REVOLUTIONARY OR ROUTINE? *KOONTZ v. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT*

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Introduction

Two decades ago, the Supreme Court first instituted a requirement that certain government demands in the land use permitting context meet a nexus and proportionality requirement to survive a takings claim.[1] Since then, courts have struggled to determine how far the *Nollan* and *Dolan* decisions extend over the myriad of demands local governments routinely make to manage the impacts of development. In *Koontz v. St. Johns River Water Management District*,[2] the Supreme Court clarified the issue in two ways. First, Justice Alito's majority opinion held that the *Nollan/Dolan* nexus and proportionality requirements apply in the context of permit denials, not just approvals. Second, it held that these requirements apply to demands for money, not just demands for an interest in land.

Four dissenters, represented by Justice Kagan, warned that the ruling would gut local governments' ability to manage the negative impacts of development.[3] Justice Alito disagreed. Many states already apply nexus and proportionality requirements to government demands for money, he wrote, so *Koontz* can hardly be considered a "revolution" in land use law.[4]

Justice Alito was right that many states already apply the nexus and proportionality standard to monetary exactions.[5] However, he left unaddressed the fact that those states vary considerably with regard to the kinds of extractions to which they apply the standard. Most notably, many states apply the nexus and

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[1] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
[2] 133 S.Ct. 2586 (2013).
[3] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct 2586, 2603–04 (2013) (Kagan, J., dissenting).
[4] *Id.* at 2602.
[5] *See, e.g.*, N. Ill. Home Builders Ass'n v. Cnty. of DuPage, 649 N.E.2d 384, 388–89 (Ill. 1995); Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000); Rogers Mach., Inc. v. Washington Cnty., 45 P.3d 966, 979–80 (Or. Ct. App. 2002); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 639–40 (Tex. 2004); Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172, 175 (Wash. Ct. App. 2000).

proportionality standard only in the context of ad hoc demands for money, not across-the-board, legislatively imposed fees. Because the majority did not clarify how far its holding extends, the decision is likely to generate significant confusion and, as the dissenters warn, hamper the ability of litigation-averse local governments to negotiate solutions with developers.

I. BACKGROUND

A. Factual Background

The story of *Koontz* began in 1972, when Coy Koontz, Sr. purchased a 14.9-acre tract of land off of a heavily developed Florida state highway east of Orlando.[6] Today, the entire site is classified as wetlands under both federal and Florida state law.[7] However, the site varies considerably in drainage and vegetation, with the northern, road-abutting portion significantly drier than the vegetated southern section.[8]

In 1994, Koontz began an attempt to develop his land.[9] Under Florida water-resource and wetland-development laws, Koontz needed two permits: a Management and Storage of Surface Water ("MSSW") permit for construction, and a Wetlands Resource Management ("WRM") permit for dredge and fill.[10] MSSW permits are granted by five state water management districts, which by statute may impose "such reasonable conditions" as will ensure that construction will "not be harmful to the water resources of the district."[11] WRM permits, also granted by water management districts, are only allowed if permit applicants provide "reasonable assurance" that proposed construction on wetlands is "not contrary to the public interest" as defined by a list of statutory criteria.[12] To implement this requirement, the St. Johns River Water Management District (the district with jurisdiction over Koontz's land) requires that applicants mitigate the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.[13]

Koontz's original permit application sought to fill, grade, and develop the 3.7-acre northern section of the property.[14] As mitigation, Koontz offered to place a conservation easement on the eleven-acre southern section of the prop-

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[6] 133 S. Ct. at 2591–92; *see also* St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 9–10 (Fla. Dist. Ct. App. 2009).
[7] *Koontz,* 133 S. Ct. at 2592.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* (citing FLA. STAT. § 373.413(1) (2013)). MSSW permits are part of a statewide water management regime established through Florida's 1972 Water Resources Act, codified as amended at FLA. STAT. §§ 373.403–468 (2013).
[12] 1984 Warren S. Henderson Wetlands Protection Act, codified as amended at FLA. STAT. § 373.414(1) (2013).
[13] *Koontz*, 133 S. Ct. at 2592.
[14] *Id.*

erty.[15] The District found that the conservation easement was inadequate.[16] District staff told Koontz that he could either reduce the size of his development to one acre and place a conservation easement on the remaining 13.9 acres, or he could continue with his initial plan, including the eleven-acre conservation easement, if he would pay a fee that would be used to improve District-owned land elsewhere.[17]

Koontz felt that the mitigation requirements were excessive compared to the environmental impacts of his proposed development, so he filed suit in state court.[18] He argued that, under Fla. Stat. § 373.617(2), he was entitled to "monetary damages" because the District's actions represented "an unreasonable exercise of the state's police power constituting a taking without just compensation."[19] The question facing the Florida state courts, then, was whether the District's demand for mitigation funds — a monetary exaction — constituted a taking. The Fifth District Court of Appeals found a taking, but the Florida Supreme Court reversed. The different results in the two cases stem from the two courts' differing conclusions as to whether the Supreme Court's *Nollan/Dolan* standard for evaluating government demands in land use permitting situations applies to monetary exactions.

B. The Nollan/Dolan *Standard for Takings*

The *Nollan/Dolan* standard emerged from two Supreme Court cases that considered governments' ability to demand dedications of real property in the context of land use permitting decisions: *Nollan v. California Coastal Commission*[20] and *Dolan v. City of Tigard*.[21] Together, these decisions hold that a government demand for land constitutes a taking under the Fifth Amendment, entitling the landowner to just compensation, unless the demand has both an "essential nexus" to a legitimate state interest[22] and is roughly proportionate to the impact of the development.[23]

The "essential nexus" requirement came from *Nollan*.[24] In this 1987 case, the California Coastal Commission demanded that a property owner grant a public easement to a beach as a condition of being able to remodel and expand a beach house.[25] The Commission argued that the purpose of the easement was to protect views of the beach from the road.[26] When the property owners' takings claim reached the Supreme Court, the Court held that, although preserving

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[15] *Id.* at 2592–93.
[16] *Id.* at 2593.
[17] *Id.*
[18] *Id.*
[19] *Id.* (citing FLA. STAT. § 373.617(2) (2013)).
[20] 483 U.S. 825, 837 (1987).
[21] 512 U.S. 374 (1994).
[22] *Nollan,* 483 U.S. at 837.
[23] *Dolan*, 512 U.S. at 391.
[24] *Nollan*, 483 U.S. at 837.
[25] *Id.* at 827–28.
[26] *Id.* at 828–29.

public beach views was a legitimate state interest, the exaction nevertheless constituted a taking because there was no "essential nexus" between the diminished view and the public access easement.[27] That is, a beach easement wasn't necessary to fulfill the Commission's stated goal of allowing the public to see the beach from the road.[28]

The Court added the "rough proportionality" test in 1994 in *Dolan*.[29] In *Dolan*, a landowner sought to replace an existing hardware store with a larger one and to pave its gravel parking lot.[30] The City of Tigard approved the application on the condition that the owner dedicate about ten percent of her land to floodplain and bike/pedestrian easements.[31] Dolan sued, arguing that the City had not met the *Nollan* standard.[32] The Supreme Court held that although there was a nexus between the impacts of the development and both flood control and transportation issues, the City had not shown that the required dedication was proportionate to those impacts.[33] To survive a takings claim, the Court held, the City must demonstrate how the bike path would mitigate the traffic impacts of the larger store, and why a public-access easement was necessary to mitigate flooding.[34] This "rough proportionality" did not require "mathematical precision."[35] However, it did require some sort of "individualized determination" that the government's demand is related in "extent and nature" to the impacts of the development,[36] a requirement that appears to place the burden of proving proportionality on the government.[37]

When the Florida Supreme Court considered Koontz's case, it found the *Nollan*/*Dolan* standard inapplicable for two reasons. First, in Koontz's case, the District had *denied* a permit rather than *approving* the permit subject to a condition.[38] The court reasoned that, in *Nollan* and *Dolan*, the taking came via the imposition of a condition on the grant of a permit. Hence, if the District merely denied the application — imposing no condition — then it could not be argued that any property had been taken.[39] Second, both *Nollan* and *Dolan* involved dedications of land, whereas all that was required of Koontz was a monetary

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[27] *Id.* at 838–39.
[28] *Id.* ("It 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.")
[29] *Dolan*, 512 U.S. at 391.
[30] *Id.* at 379.
[31] *Id.* at 379–80. The City made its demand pursuant to the Community Development Code, which required property dedications in floodplains.
[32] *Id.* at 382.
[33] *Id.* at 395–97.
[34] *Id.* at 392–96.
[35] *Id.* at 391.
[36] *Id.*
[37] *Id.* at 414 (Souter, J., dissenting).
[38] St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1230 (Fla. 2011).
[39] As dissenting Judge Griffin on the appellate court colorfully put it, "[i]n what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?" *Koontz*, 5 So. 3d at 20.

exaction in the form of mitigation fees.[40] When the case reached the U.S. Supreme Court, however, the Court rejected both of these arguments. The justices unanimously held that *Nollan*/*Dolan* applies to permit denials, and a five-member majority held that *Nollan*/*Dolan* applies to monetary exactions.

II. The Supreme Court Decision

A. Nollan/Dolan *Applies to Permit Denials*

Writing for the majority, Justice Alito rejected the argument that *Nollan*/*Dolan* applies only to conditional permit approvals.[41] On a practical level, Justice Alito reasoned that a rule applying constitutional scrutiny only to conditional approvals would allow governments to rephrase demands for property as conditions precedent to approval.[42] More importantly, *Nollan*/*Dolan* is an application of the unconstitutional conditions doctrine, which prevents the government from coercing people into giving up their rights by withholding a discretionary benefit.[43] One need not actually yield to the government's coercive pressure in order to have suffered a constitutional injury.[44]

However, the fact that no property has been taken matters with regard to remedy. If there has been no taking, Justice Alito wrote, the Constitution does not require just compensation.[45] What *other* remedy might be available is a matter of the cause of action under which the landowner sued[46] — in the case of Koontz, a Florida state law that allows "damages" for a taking.[47] Thus, Justice Alito did not address the question of what federal remedy would be available to a landowner who sued under federal law, although he did not rule out the possibility that one might exist.[48]

Although the four dissenters agreed with the major thrust of the first argument — that denials are the same as approvals — Justice Kagan's dissent expressed concern about the majority opinion leaving open the question of remedy.[49] She argued that, if there is no taking, then there can be no remedy.[50] Moreover, Justice Kagan feared that the specter of litigation with the potential for monetary damages would chill local and state governments' negotiations with developers.[51] If an idea proposed in negotiations could be characterized as an unconstitutional "demand," she warned, state and local governments would likely be more inclined to deny permits outright, rather than negotiate and risk

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[40] *Koontz*, 77 So. 3d at 1230.
[41] *See id.* at 1225, 1229–30.
[42] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2596 (2013).
[43] *Id.* at 2594.
[44] *Id.* at 2596.
[45] *Id.* at 2597.
[46] *Id.*
[47] Fla. Stat. § 373.617(3)(b) (2013).
[48] *Koontz*, 133 S. Ct. at 2597.
[49] *Id.* at 2611–12.
[50] *Id.* at 2604.
[51] *Id.* at 2610.

litigation and damages.[52] This reaction would be a major change for many developers, who frequently work closely with permitting staff to identify and resolve issues before submitting their applications.[53]

B. Nollan/Dolan *Applies to Monetary Exactions*

The major dispute in *Koontz* turned on Justice Alito's second holding: that the *Nollan*/*Dolan* standard applies to monetary exactions.[54] Justice Alito noted that courts have been divided over whether demands for money can give rise to *Nollan*/*Dolan*.[55] Unlike the Florida Supreme Court, he argued that they can.[56] He began again with a pragmatic argument: If *Nollan*/*Dolan* did not apply to monetary exactions, any government could evade the standard by demanding either an easement or a monetary payment equal to the value of the easement.[57]

The bulk of the legal argument, however, was devoted to rejecting the claim, made by both the respondents and the dissenting justices, that the Court had already held that monetary payments cannot give rise to a takings claim. The argument centered on *Eastern Enterprises v. Apfel*,[58] where a four-justice plurality found that a retroactive requirement for a mining company to pay into a compensation fund violated the Takings Clause.[59] In *Apfel*, Justice Kennedy concurred in the result, but joined the dissent in its position that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest[.]"[60] Justice Alito distinguished *Apfel* on the basis that in *Koontz*, the exaction burdened a particular piece of property, whereas in *Apfel* it did not.[61]

Justice Alito continued by arguing that this case would not hamstring local governments' ability to raise revenue, because it "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regula-

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[52] *Id.* ("[N]o local government official with a decent lawyer would have a conversation with a developer.").
[53] *Id.*
[54] *Id.* at 2599.
[55] *Id.* at 2594. Justice Alito cited three cases that the Florida Supreme Court had used to show courts' division over the issue: McClung v. City of Sumner, 548 F.3d 1219, 1228 (9th Cir. 2008) (holding that an ordinance demanding that landowners increase the size of a drainage pipe on their property in order to bring it up to a uniform citywide standard should be analyzed under the *Penn Central* test, rather than under *Nollan*/*Dolan* because the demand was a legislative, generally applicable development condition and not an adjudicative exaction of land); Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (holding that *Nollan*/*Dolan* applies to a "narrow" range of monetary exactions); and Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 640-41 (Tex. 2004) (holding that *Nollan*/*Dolan* can apply to monetary exactions, such that a requirement that a developer pay a fee to improve a roadway abutting its residential development as a condition of approval constituted a taking, but declining to adopt a rule that *Nollan*/*Dolan* applies to all legislative fees).
[56] *Koontz*, 133 S. Ct. at 2594.
[57] *Id.* at 2599.
[58] 524 U.S. 498 (1998).
[59] *Id.* at 529–37.
[60] *Id.* at 540.
[61] *Koontz*, 133 S. Ct. at 2600.

tions that may impose financial burdens on property owners."[62] He rejected the argument that it would be impossible to distinguish impermissible land use exactions from property taxes and user fees, which are also monetary payments connected to a particular piece of property.[63] He pointed out that a number of cases have found seizures of money — such as interest on a bank account[64] or liens[65] — to be takings, despite functional similarities to taxes, and courts have managed to draw a line, often because governments' ability to tax is circumscribed by state law.[66] However, he concluded that the instant case did not require drawing a line between a tax and an impermissible monetary exaction, and so declined to do so.[67]

Justice Alito concluded by rejecting claims that this ruling would cripple local governments' ability to manage development.[68] He claimed that the dissent's argument that the Federal Constitution should have nothing to say about sewer fees, as discussed below, cannot be squared with its *separate* argument that *Nollan*/*Dolan* was unnecessary because the Due Process Clause imposes an independent check.[69] According to Justice Alito, the dissenters' opinion is, at its heart, an argument for overruling *Nollan*/*Dolan*, not for drawing a distinction between land and fees.[70] Justice Alito spent little time on the practical implications of the ruling other than to point out that many states already apply *Nollan*/*Dolan* or a similar standard to monetary exactions without it causing "significant practical harm."[71]

As noted above, Justice Kagan, writing for the dissent, sharply criticized the view that the Takings Clause, and therefore *Nollan*/*Dolan*, applies to monetary exactions.[72] Citing *Apfel*, Justice Kagan explained that the Takings Clause applies only when "the government appropriates a 'specific interest'" in property or a "'specific, separately identifiable fund of money.'"[73] Justice Kagan disagreed with Justice Alito's application of the *Apfel* test to Koontz's situation and found that the required mitigation was not an appropriation of a specific interest in Koontz's property. Rather, the required mitigation was an "'obligation to perform an act' . . . that costs money"[74] and therefore akin to "general

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[62] *Id.* at 2601–02, (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 243 n.2 (2003)) (Scalia, J., dissenting) ("[t]axes and user fees . . . are not 'takings.'").
[63] *Id.*
[64] Brown v. Legal Found. of Wash., 538 U.S. 216, 232 (2003).
[65] *Koontz*, 133 S. Ct. at 2599–600 (citing United States v. Security Industrial Bank, 459 U.S. 70, 77–78 (1982); Armstrong v. United States, 364 U.S. 40, 44–49 (1960); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601–02 (1935)).
[66] *Koontz*, 133 S. Ct. at 2602.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Koontz*, 133 S. Ct. at 2603–04 (Kagan, J., dissenting).
[73] *Id.* at 2605 (citing *Apfel*, 524 U.S. at 554–55).
[74] *Id.* at 2606 (citing *Apfel*, 524 U.S. at 540–41).

liability" to pay money which is not subject to the Takings Clause.[75] Kagan also argued that the *Nollan/Dolan* analysis begins at a very different point than Justice Alito had recognized: namely, by determining whether "the demand would have constituted a taking when executed outside the permitting process."[76] In the instant case, under *Apfel*, a demand for money that occurred outside of Koontz's permitting process would not constitute a taking.

Justice Kagan then turned to the practical implications of the majority's reasoning: that many kinds of development fees could fall under the *Nollan/Dolan* umbrella. The majority's approach "threatens significant practical harm" because it extends the difficult Takings Clause standard, and the potential for compensation, "into the very heart of local land use regulation and service delivery."[77] If *Nollan/Dolan* applies to monetary exactions, then the Takings Clause would govern all manners of permitting and impact fees aimed at mitigating a development's impacts. That rule could subject local governments that negotiate with developers to takings claims, if a permit is later denied.[78] Justice Kagan added that government excesses with regard to monetary exactions are already protected by the Due Process Clause and the *Penn Central* regulatory takings test.[79] This is not an argument for "overruling" *Nollan* and *Dolan*, she wrote in response to Justice Alito; it is simply declining to extend those cases into an area where they are not needed.[80]

In addition, although the majority agreed emphatically that taxes are not takings, Justice Kagan argued that the majority provided no guidance for how to distinguish a permissible tax from an impermissible monetary exaction[81] — both of which involve "a simple demand to pay money."[82] Nor did the majority address whether the rule would apply to *all* kinds of monetary exactions — both to fees that are imposed through ad hoc negotiations over a single parcel of property, as well as to legislative fees that apply equally to all properties.[83] According to Justice Kagan, state courts faced with this issue "struggle to draw a coherent boundary."[84] Thus, state and local governments will be left making decisions in an uncertain legal environment and under the shadow of potential claims for just compensation.[85]

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[75] *Id.* (quoting *Apfel*, 524 U.S. at 555). In part, Kagan reaches this result by distinguishing the case at hand from precedents where the government dissolved a lien, or seized a particular bank account. In contrast, here the government "just ordered Koontz to spend or pay money." *Id.* at 2606.
[76] *Koontz*, 133 S. Ct. at 2605.
[77] *Id.* at 2607.
[78] *Id.* ("The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high.")
[79] *Id.* at 2609. The *Penn Central* test is from Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).
[80] *Koontz*, 133 S. Ct. at 2609.
[81] *Id.* at 2608 ("Perhaps its most striking feature is its refusal to say even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny.").
[82] *Id.* at 2607.
[83] *Id.* at 2608.
[84] *Id.*
[85] *Id.*

The majority and dissent clearly split over several points of law. However, perhaps the most interesting question is the practical one: What impact will the ruling have on the ground in the day-to-day operations of local government?

III. Analysis

If the *Koontz* majority is right that nexus and proportionality requirements similar or identical to *Nollan/Dolan* are already business as usual in much of the country, will the opinion merely bring outlying states into a proven and workable regime? Or will it, as Justice Kagan warns, hamstring local governments by limiting their ability to bargain with developers? A closer look at the law of monetary exactions reveals that although Justice Alito is right that *Nollan/Dolan*, or something similar, is already the law in much of the country, considerable variation still exists. Putting aside the difficulty distinguishing between a tax and a fee discussed in the majority opinion, the case law supports Justice Kagan's concern that the real difficulty lies in distinguishing between different types of fees. Cities impose a huge variety of fees to mitigate the impacts of developments through a wide range of mechanisms. Even if *Koontz* resolves the variation in the case law by applying *Nollan/Dolan* to all monetary exactions — which, as Justice Kagan notes, it does not clearly do[86] — Justice Alito's carve-out for "user fees and similar laws and regulations"[87] is not at all self-explanatory. Thus, this Part argues that the new rule may have a greater impact than the majority suggests.

As a starting point, the majority was indeed correct that many states have applied *Nollan/Dolan* and other similar requirements to monetary exactions without any crippling reduction in local governments' ability to control development. Courts in California, Illinois, Ohio, Oregon, Texas, and Washington all require the heightened *Nollan/Dolan* scrutiny for at least some kinds of monetary exactions.[88] For example, in *Benchmark Land Co. v. City of Battle Ground*,[89] the Washington Court of Appeals held that the *Nollan/Dolan* standard applied to a city's demand that a developer improve adjoining streets as a condition of the permit, in part because the exaction represented "the attempted transfer of a public burden."[90] Similarly, in *Home Builders Ass'n of Dayton &*

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[86] *Koontz,* 133 U.S. at 2608.
[87] *Id.* at 2601.
[88] *See* Lauren Reznick, *Note: The Death of* Nollan *and* Dolan? *Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. Rev. 725, 740–41 (2007); *see also* N. Ill. Home Builders Ass'n v. Cnty. of DuPage, 649 N.E.2d 384, 388–89 (Ill. 1995); Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000); Rogers Mach., Inc. v. Wash. Cnty., 45 P.3d 966, 979–80 (Or. Ct. App. 2002); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 639–40 (Tex. 2004); Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172, 175 (Wash. Ct. App. 2000).
[89] 14 P.3d 172 (Wash. Ct. App. 2000).
[90] *Id.* at 175 (quoting *Armstrong*, 364 U.S. at 49) ("The condition also seeks to force 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'").

the Miami Valley v. City of Beavercreek,[91] the Ohio Supreme Court found that certain fees were similar enough to land use exactions to implicate the Takings Clause, and ultimately held that the *Nollan/Dolan* "dual rational nexus test balances both the interests of local government and real estate developers."[92]

A number of state legislatures have also applied *Nollan/Dolan* to monetary exactions, using enabling legislation that permits impact fees.[93] Almost all of the twenty-eight state statutes enabling impact fees have incorporated the *Nollan/Dolan* requirement of a connection between harms and fees into their statutory language.[94] Statutes utilize differing terminology, including "proportionate share," or "reasonably related," or "reasonably attributable."[95] While this language does not directly mirror *Nollan/Dolan*'s dual test, it does support the majority's contention that many states have found it workable and advisable to require a connection between the harms imposed by a development project and the fees assessed.

However, many states have held back from applying *Nollan/Dolan* to *all* kinds of monetary exactions. State and local governments use an extremely wide range of fees to address externalities from new development.[96] These fees often pay for direct and easily quantifiable infrastructure needs, such as widening a roadway to accommodate traffic generated by the residents of a new subdivision, or laying new water and wastewater pipes to serve new homes. The further the fees stray from covering the infrastructure that directly serves the development, the more governments have to extrapolate from jurisdiction-wide averages to calculate the fees.[97] Moreover, governments impose these fees through a mix of legislative formulas and ad hoc negotiations with individual property owners. Thus, even among states that apply *Nollan/Dolan* to monetary exactions, significant variation exists as to the kind of fees to which the standard applies. As Justice Kagan noted in her dissent, the major fault line has been whether *Nollan/Dolan* applies only to ad hoc demands, or also to across-the-board, legislatively imposed fees.[98]

Consider, for example, the two cases in which the California and Texas Supreme Courts applied *Nollan/Dolan* to monetary exactions. In the California

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[91] 729 N.E.2d 349 (Ohio 2000).
[92] *Id.* at 355–56.
[93] *See* Clancy Mullen, *State Impact Fee Enabling Acts* (Aug. 21, 2012), *available at* http://perma.cc/JV6J-VKCF.
[94] *Id.* at 2.
[95] *Id.*
[96] *See generally* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees,* 59 SMU L. Rev. 177 (2006).
[97] *See, e.g.*, John L. Crompton, *An Analysis of Parkland Dedication Ordinances in Texas,* 28 J. OF PARK & RECREATION ADMIN. 1 (2010) (describing parkland fees based on the average usage of an acre of parkland, calculated by multiplying the average number of people served by an acre of parkland by the number of people in a given subdivision).
[98] *Koontz*, 133 S.Ct. at 2608 (Kagan, J., dissenting); *see also* D.S. Pensley, *Note: Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions,* 91 CORNELL L. REV. 699 (2006).

case, *Ehrlich v. City of Culver City*,[99] the California Supreme Court held that *Nollan/Dolan* was not limited to dedications of real property, and could apply to monetary exactions.[100] In *Ehrlich,* the court applied *Nollan/Dolan* to a city's requirement that a developer who sought to replace a private tennis club with residential units must pay a fee to mitigate the loss of recreational opportunities.[101] However, it also clarified that the standard would apply to a "narrow" range of exactions cases: those in which "exactions are imposed — as in this case — neither generally nor ministerially, but on an individual and discretionary basis."[102] Legislative development fees would remain exempt from *Nollan/Dolan* analysis.[103]

The *Ehrlich* court based its reasoning in part on the due process-like idea that democratic processes provide a check on government excesses when a rule applies broadly.[104] It also pointed out that the *Penn Central* test governing regulatory takings provided an independent check on legislative exactions.[105] Thus, in that same case, the *Ehrlich* court held that a separate legislative fee to pay for art in public places was not subject to *Nollan/Dolan*.[106] As a practical matter, the court's ad hoc/legislative distinction was rendered irrelevant by a subsequent California statute, the Mitigation Fee Act, which applies *Nollan/Dolan* to both legislative and ad hoc decisions.[107] However, the case still provides a notable example of a narrow interpretation of *Dolan*.

The Texas case, *Flower Mound v. Stafford Estates Ltd. Partnership*,[108] interpreted Dolan much more broadly.[109] *Flower Mound* held that a local requirement that developers improve roadways adjacent to their developments was subject to *Nollan/Dolan* analysis.[110] It rejected the argument that *Nollan/Dolan* distinguishes between ad hoc and legislative fees, reasoning that *Dolan* itself could be characterized as a legislative fee because the exaction was demanded pursuant to a local ordinance with uniform requirements.[111] However, the court still declined to adopt an across-the-board rule that *Nollan/Dolan always* ap-

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[99] 911 P.2d 429 (Cal. 1996).
[100] *Id.* at 443–44. The case reached the California Supreme Court after remand from the U.S. Supreme Court. On remand, the U.S. Supreme Court directed California to reevaluate the case in light of *Dolan*, which had been decided while *Ehrlich* was in litigation.
[101] *Id.* at 433–34.
[102] *Id.* at 444, 447.
[103] *Id.* at 447, 457–58.
[104] *Id.* at 443–44, 457–58.
[105] *Id.* at 447 (citing *Penn Central*, 438 U.S. at 124).
[106] *Id.* at 451.
[107] Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 119–20 (2001).
[108] 135 S.W.3d 620 (Tex. 2004).
[109] *Id.* at 643.
[110] *Id.*
[111] *Id.* at 641. The ordinance in question uniformly required certain floodplain easements and other dedications for similarly situated property owners. *Id.* Indeed, *Dolan* can fairly be classified either way — while the *Flower Mound* characterization is not without merit, the Court in *Dolan* distinguished the "adjudicative decision . . . on an individual parcel" at issue from other cases that had involved "essentially legislative determinations." *Dolan*, 512 U.S. at 385.

plies to legislative fees, leaving open the possibility that some kinds of local exactions should not face *Nollan/Dolan* analysis.[112]

In addition to demonstrating the legislative/ad hoc dilemma that has split the lower courts, the fact that neither the California nor Texas Supreme Court was comfortable with an across-the-board rule on monetary exactions shows how varied and slippery fees can be in practice. Justice Alito's majority opinion did not acknowledge the legislative/ad hoc dilemma. A simple reading of *Koontz* is that "monetary exactions" means *all* monetary exactions, unless they are "property taxes, user fees and similar laws and regulations."[113] Even then, Justice Alito's carve-out for "user fees and similar laws and regulations" introduces an entirely new element of uncertainty: When, if ever, is an impact fee similar to a user fee? When it requires developers to pay for infrastructure directly serving a development? Never?

One counterargument is that, even under the broadest reading of *Koontz*, it is hardly revolutionary to mandate that landowners and developers pay no more than their proportionate share of the burdens they impose on public infrastructure. Moreover, some have argued that *Nollan/Dolan* can help local governments: requiring them to study, document, and justify the exactions they impose has not only helped spur them toward more systematic planning, it has also led some cities to realize they had been under-charging developers for their impacts.[114]

Although such a position is theoretically sound, it is also the case that applying *Nollan/Dolan's* "individualized determination" requirement may not work equally well on all kinds of fees. That is, individualized determinations require some sort of quantification of impacts. As discussed above, many kinds of fees, such as fees to fund wastewater pipes or mitigate traffic impacts, are fairly easy to quantify using standardized methodologies: a residential unit requires X inches of wastewater pipe; commercial space generates Y vehicle trips per square foot. But for fees that cover more widely shared amenities — such as open space, habitat, or wetlands — governments will likely find it harder to quantify the impact of one more acre of development, particularly in built-out areas with significant preexisting development.[115] Thus, the question of how much or what kind of an individualized determination is sufficient to justify a given kind of fee is likely to generate litigation in which the government bears the burden of proving that its fees are not disproportionate.

Again, Justice Alito is right that many states already use *Nollan/Dolan* and already require individualized determinations.[116] However, they have decided to do so within the context of local facts on the ground. It is another matter to do so using federal law. As Professor Roderick Hills, Jr. has argued, federal courts are a flawed venue for adjudicating local land use decisions because they lack

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[112] *Flower Mound*, 135 S.W.3d at 640.
[113] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2601 (2013).
[114] *See generally* Carlson & Pollak, *supra* note 107.
[115] *See id.*
[116] *Koontz*, 133 S.Ct. at 2602.

both flexibility and democratic accountability.[117] Federal courts cannot adapt easily to local political regimes and policy preferences. Indeed, it was such local preference that led to *Koontz* in the first place: Some states chose to apply *Nollan/Dolan* to monetary exactions, while others did not, and many qualified its application. If nothing else, *Koontz* places federal courts "smack in the middle" of highly idiosyncratic and politically contentious local land use decisions.[118]

Conclusion

So is *Koontz* a revolution? The answer will depend on the unfinished "user fees and similar laws" question. If lower courts interpret legislatively imposed impact fees as similar to user fees, and thus outside of *Koontz*' broad application of *Nollan/Dolan*, the decision's impact will likely be relatively contained. If courts instead apply *Koontz* to all impact fees, erasing the longstanding legislative/ad hoc distinction recognized by many states, the on-the-ground effect will likely be considerable. An across-the-board application of *Koontz* to all monetary exactions would force state and local governments to make individualized determinations of property owners' impacts without room for the local variation that courts in many states have been careful to preserve, and would indeed work a revolution on the traditionally local area of land use planning and regulation.

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[117] Roderick Hills, Jr., Koontz's *Unintelligible Takings Rule: Can Remedial Equivocation save the Court from a Doctrinal Quagmire?,* PrawfsBlawg (June 25, 2013), http://perma.law.harvard.edu/06sfrQNezw4/.

[118] *Koontz*, 133 S.Ct. at 2612 (Kagan, J., dissenting).