REGULATORY TAKINGS: THE CASE OF MOBILE HOME RENT CONTROL

DANIEL L. RUBINFELD*

INTRODUCTION

In *Hall v. City of Santa Barbara* the Ninth Circuit Court of Appeals left open the possibility that a mobile home rent control ordinance could be a taking under the Fifth Amendment to the U.S. Constitution. In light of the Supreme Court’s decision in another mobile home rent control case, *Yee v. City of Escondido*, it seems appropriate to take stock of the current state of the economic and legal issues surrounding the constitutionality of rent control. William Fischel has helped us in that effort by providing a challenging and provocative analysis of the takings - rent control issue.

Professor Fischel’s analysis centers on the particulars of Judge Kozinski’s Ninth Circuit opinion in *Hall*. In this commentary I will suggest that Fischel’s focus on the Kozinski opinion gives a somewhat misleading characterization of where takings law currently stands. In addition, I will briefly suggest some important normative considerations that ought to be included in the takings debate.

Mobile home rent control can be distinguished from traditional rent control on a number of dimensions. First and foremost, most mobile home coaches are owned by the occupants. Because occupants move while coaches do not, one would expect a substantial portion of the benefits of rent control to be capitalized into the value of the coaches. Second, the amount of land that is made available for mobile home parks is often highly restricted by local zoning ordinances (in part because mobile homes are often limited to mobile home parks, and in part because communities are often reluctant to allow such parks within their boundaries.) To the extent that these restrictions are binding, the grant of the right to develop a mobile home park may amount to be the grant of the right to

* The author is Professor of Law, Professor of Economics, and Chair of the Program in Law and Economics at the University of California at Berkeley. The helpful comments of Vicki Been, William Fischel, and Andrea Peterson are greatly appreciated.

2. Specifically, the Appellate Court ruled that a challenge to the rent control ordinance should not have been dismissed on the basis of the pleadings alone. The Supreme Court did not grant *certiorari* in the case.
earn a monopoly rent.\textsuperscript{4} The first dimension helps to explain why mobile home rent control is likely to be less inefficient than other forms of rent control. One of the inefficiencies often associated with rent control is the tendency of owners of controlled units to underinvest in maintenance—without corresponding rent increases, there is no financial return to maintenance investment. In the mobile home rent control situation, if the tenants—who rent the land, but who own the coaches at the time of imposition of rent control—profit extensively, while future owners gain very little (they pay lower rents but a higher purchase price for the coach), current owners of mobile home coaches will have an incentive to invest in maintenance.\textsuperscript{5} Consequently, there is likely to be little undermaintenance.

The second dimension may also be important from a policy perspective. Monopoly rents are an indication of an excess demand for or a shortage of supply of mobile home sites. If this supply shortage is a long-run phenomena, it can conflict with the nation's overall housing supply goals.\textsuperscript{6}

In his opinion in \textit{Hall},\textsuperscript{7} Judge Kozinski chooses to oppose mobile home rent control even though it is apparently relatively efficient, while traditional rent control is highly inefficient. According to Professor Fischel, this perspective is paradoxical, since it is an apparent contradiction to the plausible view that the more inefficient the regulation the more likely that it should be opposed.

Whether the Kozinski comment, which appears in footnote twenty-four of the \textit{Hall} opinion, accurately reflects Judge Kozinski's underlying views about rent control is not particularly at issue. However, it does raise an important larger question—what relationship, if any, should the inefficiency of a regulation bear to the decision as to whether a regulatory taking has occurred?

From a purely positive legal perspective there is no contradiction in the distinction that Judge Kozinski made.\textsuperscript{8} Moreover, were I given the

\textsuperscript{4} Occasionally, the monopoly rights can be granted in direct exchange for rent control. Thus, in Stuyvesant Town Corp. v. Impellitteri, 114 N.Y.S.2d 639 (Sup. Ct. Spec. Term), \textit{aff'd}, 117 N.Y.S.2d 686 (App. Div. 1952), Metropolitan Life Insurance Company received the right of eminent domain to erect apartments in return for rent control.

\textsuperscript{5} Future owners do benefit under rent control by being insured against unusual and arbitrary rent increases. The insurance perspective is discussed later in this note.


\textsuperscript{7} 833 F.2d 1270 (9th Cir. 1986), \textit{cert. denied}, 458 U.S. 940 (1988).

\textsuperscript{8} Professor Fischel would himself characterize a paradox as an apparent contradiction that is, on closer examination, not a contradiction at all.
opportunity to distinguish mobile home rent control from other forms of rent control on a normative basis, I would base my distinction on entirely different arguments.

**Normative Concerns**

First, the normative perspective. I believe that any local ordinance, including rent control, ought to pass a substantive rational basis test: Does mobile home rent control as enacted meet or make a serious effort to meet the stated objectives of the local ordinance? In other words, is mobile home rent control an appropriate use of the police power? Thus, to the extent that the purpose of mobile home rent control is to provide affordable rents to current and future tenants, I would conclude that such controls are not constitutional. Current tenants are clearly helped, but if there is complete capitalization, future tenants receive little if any benefit.9

This rational basis test allows one to distinguish traditional rent control from mobile home rent control. Because it is illegal to charge "key money" or to use other means of appropriating the benefits of rent control, and because supply is relatively elastic in the long run, some of the benefits of traditional rent control are likely to flow to future as well as current tenants. This allows the jurisdiction passing a rent control ordinance to make a colorable claim that rent control has been administered so as to be consistent with the stated goals of the program—that of achieving affordable rents for all tenants.10

Two issues become central under this approach: (1) To what extent is the regulation likely to be fully capitalized? More generally, to what extent are the benefits of the regulation likely to accrue to future as well as current tenants? (2) What level of scrutiny should be applied to the rational basis test? In *Nollan v. California Coastal Commission* 11 Justice Scalia argued for heightened scrutiny of land use regulation12—such

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9. In Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), the Court stated that a zoning law "effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." *Id.* (citation omitted). In his dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988), Justice Scalia agreed. With respect to rent controls, he stated,

When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class . . . become richer. Singling out landlords to be the transferrors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem.

*Id.* at 22.

10. The jurisdiction could also claim that the purpose of rent control is to provide insurance against arbitrary rent increases. In this case, the rational basis test would most likely be satisfied.


12. *Id.* at 833, 834-35 n.3.
scrutiny might require an analysis of capitalization in the rent control case, with evidence of complete capitalization being sufficient to invalidate the regulation.

A more complete analysis of a particular rent control ordinance would involve an analysis of the administration of the ordinance, along with other policy concerns that affect the rental housing market. Thus, one should ask whether the stringent limitations placed on tenants by the ordinance are unfair in the sense that (a) they fail the rational basis test; and (b) they fail the *Agins* test that regulation is a taking only if it "denies an owner economically viable use" of his or her property.\(^\text{13}\)

How the Court would rule concerning a particular rent control ordinance would be highly fact dependent. It is important to note here that this substantive rule can be used to distinguish mobile home rent control from traditional rent control. Mobile home rent control can be characterized as unfair in not achieving its stated objectives, while other appropriately administered traditional rent control ordinances can be viewed as being entirely consistent with their stated objectives. In either case, the constitutionality of rent control depends on fairness, not on explicitly stated efficiency concerns.

It is important to stress that, according to the rational basis test, the constitutionality of rent control does depend crucially on the stated purpose of the ordinance. If the goal of mobile home rent control was clearly stated as eliminating the monopoly economic rent that would be earned by the owner of the mobile home park when the monopoly right to the park was granted, then the ordinance would clearly be valid.\(^\text{14}\) Traditional rent control would, however, be unlikely to meet this goal, unless it were put in place for a comparatively short period of time.

Suppose that mobile home rent control does pass a rational basis test. Should the Court declare a regulatory taking, thereby making the judgment that the ordinance unfairly places the burden of providing low rents for current tenants on the single owner of a mobile home park? My views on this subject have been developed elsewhere.\(^\text{15}\) Put briefly, I would declare a regulatory taking only if there was good reason to believe that the adversely affected owner would have chosen to insure against the risk of adverse government action had such insurance been

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14. It is important, of course, that the Court be sensitized to efforts by the State to play with the statement of regulatory purpose; the Court should be encouraged when appropriate to disavow such strategic statements.
available in the private market. The owners of mobile home parks would not satisfy this criterion for compensation to the extent that: (a) they had been (or should have been) aware of the possibility of rent control when they built or purchased the mobile home park;\(^\text{16}\) and (b) they had sufficient wealth to diversify the risk of rent control as part of a larger portfolio of risky investments.\(^\text{17}\)

**Positive Aspects of Takings Law**

A reconsideration of the positive, legal framework of takings completes the commentary. Judge Kozinski based his decision in *Hall* on the physical invasion test of *Loretto v. Telepromter Manhattan CATV Corp.*\(^\text{18}\) By giving a possessory interest to the owner of the coach, mobile home rent control (according to Kozinski) had the effect of limiting the park owner's ability to use the property and to transfer it to others. This limitation on the ability to transfer property is argued by Judge Kozinski to be a physical invasion.

Professor Fischel appears to accept the plausibility of Kozinski's argument without criticism. While a clever and intriguing argument, I believe that the physical invasion argument is neither compelling nor dispositive. Faced with similar issues in *Yee*,\(^\text{19}\) the Supreme Court did not find the argument compelling enough to declare mobile home rent control unconstitutional.\(^\text{20}\)

In terms of current takings doctrine, the physical invasion distinction is as clear as Professor Fischel's paper suggests. Fischel did not consider the appropriateness of the physical invasion test in *Hall*—nor did he point out that the Court has been backing away in recent years from the physical invasion test suggested in *Loretto*.\(^\text{21}\)

16. If they were aware of the risk of imposition of rent controls they might have paid a reduced price for the property.

17. I would provide a further test of the validity of rent control were a broader public policy perspective taken. To the extent that rent control is sufficiently invasive that it creates substantial interjurisdictional externalities, there is a strong public policy interest in restricting its use. This federalist perspective is sketched out in Robert Inman & Daniel L. Rubinfeld, *A Federalist Fiscal Constitution for an Imperfect World: Lessons from the United States, in Federalism: Studies in History, Law, and Policy* 76 (Harry Schieber ed., 1988).


20. The Court could have pursued a related line of thinking as spelled out in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). In *First English Evangelical Lutheran Church* the Court stated that compensation is required when a temporary regulation that severely limits the economic viability of the use of affected land is removed. *Id.* at 318-19. For an extensive discussion of this issue, see Frank Michelman, *Takings, 1987, 88 Colum. L. Rev.*, 1600 (1988).

21. The discussion that follows is based on a perceptive analysis of current takings doctrine by my colleague, Andrea Peterson. *See* Andrea L. Peterson, *The Takings Clause: In Search of Underly-
In *Loretto* the Court made it clear that only *permanent* physical invasions were *per se* unconstitutional.22 The installation of cable TV facilities on a landlord's apartment building was deemed to be such a permanent invasion, primarily because of the nature of the invasion, not the economic magnitude of the burden placed on the landlord.23 Even if one were to accept the *Loretto* view, it is not clear that mobile home rent control should be deemed a permanent physical invasion; one can argue that rent control does not “absolutely dispossess the owner of his rights to use, and exclude others from, his property.”24

More to the point, the Court has shown a reluctance to interpret the permanent invasion test broadly. In *Nollan*25 the California Coastal Commission had required the Nollan family to grant an easement allowing the public to walk along the beach on their land in order to get permission to build a house on the land.

In deciding *Nollan*, the Court stated that requiring access to a beach is a permanent physical invasion, but the Court added that the provision of access was conditional on the decision to build on the land.26 On this basis, the Court chose not to apply the permanent physical invasion rule of *Loretto*. As Professor Peterson characterizes it,27 the Court found a taking in *Nollan* because the Court did not find convincing the Coastal Commission’s argument that public beach access mitigated the harm of construction to the public.28 Consistent with my earlier takings perspective, the Court took a rational basis perspective, stating that the requirement of access to the beach did not “substantially advance legitimate state interests.”29

The Kozinski permanent physical invasion rent control test could have provided a circuitous way to introduce economics explicitly into takings law. It was my hope that the Court would have taken the direct

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23. *Id.*
24. *Id.* at 435 n.12. If a *temporary* physical invasion were found, then under *Loretto* the Court would apply a more complex balancing test given in Penn Cent. Transp. v. New York City, 438 U.S. 104, 124-28 (1978).
26. *Id.* at 832-34.
27. Peterson, *supra* note 21, at 1339.
28. Note, however, that the Court had rejected a similar argument in *Loretto*, 458 U.S. at 434-35. In *Loretto* there was a taking because the only alternative to a permanent physical invasion was the destruction of the value of the rental property.
29. *Id.* at 434-42. Perhaps, as Professor Peterson points out, it would be more appropriate to state that “the government was advancing this governmental interest by unfair means.” Peterson, *supra* note 21, at 1340. For a view that *Nollan* and *Loretto* are consistent, see Michelman, *supra* note 20, at 1608.
route, by choosing to emphasize the economic aspects of the takings issue explicitly—by spelling out an appropriate balancing test, which would have included the payment of compensation when those harmed were highly risk-averse individuals.

In *Yee*,30 however, the Court chose neither, instead further elaborating on its earlier opinions that were based more on fairness than on efficiency.31 The Court did, however, make it clear that they had not heard enough to resolve the general issue of regulatory takings; this clearly leaves open the possibility of a substantive treatment of the issue in the near future.32

31. Recall that Frank Michelman's demoralization cost analysis was viewed by him as a fairness, not an efficiency argument. Frank Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967).
32. In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the Court made a small move in this direction by ruling that a regulation which disallows the economic use of property entirely is a compensable taking despite the fact that the regulation was designed to prevent public harm.