How the Next Supreme Court Justice Will Shape the Future of Affordable Housing

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On Monday, the Supreme Court of the United States declined to review two cases with special bearing on the affordable housing crisis. At the same time, the Court indicated an interest in hearing these issues again in the future. Perhaps after a replacement for former Justice Antonin Scalia has been named, if and when that comes to pass.

One of these cases, *California Business Industry v. San Jose*, involved a challenge to an inclusionary-housing law passed by San Jose that requires developers to set aside 15 percent of new units for affordable housing. The California Business Industry Association sued to stop the law on the grounds that it amounted to the city appropriating private property from owners. (Read the Cato Institute's brief for more on that objection.)

The other case, *Taylor v. Yee*, concerned California's Unclaimed Property Law, which enables the state to appropriate property when the owner cannot be identified. Plaintiffs in the case appealed on the grounds that the law violated their due-process rights, arguing that the state did not use all the available data sources to try to track down the property owners. (Examples of property in this case include savings account held at a bank, jewelry locked in a safe-deposit box, or stock held in a brokerage account—not abandoned homes per se.)

As Lyle Denniston notes at *SCOTUSblog* and Marcia Coyle observes at the*National Law Journal*, there's good reason to think these issues will return to the Supreme Court soon. Justices Clarence Thomas and Samuel Alito both wrote opinions denying these cases on technical grounds, but in a way that may signal that these principles should be tested again.

"When a member of the Court makes a suggestion like those in the two property cases, that frequently will lead lawyers to move a new test case through the courts to get an answer," Denniston writes.

The stakes are high for such a test. The Supreme Court could look to resolve—or at least wade into—an increasingly partisan area of land-use politics. State and city governments are divided along rigidly partisan lines. The leaders of big cities are overwhelmingly Democratic, whereas

the Republican Party controls most state legislatures and governorships. State and local government positions on many land-use issues, such as eminent domain and inclusionary zoning, resemble this divide.

More and more often, local Democrats and state Republicans are colliding over land use. Texas state lawmakers frequently block low-income housingwithin their districts, despite a major Supreme Court decision striking down the "disparate impact" caused by the way Texas allocates its affordable-housing incentives. Michigan and Wisconsin lawmakers want to interfere with local governments' ability to declare historic districts in their communities. North Carolina lawmakers tried to pre-empt local government authority over laws affecting fair housing (as well as wage minimums and even traffic).

So the Supreme Court could guide how government allocates fair and affordable housing in the future—or rather, whether local government gets to decide. If the next administration continues to pursue the Affirmatively Furthering Fair Housing rule set forth under President Barack Obama, then these state–local land-use skirmishes are only going to grow in number.

There's no way of knowing how a future Supreme Court will rule on these issues, although, dollars to donuts, I can guess how Scalia would have ruled.