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## **Exacting Inclusion: Property Theory, the Character of Government Action, and Implicit Takings**

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*Recent takings cases challenging inclusionary housing ordinances tap into an ongoing controversy about whether government interventions in the housing market do more harm than good; but they also raise much more general questions about takings law. This Article uses the controversy raised by recent housing cases to probe the relationship between the Supreme Court's regulatory takings jurisprudence and its exaction takings jurisprudence and to suggest a more coherent approach to implicit takings. The Court's exaction takings jurisprudence is well-designed if it is applied appropriately. As a general matter, it encourages the mitigation of socially harmful nuisances, incentivizes developers to make socially desirable decisions about how to develop their properties, and protects private property from overreaching administrators who might abuse their discretion to usurp surpluses from the owners' development projects. This Article offers guidelines for determining when the Court's exaction takings jurisprudence should apply. It also proposes that, in some circumstances, a property owner should be able to make an exaction takings claim and a regulatory takings claim. Finally, it offers a roadmap for analyzing implicit takings claims more coherently. Under that roadmap, whether inclusionary housing programs should be subjected to the nexus and rough proportionality tests depends upon how they are designed.*

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## INTRODUCTION

Recent cases challenging inclusionary housing laws have raised important questions about takings law that have divided courts and remain unanswered.<sup>1</sup> The inclusionary housing laws that have been challenged require property developers to include a minimum percentage of affordable (i.e., below-market price) housing in their housing developments or pay fees toward financing affordable housing developments elsewhere.<sup>2</sup> The plaintiffs in these cases have claimed that the requirements are exactions and that they amount to takings under the Supreme Court’s exaction takings jurisprudence.<sup>3</sup> The Court’s exaction takings jurisprudence rests on the unconstitutional conditions doctrine, which holds that the government may not condition the receipt of a government benefit on an agreement to sacrifice a constitutional right.<sup>4</sup> If an exaction goes “too far,” it is a taking, and just compensation is required.<sup>5</sup>

The claims against the inclusionary housing laws have depended on characterizing the affordable housing requirements as exactions subject to the nexus and rough proportionality tests of the *Nollan* and *Dolan* cases. In *Nollan v. California Coastal Commission*, the Supreme Court held that there must be some logical connection between an exaction and the purpose of the regulation under which the permit is required for the exaction to be constitutional.<sup>6</sup> In *Dolan v. City of Tigard*, the Court held that an exaction must also be no more than roughly proportional to the adverse impact of the proposed development.<sup>7</sup> The plaintiffs in these inclusionary housing cases have argued that the purpose of the laws is to increase the supply of affordable housing so that members of all socio-economic groups, races, and ethnicities may obtain housing within a given community.<sup>8</sup> A new residential

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<sup>1</sup> See Cal. Bldg. Indus. Ass’n v. City of San Jose, 351 P.3d 974, 977–78 (Cal. 2015); Cherk v. County of Marin, No. A153579, 2018 WL 6583442, at \*4–5 (Cal. Ct. App. Dec. 14, 2018).

<sup>2</sup> See 351 P.3d at 977–78; 2018 WL 6583442, at \*1–2.

<sup>3</sup> See, e.g., Reply Brief, Cherk v. County of Marin, No. A153579, 2018 WL 6583442 (Cal. Ct. App. Dec. 14, 2018) (No. A153579), 2018 WL 3207522, at \*18–19.

<sup>4</sup> As Justice Alito explained in *Koontz*:

[T]he unconstitutional conditions doctrine . . . vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up. . . . By conditioning a building permit on the owner’s deeding over a public right-of-way . . . the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. . . . Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation.

*Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013).

<sup>5</sup> See *id.*

<sup>6</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836–37 (1987).

<sup>7</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 390–91 (1994).

<sup>8</sup> See, e.g., Reply Brief, *supra* note 3, at \*12.

housing development, however, does not necessarily reduce the supply of affordable housing.<sup>9</sup> In fact, if anything, it likely helps to make housing in general more affordable. The requirements thus bear no logical connection to the purpose of the law under which the permit is required and cannot be roughly proportional to any adverse impact of the development. Accordingly, they amount to takings.<sup>10</sup>

The plaintiffs' argument falls apart, however, if the affordable housing requirements are not exactions subject to the nexus and rough proportionality tests. If that is the case, the multi-factor inquiry from *Penn Central Transportation Company v. City of New York*<sup>11</sup> applies to the takings claim, and as long as the affordable housing requirements do not have an unduly heavy economic impact on the owners, or significantly frustrate their investment-backed expectations, the claims are likely to fail.<sup>12</sup>

State courts have been divided on whether permit requirements established under legislation are subject to the nexus and rough proportionality tests,<sup>13</sup> but most of them have declined to treat them as such.<sup>14</sup> They have therefore typically applied the *Penn Central* multi-factor inquiry to takings claims against legislatively imposed conditions, rather than the *Nollan/Dolan* rough proportionality tests, and the claims have been rejected.<sup>15</sup> To this date, the Supreme Court has denied certiorari on all appeals.

Although he has concurred in the denial of certiorari in some of the inclusionary housing cases, Justice Thomas has touched a nerve by writing a concurring opinion that raises questions about whether the nexus and rough proportionality tests should apply only in cases when the requirements are imposed

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<sup>9</sup> See *id.* at \*20.

<sup>10</sup> See *id.* at \*19–20.

<sup>11</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25, 128 (1978).

<sup>12</sup> Takings claims under the *Penn Central* standard are unlikely to succeed, except in rare cases where regulatory standards are applied retroactively or target some individuals unfairly to carry a disproportionate share of the burden of a government policy. Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 218–19 (2019).

<sup>13</sup> See *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring) (“For at least two decades . . . lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one.”).

<sup>14</sup> Eight out of the ten courts that have been asked to address the question of whether to treat legislatively imposed conditions as exactions have declined to do so. Mulvaney, *supra* note 12, at 196.

<sup>15</sup> See, e.g., *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 991–95, 1000 (Cal. 2015); *Cherk v. County of Marin*, No. A153579, 2018 WL 6583442, at \*9 (Cal. Ct. App. Dec. 14, 2018).

administratively or whether they should also apply when the requirements are imposed legislatively.<sup>16</sup> His concerns were motivated by a doubt that “the existence of a taking should turn on the type of governmental entity responsible for the taking.”<sup>17</sup> In fact, Justice Thomas’ opinion reiterated concerns he and Justice O’Connor had expressed in a dissenting opinion to a denial of certiorari in a similar case twenty years earlier.<sup>18</sup> By reiterating the concerns in the inclusionary housing case, Justice Thomas’ opinion has drawn attention to some of the inconsistencies in the Court’s implicit takings jurisprudence.<sup>19</sup>

The concerns are well-motivated. The inclusionary housing cases are important in their own right, but they also raise more general questions about the Supreme Court’s implicit takings jurisprudence. For example, why should an inclusionary housing requirement be subject to the multi-factor inquiry and not the nexus and rough proportionality tests? More generally, when should the nexus and rough proportionality tests apply? Why should an exaction that meets the nexus and rough proportionality tests allow the government to coerce from a developer an easement when a law subject to the *Penn Central* multi-factor inquiry would ostensibly deem that a taking? Why do the nexus and rough proportionality tests apply a higher standard of scrutiny than the multi-factor inquiry? Should the nexus and rough proportionality tests and the multi-factor inquiry ever both be applied? Ultimately, most of these questions are about the relationship between the Supreme Court’s regulatory takings jurisprudence and its exaction takings jurisprudence. They are both subcategories of the Court’s implicit takings jurisprudence, but the Court has neither addressed how they relate nor resolved the apparent inconsistencies.<sup>20</sup>

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<sup>16</sup> *Cal. Bldg. Indus. Ass’n.*, 577 U.S. at 1179 (Thomas, J., concurring).

<sup>17</sup> *Id.*

<sup>18</sup> *See* *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting).

<sup>19</sup> For a discussion on the term “implicit takings,” see James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 40–41 (2016). “Implicit takings” is a relatively new term, so many judges, attorneys, and legal scholars likely will be using the term “regulatory takings.” The term is used here to emphasize the difference between “regulatory” takings in a narrower sense and “exaction” takings.

<sup>20</sup> *Id.*; see, e.g., ROBERT MELTZ, CONG. RSCH. SERV., 97-122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 3 (indicating that there are four categories of takings – total regulatory takings, partial regulatory takings, physical takings, and exaction takings); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (referring to a “physical” taking, a *Lucas*-type ‘total regulatory taking,’ a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*”).

Other scholars, of course, have addressed similar questions, and some of them have been motivated by inclusionary housing cases.<sup>21</sup> Many scholars have viewed the Supreme Court's exaction takings jurisprudence as a form of heightened judicial review.<sup>22</sup> Some, especially among those who take a progressive perspective, have expressed concerns that by expanding protections for private property, the heightened review might impede governments' capabilities to advance important social agendas.<sup>23</sup> Most of the commentary seems to presume that the nexus and rough proportionality tests are an alternative to the *Penn Central* multi-factor inquiry.<sup>24</sup> There is nothing inherent in the Supreme Court's opinions, however, that requires that to be the case. A more coherent theory of implicit takings would incorporate the nexus and rough proportionality tests with the multi-factor inquiry into a unitary strand of jurisprudence.

This Article draws on basic property theory to outline a more coherent theory of implicit takings. It offers a test to identify when the nexus and rough proportionality tests should apply, and it proposes where the Supreme Court's exaction takings jurisprudence should fit within the Court's implicit takings jurisprudence. It illustrates how the Court's exaction takings jurisprudence encourages the mitigation of socially harmful nuisances, incentivizes developers to make socially constructive decisions

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<sup>21</sup> See, e.g., Mulvaney, *supra* note 12, at 218–19; see also Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 263–67 (2019); Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 TOURO L. REV. 265, 292 (2014); Tim Iglesias, *Inclusionary Zoning Affirmed: California Building Industry Association v. City of San Jose*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 409, 413 (2016).

<sup>22</sup> Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 622 (2004); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607–08 (1988); Charles M. Haar & Michael Allan Wolf, *Commentary, Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2184–87 (2002).

<sup>23</sup> See Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENV'T L. REV. 137, 142 (2016); Weiss, *supra* note 21, at 275–76; Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 299–300; Michael Allan Wolf, *The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects*, 40 FORDHAM URB. L.J. 1835, 1841–42 (2013).

<sup>24</sup> See, e.g., Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 404 (2014) (describing exaction takings jurisprudence as a “curious carve-out from the *Penn Central* test”). Not surprisingly, this has caused those who advocate for strengthening property rights to argue for expanding the exaction takings jurisprudence at the expense of traditional regulatory takings jurisprudence and those who advocate for expanding government regulatory powers to argue for limiting the exaction takings jurisprudence. As Fenster observes, “those sympathetic with government defendants or critical of the Court's occasional efforts to expand federal constitutional property rights disdain it, while those committed to robust constitutional property rights have embraced it.” *Id.* at 403–04.

about how to develop their properties, and protects private property from overreaching administrators who might abuse their discretion to usurp surplus from the owners' development projects. It also uses the controversy about inclusionary housing laws to provide examples illustrating how the theory of implicit takings should be applied more generally. Finally, it proposes a roadmap for how to analyze implicit takings claims.

The following Part of this Article provides an overview of inclusionary housing laws and the takings cases that have arisen under them. Part II uses basic property theory to offer some insights into implicit takings and to propose a more coherent approach to implicit takings jurisprudence. The final Part concludes.

## I. OVERVIEW OF INCLUSIONARY HOUSING LAWS

### A. Background

Inclusionary housing laws were first enacted in the 1970s in major metropolitan areas in California, New York, and Washington, D.C.<sup>25</sup> They have proliferated across a wide range of communities, and more than 500 local jurisdictions in at least twenty-seven states now have inclusionary housing laws of some kind.<sup>26</sup> The laws vary, but they are intended to increase the supply of affordable housing in the local market, and affordable housing is usually meant to be housing that is priced below the prevailing market value.<sup>27</sup> Some local governments have enacted laws that attempt to incentivize developers to supply housing at prices below market levels, but voluntary programs have not generally been effective.<sup>28</sup> Thus, most inclusionary housing programs require developers to include a minimum percentage of affordable housing units within their developments<sup>29</sup> or, in the alternative, to pay fees to help finance the development of affordable housing elsewhere.<sup>30</sup>

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<sup>25</sup> Benjamin Powell & Edward Stringham, "The Economics of Inclusionary Zoning Reclaimed": *How Effective are Price Controls?*, 33 FLA. STATE U. L. REV. 471, 475 (2005).

<sup>26</sup> Lisa A. Sturtevant, *Separating Fact from Fiction to Design Effective Inclusionary Housing Programs*, CTR. FOR HOUS. POLY 1–2 (May 2016), <http://ihiusa.org/wp-content/uploads/Seperating-Fact-from-Fiction.pdf> [<http://perma.cc/2H46-ZUV4>]. However, the number may be even higher. Emily Hamilton, *Inclusionary Zoning Hurts More Than It Helps*, MERCATUS CTR., <http://www.mercatus.org/publications/urban-economics/inclusionary-zoning-hurts-more-it-helps> [<http://perma.cc/XGH6-TZTE>] (Feb. 8, 2021) (citing evidence that 886 jurisdictions in the United States have adopted inclusionary zoning laws of some kind).

<sup>27</sup> Sturtevant, *supra* note 26, at 2.

<sup>28</sup> Powell & Stringham, *supra* note 25, at 475.

<sup>29</sup> The requirement typically applies to both new for sale housing and new rental housing. *Id.* at 474–75.

<sup>30</sup> *Id.* at 475.



Inclusionary housing programs are typically targeted to provide housing that is affordable for families with incomes that are below some percentage of the median family income for the area.<sup>31</sup> This means that some families with incomes that are quite high compared to a national median can still qualify for affordable housing in areas where family incomes are well above the national median. If the developer chooses to provide the affordable housing within the development, the affordable units typically must be comparable in size and quality to those that sell at the prevailing market prices.<sup>32</sup> In turn, this means that the affordable housing may be of a significantly higher quality than housing that is sold at higher market prices elsewhere. Therefore, the way the programs are structured can result in a perception that relatively affluent families are receiving subsidies on relatively luxurious housing. Together with the “not-in-my-backyard” syndrome (“NIMBY”), this can generate resentment and undermine public support for affordable housing programs.<sup>33</sup>

#### B. The Impact of Inclusionary Zoning

The impact of inclusionary housing laws is hotly debated. There appears little doubt that some of the opposition to inclusionary housing laws arises from concerns about their impact or that arguments about the adverse impact of the laws have been used in the legal challenges against them. The policy debate about their impact is thus germane to the cases. The contours of the policy debate were laid out soon after inclusionary housing programs appeared. Drawing on the conventional economic theory about how a relatively efficient market operates, Robert Ellickson argued that inclusionary zoning laws increase the costs of developing new housing and thus decrease the supply, which in turn increases the market price.<sup>34</sup> He concluded that the irony of inclusionary housing laws is that they actually turn out to be exclusionary.<sup>35</sup>

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<sup>31</sup> *Id.* at 474.

<sup>32</sup> *Id.* at 475.

<sup>33</sup> See, e.g., *Housing Matters: Affordable Housing and the Middle-Class*, WGLT.ORG (Oct. 30, 2019, 10:17 AM), <http://www.wgl.t.org/show/wglts-sound-ideas/2019-10-30/housing-matters-affordable-housing-and-the-middle-class> [<http://perma.cc/T5NA-QY4B>]; Jack Craver, *Austin Housing Advocates Must Stop Ignoring the Middle-Class*, AUSTIN POL. NEWSL. (May 25, 2021), <http://austinpolitics.net/2021/05/25/austin-housing-advocates-must-stop-ignoring-the-middle-class/> [<http://perma.cc/EBG6-NYFM>].

<sup>34</sup> Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981).

<sup>35</sup> *Id.*

Shortly after Ellickson's article was published, the Supreme Court of New Jersey revisited the famous *Mount Laurel*<sup>36</sup> case and, without citing Ellickson's article but perhaps obliquely alluding to it, observed, "[i]t would be ironic if inclusionary zoning to encourage the construction of lower income housing were ruled beyond the power of a municipality . . . when its need has arisen from the socio-economic zoning of the past that excluded it."<sup>37</sup> Thus, the New Jersey Supreme Court held that even where local governments are unable to provide affordable housing by removing restrictive barriers, inclusionary devices such as mandatory set-aside requirements are still within their zoning powers.<sup>38</sup> The court went on to observe that the failure to ensure an adequate supply of affordable housing would result in the further economic segregation of New Jersey's cities and suburbs.<sup>39</sup>

The debate about the impact of inclusionary housing programs continues to the present. As one might expect, political leanings appear to play a role.<sup>40</sup> One of the complications is that many jurisdictions offer incentives or bonuses to developers who supply affordable housing that help to offset their costs.<sup>41</sup> Those who favor private markets and limited government tend to see the shortcomings and adverse effects, and those who are more skeptical about private markets and welcoming of government interventions tend to see the successes and not any adverse effects.<sup>42</sup> On the one hand, Emily Hamilton, who is affiliated with the market-oriented Mercatus Center, observes that critics of inclusionary housing laws tend to find that the laws raise housing prices and reduce new housing supply;<sup>43</sup> indeed, her own empirical study finds that it raises prices.<sup>44</sup> On the other hand, Lisa Sturtevant, who serves on the Board of Directors of Housing Forward Virginia, a nonprofit organization that seeks to ensure affordable housing is planned and purposeful,<sup>45</sup> concludes from her summary of the evidence that inclusionary housing laws do

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<sup>36</sup> *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

<sup>37</sup> *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390, 449 (N.J. 1983).

<sup>38</sup> *Id.* at 448.

<sup>39</sup> *Id.* at 451.

<sup>40</sup> See Emily Hamilton, *Inclusionary Zoning and Housing Market Outcomes*, 23 CITYSCAPE: J. POL'Y DEV. & RSCH. 161., 163 (2021).

<sup>41</sup> See *id.* at 165.

<sup>42</sup> See *id.* at 163, 189.

<sup>43</sup> *Id.* at 163.

<sup>44</sup> Hamilton finds that inclusionary zoning laws "increase house prices but not that they reduce new housing construction." *Id.* at 189.

<sup>45</sup> See *About*, HOUS. FORWARD VA., <http://housingforwardva.org/about/#what-we-do> [<http://perma.cc/R8RN-BEQ8>] (last visited Aug. 7, 2021).

not increase housing prices or decrease the supply of housing.<sup>46</sup> One thing that most scholars who have studied the matter agree on, however, is the fact that inclusionary housing programs have often not resulted in much new affordable housing.<sup>47</sup>

Political leanings will no doubt continue to play a role in the policy debate. Those who favor markets will probably continue to see adverse consequences and advocate for market solutions to the affordable housing problem, and those who welcome government management of markets will probably continue to see the virtues of inclusionary housing policies. While this might seem like a pessimistic forecast, the policy debate is largely a sideshow. The important legal questions are about the scope of the government's power to take private property and whether courts will interpret the law to protect private landowners and developers from bearing a disproportionate burden of providing affordable housing in their communities. The answers to those questions do not generally depend on whether affordable housing programs are effective.<sup>48</sup> That is probably for the better, because the courts are probably not the best branch of government to shoulder responsibility for making important social policy decisions.

### C. The Underlying Cause of the Affordable Housing Problem

The Supreme Court's decision in *Village of Euclid v. Ambler Realty Company*<sup>49</sup> provided broad authorization for the cumulative use of zoning schemes that proliferated across the United States in the twentieth century in new municipalities and allowed white, affluent families to ensconce themselves in

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<sup>46</sup> Sturtevant, *supra* note 26, at 1.

<sup>47</sup> See, e.g., *id.* at 4 (observing that many programs were found to have very low production totals); Hamilton, *supra* note 26, at 3 (observing that inclusionary housing programs have provided huge benefits but to only a small percentage of low-income and moderate-income families).

<sup>48</sup> The Supreme Court has held that housing is not a fundamental right and that the poor are not a protected category. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding that the assurance of adequate housing is a legislative responsibility not a judicial one); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18–28 (1973) (concluding that the poor do not possess the characteristics of a suspect class under the Equal Protection Clause). Therefore, under the substantive due process doctrine, affordable housing laws are subject to a rational basis test. See *id.* at 2. Under a rational basis test, a law will be upheld against a substantive due process challenge as long as it is rationally related to a legitimate state interest. See David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 626 n.290 (2009). Most affordable housing laws would likely withstand such a challenge regardless of whether they are effective. The only plausible constitutional basis for overturning most affordable housing programs, therefore, is under the Takings Clause. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 105 (1978). The Supreme Court's implicit takings jurisprudence does not normally turn on the effectiveness of the government actions. *Id.* at 130–31.

<sup>49</sup> 272 U.S. 365 (1926).

predominantly white, affluent suburban enclaves with safe streets, good schools, and strong tax bases.<sup>50</sup> Unfortunately, the high housing prices in many of those tony neighborhoods were beyond the reach of most non-white and less affluent families.<sup>51</sup> *Village of Euclid* was, therefore, a pivotal case, and it probably contributed far more to the escalation of property values and the lack of affordable housing than any other single factor.<sup>52</sup> In fact, some leading economists believe the best way to increase the stock of affordable housing would be to relax many of the restrictions under existing zoning regulations.<sup>53</sup>

Zoning schemes commonly regulate the type of housing that may be developed within certain neighborhoods. Some areas are typically designated for single-family homes, others may also allow duplexes, and others still may allow duplexes and multi-family dwellings.<sup>54</sup> This can limit the supply of single-family homes, which Americans tend to consider most desirable for families of any size. In addition, zoning schemes commonly specify minimum floor space requirements for houses, minimum setback requirements on housing lots, and minimum frontage requirements on public streets.<sup>55</sup> Requirements to build big homes on spacious, wide lots no doubt help to ensure that neighborhoods will appear stately and tranquil, but they also directly increase the cost of supplying new houses and thus make affordable housing scarce.<sup>56</sup>

This was obvious well before the Supreme Court upheld the constitutionality of Euclidian zoning. In fact, when the constitutionality of Euclidean zoning was first challenged in the trial court, it was declared unconstitutional.<sup>57</sup> In his opinion striking the scheme, Judge Westenhaver observed:

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<sup>50</sup> For an overview, see Donald J. Smythe, *The Power to Exclude and the Power to Expel*, 66 CLEV. ST. L. REV. 367, 388–95 (2018). For a more detailed discussion, see MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA* 22 (2008).

<sup>51</sup> Smythe, *supra* note 50, at 389–95.

<sup>52</sup> *Village of Euclid* authorized the cumulative land use regulations that resulted in allegations of exclusionary zoning. *See id.* at 390–93. Studies by leading economists have pointed to land use regulations as the most important factor driving up land values and housing prices. *See, e.g.*, Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 21 (Nat'l Bureau of Econ. Rsch., Working Paper No. 8835, 2002) [http://www.nber.org/system/files/working\\_papers/w8835/w8835.pdf](http://www.nber.org/system/files/working_papers/w8835/w8835.pdf) [<http://perma.cc/Q6MK-9B7F>]; Edward, L. Glaeser, Joseph Gyourko, & Raven E. Saks, *Why Have Housing Prices Gone Up?*, 85 AM. ECON. REV. 329, 329 (2005).

<sup>53</sup> *See, e.g.*, Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RESV. BANK OF N.Y., ECON. POL'Y REV., June 2003, at 21, 23.

<sup>54</sup> *See* Smythe, *supra* note 50, at 394–96.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.* at 395.

<sup>57</sup> *See* *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 317 (N.D. Ohio 1924).

The plain truth is that the true object of the ordinance in question is to place all the property in . . . a strait-jacket. . . . In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service.<sup>58</sup>

The Supreme Court was fully aware of this when it later overruled Judge Westenhaver and upheld Euclidean zoning schemes.<sup>59</sup> By then, the issues had already been litigated in some state courts, several of which had also upheld the schemes.<sup>60</sup> There had been wide-ranging discussions and debates among planning experts, politicians, and attorneys about zoning that had led to wide-spread support for zoning across political lines as well as regions of the country.<sup>61</sup> And, of course, the Supreme Court benefitted from extensive representations that were made by advocates and experts when it heard the case on appeal.<sup>62</sup> This was long before affordable housing became an obvious social problem, and many of those who supported Euclidean zoning schemes emphasized the positive impacts they would have on property prices.<sup>63</sup> Experts generally concurred, and the media as well as political leaders welcomed the idea.<sup>64</sup>

Contemporary economic studies have almost unanimously affirmed the adverse impact that zoning regulations have had on the affordability of housing. As economists Edward Glaeser, Joseph Gyourko, and Raven Saks have observed, the impact of zoning regulations has been manifested not only in a national increase in real housing prices since the 1950s, but also in a

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<sup>58</sup> *Id.* at 316.

<sup>59</sup> See Smythe, *supra* note 50, at 396–97.

<sup>60</sup> See, e.g., *Clements v. McCabe*, 177 N.W. 722, 726 (Mich. 1920); *In re Opinion of the Justices*, 127 N.E. 525, 532 (Mass. 1920); *State ex rel. Morris v. City of East Cleveland*, 22 Ohio N.P. (n.s.) 549, 549 (1920); *State v. Durant*, 2 Ohio Law Abs. 75, 75 (1923).

<sup>61</sup> See Smythe, *supra* note 50, at 388–89. Sadly, there is also evidence that racial and ethnic prejudices played a role in the diffusion of zoning schemes. *Id.*; see also WOLF, *supra* note 50, at 138–40.

<sup>62</sup> See WOLF, *supra* note 50, at 58.

<sup>63</sup> *Id.* at 83–84.

<sup>64</sup> Progressive era reformers played an important role. See *id.* at 23. Not surprisingly, the Progressives also often advocated racial and socio-economic segregation. See, e.g., MICHAEL MCGERR, *A FIERCE DISCONTENT* 187–94 (2003). Advocates of zoning sometimes sought to publicize the virtues of comprehensive zoning laws in the media. See Smythe, *supra* note 50, at 388.

national increase in the *variance* of real housing prices.<sup>65</sup> In other words, the gap between the highest and lowest priced homes has risen, and, on average, real housing prices have risen overall. In a related article, Glaeser et al. have also observed that the gap between housing prices and the costs of constructing houses rose in the latter half of the twentieth century in major housing markets across the country.<sup>66</sup> They conclude that restrictions on the supply of new housing have been the driving force behind the escalation in real housing prices and that the restrictions were caused by government regulations and not the scarcity of land.<sup>67</sup> Although the affordable housing crisis has arisen primarily in pockets of the country, where there is an affordable housing crisis, Glaeser and Gyourko attribute it to land use regulations.<sup>68</sup> Many other scholars agree, and a host of studies have concurred.<sup>69</sup>

#### D. The Real Irony of Inclusionary Housing

To paraphrase the New Jersey Supreme Court, it is ironic that courts should now be addressing the constitutionality of inclusionary housing programs, when the demand for affordable housing arose from judicial decisions upholding the constitutionality of zoning laws that *excluded* affordable housing.<sup>70</sup> The real irony of inclusionary housing laws is that they are a government response to a problem the government has largely created through the enactment of laws and creation of regulations that restrict the supply of housing and drive up the costs of construction.

One obvious alternative would be to deregulate land uses and allow the housing market to respond to the demand for new housing free of the restrictions that have impeded it.<sup>71</sup>

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<sup>65</sup> Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005).

<sup>66</sup> See Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11129, 2005).

<sup>67</sup> See *id.* at 8.

<sup>68</sup> See Glaeser & Gyourko, *supra* note 53, at 21, 35.

<sup>69</sup> See, e.g., Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265 *passim* (2008); John M. Quigley & Steven Raphael, *Regulation and the High Cost of Housing in California*, 95 AM. ECON. REV. 323 *passim* (2005); Keith Ihlanfeldt, *Exclusionary Land-Use Regulations Within Suburban Communities: A Review of the Evidence and Policy Prescriptions*, 41 URB. STUD. 261 *passim* (2004); Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331 *passim* (2005).

<sup>70</sup> S. Burlington Cnty. NAACP v. Mount Laurel, 456 A.2d 390, 449 (N.J. 1983).

<sup>71</sup> In addition to relaxing the zoning restrictions that diminish the supply of affordable housing, housing and building codes that increase the costs of constructing new housing or refurbishing existing housing could also be relaxed. Moreover, habitability

Unfortunately, government actions are a response to political incentives and not common sense. In many communities, zoning regulations are deeply entrenched; if they are relaxed, property values will fall. Homeowners who might otherwise welcome deregulation and elimination of government restrictions may nonetheless object to any initiatives to “abolish the suburbs.”<sup>72</sup> In local matters, homeowners have tremendous political clout, and the NIMBY response creates an insurmountable obstacle to addressing the root causes of the affordable housing problem by relaxing zoning restrictions.<sup>73</sup>

Inclusionary housing laws, on the other hand, are politically expedient. Although the laws, in theory, might affect any landowner, in practice, the real bite is felt by those who own large parcels of land suitable for residential developments and property developers who hope to prosper from building them.<sup>74</sup> Property developments may initially become less profitable and, as the market responds, some land might become less valuable. As many have observed, however, market prices for housing may

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requirements could be moderated, thus allowing landlords to offer rental units with fewer amenities (e.g., fewer electric wall sockets, fewer windows, central heating, hot water, etc.) at much lower rents.

<sup>72</sup> The 2020 presidential election generated considerable rhetoric about the future of American suburbs, in part because some have advocated making the suburbs more inclusionary and political opponents obviously thought this might be a sore point with many suburban voters. As a result, media commentary began to appear about attempts to “end” or “abolish” the suburbs. See, e.g., John Pattison, *Nobody wants to “destroy the suburbs.” But Everyone Should Want to End the Suburban Experiment.*, STRONG TOWNS (July 30, 2020), <http://www.strongtowns.org/journal/2020/7/28/destroying-the-suburbs> [<http://perma.cc/KX52-CLTX>]; Stanley Kurtz, *Biden and Dems Are Set to Abolish the Suburbs*, NAT. REV. (June 30, 2020, 9:42 AM), <http://www.nationalreview.com/corner/biden-and-dems-are-set-to-abolish-the-suburbs/> [<http://perma.cc/N82V-FWHG>]; Thomas Beaumont, *Does Joe Biden want to ‘abolish the suburbs?’ No.*, CHI. TRIB. (Aug. 27, 2020, 8:04 AM), <http://www.chicagotribune.com/election-2020/ct-joe-biden-abolish-the-suburbs-fact-check-20200827-3lwobgvu75ajdpodsoz32tb2sm-story.html> [<http://perma.cc/JMN5-7NFB>].

<sup>73</sup> Zoning restrictions apply to neighborhoods and homeowners have incentives to resist changes in their own “backyards.” There may be fewer impediments, however, to relaxing housing and building codes because those changes would not have much or any near-term impact on affluent middle-class suburbs. Smythe, *supra* note 50, at 375–85.

<sup>74</sup> Inclusionary housing programs may be structured so that they apply only in certain areas or to high density residential zones. See, e.g., *Rules for Special Areas*, N.Y.C. DEPT OF CITY PLAN., <http://www1.nyc.gov/site/planning/zoning/districts-tools/inclusionary-housing.page> [<http://perma.cc/2BPD-CF33>] (last visited July 26, 2021) (stating that New York city’s inclusionary housing program only applies to high density zones); *Inclusionary Housing Program*, CITY & CNTY. OF S.F., <http://sfmohcd.org/inclusionary-housing-program> [<http://perma.cc/7AEX-5YKZ>] (last visited July 26, 2021) (San Francisco’s inclusionary housing program only applies to residential developments of ten or more units); *Inclusionary Zoning*, D.C. ZONING HANDBOOK, <http://handbook.dcoz.dc.gov/zoning-rules/general-rules/inclusionary-zoning/> [<http://perma.cc/2ND2-MCNU>] (last visited July 26, 2021) (instructing that the purpose of Washington D.C.’s inclusionary zoning are to use private development to lessen the financial burden of producing affordable housing).

rise, especially at the moderate and higher-priced ends of the market.<sup>75</sup> In a well-functioning, competitive market, the developers will, as the market responds, pass the costs along to those who buy the new housing at market rates and their profit rates on new developments will return to normal. The primary beneficiaries, of course, will be those who are able to obtain housing at below-market prices.<sup>76</sup>

Most of the affected groups have little reason to object to inclusionary housing laws, at least until an affordable housing project is planned for their neighborhood. The developers will earn their profits, and existing homeowners will benefit from the escalation in housing prices. Even those who buy new housing priced higher than it would otherwise be would not want to see prices fall, so they would have no incentive to argue for repealing the laws once they have bought their own homes. Those who obtain below-market-rate housing, of course, will be more than happy. If the critics are right, the group that might suffer the most from inclusionary housing laws is the larger group of low and moderate-income households that are not fortunate enough to benefit from the laws and thus have to pay for market-rate housing that might be even more expensive because of these laws. This group might clamor for more affordable housing, possibly even through expansions in inclusionary housing programs, but they probably would not connect their own plight to the existence of the inclusionary housing laws.

Almost all of the political incentives, therefore, incline elected officials to enact inclusionary housing laws and to keep them once enacted. The politicians are then able to point to new inclusionary housing laws as an achievement accomplished to help redress the affordable housing problem. Even long after the laws have been enacted, politicians are still able to point to the completion of new affordable housing projects as evidence of accomplishments towards addressing the affordable housing problem, even though they may have had nothing to do with the genesis of the projects.<sup>77</sup>

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<sup>75</sup> Of course, as the discussion above indicates, this is debated, and many advocates of inclusionary housing programs believe they do not raise housing prices. *See supra* Section I.B.

<sup>76</sup> Even opponents of inclusionary housing programs agree that it benefits those who receive affordable housing. *See, e.g.,* Hamilton, *supra* note 26, at 2–3, 6.

<sup>77</sup> The media provides profuse coverage of ribbon cutting ceremonies at new affordable housing projects and local politicians of all political stripes are happy to attend and honor the occasions. *See, e.g., City Celebrates New 100 Percent Affordable Housing Complex in the Mission*, BAY CITY NEWS (July 10, 2021), <http://sfbayca.com/2021/07/10/city-celebrates-new-100-percent-affordable-housing-complex-in-the-mission/> [<http://perma.cc/Y6X6-MQ4R>] (reporting that San Francisco Mayor Breed cut the ribbon for a new affordable housing complex); Debbie L. Sklar,



Unfortunately, the “successes” of inclusionary zoning laws may help to relieve the pressures on political leaders to find more effective solutions to the affordable housing problem, urban poverty, homelessness, and related social problems.

There are less politically palatable alternatives.<sup>78</sup> Even if they did not want to deregulate, elected officials could raise property taxes to help finance new affordable housing projects. They could also raise (or impose) sales and income taxes. The tax revenues could then be used to subsidize affordable housing developments or to finance the affordable housing investments directly. Either way, the supply of affordable housing would increase. But raising property taxes would tend to diminish existing property values and thus face political opposition from homeowners (and other property owners whose property taxes were raised) and raising sales and income taxes would likely face an even wider base of political opposition.<sup>79</sup>

Even if the public knew the tax revenues would be dedicated to addressing an important social problem, the costs to taxpayers would likely be more obvious than the costs of inclusionary housing laws and, absent some sea change in public attitudes, the opposition, therefore, would likely be greater.<sup>80</sup> Inclusionary

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*Affordable Apartment Complex Opens in Navajo Neighborhood*, TIMES OF SAN DIEGO (May 31, 2018), <http://timesofsandiego.com/politics/2018/05/31/affordable-apartment-complex-opens-in-navajo-neighborhood/> [http://perma.cc/7QTR-34C6] (reporting on San Diego Mayor Faulconer celebrating the Grand Opening of an affordable apartment complex); *City Officials Join Development Partners for La Central A&B Ribbon Cutting*, N.Y.C. HOUS. DEV. CORP. (June 16, 2021), <http://www.nychdc.com/newsroom/city-officials-join-development-partners-la-central-b-ribbon-cutting> [http://perma.cc/G39F-E64U] (reporting that New York Mayor de Blasio took part in ribbon cutting ceremony for a new affordable development).

<sup>78</sup> This is not meant to suggest that these alternatives have not been pursued, at least in some municipalities and to some extent. But, inclusionary housing programs would not be necessary if they had been pursued to a much greater extent in all municipalities.

<sup>79</sup> A survey conducted by the Pew Research Center in 2012 found that most respondents from both political parties felt the American middle-class pays at least its fair share of taxes, while only six percent of respondents felt that the American middle-class pays too little in taxes. Interestingly, however, most respondents (fifty-eight percent) felt that upper-income Americans pay too little in taxes. This suggests that it might be more expedient for elected officials to raise taxes on the rich than the middle-class. As a practical matter, however, that is not the case. For one thing, upper-income voters may provide more campaign contributions than the middle-class. Even if they do not, they are highly mobile and attempts to squeeze them for taxes at the local level may cause them to “vote with their feet” and decamp to cities with lower taxes. Kim Parker, *Yes, the Rich Are Different*, PEW RSCH. CTR. (Aug. 27, 2012), <http://www.pewresearch.org/social-trends/2012/08/27/yes-the-rich-are-different/> [http://perma.cc/62PN-BW3U].

<sup>80</sup> According to a survey conducted by the Pew Research Center in 2019, a majority of taxpayers would not object to raising taxes on corporations or upper-income taxpayers. See *Growing Partisan Divide Over Fairness of the Nation’s Tax System*, PEW RSCH. CTR. (Apr. 4, 2019), <http://www.pewresearch.org/politics/2019/04/04/growing-partisan-divide-over-fairness-of-the-nations-tax-system/> [http://perma.cc/MYC4-8ZUC]. Unfortunately,

housing laws are politically more expedient than conventional tax and spend policies.

What is politically expedient does not necessarily make for the best public policy. As Glaeser and Gyourko observe:

[I]f policy advocates are interested in reducing housing costs, they would do well to start with zoning reform. Building small numbers of subsidized housing units is likely to have a trivial impact on average housing prices (given any reasonable demand elasticity), even if well targeted toward deserving poor households. However, reducing the implied zoning tax on new construction could well have a massive impact on housing prices.<sup>81</sup>

In an ideal world, therefore, it might be better if elected officials revised zoning laws to eliminate single-family only neighborhoods, large area requirements, wide frontage requirements, and setback requirements that exceed what is necessary for public safety.<sup>82</sup>

Although the zoning changes would not have any immediate effects in established neighborhoods, they would help to encourage construction of lower cost housing in the longer run, and they would provide more flexibility in neighborhoods that were still developing.<sup>83</sup> Elected officials might also go a step further and relax building and housing codes. In many cases, however, if elected officials attempted to do any of that, they would not remain elected for as long as they would like. What is politically expedient is usually what will win out, even if it is not the best public policy. Frustrating though that might be, political expediency has played an important role in American democracy since its earliest days.<sup>84</sup>

#### E. Courts Are Not the Policy Police

Whether a law or other government action is bad public policy is—and should be—irrelevant to takings claims. In

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local governments do not have much opportunity to generate tax revenues from corporations or upper-income residents. Only a small minority of states allows local governments to levy personal income taxes and corporate taxes. See *Corporate Income Taxes*, URB. INST., <http://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/corporate-income-taxes#revenue> [<http://perma.cc/Y7HA-P7KH>] (last visited July 26, 2021); *The State of State (and Local) Tax Policy*, TAX POLY CTR., <http://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-individual-income-taxes-work> [<http://perma.cc/2DQF-A87F>] (last visited July 26, 2021). Moreover, corporations and upper-income residents might relocate if subjected to higher tax rates than in other cities.

<sup>81</sup> Glaeser & Gyourko, *supra* note 68, at 35.

<sup>82</sup> Smythe, *supra* note 50, at 370–71.

<sup>83</sup> *Id.* at 398.

<sup>84</sup> For example, see David Brian Robertson, *Madison's Opponents and Constitutional Design*, 99 AM. POL. SCI. REV. 225 *passim* (2005) for an analysis of the expedient accommodations forced on James Madison during the U.S. Constitutional Convention.

addressing takings claims, courts' sole responsibility is to apply the Takings Clause of the United States Constitution as it has been interpreted by the Supreme Court.<sup>85</sup> Although the Supreme Court has indicated that the character of the government action is one of the factors for a court to consider in a regulatory takings case, that criterion has never been interpreted to allow courts to base a decision that a government action amounts to a taking because it is bad policy. The character of government action typically relates to the connection between government actions and land uses. For example, it is well-understood that a law or regulation that results in a physical invasion of land is a taking *per se*.<sup>86</sup> If a law or regulation results in a physical occupation, just compensation is required, without any further inquiry, regardless of whether the law or regulation is good policy or bad, or whether it results from any kind of policy at all.<sup>87</sup>

Questions about whether laws or regulations are good public policy are generally best left to the political process.<sup>88</sup> Courts sometimes do base their decisions on public policy considerations and most scholars would agree that sometimes they should.<sup>89</sup> But basing a decision on public policy considerations is different than deciding on an inherently political question. Principles of democracy not only require the assignment of some important law-making authority to the elected officials within the legislative and executive branches, but also that the judicial branch should exhibit substantial deference to any laws created by elected officials that are within the scope of their constitutional authorities.<sup>90</sup>

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<sup>85</sup> Of course, to the extent that a state constitution is applied, the relevant language from the state constitution as it has been interpreted by the state supreme court should be applied.

<sup>86</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

<sup>87</sup> In the majority opinion, Justice John Roberts wrote: “[G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.” *Id.* at 2074.

<sup>88</sup> This statement is in the spirit of the “political question doctrine,” but it does not formally depend upon it. The roots of the political question doctrine arguably originated in Justice John Marshall’s opinion in *Marbury v. Madison*, where he wrote “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The doctrine rests on the idea that there are constitutional limits to the judicial power, and that inherently political questions must be left to the executive and judicial branches. See, e.g., *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 726 (2016). Scholars have critiqued the political question doctrine, and it remains highly controversial. See e.g., Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 442 (2004).

<sup>89</sup> Edward L. Rubin & Malcom M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 619 (2003).

<sup>90</sup> Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 11 (1996).

As long as they are within the powers of the legislature and executive branches that create them, laws should remain the province of elected officials and the voters who elect them. The policy debate about the consequences of inclusionary housing laws is important, but it should not bear on any questions about whether any limits or requirements they place on property developments amount to takings. The sole judicial consideration in addressing takings claims should be the Takings Clause and the Supreme Court's takings jurisprudence.

## II. PROPERTY THEORY AND IMPLICIT TAKINGS

### A. The Bundle of Sticks Analogy

A well-defined system of property law defines a hierarchy of persons' rights in land or chattels. The dominant conception of private property rights in the United States draws on an analogy with a bundle of sticks.<sup>91</sup> The bundle of sticks analogy provides a useful tool for analyzing the ways in which government actions affect private property rights and a framework within which it may be determined when those government actions amount to takings.<sup>92</sup> Consider a fee simple absolute in land. Under the bundle of sticks conception, the property rights associated with the fee simple absolute are analogized to a "bundle of sticks." Each distinct legal right and each distinct legal obligation associated with the fee simple absolute may be conceptualized as a particular stick in the bundle.<sup>93</sup> For example, the legal rights may include the uses that may be made of the land, the actions that can be taken on the land, the actions that can be taken against others regarding the land, and the transactions that can be undertaken to convey rights in the land.<sup>94</sup> The legal obligations may include the duty to pay taxes on the land, affirmative duties under public laws or regulations affecting the land, obligations toward others under private law, and any affirmative duties arising under private land use servitudes.<sup>95</sup>

It is worth emphasizing that both public and private law play a role in defining the hierarchy of private property rights. Public laws or regulations and private laws or land use servitudes that restrict land uses eliminate or diminish specific rights in the

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<sup>91</sup> See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 102–03 (8th ed., 2014).

<sup>92</sup> Property rights are inherently hierarchical but the focus here is on the private property rights of individuals as against the government. *Id.* at 33–34.

<sup>93</sup> See Smythe, *supra* note 50, at 369–70.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

bundle of sticks;<sup>96</sup> public laws or regulations and private laws or land use servitudes that impose affirmative duties on the owner add new or augment existing obligations in the bundle of rights.<sup>97</sup> Laws can change, and when they do, that can affect an owner's private property rights. The fact that laws can change means that there is always some uncertainty associated with an owner's property rights.<sup>98</sup> Of course, when an owner's property rights are diminished through government actions under public laws, the owner may be entitled to just compensation under takings law if the owner can sustain an implicit takings claim under the Supreme Court's takings jurisprudence.

#### B. The Character of Government Action and Takings

The fact that the government has the authority to eliminate rights (or add obligations) in an owner's bundle implies that the government holds something similar to a right of entry against private property rights even if the regulatory authority is never exercised.<sup>99</sup> The scope of the government's "right of entry" is limited, of course, by constitutional restraints, such as the doctrine of substantive due process and the Takings Clause.

When a government exercises its right of entry, the elimination of rights (or addition of obligations) in the owner's bundle can give rise to a takings claim. For example, in a conventional, physical taking, the government terminates all the owner's rights, including possessory rights, and keeps them or transfers them to some other party.<sup>100</sup> In order for the government to exercise such extreme powers, the public use requirement would have to be met and the government would have to provide just compensation. The owner could challenge the exercise of the government's takings power on the grounds that it was not for a public use,<sup>101</sup> or that just compensation was either not provided or not adequate.<sup>102</sup>

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<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See id.* at 371.

<sup>99</sup> *See id.*

<sup>100</sup> *See id.* at 372; *see also* Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 101 (2012).

<sup>101</sup> *See, e.g.,* *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>102</sup> The calculation of just compensation can be tricky. The Supreme Court has held that the calculation should reflect the amount of the property owner's loss. The owner's loss, not the taker's gain, is the measure of such compensation. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 236 (2003). The Court has also indicated that the loss should be calculated with reference to market values. *See, e.g., U.S. ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266 (1943); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946).

Implicit takings are conceptually more complicated. For the sake of the analysis in this article, implicit takings include both regulatory takings and exaction takings.<sup>103</sup> A regulatory taking is one caused by a law or regulation that eliminates or diminishes an owner's property rights. The overarching principle of regulatory takings jurisprudence is that a law or regulation can go too far, and when it does, it amounts to a taking that requires just compensation.<sup>104</sup> Thus, when a government law or regulation eliminates too many rights of too much importance in an owner's bundle, or adds too many obligations with too many burdens<sup>105</sup> to an owner's bundle, there is a regulatory taking and the government will be required to pay the owner just compensation.<sup>106</sup> For the sake of the contrast with a taking through an exaction, the most important fact to emphasize about a regulatory taking is that it results when a law or regulation causes the immediate and nondiscretionary elimination of a right in an owner's bundle.<sup>107</sup> This is important, of course, because until the right has been eliminated, there can be no taking.<sup>108</sup>

The definition of "exaction" and "exaction takings" is centrally important. Most scholars have used the term exaction quite broadly. For example, Mark Fenster defines exactions as "concessions local governments have the discretion to require of property owners as conditions for the issuance of entitlements that enable the intensified use of real property."<sup>109</sup> He elaborates

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<sup>103</sup> As used by Krier and Sterk, the term "implicit takings" includes all takings other than conventional, physical ones, which they refer to as "explicit takings by condemnation." Krier & Sterk, *supra* note 19, at 40. Thus, it includes some takings other than regulatory or exaction takings, and even judicial takings, which have not yet been recognized by the Supreme Court. *But see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't. Prot., 560 U.S. 702, 714–15 (2010); *see also* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1471–72 (1990).

<sup>104</sup> This was an overarching principle of takings law stated by the Supreme Court in *Pennsylvania Coal Co. v. Mahon*. 260 U.S. 393, 415 (1922). The Supreme Court provided its most definitive statement about implicit takings in *Penn Central*, but the *Penn Central* multi-factor inquiry incorporates the principle from *Penn Coal* that a law or regulation that goes too far amounts to a taking. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

<sup>105</sup> For the sake of elegance, the analysis shall from here on assume all takings arise from the elimination of rights.

<sup>106</sup> The Supreme Court has not yet required that implicit takings be for a public use. This is another respect in which the Court's takings jurisprudence has lacked coherence. That matter, however, is beyond the scope of the present endeavor. For a critique, and an argument that the public use requirement should be extended to all takings, see Donald J. Smythe, *SCOTUS in the Strait of Messina: Steering the Course Between Private Rights and Public Powers*, 25 TEX. REV. L. & POL. 437, 440 (2021).

<sup>107</sup> In other words, in a regulatory taking, the government exercises its "right of entry" immediately, thus eliminating the owner's property right immediately. *See id.* at 444.

<sup>108</sup> *See id.*

<sup>109</sup> Fenster, *supra* note 22, at 613.

that they “include mandatory dedications of land, fees required in lieu of dedication, and impact fees given by property owners in exchange for permits, zoning changes, and other regulatory clearances.”<sup>110</sup> Fenster was following Vicki Breen, who, in an earlier article, defined exactions to include nondiscretionary requirements established under laws or regulations as well as discretionary ones demanded by administrative bodies.<sup>111</sup> More recently, Krier and Sterk, citing Fenster, define exactions as “government measures requiring land developers to provide goods and services, or pay money (impact fees) as a condition of project approval.”<sup>112</sup>

The Supreme Court itself has not expressly defined the term “exaction,” although it has used the term in addressing exactions takings claims.<sup>113</sup> It is important to observe, therefore, that the takings claims in its three major exaction cases—*Nollan*, *Dolan*, and *Koontz*—were each brought against decisions made by a government administrative body, comprised of appointed officials<sup>114</sup> exercising discretion delegated to it under a law,<sup>115</sup> and required an owner to convey property rights to the government or the public in return for the granting of a permit necessary to develop the owner’s property.<sup>116</sup> The Supreme Court has thus only upheld exaction takings claims against administrative bodies comprised of appointed members who exercised discretion that was granted to them under the laws that established the permit requirements in making individualized determinations about the exactions that were required.

Although the Supreme Court has never formally defined the term, we can deduce that the Court’s definition of exaction must be at least broad enough to encompass the exactions in *Nollan*,

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<sup>110</sup> *Id.* Such a broad definition may go too far, although that is beyond the scope of the analysis here.

<sup>111</sup> Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 481–82 (1991).

<sup>112</sup> Krier & Sterk, *supra* note 19, at 47.

<sup>113</sup> See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994); see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). Interestingly, Justice Scalia’s majority opinion in *Nollan* did not use the term exaction. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

<sup>114</sup> The voting members of the California Coastal Commission, which demanded exactions from *Nollan*, the City Planning Commission, which demanded exactions from *Dolan*, and the St. Johns River Water Management District officials, who suggested exactions to *Koontz*, were all appointed officials or public employees exercising discretion delegated to them under law. See CAL. PUB. RES. CODE § 30301 (2017); TIGARD MUN. CODE § 2.08.110 (2021); FLA. STAT. § 373.073 (2009).

<sup>115</sup> See CAL. PUB. RES. CODE § 30301 (2017); TIGARD MUN. CODE § 2.08.110 (2021); FLA. STAT. § 373.073 (2009).

<sup>116</sup> See *Nollan*, 483 U.S. at 825; *Dolan*, 512 U.S. at 377; *Koontz*, 570 U.S. at 595.

*Dolan*, and *Koontz*. There is no reason, however, to believe that the Court would uphold takings claims against any exactions that were not within the scope of those precedents. If the term “exaction” is to be defined more broadly than the exactions in those cases, therefore, then we must allow for the possibility that some exactions might not be subjected to the nexus and rough proportionality tests. Alternatively, if we want the term “exaction” to apply only when an exaction would be subject to the nexus and rough proportionality tests, then we must limit the definition to include only exactions to which the Supreme Court has applied the nexus and rough proportionality tests.<sup>117</sup> The analysis here will follow the practice in the scholarly literature and define exactions broadly. Yet nothing in the analysis depends on that definition.

Under Supreme Court jurisprudence, when an exaction is demanded in return for a permit by an administrative body exercising discretion delegated to it under a law or regulation, the nexus and rough proportionality tests will be applied to determine whether the exaction is a taking.<sup>118</sup> The nexus test inquires into whether there is a logical connection between the exaction and the purpose for which the permit is required under the law,<sup>119</sup> and the rough proportionality test inquires into whether there is at least rough proportionality between the extent of the exaction and the adverse impact of the proposed development.<sup>120</sup> If an exaction fails either or both tests, it amounts to a taking and just compensation is required.<sup>121</sup> The mere fact that the owner may convey some alternative to a property right in the property she wishes to develop, such as a money payment, in return for the permit does not negate the fact that a taking occurs.<sup>122</sup> Moreover, the mere fact that the permit has not yet been denied when it is made known that the exaction will be required does not negate the fact that a taking occurs either.<sup>123</sup> A taking thus occurs when an exaction that has been

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<sup>117</sup> This appears to be the way the Supreme Court of California has defined the term “exaction.” In *California Building Industry Association v. City of San Jose*, the court addressed whether the inclusionary housing requirements under a San Jose ordinance amounted to a taking and stated that “the conditions that the San Jose ordinance imposes upon future developments do not impose ‘exactions’ upon the developers’ property so as to bring into play the unconstitutional conditions doctrine under the takings clause of the federal or state Constitution.” *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974, 979 (Cal. 2015).

<sup>118</sup> See *Koontz*, 570 U.S. at 605–06.

<sup>119</sup> See *Nollan*, 483 U.S. at 836–37.

<sup>120</sup> See *Dolan*, 512 U.S. at 391.

<sup>121</sup> As with regulatory takings, the Supreme Court has not yet imposed a public use requirement. For a discussion and critique, see Smythe, *supra* note 106.

<sup>122</sup> See *Koontz*, 570 U.S. at 612.

<sup>123</sup> See *id.* at 606.



required or suggested in return for a permit by an administrative agency or tribunal authorized to exercise its discretion under a law or regulation fails one or both of the nexus and the rough proportionality tests.<sup>124</sup>

As the Supreme Court has developed its takings jurisprudence thus far, there are some important distinctions between exactions takings and regulatory takings. An exaction taking does not occur until an administrative body demands or suggests the exaction requirement to an applicant for a permit.<sup>125</sup> Unlike a regulatory taking, this means an exaction taking does not occur at the time the law or regulation under which the permit is required is enacted or created.<sup>126</sup> The law is therefore not the target of the takings claim, the takings claim is against the exaction.

Moreover, an exaction requirement is determined by an administrative body comprised of appointed government officials acting with discretion granted to it under a law or regulation. Unlike a regulatory taking, an exaction taking occurs under the discretionary authority exercised by appointed officials, not under the legislative authority of elected officials who are directly accountable to voters. Furthermore, exaction requirements are determined on an individual basis by an administrative body, and they are not as transparent as laws or regulations, which are typically made public knowledge as soon as they are enacted or created.<sup>127</sup>

These are important distinctions. If the term “exaction” is used broadly to include any “government measures requiring land developers to provide goods and services, or pay money (impact fees) as a condition of project approval,”<sup>128</sup> then it appears that only exactions required by an administrative body using its discretion to make individualized decisions on a case-by-case basis will be subjected to the nexus and rough proportionality tests.<sup>129</sup> This comports with basic property theory.

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<sup>124</sup> See *Id.* at 595.

<sup>125</sup> In fact, it would technically only occur when the permit applicant conveyed the exaction. See *Smythe*, *supra* note 106, at 462. Therefore, an exaction taking cannot occur until the administrator has made the requirement known.

<sup>126</sup> Technically, a regulatory taking can only occur when a law or regulation deprives an owner of a property right. See *Krier & Sterk*, *supra* note 19, at 41. Thus, if a law is enacted that will deprive an owner of a property right at some future date, a regulatory taking could only occur at that future date, when the law becomes effective.

<sup>127</sup> This is emphasized by Timothy Mulvaney. See *Mulvaney*, *supra* note 12, at 198.

<sup>128</sup> *Krier & Spier*, *supra* note 19, at 47.

<sup>129</sup> See *Koontz*, 570 U.S. at 605–06.

When a law requiring a permit is enacted and discretion to grant permits is delegated to an administrator, it is not clear whether or what property rights must be conveyed by an owner to obtain a permit until the administrator exercises its discretion. Nothing is taken until the administrator demands an exaction. But when a law requiring a permit is enacted which also establishes the requirements for obtaining a permit, it is immediately clear what property rights must be conveyed by an owner to obtain a permit. Of course, a major concern when exactions are determined at the discretion of an administrator is whether the administrator might abuse its discretion and demand too much. The strongest justification for the Supreme Court's heightened scrutiny of exactions is the need to curb abuses of administrative discretion and ensure that owners are not coerced into sacrificing too much of their property in return for development permits.

### C. What About Inclusionary Housing Programs?

When a regulation is challenged as a taking the courts normally apply the multi-factor inquiry prescribed by the Supreme Court in *Penn Central*.<sup>130</sup> When an exaction is challenged as a taking the courts normally apply the nexus and rough proportionality tests.<sup>131</sup> Recent California cases challenging inclusionary zoning laws as takings have turned on whether the multi-factor inquiry from *Penn Central* or the nexus and rough proportionality tests from *Nollan* and *Dolan* should apply.<sup>132</sup> The inclusionary zoning laws considered in the California cases required a permit for any property development that would only be granted if the development plan included a minimum percentage of “affordable” housing units below market prices or the developer paid a fee toward financing affordable housing elsewhere. The California courts rejected claims the inclusionary zoning laws effected takings on the ground that they were regulations subject to the *Penn Central* multi-factor inquiry, rather than exactions, subject to the nexus and rough proportionality tests.<sup>133</sup> The Supreme Court denied certiorari in both cases, but, in a notable concurring opinion from one of the cases, Justice Thomas observed that it raised an unsettled

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<sup>130</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>131</sup> See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

<sup>132</sup> See, e.g., *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 1001 (Cal. 2015); *Cherk v. County of Marin*, No. A153579 WL 6583442, \*5 (Cal. Ct. App. Dec. 14, 2018).

<sup>133</sup> See, e.g., *Cal. Bldg. Indus. Ass'n*, 351 P.3d at 1002; *Cherk*, WL 6583442, at \*7, \*9.

question under the law of takings: “whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one.”<sup>134</sup> In fact, in a much earlier case involving a takings claim against an Atlanta ordinance that mandated certain minimum landscaping requirements for paved parking lots, the Supreme Court of Georgia affirmed the decision of a state trial court that had rejected the application of the nexus and rough proportionality tests, and Justice Thomas and Justice O’Connor joined in an opinion dissenting from a decision of the Supreme Court to deny certiorari.<sup>135</sup> Confusion about when the Court’s exaction takings analysis should apply, thus, long pre-dated the California inclusionary zoning cases, and Justice Thomas’s concurring opinion merely reiterated the doubt that he and Justice O’Connor had expressed twenty years earlier that “the existence of a taking should turn on the type of governmental entity responsible for the taking.”<sup>136</sup>

From the perspective offered, however, there is an important difference between the character of the government’s action when a property right is taken under a law or regulation and when a property right is taken as a matter of administrative discretion. When a land use regulation is enacted and establishes the requirements for a permit, it immediately removes a stick from a landowner’s bundle of rights. If the regulation goes too far, there is a taking and just compensation is required.<sup>137</sup> When a law is enacted to address some social problem and requires a permit from an administrative body with the discretion to demand requirements in return for granting the permit, there is no immediate removal of any stick from the landowner’s bundle. A stick is removed from a landowner’s bundle only if the administrator exercises its discretion by demanding an exaction in return for the permit. The landowner might never apply for a permit, and the administrator might not demand an exaction even if the landowner does. Only if an exaction is demanded and it goes too far because it fails one or both of the nexus and rough proportionality tests is there a taking.<sup>138</sup>

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<sup>134</sup> *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring).

<sup>135</sup> *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1116–17 (1995) (Thomas, J. and O’Connor, J., dissenting).

<sup>136</sup> *Cal. Bldg. Indus. Ass’n*, 577 U.S. at 1179 (Thomas, J., concurring).

<sup>137</sup> See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (discussing regulatory takings).

<sup>138</sup> See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Whether the nexus and rough proportionality tests should apply to takings claims against inclusionary housing programs therefore should depend upon how the programs are designed. If the inclusionary housing requirements are determined by an administrator exercising discretion under a law that establishes the permit requirement, any property interests demanded or suggested by the administrator in return for a permit should be subject to the nexus and rough proportionality tests. The inclusionary housing programs in the California cases were not designed this way, but some affordable housing programs do apparently give administrators broad discretion to determine affordable housing requirements on an individualized basis.<sup>139</sup>

For example, some affordable housing replacement ordinances do not expressly limit administrators discretion over affordable housing replacement requirements.<sup>140</sup> If administrators are delegated sufficient discretion in determining affordable housing replacement requirements under an affordable housing replacement ordinance, concerns about administrative coercion, lack of transparency, and weak political accountability might justify the application of the Supreme Court's exactions jurisprudence. If so, the nexus test would probably be met if the administrators demanded affordable housing since the logical connection would be obvious. The rough proportionality test would probably also be met, unless the administrator's demand was for more affordable housing than the amount that would be destroyed under the owner's development plan.

The type of inclusionary housing ordinance that has been the focus of most of the recent litigation, however, appears to involve the exercise of legislative authority rather than the exercise of administrative discretion. The ordinances typically require that either a percentage of the units meet specific affordability criteria or that the developer pays a fee that will be used to help finance affordable housing elsewhere.<sup>141</sup> The requirements are not determined on an individual basis by a regulator, and there

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<sup>139</sup> See Hamilton, *supra* note 40, at 172.

<sup>140</sup> For an example, see County of Los Angeles, Cal., Ordinance Amending Title 8—Consumer Protection, Business and Wage Regulations, Title 21—Subdivisions, and Title 22—Planning and Zoning of the Los Angeles County Code (Apr. 6, 2021). The ordinance requires some residential housing redevelopers to replace affordable housing demolished under their redevelopment projects. *See id.* § 22.119.050.A. Moreover, it requires redevelopers subject to the ordinance to obtain permits in advance. *See id.* § 22.119.050.G.1. The ordinance, does not, however, appear to entail the exercise of much administrative discretion. *See id.* § 22.119.050.

<sup>141</sup> *See* RICK JACOBUS, INCLUSIONARY HOUSING: CREATING AND MAINTAINING EQUITABLE COMMUNITIES 24, 27–28 (2015).

is no exercise of administrative discretion.<sup>142</sup> By the reasoning developed here, the requirements should not, therefore, be subject to the nexus and rough proportionality tests. If a landowner subject to such an ordinance makes a takings claim, it should be treated as a regulatory taking, and the *Penn Central* multi-factor inquiry should be applied. As long as the requirements do not go too far,<sup>143</sup> the ordinance will survive the takings challenge and just compensation will not be required.

#### D. The Nexus and Rough Proportionality Tests May Enhance Economic Welfare

Regulatory schemes that establish permits and delegate discretion to an administrative body to decide whether to grant permits and under what conditions have commonly been established to regulate nuisance problems.<sup>144</sup> Nuisance problems typically arise in land use contexts when a landowner's land uses impose external costs on other landowners. In a rough and ready fashion, the Supreme Court's exaction takings jurisprudence has the virtue of curbing administrative excesses, limiting the impact on private property rights, and encouraging economically efficient outcomes when nuisance regulation schemes that entail significant administrative discretion are enacted.<sup>145</sup>

Under nuisance regulation schemes, exactions can enhance economic efficiency by helping to abate or offset the external costs of nuisances caused by property developments.<sup>146</sup> But when

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<sup>142</sup> See *id.* at 48.

<sup>143</sup> In theory, an inclusionary housing ordinance could be deemed a taking under the multi-factor inquiry if the requirements for a permit were too extreme. For example, if an ordinance required all new developments in an area to supply only new affordable housing at below-market prices without providing any offsetting incentives or bonuses, a court might well decide that the law goes too far and amounts to a taking.

<sup>144</sup> For example, in *Nollan* the California statute under which an easement was demanded was intended, in part, to protect views of the coastline. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987). Property developments along the coast can obscure other property owners' views and thus decrease their properties' values. That is an external cost associated with coastline property developments. In *Dolan*, one of the purposes of the city's ordinance was to abate water runoff problems. *Dolan v. City of Tigard*, 512 U.S. 374, 378 (1994). Buildings and pavement can diminish the capacity of the land to absorb rain and thus increase water runoff. The additional water runoff from a new development can flood neighboring owners' properties, thus causing external costs.

<sup>145</sup> See, e.g., Richard P. Adelstein & Noel M. Edelson, *Subdivision Exactions and Congestion Externalities*, 5 J. LEGAL STUD. 147, 153-57 (1976); see generally William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 L. & CONTEMP. PROBS. 101 (1987); David E. Mills, *Zoning Rights and Land Development Timing*, 66 LAND ECON. 283 (1990); J. Michael Pogodzinski & Tim R. Sass, *The Economic Theory of Zoning: A Critical Review*, 66 LAND ECON. 294 (1990).

<sup>146</sup> See, e.g., Fischel, *supra* note 145; Mills, *supra* note 145; Pogodzinski & Sass, *supra* note 145.

administrators abuse their discretion by demanding exactions that do not help to abate or offset the costs of the nuisances or by demanding exactions that go beyond abatement, they can impede property developments that would be economically efficient.<sup>147</sup> The nexus and rough proportionality tests help police against exactions that do not mitigate nuisances or that are so excessive they discourage owners from investing in economically efficient property developments.

A classic example is water runoff. Property developments can create water runoff problems for neighboring properties. New buildings and more pavement can result in less water absorption into the land and hence more water runoff from the property. The additional water runoff can flood neighboring properties, damage basements, destroy gardens, erode the soil, and even undermine structures. It can also contribute to pollution and carry off sediment.<sup>148</sup> A permit requirement under a regulatory scheme can help to ensure that the external costs associated with the water runoff are internalized<sup>149</sup> and the water runoff is mitigated. In deciding whether to grant a permit the administrator can evaluate the adverse impact of the development on water runoff. It can also determine what exactions will be required, but the administrator's discretion in demanding exactions is constrained by the need to ensure the exactions meet the nexus and rough proportionality tests.

### 1. The Nexus Test

The nexus test ensures that an exaction is logically related to the purpose for which the permit is required and thus directly helps to mitigate the adverse impact of the proposed development. Thus, when a development increases water runoff a demand for an easement to channel the water runoff into the public sewer system would meet the nexus test because the easement would help to mitigate the water runoff problem. A demand for dedicated parking spaces for city employees would not meet the nexus test. Even if the developer was willing to convey the parking spaces, the parking spaces would not help mitigate the water runoff problem. That means the social costs of water runoff would not be abated,

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<sup>147</sup> See, e.g., *id.*

<sup>148</sup> See, e.g., *Runoff: Surface and Overland Water Runoff*, USGS WATER SCI. SCH., [http://www.usgs.gov/special-topic/water-science-school/science/runoff-surface-and-overland-water-runoff?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](http://www.usgs.gov/special-topic/water-science-school/science/runoff-surface-and-overland-water-runoff?qt-science_center_objects=0#qt-science_center_objects) [<http://perma.cc/D7SW-XBD3>].

<sup>149</sup> For the classic discussion of internalizing externalities, see generally ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* (1920).

unless the neighbor abated them, and the neighbor might not do that. As long as the costs to the property owner of abating the water runoff were less than the costs to the neighbor of suffering the water runoff damage, it would be economically efficient to condition a development permit on the property owner conveying an easement to abate the water runoff.

A related virtue of the nexus requirement is that it may discourage excessive regulation. There has been an explosion in administrative regulations over the last fifty years, and the proliferation has been accompanied by growing concerns that the regulations are too often used to coerce property owners into making concessions to the government.<sup>150</sup> The nexus requirement ensures that any exactions demanded by regulators will be related to the adverse impact of proposed developments. It thus, ensures some minimal integrity in the regulatory process. If an exaction was simply required to be roughly proportional, the adverse impact of the development might not be mitigated even though it would be economically efficient to mitigate it.

Equally importantly, without the nexus requirement, the distribution of benefits from a property development might be different. To the extent the exactions were unrelated to the nuisance problem, neighbors would still bear the external costs, and the exactions would provide a windfall to whomever benefitted from them. There is a concern that if governments can use exactions to redistribute the benefits of property developments instead of using them to mitigate nuisance problems, they might establish even more regulations than are necessary to further their redistributive objectives.<sup>151</sup> Of course, those who administer the government's regulatory apparatus might be among the biggest beneficiaries,<sup>152</sup> as well as those who benefit from the exactions.

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<sup>150</sup> The possibility of administrative "extortion" was recognized by the Supreme Court in *Nollan* and referenced in *Dolan*. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994). For articles addressing the problem, see Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 6-7 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1413 (1989).

<sup>151</sup> See WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 341-51 (1995).

<sup>152</sup> This implicates the economic theory of bureaucracy. See generally William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293 (1968) (seminal article on economic theory of bureaucracy); see also WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND PUBLIC ECONOMICS* (1994).

## 2. The Rough Proportionality Test

From the developer's perspective, any exactions demanded by an administrator for a permit are the "price" the developer must "pay" to proceed with the project. The rough proportionality test helps to ensure that the price the developer pays for the permit does not grossly exceed the amount necessary to abate the adverse impact of the proposed development. For example, if the additional water runoff during a rainfall caused by an owner's proposed development is expected to be one hundred gallons of water per minute, then an easement that would have the capacity to accommodate two hundred gallons of water per minute would exceed what was proportional to the adverse impact of the proposed development and it should fail the rough proportionality test.<sup>153</sup> A demand for an easement with such a large capacity would thus amount to a taking. An easement with a capacity of one hundred gallons per minute, however, would pass the rough proportionality test. To the extent that an exaction is calibrated to be proportional to the adverse impact of a proposed development, the price paid for a development permit will be no more than the cost of mitigating the adverse impact on neighbors.

Rough proportionality between exactions and the external impact of a development encourages owners to make socially efficient decisions about developing their properties. For the sake of illustration, assume the costs of abating the external impact of a proposed development are less than the costs of the unabated external impact.<sup>154</sup> The maximum social surplus that could be earned from the development, therefore, would be the gross (not net of abatement costs) value the owner could expect to derive from the development minus the costs of abating the external impact of the development on neighbors. If the owner is required to provide an exaction that abates the neighbors' costs, the owner will only proceed with the development plan if the gross value the owner derives exceeds the cost of the exaction. If the cost of the exaction makes the development plan unprofitable for the owner, then the development is socially undesirable because the

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<sup>153</sup> The formal study of stormwater runoff is very scientific and uses different terms. The fact that it is a subject to which so much careful thought has been devoted reflects its importance. See U.S. Dep't of the Interior, *U.S. Geological Survey*, USGS WATER SCI. SCH., <http://www.usgs.gov/special-topic/water-science-school> [<http://perma.cc/KR72-PBHL>] (providing a more comprehensive introduction to water issues).

<sup>154</sup> This raises the question: what if the costs of abating the external impact of the development are greater than the external costs? Of course, in that case, it would not be economically efficient to abate the external impact. There are many possibilities that could confound the example, but the example makes a simple point that is probably germane to a wide number of situations, especially in cases involving water runoff.



maximum social surplus that could be derived from it would be negative. If the exaction is proportional to the adverse impact of the development and the development project is still profitable or desirable for the owner, then the development is socially desirable because it will generate positive social surplus.<sup>155</sup>

In the parlance of economic theory, an exaction helps to internalize the costs of an externality and harmonize the property owner's economic incentives with the social good.<sup>156</sup> The rough proportionality test helps to ensure that property owners are not discouraged from proceeding with socially desirable developments by exactions that are excessive and make them unprofitable. Of course, the rough proportionality test only militates against exactions that are excessive. If an administrator demands exactions that do not fully mitigate the adverse impacts of a development, the owner might be encouraged to proceed with a development that is socially undesirable because the private gain is more than offset by the external costs.<sup>157</sup> By internalizing the external costs of development projects, exactions that are appropriately calibrated can help ensure that only socially desirable developments—those that yield positive social surplus—will be undertaken.

The rough proportionality test inhibits administrators from demanding exactions that are excessive and discourage socially desirable property developments, but it does not help to inhibit administrators from demanding exactions that are inadequate to mitigate fully the adverse impacts of property developments that might therefore be undertaken even though, on balance, they are socially undesirable.<sup>158</sup> From a social perspective, if the costs of abating a nuisance are less than the costs of the nuisance, then the nuisance should be abated, so that is unquestionably a problem. Nonetheless, it could be overstated. The costs of an unabated nuisance might not be enough to make the economic surplus from a property development negative. As long as the gross value of the development to the property owner exceeded the costs of the nuisance, the property development would still make a

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<sup>155</sup> This is a simple example illustrating the social benefits of “internalizing” an externality. For the classic treatment, see PIGOU, *supra* note 149, at 43.

<sup>156</sup> *See id.*

<sup>157</sup> Mulvaney, *supra* note 12, at 180 (suggesting this is commonly the case).

<sup>158</sup> The social surplus would be the gross value derived by the owner minus the costs of any exactions minus the unabated external costs to others. The owner would derive a profit if the gross value minus the costs of exactions was positive, but the social surplus could be negative if the unabated external costs were sufficiently high. Nonetheless, in many cases the unabated external costs would probably not be sufficiently high to make the economic surplus from the proposed development negative.

positive addition to social surplus, even though the distribution of the benefits might be unfair to those harmed by the nuisance.

Although the rough proportionality test might not achieve the most desirable outcomes in all cases, it still serves important purposes. The regulatory process probably should help to militate against any other parties from having to bear inordinate external costs. In ideal cases, the exactions demanded from a developer would mitigate the adverse impacts of the plan optimally and compensate others adequately for any adverse impacts that could not be mitigated. Moreover, in such cases, property owners would be able to recoup all of the social surplus generated by their development projects. In that respect, when exactions pass constitutional muster, they allow owners to derive the maximum possible value from their properties, subject to mitigating the adverse impacts they might have on others. Of course, in less-than-ideal cases, the rough proportionality test would not help to achieve such lustrous outcomes. But it might not be too much of an exaggeration to say that the Supreme Court's exactions jurisprudence tends to encourage socially constructive property developments, and it tends to protect private property from the overreaches of incompetent or self-serving administrators.

### 3. What About Inclusionary Housing Programs?

Inclusionary housing programs advance an important social objective, which is to make housing more affordable and neighborhoods more inclusive, but they do not address nuisance problems. The inclusionary zoning ordinances which have been the subject of recent litigation have not entailed the kind of administrative discretion that warrants application of the nexus and rough proportionality tests either. The affordable housing requirements have been established under the ordinances and have not been determined on an individualized basis. One of the concerns about the requirements, no doubt, is that they are perceived to be a way for elected officials to advance a social objective—more inclusionary housing—at the expense of a relatively small group: property developers. To that end, the requirements extract some of the surplus from property developments to advance an arguably unrelated social objective. While this may diminish the incentives for some property developments, and while it no doubt impinges on private property rights, to the extent that the affordable housing requirements are subject to any discipline, it is through the political process.

Some inclusionary housing programs, however, could involve enough administrative discretion to warrant application of the nexus and rough proportionality tests. The previous example of affordable housing replacement programs is germane.<sup>159</sup> Such programs are analogous in some ways to nuisance regulatory schemes. For example, suppose a developer wants to redevelop a city block that is fifty percent affordable housing. If the ordinance requires the replacement of any affordable housing destroyed and delegates some discretion over granting permits to an administrator, the administrator would be appropriate to demand that the redevelopment plan should include fifty percent affordable housing. The cannibalization of affordable housing would be analogous to the adverse impact of the development plan, and the nexus and rough proportionality tests would ensure that the exaction mitigated the adverse impact but did not extract excessive surplus from the redevelopment project.

#### E. Reconciling Exactions and Regulatory Takings

Whether an exaction should be subjected to the nexus and rough proportionality tests depends on the character of the government action that determines the exaction. This brings the analysis full circle because the character of the government action is one of the factors stated by the Supreme Court in its articulation of the multi-factor inquiry for a regulatory taking in *Penn Central*. Writing for the majority, Justice Brennan acknowledged that the Court's regulatory takings jurisprudence had developed on an ad hoc case-by-case basis, but he observed that:

[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action.<sup>160</sup>

Scholars have parsed this language and Justice Brennan's opinion to try to squeeze out of it as much guidance from it as they can. At least three factors leap from the page, and one of them is the character of the government action.<sup>161</sup>

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<sup>159</sup> See discussion *supra* Section II.C.

<sup>160</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation omitted).

<sup>161</sup> Professors Dana and Merrill identify six factors: the diminution in value; the degree to which reasonable investment-backed expectations were frustrated; whether the government action involved a physical invasion; whether the government action was a nuisance regulation; whether there was an "average reciprocity of advantage;" and

Justice Brennan explained how the character of the government action might matter by observing that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government.”<sup>162</sup> Others have suggested that when the government action entails the regulation of a nuisance, a taking is unlikely to be found.<sup>163</sup> Nothing in the majority opinion, however, suggests that an inquiry into the character of the government action should be limited to whether it results in a physical invasion by the government or a nuisance regulation. In fact, the Court’s acknowledgement that it has been unable to develop any “set formula” for its takings jurisprudence<sup>164</sup> was an acknowledgement that it is possibly in need of further development and refinement.

The apparently ad hoc nature of the Court’s implicit takings jurisprudence has only been exacerbated by some of the apparent inconsistencies between the treatment of regulatory takings and exaction takings. For example, under the *Penn Central* multi-factor inquiry, when a government action results in a physical invasion, it is a taking.<sup>165</sup> That is one of the few categorical rules of modern takings law. Yet, when the nexus and rough proportionality tests from *Nollan* and *Dolan* apply, an exaction that consists of the owner conveying an easement to the public is a taking only if the easement is not logically connected to the purpose of the regulation under which a permit is required and/or the easement is not proportional to the adverse impact of the proposed development.<sup>166</sup> If the easement passes both the nexus and rough proportionality tests, the exaction is not a taking and just compensation is not required.

The other glaring inconsistency was called out by Justices Thomas and O’Connor in their dissenting opinion to the Supreme Court’s denial of certiorari in *Parking Association of Georgia*,<sup>167</sup> and it was restated by Justice Thomas in his concurrence in *California Building Industry Association*.<sup>168</sup> This Article has attempted to explain why the nexus and rough proportionality

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whether the regulation destroyed a recognized property right. See DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 132 (2002).

<sup>162</sup> *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citation omitted).

<sup>163</sup> DANA & MERRILL, *supra* note 161, at 133.

<sup>164</sup> *Penn Cent. Transp. Co.*, 438 U.S. at 124.

<sup>165</sup> See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

<sup>166</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 391–96 (1994).

<sup>167</sup> *Parking Ass’n v. City of Atlanta*, 515 U.S. 1116–18 (1995) (Thomas, J. and O’Connor, J., dissenting).

<sup>168</sup> *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring).

tests should be applied to exactions demanded by administrators exercising discretion delegated to them under laws, and not to the laws that establish identical or similar requirements for a permit. Justice Thomas, however, raises a bigger question: why should the likelihood that a taking is found seem to turn so heavily on whether the multi-factor inquiry or the nexus and rough proportionality tests apply?

The matter may be more complicated than it appears. Inclusionary housing programs offer a good example. Consider again an affordable housing replacement policy.<sup>169</sup> Suppose it is implemented through a law that requires property owners to replace all the affordable housing units they destroy in redeveloping their properties with an equivalent number of affordable housing units of the same size and quality. Suppose that it does not require the exercise of any administrative discretion because the definitions of affordable housing, housing size, and affordability are all clear and objectively determinable.

Suppose that a developer owns a city block comprised entirely of affordable housing. The law would require the owner to replace the entire city block with equivalent affordable housing under any redevelopment plan. That would severely constrain the owner's economic opportunities, especially if there were no incentives or bonuses to offset the owner's losses from the affordable housing. If the developer made a takings claim against the law, the claim would probably be assessed using the *Penn Central* multi-factor inquiry. Under that inquiry, the law might well be deemed a taking because it would have a severe economic impact on the value of the owner's property,<sup>170</sup> and it might also frustrate the owner's distinct investment-backed expectations. Indeed, the owner might have purchased the block for the sole purpose of redeveloping it for more profitable uses, and she might have made significant investments towards doing so by hiring architects, attorneys, and other professionals to do the planning.

Alternatively, suppose the affordable housing program is structured so that an administrator is delegated discretion to determine how much affordable housing, what size, quality, and cost, any property owner will need to replace. Faced with an application for a permit from the owner of the entire block of affordable housing, the administrator might well decide to demand that the entire block be redeveloped with affordable housing of the

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<sup>169</sup> See *supra* Section II.C.

<sup>170</sup> If affordable housing means housing sold at below market prices, the only way the developer could even break even on any redevelopment is if various incentives were offered.

same size and affordability as the housing already on the block. This demand would amount to an exaction. The exaction would constrain the owner's economic opportunities in exactly the same way as the alternative law discussed above. If the owner made a takings claim, however, the exaction would be subjected to the nexus and rough proportionality tests.<sup>171</sup> Given that the exaction (the requirement to replace the affordable housing) is logically related to the regulation's purpose, and that the required amount of replacement affordable housing is proportional to the amount of affordable housing to be destroyed by redevelopment, it seems unlikely that an exaction taking has occurred.

The impact on the owner of the property is the same regardless of how the program is structured. Yet, there is probably a regulatory taking if the requirements are established using objective criteria under the law, and there is probably *not* an exaction taking if the same requirements are established by an administrator exercising discretion delegated to it under the law. Should the assessment of whether a taking has occurred depend so heavily on how the program is structured? The only sensible answer is no. As Justice Thomas has implied, there is something still missing from the Supreme Court's implicit takings jurisprudence, so that it lacks coherence and consistency, and is in need of further refinement and development.<sup>172</sup>

That said, the Supreme Court's exaction takings jurisprudence should have an important place in any further refinements and developments. There are important reasons for the Court to scrutinize government actions that involve the exercise of administrative discretion more carefully than government actions that involve the exercise of legislative authority. The exercise of administrative discretion is less transparent, less accountable, and typically involves case-by-case decisions that can result in inequities. Not least of all, there is a larger social concern about encouraging excessive exercises of discretionary administrative authority.

By all appearances, the Supreme Court's exaction takings jurisprudence is well-designed, at least within the sphere of its most appropriate application. As a general matter, it encourages the mitigation of socially harmful nuisances or other social harms, it incentivizes developers to make socially desirable decisions about how to develop their properties, and it allows property owners to derive as much value from their properties as possible

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<sup>171</sup> See *supra* Section II.C.

<sup>172</sup> *Cal. Bldg. Indus. Ass'n.*, 577 U.S. at 1179 (Thomas, J., concurring).

subject to the need to pay for external costs. Perhaps most important of all, it protects private property from unelected administrative officials who might abuse their discretion to usurp surplus from the owner's development projects for other purposes.

Nonetheless, the Supreme Court's exactions jurisprudence is better regarded as a further development of implicit takings jurisprudence than as an island unto itself. If the character of the government action involves the exercise of administrative discretion to demand an exaction in return for a permit required to develop property under a law enacted by a legislature, then the nexus and rough proportionality tests should be applied. If the exaction fails one or both of the tests, it is a taking. If the exaction fails the nexus test, then there is no logical connection between the exaction and the purpose for which the permit is required. The administrative body that demands the exaction has gone too far by seeking to advance some purpose other than the one that the law was intended to serve. If an exaction fails the rough proportionality test, then the administrator has gone too far by demanding too much in return for the permit.

If an exaction passes the nexus and rough proportionality tests, it is not a taking, even though it might entail a physical invasion of an owner's land.<sup>173</sup> That is consistent with the multi-factor inquiry because of the character of the government action. An exaction is only demanded by an administrator in return for a permit. The permit is required under law, but the requirements for obtaining the permit, if any, are left to the administrator's discretion. A landowner's right to develop her property is thus eliminated by the law requiring the permit. If the owner applies for a permit and an exaction is demanded, then it is the price the owner must pay to "buy back" the right to develop her land. If the owner is willing to "pay" for the right to develop her land by conveying an easement, or otherwise allowing a physical invasion, the easement is not taken, rather it is consideration for a development right.

In principle, however, there is no reason why a property owner should be limited to making an exaction takings claim. The administrator is delegated discretion to demand exactions by law. The law has a purpose that is relevant in applying the nexus and rough proportionality tests and thus it limits the scope of the administrator's discretion. But what if an administrator properly exercises discretion under the law so that neither the nexus nor rough proportionality test fails, but the exactions that are properly

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<sup>173</sup> *Dolan v. City of Tigard*, 512 U.S. 371, 391–96 (1994).

demanded under the law still go too far? Can the property owner then not also make a claim that the law amounts to a regulatory taking? There is no logical reason why not. In fact, the principles of takings jurisprudence seem to obligate courts to vindicate the owner's property rights by allowing the additional claim.

Consider again the example of an affordable housing replacement program, structured so that an administrator is delegated discretion to determine how much affordable housing a property owner will need to replace in order to obtain a development permit.<sup>174</sup> Suppose an owner whose property is devoted entirely to affordable housing units applies for a development permit. Suppose further she had purchased the property in the hope of redeveloping it for more profitable uses and had made significant concrete investments in a redevelopment plan. If the administrator demands that her new development be comprised entirely of affordable housing to replace all the affordable housing that would be destroyed, an exaction takings claim would probably fail because the nexus and rough proportionality tests would probably be met.<sup>175</sup> Of course, the exactions could nonetheless have a very severe economic impact on the owner.

If the owner was allowed to make an additional takings claim targeted not at the exaction but at the law under which the exaction was demanded, that could help to protect the owner from a law that goes "too far" even if the exaction does not. In the affordable housing replacement example, the law might amount to a taking by authorizing an exaction that has such a severe economic impact on the owner. As a general matter, the additional claim would most appropriately be assessed under a slightly modified version of the *Penn Central* multi-factor inquiry. Slight modification would be necessary to accommodate some of the special characteristics of exactions. For example, if an exaction was for an easement, the *per se* rule regulating government action that results in a physical invasion would not apply. But the other components of the *Penn Central* multi-factor inquiry could still apply.

This approach to implicit takings would incorporate the *Nollan/Dolan* nexus and rough proportionality tests into implicit takings jurisprudence, instead of treating them as an alternative to the *Penn Central* multi-factor inquiry. It would entail first determining whether the nexus and rough proportionality tests

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<sup>174</sup> See discussion, *supra* Section II.C.

<sup>175</sup> See *id.*



were needed, and then applying the nexus and rough proportionality tests if they were needed. If the exaction takings claim failed, it would also allow the owner to succeed with a regulatory takings claim using the *Penn Central* multi-factor inquiry. The converse, however, would not be the case. If a regulatory takings claim failed, the owner would not then be able to make an exaction takings claim. An exaction takings claim could only be made if the criteria for applying the nexus and rough proportionality tests were met.

This would respect the special purpose of the Supreme Court's exaction takings jurisprudence: to protect private property rights from the overreaches of unelected administrative officials exercising discretion delegated to them under the law. An exaction takings claim is directed at the exactions demanded by the administrators, not at the law under which the administrators derive their authority. It is easy to imagine a scenario in which the administrators exercise their discretion appropriately under the law, thus exempting any exactions from a successful exaction takings claim, but the law establishes such wide parameters for their discretion that the owner is nonetheless unconstitutionally deprived of property. In such a case, the owner should be able to make a regulatory takings claim against the law itself.

#### F. A Roadmap for How to Analyze an Implicit Takings Claim

Analyzing implicit takings claims is difficult. The task may be simplified by proceeding in discrete steps, each of which prompts an important part of the analysis. The first step addresses any possible exaction takings claim. The subsequent steps begin by applying the per se rules under the *Penn Central* multi-factor inquiry and end with the balancing test. The following steps are suggested:

*Step 1:* Is the property right claimed to be taken through an exaction demanded or suggested by an administrative body exercising discretion delegated under a law or regulation?

- If the answer is yes, apply the nexus and rough proportionality tests. If either or both tests fail, there is an exaction taking. If neither test fails, there is no exaction taking. Proceed to Step 3.
- If the answer is no, there is no need to apply the nexus and rough proportionality tests. Proceed to Step 2.

*Step 2:* Does the government action cause a physical invasion of the property?

- If the answer is yes, there is a taking.
- If the answer is no, proceed to the next step.

*Step 3:* Does the government action consist of a law or regulation that codifies an existing common law nuisance regulation?

- If the answer is yes, there is no taking.
- If the answer is no, proceed to Step 4.

*Step 4:* Does the government action deprive the owner of all economically viable uses of the property?

- If the answer is yes, there is a taking.
- If the answer is no, proceed to Step 5.

*Step 5:* Apply the *Penn Central* balancing test<sup>176</sup> and consider the following:

- The diminution in value of the property.
- The degree to which the owner's reasonable investment-backed expectations were frustrated.
- Whether the government action was a nuisance regulation, even though it did not codify a common law nuisance regulation.
- Whether there was an "average reciprocity of advantage."
- Whether the regulation destroyed a recognized property right.

#### CONCLUSION

The recent cases challenging affordable housing requirements under inclusionary housing laws touch a nerve because they bear on an important social issue and address the line between state powers and private property. They tap into an ongoing controversy about whether government interventions in the housing market do more harm than good. But they also raise much more general questions about implicit takings law. The Supreme Court itself has characterized its implicit takings jurisprudence as ad hoc and lacking any set formula, but some of the questions raised by the inclusionary housing cases cut to whether it is even coherent. The Court's exaction takings cases seem to apply a much higher

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<sup>176</sup> This version of the balancing test is the one suggested in *DANA & MERRILL*, *supra* note 161, at 132, with one slight modification. In light of the Supreme Court's elimination of the permanent/temporary distinction for physical invasions in *Cedar Point Nursery*, the question relating to temporary physical invasions has been eliminated. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

standard of scrutiny than its regulatory takings cases. This has made the scope of exaction takings law a battleground for the opposing sides in the endless struggle between advocates for stronger private property rights and social progressives who advocate for more expansive government powers.

Property theory, the Supreme Court's cases, scholarly commentary, and common sense all imply that takings claims against exactions demanded by unelected administrative officials—who are exercising discretion to make individualized decisions on a case-by-case basis—should be subjected to the *Nollan/Dolan* nexus and rough proportionality tests. Takings claims against exactions required under laws enacted by elected officials, however, should be subjected to the *Penn Central* multi-factor inquiry. There are important reasons for courts to scrutinize government actions that involve the exercise of administrative discretion more carefully than government actions that involve the exercise of legislative authority. The exercise of administrative discretion is less transparent, less accountable, and typically involves individualized decisions made on a case-by-case basis that can result in inequities. Moreover, the expansion in the scale of administrative discretion over the last fifty years has heightened concerns about the abuse of administrative authority. It makes sense, therefore, for exaction takings claims to be subjected to a stricter standard than regulatory takings claims.

The Supreme Court's exaction takings jurisprudence is especially efficacious in policing against administrative abuses under nuisance regulations. Nuisance problems have often been regulated under schemes that delegate discretion to administrators to decide whether to grant permits and what exactions will be required. The exactions can enhance economic efficiency by helping to abate the external costs of nuisances caused by property developments. But when the administrators abuse their discretion by either demanding exactions that do not help to abate the costs of the nuisances or going beyond what is necessary to abate them, the exactions can impede economically efficient property developments. The nexus and rough proportionality tests can help to police against exactions that do not abate nuisances or discourage owners from investing in economically efficient property developments.

Whether inclusionary housing programs should be subjected to the nexus and rough proportionality tests depends upon how they are designed. If the inclusionary housing requirements are determined by an unelected administrator exercising discretion

under a law that establishes the permit requirement, any property interests demanded or suggested by the administrator in return for a permit should be subject to the nexus and rough proportionality tests. The inclusionary housing programs that have recently been challenged were not designed that way, but some inclusionary housing programs, such as some affordable housing replacement programs, may give administrators relatively broad discretion to determine affordable housing requirements on an individualized basis.

If administrators are delegated sufficient discretion in determining affordable housing replacement requirements on an individualized basis, concerns about administrative coercion, lack of transparency, and weak political accountability might justify the application of the Supreme Court's exaction takings jurisprudence. If so, the nexus test would probably be met as long as the exactions included affordable housing requirements because the logical connection between affordable housing requirements and the purpose of the permit requirement would be obvious. The rough proportionality test would also probably be met, unless the administrator's demand was for more affordable housing than the amount that would be destroyed under the owner's development plan.

It is conceivable that exactions might survive an exaction takings claim even though they have a severe economic impact on the property owner. Such a case might arise, for example, when the exactions demanded under an affordable housing replacement program deprive the owner of almost all economically viable property rights. In such a case, the owner should be able to direct a regulatory takings claim against the law itself and not just the exactions. The claim should be subjected to a modified version of the *Penn Central* multi-factor inquiry. The first step in analyzing an implicit takings claim, therefore, should be to ask whether the nexus and rough proportionality tests should be applied. If the answer is no, the full *Penn Central* multi-factor inquiry should be undertaken. If the answer is yes, the nexus and rough proportionality tests should be applied. If either test fails, there is a taking. If neither fails, the *Penn Central* multi-factor inquiry without the *Cedar Point Nursery* per se rule should be undertaken.

Allowing property owners to make exaction takings claims against exactions—which are demanded by administrators exercising discretion delegated to them under laws, and also regulatory takings claims against the laws under which the exactions are determined—would help to achieve greater coherence in the Supreme Court's implicit takings jurisprudence.

It would preserve the virtues of the Court's exaction takings jurisprudence without compromising its regulatory takings precedents, and it would provide an additional layer of protection for property rights in some important cases. Most important of all, it would help to resolve the battle over the scope of the Supreme Court's heightened scrutiny standard in implicit takings cases and allow the important debate about state powers over private property to move forward.