Hall v. City of Santa Barbara: A New Look At California Rent Controls and the Takings Clause

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INTRODUCTION

Since its inception as a response to World War I-era housing shortages, rent control has been a controversial regulatory tool fought, by some, with considerable vigor.¹ Property owners have challenged rent control on various constitutional grounds, but these challenges for the most part have been unsuccessful.² One recent case, however, strongly suggested that a takings challenge could invalidate a mobile home park rent control ordinance. In Hall v. City of Santa Barbara,³ the Ninth Circuit outlined a standard of review under which Santa Barbara’s ordinance would likely result in an uncompensated and therefore unconstitutional taking of property.⁴ In so doing, the court reopened the debate regarding the constitutionality of rent control laws.

Most decisions preceding Hall analyzed rent control laws deferentially, upholding the laws as long as they were reasonably related to a legitimate government purpose.⁵ Courts considering takings challenges to rent control generally applied the regulatory takings analysis articulated in Penn Central Transportation Co. v. City of New York.⁶ Other cases have upheld the constitutionality of rent ceilings as price controls

4. Id. at 1275-80; see infra text accompanying notes 167-87.
6. 438 U.S. 104 (1978) (whether public action works a taking involves an ad hoc inquiry). A regulatory taking occurs when “the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property.” Hall, 833 F.2d at 1275 (discussing the history of Supreme Court takings cases).
so long as the landlords’ economic interest in the property was given some protection.\(^7\) With few exceptions, courts using these approaches have upheld rent control statutes.\(^8\)

The *Hall* court abandoned the deferential approach and instead scrutinized the specific provisions of Santa Barbara’s mobile home rent control ordinance with the standard of review previously applied to takings by physical occupation as articulated in *Loretto v. Teleprompter Manhattan CATV Corp.*\(^9\) Thus, instead of examining only the economic aspects of rent control, the *Hall* court focused primarily on the landowner’s noneconomic property rights, such as the right to exclude and the right to occupy the property.\(^10\) When analyzed in relation to traditional takings and rent control jurisprudence, *Hall* represents a new direction in the judicial review of residential rent control statutes in general, and mobile home park rent control laws in particular.

This Note reviews the *Hall* decision and its impact on residential rent control laws in California and argues that *Hall* represents an appropriate shift toward more exacting scrutiny of land use regulations, particularly rent control laws. Part I briefly reviews the development of rent control laws from an historical and policy perspective. Part II examines takings jurisprudence and constitutional challenges to rent control prior to *Hall*. Part III examines the *Hall* case and its departure from earlier rent control rulings. Part IV evaluates some of the likely implications of *Hall* for rent control laws in general, and for specific California ordinances. This Note concludes by arguing that *Hall* provides landlords with a new opportunity to challenge restrictive rent control laws as unconstitutional takings.

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7. See, e.g., *Birkenfeld*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (the ordinance at issue did not provide landlords with a just and reasonable return on their investment); *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), aff’d 475 U.S. 260 (1986) (rent control laws as price control measures are constitutional if they provide landlords with a just rate of return).

8. See, e.g., *Birkenfeld*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (striking down the law at issue as being beyond the police power of the city, while stating that general state law does not preclude a city from imposing maximum rents or restricting the grounds for tenant eviction); *Ross v. City of Berkeley*, 655 F. Supp. 820 (N.D. Cal. 1987) (striking down rent control ordinance on contracts clause claim, although dismissing due process and takings clause claims).

9. 458 U.S. 419 (1982) (a permanent physical occupation authorized by government is a taking); see *Hall*, 833 F.2d at 1275-80 (discussing *Loretto*).

10. See *Hall*, 833 F.2d at 1275-76.
I

RENT CONTROL IN PERSPECTIVE

A. Historical Development

The nation’s first rent control laws, like most of their current counterparts, were adopted in response to escalating rents sparked by a dwindling supply of rental housing.\(^{11}\) During World War I, raw materials and labor needed by the housing industry were diverted to the war effort, and the consequent shortage of rental housing threatened many families with eviction.\(^{12}\) Local governments responded with the nation’s first rent control statutes.\(^{13}\) Although initially enacted only for the duration of the war, the statutes were subsequently reenacted during other “national emergencies,” such as World War II and the high inflation of the 1970’s.\(^{14}\) These first generation controls, unlike the modern statutes, involved absolute rent freezes,\(^{15}\) but were upheld by the courts partly because of their short life span.\(^{16}\)

“Second generation” rent control laws, which permit landlords to pass along certain operating and maintenance costs,\(^{17}\) came to life in the 1970’s primarily as a result of two developments. First, the federal courts abandoned the requirement that a housing emergency exist as a prerequisite for a rent control ordinance.\(^{18}\) The California Supreme Court joined this trend in *Birkenfeld v. City of Berkeley*\(^{19}\) where it rejected the emergency requirement and held that the constitutionality of rent control depends only upon the “existence of a housing shortage and its concomitant ill effects of sufficient seriousness to make rent control a

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11. Comment, *supra* note 1, at 149 n.2.
12. See *id.* at 149.
13. *Id.*
16. See, e.g., Block v. Hirsh, 256 U.S. 135, 157 (1921) (rent control regulation during World War I was justified as a temporary measure).
17. Comment, *supra* note 1, at 149.
18. See, e.g., Eisen v. Eastman, 421 F.2d 560, 567 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970) (asserting in dicta that a war-related housing emergency is not necessary to validate a rent control regulation).
rational curative measure." Second, spiraling housing prices spurred political pressure for government control over rental rates.

In California, a third development, the 1978 passage of the Proposition 13 property tax reform package, also contributed to the enactment of rent control statutes. Tenants were promised some of the benefit—in the form of lower rents—that their landlords received from Proposition 13, but those benefits never materialized. In fact, some landlords raised rents. In response, tenants turned to local legislators for protection, and several rent control ordinances were enacted, providing varying degrees of protection. These ordinances range from relatively lenient regulations, which permit landlords to raise rents to market levels, to restrictive statutes that permit increases below the rate of inflation and forbid increases when tenancy changes.

B. Policy Arguments in the Rent Control Debate

A variety of policy and empirical arguments have been advanced to support and challenge rent control statutes. Several commentators have extensively analyzed the policy arguments for and against rent control.

Consequently, the discussion that follows offers only a summary of this debate.

Proponents justify rent control with economic and social policy arguments based in part on a belief that adequate housing is a fundamental right. They argue that housing, like food and clothing, is a fundamental

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20. Id. at 160, 550 P.2d at 1024, 130 Cal. Rptr. at 489.
22. Proposition 13, as codified at CAL. CONST. art. 13A, §§ 1-6 (1978), provides that the maximum amount of ad valorem taxes on real property shall not exceed one percent of the property's full cash value. Id. § 1. "The 'full cash value' means... the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred." Id. § 2(a). The Proposition also established policies regarding reassessments of property for tax purposes and procedures for increasing tax rates. Id. § 2.
24. Id. at 59.
25. Id.
necessity, the cost of which is escalating beyond the reach of many families. Proponents argue that the affordability of adequate housing is being eroded by low vacancy rates and increasing landlord profits. They point out, for example, that tenants' real income has declined, while rent increases have kept pace with inflation. While there are no definitive figures available regarding the impact that this disparity has on housing affordability, the gap between income and rent expense, proponents argue, is illustrative of a "national rental housing problem," which is producing landlord profits unrelated to housing improvements. Advocates believe that low income families face both a dwindling supply and an inherently unfair economic market. Therefore, rent control supporters conclude that rent control is needed to make prices fair and to protect low income families from a deteriorating standard of living caused by the unavailability of decent, affordable housing.

Rent control critics dispute these economic, social, and legal arguments. As a matter of economic policy, opponents argue that rent control is inefficient and counterproductive. They argue that administrative expenses mean that government regulated industries are less efficient than free markets. Second, they argue that the artificially low prices enforced by rent control statutes reduce the supply of rental housing because landlords who cannot earn an adequate return on their investment stop supplying housing units when market rents are controlled. Those landlords who remain in the market minimize maintenance to maximize profit under the price ceiling. Moreover, property owners will avoid capital improvements because the allowed rents do not generate enough return on the marginal investment in improvements. Consequently, the quality of the housing supply declines, and the deterioration in the hous-

29. Comment, supra note 1, at 153.
32. Keating, supra note 23, at 59; cf. Rabin, supra note 14, at 568-75 (arguing that vacancy rates are not a measure of unfulfilled housing needs).
34. See C. Rhyne, W. Rhyne & P. Asch, supra note 31, at 77-78.
35. Id.
36. Assembly Committee on Housing and Community Development, California State Assembly, Rent Regulation in Mobilehome Parks: Assembly Bill 2320-1978, at 1-3, (Nov. 1, 1978) (statement of Mr. Fred Feiten); C. Baird, Rent Control: The Perennial Folly 61-64 (1980).
ing stock reduces the city's tax base. Finally, property owners who want to realize market returns on their investments are encouraged to convert their rental property to owner-occupied property that can be sold at unregulated rates. Thus, opponents conclude, rent control reduces both the supply and the quality of rental housing.

Critics also dispute the equities of rent control. They point out that most rent control laws do not restrict the availability of rent-controlled units to low income individuals. As a result, individuals without any need for protection benefit unfairly, which reduces whatever benefit rent control might provide the intended beneficiaries. Similarly, critics claim that rent control unfairly isolates rental property owners and forces them alone to pay for a social policy—providing adequate housing—the cost of which should be spread across society. Indeed, "[t]he traditional way that the American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes." Legally, critics note that "decent, affordable housing" is not a right explicitly protected in the Constitution. Property ownership, however, is explicitly protected by the due process clause of the fifth and fourteenth amendments, as well as the takings clause of the fifth amendment. The exact scope of these constitutional protections is the issue that underlies the cases discussed in the remainder of this Note.

II
TAKINGS AND RENT CONTROL JURISPRUDENCE BEFORE HALL

A. Regulatory Takings Cases

Government regulations affecting private property are generally challenged under the takings clause of the United States Constitution, which prohibits the taking of private property "for public use without just compensation." Courts have applied different standards of review depending upon whether the government action is characterized as a reg-

40. Comment, supra note 1, at 151.
41. C. BAIRD, supra note 36, at 71; see also ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, supra note 36, at 40-43 (comments of Mr. Barry Whittlesey).
42. C. BAIRD, supra note 36, at 83-85; see also R. DEVINE, supra note 30, at 71-74.
43. See C. BAIRD, supra note 36, at 85 & n.4 (quoting D. Gale Johnson, Rent Control and the Distribution of Income, AM. ECON. REV., May 1951, 569, 582 (arguing that landlords do not have a significantly higher income than tenants)).
44. Pennell v. City of San Jose, 108 S. Ct. 849, 863 (1988) (Scalia, J., concurring in part and dissenting in part); see generally infra text accompanying notes 236-41.
45. Note, supra note 14, at 1068 (discussing constitutional protections of property rights).
46. U.S. CONST. amend. V.
ulatory taking or a taking by physical occupation. Courts have characterized land use regulations not involving physical occupation by the government as regulatory takings. The constitutionality of these actions has been determined by balancing the government's interest in public health, safety, and welfare against private property interests. Under this branch of takings jurisprudence, courts customarily do not disturb a legislative enactment "substantially related to the promotion of the general welfare" unless it denies a landowner all economically viable use of his land.

In determining whether a land use regulation constitutes a taking under the regulatory branch of the takings clause, courts generally rely on "ad hoc, factual inquiries." The exact subject matter and scope of these inquiries remained uncertain until the U.S. Supreme Court's seminal decision in *Penn Central Transportation Co. v. City of New York.* In that case, the Supreme Court upheld New York City's Landmark Preservation Act against a takings challenge mounted by the owners of Grand Central Station. The Court established a three-pronged test to determine whether a regulation constitutes a taking. First, courts should examine the economic impact of the regulation on the claimant. Second, they should evaluate the extent to which the regulation has interfered with the landowner's "investment-backed expectations." Finally, courts should examine the character of the government action. Applying this test to the New York Landmark Preservation Act, the Court held that the Act did not constitute a taking because it did not interfere with plaintiff's primary investment-backed expectations of use of the

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47. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978). "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124 (citation omitted).

48. *See Hall,* 833 F.2d at 1275 & n.11.


50. *See Keystone Bituminous Coal Ass'n v. DeBenedicts,* 480 U.S. 470 (1987). "We have held that land use regulation can effect a taking if it 'denies an owner economically viable use of his land,'" *id.* at 485 (citing *Agins v. Tiburon,* 447 U.S. 255, 260 (1980) (citations omitted)).

51. *Penn Central,* 438 U.S. at 124.


53. The Act designated certain monuments, including plaintiff's Grand Central Station, as landmarks and placed restrictions on modifications or additions to those properties. In plaintiff's case, the restrictions meant that it could not develop a multistory building above the station. Plaintiff said this diminished the value of the building and, consequently, sued the city on takings grounds. 438 U.S. at 116-18, 128-35.

54. *Id.* at 124.

55. *Id.*

56. *Id.; see supra* note 47 and accompanying text (distinguishing between a regulatory taking and a taking by physical occupation).
land as a railroad terminal and it provided the landowner with some reasonably beneficial use of the property. 57

In *Agins v. City of Tiburon*, 58 the Supreme Court applied the economic impact test of *Penn Central* and demonstrated the Court's hesitancy to find a taking when a regulation of property is involved. In *Agins*, the Court rejected a landowner's claim that the city's downzoning of his residential property was facially unconstitutional under the takings clause. 59 The Court said, "Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests." 60 The Court found that the zoning ordinance benefited the plaintiff and the public at large by protecting them from the ill effects of "urbanization." 61 At the same time, the ordinance did not overburden the plaintiff because it did not deny him all use of his property. 62

The Court recently reached a similar result in *Keystone Bituminous Coal Association v. DeBenedictis*. 63 The plaintiff in that case claimed that a state regulation prohibiting underground mining activities that caused subsidence damage to buildings above the mining activity constituted a taking of his subsurface property rights. 64 In rejecting that claim, the Court used a public nuisance analogy to justify its deference to the legislative enactment. The Court applied the longstanding principle that property cannot be used in a manner that will injure the community 65 and found that the takings clause does not require compensation every time the state seeks to regulate property use for the good of the community. 66 Therefore, although the subsidence act impaired some of the coal association's subsurface property rights, the Court held that the regulation did not constitute a taking within the fifth amendment because public health and safety required some restriction on the use of the landowner's property. 67

These cases illustrate the considerable obstacles that landowners face in challenging land use regulations not involving physical occupa-

57. 438 U.S. at 138.
59. Id. at 260-63.
60. Id. at 260-61 (citation omitted).
61. Id. at 261 n.8.
62. Id. at 262. "Although the ordinances limit development, they neither prevent the best use of appellants' land, nor extinguish a fundamental attribute of ownership." Id. (citations omitted).
64. Id. at 478-79.
65. Id. at 491. The Court stated that "hesitation to find a taking when a state restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage'" which states that whereas one may be burdened by restrictions on property, one also benefits from the restrictions placed on others. Id.; see also id. at 492 n.22.
66. Id. at 491-92.
67. Id. at 491-93.
tion as unconstitutional takings. Property owners face a heavy burden of proving either that all economically viable use of their land has been taken by the state or that the state’s determination that the restrictions were necessary to protect public health and safety did not deserve judicial deference.

B. Physical Occupation Cases

The property owner’s burden is significantly lighter when the government action constitutes a physical invasion and occupation of the property. As stated in *Penn Central*, “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government.” When the government or its agent actually intrudes upon the landowner’s property, judicial deference to legislative determinations of the proper balancing of public and private welfare is abandoned and the character of the government action is paramount. In *Kaiser Aetna v. United States* and *Loretto v. Teleprompter Manhattan CATV Co.*, the U.S. Supreme Court used this heightened standard of review to hold that government regulations that amount to physical occupations are possessory takings for which just compensation must be made. These cases set the stage for the *Hall* decision, which applied the possessory taking standards defined in *Kaiser Aetna* and *Loretto* to Santa Barbara’s rent control law.

In *Kaiser Aetna*, the Court held that the government’s claimed right of public access to the pond surrounding a privately owned marina constituted a taking where the landowner had reasonably relied on government consent in connecting the marina to navigable water. The Court stressed that the government’s action took from the landowner one of the most important aspects of property ownership—the right to exclude. The Court also found that, unlike regulations that cause an “insubstantial devaluation” of property, the servitude at issue would result in physical invasion and a taking of the landowner’s property by the government.

In *Loretto*, the Supreme Court similarly declined to apply the deferential regulatory takings standard of review. In that case, an apartment owner claimed that a New York state law that permitted cable television companies to install facilities on private buildings and compensate own-

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69. “‘[T]he character of the government action’ not only is an important factor... [it] is determinative.” *Loretto v. Teleprompter Manhattan CATV Co.*, 458 U.S. 419, 426 (1982).
71. 458 U.S. 419 (1982).
74. *Id. at* 176.
75. *Id. at* 180.
ers one dollar per year resulted in a taking of her property.\textsuperscript{76} The Court agreed that physical invasion of even a few square feet of the landowner's property constituted a taking.\textsuperscript{77} Relying on the language of \textit{Penn Central},\textsuperscript{78} the \textit{Loretto} Court said that while it has often upheld substantial regulation of an owner's use of his own property, a physical intrusion by government has long been considered to be a property restriction of "an unusually serious character for purposes of the Takings Clause."\textsuperscript{79} Moreover, the Court said, when the intrusion becomes a permanent physical occupation, a taking has occurred per se.\textsuperscript{80} The Court distinguished earlier cases, including \textit{Penn Central}, on the grounds that none of those cases involved an actual permanent physical occupation of the landlord's property by the government.\textsuperscript{81}

The \textit{Loretto} Court rejected New York's claim that the physical invasion should be treated differently under the takings clause because it involved a private party.\textsuperscript{82} Relying on agency theory, the Court held that a permanent physical occupation authorized by state law is a taking, whether it is accomplished by the state or a third party acting under state authorization.\textsuperscript{83}

Finally, the \textit{Loretto} Court dismissed the state's claim that application of the possessory takings analysis would severely impair the government's power to regulate landlord-tenant relationships.\textsuperscript{84} After citing some of the landlord-tenant cases upholding governmental restrictions, the Court said that none of them involved the permanent occupation of a landlord's property that was present in \textit{Loretto}.\textsuperscript{85} "So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity."\textsuperscript{86}

In holding that the takings clause applies to state-authorized invasions, \textit{Loretto} represented an important precursor to \textit{Hall}. \textit{Loretto} also paved the way for \textit{Hall}'s reiteration of the multifaceted nature of property rights.\textsuperscript{87} In addition to the right to exclude, \textit{Loretto} reaffirmed that property ownership includes the right to control, possess, and dispose of

\begin{itemize}
\item \textsuperscript{76} 458 U.S. at 421-23.
\item \textsuperscript{77} \textit{Id.} at 430.
\item \textsuperscript{78} \textit{See supra} note 47.
\item \textsuperscript{79} \textit{Loretto}, 458 U.S. at 426.
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.} at 432.
\item \textsuperscript{82} \textit{Id.} at 432 n.9.
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.} at 440.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.} (citing \textit{Penn Central}).
\item \textsuperscript{87} \textit{See infra} text accompanying notes 174-87 (discussing the bundle of property rights protected in \textit{Hall}).
\end{itemize}
the property, all of which are effectively destroyed (i.e., taken) by permanent physical occupation by the government.

**C. Pre-Hall Rent Control Cases**

Cases predating the 1986 *Hall* decision analyzed rent control laws under the regulatory takings framework discussed above. The courts focused on economic property rights vis-a-vis rent ceilings and rental rate adjustments. Courts generally validated rent control laws as a permissible exercise of the police power and as an appropriate response to housing emergencies. The courts deferred to government determinations of the necessity for the restrictions and upheld provisions that were rationally related to the avowed purposes of protecting tenants from exploitation and improving the public health, safety, and welfare.

The first rent control case decided by the U.S. Supreme Court, *Block v. Hirsh*, upheld a wartime rent freeze and established the "public emergency" requirement for rent control laws. In *Block*, a landlord brought an action to recover possession from a holdover tenant. In justifying his refusal to surrender possession, the tenant argued that the District of Columbia rent control law permitted tenants to remain on the premises as long as the rent was paid and all conditions of the lease were being performed. The Court narrowly held that a temporary rent control measure enacted in response to a wartime housing shortage was a valid exercise of the district's police power. The Court also found that the regulation did not unconstitutionally restrict the landlord's right to contract or his right to exercise dominion. Consequently, there was no taking of the landlord's property in violation of the fifth amendment. Recognizing that the law contained a two-year sunset clause, the Court reasoned that a public emergency such as World War I justified limited restrictions on property rights without compensation, provided that the restriction did not deny the landlord all economically viable use of his land. In addition, the Court said price controls are a well-settled legislative and constitutional response to a pressing public problem.

89. *Id.* at 435-46.
90. 256 U.S. 135 (1921).
91. *Id.* at 155-56.
92. *Id.* at 153.
93. *Id.* at 153-54.
94. *Id.* at 156. Four Justices dissented from the opinion, asserting that it was a broad overreaching of federal power. *Id.* at 158-70.
95. *Id.* at 157. "The regulation is put and justified only as a temporary measure." *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
The public emergency requirement announced in Block remained prominent in rent control discussions until 1969. In Eisen v. Eastman, the Second Circuit affirmed the dismissal, based on lack of jurisdiction, of a challenge to a New York City rent control law waged by a landlord under the federal Civil Rights Act. Although the case was determined on procedural grounds, the court, in dicta, defended the constitutionality of rent control laws. The court noted that the Supreme Court had not heard a rent control case since World War II, and, therefore, had not addressed the question of whether rent control laws could withstand constitutional scrutiny in the absence of a public emergency. Noting that the Supreme Court had abandoned the public emergency requirement to justify price controls, the appellate court stated that the validity of rent control did not depend on a public emergency.

The California Supreme Court abandoned the public emergency requirement in Birkenfeld v. City of Berkeley, which established the standard of judicial review for rent control challenges in California for the next decade. In Birkenfeld, a group of Berkeley landlords brought a class action suit challenging a 1972 charter amendment that required the imposition of residential rent control within the city. The amendment established a rent control scheme under which base rents were set at the August 15, 1971 level and could be increased only through individual

100. The landlord sued under § 1 of the Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3). Eisen, 421 F.2d at 561. The Second Circuit held that the Civil Rights Act did not grant jurisdiction here since the plaintiff alleged only the loss of money damages. Id. at 566. The court adopted Justice Stone's construction of the Civil Rights Act's jurisdictional provision which asserted that the statute applied "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights." Id. at 564 (citing Hague v. CIO, 307 U.S. 496, 531 (1939)). Any other reading of the statute would make the jurisdictional provision, 28 U.S.C. § 1331, with its requirement of a minimum dollar amount, redundant. Id. at 564-65. While the Second Circuit held that the complaint satisfied the $10,000 jurisdictional amount requirement of 28 U.S.C. § 1331, the court held that federal jurisdiction was not available under that provision because the plaintiff had not exhausted state administrative remedies. Id. at 569.
101. Id. at 567. The court cited Bowles v. Willingham, 321 U.S. 503 (1944), and Woods Housing Expediter v. Cloyd W. Miller Co., 333 U.S. 138 (1948). These cases addressed the housing shortage caused by World War II and stressed the war and postwar emergencies. Eisen, 421 F.2d at 567.
102. Eisen, 421 F.2d at 567.
103. "The time when extraordinarily exigent circumstances were required to justify price control outside the traditional public utility areas passed on the day that Nebbia v. New York, 291 U.S. 502 (1934), was decided." Id. Nebbia upheld the power of a state to adopt any economic policy that "may reasonably be deemed to promote public welfare." Nebbia, 291 U.S. 502, 537. This power covers a business in any of its aspects, including the prices to be charged for the products or commodities it sells. Id.
104. Eisen, 421 F.2d at 567.
106. Id. at 138, 550 P.2d at 1008, 130 Cal. Rptr. at 472.
rent adjustments granted by the rent control board.\textsuperscript{107} The landlords argued that rent control could not be enacted under the city's police powers in the absence of an emergency\textsuperscript{108} and that the charter amendment in question was unconstitutionally confiscatory.\textsuperscript{109} The court agreed with the plaintiffs on the second claim,\textsuperscript{110} but upheld the city's power to enact a rent control ordinance regardless of whether an emergency existed.\textsuperscript{111}

In rejecting the landlords' claim that the city's police powers did not encompass the ability to regulate rents, the court held that, in the absence of conflicting or preemptive state law, a city's police powers are as broad as the state's.\textsuperscript{112} Since state law did not preclude the city from imposing rent ceilings, and there was no state rent control statute preempting Berkeley's regulation, the city was free to enact a rent control ordinance.\textsuperscript{113} The court indicated that it would sustain rent control laws under the police power "unless the findings establish a complete absence of even a debatable rational basis for the legislative determination . . . that rent control is a reasonable means of counteracting harms and dangers to the public health and welfare emanating from a housing shortage."\textsuperscript{114}

The court held that while the ends chosen by the city were constitutionally justified, the means could not survive because the ordinance did not provide landlords with a just and reasonable return on their investment.\textsuperscript{115} Birkenfeld suggests that courts viewing rent control as a price control measure focus on the landlords' return on their investments. Questions of noneconomic property rights do not arise.

The California Supreme Court clarified a portion of its Birkenfeld holding in Carson Mobile Home Park Owners' Association v. City of Carson.\textsuperscript{116} In Carson, plaintiff landlords' association challenged the city's mobile home park rent control ordinance as an unconstitutional taking on the grounds that the regulation, like the charter amendment struck down in Birkenfeld, did not provide for automatic general rent adjustments and employed an individual rent adjustment procedure fraught with delays.\textsuperscript{117} In rejecting the plaintiff's argument, the court said that

\textsuperscript{107} Id. at 136, 550 P.2d at 1008, 130 Cal. Rptr. at 470-71.
\textsuperscript{108} Id. at 153, 550 P.2d at 1018, 130 Cal. Rptr. at 482-83.
\textsuperscript{109} Id. at 165, 550 P.2d at 1027, 130 Cal. Rptr. at 491.
\textsuperscript{110} Id. at 169, 550 P.2d at 1030, 130 Cal. Rptr. at 494.
\textsuperscript{111} Id. at 158, 550 P.2d at 1022, 130 Cal. Rptr. at 486.
\textsuperscript{112} Id. at 153, 550 P.2d at 1018, 130 Cal. Rptr. at 482.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 161, 550 P.2d at 1024, 130 Cal. Rptr. at 488.
\textsuperscript{115} Id. at 173, 550 P.2d at 1033, 130 Cal. Rptr. at 497.
\textsuperscript{116} 35 Cal. 3d 184, 672 P.2d 1297, 197 Cal. Rptr. 284 (1983).
\textsuperscript{117} The Carson City ordinance, number 79-485U, regulated rent increases and evictions in mobile home parks. Id. at 187, 672 P.2d at 1299, 197 Cal. Rptr. at 285. The ordinance set base rents at the May 1, 1979 level. It directed the Mobilehome Park Rental Review Board to
the Carson ordinance's 105-day review period, unlike the Berkeley law, was "carefully tailored to meet the legitimate interests of the ordinance 'without a substantially greater incidence and degree of delay than is practically necessary.'" Furthermore, the absence of an automatic general rent adjustment mechanism, while a factor in the striking down of the Berkeley ordinance, did not make the Carson ordinance unconstitutional. The court found that general rent adjustments are not constitutionally required, particularly where, as in Carson, the ordinance carefully tailored the rent adjustments to the needs of landlords and tenants.

California courts have now fully embraced the Birkenfeld/Carson analysis, particularly the just and reasonable return standard as a measure of adequacy of compensation to landlords. The courts explained and expanded the standard in several cases, including Cotati Alliance for Better Housing v. City of Cotati, Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles, and Oceanside Mobile Home Park Owners' Association v. City of Oceanside. Focusing on the economic aspects of rent control, these cases clarified that a just and reasonable return under Birkenfeld requires that the landlord receive a fair return on his investment in the property, not a fair return based on the market value of the property. Utilizing this return on investment standard, and the deference toward governmental determinations of the need for rent control announced in Birkenfeld, the courts of appeal upheld the rent control ordinances in each of these cases.

approve "just, fair and reasonable" rent increases, specifying 12 factors to consider. Id. at 188 & n.2, 672 P.2d at 1298 & n.2, 197 Cal. Rptr. at 285 & n.2. Each owner was allowed to submit one application for rent increases for all spaces within a park. Id. at 188, 672 P.2d at 1298, 197 Cal. Rptr. at 285. The Board was required to hold a hearing within 90 days and to render a decision within 15 days. Id. If the Board did not make a decision within that time, an interim increase should be granted. Id.

118. Id. at 193, 672 P.2d at 1301, 197 Cal. Rptr. at 288. The Carson ordinance's provisions for a 105-day review period by the Rent Review Board, and for an interim increase if the board had not acted within that time, ensured that "a landlord will not suffer impermissibly confiscatory rents longer than is necessary for a relatively prompt determination of the merits of his or her application." Id., 672 P.2d at 1302, 197 Cal. Rptr. at 289.

119. Id. at 194, 672 P.2d at 1302, 197 Cal. Rptr. at 290.

120. Id. at 195, 672 P.2d at 1303, 197 Cal. Rptr. at 290.

121. 148 Cal. App. 3d 280, 292-94, 195 Cal. Rptr. 825, 832-34 (1983) (the return on investment standard is constitutional where it permits a landlord to pay all actual and reasonable expenses and receive a fair profit).

122. 142 Cal. App. 3d 362, 368-72, 190 Cal. Rptr. 866, 868-72 (1983) (ordinance with provisions for automatic rent increases that also empowered a commission to grant individual increases based on a list of factors set forth sufficient standards for determining what constitutes a just and reasonable return on property).

123. 157 Cal. App. 3d 887, 897-902, 204 Cal. Rptr. 239, 244-48 (1983) (the fair net operating income standard effectively allows property owners a just and reasonable return on property).

In *Fisher v. City of Berkeley*, the California Supreme Court reaffirmed *Birkenfeld*’s use of the return on investment standard. The *Fisher* court upheld Berkeley’s 1980 Rent Stabilization and Eviction for Good Cause ordinance, enacted by the voters following the invalidation of the earlier statute addressed in *Birkenfeld*. The court also rejected the landlords’ antitrust, due process, and takings challenges. In reviewing the takings claim, the court said that the new statute avoided the fatal flaw of the previous Berkeley ordinance—lack of a provision for general rental adjustments. The court noted that such a rent increase scheme is not always a constitutional prerequisite, but is required when the rent control ordinance regulates a substantial number of units. Specifically, a rent control statute can pass constitutional muster if it contains a comprehensive scheme that provides for annual increases across the board based upon economic factors. Thus, the *Fisher* court reiterated the *Birkenfeld* holding that rent control laws are constitutional as price control measures if they provide landlords with a just rate of return.

These pre-*Hall* rent control cases focused primarily on the due process, equal protection, and takings questions inherent in the price control aspect of rent control. They did not address the takings issues related to a landlord’s noneconomic property rights. Justice Rehnquist discussed this conceptual omission in his opinion dissenting from the Supreme Court’s dismissal of an appeal in *Fresh Pond Shopping Center, Inc. v. Callahan*.

In *Fresh Pond*, a shopping center owner agreed to purchase an adjacent apartment building. He planned to demolish the building in order to provide parking for a tenant in the shopping center. A Cambridge, Massachusetts rent control ordinance regulated the apartments, however, and required property owners to obtain permission from the Cambridge Rent Control Board before removing rental property from the market. The board denied a permit to the owner, and the

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125. 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), aff’d, 475 U.S. 260 (1986) (the Supreme Court affirmed only the antitrust issue, i.e., that the ordinance was not preempted by the Sherman Act).
126. *Id.* at 686, 693 P.2d at 275, 209 Cal. Rptr. at 716.
127. *See id.* at 652, 693 P.2d at 269, 209 Cal. Rptr. at 690.
128. *Id.*
129. *Id.* at 687-88, 693 P.2d at 295-96, 209 Cal. Rptr. at 716-17.
130. *Id.*
131. *Id.*
134. 464 U.S. at 875.
135. *Id.*
136. *Id.*
board's action was upheld as constitutional by the Massachusetts Superior and Supreme Courts.\textsuperscript{137} The U.S. Supreme Court refused certiorari for lack of a substantial federal question.\textsuperscript{138}

Justice Rehnquist dissented, arguing that the provisions requiring board approval before evicting tenants or demolishing structures presented "important and difficult questions concerning the application of the Takings Clause of the Fifth Amendment... which have not been decided before by this Court."\textsuperscript{139} Relying on the physical occupation takings standard advanced in \textit{Loretto v. Teleprompter Manhattan CATV Corp.},\textsuperscript{140} Justice Rehnquist argued that the Cambridge Rent Control Board's decision to deny the landlord a demolition permit because one of six apartment units remained occupied deprived the landlord of the use of his property in a manner analogous to a physical invasion.\textsuperscript{141} Unlike the earlier rent control disputes, the dispute in \textit{Fresh Pond} did not involve a claim that the rental rates were insufficient.\textsuperscript{142} Instead, Rehnquist argued, \textit{Fresh Pond} involved a transfer of control over the reversionary interest from the landlord to the tenant that constituted a taking of the landlord's power to exclude, "one of the most treasured strands in an owner's bundle of property rights."\textsuperscript{143} While Justice Rehnquist's views did not prevail in \textit{Fresh Pond}, they underscored the importance of noneconomic property rights in relation to takings jurisprudence.

III

\textbf{HALL V. CITY OF SANTA BARBARA}

\textbf{A. Factual/Procedural Background}

The facts surrounding \textit{Hall v. City of Santa Barbara}\textsuperscript{144} and the provisions of the challenged statute are substantially similar to those in earlier rent control cases. However, the analysis adopted by the court goes beyond the deferential review of permissible rent ceilings and just rate of return that typified earlier rent control challenges.

The plaintiffs in \textit{Hall} owned a mobile home park in the city of Santa Barbara.\textsuperscript{145} In 1984, the Halls' mobile home park, like all others within the city, became subject to a mobile home rent control ordinance enacted by the Santa Barbara City Council.\textsuperscript{146} The ordinance required that mo-

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.} at 876.
  \item \textsuperscript{140} 458 U.S. 419 (1982).
  \item \textsuperscript{141} \textit{Fresh Pond}, 464 U.S. at 877.
  \item \textsuperscript{142} \textit{Id.} at 878.
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} 833 F.2d 1270 (9th Cir. 1986), \textit{cert. denied}, 485 U.S. 940 (1988).
  \item \textsuperscript{145} 833 F.2d at 1273.
  \item \textsuperscript{146} \textit{SANTA BARBARA, CAL.}, Code ch. 26, §§ 26.08.010-.080 (1984).
\end{itemize}
bile home park owners provide tenants with leases of unlimited duration.\textsuperscript{147} While tenants could terminate the leases at will,\textsuperscript{148} landlords could only terminate for cause.\textsuperscript{149} Specifically, landlords could terminate a lease for: (1) a tenant's failure to comply with local or state mobile home laws; (2) conduct by a tenant that substantially annoyed other tenants; (3) a tenant's failure to comply with a lease provision or other park rule or regulation; (4) nonpayment of rent; (5) condemnation of the park; (6) a change in the use of the park, provided that state and local mobile home park relocation laws were followed; or (7) cessation of occupancy by the tenant.\textsuperscript{150} The ordinance also permitted one unilateral indexed rent increase per year\textsuperscript{151} and a ten percent increase whenever a space became vacant.\textsuperscript{152}

The Halls brought suit in federal district court under the Civil Rights Act,\textsuperscript{153} claiming that the ordinance amounted to an unconstitutional taking of their property without public purpose or just compensation.\textsuperscript{154} The district court dismissed the claim and the Halls appealed.\textsuperscript{155}

The Halls argued that the ordinance gave tenants the right to a perpetual lease at below market rents, thereby transferring to each tenant a possessory interest in the land upon which their mobile home was located.\textsuperscript{156} Furthermore, the Halls argued that the possessory interest had

\textsuperscript{147} \textit{Id.} § 26.08.040(A).
\textsuperscript{148} See \textit{id.} § 26.08.040(A)(7).
\textsuperscript{149} \textit{Id.} § 26.08.040(A).
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} These increases were limited to the greater of three-quarters of the percentage increase in the Consumer Price Index since the date of the last rent increase, or three percent multiplied by the number of complete months since the date of the last rent increase, divided by 12. \textit{Id.} § 26.08.040(C). In addition, landlords were able to seek additional rent increases through arbitration. Arbitrators were given the power to grant "just and reasonable" increases above the statutory maximum. \textit{Id.} § 26.08.040(D). The factors used to determine whether a proposed increase was just and reasonable included: changes in the Consumer Price Index; voluntary pay and price standards promulgated by the President; rent charged for comparable mobile home park spaces in Santa Barbara County; the length of time since the last rent increase; proposed capital improvements or rehabilitation work; changes in property taxes, rental payments or utility charges; changes in reasonable operation and maintenance expenses; the need for repairs other than normal wear and tear; and any change in the amount and quality of services provided by the park owner. \textit{Id.}
\textsuperscript{152} \textit{Id.} § 26.08.060.
\textsuperscript{153} 42 U.S.C. § 1983 (1982) states:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\end{quote}
\textsuperscript{154} \textit{Hall}, 833 F.2d at 1273.
\textsuperscript{155} \textit{Id.} at 1274. Although the Ninth Circuit noted that the Halls' complaint was "somewhat elliptical," the court concluded that the district court abused its discretion by dismissing the suit rather than granting leave to amend the complaint. \textit{Id.} at 1274 n.6.
\textsuperscript{156} \textit{Id.} at 1273-74.
a market value and a market, evidenced by the fact that prices of mobile homes in rent-controlled parks shot up dramatically after the rent control ordinance, with many homes selling well above their blue book value. The Halls claimed that the substantial premium paid for mobile homes in Santa Barbara mobile home parks represented a transfer of a valuable property right, i.e., the right to occupy a mobile home site at below market rates. Thus, instead of challenging the rent ceiling and rent adjustment provisions as confiscatory of the landlord's economic right to a just rate of return, the Halls argued that the lease provisions, coupled with the peculiarities of the mobile home market, constituted a taking of both economic rights and the owner's noneconomic property rights, such as the right to exclude.

The Ninth Circuit reversed and remanded the case to the district court, holding that the facts claimed, if proven, would establish a compensable taking. However, the court emphasized that the procedural posture of the case dictated the outcome. The court noted that motions to dismiss for failure to state a claim are generally disfavored, especially in an area where the Supreme Court “has admitted its inability ‘to develop any “set formula”’ for determining when compensation should be paid.”

Despite couching its opinion in procedural terms, the court outlined an analytical framework for the trial court that was tantamount to concluding that a taking had occurred. The court noted its general skepticism about the constitutional viability of rent control regardless of whether the laws are classified as regulatory actions or possessory actions. In a footnote, the court cited “a growing consensus” of commentators who believe that rent control is counterproductive. The court

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157. Id. at 1274. The blue book is the Kelley Blue Book for Manufactured Housing, published by the Kelley Blue Book Company of Costa Mesa, California. It is the standard reference work for the prices of mobile homes. Id. at n.5.

158. Id. at 1274.

159. Id. at 1278-80.

160. Id. at 1281-82. After a rehearing and a rehearing en banc were denied, id. at 1282, the U.S. Supreme Court denied certiorari. 485 U.S. 940 (1988).

161. 833 F.2d at 1274 (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, Civil § 1357, at 598 (1969)). “While a dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism . . . .” Id.; see also id. at 1282:

Because there has been no trial, we cannot and do not express any view as to whether the Santa Barbara ordinance constitutes a taking. We hold only that on the facts alleged, it may, and that at this stage we are unable to resolve this fact-bound issue.

In such circumstances, the motion to dismiss was improvidently granted and we remand.

162. Id. at 1274 (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

163. Id. at 1281 n.26.
concluded, "The rationality of rent control vel non may have to be reassessed in light of this growing body of thought on the subject."164

B. Issues for Trial Court Consideration

The court stated that adjudicating a takings challenge as presented by the Halls requires a trial court to answer three questions. First, did the challenged government action rise to the level of a taking? Second, did the action advance a legitimate government interest? Third, was there adequate compensation?165 If the initial question is answered in the affirmative, and either of the other two in the negative, the plaintiffs prevail; otherwise, they lose.166 The Ninth Circuit broke new ground with respect to the initial question by suggesting how the Halls could establish a possessory taking.

1. Did the Government Action Amount to a Taking?

In addressing the initial question of whether the Santa Barbara ordinance amounted to a taking, the Hall court recognized the two dramatically different tests applied to takings challenges.167 The court noted that while many regulations may be upheld as constitutional, a permanent physical occupation of property is a taking per se under Loretto.168 After examining the Halls' contention that the Santa Barbara ordinance effectively transferred a marketable property right to mobile home park tenants, the court concluded that the Halls presented a colorable claim of an unconstitutional taking by physical occupation.169

The court summarily rejected the city's arguments. First, the court rejected the city's contention that the leases are not truly perpetual because the ordinance might someday be repealed. The fact that a governmental taking could be undone would not change the fact that a taking has occurred.170 In addition, the fact that tenants could be removed for

164. Id. The court's opinion elicited strong opposition in the Ninth Circuit. In dissenting from the denial of en banc hearing, Judge Schroeder, joined by Judges Nelson and Norris, took sharp exception to Judge Kozinski's opinion for the panel. Id. at 1282-84. The dissent argued that Hall should be resolved conclusively in favor of the City of Santa Barbara given Supreme Court precedents, emphasizing that the Supreme Court has upheld land use regulations despite "drastic diminution in the value and usefulness" of property. Id. at 1283. The dissent viewed the panel's opinion as illegitimately reaching to characterize the Santa Barbara ordinance as a physical occupation. "The panel's appellation of rent control as a 'physical invasion' is built upon the notion that economic regulation can 'shade' into physical occupation. This is antithetical to the reasoning of Loretto," the decision upon which the panel "relies almost exclusively." Id. (citations omitted).

165. Id. at 1274.

166. Id. at 1275.

167. Id.; see also supra notes 46-89 and accompanying text.

168. 833 F.2d at 1275-76 (discussing Loretto v. Teleprompter Manhattan CATV Co., 458 U.S. 419 (1982)).

169. Id. at 1276.

170. Id. at 1277.
cause "does not change the fact that tenants are given an indefeasible right to possession so long as they pay the controlled rent and behave themselves."\(^\text{171}\)

The court also dismissed the city's claim that, based on previous rent control decisions, rent control is conclusively constitutional.\(^\text{172}\) The court found that the U.S. Supreme Court had not provided any definitive guidelines for evaluating constitutional challenges to rent control. Therefore, the appellate court could not condone the use of rent control as a constitutional shield behind which cities could hide as they "eviscerate a property owner's rights."\(^\text{173}\) Furthermore, the court found that none of the previous rent control cases involved giving tenants an alienable property right with a market value, as did the \textit{Hall} case.\(^\text{174}\) The ordinance, accepting plaintiff's allegations, allowed the tenant to obtain "a rent control premium" that "he can use, sell or give away at his pleasure."\(^\text{175}\) The court also noted that this transferable right deprived the owner of the right to exclude, a fundamental element of property ownership.\(^\text{176}\) Accepting the plaintiff's allegations as true, the court concluded, "the landlord has no meaningful say as to who will live on the property, now or in the future."\(^\text{177}\)

This difference was "crucial," the court concluded, because the fact that a tenant could sell his interest to a third party had a drastic effect on the landlord-tenant relationship.\(^\text{178}\) While the court acknowledged that all rent control statutes modify the landlord-tenant relationship to some extent in order to protect tenants from increased rents,\(^\text{179}\) the Santa Barbara ordinance changed the fundamental landlord-tenant relationship by giving the parties complementary estates in the same land.\(^\text{180}\) As the court stated:

On the one hand, the landlord loses forever a fundamental aspect of fee ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.\(^\text{181}\)

The court found that under the Santa Barbara ordinance, landlords might be left with only the right to collect reduced rents, while tenants

\(^{171}\) \textit{Id.}

\(^{172}\) \textit{Id.} at 1278.

\(^{173}\) \textit{Id.}

\(^{174}\) \textit{Id.}

\(^{175}\) \textit{Id.}

\(^{176}\) \textit{Id.} (citing \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 179-80 (1979)).

\(^{177}\) \textit{Id.}

\(^{178}\) \textit{Id.} at 1279.

\(^{179}\) \textit{Id.}

\(^{180}\) \textit{Id.}

\(^{181}\) \textit{Id.}
gained practically all the other rights in the property.\textsuperscript{182} The court concluded that, based upon the assumed truth and accuracy of the plaintiff's allegations, the ordinance arguably went beyond merely regulating ownership and use of the property and operated as a permanent occupation of the property for which compensation was due.\textsuperscript{183} Consequently, the trial court abused its discretion by granting summary judgment for the city, and the Ninth Circuit remanded for a full trial on the takings issue.\textsuperscript{184}

Under \textit{Hall}, the proper standard of judicial review for a challenged rent control ordinance is not dependent upon mere categorization of the ordinance as regulatory or physical occupation. Instead, the determination of a rent control law's constitutionality must be based upon an ad hoc critical examination of the statute's impact on fundamental rights of property ownership and the relationship between landlords and tenants.\textsuperscript{185} If an ordinance invades fundamental property rights—as the Santa Barbara ordinance arguably did—then, despite earlier courts' applications of formalistic labels to similar regulations, the property has been physically occupied, not merely regulated by the governing body.\textsuperscript{186} As a consequence, an ordinance that represents a taking, in order to avoid being struck down as unconstitutional, must advance a legitimate state interest and provide adequate compensation.\textsuperscript{187}

2. \textit{Did the Action Substantially Advance a Legitimate Government Interest?}

The court left determination of whether the Santa Barbara ordinance advanced a legitimate government interest to the district court.\textsuperscript{188} However, the court expressed doubts that the ordinance would withstand even the most deferential standard of judicial review.\textsuperscript{189} The \textit{Hall} court implied that it did not believe that the city could justify the ordinance, no

\textsuperscript{182} \textit{Id.} at 1280.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.} at 1282. On remand, the district court granted the Halls' motion for summary judgment on the takings issue. \textit{Hall v. City of Santa Barbara, No. CV 84-9506 LAW} (C.D. Cal. July 18, 1989). There was a trial on the damages issue and the district court awarded $310,000 of damages for income lost as a result of the vacancy control provisions. Telephone interview with Sherman Stacy, attorney for the Halls (Feb. 21, 1990). The court found that it could not sever the unconstitutional provision from the ordinance as a whole, so the court struck the entire ordinance. However, the court has stayed that order for 60 days. \textit{Id.} The stay was still in effect as of this writing.

The Halls and the city of Santa Barbara have tentatively agreed on a settlement, pending the final ruling of the court, under which the Halls will waive damages and attorneys fees and the city will pass a new ordinance with a vacancy decontrol provision. \textit{Id.}

\textsuperscript{185} \textit{See Hall}, 833 F.2d at 1278-79.

\textsuperscript{186} \textit{See id.} at 1279-80.

\textsuperscript{187} \textit{See id.} at 1274-76.

\textsuperscript{188} \textit{Id.} at 1281.

\textsuperscript{189} \textit{Id.} at 1280.
matter what standard was employed. In fact, the court went out of its way to question whether rent control could ever be considered "rational" given the current body of law and economics literature.

### 3. Was Adequate Compensation Paid?

While recognizing that the compensation issue was one "fraught with factual uncertainty," the court questioned the city's claim that the Halls were adequately compensated because they were entitled to rents that assured them a fair return on their investment. Relying on the physical occupation takings analysis, the Hall court noted that if the Halls' claim was substantiated, the fair return on investment standard did not adequately address the problem of compensation for that which was taken. While the rental payments compensated the Halls for the use of the land during the rental period, if a physical occupation had in fact occurred, the Halls were entitled to compensation for the possessor interest in land transferred to the tenants.

### C. Implications of the Hall Decision

Read narrowly, the Hall decision simply overturned the trial court on a procedural issue, suggesting guidelines for future trial court treatment of the factual issues. However, the implications of the decision could reach much further. The decision reflects one court's willingness to extend constitutional protection beyond economic rights to basic noneconomic aspects of property ownership. Hall was the first federal appellate case to suggest such protection for noneconomic interests in the rent control context. In so doing, it suggests that noneconomic property rights, including the right to control the use of one's property, should receive increased constitutional protection in the form of physical

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190. Id. at 1281.
191. Id. n.26. To the extent that Hall can be read as an appellate court's constitutional gloss on a disagreement about the wisdom of economic regulation, Hall, potentially, was answered by CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (upholding Indiana's antitakeover statute against dormant commerce clause and preemption challenges), where the Court reversed the appellate court and noted that, "The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation." CTS Corp., 481 U.S. at 92 (citing Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 679 (1981) (Brennan, J., concurring in judgment)). As Justice Scalia noted in his concurrence, "a law can be both economic folly and constitutional." CTS Corp, 481 U.S. at 96-97 (Scalia, J., concurring).
192. Hall, 833 F.2d at 1281.
193. Id. The court added that "[i]t may well be that the rental payments . . . adequately compensate the Halls for the taking of their property. However, this cannot be assumed, it had to be proven." Id.
194. Id.
195. See Note, supra note 14, at 1067.
196. Id. at 1075.
occupation scrutiny instead of regulatory taking scrutiny.\textsuperscript{197} Noneconomic property rights, like economic property rights, have not been elevated to the status of fundamental rights subject to strict scrutiny under the due process clause;\textsuperscript{198} nevertheless, the \textit{Hall} court recognized that both economic and noneconomic rights are instrumental in defining the scope of protection of property rights under the Constitution.\textsuperscript{199}

One commentator has criticized the \textit{Hall} decision for its heightened scrutiny of noneconomic property interests, claiming that \textit{Hall} will promote overly strict scrutiny of legislative action where fundamental liberties are not at stake.\textsuperscript{200} This criticism is misplaced, however, because noneconomic property interests are at the very heart of the basic right to property ownership. Property ownership in the constitutional sense embodies more than the bare right to hold and profit from property; it involves the right to possess, use, and dispose of property without unjustified and uncompensated interference from the state.\textsuperscript{201} The \textit{Hall} court recognized this argument by suggesting that rent control statutes could be analyzed as physical occupations instead of economic regulations.

\section*{IV THE FUTURE OF RENT CONTROL TAKINGS CHALLENGES}

The \textit{Hall} court's suggestion that the city of Santa Barbara's mobile home park rent control ordinance could be a prima facie unconstitutional taking demonstrates that California rent control statutes cannot be considered conclusively constitutional simply because landlords are guaranteed a fair return on their investment. On the other hand, the \textit{Hall} decision does not indicate that rent control laws are unconstitutional per se. The long line of cases beginning with \textit{Block}, which established the facial constitutionality of local rent regulations, were not questioned by \textit{Hall}. Rather, \textit{Hall} suggests a new focus for constitutional review of rent control regulations by looking at both the purely economic aspects of landowners' property rights and the more basic noneconomic rights. In so doing, the \textit{Hall} court offered a rationale for greater protection of property owners who, while assured of a "fair and reasonable return on their investment" through rent adjustment schemes, were nonetheless deprived of their right to control their property. An examination of some of the case law following \textit{Hall} and a critical evaluation of sample California

\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.} at 1079.
\textsuperscript{199} See generally \textit{Id.}
\textsuperscript{200} \textit{Id.} at 1080-81.
\textsuperscript{201} See \textit{Hall}, 833 F.2d at 1277. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" \textit{Id.} (citing \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 435 (1982)).
rent control ordinances will illustrate the potential impact the *Hall* case might have on rent control provisions within the Ninth Circuit.

### A. Subsequent Case Law

Courts have not yet determined the impact of *Hall*’s analysis or the future of *Hall*’s suggestion that rent control can amount to a physical occupation. In a pivotal takings case decided after *Hall*, *Nollan v. California Coastal Commission*, the U.S. Supreme Court applied the possessory occupation standard in a coastal development context and created a new test for the constitutionality of land use regulations. Two other cases, *Pennell v. City of San Jose* and *Ross v. City of Berkeley*, while only tangentially addressing the applicability of physical occupation analysis to rent control statutes, indicate that the standard adopted in *Hall* might receive increased judicial support given the right factual situation.

#### 1. Nollan v. California Coastal Commission

Nearly one year after the *Hall* decision, the U.S. Supreme Court decided *Nollan v. California Coastal Commission*. In *Nollan*, the Court revisited land use regulations and established a new test for judicial review of these regulations.

The plaintiffs in *Nollan* sought a Coastal Commission permit to demolish a dilapidated bungalow and construct a house on their beachfront lot. The Coastal Commission approved the permit on the condition that the Nollans allow a public easement across their property in order to facilitate travel between neighboring public beaches. The Nollans filed a petition for writ of administrative mandamus, arguing that the condition could not be imposed without evidence that the new house would have a direct adverse impact on public access to the beach. In affirming the permit condition on remand from the Ventura County Superior Court, the Commission argued that the Nollans’ house would further block the view of the ocean and contribute to a “wall” of residential structures that prevents the public from realizing psychologically that there was a stretch of coastline nearby. The Commission also argued that since the house would increase the burden on the public’s

206. *Id.* at 828.
207. *Id.*
208. *Id.* at 828-29.
right to traverse the beach, the Commission could require the Nollans to offset the burden by providing the easement.\textsuperscript{209}

The Nollans supplemented their petition for a writ of mandamus from the superior court, arguing that the condition violated the takings clause.\textsuperscript{210} The trial court avoided the constitutional issue and struck down the condition on statutory grounds, stating that it was not justified by the California Coastal Act standards.\textsuperscript{211} The state appellate court reversed the lower court ruling on statutory grounds and also rejected the Nollans' constitutional claim.\textsuperscript{212} Utilizing the traditional regulatory takings analysis, the court of appeal ruled that no taking was established. Although the "condition diminished the value of the lot, it did not deprive [the Nollans] of all reasonable use of their property."\textsuperscript{213} The Nollans subsequently appealed the constitutional question to the Supreme Court.

The Supreme Court rejected the court of appeal's characterization of the Coastal Commission's condition as a regulatory taking and invalidated the condition as a taking per se under the physical occupation analysis of \textit{Loretto}.\textsuperscript{214} As in \textit{Loretto}, the Supreme Court found that a permanent physical occupation is not predicated on literal notions of substantial, perpetual intrusion, but can occur whenever anyone is given a permanent and continuous right to traverse the property.\textsuperscript{215}

Turning to the substantial state interest question of the takings inquiry, the \textit{Nollan} Court focused on whether a "substantial nexus" existed between "the condition substituted for the prohibition" and "the end advanced as the justification for the prohibition."\textsuperscript{216} This evaluation determines whether a governmental action that constitutes a physical occupation can be justified as advancing a legitimate state interest.\textsuperscript{217} The Court found that the Coastal Commission's permit condition would have been constitutionally permissible if it had required the Nollans to limit their building to a certain height or to provide a viewing spot for those whose view was blocked by the house.\textsuperscript{218} Such conditions, the Court said, would be legitimate exercises of the police power because they would advance the state's purpose of protecting the public against

\textsuperscript{209} Id. at 829.

\textsuperscript{210} Id.

\textsuperscript{211} Id. The superior court found that the California Coastal Act authorized the imposition of public access conditions on coastal developments only where the proposed development would have an adverse impact on public access to the beach. The court found that the record was insufficient to make such a conclusion. Id.

\textsuperscript{212} Id. at 829-30.

\textsuperscript{213} Id. at 830.

\textsuperscript{214} Id. at 831-32.

\textsuperscript{215} Id.

\textsuperscript{216} Id. at 837.

\textsuperscript{217} Id. at 836-37.

\textsuperscript{218} Id. at 836.
the detrimental impacts the Nollans' house would have on ocean views.\textsuperscript{219} However, if the condition "utterly fails" to remedy the evils that the state claims justify the restriction, the essential nexus between the means and end disappears, along with constitutional propriety.\textsuperscript{220} In the Nollans' case, a requirement that people on the beach be able to walk across the Nollan's property had no connection to the need to reduce any visual obstacles presented by the Nollans' house.\textsuperscript{221} Since the state could not justify the requirement as being rationally related to the legitimate state purpose of preserving coastal views, the permit condition represented a taking of property for public use through inappropriate means and without compensation.\textsuperscript{222}

The Supreme Court thus continued the trend exemplified by Hall toward decreased deference to legislative enactments and increased judicial scrutiny of land use regulations. The Court decreed that when a regulation presents a prima facie case of a taking by physical occupation, it will be constitutional only if a clearly defined, substantial connection exists between the avowed purpose of the regulation and the burdens it places on landowners. Whether this in turn means that landowners will be more successful in overturning restrictive land use and/or rent control statutes remains to be seen.

2. Pennell v. City of San Jose

In the first U.S. Supreme Court rent control case decided since Hall, Pennell v. City of San Jose,\textsuperscript{223} the Court upheld the constitutionality of a rent control scheme on familiar due process and equal protection grounds.\textsuperscript{224} Although the opinion rejected as premature a Hall-type takings claim, two dissenting justices, Justice O'Connor and Justice Scalia (author of the Nollan decision), found merit in the takings claim.\textsuperscript{225} Justice Scalia's dissent indicates that Hall's analytical framework is in step

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id. at 837.
\item \textsuperscript{221} Id. at 838-39.
\item \textsuperscript{222} Id. at 837. "Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" Id. (citations omitted).
\item \textsuperscript{223} 485 U.S. 1 (1988).
\item \textsuperscript{224} Id. at 14. The Court held that the tenant hardship allowances of the ordinance did not violate the due process clause. The Court stated that the provision was a "rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." Id. at 13. The Court also found that the ordinance did not violate the equal protection clause. Because the tenant hardship provision reflected a legitimate purpose, it was not irrational to treat landlords differently depending on whether or not they had hardship tenants. Id. at 14.
\item \textsuperscript{225} Id. at 15-19 (Scalia, J., dissenting).
\end{itemize}
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with a new perspective on land use and takings jurisprudence.226 While not authoritative, the Pennell dissent, in combination with Hall's analysis, indicates that there is growing judicial interest in enhancing the constitutional protection of private property ownership.

The San Jose rent control ordinance challenged in Pennell was enacted in 1979.227 The ordinance permitted an automatic annual rent increase of up to eight percent, with increases above eight percent subject to the approval of a hearing officer.228 In determining whether an increase above the statutory maximum was reasonable, the hearing officer could consider a number of factors enumerated in the ordinance,229 including "tenant hardship,"230 which became the focus of the plaintiff's challenge.

The plaintiffs argued that a taking would occur if the hearing officer took tenant hardship into account and reduced the rent below the level established after reviewing the other factors.231 This taking would be impermissible, they argued, because it would not serve the legitimate public purpose of reducing excessive rents. Instead, the provision would force landlords to shoulder the public burden of subsidizing poor tenants.232

Chief Justice Rehnquist, writing for the majority, dismissed the plaintiffs' claim as premature because there was no evidence that the tenant hardship provision had ever been relied upon by a hearing officer to

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226. See generally id. at 15-24.
228. Id. § 17.23.180.
229. These factors include increased costs for capital improvements, operation and maintenance, rehabilitation, and debt service; history of the rental unit; physical condition of the premises; increases or decreases in services; market value of rents for similar units; landlord financial information; and tenant hardship. Id. §§ 17.23.440-.450.
230. Id. § 17.23.450. The tenant hardship provision states:

In the case of a rent increase or any portion thereof which exceeds the standard set in Section 17.23.440A or B [the eight percent limit], then with respect to such excess and whether or not to allow same to be part of the increase allowed under this chapter, the hearing officer shall consider the economic and financial hardship imposed on the present tenant or tenants of the unit or units to which such increases apply. If, on balance, the hearing officer determines that the proposed increase constitutes an unreasonably severe financial or economic hardship on a particular tenant, he may order that the excess of the increase which is subject to consideration . . . or any portion thereof, be disallowed. Any tenant whose household income and monthly housing expense meet the criteria established by the Housing Assistance Payments Program under Section 8, existing housing provisions of the Housing and Community Development Act of 1974 . . . and the regulations pertaining thereto, shall be deemed to be suffering under financial and economic hardship which must be weighed in the hearing officer's determination. The burden of proof in establishing any other economic hardship shall be on the tenant.

An editorial note to the section states that the city suspended effectiveness of the section pending the outcome of the Pennell case.
232. Id.
reduce a proposed rent increase.\textsuperscript{233} The Court also found the provision to be permissive, not mandatory; therefore, it did not necessarily lead to a reduction of a proposed increase.\textsuperscript{234} Finally, the Court rejected the plaintiffs' due process and equal protection claims.\textsuperscript{235}

Justices Scalia and O'Connor, while agreeing that the tenant hardship provision did not violate due process or equal protection guarantees,\textsuperscript{236} disagreed with the majority on the takings issue. The dissent would have addressed the takings issue on the merits.\textsuperscript{237} They agreed with the plaintiffs that employment of the tenant hardship factor to reduce what would otherwise be a reasonable rent increase would be inconsistent with the Constitution.\textsuperscript{238} The dissent concluded that once the other rent increase factors were applied to give a landlord a reasonable return, the landlord could no longer be regarded as the cause of excessive rental rates or as reaping exorbitant profits from a housing shortage.\textsuperscript{239} Therefore, if the tenant hardship provision was invoked after a reasonable rent increase was otherwise determined, then the city would be asking landlords to remedy the problem of low income tenants who could not afford even reasonably priced housing.\textsuperscript{240}

While not specifically invoking \textit{Hall}, the dissenting opinion in \textit{Pennell}, like \textit{Hall}, advanced a rationale more receptive to private property ownership. The \textit{Pennell} dissent also employed, albeit indirectly, \textit{Nollan}'s substantial nexus reasoning and found that the tenant hardship provision in the San Jose ordinance went beyond the stated purpose of rent regulation to seek protection from social ills that had no connection to the landlords' provision of rental housing.

The dissenting opinion in \textit{Pennell} illustrates that the judicial attitude toward land use regulations in general and rent control statutes in particular may be in transition. If a ripe claim that a rent control statute ef-

\textsuperscript{233} Id. at 9-10. In takings cases, the Court will not decide the constitutionality of statutes “except in an actual factual setting that makes such a decision necessary.” \textit{Id.} at 10 (citations omitted). The Court found the claim to be premature because the factual record contained no evidence that the tenant hardship provision was ever relied on. \textit{Id.}

\textsuperscript{234} Id.

\textsuperscript{235} The court said that the statute did not violate the due process clause because it represented a rational attempt to accommodate the conflicting interests of protecting tenants from rent increases and ensuring landlords a fair return. \textit{Id.} at 13-14. In addition, the ordinance did not violate the equal protection clause because the tenant hardship classification scheme was rationally related to the city’s interest in protecting tenants. \textit{Id.} at 14.

\textsuperscript{236} Id. at 15.

\textsuperscript{237} Id. at 19. The dissent asserted that the takings challenge was not premature just because there was no actual example of a taking. It should be treated the same as any equal protection challenge: “[i]t is inconceivable that we would say judicial challenge must await demonstration that this provision has actually been applied to the detriment of one of the plaintiffs.” \textit{Id.} at 16.

\textsuperscript{238} Id. at 21.

\textsuperscript{239} Id.

\textsuperscript{240} Id. at 22.
fects a taking comes before the Supreme Court, the justices should provide guidance on whether *Hall*'s physical possession approach represents merely one court stepping away from precedent or the establishment of a new standard of review for all takings challenges of land use and rent control regulations.

3. Ross v. City of Berkeley

Another *Hall*-type takings challenge was similarly dismissed as not ripe for review in *Ross v. City of Berkeley*. In *Ross*, landlords challenged the constitutionality of Berkeley's now defunct commercial rent control ordinance. The plaintiffs argued that the city's exclusion of owner occupancy from a list of permissible causes for eviction constituted a taking because it deprived them of their right to recover possession of their commercial property.

The district court applied the *Hall* analysis to determine that the plaintiffs had indeed established a possessory taking claim, but, because they had failed to exhaust all available administrative remedies, the claim was not ripe for review. The *Ross* court found that the Berkeley eviction control provision, like the lease provision in the Santa Barbara ordinance, essentially granted tenants an indefinite leasehold interest in the landlord's property, thus effectively depriving the landlord of his right to possession. Moreover, the court found that the Berkeley ordinance granted tenants an alienable property interest similar to that granted to the tenants in *Hall*. Just as the tenants in *Hall* could sell their mobile home coaches in place at a higher price due to the promise of controlled rents, the tenants in *Ross* could sell their businesses at premium prices because of the promise that the business could not be evicted by the landlord. This ability of the tenants to profit from the transfer of a virtually perpetual leasehold interest constituted in *Ross*, as in *Hall*, a taking by physical occupation for which the landlords were due just compensation. However, as the plaintiffs had failed to exhaust all the administrative remedies available under the ordinance and thus had not proven that the ordinance failed to provide adequate compensation, the court

242. Commercial rent control ordinances in California became invalid on January 1, 1988, when California Civil Code § 1954.27 became effective. 1987 Cal. Stat. ch. 824, § 2 (codified at CAL. CIV. CODE § 1954.27 (West Supp. 1990)). The code section provides in pertinent part: "(a) No public entity shall enact any measure constituting commercial rental control, nor shall any public entity enforce any commercial rental control, whether enacted prior to or on or after January 1, 1988."
243. 655 F. Supp. at 841.
244. Id. at 837.
245. Id.
246. Id. at 838.
247. Id.
248. Id. at 839.
did not grant the plaintiffs' request for summary judgment on the takings issue.249 The Ross court's willingness to look beyond the reasonable rate of return standard and city pronouncements of legitimate state interests illustrates the potential impact that Hall could have on land use regulations in general and rent control statutes in particular.

B. Implications for Rent Control in General

Purely economic rent control provisions that regulate rental rates and guarantee landlords a fair rate of return on investment are not threatened by Hall. Not all statutes raise the constitutional issues addressed in Hall, although, arguably, all rent control statutes in effect take a portion of the landlord's property by taking some of the profits the landlord would realize if the marketplace governed rental rates. In addition to the economic elements of property ownership, the Hall case considered the noneconomic property rights of landlords and brought to the forefront issues not previously addressed in cases upholding cities' ability to regulate rental rates. What Hall places at issue, then, is the extent to which municipalities can infringe upon landlords' noneconomic interests through statutes designed to prevent rent gouging.

1. Mobile Home Park Ordinances

Obviously suspect under the Hall analysis are mobile home park rent control ordinances that contain lease provisions similar to the Santa Barbara statute. As the Hall court implied, the landlord-tenant relationship in mobile home parks, coupled with indefinite lease provisions and a price control, is especially susceptible to takings challenges.250 Under such ordinances, a tenant can not only profit on his independent interest in the landlord's property, but also restrict the landlord from choosing who will take over the space.

Most mobile home park tenants own their dwelling units and rent from a landowner a "pad" on which the unit sits.251 While this makes the tenants dependent on the landlord, as in the typical rental situation, it also gives the tenants the unique ability to profit from the relationship through their property interest in the home.252 Most mobile homes are rarely moved,253 so when a tenant sells his coach he usually also sells his

249. Id. at 841.
251. See Hirsch & Hirsch, supra note 26, at 405-06.
252. The existence of this profitable independent property interest proved crucial to the Hall case. See Hall, 833 F.2d at 1279.
253. Most modern mobile homes are less like trailers and more like prefabricated houses. The majority of coaches are "doublewides"—two prefabricated shells connected by rivets and screws—and do not have permanently affixed axles or wheels. Moving the coaches, therefore, can be very expensive, costing several hundred dollars. Consequently, only about one percent
tenancy in the park. This has some effect on the landlord's ability to choose who will occupy his park. However, in most jurisdictions, the landlord can exercise his right to control through tenant approval procedures and other rules that protect the owner's right to exclude. In addition, the park owner often can exercise his right to exclude by permitting only month-to-month tenancies or leases of specific duration.

Provisions establishing mandatory leases of unlimited duration, on the other hand, transfer a leasehold interest of unlimited duration to the tenant. This is particularly true in the mobile home context because the tenant sells the coach in place. The tenant thus profits on his independent interest in the landlord's property and prevents the landlord from choosing who will occupy the space. Under Hall, this presents a prima facie claim of a taking by physical occupation.

Equally suspect under the Hall rationale are mobile home park rent control ordinances that do not provide for vacancy decontrol—a release from rent ceilings upon change of tenancy. These provisions are particularly suspect because they increase the value of the "rent control premium" that selling tenants can realize from new tenants. As in the case of perpetual leaseholds, if a tenant selling his mobile home can include a space that will not recognize a rent increase upon change in tenancy, he will get a higher selling price. Even without the perpetual lease provisions, tenants profit from these leasehold interests because they can sell the right to live at below market rents for as long as the tenancy lasts. Under the Hall analysis, this type of intrusion upon the landlord's rights of alienation could present a prima facie case of a taking by physical occupation.

The Hall rationale could have a far-reaching impact in California, where mobile home rent control ordinances have become increasingly popular. Many cities have lease provisions similar to the Santa Barbara ordinance and several fail to provide for vacancy decontrol. The mobile home park ordinance governing the city of Carson is an example of a particularly restrictive provision susceptible to a Hall-type challenge. The Carson ordinance provides that landlords cannot refuse to

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254. See id. at 421.
255. See id.
256. Hall, 833 F.2d at 1276 & n.16.
257. See id.
258. Id. at 1276-77.
259. As of 1988, approximately 35% of California mobile home parks were subject to rent control ordinances. By comparison, about 25% of the apartment units in California were governed by rent control. Hirsch & Hirsch, supra note 26, at 406.
260. For a complete listing of rent control statutes in California and their key provisions, see id. at 408-11.
261. CARSON, CAL., MUNICIPAL CODE ch. 7 (1987). While the constitutionality of the
renew or terminate a tenancy unless the tenant has failed to comply with a local ordinance, exhibited conduct that annoys other tenants, or failed to comply with mobile home park rules and regulations.\textsuperscript{262} This provision is similar to the leasehold provision struck down in \textit{Hall} and, therefore, would likely be declared a taking under the reasoning in \textit{Hall}.

In restricting the landlords' ability to exclude tenants, the Carson provision, like the Santa Barbara ordinance, provides existing tenants with a valuable, alienable property right. Consequently, the provision gives tenants the ability to increase the prices of their coaches because of low rents and deprives landlords of their right to exclude.

2. General Rent Control Statutes

Rent control ordinances governing all types of residential property frequently exclude vacancy decontrol, and many contain other provisions somewhat analogous to the perpetual lease provision considered in \textit{Hall}. However, the issues associated with tenant sales of dwelling units present in mobile home parks are not as obvious in the typical rental situation because the living space is not sold to the new tenant by the old tenant. Nonetheless, under certain circumstances, these ordinances regulate noneconomic property rights and could be challenged on the grounds advanced in \textit{Hall}.

a. Provisions Prohibiting Vacancy Decontrol

Under the \textit{Hall} analysis, provisions prohibiting vacancy decontrol could be viewed as giving tenants a virtually guaranteed, alienable, below market lease. Such an interest could represent a permanent physical intrusion upon the landlord's property and could constitute an unconstitutional possessory taking under \textit{Hall}. Although a tenant vacating a rent-controlled unit cannot sell the unit at a profit, as can a mobile home owner, he might be able to realize a profit on the leasehold interest by collecting "key money" or side payments from an incoming tenant willing to pay for the guarantee of a below market rental rate.\textsuperscript{263} In addition, third parties such as apartment managers or superintendents might also profit at the landlord's expense by having new tenants pay a fee to secure a coveted rent-controlled unit.\textsuperscript{264} If landlords can prove that tenants and third parties are profiting from such "invisible" transactions, then the

\textsuperscript{262} The ordinance's rent adjustment provisions was previously upheld by the California Supreme Court in \textit{Carson Mobile Home Park Owners' Ass'n v. Carson}, 35 Cal. 3d 184, 672 P.2d 1297, 197 Cal. Rptr. 284 (1983), its provisions regarding tenancy renewal have not yet been reviewed and would be susceptible to a \textit{Hall}-type challenge.

\textsuperscript{263} See \textit{id.}

\textsuperscript{264} See \textit{id.}
provisions prohibiting vacancy decontrol might be vulnerable to constitutional attack under *Hall*.

The city of Berkeley’s Rent Stabilization and Eviction for Good Cause Program prohibits vacancy decontrol, and consequently is susceptible to this challenge. The ordinance requires landlords to register their units, and it provides annual general rent adjustments determined by the Rent Stabilization Board. The rent adjustments can be upward or downward, depending on a number of factors including taxes, utility rates, and changes in the Consumer Price Index. The ordinance also permits individual rent adjustments to be determined by the city’s Rent Stabilization Board upon the request of either the landlord or tenant.

Since Berkeley’s ordinance does not provide for vacancy decontrol, incoming tenants might be willing to pay a substantial premium to secure a rent-controlled unit from which they cannot be evicted without good cause. This could lead to the development of various monetization schemes. These schemes arguably give Berkeley residents a marketable interest in the landlord’s property similar to the interest at issue in *Hall* and could consequently subject the Berkeley ordinance to a *Hall*-type takings challenge.

The city of Santa Monica’s rent control law is strikingly similar to Berkeley’s. Like the Berkeley ordinance, the Santa Monica ordinance provides for upward or downward annual rent adjustments at the determination of the city’s rent control board. Unlike Berkeley’s ordinance, Santa Monica’s law provides for vacancy decontrol, but only for those landlords who have dedicated a portion of their property to rentals for low income people.

The Santa Monica vacancy decontrol provision’s qualification for landlords who provide low income housing might be challengeable under the *Pennell* dissent as forcing landlords to subsidize low income tenants. As argued by the plaintiffs in *Pennell*, incorporating factors such as tenant hardship into the calculation of rent increases may effect a taking of the landlord’s property for the impermissible purpose of subsidizing rents.

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266. *Id.* §§ 13.76.080-.110.
267. *Id.* § 13.76.120.
268. *Id.* § 13.76.120.
270. *Id.* § 1805.
271. *Id.* § 1805(i).
273. *See id.*
b. Good Cause Eviction Provisions

A provision that allows a landlord to evict a tenant only for good cause might be vulnerable to a *Hall*-type challenge because the eviction controls, like the leasehold provisions in *Hall*, could be characterized as depriving property owners of their right to possession. As stated by the *Hall* court, "The ability to remove tenants for cause may lessen somewhat the economic impact of the Santa Barbara ordinance; it does not change the fact that tenants are given an indefeasible right to possession so long as they pay the controlled rent and behave themselves."\(^{274}\) This is particularly true in the case of provisions like the Berkeley commercial rent regulation, which prevented landlords from terminating a tenancy in order to occupy the unit themselves.\(^{275}\) Depriving landlords of this right might constitute a possessory taking under *Hall*.

Pursuant to Berkeley's good cause eviction provision landlords can evict tenants only for: failure to pay rent, substantial violations of material terms of a rental agreement, willful damage to the premises, refusal to agree on a new rental agreement, disorderly conduct, refusal of access, a need for repairs, the desire to demolish the unit, and occupancy by the landlord or his immediate family.\(^{276}\) The landlord is not permitted to recover possession for his own or a family member's use, however, if he has a comparable vacant unit available.\(^{277}\) In addition, tenants who are evicted because of repairs are to be given the right of first refusal when the unit is returned to the market, or must be given the right to move into any available vacant units owned by the landlord.\(^{278}\)

Although Berkeley's rent control law, including its good cause eviction provisions, has been upheld under the traditional rational relationship test, it might be vulnerable to attack under *Hall*'s physical possession analysis. The provisions could be viewed as a constructive deprivation of the landlord's rights to possession and control. Under the Berkeley ordinance, landlords are unable to exclude all but the most egregious tenants; consequently, they might be seen as having essentially lost their ability to control who uses their property. In addition, while landlords are permitted to occupy a rent-controlled unit themselves, they may be denied the right to occupy a particular unit if another unit is available. Therefore, a landlord who wishes to live, or permit a family member to live, in a particularly desirable unit is precluded from exercising that right if another comparable unit owned by the same individual happens to be vacant. Under the *Hall* rationale, these landlords could be

\(^{274}\) Hall v. City of Santa Bárbara, 833 F.2d 1270, 1277 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988).


\(^{276}\) BERKELEY, CAL., MUNICIPAL CODE § 13.76.130 (1982).

\(^{277}\) Id. § 13.76.130(9).

\(^{278}\) Id. § 13.76.130(7)(c)-(d).
characterized as suffering a permanent physical occupation of their property, a per se taking. Santa Monica's rent control ordinance includes a good cause eviction clause substantially similar to Berkeley's and would be vulnerable to this same Hall challenge.

Because the Hall decision clearly dealt with the unique aspects of mobile home park rent control ordinances in a narrow procedural posture, its holding, strictly construed, does not reach rent control ordinances governing other types of dwelling units. Nevertheless, especially when viewed as part of a general trend that is less deferential to land use and rent control regulations, Hall may be extended to other types of rent control ordinances. Cities, therefore, can no longer rest on their laurels content that they have developed constitutionally sound rent control statutes simply because a landlord's economic return is guaranteed.

CONCLUSION

While not revolutionary, Hall is nonetheless a pivotal decision in the history of land use takings jurisprudence. At once recognizing and questioning local governments' power to regulate land use, the decision pushes landowners' property rights toward a higher constitutional plane. It tries to confer on landowners greater protection from unwarranted governmental intrusions. At the same time, Hall preserves local governments' power to regulate prices provided that the regulations are necessary to protect the public health, safety, and welfare. The Hall decision thus represents a shift in the balance of power between landowners and regulators, giving landowners a greater edge in the fight against governmental regulation.

Hall does not yet represent an end to rent control. Price control provisions of rent control laws are not affected by the reasoning in Hall. However, in questioning the fair return on investment standard as the test for constitutionality, the Hall court reopened an issue seemingly settled by previous cases. Moreover, the full impact of Hall has not yet been realized. Extension of Hall's analysis could lead to the demise of rent control in its present form. For the present, however, the decision presents landlords with a rationale to challenge rent control provisions that go beyond regulating prices and infringe upon noneconomic property rights.
