The Takings Are Coming: How Federal Courts Can Protect Regulatory Efforts to Address California's Housing Crisis

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In 2018, California Governor Gavin Newson called for building 3.5 million new homes by 2025, a historically unprecedented rate of construction intended to address the state's severe and worsening housing crisis. Spiraling unaffordability, insufficient housing, and destructive urban sprawl have exacerbated environmental and socioeconomic disparities in California, enabled by restrictive local government regulations that make it difficult to build housing in the dense, job-rich areas where it is needed most. Taking aggressive action to alleviate this crisis is crucial. As state and local governments seek to do so, courts play a critical role in evaluating the legitimacy of land use laws intended to facilitate more affordable housing construction.

For decades, state courts have been the first to evaluate such laws when subject to legal challenges, including determining whether a government regulation has gone too far by taking private property without just compensation under the Fifth Amendment's Takings Clause. But a recent Supreme Court decision upends this precedent. In Knick v. Township of Scott*, the Court issued an opinion that allows property owners to go directly to federal court if they believe a regulation amounts to an unconstitutional taking. This includes challenging regulations that are central to California's efforts to build more affordable housing, such as rent control ordinances, inclusionary zoning laws, and measures designed to limit sprawl. Because federal courts unfamiliar with state law will likely mistakenly evaluate takings claims and view property owners more sympathetically than state courts,* Knick *threatens to undermine these regulations. This Note explores why safeguarding rent control, inclusionary housing, and growth control measures is crucial to addressing California's housing crisis. In doing so, it evaluates the implications of the* Knick *decision*

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for relevant Takings Clause jurisprudence and argues that a threatened reevaluation of takings claims can be avoided if federal courts look to California housing law as a guide.

INTRODUCTION

California is experiencing an unprecedented housing crisis. Spiraling unaffordability, insufficient housing, and destructive urban sprawl continue to exacerbate environmental and socioeconomic disparities. As the state seeks to build 3.5 million homes by 2025 in increasingly low carbon communities to meet these challenges, determining where and how cities grow is critical.[1]

In *Knick v. Township of Scott*, the Supreme Court issued an opinion that could undermine California's efforts to build more housing when it held that property owners can go directly to federal court if they believe the government has taken their property without just compensation under the Fifth Amendment's Takings Clause.[2] Cheered by developers and property rights advocates, the decision overruled decades of precedent that had sensibly ensured state courts could be the first to evaluate the legitimacy of a state or local land use law before determining if an unconstitutional taking had occurred. Under *Knick*, however, federal courts can now be the first to do so. Because federal courts unfamiliar with state law will likely mistakenly evaluate takings claims and view property owners more sympathetically than state courts, *Knick* encourages property rights advocates to challenge California regulations intended to address its housing crisis. At a time when the state is exploring how these regulations can help meet urgent housing needs, guidance is needed for how federal courts can evaluate takings claims in ways that protect California's efforts.

In Part I, I provide an overview of California's housing crisis, including its causes and regulatory efforts to address it. Amidst increasing unaffordability, local and state regulations governing rent control, inclusionary housing, and

1. *See* Elijah Chiland, *California's Next Governor Wants to Build 3.5 Million New Homes by 2025*, L.A. CURBED (Nov. 8, 2018, 9:15 AM), https://la.curbed.com/2018/11/8/18073066/california-governor-election-gavin-newsom-housing-plan.

2. Knick v. Township of Scott, 139 S. Ct. 2162, 2167 (2019).

growth limitation have incentivized and protected affordable housing throughout the state. Safeguarding these regulations is crucial.

In Parts II and III, I discuss relevant Takings Clause jurisprudence and provide an explanation of the *Knick* decision. Part II summarizes how California state courts have evaluated regulatory takings claims leading up to *Knick*, focusing on cases involving rent control, inclusionary housing, and growth limitation measures. Part III provides a description of case facts and the Supreme Court's reasoning in *Knick*, which I argue rests on a distorted understanding of the Fifth Amendment that threatens a reevaluation of Takings Clause jurisprudence by federal courts.

In Part IV, I analyze how this reevaluation endangers California's efforts to build more affordable housing by applying *Knick*'s inferred reasoning to the cases examined in Part II. In addition to straining federal court resources and betraying principles of judicial federalism, I argue that *Knick* will curtail or drastically weaken rent control, inclusionary housing, and growth limitation measures in the state, thereby exacerbating problems caused by the housing crisis.

Finally, in Part V, I offer a framework for how federal courts can evaluate regulatory takings claims in ways that protect California's efforts to address its housing crisis. The California State Legislature has identified a pressing need for more housing and passed legislation that can guide federal courts in assessing takings claims, helping to ensure that local and state governments can continue regulatory efforts to alleviate the state's housing shortage and its attendant inequities.

I. CALIFORNIA'S HOUSING CRISIS AND REGULATORY EFFORTS TO ADDRESS IT

In the following Subparts, I discuss the impacts of California's housing crisis and the role restrictive land use regulations have played in exacerbating the crisis by constraining the housing supply. Local and state regulatory efforts to increase supply and protect existing affordable housing have helped alleviate the crisis to some extent. But some local governments, particularly in the state's populous coastal regions, have been reluctant to adopt such measures, and at the same time state efforts to exert greater control over local land use have faltered. At a time when local and state governments in California are pursuing a range of regulatory measures to address the worsening crisis, it is critical to protect the legality of these efforts.

A. A Lack of Housing Has Created Severe Environmental, Economic, and Social Impacts

The lack of housing in California has led to severely detrimental impacts. The state faces increasing unaffordability, insufficient housing supply,

intensifying homelessness, and housing development patterns that exacerbate environmental and socioeconomic disparities.[3]

Over half of California families cannot afford the cost of housing.[4] The state is far and away the most expensive place for rental housing, containing five of the ten priciest rental markets in the nation.[5] In all of California's major metropolitan regions, a family that fell within the state's median income level could afford less than a quarter of homes sold in 2017.[6] The scope of the problem is perhaps best illustrated in the San Francisco Bay Area, where, in 2012, a household earning $100,000 a year could afford the median rent in 72 percent of the region's neighborhoods.[7] By 2018, that same family could afford the median rent in barely a quarter of Bay Area neighborhoods.[8]

It is well documented that California's exorbitant housing costs are largely driven by an acute lack of housing.[9] Over the past decade, housing production has averaged less than 50 percent of the need each year.[10] This production deficit has led to a shortage of nearly 2 million homes, and the shortage is projected to grow to 2.5 million by 2025.[11] California's desirable coastal metro areas are particularly falling short—two-thirds of the state's population lives in these areas, yet there is insufficient housing to meet growing demand.[12] Over the past three decades, new housing construction in these regions has been significantly lower than in similar metro regions outside of California.[13] As a result, housing prices in coastal areas have skyrocketed while housing development has moved

3. *See*, *e.g.*, CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES, FINAL STATEWIDE HOUSING ASSESSMENT 2025, CALIFORNIA DEP'T OF HOUS. AND COMTY. DEV. 1 (2018) [hereinafter *California's Housing Future*].

4. McKinsey Glob. Inst., *A Tool Kit to Close California's Housing Gap 3.5 Million Homes by 2025*, vi (Oct. 2016), https://www.mckinsey.com/~/media/mckinsey/industries/public%20and%20social%20sector/our%20insights/closing%20californias%20housing%20gap/mgi-california-housing-affordability-exhibits.pdf [hereinafter *A Tool Kit to Close California's Housing Gap*].

5. Jeremiah Jensen, *Here are the top 10 Most Expensive Rental Markets in the U.S.*, HOUS. WIRE (May 1, 2018, 3:24 PM), https://www.housingwire.com/articles/43253-here-are-the-top-10-most-expensive-rental-markets-in-the-us.

6. Joint Ctr. for Hous. Stud. of Harv. Univ., *The State of the Nation's Housing 2019*, 21–22 (June 25, 2019), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf.

7. Tessa Stuart, *Why Can't California Solve Its Housing Crisis?*, ROLLING STONE (Sept. 5, 2019, 9:00 AM), https://www.rollingstone.com/politics/politics-features/california-housing-crisis-causes-874803/.

8. *Id.*

9. *See*, *e.g.*, Econ, & Plan. Sys., Inc., *California's Available Land for Housing—A Review of Existing Estimates and Actions for Increasing the Places Where Housing Can Be Built* (California Forward, Working Paper, Aug. 2019), https://caeconomy.org/resource/californias-housing-land-supply-a-review-of-existing-supply-estimates-and-a.

10. *See California's Housing Future*, *supra* note 3, at 1.

11. *See A Tool Kit to Close California's Housing Gap*, *supra* note 4, at 2–3.

12. MAC TAYLOR, LEG. ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 10 (2015). These coastal metro areas include Los Angeles, Oakland, San Diego, San Francisco, San Jose, and Santa Ana-Anaheim.

13. *Id.*

into the state's inland regions, making coastal areas comparatively more expensive than similar metro areas throughout the United States.[14]

Rising costs and the shortage of housing have led to escalating homelessness that shows no signs of abating. California is home to 12 percent of the nation's population but 22 percent of its homeless population.[15] The number of homeless individuals statewide grew by 25 percent from 2014 to 2018.[16] In 2019, nearly 60,000 people in Los Angeles County were experiencing homelessness, a 12 percent rise from 2018.[17] In the Bay Area counties of San Francisco, Alameda, and Santa Clara, the homeless population increased by 17 percent, 31 percent, and 43 percent respectively from 2017 to 2019.[18]

Additionally, the crisis has exacerbated environmental and socioeconomic disparities due to harmful development patterns. Housing growth that does occur typically takes the form of inland, urban sprawl: lower-density, single-family housing that is often further away from job centers.[19] This type of housing generates longer commutes, higher transportation costs, and more transportation-related greenhouse gas emissions.[20] Residents in many of these largely inland metro areas are already burdened by disproportionate levels of poverty, unemployment, and environmental pollution that can lead to negative public health effects.[21] As inland housing costs rise, albeit at a less rapid pace than coastal areas, the poorest households are the most severely impacted. According to a study using state income guidelines, nearly 100 percent of low -income, very low-income, and extremely low-income households cannot afford the local cost of housing almost anywhere in California.[22] Moreover, these burdens disproportionately impact people of color. Almost two-thirds of African American and Hispanic households experiencing poverty live in neighborhoods of concentrated poverty, compared to one-quarter of white households experiencing poverty.[23]

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14. *Id.* at 11–12.

15. *California's Housing Future*, *supra* note 3, at 1.

16. *The State of the Nation's Housing 2019*, *supra* note 6, at 5.

17. *Greater Los Angeles Homeless Count Shows 12% Rise in Homelessness*, L.A. HOMELESS SERV. AUTH. (June 4, 2019), https://www.lahsa.org/news?article=558-greater-los-angeles-homeless-count-shows-12-rise-in-homelessness.

18. *Homeless Population Surges Across San Francisco Bay Area*, CBS S.F. (May 16, 2019, 4:50 PM), https://sanfrancisco.cbslocal.com/2019/05/16/homeless-population-surges-across-san-francisco-bay-area/.

19. *See California's Housing Future*, *supra* note 3, at 47 (Appendix B).

20. *See id.*; *see also* TAYLOR, *supra* note 12, at 3 (noting that workers in California's coastal communities commute 10 percent further than workers elsewhere in the state).

21. *See California's Housing Future*, *supra* note 3, at 42 (Appendix A).

22. *A Tool Kit to Close California's Housing Gap*, *supra* note 4, at 5 (providing that "[u]nder state guidelines, 'low-income households' are defined as households earning 50 to 80 percent of area median income (AMI), 'very-low-income households' are defined as households earning 30 to 50 percent of AMI, and 'extremely-low-income households' are defined as households earning 0 to 30 percent of AMI.").

23. *California's Housing Future*, *supra* note 3, at 40 (Appendix A). Neighborhoods of concentrated poverty are those with 20 percent or greater rates of poverty.

Taken together, the increasingly severe impacts of the housing crisis have reinforced income inequality and patterns of segregation in the state.[24] Higher-income residents living in desirable coastal areas seek to protect their elevated property values, placing affordable homes even more out of reach for Californians earning lower incomes.[25] Meanwhile, affordable housing development is predominantly occurring in inland areas and disproportionately concentrating poor communities of color away from job centers and other economic opportunities.[26]

B. Restrictive Land Use Regulations Are a Significant Cause of the Housing Shortage

Restrictive land use regulations play a significant role in the crisis. Growth limitation measures, costly regulatory hurdles, and constraints on land development make it more difficult to build housing, especially in California's coastal areas.

Over two-thirds of the cities and counties in California's coastal metro areas have enacted policies explicitly aimed at limiting the growth of housing.[27] Cities and counties have authority over housing development within their boundaries and can adopt zoning laws specifying where housing can be built, the type of housing (for example, single-family residential), its density (the number of units per floor area), and the requirements developers must meet to obtain building permits.[28] Examples of growth limitation measures adopted by local governments in coastal areas include limiting densities and building heights, capping the number of new homes that can be built per year, and requiring a supermajority of local board members to approve housing projects.[29] These measures make it harder to build housing with greater density, such as multi-family dwellings, which can house more people using less land. From 2013 to 2017, local governments in California that adopted policies setting lower densities and building heights issued fewer multi-family dwelling permits than other jurisdictions in the state.[30] Moreover, during the same period, the twelve

24. *Id.* at 3.

25. TAYLOR, *supra* note 12, at 18. For instance, higher-income residents can seek to protect elevated property values by passing local ballot measures that limit housing development, or by filing a lawsuit challenging the validity of a project under the California Environmental Quality Act. Opponents to a housing project can raise a wide array of legal concerns under the California Environmental Quality Act to slow down or stop a project from moving forward, including a project's effect on traffic, air and water quality, endangered species, and historical site preservation.

26. *California's Housing Future*, *supra* note 3, at 3.

27. TAYLOR, *supra* note 12, at 15.

28. *Id.* at 16.

29. *Id.*

30. Cecile Murray & Jenny Schuetz, *Is California's Apartment Market Broken? The Relationship Between Zoning, Rents, and Multifamily Development*, TERNER CTR. FOR HOUS. INNOVATION AT U.C. BERKELEY 5–6 (July 2019), https://www.brookings.edu/research/is-californias-apartment-market-broken/.

most expensive cities for renters in the state issued almost no multi-family permits.[31]

Additionally, burdensome regulatory hurdles and fees in the state's coastal areas increase the time and cost it takes to build, further slowing housing development. Cities and counties that require multiple layers of department-level review for housing projects make the approval process more complex, opening up additional avenues for residents to challenge approvals.[32] This process can include reviews by building, health, and fire departments, as well as by local planning commissions and city councils.[33] As a result, building permits take nearly 50 percent longer to issue in coastal metro areas than in inland areas.[34]

Furthermore, most jurisdictions in the state zone the majority of their land for single-family housing, constraining the land available for more dense dwellings.[35] According to a statewide survey, nearly 75 percent of the land in California cities is devoted to single-family housing and less than 25 percent to multi-family housing.[36] Moreover, there is less vacant land available in coastal metro areas, which constrains the opportunities to redevelop properties in ways that would increase housing.[37] For instance, developers seeking to redevelop older, underutilized buildings face many of the regulatory hurdles described above, including lengthy review processes and development fees, which limit the degree to which lower-density housing can be replaced with newer, higher-density housing.[38]

Because restrictive land use regulations have played such a significant role in the housing shortage, local and state governments have responded by enacting a range of regulatory and deregulatory measures to incentivize and protect affordable housing.

C. Regulatory Efforts to Incentivize and Protect Affordable Housing

Local governments in California have sought to address the crisis in many ways, including enacting inclusionary housing and rent control regulations within a statewide policy designed to encourage infill and transit-oriented development. But many communities in the state's coastal areas have resisted both greater density and more affordable housing, further driving up housing costs and making it harder to build. Although the state legislature has passed a

31. *Id.* at 10.
32. TAYLOR, *supra* note 12, at 16–17.
33. *Id.*
34. *Id.*
35. Sarah Mawhorter & Carolina Reid, *Local Housing Policies Across California Presenting the Results of a New Statewide Survey*, TERNER CTR. FOR HOUS. INNOVATION AT U.C. BERKELEY 12 (Dec. 2018), https://californialanduse.org/download/Terner_California_Residential_Land_Use_Survey_Report.pdf.
36. *Id.*
37. TAYLOR, *supra* note 12, at 20.
38. *Id.*

suite of laws to streamline housing production and to increase density, efforts to seriously mitigate the housing shortage by enabling more widespread density have failed. As the state continues to explore a range of regulations to alleviate the crisis in a shifting political landscape, it is critical that local and state governments have the regulatory flexibility to test measures that increase and preserve affordable housing.

1. Local Regulatory Efforts

At the local government level, inclusionary housing regulations encourage or require developers to include a certain percentage of affordable housing units within their projects.[39] Many of these ordinances include the option of "in lieu" fees, where developers can pay an amount equal to the fractional share of the required affordable housing units if they choose not to include affordable housing in their projects.[40] Although California cities implement inclusionary housing policies in myriad ways, survey data indicate that approximately half of the cities in the state have policies that encourage or require the inclusion of affordable housing units in market rate housing projects and that more housing is built in cities that encourage rather than require inclusionary housing.[41]

Additionally, rent control regulations at the local level limit the amount landlords can charge tenants. Typically, rent control ordinances set a maximum percentage by which landlords can increase rents and specify how often rents can be raised.[42] In Los Angeles, for instance, only one rental price increase is allowed each year, and the amount is based upon the regional Consumer Price Index and capped at 4 percent.[43] The Costa-Hawkins Rental Housing Act governs and places restrictions on rent control, including exempting all single-family homes and condominiums built after 1995 and prohibiting rents from remaining controlled once a tenant moves out.[44] Before 2019, fifteen jurisdictions in California had some form of rent control, representing approximately 45 percent of the state's housing and rental units.[45] Legislation passed in 2019 expanded tenant protection by enacting rent control statewide that restricted landlords from raising rents by more than 5 percent annually plus the Consumer Price Index.[46]

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39. CHRISTINE DIETRICK & JON ANSOLABEHERE, CITY OF SAN LUIS OBISPO, LAND USE 101 A FIELD GUIDE 23 (2015).

40. *Id.*

41. *See* Sarah Mawhorter, *Housing Policies in California Cities Seeking Local Solutions to a Statewide Shortfall* 19, 30 (Terner Ctr. for Hous. Innovation at U.C. Berkeley, Working Paper, Mar. 2019). Survey data suggest that the intent to encourage affordable housing may make a difference for housing developers, including the flexibility of applying inclusionary incentives rather than outright requirements.

42. L.A., CAL., MUN. CODE § 151.00–31 (1979).

43. *Id.*

44. *Finding Common Ground on Rent Control A Terner Center Policy Brief*, TERNER CTR. FOR HOUS. INNOVATION AT U.C. BERKELEY 3 (May 2018), https://ternercenter.berkeley.edu/finding-common-ground-rent-control.

45. *Id.*

46. Assemb. B. 1482, 2019-2020 Reg. Sess., Ch. 597 (Cal. 2019).

These local regulations have been enacted within a statewide policy framework designed to encourage infill and transit-oriented development. California's State Planning Priorities specifically encourage infill, or the repurposing of land in an urban environment for new construction, as well as more efficient land use patterns to protect environmental and agricultural resources.[47] The Sustainable Communities Act (SB 375), adopted in 2008, increases coordination between local government planning for housing and regional planning for transportation with the goal of reducing greenhouse gas emissions to meet regional targets.[48] These laws and related policies aim to decrease emissions by making housing more location-efficient. Location-efficient housing minimizes the distance between housing, jobs, and other amenities and promotes the use of transit, biking, or walking instead of single-passenger vehicle trips.[49]

As the crisis itself illustrates, however, some local governments in California have been less willing to adopt these policies, especially in the state's coastal areas.[50] Local residents often express concern about new housing because they see it as a threat to their financial wellbeing and a harbinger of negative changes to their community.[51] Because a home is typically the most significant financial investment a Californian makes in her life, residents fear that the creation of new housing may lower their homes' values.[52] The fear of these potential changes that accompany new development, including changes from increased infrastructure and traffic congestion, as well as shifting from a single-family home neighborhood to a more dense, mixed-use neighborhood, can therefore generate local resistance.[53] Such opposition is heightened in the state's coastal areas, and particularly in wealthier communities.[54] The wealthy coastal metro city of Atherton, for instance, where the average home price is $8.1 million, prohibits construction of anything other than a single-unit building with a footprint that cannot exceed 8 percent of the land.[55] In 2017, Marin County, one of the wealthiest counties in the state, won a legislative moratorium from having to meet the state's affordable housing requirements until 2028.[56]

Such local resistance has led to efforts by the state government to exert greater control over local land use as the housing crisis has grown more acute.

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47. CAL. GOV'T CODE § 65041.1 (West 2003).
48. *California's Housing Future*, *supra* note 3, at 48 (Appendix B).
49. *Id.* at 47.
50. *See id.* at 55–56.
51. TAYLOR, *supra* note 12, at 16.
52. *Id.*
53. *Id.*
54. *Id.*
55. Stuart, *supra* note 7.
56. Katy Grimes, *Huntington Beach Sued While Marin County Exempted from Affordable Housing Requirements*, CAL. GLOBE (Jan. 31, 2019, 1:05 AM), https://californiaglobe.com/section-2/huntington-beach-sued-while-marin-county-exempted-from-affordable-housing-requirements/.

2. State Regulatory Efforts

In 2017, California passed legislation that required local governments not building their fair share of housing to adopt a streamlined approval process for multi-family housing, among other new laws.[57] Under California's regional Housing Element law, cities must zone for enough new housing to accommodate future population growth and ensure that a portion of their land is specifically zoned for affordable housing.[58] The process entails the state Department of Housing and Community Development projecting regional population growth and household formation throughout the state, followed by regional government entities allocating the projected housing need to cities in their region, including housing for lower-income residents.[59] Prior to the 2017 legislation, the Housing Element law had long been criticized for its lack of enforcement and the high degree of local government noncompliance.[60] The new streamlined process, however, enables "by right" approval, which ensures that projects meeting certain zoning and planning requirements do not have to undergo additional scrutiny by local governments to get a building permit.[61] The new law also requires multi-family housing developments to provide at least 10 percent of their units to lower-income families.[62]

Additionally, in 2018, California passed laws to strengthen and expand the state's density bonus law and increase density on properties near transit in the San Francisco Bay Area. The density bonus law, originally enacted in 1979, requires local governments to grant developers a density bonus or other development-related concessions if a developer agrees to construct affordable housing and meet certain criteria.[63] It is a "bonus" in that the law entitles developers to an increase in density over the otherwise maximum density allowed by a given local government.[64] The 2018 amendments to the law expedite local government processing of density bonus applications, extend the law to student housing, and let cities grant density bonuses based on floor area ratio, allowing for more units on a given property.[65] The reforms also prohibit

57. *California's 2017 Housing Package*, CAL. DEP'T. OF HOUS. AND CMTY. DEV., http://www.hcd.ca.gov/policy-research/lhp.shtml#summary (last visited June 14, 2020).

58. CAL. GOV'T CODE § 65584 (West 2019).

59. *See, e.g.*, Paavo Monkkonen et al., *A Flawed Law Reforming California's Housing Element*, UCLA LEWIS CTR. FOR REG'L POL'Y STUD. 1–2 (2019), https://www.lewis.ucla.edu/2019/05/10/rhna-flawed-law/.

60. *See, e.g.*, Paul G. Lewis, *California's Housing Element Law The Issue of Local Noncompliance*, PUB. POL'Y INST. OF CAL. vii-ix (2003), https://www.ppic.org/publication/californias-housing-element-law-the-issue-of-local-noncompliance/; *see also* Monkkonen, *supra* note 59, at 2.

61. Eric Biber, *CEQA What's Really Behind CA's Affordable Housing Shortage?* CITYWATCH (Oct. 2, 2017), https://www citywatchla.com/index.php/los-angeles-for-rss/14120-ceqa-what-s-really-behind-ca-s-affordable-housing-shortage.

62. *See California's 2017 Housing Package*, supra note 57.

63. CAL. GOV'T CODE §§ 65915–18 (West 2020).

64. *See id.*

65. *See* Assemb. B. 2753, 2017-2018 Reg. Sess., Ch. 921 (Cal. 2018); S.B. 1227, 2017-2018 Reg. Sess., Ch. 937 (Cal. 2018); Assemb. B. 2372, 2017-2018 Reg. Sess., Ch. 915 (Cal. 2018).

cities from imposing parking requirements on developments eligible for density bonuses in excess of specified ratios, thereby freeing up more land for development.[66] In addition, other legislation passed in 2018 requires cities in the San Francisco Bay Area to adopt more dense, transit-oriented zoning standards around properties owned by the region's Bay Area Rapid Transit Authority.[67] The new law facilitates the construction of 20,000 new housing units within a half-mile of transit stations throughout the region.[68]

While these laws are promising, they are not nearly enough. A report by California's own state Legislative Analyst estimates that even if an expected 100,000 to 140,000 units per year were built across the state, an additional 100,000 units would still be needed just in the state's coastal areas to seriously mitigate the housing shortage.[69] To put these numbers in perspective, only 77,000 units were built in California in 2018.[70] The magnitude of the challenge is staggering, and lawmakers have recognized the need for more radical changes to local government land use authority to address it.[71]

Yet state legislative efforts to limit local land use control and to require greater levels of density have faltered. Legislation proposed in 2018 and again in 2019, Senate Bill 827 and Senate Bill 50, respectively, would have changed much of the land in California currently zoned exclusively for single-family homes to instead permit multi-family dwellings, with additional increases in density allowed in areas with higher concentrations of jobs and greater access to transit.[72] Although the most recent bill, SB 50, was supported by an unusual coalition of pro-development groups, environmentalists, and labor unions, among others, it was strongly opposed by local government organizations and cities who decried the potential loss of local control over land use decisions.[73] The debate pitted those who promoted density-boosting zoning reforms (known as YIMBYs, or Yes In My Backyard) against those who advocated for slow growth and local control over urban development (known as NIMBYs, or Not In My Backyard).[74] The bill was ultimately shelved by legislators who expressed concern about facilitating a surge of new development that would push out

66. Assemb. B. 2372.

67. Assemb. B. 2923, 2017-2018 Reg. Sess., Ch. 1000 (Cal. 2018).

68. Adam Brinklow, *Huge BART Housing Bill Becomes Law*, CURBED S.F. (Oct. 1, 2018, 11:17 AM), https://sf.curbed.com/2018/10/1/17924290/bart-housing-ab-2923-brown-signs-law.

69. TAYLOR, *supra* note 12, at 35.

70. Elijah Chiland, *Los Angeles Led California in Housing Development in 2018*, CURBED L.A. (May 14, 2018, 11:43 AM), https://la.curbed.com/2019/5/14/18623195/los-angeles-housing-production-2018.

71. *Id.*

72. Zoie Matthew, *Here's What You Need to Know About Controversial Housing Bill SB 50*, L.A. MAG. (May 16, 2019), https://www.lamag.com/citythinkblog/sb-50-explainer/.

73. Julia Wick, *Newsletter Essential California Inside the Demise of SB 50, the State's Most Talked-About Bill*, L A. TIMES (May 17, 2019, 3:30 AM), https://www.latimes.com/newsletters/la-me-ln-essential-california-20190517-story.html.

74. Laura Bliss, *The NIMBY Principle*, CITYLAB (July 26, 2019), https://www.citylab.com/equity/2019/07/nimby-vs-yimby-single-family-zoning-laws-california-housing/594373/.

lower-income residents, fearing that affordable housing would be replaced by more expensive market-rate housing.[75]

Despite the housing need, these concerns are not without merit. Although less restrictive zoning can increase the supply of affordable housing, removing regulatory restrictions has at times displaced communities through gentrification (the inflow of new investment and wealthier renters in neighborhoods originally home to lower-income residents).[76] In San Francisco, for instance, the African American population has decreased by nearly 20 percent since 2000, in part because African Americans were shut out of high-paying jobs in the tech sector and the subsequent inability to afford rents in the city.[77] In Los Angeles, transit-oriented development aimed at revitalizing neighborhoods has led to increases in white, college-educated, higher-income households and higher rents, as well as the displacement of pre-existing populations.[78] Moreover, while permitting greater density can reduce sprawl and the associated greenhouse gas emissions, the inflow of wealthier residents to gentrifying neighborhoods can also bring comparably higher carbon emissions.[79] Affluent residents tend to have much larger carbon footprints due to their consumption patterns, even when accounting for reductions in transportation and building energy emissions.[80]

This is all to say that California's housing crisis presents a complex array of challenges for which there are no quick fixes in an evolving socio-economic and political landscape. While more progressive local governments seek to address the adverse impacts of zoning protectionism on housing affordability, this is no longer a historically liberal concern for protecting existing communities from over-development.[81] At the same time, historically liberal views of property protection have in some places aligned with more conservative interests in strengthening property rights against government intrusion.[82] Amidst such shifting perspectives, and as housing affordability continues to decrease along with the socio-economic wellbeing of a growing number of residents, it is essential that local and state governments have the regulatory flexibility to test measures aimed at increasing and preserving affordable housing.

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75. Stuart, *supra* note 7.

76. KAREN CHAPPLE & ANASTASIA LOUKAITOU-SIDERIS, TRANSIT-ORIENTED DISPLACEMENT OR COMMUNITY DIVIDENDS?: UNDERSTANDING THE EFFECTS OF SMARTER GROWTH ON COMMUNITIES 45 (2019).

77. *Eve Bachrach & Michael Lens, Can a Tool of Segregation be Used to Fight Displacement?*, UCLA LEWIS CTR. FOR REG'L POL'Y STUD. 2 (2017), https://www.lewis.ucla.edu/residential-preference-policies/.

78. Stan Paul, *Gentrification and Displacement in Southern California*, UCLA LUSKIN SCH. OF PUB. AFF. (Aug. 29, 2016), https://luskin.ucla.edu/gentrification-displacement-southern-california.

79. *See* Jennifer L. Rice et al., *Contradictions of the Climate Friendly City New Perspectives on Eco-Gentrification and Housing Justice*, 44 INT'L J. URB. & REGIONAL RES. 145, 146 (2019).

80. *See id.* at 152.

81. Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 12–14 (2017).

82. *Id.*

II. KEEPING LAND USE REGULATIONS FROM GOING TOO FAR

Although California has some of the most prescriptive land use regulations in the country, there are federal constitutional limits. The Takings Clause of the Fifth Amendment guarantees that the government shall not take private property for public use without just compensation.[83] Courts have held that takings are not just physical appropriations of land, but also include land use and zoning regulations that are so onerous as to be tantamount to a physical taking of property.[84] The government is not prohibited from taking an owner's private property, but instead the exercise of the government's power is conditioned on paying the owner fair compensation.[85]

In the following Subparts, after providing a brief overview of relevant Takings Clause law, I examine the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, which gave state courts a crucial role in determining whether a regulation is legitimate or unconstitutional.[86] I then analyze three California Supreme Court cases involving rent control, inclusionary housing, and growth limitation regulations, all challenged by property owners as takings of private property. These cases demonstrate how the *Williamson County* decision, and state courts themselves, justly allowed for the protection of California land use regulations that are critical to addressing the state's housing crisis.

A. A Brief Overview of Regulatory Takings

Property owners seeking to challenge a government regulation as a taking under the Fifth Amendment can do so in four ways.[87] They can allege that: 1) the regulation creates a permanent physical invasion of property; 2) the regulation amounts to a loss of all economically beneficial use of property; 3) the regulation, while not falling into the first two categories, nonetheless is a taking due to its economic impact on the property, its effect on the owner's investment-backed expectations, and the character of the government action; or 4) the regulation sets unreasonable conditions on developing land.[88]

Courts have found that the claims based on a physical invasion of property or loss of all economic use entail two categorical rules.[89] First, a government must provide just compensation when a regulation requires an owner to suffer a permanent physical invasion of property, no matter how minor.[90] For instance,

83. U.S. CONST. amend. V.

84. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005).

85. *See id.*

86. 473 U.S. 172, 199–200 (1985), *overruled by* Knick v. Township of Scott, 139 S. Ct. 2162, 2177–79 (2019) (overruling *Williamson County* and noting the case "was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence.").

87. *Lingle*, 544 U.S. at 548.

88. *Id.*

89. *See id.* at 538.

90. *Id.*

a state law that required landlords to allow cable companies to install cable facilities on their property, including a mere half-inch wide cable, nonetheless effected a taking.[91] Second, a government must provide just compensation if a regulation completely deprives an owner of all economically beneficial use of his or her property, except to the extent that background principles of a state's property and nuisance law already restrict an owner's intended property use.[92] For example, a state law that barred development of an owner's beachfront property, rendering the land parcels "valueless" in terms of development, amounted to such a total regulatory taking.[93]

Third, outside of these two categorical rules, a government must also provide just compensation if a taking is established under a set of factors developed in *Penn Central Transportation Co. v. City of New York*.[94] In *Penn Central*, the Court held that a historic preservation law that limited an owner's development of a railway station did not constitute a taking in light of three factors—the economic impact of the regulation on the property owner, the extent to which the regulation interfered with the owner's distinct investment-backed expectations, and the character of the government action.[95] The Court reasoned that the city's regulation did not effect a taking because it entailed a comprehensive plan affecting all historic structures in a non-discriminatory way, and that it did not interfere with the developer's transferable rights to develop other land.[96] The evaluation of these three *Penn Central* factors has served as the principal guide for resolving regulatory takings claims.[97]

Finally, a government must provide just compensation if a regulation sets unreasonable conditions on development. Such conditions are known as land use exactions, or a government requirement that a property owner must satisfy as a condition to obtaining permission to develop land. A government may impose conditions as long as the conditions are reasonable and there is a sufficient nexus between the conditions and the projected burden of the proposed development.[98] Additionally, a government must prove that such conditions have a "rough proportionately" to the development's impact.[99] To better grasp what these limitations mean, it is helpful to understand the conditions in the underlying cases

91. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 422, 441 (1982).

92. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–30 (1992). For example, if an owner of a property was denied a permit to operate a brickyard because it would emit noxious fumes affecting a neighbor's property, the government's action would not be subject to a takings claim because such use would be a nuisance.

93. *See id.* at 1020–22.

94. 438 U.S. 104, 124 (1978).

95. *See id.*

96. *See id.* at 138.

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

98. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

99. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

that established the standard: *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.[100]

In *Nollan*, a property owner who wanted to build on the coast brought a takings claim against a government agency that required the owner to provide public access to the owner's private beach as a condition of approval.[101] The agency's rationale for the condition was to assist the public in viewing the ocean and to overcome a "psychological barrier" to using the beach.[102] The Court reasoned, however, that this public purpose was not plausibly related to the permit requirement, and the agency could therefore not impose the condition without paying just compensation.[103] The Court held that there was no nexus between the impact of the project (obstruction of the ocean view) and the condition (providing physical access to cross the owner's beach).[104]

In *Dolan*, an owner who sought to develop her property brought a takings claim against a land use board that, as a condition of approval, required her to dedicate a portion of her land to drainage improvement and construction of a bicycle and pedestrian pathway.[105] The Court reasoned that there was a sufficient nexus under *Nolan* between the impact of the project and the board's condition because the project was located in a flood plain.[106] However, the Court found that despite the condition's legitimate public purpose, the land use board did not show that the requirement to dedicate a public greenway was roughly proportional to the development's impact.[107] In other words, the board's condition to require recreational visitors to use a pathway on the owner's land at any time went too far in relation to the impact of the development.[108]

Taken together, the standard set forth in *Nollan* and *Dolan*, known as the *Nollan*/*Dolan* standard, requires courts to undertake a two-part analysis to determine whether a land use exaction is a taking under the Fifth Amendment. First, a court must examine whether a nexus exists between the exaction and the impact a proposed development will have on public infrastructure. Second, a court must determine if the extent of the exaction is roughly proportional to the proposed development's impact.[109]

B. Williamson County *and the "Ripeness Doctrine"*

State courts have played a critical role in evaluating the four ways in which property owners can challenge regulations as takings of private property. This is

100. *Nollan*, 483 U.S. at 827–31; *Dolan*, 512 U.S. at 379–83; *see also Lingle*, 544 U.S. at 545–47.
101. *Nollan,* 483 U.S. at 827.
102. *Id.* at 835.
103. *Id.* at 825.
104. *See id.* at 837.
105. *See Dolan,* 512 U.S. at 379–81.
106. *Id.* at 387.
107. *Id.* at 394–395.
108. *Id.* at 393.
109. *Id.*

due to the Supreme Court's 1985 decision in *Williamson County*, which allowed state courts, rather than federal courts, to first determine whether the application of a regulation to a specific property violates the Takings Clause.[110]

In *Williamson County*, property owners seeking to develop a residential subdivision alleged that the application of various zoning laws and regulations amounted to a taking of their property.[111] The Supreme Court reasoned that the owners did not seek variances from the local government that would have allowed them to develop the land, nor did they bring an inverse condemnation claim that would have allowed them to obtain just compensation under state law.[112] Inverse condemnation arises when a property owner seeks just compensation from a public entity that has taken or damaged the owner's property for public use.[113] It stands in contrast to direct condemnation, otherwise known as eminent domain, where a public entity condemns a piece of private property for public use.[114] The Court also reasoned that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[115] The Constitution, in other words, does not require any compensation before it can be determined whether a taking has occurred.[116] The Court thus held that there was not a "ripe" Takings Clause claim "if a State provides an adequate procedure for seeking just compensation . . . until [the property owner] has used the procedure and been denied just compensation."[117]

The Supreme Court's decision established a two-prong test to determine whether a takings claim was ripe.[118] First, the government entity charged with implementing the regulation had to reach a final decision regarding its application to the property at issue.[119] Second, if the state provided an adequate procedure for seeking just compensation for the taking of the property, the owner had to use the procedure and be denied compensation.[120] Known as the ripeness doctrine, if these two conditions were not met, a property owner did not have a claim under the Takings Clause.[121]

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110. Nikolas Bowie, *The Deregulatory Takings Are Coming!*, LAW AND POL. ECON. (Sept. 3, 2019), https://lpeblog.org/2019/09/03/the-deregulatory-takings-are-coming/.

111. Williamson Cty. Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 175 (1985).

112. *See id.* at 175–82, 196 (noting "[u]nder Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. TENN. CODE ANN. § 29–16–123 (1980).").

113. NATURE AND BASIS OF ACTION, 2 CAL. REAL EST. DIGEST 3D EMINENT DOMAIN § 132.

114. *Id.*

115. *Williamson County*, 473 U.S. at 194.

116. *Id.* at 195.

117. *Id.*

118. Richard Frank, *Supreme Court Takes a Knick Out of Regulatory Takings Law*, LEGALPLANET (June 23, 2019), https://legal-planet.org/2019/06/23/supreme-court-takes-a-knick-out-of-regulatory-takings-law/.

119. *Williamson County*, 473 U.S. at 186.

120. *Id.*

121. *Id.*

Justice John Paul Stevens, in a concurring opinion, gave further, important rationales for the significance of requiring property owners to exhaust state judicial remedies before they could have a valid takings claim.[122] In describing permanent harms that may be inflicted upon property owners by zoning regulations, Stevens highlighted the conditional nature of the Takings Clause: Such harms do not violate the Constitution if the owner is fairly compensated, and may not violate the Constitution even if the owner is not compensated.[123] Stevens reasoned that "[w]e do not yet know whether the harm inflicted by the zoning regulations is severe enough" to be unconstitutional and that a regulation's constitutionality could not be fairly assessed until a claimant went through a state procedure set up for that very purpose.[124] Moreover, such procedures give the government the opportunity to abandon or adjust the regulation or to pay compensation if needed.[125]

Additionally, and more practically, Justice Stevens noted that we necessarily live in a highly regulated society.[126] As such, temporary harms caused by government regulations are an inevitable cost of doing business.[127] Although these costs are unfortunate, Stevens reasoned, as long as a regulatory agency uses a fair process to provide compensation, there is no basis in the Constitution for characterizing every regulation as a taking.[128]

C. Williamson County *Justifiably Allowed State Courts to Protect California's Rent Control, Inclusionary Housing, and Growth Limitation Regulations*

Justice Stevens was right. The following California Supreme Court cases demonstrate how *Williamson County*'s requirements, and state courts themselves, justifiably allowed for the protection of regulations that are critical to addressing California's housing crisis. In the following Subparts, I first examine *Kavanau v. Santa Monica Rent Control Board*, which shows how a state process for adjusting excessive rent control ordinances promoted judicial economy.[129] Next, I examine *California Building Industry Association v. City of San Jose* (*CBIA*), where the state court averted a significant threat to inclusionary housing ordinances by not applying a stricter legal standard.[130] Lastly, I consider *Hensler v. City of Glendale*, which demonstrates how state processes can be integral to determining if a taking has even occurred.[131]

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122. *See id.* at 202–05 (Stevens, J., concurring).
123. *Id.* at 202 (Stevens, J., concurring).
124. *Id.* at 203 (Stevens, J., concurring).
125. *Id.* at 202 (Stevens, J., concurring).
126. *Id.* at 204 (Stevens, J., concurring).
127. *Id.*
128. *Id.*
129. *See* 941 P.2d 851, 866 (Cal. 1997).
130. *See* 351 P.3d 974, 991 (Cal. 2015).
131. *See* 876 P.2d 1043, 1046 (Cal. 1994).

1. Rent Control and Kavanau v. Santa Monica Rent Control Board

The California Supreme Court's decision in *Kavanau v. Santa Monica Rent Control Board* illustrates how *Williamson County* appropriately left the task of assessing the fairness of rent control regulations to local governments, thereby promoting judicial economy.[132] The holding required landlords to first use a local government process for fairly adjusting excessively low rents when seeking to challenge a rent control regulation.[133] This process, which came to be known as a *Kavanau* adjustment, provided an adequate procedure for obtaining compensation, rather than allowing a landlord to pursue an unnecessarily duplicative claim for seeking compensation through federal court under the Takings Clause.[134]

In *Kavanau*, the court held that although a property owner need not lose the value of all of his or her property to have a viable takings claim, a city's rent control ordinance did not constitute a taking because an adequate process existed for the owner to recoup losses from prior rent ceilings.[135] Kavanau, a landlord of a multi-family apartment, brought a claim to obtain just compensation from the City of Santa Monica's Rent Control Board, alleging that he had suffered a taking from lost rent due to a city ordinance that limited annual rent increases to 12 percent.[136] The court found that an owner need not lose all property value from a rent control ordinance to have a viable takings claim under *Penn Central*, and in doing so expanded the list of *Penn Central* factors to thirteen.[137] However, the court reasoned that because a remedy was available through the Rent Control

132. *See generally Kavanau*, 941 P.2d at 854–55 (holding that plaintiff "is not entitled to maintain an inverse condemnation action, because he may obtain a full and adequate remedy for any interim loss . . . through an adjustment of future rents under the rent regulation process").

133. *Id.*

134. HON. TERRY B. FRIEDMAN ET AL., CALIFORNIA PRACTICE GUIDE—LANDLORD-TENANT, CH. 5-B (2019).

135. *Kavanau*, 941 P.2d at 854–55.

136. *Id.*

137. *Id.* at 860. The court noted the three factors most emphasized in *Penn Central*, including (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has infringed on reasonable investment-backed expectations, and (3) the character of the government action. The court also noted other relevant factors, including (4) whether the regulation interferes with interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes, (5) whether the regulation affects the existing or traditional use of the property, (6) the nature of the state's interest in the regulation, (7) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader, (8) whether the government is requiring resources to permit or facilitate uniquely public functions, (9) whether the regulation permits the owner to profit and obtain a reasonable return on the investment, (10) whether the regulation provides the owner benefits or rights that mitigate the burdens of the regulation, (11) whether the regulation prevents the best use of the land, (12) whether the regulation extinguishes a fundamental attribute of ownership, and (13) whether the government is demanding the property as a condition for the granting of a permit. The court emphasized that the list is not intended to be comprehensive, nor is it intended to provide a single analytical method for approaching takings claims.

Board's rent adjustment process, this precluded a federal takings claim due to *Williamson County*'s requirement to first utilize state judicial remedies.[138]

The *Kavanau* decision promoted judicial economy because it channeled claims of confiscatory rent control regulations into local administrative processes, rather than into federal courts unfamiliar with state law. As long as a process was in place to obtain a *Kavanau* adjustment of future rents and the approved adjustments adequately compensated the landlord for excessively low rent ceilings, there was no need to allow landlords to seek additional compensation under the Takings Clause. Allowing landlords to go directly to federal courts would have needlessly expended additional resources by litigants and courts towards the same end of obtaining just compensation. The *Kavanau* decision thus saved courts' and litigants' time and money by avoiding unnecessary litigation. Moreover, setting rent controls in California is a task for local governments.[139] Because local rent control boards throughout the state use a variety of complex formulas to satisfy a standard of providing a reasonable return for property owners, the *Kavanau* holding also kept federal courts from having to regularly evaluate claims in areas of state law with which they may not have been familiar.[140]

Furthermore, before the *Kavanau* decision, many California local government attorneys took the position that no taking occurred under a rent control ordinance unless 100 percent of the value of a property was lost.[141] But the *Kavanau* court's finding that a property owner could potentially have a viable takings claim due to rent control allowed for a more flexible, case by case approach to evaluating the constitutionality of rent control ordinances. The court's articulation of thirteen *Penn Central* factors to evaluate regulatory takings claims justifiably created a pathway for property owners to challenge rent control ordinances that went too far.[142]

2. Inclusionary Housing and California Building Industry Association v. City of San Jose

The California Supreme Court's holding in *CBIA* protected inclusionary housing ordinances in California by finding that such regulations were not land use exactions subject to the *Nollan*/*Dolan* standard. Although *Williamson County*'s state litigation requirement was not relevant to the case, the decision demonstrates the deference shown by California state courts to local

138. *Id.* at 864–66.

139. *Id.* at 855–56.

140. *Id.*

141. Brigit S. Barnes & Assocs., Inc., *California Supreme Court Recognizes a Partial Taking*, FINDLAW (Mar. 26, 2008), https://corporate.findlaw.com/litigation-disputes/california-supreme-court-recognizes-a-partial-taking.html.

142. *See, e.g.*, *Kavanau,* 941 P.2d at 860 (noting additional factors under *Penn Central* from a close reading and subsequent cases).

governments in evaluating regulatory takings claims in the critical area of affordable housing.

In *CBIA*, the California Supreme Court upheld an inclusionary housing ordinance as an allowable use restriction under a city's discretionary authority.[143] The City of San Jose's ordinance required developers of new residential projects containing twenty or more units to sell at least 15 percent of the units to low or moderate income buyers, in order to provide for more affordable housing.[144] The court found that the ordinance was not an exaction under *Nollan*/*Dolan* because it did not require a developer to dedicate any portion of his or her property to the public or pay money to the public.[145] Instead, the court reasoned, the ordinance simply restricted the use of a property by limiting the price a developer could offer for some of a project's units.[146] The court thus held that the proper constitutional inquiry was whether the housing ordinance was reasonably related to the city's legitimate interest in serving the community at large and that the ordinance easily met this standard due to a severe affordable housing shortage.[147] The court found that the ordinance had a legitimate purpose of not only increasing affordable housing but also of assuring that the units were part of mixed-income developments to create "economically diverse communities and avoid the problems that have historically been associated with isolated low-income housing."[148]

The *CBIA* decision removed a potentially fatal threat to inclusionary housing ordinances by not applying the *Nollan*/*Dolan* standard. That standard is more protective of private property because it imposes additional restrictions on a government's otherwise broad authority to condition the grant of a benefit if that condition limits a property owner's constitutional right to just compensation.[149] The rationale for the standard was developed by Justice Antonin Scalia, who was keenly interested in protecting private property rights and shaping regulatory takings jurisprudence accordingly.[150]

Although California state courts limit *Nollan*/*Dolan*'s application to administrative decisions, lower courts throughout the country are divided over whether the standard applies to regulatory takings involving legislatively imposed conditions or only administrative ones.[151] In a concurring opinion denying certiorari of the *CBIA* decision, Justice Clarence Thomas noted that the split amongst lower courts implicated an "unsettled issue under the Takings

143. *See* 351 P.3d 974, 991 (Cal. 2015).
144. *Id.* at 980–84.
145. *Id.* at 990–91.
146. *Id.*
147. *Id.* at 990–93.
148. *Id.* at 979.
149. *See id.* at 997–98.
150. Richard Frank, *San Jose's Inclusionary Housing Ordinance Dodges Supreme Court Bullet,* LEGALPLANET (Mar. 1, 2016), https://legal-planet.org/2016/03/01/san-joses-inclusionary-housing-ordinance-dodges-supreme-court-bullet/.
151. *Id.*

Clause."[152] Although Thomas found that the *CBIA* case did not present an opportunity to resolve the conflict, he expressed doubt that "the existence of a taking should turn on the type of governmental entity responsible for the taking."[153]

The consequences of the *CBIA* decision are substantial.[154] With median home values at nearly $1 million in San Jose, lower-income residents are increasingly priced out and face housing insecurity, lengthy commutes, and attendant increases in greenhouse gas emissions.[155] Moreover, approximately 170 other California municipalities have similar inclusionary housing ordinances. The decision thus allows these jurisdictions and others in the state to continue to use such ordinances to help increase affordable housing.[156]

3. Growth Limitation and Hensler v. City of Glendale

The decision in *Hensler v. City of Glendale* is important because it illustrates how, under *Williamson County*, California state court processes can be integral to determining whether a regulatory taking has even occurred.[157]

In *Hensler*, the California Supreme Court held that *Williamson County* barred a property owner's inverse condemnation claim against a city ordinance restricting development because his claim was subject to a state law's statute of limitations.[158] The City of Glendale had adopted an ordinance prohibiting construction on major ridgelines, enacted according to California's Subdivision Map Act which regulates the subdivision of real property.[159] Under the act, challenges to local government decisions concerning subdivisions must be made within ninety days.[160] Hensler owned 300 acres on which he sought to develop residential units, but the city rejected 40 percent of his proposed development because of its location on major ridgelines.[161] Although Hensler argued that the ninety day statute of limitations did not apply because his inverse condemnation claim seeking just compensation did not challenge the ordinance itself, the court reasoned that the essence of his complaint was indeed a Takings Clause challenge.[162] The court held that actions attacking decisions concerning

152. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 928 (2016).

153. *Id.* at 928–29 (quoting *Parking Assn. of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissenting)) (internal quotations omitted).

154. *See* Richard Frank, *California Supreme Court Upholds Affordable Housing Ordinance*, LEGALPLANET (June 15, 2015), https://legal-planet.org/2015/06/15/california-supreme-court-upholds-affordable-housing-ordinance/.

155. *Id.*

156. *Id.*

157. *See* Brief of the States of California et al. as Amici Curiae Supporting Respondents, Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (No. 17-647) [hereinafter *Brief of States*].

158. *See* 876 P.2d 1043, 1046 (Cal. 1994).

159. *Id.* at 1046–48.

160. *Id.*

161. *Id.*

162. *Id.*

subdivisions were governed by the Subdivision Map Act, and that, due to *Williamson County*'s state litigation requirement, property owners were required to exhaust judicial remedies before bringing an inverse condemnation claim.[163]

The holding effectively required a property owner who brought a takings claim against a growth limitation ordinance to combine a claim for just compensation with a complaint to reverse the local government decision or a complaint to declare the restriction unconstitutional.[164] This joining of claims allowed a judge to determine if the application of the ordinance was permitted under state law. If not, the ordinance could be set aside on state law grounds, without the court having to find that a taking had occurred requiring just compensation.[165]

This process was crucial because it gave local and state governments flexibility. Growth limitation measures can at times be harmful because they encourage sprawl, but they can also be helpful when combined with other policies that encourage density and infill development. By allowing state courts to resolve state law issues and liability for any taking, *Hensler* established a process whereby local governments could rescind or modify a regulation before a court found a taking. In turn, if the growth restriction violated the Constitution when applied to a landowner's specific property, this allowed local governments to choose to pay a smaller amount of compensation for a temporary taking, or a larger amount for a permanent taking.[166]

III. THE *KNICK* DECISION AND ITS IMPLICATIONS

For over thirty years, *Williamson County*'s ripeness doctrine meant that anyone who wanted to challenge the application of a local or state law under the Takings Clause had to go through state court.[167] Because takings claims rely on the interpretation of local and state law in determining if there has been a constitutional violation, the decision appropriately ensured state courts had the opportunity to construe and apply that law.[168] However, after the Supreme Court's decision in *Knick v. Township of Scott*, federal courts are now able to hear takings claims without the exhaustion of state law remedies, which will bog down federal courts in local and state law issues while undermining the appropriate role of state courts.[169]

In *Knick*, the Court overruled the second prong of *Williamson County*'s holding that required property owners to use state judicial remedies before

163. *Id.*
164. *Id.* at 1050–53.
165. *Brief of the States*, *supra* note 157.
166. *Id.*
167. *See* Bowie, *supra* note 110.
168. Brief of Amici National Governors Association et al. Supporting Respondents at 23–24, Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (No. 17-647).
169. *Id.*

bringing a federal takings claim.[170] In a five-to-four decision, the Court held that even if a local or state government has an adequate mechanism to pay just compensation, a property owner has a Fifth Amendment takings claim as soon as the government takes his or her property without paying for it, and may go directly to federal court at that time.[171]

A. Case Facts and Majority Opinion: Restoring the Takings Clause to "the Status the Framers Envisioned"

Even though *Knick* arose out of a small town in Pennsylvania, the repercussions of the case would reverberate across the country. The Township of Scott, Pennsylvania had passed an ordinance requiring all cemeteries to be open and accessible to the public during daylight hours.[172] Rose Mary Knick owned ninety acres in the Township that included a small cemetery.[173] After Township code enforcement officers entered Knick's property and found several grave markers, they notified her that she was violating the ordinance by failing to open the cemetery during the day.[174] Rather than bringing an inverse condemnation claim to seek compensation under Pennsylvania state law, Knick responded by seeking declaratory and injunctive relief in state court alleging that the ordinance effected an unconstitutional taking of her property.[175] However, because the Township later withdrew the violation notice and agreed not to enforce the ordinance, the court granted the Township's motion to dismiss Knick's claims.[176]

Knick then filed an action in federal district court alleging that the ordinance violated the Fifth Amendment's Takings Clause.[177] The district court dismissed Knick's claim under the second prong of *Williamson County* because Knick had not first sought compensation by bringing an inverse condemnation action under state law.[178] On appeal, the Third Circuit affirmed.[179] The Supreme Court granted certiorari to reconsider the holding of *Williamson County*, and specifically the second prong requiring property owners to seek just compensation under state law in state court before bringing a federal takings claim.[180]

Contrary to *Williamson County*, the Supreme Court found that a property owner has a Takings Clause claim "as soon as government takes his property for

170. Knick v. Township of Scott, 139 S. Ct. 2162, 2167 (2019).
171. *Id.* at 2168.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 2168–69.
179. *Id.* at 2169.
180. *Id.*

public use without paying for it."[181] The Court reasoned that *Williamson County* relegated the Fifth Amendment to "the status of a poor relation" among the Bill of Rights, and that overruling the decision was necessary to restore takings claims to "the status the Framers envisioned."[182] The Court found that this reasoning was in line with the traditional understanding of the Fifth Amendment because nowhere in the Constitution's text does it say that claimants have to first go through state procedures for just compensation.[183]

Moreover, the Supreme Court found that *Williamson County* itself rested on "poor reasoning" because it created an unanticipated consequence that precluded takings claimants from ever reaching federal court.[184] The Court focused on the problem created by *San Remo Hotel, L.P. v. City and County of San Francisco*, raised by many *amici* on both sides of the dispute, where a property owner who proceeded to federal court after an unsuccessful state takings claim had her federal claim barred because of the full faith and credit statute, which gave preclusive effect to the state court's decision.[185] The Court reasoned that *San Remo* effectively created a "preclusion trap," meaning that because of *Williamson County*'s state litigation requirement, takings plaintiffs might never be able to litigate in federal court.[186]

In overruling *Williamson County*, the Supreme Court held that the Fifth Amendment guaranteed full compensation at the time of a taking, regardless of any available post-taking state law remedies.[187] Chief Justice John Roberts, writing the majority opinion for the Court, reasoned that state and local governments "need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional," because injunctive relief will be foreclosed as long as just compensation remedies are available.[188] In other words, even though a government now violates the Constitution as soon as a regulation takes an owner's property without just compensation, and even though the government may not know right away if a regulation amounts to a taking, government officials should not fear that federal courts will automatically invalidate such a regulation.[189]

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181. *Id.* at 2170.
182. *Id.* at 2167, 2170.
183. *Id.*
184. *See id.* at 2178–79.
185. *Id.*; *see also* 545 U.S. 323, 326–28 (2005); 28 U.S.C. § 1738 (2012).
186. *Knick*, 139 S. Ct. at 2167.
187. *Id.* at 2171.
188. *Id.* at 2177–79 (discussing whether the Court "should overrule *Williamson County*, or whether *stare decisis* counsels in favor of adhering to the decision, despite its error"). Although this Note does not discuss the Court's application of the factors concerning *stare decisis*, for further discussion see, e.g., Case Comment, *Fifth Amendment-Takings Clause-State Litigation Requirement-Knick v. Township of Scott*, 133 HARV. L. REV. 322, 328 (2019).
189. *Knick*, 139 S. Ct. at 2177–79.

B. Knick*'s Threat to Takings Jurisprudence*

The majority opinion got it wrong. In writing for the dissent, Justice Kagan rightly stated that the holding "smashes a hundred-plus years of legal rulings to smithereens."[190] The decision pulls the rug from under core state interests in the areas of property law and state land use regulation.[191] It rests on a distorted understanding of the Fifth Amendment because it ignores the conditional nature of the Takings Clause that lawfully permits the government to take private property for public use.[192] The holding effectively forces federal courts to entertain land use disputes concerning unique and complex issues of state law, doing a disservice to both judicial economy and the appropriate roles of federal and state courts.[193]

Contrary to Chief Justice Roberts' conclusory words of encouragement that local governments "need not fear" the holding, the decision makes government officials unwitting lawbreakers.[194] The Supreme Court's understanding of the Fifth Amendment sees a taking immediately when the government takes property—disregarding the conditional nature of the Takings Clause. As Justice Kagan noted, a Takings Clause violation has two elements: First, a government must take property, and second, it must deny the owner just compensation.[195] Only after these two elements are met has a taking occurred.[196] Because of the multitude of ways that regulations affect property interests, government officials often cannot know in advance if a regulation will effect a taking before it has actually been applied. But now local governments will have good reason to fear that any number of zoning and land use regulations could be considered takings. The *Knick* decision is thus not only unfair to local governments by removing their ability to determine if a taking has occurred, but it also raises the potential for government officials to be held individually liable for administering land use regulations as possible takings.[197]

Additionally, the decision will channel a flood of state law land use cases into federal courts that are likely more sympathetic to property owners.[198] Although *Knick* does not substantively change regulatory takings law, it allows takings claimants to forum shop between federal and state courts to choose the court offering the best prospects for success.[199] In California, this will almost

190. *Id.* at 2183.
191. *Id.* at 2187–88.
192. *Id.* at 2181.
193. *Id.* at 2188–89.
194. *See id.* at 2183.
195. *Id.* at 2181.
196. *Id.*
197. Christian Torgrimson et al., *The Eminent Domain Consequences of a U.S. Supreme Court Ruling*, LAW360 (Aug. 6, 2019), https://www.parkerpoe.com/news/2019/08/the-eminent-domain-consequences-of-us-supreme-court.
198. *See Knick*, 139 S. Ct. at 2187 (Kagan, J., dissenting).
199. John Echeverria, *Knick Williamson County Overruled*, TAKINGS LITIGATION (June 25, 2019), https://takingslitigation.com/2019/06/25/knick-williamson-county-overruled/.

certainly be federal courts. For the first time in decades, nearly half of the seats on the Ninth Circuit Court of Appeals are occupied by judges who share the *Knick* majority's conservative, pro-property rights ideology, in contrast to the Ninth Circuit's historically liberal leanings.[200]

Perhaps more worryingly, federal courts may mistakenly determine whether a regulation goes too far, subverting traditional notions of state rights that have historically left complex decisions of state land use law to state courts.[201] A threshold issue in many takings cases is the nature and scope of the property interest allegedly taken, which can turn on nuanced questions of state law with which federal courts are unfamiliar.[202] When an alleged state action results in a taking under the Takings Clause, this necessarily implicates relationships of power between federal and state sovereigns.[203] These situations present a dangerously heightened prospect of overreach by the federal government, bringing to bear federal coercive power in areas that were largely the domain of state and local governments prior to *Knick*.[204]

IV. *KNICK*: AN OPEN DOOR FOR DEVELOPERS AND PROPERTY RIGHTS ADVOCATES

The *Knick* decision has significant repercussions in California, which has some of the most robust land use regulations in the nation.[205] *Knick* emboldens developers and property rights advocates to bring their cases directly to more sympathetic federal courts to challenge regulations designed to incentivize and protect affordable housing, which will make it harder to build the type of housing California needs.[206]

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200. *See generally* Ben Feuer, *Thanks to Trump, the Liberal 9th Circuit is No Longer Liberal*, WASH. POST (Feb. 28, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/02/28/thanks-trump-liberal-ninth-circuit-is-no-longer-liberal/ (discussing the morphing conservative valence of the Ninth Circuit).

201. *Knick*, 139 S. Ct. at 2188.

202. *See* Echeverria, *supra* note 199.

203. *See* John Echeverria, *Knick v. Township of Scott Takings Advocates' Nonsensical Forum Shopping Agenda*, CPRBLOG (Sept. 28, 2018), http://progressivereform.org/cpr-blog/knick-v-township-of-scott-takings-advocates-nonsensical-forum-shopping-agenda/.

204. *Id.*

205. *See* Richard Florida, *The Flip Side of NIMBY Zoning*, CITYLAB (Oct. 26, 2017), https://www.citylab.com/equity/2017/10/the-flip-side-of-nimby-zoning/543930/.

206. *See, e.g.,* Frank, *supra* note 118 (noting that *Knick* "hand[s] property rights advocates a major victory while repudiating an important regulatory takings precedent"); Brandon M. Schumacher, *Sending Williamson County Out to Pasture State Court Exhaustion No Longer Required for Federal Takings Claims*, LEXOLOGY (July 24, 2019), https://www.lexology.com/library/detail.aspx?g=010ff0cc-3d57-4199-839c-3a684499df02 (concluding the "likely result" of *Knick* "is that takings plaintiffs can bring federal takings claims in federal court without the need to pursue state law remedies in state court"); Andrew McIntyre, *Knick Ruling Levels The Field, May Signal Court's Agenda*, LAW360 (June 21, 2019, 9:43 PM), https://www.law360.com/articles/1171701/knick-ruling-levels-the-field-may-signal-court-s-agenda; Paul Beard, *High Court's* Knick *Ruling Is A Big Win For Property Rights*, LAW360 (June 28, 2019, 2:12 PM), https://www.law360.com/articles/1174082/high-court-s-knick-ruling-is-a-big-win-for-property-rights.

For years, the petitioner's counsel in *Knick* and like-minded advocates had sought to overturn *Williamson County*, arguing in support of the originalist vision of the Takings Clause that *Knick* has now enshrined.[207] They argued that *Williamson County* created a double standard because takings claims against state governments were barred from federal court due to *San Remo*, whereas other constitutional claims were not.[208] Developers echoed this concern and added that *San Remo* proved that the ripeness doctrine was merely a pretense for keeping takings claims in state courts that were more sympathetic to local and state governments.[209] As Justice Kagan noted in *Knick*'s dissenting opinion, however, Congress could have chosen to address the *San Remo* preclusion issue at any time, but chose not to—and it was not the Court's place to usurp Congress's role.[210]

But the Court did so anyway, handing a win to developers and property rights advocates.[211] To show how *Knick* would negatively impact affordable housing development in California, in the following sections I re-examine the *Kavanau*, *CBIA*, and *Hensler* cases to apply these new *Knick* standards that are more protective of private property rights. The analyses demonstrate the threat posed to rent control, inclusionary housing, and growth limitation regulations intended to address California's housing crisis.

A. Weakening Rent Control Ordinances: A Different Application of the Penn Central *Factors in* Kavanau

In *Kavanau*, because of *Williamson County*'s state litigation requirement, landlords had to use a local rent control board process for challenging excessively low rents before bringing a federal takings claim.[212] Under *Knick*, however, landlords can now challenge rent control ordinances directly in federal court. These challenges will thus be subject to an evaluation under the *Penn Central* factors that the *Kavanau* court identified for determining if a regulation goes too far.[213] Applying these factors through a lens that is more protective of private property rights demonstrates how the rent control ordinance in *Kavanau* could be found to violate the Takings Clause.

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207. *See, e.g.*, J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209, 210–11 (2003); *see also* Brief of the Cato Institute, et al. as Amici Curiae Supporting Petitioner at 3–5, Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (No. 17-647).

208. Ilya Somin, *Knick v. Township of Scott Ending a Catch-22 That Barred Takings Cases from Federal Court,* CATO U.S. REV. 153, 154 (2019).

209. Brief Amicus Curiae of Western Manufactured Housing Communities Association Supporting Petitioner at 21–23, Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (No. 17-647).

210. Knick v. Township of Scott, 139 S. Ct. 2162, at 2189–90 (2019).

211. McIntyre, *supra* note 206.

212. *See* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 854–55 (Cal. 1997).

213. *See id.* at 863–64.

*1. Revisiting California Rent Control Cases Post-*Knick

Even though *Williamson County* precluded Kavanau from bringing a federal takings claim, the *Kavanau* court nonetheless reasoned that the *Penn Central* factors, if applied to the ordinance, would not indicate a taking.[214] The California Supreme Court focused on the rent control ordinance's 12 percent annual rent ceiling, which limited rents regardless of increases in a landlord's expenses.[215] Kavanau had collected approximately $43,000 in rent over a yearlong period, yet spent over $160,000 in improving and maintaining the property, as well as servicing debt.[216] The city had approved a rent increase totaling approximately $5,000 a year over an eight-year period, so as not to exceed the 12 percent limit in any one year.[217] In considering the three primary *Penn Central* factors, the court reasoned that the economic impact of the 12 percent limit was insignificant because it simply delayed Kavanau's income over a longer period, and he nonetheless continued to receive income from his rental units.[218] The court also found that there was minor interference with Kavanau's investment-backed expectations because he was already aware of the ordinance before he had improved his property.[219] Additionally, the court found that the character of the government action "did not compel [the court] to find a taking."[220] Finally, in summary fashion, the court held that none of the other ten factors from *Penn Central* were significant enough to constitute a taking.[221]

But a dissenting opinion in another California rent control case reveals how a federal court that is more protective of private property rights might see things differently. In the Ninth Circuit Court of Appeals case of *Guggenheim v. City of Goleta*, a landlord challenged a mobile home rent control ordinance that kept rents so low as to effectively transfer $10,000 a year from the landlord to each tenant, due to lost returns on rent.[222] The court's majority found that the ordinance did not constitute a taking under *Penn Central* because the court reasoned, the ordinance was in place before the landlord purchased the property and he could not have reasonably had distinct investment-backed expectations of higher returns.[223]

In a scathing dissent, Judge Carlos Bea argued that the majority in *Guggenheim* ignored the other two primary *Penn Central* factors—the economic impact of the regulation and the character of the government action—and introduced "irrelevant considerations" that "confuse[d] the regulatory takings

214. *Id.*
215. *Id.*
216. *Id.* at 854–55.
217. *Id.*
218. *Id.* at 863–64.
219. *Id.*
220. *Id.*
221. *See id.*
222. *See* Guggenheim v. City of Goleta, 638 F.3d 1111, 1115–16 (9th Cir. 2010).
223. *See id.* at 1120–21.

analysis."[224] Bea found that the economic impact of the regulation was significant because the landlord lost 80 percent of the rental value of the mobile home pads even though he received some return on investment.[225] Relatedly, the character of the government action was overly burdensome because it amounted to a "wealth transfer from the landowner to the original tenant[s]."[226] Furthermore, in evaluating the landlord's distinct investment-backed expectations, Bea reasoned that the majority irrelevantly considered the tenants' distinct investment-backed expectations, even though the Takings Clause did not protect tenants from losses in the free market.[227] In sharp contrast to the majority, Bea considered it reasonable for the landlord to expect that the ordinance could be changed through legal or political means and that to think otherwise would entail a "simplistic view of law, politics, and economics."[228] Bea thus found that the rent control ordinance violated the Takings Clause.[229]

Applying Bea's reasoning from *Guggenheim* to the facts in *Kavanau* would likely find that Santa Monica's rent control ordinance is an unconstitutional taking under the *Penn Central* factors. Following *Knick*, such decisions may be more common as landlords who challenge rent control ordinances go directly to federal courts that are more sympathetic to property owners.

First, under Bea's reasoning, the economic impact of the ordinance would likely not be considered minor. Kavanau would have to pay nearly 40 percent more per year than what he received in rent just to keep his property afloat, due to maintenance costs and debt-service.[230] In contrast to the *Kavanau* court's finding that this was insignificant, Bea would likely find that the loss is substantial because it imperils Kavanau's ability to maintain his investment in the first place.[231] Moreover, just as in *Guggenheim*, it did not matter that Kavanau continued to receive some return on his investment from his rental units because the amount was not enough to cover the costs of maintaining his property and servicing his debt.[232]

Second, although the *Kavanau* court found that the regulation did not interfere with Kavanau's distinct investment-backed expectations because he knew of the regulation's existence before he improved his property, Bea would likely find this to be a "simplistic view of law, politics, and economics."[233] As noted in Bea's dissent in *Guggenheim*, the Takings Clause does not protect Kavanau's tenants from losses in the free market.[234] Kavanau could reasonably

224. *See id.* at 1130–32.
225. *See id.* at 1126–27.
226. *See id.* at 1132.
227. *Id.* at 1131.
228. *Id.*
229. *See id.* at 1133.
230. *See* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 854–55 (Cal. 1997).
231. *See id.* at 863–64.
232. *See Guggenheim*, 638 F.3d at 1126.
233. *See id.* at 1131.
234. *See id.*

expect to obtain higher rents by seeking to change the ordinance through legal or political means because his improvement and maintenance costs were nearly three and half times what he received in rents.[235] He could argue, for instance, that further raising his rents was justified in order to allow him to maintain the quality of his residential building, which in turn would keep the surrounding community from having to suffer creeping blight from an otherwise vacant property.[236]

Third, rather than finding that the character of the rent control ordinance gave no cause for concern, Bea would likely find that the ordinance amounted to an overly burdensome transfer of wealth.[237] By distributing the increase in rent over an eight-year period so as not to exceed the 12 percent limit, Kavanau's tenants were effectively allowed to reap economic benefits from excessively low rents at Kavanau's expense.[238]

Finally, Bea would also likely summarily find that the other ten relevant factors from *Penn Central* weigh in Kavanau's favor, including: (1) The rent control ordinance interferes with interests that are bound up with Kavanau's reasonable expectations to benefit financially from his property investment; (2) the ordinance clearly affects Kavanau's existing use of his multi-family apartment building because he cannot enjoy higher rents; (3) even though the nature of the city's interest in the ordinance is strong, the city would still be able to enforce a rent control ordinance as long as it is not confiscatory; (4) Kavanau's investment holding is limited to the specific interest in his rental property that the rent control ordinance effects, thus the effect is not broad; (5) the government is not requiring resources to permit a uniquely public function, as the rent control ordinance applies to apartment dwellings throughout the city; (6) to Kavanau's detriment, the ordinance does not permit him to obtain a profit or reasonable return on the investment; (7) the ordinance does not provide Kavanau with any unique benefits or rights that mitigate the burden of lost rental income; (8) although the ordinance does not necessarily prevent the best use of Kavanau's land, the rent ceiling may be so low as to cause Kavanau to sell his property outright, thereby eliminating the use of the land for that purpose, at least temporarily; (9) the ordinance does not extinguish a fundamental attribute of Kavanau's ownership; and (10) the city is not demanding the property as a condition for the granting of a permit.[239]

Thus, under Bea's reasoning, because of the substantial weight of the three primary *Penn Central* factors and, on balance, the significance of the other ten factors, the rent control ordinance in *Kavanau* would likely constitute a taking.

235. *See Kavanau*, 941 P.2d at 854–55.
236. *See id.*
237. *See Guggenheim*, 638 F.3d at 1132.
238. *See Kavanau*, 941 P.2d at 767.
239. *See id.* at 863–64.

2. Implications for Rent Control in California

If the Ninth Circuit were to gain a plurality of judges who share Bea's—and the *Knick* majority's—more pro-property rights ideology, it would likely lead to the weakening of local and state government efforts to set lower rent control prices in California. To be sure, if a rent control ordinance similar to that in *Kavanau* was found to violate the Takings Clause, it would not necessarily jeopardize the constitutionality of rent control as a mechanism for regulating rental prices. California cities have broad authority to enact rent control measures as long as they are reasonably calculated to eliminate excessive rents and provide landlords with a fair return.[240] However, if federal courts adopted an understanding of *Penn Central* that was more protective of a landlord's free market investment returns as opposed to tenant affordability, in line with Judge Bea's reasoning, local governments would be more cautious about setting lower rent controls in fear of takings challenges. This would effectively make a city's poorest tenants less able to afford rent in high-demand markets.

More ominously, such a change in judicial ideology would chill important efforts to expand rent control to new types of property in California. Despite the 2019 legislation that expanded rent control throughout the state, the law did not repeal the Costa-Hawkins Rental Housing Act which exempts single-family homes and condominiums built after 1995, among other types of residential units.[241] Efforts to repeal Costa-Hawkins have increased in recent years as lawmakers have recognized the dire need to protect tenants from price-gouging and expand the amount of units subject to rent control.[242] Federal court rulings that move away from tenant protections and are more protective of private property would chill these efforts by signaling a retreat from further protecting tenants.

B. Curtailing Inclusionary Zoning: Reconsidering Exactions in CBIA

In *CBIA*, the California Supreme Court upheld the City of San Jose's inclusionary housing ordinance by finding it was an allowable use restriction and not a land use exaction, which would have made the ordinance subject to the more rigorous takings standard under *Nollan*/*Dolan*. However, following *Knick*, a federal court that is ideologically more property-protective would likely find that the ordinance was an exaction subject to the *Nollan*/*Dolan* standard, requiring further justification by the city. Such a holding would drastically reduce both the effectiveness of inclusionary housing ordinances in California and the willingness of cities to enact these ordinances in the first place.

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240. *Id.* at 857–58.

241. TERNER CTR., *supra* note 44, at 3.

242. Jason McGahan, *Why Didn't the Landlord Lobby Fight California's New Statewide Rent Control Law?*, L.A. MAG. (Oct. 11, 2019), https://www.lamag.com/citythinkblog/california-rent-control-law-landlord/.

*1. Revisiting California Exactions Cases Post-*Knick

The *CBIA* court found that requiring developers to sell 15 percent of their units at an affordable price was not an exaction because it did not amount to dedicating property or money to the public.[243] In reasoning that *Nollan*/*Dolan* did not apply, the court distinguished a U.S. Supreme Court case, *Koontz v. St. Johns River Water Management District*, decided just two years earlier.[244] The *Koontz* decision was significant because it held that the *Nollan*/*Dolan* standard applied to permit approvals and rejections as well as to ad hoc fees, giving developers hope that state courts would subsequently find that the standard also applied to inclusionary housing ordinances.[245] Following *Knick*, *Koontz* thus illustrates how federal courts in California that are more sympathetic to property owners may disagree with the *CBIA* decision and find that the *Nollan*/*Dolan* standard applies. Such decisions may become more common following *Knick*, as developers who challenge the state's inclusionary housing ordinances seek to do so in federal court.

In a majority opinion by Justice Samuel Alito, the *Koontz* Court held that conditioning a land use permit on an owner's relinquishment of part of his wetlands property was an exaction subject to the *Nollan*/*Dolan* standard, even when the government demanded money.[246] Hoping to build on wetlands, Koontz offered to deed nearly three-quarters of his property to the local water management agency to mitigate the environmental impact.[247] However, the local agency rejected Koontz's offer. Instead, as a condition of approval, the agency required that Koontz reduce the size of his development and deed a larger portion of his property for conservation or otherwise pay for nearby wetlands improvements.[248] The Court reasoned that because there was a "direct link" between the government's requirement and a specific parcel of property, these conditions of approval implicated a dangerous risk that was central to *Nollan*/*Dolan*: that government would use its land use permitting power to pursue ends "that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue."[249] The Court found that the local agency's demands for both property and money raised this concern because it burdened Koontz's ownership of a specific piece of land.[250] Moreover, even though the local agency argued that making monetary exactions subject to *Nollan*/*Dolan* would unduly limit the authority of local governments to

243. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 990–91 (Cal. 2015).

244. *Id.*

245. Kriston Capps, *Will the Supreme Court Strike Down Inclusionary Zoning?*, CITYLAB (Oct. 3, 2019), https://www citylab com/equity/2019/10/supreme-court-inclusionary-zoning-constitutional-takings-clause/596863/.

246. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 599 (2013).

247. *Id.* at 599–60.

248. *Id.*

249. *Id.* at 614.

250. *Id.*

implement sensible land use regulations, the Court reasoned that this was already settled law in many states that offered adequate protections.[251] Although the court in *Koontz* did not apply the *Nollan*/*Dollan* requirements itself, it remanded the case for the lower state court to do so.[252]

Applying Justice Alito's reasoning to *CBIA* through the lens of a more property-protective court would likely find San Jose's inclusionary housing ordinance to be an exaction subject to *Nollan*/*Dolan*. The key issue is whether requiring a developer to sell some of his or her units at a lower price amounts to property or money given to the public. Alito's more property-protective reasoning would likely find that it does. Like the money that the owner in *Koontz* paid for wetland conservation, developers in *CBIA* essentially had to pay for the city's public purpose of housing lower-income people.[253] There was a "direct link" between the city's demand to provide more affordable housing and the burden imposed on a residential developer's specific parcel of real property.[254]

Additionally, although the *CBIA* court reasoned that the ordinance was simply a restriction limiting a developer's use of property and not a monetary exaction or in lieu fee, a more property-protective assessment would find this reasoning to be strained.[255] While it is true that the city's ordinance was not called a monetary exaction or in lieu fee, avoiding those names does not get around the constitutional limitations of a requirement that in practice functions as a condition of approval. In this case, a government demands that a developer must relinquish higher investment returns from specific housing units of his or her proposed development. The city's ordinance therefore meets the definition of a monetary exaction because it transfers an interest in property from the landowner to the government.[256]

This reasoning would not necessarily question the constitutionality of the ordinance under the Takings Clause. Instead, the city would be required to explain how there was an "essential nexus" between the ordinance and its impact on affordable housing, as well as whether the demand to sell 15 percent of the units at an affordable price was "roughly proportional" to the proposed development's impact.[257]

2. Implications for Inclusionary Housing in California

If undertaking this analysis under *Nollan*/*Dolan* seems confusing, that is because it is. The standard is notoriously perplexing and difficult to apply in

251. *Id.* at 595.
252. *Id.* at 619.
253. *See id.* at 595.
254. *See id.* at 614.
255. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 998–99 (Cal. 2015).
256. *See Koontz*, 570 U.S. at 614–15.
257. *See id.*

practice.[258] Forcing California cities to justify inclusionary housing ordinances under *Nollan*/*Dolan* would require a city's staff to answer and defend a confounding array of questions for each residential project subject to the condition. Examples of these questions include: "What is the impact that this project has on this issue? Does the condition serve a legitimate public interest? What is the relationship between the particular impact of the development and the condition? How do they relate to one another? Are the impact and the condition on par with one another?"[259]

Rather than undertaking such a prohibitively exhaustive analysis, a city would more likely deny a building permit to avoid the risk of crushing litigation costs.[260] Moreover, cities without pre-existing inclusionary housing ordinances would likely shy away from enacting them at all. Making inclusionary housing ordinances subject to the *Nollan*/*Dolan* standard would thus drastically limit the effectiveness of such ordinances in California and restrain local governments' willingness to require developers to sell some of their units at an affordable price.

C. Unleashing Sprawl Development: Bypassing Hensler*'s Requirements and Chilling Regulatory Restrictions on Growth*

In *Hensler*, the California Supreme Court outlined a process that property owners must follow when bringing inverse condemnation claims. This included a requirement under *Williamson County* that, when a regulation is applied to a particular piece of land, a claim is not ripe for decision in federal court until an owner first utilizes available state administrative remedies to determine whether a taking has occurred. After *Knick*, however, a property owner can bypass such processes altogether and bring their claim directly to federal court. This not only hampers the regulatory flexibility of local governments in California, but it also chills efforts to enact growth limitation measures and exacerbates the state's housing crisis.

No longer requiring takings claimants to exhaust state judicial remedies exposes local governments to costly litigation and the risk of paying expensive compensation. In *Hensler*, part of the landowner's complaint was that, because of the city's administrative process that precluded a federal takings claim, he would not know the point in time at which a taking occurs, with each day's delay amounting to a "continuous wrong."[261] Removing these delays effectively unleashes such developers. When confronted by a restrictive ordinance that takes a significant amount of property off the table—120 acres in Hensler's case—a developer of sprawling single-family homes would almost certainly challenge

258. *See id.* at 626 (Kagan, J., dissenting) (stating "[b]y applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously 'difficult' and 'perplexing' standards, into the very heart of local land-use regulation and service delivery").

259. DIETRICK & ANSOLABEHERE, *supra* note 39, at 22.

260. *See Koontz*, 570 U.S. at 633.

261. Hensler v. City of Glendale, 876 P.2d 1043, 1056–57 (Cal. 1994).

the ordinance.[262] A local government would therefore face costly litigation. Moreover, because they no longer have the freedom to adjust or rescind a regulation before a federal court's finding, local governments risk having to pay a developer exorbitant compensation if a court finds that the ordinance violates the Takings Clause.

These costly risks will make local governments think twice before enacting measures that restrict growth, increasing the likelihood of environmentally and socioeconomically damaging sprawl. Because over two-thirds of the municipalities in California's in-demand coastal areas have policies that limit housing growth, the impact could be substantial.[263]

For example, a Ninth Circuit case involving a land use plan that restricted growth in a coastal area demonstrates the potentially devastating impact. In *Sinclair Oil Corporation v. County of Santa Barbara*, the court found that before a development company had a viable takings claim, it had to use a county's administrative procedure that might prevent application of a land use plan that limited subdivision of the developer's property.[264] Sinclair owned 265 acres of undeveloped California coastal land, and because of environmentally sensitive habitat identified in the county's land use plan, the number of potentially developable homes on the property was reduced from 300 to 70.[265] The court found that the land use plan had a procedure that would have allowed Sinclair to request more extensive development, which gave the county the flexibility to avoid an unconstitutional taking.[266]

But not after the *Knick* decision. Now, a developer like Sinclair can directly challenge such restrictive land use plans, burdening local governments with legal costs. Because a local government would not know if a growth regulation would later be considered unconstitutional, it would have to decide between shouldering legal costs, compensating the owner for his coastal property, or simply allowing the owner to develop the land. Such coastal development could be challenged under other laws, including the California Environmental Quality Act or the National Environmental Protection Act. But the ability of landowners to directly challenge growth limitation regulations nonetheless threatens environmentally sensitive coastal areas like those in *Sinclair*.

In inland communities already experiencing the sprawl-induced effects of longer commutes, higher transportation costs, and compromised public health from environmental pollution, these detrimental impacts may be exacerbated. [267] Faced with the likelihood of costly litigation, inland governments with less

262. *See id.* at 1048.
263. TAYLOR, *supra* note 12, at 15.
264. 96 F.3d 401, 404 (9th Cir. 1996).
265. *Id.*
266. *Id.* at 408.
267. *See California's Housing Future*, *supra* note 3, at 47 (Appendix B); *see also* TAYLOR, *supra* note 12, at 3.

financial resources will be even more hesitant to enact growth restrictions to begin with, allowing sprawl development to continue unabated.

By overturning *Williamson County*'s state litigation requirement, the *Knick* decision opens the door for developers and property rights advocates to challenge rent control, inclusionary housing, and growth limitation regulations—all of which are critical to helping California build and preserve more affordable housing. As the Ninth Circuit becomes increasingly occupied by judges who share the *Knick* majority's pro-property rights ideology, takings claimants have the prospect of achieving greater success in defeating such regulations in federal court. As a result, this could weaken local and state government efforts to keep rents low, curtail inclusionary housing ordinances by applying the more exacting *Nollan*/*Dolan* standard, and chill the enactment of measures that limit destructive sprawl development.

V. HOW FEDERAL COURTS CAN EVALUATE REGULATORY TAKINGS CLAIMS IN WAYS THAT PROTECT CALIFORNIA'S EFFORTS TO ADDRESS ITS HOUSING CRISIS

The *Knick* decision's potential to undermine California's efforts to address its housing crisis can be avoided. Rent control, inclusionary housing, and growth limitation measures reflect a kind of regulatory redistribution that is rooted in the government's power to identify what counts as a public use or purpose when it takes private property under the Fifth Amendment. And in these cases, the California State Legislature has identified a compelling public purpose: the pressing need for affordable housing.[268] Judicial deference to this legislatively declared purpose should guide federal courts in evaluating takings claims that challenge regulations intended to alleviate California's affordable housing shortage and its attendant inequities.

In the following Subparts, I examine the importance of judicial deference to state legislation as illustrated by the Supreme Court case of *Hawaii Housing Authority v. Midkiff*, followed by an examination of analogous laws enacted by the California State Legislature to address the state's housing shortage.[269] I then analyze how California's housing laws can guide federal courts in evaluating rent control, inclusionary housing, and growth limitation regulations. At a time when local and state governments are exploring a range of redistributive measures to alleviate California's housing shortage, this shifting landscape makes it critical to protect the state's role in defining when a regulation should be recognized as a taking under the Takings Clause.

268. *See* CAL. HEALTH & SAFETY CODE § 50003 (West 2003); *see also* CAL. GOV'T CODE § 65584 (West 2003).

269. *See* 467 U.S. 229, 244 (1984).

A. Judicial Deference to the State Legislature in Hawaii Housing Authority v. Midkiff

Midkiff demonstrates how takings claims will not be successful when the exercise of the government's power under the Takings Clause is rationally related to a legitimate public purpose.[270] Courts have affirmed that the regulatory redistribution of private property for socioeconomic purposes is a lawful exercise of the government's power under the Takings Clause, to which the judicial branch must defer.[271] The decision in *Midkiff* illustrates such judicial deference, which has important implications for how federal courts should evaluate California's redistributive regulations intended to address its housing crisis.

In *Midkiff*, the Supreme Court held that a state land reform act that sought to redistribute land was a valid exercise of government's power to condemn private property for public use under the Fifth Amendment.[272] A historically feudal land system in Hawaii had placed nearly 50 percent of the state's land in the hands of seventy-two private landowners.[273] Because this concentration of ownership skewed the state's residential property market, inflated land prices, and "injur[ed] the public tranquility and welfare," the Hawaii State Legislature enacted the Land Reform Act of 1967, which compelled large landholders to break up and transfer their ownership to lessees of their property.[274]

In upholding the Act, the Supreme Court reasoned that the Hawaii State Legislature, and not the judiciary, defines what constitutes a public use under the Fifth Amendment, with the court's role narrowly limited to ensuring that the purpose of such legislation has a reasonable foundation.[275] The Court found that the act clearly had a rational basis because its explicit purpose was to reduce the "perceived social and economic evils" of land concentration, and it sought to do so through a comprehensive process for identifying and fixing market failure.[276] Moreover, the Court reasoned, federal courts are not the place for debates over the wisdom of such socioeconomic legislation.[277] Rather, the Court held that judicial deference required that the Act be deemed constitutional because legislatures, and not courts, are "better able to assess what public purposes should be advanced by an exercise of the taking power."[278]

270. *Id.* at 241.
271. *Id.* at 242–43.
272. *Id.* at 230–31.
273. *Id.* at 232.
274. *Id.*
275. *Id.* at 240–41.
276. *Id.* at 241–42.
277. *Id.* at 243.
278. *Id.* at 244.

B. The California State Legislature's Declaration of the Need to Address the State's Housing Shortage

Just as the Hawaii State Legislature in *Midkiff* enacted legislation to reduce the "perceived social and economic evils" of land concentration, the California State Legislature passed legislation to address the detrimental social and economic impacts of the state's affordable housing shortage.[279] The California State Legislature has declared an urgent need for more affordable housing that informs a statutory requirement that local governments meet the housing needs of all income levels.[280] The analogy to *Midkiff* here is not meant to offer the Hawaii State Legislature's specific solution of compensating landowners as the right way to redistribute property rights but rather is meant to emphasize the legitimacy of relying on redistributive purposes.

Affordable housing is critical to improving California's economic outcomes and the socioeconomic success of its future generations.[281] Increasing housing affordability in the state's coastal areas and other urban communities with greater economic opportunity helps decrease a host of costs, thereby improving the state's economy.[282] Workers and families who live further from job centers not only have higher transportation costs due to longer commutes, but also experience greater socioeconomic burdens because they are further from high-performing schools, hospitals, and other services.[283] By providing greater access to affordable housing, residents have more money for food and health care, they are less likely to become homeless and need government support, their children are likely to perform better in school, and businesses are more easily able to recruit and retain employees.[284] Moreover, increasing affordable housing in urban areas helps to avoid the detrimental environmental impacts of fringe development, or building housing in areas that lack infrastructure and services.[285]

For many of these reasons, the California State Legislature declared that due to "a serious shortage of decent, safe, and sanitary housing," providing a "decent home and suitable living environment" for all Californians is the basic housing goal of state government.[286] The legislature found that the state's housing shortage not only inflates the cost of housing, but also decreases affordability and is "inimical to the safety, health, and welfare" of its residents.[287] Additionally, the legislature specifically recognized a need to provide housing

279. *See id.* at 241–42.
280. *See* CAL. HEALTH & SAFETY CODE § 50003 (West 2003); *see also* CAL. GOV'T CODE § 65584 (West 2003).
281. *See California's Housing Future*, *supra* note 3, at 34–45 (Appendix A).
282. *See id.* at 41–42.
283. *Id.*
284. *Id.* at 48.
285. *See id.* at 32 (Appendix A).
286. CAL. HEALTH & SAFETY CODE § 50003 (West 2003).
287. *Id.*

for moderate, low, and very low income households, and declared an intent to adopt a "comprehensive and balanced approach" to addressing its housing problems.[288]

This comprehensive approach is articulated in California's Housing Element law, mentioned above, which outlines a process whereby cities must not only zone for new housing to accommodate future population growth, but also ensure a portion of their land is zoned for affordable housing.[289] In addition to reiterating the vital need for affordable housing, the law explicitly states that local governments have a "responsibility" to facilitate the development of housing for all income levels and to designate a sufficient supply of land for this purpose.[290] The law further declares the legislature's intent to ensure cities and counties meet the state housing goal and recognizes that each locality is best suited to determine the specific efforts required to meet its jurisdiction's housing need, considering economic, environmental, and fiscal factors.[291]

C. Federal Courts Should Defer to California Legislation Requiring Cities and Counties to Meet the Housing Needs of All Residents

Federal courts' approach to evaluating takings claims in the context of affordable housing should draw from the Supreme Court's approach to evaluating what constitutes a public use in *Midkiff*. The Court in *Midkiff* recognized that legislative bodies are better equipped "to assess what public purposes should be advanced by an exercise of the taking power."[292] The Housing Element law has a clearly defined public purpose—to meet the housing needs of all Californians—and the state's legislature has charged local governments with developing regulations to provide a "decent home and suitable living environment" for residents, especially those with lower incomes.[293] This is a significant challenge, and local and state governments have necessarily refined and tested a variety of regulations as the affordability crisis has worsened. Because of the urgency of the crisis, federal courts should show deference to municipalities in determining what constitutes a taking.

Rent control, inclusionary housing, and growth limitation regulations entail redistributive purposes that can address the state's housing needs. Each regulation burdens some individuals in order to benefit society by alleviating disparities in housing affordability, rebalancing an unequal distribution of property, or correcting market failures.[294] Because of the legislature's broad mandate to meet the housing needs of all Californians, these purposes should both weigh more heavily in a federal court's regulatory takings analysis and help

288. *Id.*
289. CAL. GOV'T CODE § 65584 (West 2003).
290. *Id.* § 65580.
291. *Id.* § 65581.
292. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).
293. *See* § 50003.
294. *See* Serkin, *supra* note 81, at 6–7.

to define the parameters for when a regulation goes too far. A closer examination of these regulations demonstrates this approach.

1. Evaluating Rent Control: Focusing on Alleviating Disparities in Housing Affordability

The concern raised by a more property-protective analysis of the facts in *Kavanau* stems from an application of the *Penn Central* factors that gives more weight to a landlord's free market investment returns than to tenant affordability. Specifically, this analysis is more sympathetic to a rent control ordinance's economic impact on a landlord and its interference with his or her distinct investment-backed expectations; it is also more inclined to view the character of the government action as a confiscation of wealth.[295]

However, in evaluating the constitutionality of rent control ordinances under *Penn Central*, federal courts should instead give the most weight to a government's purpose of alleviating disparities in housing affordability, because this purpose addresses the problem of inflated property costs identified in California's Housing Element law. The analysis should thus give primacy to the character of the government action. Rent control ordinances explicitly burden property-owning landlords by limiting the amount of rent they can charge and the money they can make from otherwise higher rents, but these ordinances work to the benefit of tenants who can remain in rental housing because it is more affordable over longer periods of time.[296] The character of the government action transfers wealth, to be sure, but this wealth redistribution is justified by the exorbitant costs of rent in many California cities and what is needed to maintain rental housing affordability.

This does not mean that federal courts should not give any weight to a rent control ordinance's economic impact and its interference with a landlord's distinct investment-backed expectations—requiring excessively low rents should still be considered confiscatory and therefore unconstitutional.[297] Rather, this analysis recognizes that California's housing crisis more severely impacts the poorest tenants who are less able to afford rent, and is therefore more sympathetic to a government's good faith effort to meet their jurisdiction's statutorily required housing need.

Opponents of rent control, on the other hand, argue that it discourages developers from building new housing and thereby further aggravates housing shortages.[298] Some studies show that while rent control can help affordability

295. *See* Guggenheim v. City of Goleta, 638 F.3d 1111, 1130–32 (9th Cir. 2010).

296. *See* TERNER CTR , *supra* note 44, at 3.

297. *See* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 854–55 (Cal. 1997).

298. Sophie Kasakove, *The Deceptive, Shameful, Lucratively Funded War Against Rent Control* (Oct. 18, 2018), https://newrepublic.com/article/151783/deceptive-shameful-lucratively-funded-war-rent-control.

for current tenants in the short run, over the long term it can fuel gentrification.[299] While these concerns may be valid at a national level, in California, they are overblown because rent control ordinances have successfully kept lower-income tenants from being displaced over time in the state's exceptionally high cost rental markets.[300] Moreover, the effect on developers' ability to construct new housing is limited because under existing state law rent control does not apply to new construction.[301]

The degree to which a jurisdiction's rent control ordinance has contributed to meeting its affordable housing need can also help define parameters for when a rent control ordinance goes too far. For example, federal courts evaluating a more far-reaching rent control ordinance that enables deeper affordability (thus allowing more people to remain in rental units) in a city or county that is out of compliance with meeting its housing need, could be more readily upheld. A rent control ordinance in a city or county that is close to or in compliance, on the other hand, could be viewed more skeptically. In other words, in judging whether the character of the rent control ordinance goes too far, federal courts should rely heavily on the degree to which the jurisdiction has met its housing need, as determined by the state's Housing Element law.

2. Evaluating Inclusionary Housing: Focusing on Rebalancing an Unequal Distribution of Property

If federal courts were to assess the constitutionality of inclusionary housing ordinances in California under *Nollan*/*Dolan*, it would be a fact-intensive inquiry tied to an ordinance's impact on a specific, proposed residential project. In such an event, federal courts should foreground California's Housing Element law in their two-step analysis. First, this would entail evaluating the essential nexus between an inclusionary housing ordinance and a housing development's impact on affordable housing. Here, courts should focus on rebalancing an unequal distribution of property to address the state's statutorily identified problem of a lack of affordable housing. Second, in assessing whether an inclusionary housing ordinance is roughly proportional to a development's impact, federal courts should focus on the availability of affordable housing in a specific jurisdiction, in relation to a development's contribution to meeting the jurisdiction's housing need.

An analysis of the inclusionary housing ordinance in *CBIA* under *Nollan*/*Dolan* demonstrates this approach. In *CBIA*, San Jose's ordinance required developers of new projects containing twenty or more units to sell 15

299. Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?*, BROOKINGS (Oct. 18, 2018), https://www.brookings.edu/research/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control/.

300. *Id.*

301. Matt Levin, *Big Rent Hikes are About to be Illegal in California. Here's What You Should Know*, CALMATTERS (Sept. 11, 2019), https://calmatters.org/housing/2019/09/big-rent-hikes-illegal-in-california-heres-what-to-know/.

percent of their units at an affordable price.[302] In passing the ordinance, the city found that there was a substantial need for affordable housing to meet statutory requirements under the state's Housing Element law, and that affordable housing should be part of mixed-income developments to avoid problems associated with isolated poverty.[303] Beginning with the essential nexus analysis, the ordinance explicitly burdens developers who lose money from lower sales prices and implicitly burdens more affluent neighborhoods that may object to perceived changes in property values and neighborhood demographics.[304] Yet unlike *Nollan*, where the Supreme Court found there was no plausible relationship between a condition's public purpose of providing ocean views and its impact of requiring a developer to provide beach access, the inclusionary housing ordinance in *CBIA* clearly has such a plausible relationship between its purpose and its impacts.[305] The ordinance's public purpose is to benefit the welfare of the city by more equitably distributing affordable housing to lower-income residents.[306] This purpose has a plausible relationship, or essential nexus, with the impacts on the developer because requiring the sale of affordable units alongside market rate units helps to achieve the purpose of distributing affordable housing more equitably, and helps meet the city's statutorily determined housing need.

Fully assessing the extent of the ordinance's impact for the rough proportionality analysis requires a more thorough evaluation of San Jose's socioeconomic conditions beyond the scope of this Note. Briefly, however, requiring developers to sell only three out of every twenty units at an affordable price is likely "roughly proportional" to such a development's impact in a city with median home values at nearly $1 million.[307] The ordinance is in sharp contrast to the condition in *Dolan*, where a land use board did not show that a requirement to dedicate a public greenway was roughly proportional to a development's impact in a floodplain.[308] Rather, the extent of the impact of San Jose's ordinance directly affects the availability of affordable housing. Without the ordinance, developers would almost certainly build market rate housing instead. This would price out lower-income residents and work against their "safety, health, and welfare," thereby detracting from the city's efforts to meet the state's required housing need.[309]

On the other hand, developers and property rights advocates in California who oppose inclusionary housing argue that forcing homebuilders to construct affordable housing raises overall development costs and makes it harder for

302. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 990–91 (Cal. 2015).
303. *Id.* at 979.
304. *See* TAYLOR, *supra* note 12, at 16.
305. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).
306. *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 1000.
307. *See* Frank, *supra* note 154.
308. *See* Dolan v. City of Tigard, 512 U.S. 374, 394–95 (1994).
309. *See* CAL. HEALTH & SAFETY CODE § 50003 (West 2003).

average families to afford homes.[310] But even though inclusionary housing ordinances add to the costs of development, the public benefits of additional housing for lower-income residents far outweigh these costs given the well-recognized, widespread need for more affordable housing.[311] Dispersing affordable units among market rate units furthers the integration of lower-income households into the main fabric of a city, thereby reducing the geographic concentration of racial and ethnic groups in impoverished areas.[312] Moreover, inclusionary housing reduces the economic stratification of schoolchildren, thereby advancing the goal of non-discriminatory public education.[313]

Similar to federal courts' evaluation of rent control ordinances, the degree to which a jurisdiction's inclusionary housing ordinance has contributed to that jurisdiction meeting its affordable housing needs can help define parameters for when an inclusionary housing ordinance is unconstitutional under *Nollan*/*Dolan*. For instance, in a jurisdiction that has not met its housing need, a federal court could more readily uphold an inclusionary housing ordinance requiring developers to have a greater percentage of affordable housing units. The opposite would be the case for an inclusionary housing ordinance in a jurisdiction that is close to or in compliance, where enjoining the ordinance would not appreciably decrease the amount of affordable housing. In other words, just as with rent control ordinances, federal courts should rely heavily on the degree to which a jurisdiction has met its housing need in judging whether an inclusionary housing ordinance is unconstitutional.

3. Evaluating Growth Limitation: Focusing on Correcting Market Failures

Finally, the concern raised in *Hensler* is that local governments will no longer have the flexibility to adjust or rescind a growth limitation measure before a federal court potentially finds the measure to be unconstitutional, exposing municipalities to costly litigation and possibly having to pay exorbitant compensation. As a result, local governments might be less likely to enact growth limitation measures and could thereby induce damaging sprawl development.

To mitigate these outcomes, federal courts should again focus on California's Housing Element law in evaluating growth limitation measures—specifically the problems of inflated property costs and the lack of housing.[314] These problems point to market failures. In healthy markets, developers will

310. Breton Mock, *Taking Inclusionary Zoning All the Way to SCOTUS*, CITYLAB (Sept. 17, 2015), https://www.citylab.com/equity/2015/09/taking-inclusionary-zoning-all-the-way-to-scotus/405934/.

311. *See* Andrew L. Faber & Berliner Cohen, *Inclusionary Housing Requirements Still Possible?*, LEAGUE OF CAL. CITIES 1–2 (2014), https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2014/2014-Annual/9-2015-Annual-Andrew-Faber-Inclusionary-Housing-Re.aspx.

312. *Id.*

313. *Id.*

314. *See* CAL. GOV'T CODE § 65580 (West 2003).

build at higher densities when there are high land values and high demand, as is the case in California's coastal areas. However, inflated costs partially due to regulatory restrictions have made it prohibitively difficult to do so.[315] The Housing Element law recognizes that local governments are best suited to determine the specific efforts required to meet their jurisdiction's housing need, considering economic, environmental, and fiscal factors, and this includes correcting such market failures.[316] Growth limitation measures may burden communities that prefer more restrictive residential zoning, but they can also improve the functioning of housing development markets by increasing the housing supply in areas that are in demand.

Viewing these measures in the context of correcting market failures to meet a given jurisdiction's housing need could thus enable federal courts to more readily uphold growth limitation measures that alleviate housing shortages. For instance, in *Sinclair*, where the identification of environmentally sensitive habitat in a county's land use plan drastically reduced the number of residential units an owner could develop, a federal court would consider whether the regulation constitutes a taking under *Penn Central*.[317] A full analysis of the *Penn Central* factors is beyond the scope of this Note. However, at a high level, the analysis could give the most weight to the character of the government action and focus on the county's ability to correct residential market distortions that fail to provide sufficient housing. Under this approach, the analysis could consider the entirety of the land use plan, including any offsetting measures available to the developer to construct more housing in urban areas with greater density, as well as the county's intention to preserve sensitive coastal habitat. California's Housing Element law explicitly permits jurisdictions to adopt such offsetting incentives to build more housing—including reforms to the state's density bonus law and other infill-oriented policies—and to consider environmental factors.[318] Such an analysis could more readily uphold the growth restriction if, on balance, the land use plan included housing development incentives to offset the developer's loss, while allowing for the construction of additional units in another area to meet the county's housing need.

As with rent control ordinances, this does not mean that federal courts should give little or no weight to the economic impact of a growth limitation measure or its interference with an owner's distinct investment-backed expectations. A more thorough examination of a growth restriction in the context of a jurisdiction's land use plan and existing socioeconomic conditions would be necessary. However, the analysis recognizes that California's inflated property costs and severe housing shortage have distorted residential property markets,

315. *See* Murray & Schuetz, *supra* note 30, at 13.
316. *See* CAL. GOV'T CODE § 65581 (West 2003).
317. *See* Sinclair Oil Corp. v. Cty. of Santa Barbara, 96 F.3d 401, 404 (9th Cir. 1996).
318. *See* CAL. GOV'T CODE §§ 65581, 65582.1 (West 2003).

thus justifying giving the most weight to the character of growth limitation measures that help meet a jurisdiction's statutorily required housing need.

On the other hand, bringing such takings claims in federal court may be good for striking down growth measures that limit density, thereby making it easier to build multi-family housing and bring down prices. Because a more politically liberal emphasis on encouraging density has increasingly aligned with developers' interests in constructing more housing in California, takings claimants may find greater success in seeking to dismantle restrictive zoning in more sympathetic federal courts.[319] As long as federal courts were to focus on the state's Housing Element law in evaluating such claims, rather than deferring to local NIMBYism, this would be a good thing. Growth limitation regulations across California vary widely; by focusing on California's housing law, measures that help meet the state's housing goal without damaging the environment would more likely be upheld by federal courts, while those that do not would face greater scrutiny.[320] As a result, this would make it easier for jurisdictions to enact and defend less restrictive measures going forward.

CONCLUSION

Following the *Knick* decision, deference to local and state governments and a focus on California's housing laws can help guide federal courts as they evaluate takings claims against the state's redistributive regulations. In turn, this can help protect California's efforts to address its ongoing housing crisis.

Although this Note offers a framework for federal courts to avoid a detrimental reevaluation of Takings Clause jurisprudence following *Knick*, it is uncertain how federal courts will react to the decision. For takings claims involving more complex areas of state law, federal courts may abstain from hearing such cases so that state courts can resolve threshold state law issues, thereby appropriately deferring to state courts that are more protective of local and state government land use regulations.[321] On the other hand, if landowners append their state law claims to their takings claims in federal court, more conservative judges could choose to interpret California law narrowly rather than looking to legislative intent and seeking to advance its purposes.[322] This could be more harmful when, for instance, a land use regulation inhibiting sprawl is found to be a taking before the government has an opportunity to modify it, thus requiring the payment of just compensation. But such a scenario could be more advantageous for takings claims that challenge restrictive zoning regulations, making it easier to build more dense and affordable housing.

In light of this uncertainty, ongoing judicial deference to local and state governments committed to building more affordable housing is essential. Courts

319. *See* Serkin, *supra* note 81, at 15.
320. *See* TAYLOR, *supra* note 12, at 15–17.
321. *See* Echeverria, *supra* note 199.
322. *See* Schumacher, *supra* note 206.

must give municipalities the leeway they need to test redistributive regulations that aim to increase the state's housing supply while advancing socioeconomic and racial equity.