may be grounded by reasons having nothing to do with the substance of the case. See opinion of Justice Frankfurter respecting the denial of the petition for writ of certiorari in Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950). In that case, Justice Frankfurter stated:

> [T]his Court has rigorously insisted that such a denial [of certiorari] carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

Id. at 919; see also Justice Stevens's dissent from the denial of certiorari in Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 944 (1978) (quoting with approval Justice Frankfurter's opinion in *Baltimore Radio Show*).

175 See Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 483 (N.Y. 1994) (asserting that "there is no basis in *Nollan* itself for concluding that the Supreme Court decided to apply different takings tests, dependent on whether the takings were purely regulatory or physical"), cert. denied, 115 S. Ct. 1961 (1995).

176 See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (finding a taking due to loss of land's entire economic value); *Keystone*, 480 U.S. at 499 (evaluating takings claim on economic viability grounds).

unless all three of the conditions were satisfied. In short, no court aside from *Manocherian* has applied the heightened scrutiny requirement of *Dolan* where none of the conditions were present.

First, both federal and state courts have repeatedly refused to apply the *Nollan/Dolan* standard absent a physical exaction. In *Commercial Builders v. City of Sacramento*,[177] a case decided before *Dolan*, the Ninth Circuit specifically refused to apply *Nollan*'s heightened scrutiny to a situation that involved a monetary exaction, not a physical exaction.[178] In rejecting a takings challenge to a city ordinance that conditioned building permits on the payment of a fee meant to offset the burdens of development, the court noted that "we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply."[179] The Ninth Circuit instead looked to other circuit court decisions and noted that none had "interpreted [*Nollan*] as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land."[180] Similarly, in the post-

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177 941 F.2d 872 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992).

178 Id. at 874.

179 Id.

180 Id. The *Commercial Builders* court also noted that the Ninth Circuit recently had reversed a district court's decision applying *Nollan* to invalidate a law requiring a developer to mitigate environmental harm because that decision "required too close a nexus between the regulation and the interest at stake." Id. at 874-75 (citing Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991), rev'g 733 F. Supp. 1399 (D. Nev. 1990)).

In Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991), decided less than three months after *Commercial Builders*, the Ninth Circuit interpreted *Nollan* as holding that the nexus under the Takings Clause must be closer than that required under substantive due process and mandates "close analysis." Id. at 582-83. The *Azul Pacifico* court, however, applied this close nexus in what it deemed to be a physical takings situation. See id. at 579-80. Furthermore, although the *Azul Pacifico* court used heightened scrutiny to invalidate one challenged provision, it upheld another, noting that it fell "within the traditional police power and thus there is a sufficient nexus between the challenged provision and a legitimate justification." Id. at 583. This language does not appear to be an application of heightened scrutiny, and nowhere in the opinion did the court refer to or attempt to limit *Commercial Builders*.

For other pre-*Dolan* federal cases refusing to apply *Nollan*'s heightened scrutiny in nonphysical encroachment situations, see Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 95 n.6 (2d Cir. 1992) (refusing to apply *Nollan* to denial of building permit because "the [Vermont Environmental] Board has not *required* [the landowner] to submit to a physical invasion"); St. Bartholomew's Church v. City of N.Y., 914 F.2d 348, 357 n.6 (2d Cir. 1990) (declining to apply *Nollan* in challenge to landmark preservation law), cert. denied, 499 U.S. 905 (1991); Pinewood Estates v. Barnegat Township Leveling Bd., 898 F.2d 347, 351 (3d Cir. 1990) (citing *Nollan* for proposition that per se taking exists when "the government has permanently occupied, or authorized a third party to occupy permanently, the private property of another"); Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737 (5th Cir. 1988) (refusing to apply *Nollan* to invalidate flood-plain ordinances because "it is apparent that *Nollan* did not revolutionize takings law"); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988) (distinguishing

Dolan case of *Clajon Production Corp. v. Petera*,[181] the Tenth Circuit explicitly limited *Nollan* and *Dolan* to physical exactions, stating: "Based on a close reading of *Nollan* and *Dolan*, we conclude that those cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking or its equivalent."[182]

In addition to the lower federal courts, the vast majority of state appellate courts that have expressly considered using heightened scrutiny have limited *Nollan* and *Dolan* to exactions involving physical invasions. In the pre-*Dolan* case of *Blue Jeans Equities West v. City of San Francisco*,[183] the California Court of Appeal upheld San Francisco's exaction of a development payment to its municipal railway (to compensate for increased ridership) in return for development rights.[184] The court specifically refused to apply heightened scrutiny in an exaction not involving a physical occupation, stating that "[i]n light of the . . . post-*Nollan* case law, we hold that any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases."[185]

Nollan on grounds that *Nollan* involved granting of public easement while instant case involved prohibition of certain billboard advertising); Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 695 F. Supp. 15, 20 n.17 (D.D.C. 1988) (refusing to apply *Nollan* standard to stock purchase requirement).

181 70 F.3d 1566 (10th Cir. 1995).

182 Id. at 1578; see also Harris v. City of Wichita, 862 F. Supp. 287, 294 (D. Kan. 1994) (declining to apply *Dolan* standard because *Dolan* required "a dedication of property as a condition for granting a redevelopment permit"); cf. Garneau v. City of Seattle, 897 F. Supp. 1318, 1325-26 (W.D. Wash. 1995) (observing that *Nollan* and *Dolan* appeared to be limited to their facts, but finding that challenged regulation was not a taking even if *Nollan* and *Dolan* were applicable).

183 4 Cal. Rptr. 2d 114 (Ct. App.), cert. denied, 506 U.S. 866 (1992).

184 See id. at 116, 119.

185 Id. at 118. For other pre-*Dolan* cases explicitly limiting heightened scrutiny to physical land-use exactions, see Builders Serv. Corp. v. Planning & Zoning Comm'n, 545 A.2d 530, 539 n.12 (Conn. 1988) (asserting that *Nollan* was not applicable to zoning challenge because heightened standard of review was limited to facts of *Nollan*); Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1006-07 (Ind. 1989) (holding that declaration of archeological site unsuitable for mining did not effect uncompensated taking, and noting that heightened scrutiny "clearly extends only to situations where government requires an actual conveyance of property as a condition to removal of a land use restriction"); Steinbergh v. City of Cambridge, 604 N.E.2d 1269, 1276 (Mass. 1992) (stating that regulation restricting sale of condominium units was not attempt to "acquire an interest in land" and therefore was distinguishable from *Nollan*'s use of higher standard of scrutiny).

For cases limiting *Nollan* to physical invasion situations without mentioning levels of scrutiny, see Van Sickle v. Boyes, 797 P.2d 1267, 1272 (Colo. 1990) (asserting that "*Nollan* does not require that we undertake an exhaustive review of the technical requirements .... Courts are singularly unsuited to engage in such a task."); Department of Transp. v. Weisenfeld, 617 So. 2d 1071, 1081 n.5 (Fla. Dist. Ct. App. 1993) (asserting that *Nollan* itself noted that it fell into category of permanent physical invasion); City of Atlanta Bd. of

The post-*Dolan* state cases have continued to require a physical invasion to justify the application of heightened scrutiny. In *McCarthy v. City of Leawood*,[186] the Supreme Court of Kansas explicitly limited *Dolan* to its facts, stating: "There is nothing in [*Dolan*], however, which would apply the same conclusion to Leawood's conditioning certain land uses on payment of a fee. The landowners cite no authority for the critical leap which must be made from a fee to a taking of property."[187] Similarly, in *Waters Landing Ltd. Partnership v. Montgomery County*,[188] the Court of Appeals of Maryland refused

Zoning Adjustment v. Midtown N., Ltd., 360 S.E.2d 569, 571 n.2 (Ga. 1987) (deciding that *Nollan* did not apply to issue of whether zoning enactment was a taking); Clem v. Christole, Inc., 548 N.E.2d 1180, 1186 (Ind. Ct. App. 1990) (declaring that zoning law was a taking because it effected physical invasion like that in *Nollan*); Offen v. County Council, 625 A.2d 424, 434 (Md. Ct. Spec. App. 1993) (declining to apply *Nollan* because it "did not just create a regulatory taking, it actually confiscated property"); Wilson v. Commonwealth, 583 N.E.2d 894, 899 n.12 (Mass. App. Ct. 1992) (citing *Nollan* for proposition that a taking occurs when regulation results in permanent physical occupation, and noting that despite suggested heightened scrutiny of *Nollan*, plaintiffs had to overcome heavy presumption of constitutionality); Bevan v. Brandon Township, 475 N.W.2d 37, 44 n.12 (Mich. 1991) (noting that challenged ordinance merely "regulates the scope of development," in contrast to *Nollan*, which required transfer of land to government); Saunders v. City of Jackson, 511 So. 2d 902, 907 n.3 (Miss. 1987) (stating that review of zoning reclassification denial was not controlled by *Nollan*); McElwain v. County of Flathead, 811 P.2d 1267, 1270 (Mont. 1991) (equating "substantial" standard of review in *Nollan* to "reasonable" standard of review in Montana); Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251, 259 (N.J. 1991) (holding that deed restriction differed from *Nollan* in that *Nollan* "was in the nature of a classic easement or servitude"); In re "Plan for Orderly Withdrawal from N.J." of Twin City Fire Ins. Co., 591 A.2d 1005, 1010 (N.J. Super. Ct. App. Div. 1991) (distinguishing *Nollan* because *Nollan* was physical invasion), aff'd, 609 A.2d 1248 (N.J. 1992); Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 348 (N.D. 1987) (determining that land-use restriction statute was distinguishable from *Nollan* in that it was not a permanent physical occupation); Shopco Group v. City of Springdale, 586 N.E.2d 145, 148 (Ohio Ct. App. 1990) (refusing to apply *Nollan* because *Nollan* involved permanent physical occupation); State ex rel. Pitz v. City of Columbus, 564 N.E.2d 1081, 1087 (Ohio Ct. App. 1988) (holding that building permit denial was not comparable to *Nollan* because there was no physical encroachment in case at bar). But see Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 408 (Neb. 1994) (holding that zoning ordinance was unconstitutional and that heightened scrutiny of *Nollan* was applicable to evaluation of zoning ordinance). The *Whitehead Oil* court did state, however, that the zoning designation did not further a legitimate state interest because it was "arbitrarily and capriciously" applied, id., which suggests that it would not have even passed a rational-basis test.

Further, those state court cases that applied some form of heightened scrutiny and that were cited by the *Dolan* court in its development of the "rough proportionality" test involved physical exactions and dedications. See *Dolan*, 114 S. Ct. at 2318-19 (citations omitted); see also Stephen M. Johnson, Avoid, Minimize, Mitigate: The Continuing Constitutionality of Wetlands Mitigation After *Dolan v. City of Tigard*, 6 Fordham Envtl. L.J. 689, 717 (1995) (noting that all cases cited by *Dolan* involved land dedication requirements).

186 894 P.2d 836 (Kan. 1995).

187 Id. at 845.

188 650 A.2d 712 (Md. 1994).

to apply the *Dolan* standard to a fee exaction because the fee did not "require landowners to deed portions of their property to the County" and because the exaction was imposed by legislative enactment, not by adjudication as was the exaction in *Dolan*.[189]

Second, in addition to the courts that have emphasized the physical takings aspect of *Dolan* and *Nollan*, other lower federal courts and state courts have recognized that application of heightened scrutiny is limited to those situations involving an exaction—albeit a monetary exaction—in return for the granting of a permit. In *McNulty v. Town of Indialantic*,[190] a district court asserted that *Nollan* used "strict scrutiny" in examining the nexus between the regulation and the state interest.[191] Nonetheless, the *McNulty* court refused to apply that same scrutiny to a setback requirement because the requirement "[did] not *attach conditions* to building permits but rather *prohibited* habitable structures within 25 feet of the top of the dune."[192] Similarly, in *Sprenger, Grubb & Associates v. City of Hailey*,[193] the Supreme Court of Idaho refused to be guided by *Dolan* in a case where the rezoning of land adversely affected the value of the landowner's property. The court observed: "*Dolan* is distinguishable. It involved the reasonableness of conditions exacted on a property owner before the community would grant a building permit. . . . Here, there have been no exactions . . . ."[194]

Third, courts have limited *Dolan* to those situations involving adjudicative, not legislative, determinations. In *Home Builders Ass'n v. City of Scottsdale*,[195] the Court of Appeals of Arizona held that "[b]ecause we find that Scottsdale's development fees involve a legislative, rather than adjudicative, determination, we conclude that *Dolan* does not control the outcome of this case."[196] As noted previously,[197] the Maryland Court of Appeals in *Waters Landing* explicitly distinguished *Dolan* based on the fact that a legislative determination

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189 Id. at 724. For another post-*Dolan* case refusing to apply rough proportionality to a fee exaction, see Third & Catalina Assocs. v. City of Phoenix, 895 P.2d 115, 120 (Ariz. Ct. App. 1994) (noting that "[h]ere we do not have a situation of private property being pressed into public service as in *Dolan v. City of Tigard*").

190 727 F. Supp. 604 (M.D. Fla. 1989).

191 Id. at 606.

192 Id. at 607 (emphasis added). The court agreed with the town that "this exercise of police power on public safety and general welfare grounds" provided a sufficient nexus between the act and the governmental purposes. Id.

193 903 P.2d 741 (Idaho 1995).

194 Id. at 747.

195 902 P.2d 1347 (Ariz. Ct. App. 1995).

196 Id. at 1352.

197 See supra notes 188-89 and accompanying text.

was involved.[198] In *Parking Ass'n v. City of Atlanta*,[199] a case not involving a land-use exaction, the Supreme Court of Georgia held that *Dolan* was inapplicable because the city made a legislative, not an adjudicative, decision to limit the use of property.[200]

Finally, although there have been a few cases that have applied the rough proportionality test of *Dolan* in the absence of one or two of the important characteristics, in none of the cases—except *Manocherian*—have all three factors been absent.[201] Although the *Manocherian* court asserted that there is no language in the *Nollan* opinion limiting it to physical takings,[202] the majority of state courts and lower federal courts have recognized the regulatory/physical taking distinction as critical and have followed *Nollan* and *Dolan* only in situations involving a physical land-use exaction. Furthermore, the *Manocherian* court failed to recognize the significance of the exaction itself (be it a monetary or land-use exaction) or of the fact that both *Nollan* and *Dolan* involved challenges to adjudicative, not legislative, decisions. Even those courts that agree with *Manocherian*'s contention that the physical invasion is not dispositive have nonetheless only applied heightened scrutiny when one or both of the latter two factors were present.

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198 Waters Landing Ltd. Partnership v. Montgomery County, 650 A.2d 712, 724 (Md. 1994) (noting that "Montgomery County imposed the development impact tax by legislative enactment, not adjudication").

199 450 S.E.2d 200 (Ga. 1994).

200 See id. at 203 n.3; see also Southeast Cass Water Resource Dist. v. Burlington N.R.R., 527 N.W.2d 884, 896 (N.D. 1995) (declining to follow *Nollan* and *Dolan* because landowner's "duty in this case arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty under a constitutional reservation of police power over a corporation").

201 See Northern Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384, 388-89 (Ill. 1995) (following *Dolan* in case involving fee—not physical—exaction); Peterman v. Department of Natural Resources, 521 N.W.2d 499, 511-12, 512 n.34 (Mich. 1994) (following *Dolan* in case involving adjudicative decision leading to destruction of landowner's property, without requiring any type of exaction); Clark v. City of Albany, 904 P.2d 185, 189 (Or. Ct. App. 1995) (applying *Dolan* to nonphysical exaction); Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* to case involving legislative monetary exaction). The most prominent case extending *Dolan* to monetary exactions was the Supreme Court of California's decision in Ehrlich v. City of Culver City, 911 P.2d 429, 438 (Cal. 1996), after the United States Supreme Court vacated and remanded the earlier decision by the Court of Appeal of California, Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468 (Ct. App. 1993), in light of *Dolan*. See Ehrlich v. City of Culver City, 114 S. Ct. 2731 (1994) (vacating and remanding decision of Court of Appeal of California). To reemphasize: in each of these cases at least one of the *Dolan* factors was present.

202 See Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 483 (N.Y. 1994), cert. denied, 115 S. Ct. 1961 (1995).

3. *New York State Takings Precedent*

As Part IV.B has shown, federal and state courts have been nearly unanimous in their refusal to apply the heightened scrutiny of *Nollan* and *Dolan* to situations that do not involve a physical taking, a permit condition exaction, or an adjudicative decision. In contrast, the *Manocherian* decision involved none of these three elements. The court of appeals nevertheless justified its decision using federal and state court precedent. This section demonstrates that despite its assertion that the failure to apply heightened scrutiny would undermine prior New York cases,[203] the *Manocherian* court should not have followed the earlier decisions of the New York Court of Appeals.

The first case that the *Manocherian* court cited in support of its decision to apply heightened scrutiny was *Seawall Associates v. City of New York*.[204] In *Seawall*, the New York Court of Appeals applied *Nollan*'s close causal nexus requirement in determining whether a New York City law regarding single-room occupancy (SRO) properties substantially advanced legitimate state interests.[205] Owners of SRO properties asserted that Local Law No. 9 was a taking under both federal[206] and state[207] constitutions.[208] Local Law No. 9, enacted for the purpose of relieving homelessness, prohibited the "conversion, alteration and demolition of SRO [dwellings]"; mandated that SRO owners rehabilitate, make habitable, and lease out every SRO that they own; and established penalties for noncompliance reaching into the hundreds of thousands of dollars.[209]

In the first part of the opinion, the court of appeals held that, under both the Federal and State Constitutions, Local Law No. 9 was a per se physical taking.[210] The court of appeals also determined that had Local Law No. 9 not been a physical taking, it would have been invalid as a regulatory taking first because it denied the SRO owners economically viable use of their property,[211] and second because it did

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203 See id. (asserting that "Judge Levine's dissent discounts *Seawall*" as governing precedent).

204 542 N.E.2d 1059 (N.Y.), cert. denied, 493 U.S. 976 (1989).

205 See id. at 1068.

206 U.S. Const. amend. V.

207 N.Y. Const. art. I, § 7.

208 *Seawall*, 542 N.E.2d at 1061.

209 Id.

210 Id. at 1062. The court, citing only federal takings cases (most prominently Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)) and law review articles, determined that the law in effect infringed SRO owners' rights of possession and exclusion by forcing them to rehabilitate their properties and accept occupation by "persons not already in residence." *Seawall*, 542 N.E.2d at 1063.

211 See id. at 1066, 1068.

not substantially advance a legitimate state interest.[212] In deciding that the "close nexus" between the SRO ordinance and the governmental purpose of providing low-cost housing was not sufficient, the court relied on a New York City study which found that Local Law No. 9 "would do little to resolve the homeless crisis."[213]

The court of appeals next applied heightened scrutiny in *Rent Stabilization Ass'n v. Higgins*.[214] In *Higgins*, the court confronted a facial challenge to a regulation that, to prevent unwarranted evictions and resulting homelessness,[215] expanded the class of "family members" entitled to have succession rights to a rent-stabilized apartment upon "the death or departure of the tenant of record."[216] In its analysis, the court cited *Nollan* for the proposition that the challenged regulation must substantially advance a legitimate state interest.[217]

For a number of reasons, the *Manocherian* court was inaccurate in asserting that a decision not applying heightened scrutiny would undermine this precedent. First, the court's decision to apply heightened scrutiny in *Seawall*,[218] whether on state or federal grounds, has been criticized for other reasons,[219] and contradicts federal precedent. In addition, the language used by the court in deciding to apply the

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212 See id at 1068.

213 Id. It is clear that as one of its alternative holdings, the *Seawall* court did apply heightened scrutiny to a regulation that did not constitute an adjudicative land-use exaction. Notwithstanding the *Seawall* court's claim that it was evaluating the legislation under both federal and state constitutions, only federal precedent was cited, making it unclear whether the court was affording greater protection to property owners under the state constitution or under the Federal Constitution. See id. at 1068-69; cf. William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 550 (1986) (asserting that Bill of Rights creates "federal floor of protection" and that states may expand individual rights above this floor).

214 630 N.E.2d 626 (N.Y. 1993).

215 Id. at 634.

216 Id. at 628.

217 See id. at 633.

218 See *Seawall*, 542 N.E.2d at 1068-89. The court's decision to apply a heightened standard of scrutiny was readily apparent from its decision to second-guess the legislature on questions of the workability of Local Law No. 9. The court noted that the "City's own Blackburn study . . . acknowledges that a ban on converting, destroying and warehousing SRO units would do little to resolve the homeless crisis." Id. at 1068.

219 See Jason W. Rose, Note, Forced Tenancies as Takings of Property in *Seawall Associates v. City of New York*: Expanding on *Loretto* and *Nollan*, 40 DePaul L. Rev. 245, 268-69, 277 (1990) (noting that although end result of *Seawall* was justifiable, court's reasoning was "confused and indecisive" and amounted to "fairly expansive" application of *Nollan*); see also *Seawall*, 542 N.E.2d at 1072, 1074 (Bellacosa, J., dissenting) (noting that majority opinion was reminiscent of *Lochner* and that "'modern substantive due process principles require that judiciary give great deference to the [legislative body]'" (quoting Rochester Gas & Elec. Corp. v. Public Serv. Comm'n, 520 N.E.2d 528 (N.Y. 1988))). The court's reliance on a study concluding that the SRO law would do little to alleviate the homeless problem again exemplifies the problems with courts substituting their own economic judgment for that of a legislature.

regulatory takings analyses[220] strongly suggests that the regulatory takings analysis was dicta, discussed only after the court struck down the ordinance as a physical taking.[221] Moreover, even if the aforementioned reasons are not sufficient to distinguish *Manocherian* from *Seawall*, the *Manocherian* court could have overruled that part of *Seawall* applying heightened scrutiny under *Nollan*'s means-ends analysis without changing the outcome of *Seawall* because the means-ends analysis was only one of three alternative holdings in the opinion.[222]

Furthermore, although the *Higgins* court purported to require a close causal nexus, it upheld the challenged regulation without much scrutiny, summarily determining that such a nexus was present and deferring to the governing agency's experience.[223] In fact, because the case involved an administrative regulation (as opposed to a statewide law),[224] it contained one of the three dispositive factors of *Nollan* and *Dolan*,[225] and was therefore also distinguishable on that ground.

After analyzing *Seawall* and *Higgins*, it becomes evident that the *Manocherian* court's repeated warnings about undermining precedent were exaggerated. While the *Manocherian* court did have some justification for applying heightened scrutiny in light of those two cases, it need not have been bound by them. The court of appeals could have treated *Seawall*'s means-ends analysis as dicta, and it could have distinguished *Higgins* on the grounds that it dealt with an administrative decision and not a legislative act.

C. *An Erroneous Application of Heightened Scrutiny*

In addition to misapplying federal precedent, the *Manocherian* court's decision to apply heightened scrutiny to a situation not involving a physical invasion, an exaction, or an adjudicative decision is flawed because the normative reasons that justified application of such scrutiny in *Nollan* and *Dolan* were absent in *Manocherian*.[226]

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220 See *Seawall*, 542 N.E.2d at 1065 ("Even if Local Law No. 9 were not held to effect a physical taking, it would still be facially invalid as a regulatory taking.").

221 See id. The court could have concluded its opinion with the physical taking argument. See Rose, supra note 219, at 271 (arguing that *Seawall*'s decision to apply regulatory takings analyses "was unfortunate and unnecessary" because it failed to differentiate physical and regulatory takings).

222 See supra notes 210-12.

223 See *Higgins*, 630 N.E.2d at 634.

224 The regulation was promulgated by the Division of Housing and Community Renewal. Id. at 628.

225 See supra Part IV.A.

226 See Collins, supra note 20, at 1303 (noting that *Manocherian* is "difficult to fathom").

As noted in Part III.B, the general argument for viewing *Dolan* narrowly is premised on a presumption that has formed the backbone of the Supreme Court's modern judicial philosophy regarding economic legislation: Legislatures, as democratic institutions with greater resources, are far superior to courts and regulatory agencies in both defining legitimate governmental goals and determining what legislation is necessary to effect those goals, and are thus generally given deference by courts.[227]

The Supreme Court has recognized, however, that some kinds of economic legislation challenged under the Takings Clause require heightened judicial scrutiny. In the regulatory takings arena, the Supreme Court has applied heightened scrutiny only in *Nollan v. California Coastal Commission*[228] and *Dolan v. City of Tigard*.[229] This section examines the three important factors present in those two cases and analyzes why the Court elected to apply heightened scrutiny when all three factors were present. It then argues that such heightened scrutiny should be limited to those instances involving an adjudicative land-use exaction.

1. *The Importance of Physical Occupations*

By applying heightened scrutiny only to those situations in which the exaction involves a physical invasion, courts limit themselves to reassessing legislative decisions only when there is a clear-cut rule. The Supreme Court has definitively determined that when governmental legislation has the effect of permanently authorizing a physical

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[227] See United States v. Carolene Products Co., 304 U.S. 144 (1938), where the Court stated:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Id. at 152; see West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937) ("The legislature is 'free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.'"); Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J., dissenting). In his dissent in *Lochner*, Justice Holmes stated:

> [A] constitution is not intended to embody a particular economic theory . . . . [T]he word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Id. at 75-76 (Holmes, J., dissenting); see also supra notes 121-24 and accompanying text.

[228] 483 U.S. 825 (1987).

[229] 114 S. Ct. 2309 (1994).

occupation of land, there is a per se taking because such regulation destroys the right of an owner "'to possess, use and dispose of'" land.[230] Moreover, as Justice Marshall has noted, there are "relatively few problems of proof" in determining whether a permanent physical occupation has occurred.[231]

In addition, there was good reason for the *Nollan* Court to extend *Loretto* to physical exactions: it would have been "extortion" to allow the agency to disregard the strict physical taking test by conditioning the building permit on the grant of a permanent physical occupation.[232] Although the Court arguably could have strictly construed *Loretto* so as to strike down the easement exaction as a permanent physical occupation,[233] Justice Scalia recognized that the presence of a building permit added a critical new fact to the situation because the Coastal Commission could have simply rejected the permit applicant outright without effecting a taking.[234] As a result, he concluded that it would have been "strange" not to offer the landowner a choice less restrictive than denial of the permit altogether.[235] Justice Scalia therefore decided that some measure of heightened scrutiny was necessary to determine whether the exaction of land furthered the same goals as a legitimate permit denial.[236] If the exaction had furthered the same goal as a denial, then it would not have been a taking. Therefore, the means-ends scrutiny of the close causal nexus test, viewed in light of the specific fact patterns of *Nollan* and *Dolan*, can be seen as a *less* searching alternative to the per se permanent physical occupation test. While the *Nollan* Court did question the legislature's motives,[237] it did so in a very fact-specific situation and only as an alternative to automatically striking down the law.

By contrast, the extension of such scrutiny to the *Manocherian* case, where there was no chance the law would have been struck down as a per se physical taking, was a more stringent alternative than the

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230 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).

231 Id. at 437.

232 See *Nollan*, 483 U.S. at 837.

233 See id. at 831-32 (suggesting that permanent physical occupation had occurred, and citing *Loretto*).

234 Id. at 835-36.

It has been suggested that *Nollan* and *Dolan* should have found *Loretto* to be controlling precedent instead of creating a new takings test. See Damon C. Watson, Note, *Dolan* and the "Rough Proportionality" Standard: Taking Its Toll on Loretto's Bright Line, 18 Harv. J.L. & Pub. Pol'y 591, 601 (1995) ("The *Nollan* and *Dolan* Courts failed to explain why Loretto does not apply to these two obvious physical occupations.").

235 See *Nollan*, 483 U.S. at 836-37.

236 See id. at 837.

237 See id. at 832.

typical regulatory takings tests. The *Manocherian* court applied heightened scrutiny to a rent-stabilization law where previous courts had always applied the diminution-in-value test of *Penn Central Transportation Co. v. City of New York*,[238] or the deferential means-ends test of *Agins v. City of Tiburon*.[239]

The danger of applying such scrutiny in nonphysical exaction situations is clear—courts have little guidance and few limits on their use of judicial review. In fact, one critique of the *Dolan* Court can also be made with respect to the *Manocherian* court: it "blurred the 'one area of takings law where the Court has attempted to provide a bright-line rule[:] . . . where the government has physically invaded the claimant's land . . . or has authorized third parties to do so.'"[240] By applying a test designed for physical takings, the *Manocherian* court has blurred takings law in the same manner.

In addition to doctrinal simplicity, other normative reasons exist for limiting *Nollan* and *Dolan* to situations involving a physical taking of land. Most importantly, a physical taking is more burdensome than a regulatory taking.[241] As the *Loretto* Court noted: "Property rights in a physical thing have been described as the rights to 'possess, use and dispose of it.' . . . To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights."[242] Conversely, commentators have seized upon this rationale to argue that *Dolan* should not be extended to monetary exactions because in such situations "[l]andowners retain the right to exclude the public from their property and the right to use their land in any way that is not prohibited by the covenant."[243] Because *Manocherian*, unlike *Dolan*, did not involve the right to exclude others from land—"'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"[244]—the heightened scrutiny of the rough proportionality test should not be extended to it.[245]

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238 438 U.S. 104, 124 (1978).

239 447 U.S. 255, 260 (1980).

240 Watson, supra note 234, at 601 (quoting Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine, 77 Cal. L. Rev. 1299, 1333 (1989)).

241 See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character . . . .").

242 Id. at 435 (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).

243 Johnson, supra note 185, at 718.

244 *Dolan*, 114 S. Ct. at 2320 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

245 See Freilich & Bushek, supra note 154, at 201-02 (arguing that *Dolan* should be limited to physical exactions because it involved right to exclude others from property); see also Sam D. Starritt & John H. McClanahan, Comment, Land-Use Planning and Takings:

Finally, broadening the use of heightened scrutiny could have a drastic effect on land-use regulation throughout the United States. As Professor Michelman asserts, the "import [would be] both clear and startling: Who knows how many land-use regulations, hitherto thought virtually immune from federal judicial censorship, might be destined for doom at the hands of lower federal courts now supremely licensed to apply to them an intensified means-ends scrutiny?"[246] The better reading of *Nollan* and *Dolan*, therefore, is to limit those cases to situations involving physical exactions.

2. *The Significance of the Exaction Requirement*

The land-use exaction that was present in both *Nollan* and *Dolan* is another fact specific to those cases limiting the discretion of courts in applying heightened scrutiny. One very plausible justification for the Supreme Court's application of heightened scrutiny in the land-use exaction cases is that the Court needed to second-guess only the means aspect of the nexus, while assuming that the ends were legitimate.[247] A reviewing court, when evaluating an exaction, is not in a position to pick and choose among legislative goals because the legislative or adjudicative body in charge of approving the permit application generally provides a very specific reason for either denying the permit or requiring an exaction. Thus, in *Nollan* and *Dolan*, the Supreme Court was not required to search for a governmental purpose; that purpose was fairly clear.[248]

In *Manocherian* on the other hand, the majority's decision to strike down chapter 940 as not substantially advancing a legitimate governmental interest was based largely on a determination about what constituted legitimate governmental goals. Taking a narrow view of the situation, the court, seeking to limit chapter 940 to its effect on rent stabilization, asserted that the law must further the inter-

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The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After *Dolan v. Tigard*, 114 S. Ct. 2309 (1994), 30 Land & Water L. Rev. 415, 461 (1995) (asserting that *Dolan* should not apply to monetary exactions because "money exaction does not involve the loss of real property, nor does it entail losing one's right to exclude from real property").

246 Michelman, supra note 117, at 1608.

247 See *Nollan*, 483 U.S. at 835-36 (assuming that Commission would deny permit outright and protect public's ability to see beach); see also supra note 148 and accompanying text.

248 See Freitag, supra note 169, at 758 n.95 ("By so altering the Court's inquiry, Scalia relegated the ends of the regulation to the background, while he focused solely in the foreground upon the means used to advance these ends."). But see *Nollan*, 483 U.S. at 850 (Brennan, J., dissenting) (asserting that Coastal Commission was concerned not only with visual access of beach, but also with increase in private use of beaches and public's impression of whether beaches are for public use).

ests of the state in and of itself, and not as part of "some generalized State interest found elsewhere in organic law or other statutes."[249] The interests to which the court was referring were the same interests served by the RSL itself, but the court held that the nexus between chapter 940 and these interests was insufficient. The court's decision was based on its finding that chapter 940 actually contradicted the RSL's two goals—occupant protection and market redemption.[250]

Both dissenting opinions took issue with the majority's definition of the legitimate state interest. First, they argued that the majority incorrectly identified the goals of the RSL by overlooking the fact that "one of the original primary purposes of the rent-stabilization laws was 'to prevent speculative, unwarranted and abnormal increases in rents' and 'to forestall [landlord] profiteering, speculation and other disruptive practices.'"[251] Second, they asserted that it was legitimate for chapter 940 to further governmental interests other than the RSL, such as easing the health-care crisis created by the inability of hospitals to provide adequate staffing.[252]

Section 26-501 of the RSL clearly indicates that the law had two primary purposes: preventing high rents and limiting evictions.[253] In

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249 Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 483 (N.Y. 1994), cert. denied, 115 S. Ct. 1961 (1995).

250 See id. at 484-85. In fact, the court determined that the "real goal of Lenox Hill and other arguably similarly situated not-for-profit hospitals is preserving a valuable perk for some of its health care workers." Id. at 484. Because this was not the goal of the RSL, a sufficient nexus was not present. Id.

The majority's characterization of the purposes of chapter 940 as a "perk" for hospital employees, however, has little basis in the record. By all accounts, Lenox Hill sublet the apartments not to doctors, who could presumably afford such apartments on their own, but to nurses, who may have been less able to afford them. See Brief for Plaintiffs-Appellants at 15, *Manocherian* (No. 93/441) (on file with the *New York University Law Review*) (noting that Lenox Hill Hospital employs "nurses and other staff").

The majority even argued that the nurses benefitted only secondarily from chapter 940 because they could have been evicted at the "whim" of Lenox Hill. *Manocherian*, 643 N.E.2d at 481. Judge Ciparick again disagreed with this contention, noting that hospital employees have adequate notice before being informed that their subleases were not being renewed. Id. at 500-01 (Ciparick, J., dissenting). In asserting that chapter 940 actually may harm the nurse-subtenants, the majority ignored the fact that their invalidation of chapter 940 had the effect of securing the nurses' eviction.

251 *Manocherian*, 643 N.E.2d at 492 (Levine, J., dissenting) (quoting New York, N.Y., Charter & Admin. Code Ann. § 26-501 (N.Y. Legal Publishing Corp. 1992)); see also id. at 499 (Ciparick, J., dissenting) (asserting that chapter 940 "is constitutionally sound because it substantially advances the State's interest in curbing chronic rental housing shortages").

252 See id. at 492.

253 See New York, N.Y., Charter & Admin. Code Ann. § 26-501 (N.Y. Legal Publishing Corp. 1992). The RSL itself stresses that "a serious public [housing] emergency continues to exist," and that the RSL was designed to "prevent speculative, unwarranted and abnormal increases in rents." Id. This first section of the RSL also emphasizes that there had been "sharp increases in rent levels," and that "unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will

contrast to the repeated and forceful language of section 26-501 supporting these two goals, the market redemption that the majority cited as a purpose of the RSL is supported only by a single vague clause in that section.[254] Furthermore, Judge Levine recognized that there was a more general problem created by the majority's expansion of the *Nollan* and *Dolan* rough proportionality test into less precise factual settings. He stated that regardless of which characterization of legitimate governmental interests was correct, the harm was the actual picking and choosing among governmental purposes, something that even heightened scrutiny prohibits.[255]

Therefore, even without evaluating the nexus between chapter 940 and the legitimate governmental goals, the *Manocherian* fact pattern is quite different from the typical exaction, in which the Supreme Court accepts the stated goals and simply attempts to determine the proper nexus. The discretion exercised by the court of appeals directly contradicts judicial philosophy regarding economic legislation.[256]

3. *Adjudicative Versus Legislative Decisionmaking*

Another fact present in both the *Nollan* and *Dolan* opinions was that the determinations of both the California Coastal Commission in *Nollan* and the City Planning Commission in *Dolan* involved "an *adjudicative* decision to condition petitioner's application for a building permit on an individual parcel."[257] The *Dolan* Court proceeded to distinguish the action of the City Planning Commission from other takings cases in that typical zoning regulations and land-use laws generally involve legislative determinations affecting a large number of

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produce serious threats to the public health, safety and general welfare." Id. The RSL also justifies itself by noting that it is "necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare." Id. In that same section, the legislature noted that unregulated landlords were "demanding exorbitant and unconscionable rent increases," and that these "demands were causing severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities." Id. It was therefore necessary to subject these accommodations to "reasonable rent and eviction limitations." Id.

254 See id. (stating that "transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for" housing emergency in effect in New York City).

255 See *Manocherian*, 643 N.E.2d at 491 (Levine, J., dissenting). Judge Levine also noted that strict scrutiny does not "require that a regulation serve *all* of the legitimate State interests the Legislature sought to advance by the statutory scheme." Id.

256 See Lehmann, supra note 154, at 1172 (noting that *Dolan* represented "sharp turnaround from the presumption of constitutionality for legislation affecting economic interests set forth in *Carolene Products*").

257 *Dolan*, 114 S. Ct. at 2316 (emphasis added).

people and property, whereas the adjudicative decision of the City Planning Commission was aimed at one particular landowner.[258]

Although the literature is by no means unanimous, most commentators view agency determinations as more susceptible to special-interest group capture than legislative enactments, and therefore less entitled to deference by courts.[259] This factor could explain the willingness of the *Dolan* Court to draw a distinction between the challenged regulation there and the essentially legislative actions of zoning. In the specific context of land-use regulation, zoning and other legislative determinations deserve more deference than adjudicatory decisions regarding specific plots of land. The heightened scrutiny test of *Dolan* "should not be extended to traditional land-use regulations. Traditional land-use regulations can be distinguished from [*Nollan* and *Dolan*-type adjudicatory decisions] because they are justified under the state's broad police powers."[260]

In *Manocherian*, although chapter 940 was narrow in scope, it was distinguishable from the actions of the land-use boards in *Nollan* and *Dolan* because it was enacted by the legislature of the State of New York.[261] Chapter 940 was a narrow legislative act in two respects: First, on the demand side, it benefitted the relatively few apartments occupied by hospital employees;[262] second, on the supply side, it bur-

258 See id. The Court contrasted the *Dolan* fact pattern to Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a zoning law), and Agins v. City of Tiburon, 447 U.S. 255 (1980) (same). For other rulings where legislation did not exact a regulatory taking, see Yee v. City of Escondido, 503 U.S. 519, 539 (1992) (holding that rent-control ordinance forcing mobile-home-park owners to allow mobile-home owners to sell their homes without permission did not effect physical taking); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (holding that regulation mandating that coal be left in ground to prevent subsidence was not a taking).

259 See William H. Page, Interest Groups, Antitrust, and State Regulation: *Parker v. Brown* in the Economic Theory of Legislation, 1987 Duke L.J. 618, 632-37 (arguing in economic terms that agencies are more susceptible than legislatures to interest-group capture). But see John Shepard Wiley Jr., A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer, 61 S. Cal. L. Rev. 1327, 1330-33 (1988) (arguing that legislatures are more susceptible than agencies to administrative capture).

260 Janutis, supra note 170, at 1005.

261 1984 N.Y. Laws 940.

262 The majority, denigrating chapter 940's narrowness, asserted that the law "affects a tiny number" of rental units and is "quite ephemeral" in its overall effect. Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 484 (N.Y. 1994), cert. denied, 115 S. Ct. 1961 (1995).

In the apartment building owned by the Manocherians, Lenox Hill subleased only 15 apartments to its employees, six of which were at issue in the case. Id. at 496-97 (Ciparick, J., dissenting). The Manocherians also alleged that Lenox Hill sublet a total of 54 apartments to its employees. Brief for Plaintiffs-Appellants at 31, *Manocherian* (No. 93/441) (on file with the *New York University Law Review*).

dened only those landlords who rented to hospitals.[263] Yet, despite the majority's assertions to the contrary, it appears that although narrow in scope, the legislation affected hospitals other than Lenox Hill. The president, director of nursing, and general medical director of Beth Israel Medical Center also requested the Governor's approval of chapter 940.[264]

Mere narrowness of legislative scope, however, should not be confused with the narrow interests of a purely adjudicative body in comparison to a legislature, especially when dealing with laws such as rent stabilization. As Judge Ciparick noted when commenting on the majority's claim that chapter 940 unfairly burdened such a narrow class of landlords, "the entire scheme of rent stabilization saddles owners of rental buildings with greater burdens than their unregulated counterparts."[265] The implication is clear: Although rent stabilization is a narrow piece of legislation burdening landlords for the benefit of tenants,[266] both rent-stabilization and rent-control laws in New York City are permissive ways in which government can shift benefits from landlords to tenants without effecting a taking. Moreover, as the dissent argued, chapter 940's lack of breadth was a result of the law's being "narrowly tailored."[267]

There is another difference between the narrow scope of chapter 940 in *Manocherian* and the narrowness of the adjudicative action in *Nollan* and *Dolan*. Chapter 940 was specifically enacted to remedy an unintended consequence of the OHA. Indeed, it was passed just one year after the OHA itself amended the RSL so that only a tenant—not a subtenant—could be the primary resident of each apartment in order to qualify for rent stabilization.[268] For well over a decade, property owners rented to hospital employees subject to the RSL, which

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263 The Manocherians also alleged that chapter 940 only affected two landlords in New York City. Brief for Plaintiffs-Appellants at 5, *Manocherian* (No. 93/441) (on file with the *New York University Law Review*).

264 *Manocherian*, 643 N.E.2d at 493; see also Letter of Hospital Ass'n of New York State (July 5, 1984), Governor's Bill Jacket to 1984 N.Y. Laws 940 (recommending passage of chapter 940).

265 *Manocherian*, 643 N.E.2d at 499 (Ciparick, J., dissenting).

266 See id. (noting that "it is anomalous to single out chapter 940 as 'special interest legislation' since by its very nature rent stabilization bestows preferences on designated tenancies").

267 See id. at 493 (Levine, J., dissenting) (noting that chapter 940 was narrowly tailored to minimize wealth transfers that occur under rent-regulated systems); Brief of the Attorney General Appearing Under Executive Law § 71 at 19, *Manocherian* (No. 93/441) (on file with the *New York University Law Review*) ("That the legislation is limited to not-for-profit hospitals is indicative of the Legislature's interest in avoiding the transfer of the potential fruits of profiteering from landlords to other commercial enterprises.").

268 See *Manocherian*, 643 N.E.2d at 480-81.

stated that subtenants met the primary tenant requirements.[269] While chapter 940 was narrow in scope, the dissent characterized it as restoring the employee housing of hospitals to the protection of the RSL, after they had been inadvertently exempted from protection as a side effect of the OHA.[270] The narrowness of scope, therefore, was due to the fact that chapter 940 was designed to remedy an unintended evil, not to create a mass exemption.[271] While *Manocherian* may have been facially similar to *Nollan* and *Dolan* in that all three involved narrow regulatory decisions by government organizations, the narrow scope affected by the New York Legislature in passing chapter 940 in no way resembled the actions of the land-use boards in *Nollan* and *Dolan*.

In sum, the policy reasons that caused the Supreme Court to apply heightened scrutiny in *Nollan* and *Dolan* were specific to the facts of those adjudicative land-use exactions. Because the facts of *Manocherian* are sufficiently different from the facts in those cases, the court's use of heightened scrutiny was unwarranted. The court of appeals should have applied the same rational-basis scrutiny to chapter 940 that is applied in most regulatory takings cases that affect only property rights.

CONCLUSION

Although the wisdom of chapter 940 of the Laws of 1984 can be debated at length, the ultimate decision regarding its soundness was made by the Court of Appeals of New York in *Manocherian v. Lenox Hill Hospital*.[272] This decision to second-guess the democratically elected New York Legislature regarding legislation regulating economic interests employed a strictness of scrutiny which, since the demise of the *Lochner* era, has not often been applied to economic legislation. The decision to invalidate the legislation, while arguably supported by New York State case law, contradicted federal precedent that had carefully limited the use of heightened scrutiny to those situations involving adjudicative land-use exactions. The challenge to chapter 940 in *Manocherian* presented a factual situation extremely different from those presented in *Nollan* and *Dolan* and therefore it should not have been viewed with heightened scrutiny. Both the *Nollan* and *Dolan* decisions have been criticized for their willingness

269 See id.

270 See id. at 496 (Ciparick, J., dissenting) (asserting that chapter 940 "was enacted to remedy an unintended consequence of the OHA").

271 See id. (noting that nonprofit hospitals were not susceptible to "speculative and profiteering practices" that OHA intended to regulate).

272 643 N.E.2d 479 (N.Y. 1994), cert. denied, 115 S. Ct. 1961 (1995).

to return to the *Lochner* era of invalidating economic legislation, and *Manocherian* extended this approach even further. Moreover, the heightened scrutiny employed by *Manocherian*, if followed by other courts, may have the effect of undermining the longstanding deference that the Supreme Court has employed in evaluating economic legislation under the Due Process and Equal Protection Clauses.

For the above reasons, the Court of Appeals of New York (and other federal and state courts) should heed the advice of dissenting Judge Levine to reconsider its reading of *Nollan* and *Dolan*, and to examine economic legislation under the Takings Clause with a more deferential eye. Unless heightened scrutiny under the Takings Clause is limited to adjudicative land-use exactions, lower federal and state courts may apply such intensive scrutiny in all regulatory takings cases, thereby running the risk of undermining legislative decision-making in a wholesale manner.