MAKING ROOM AT THE INN: RENT CONTROL AS A REGULATORY TAKING

I. INTRODUCTION

Numerous states and localities have passed rent control laws[1] to stabilize rents and prevent landlord "profiteering" during times of rental unit shortages. Although rent control systems differ,[2] their common purpose is to maintain rents below market levels.[3] Landowners have challenged rent control laws on several constitutional grounds. One such ground is the fifth amendment's just compensation clause which proscribes uncompensated government usurpation of property rights for public use.[4] In *Pennel v. City of San Jose*,[5] for example, the United States Supreme Court responded to the just compensation challenge

1. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 725-728 and n.1 (1983) for estimates of the extent of rent control as of 1983. More than ten percent of residential rental units in the U.S. were subject to rent control at that time. *Id.* at 725 n.1. Rent control laws were effective in New York City, the greater Boston area, over 100 New Jersey municipalities, Washington, D.C., Miami Beach, municipalities throughout California, and other localities. *Id.* at 727-28 and nn.7-16.

2. *See generally* Baar, *supra* note 1, for an extensive review of the types of rent control laws.

3. *See* Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741, 746 (1988) (every rent control law insures that the rents are kept below fair market rental of the property).

4. The fifth amendment provides in pertinent part that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment applies to the states through the fourteenth amendment. *See* Chicago, B & Q R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (private property taken by the state for public use without compensation violates the due process clause of the fourteenth amendment).

5. 485 U.S. 99 (1988), *aff'g* 42 Cal. 3d 365, 721 P.2d 1111, 228 Cal. Rptr. 726 (1986).

and held that rent control laws do not constitute "takings"[6] when the laws merely protect tenants from "burdensome rent increases" and allow landlords a "reasonable" return on investment.[7]

This Recent Development first reviews regulatory taking jurisprudence. With this foundation it then reviews the case law where landlords have challenged rent control as an unconstitutional taking. Then, it criticizes courts' continuing use of economic substantive due process as an element of regulatory taking analysis. Finally, the author departs from established precedent to conclude that rent control laws are uncompensated takings and therefore unconstitutional.

II. THE ORIGIN AND DEVELOPMENT OF REGULATORY TAKING ANALYSIS

The just compensation clause prohibits the taking of private property for public use without compensating the deprived property owner.[8] The typical takings claim arises when government, exercising its power of eminent domain,[9] physically seizes property for public use.[10] A taking may also occur when government exercises its police power[11] by enacting building or zoning ordinances.[12] Although gov-

6. The convention is to use the word "taking" in quotation marks to indicate regulatory takings in which the government does not actually take possession of the land. The author discontinues this use of quotation marks after the first few such uses.

7. 485 U.S. at 113.

8. *See supra* note 4.

9. Eminent domain is the government's power to appropriate, within constitutional constraints, private property for public use. *See, e.g.*, United States v. Jones, 109 U.S. 513, 518 (1883) (The power to take private property for public use, termed eminent domain, is an incident of sovereignty. It requires no constitutional grant, but is limited by the fifth amendment).

10. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 316 (1987) (the typical taking occurs when government condemns property within its eminent domain power); United States v. Clarke, 445 U.S. 253, 257 (1980) (condemnation proceeding typically involves action by condemnor to effect taking and acquire title).

11. The police power is the power inherent in a sovereign government to "direct the activities of persons within its jurisdiction." *See* Stoebuck, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV. 1057, 1057 (1980). Implicit in the concept of police power is the idea that government shall only exercise the power to advance the public interest. *Id.* A court will declare a regulatory measure void if found to be "arbitrary, capricious, or unreasonable." *Id.* at 1058. In the context of the regulatory takings issue, courts will apply a "means-ends" or "rationally related" test in varying degrees where the court questions whether the regulation serves a legitimate public purpose and, if so, whether the means reasonably relate to that purpose. *See, e.g.*, East Coast Lumber Terminal v. Town of Babylon, 174 F.2d 106, 110-11 (2d Cir. 1949) ("un-

ernment does not acquire title to the property, owners contend that the restrictions constitute de facto takings because they limit the property's use and diminish its value.[13]

The United States Supreme Court has recognized regulatory takings since its 1922 decision in *Pennsylvania Coal Co. v. Mahon*.[14] In *Mahon*, a coal company conveyed the surface rights to its property but

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reasonable" conditions imposed upon use of land, even though not an "out and out taking," is unconstitutional if accomplished without compensation); Hulen v. City of Corsicana, 65 F.2d 969, 970 (5th Cir. 1933), *cert denied*, 290 U.S. 662 (the court's duty is to determine the reasonableness of the police power exercise); Delaware, L & W. R. Co. v. Mayor of Morristown, 14 F.2d 257, 259 (3d Cir. 1926), *rev'd on other grounds*, 276 U.S. 182 (1928) (the test as to whether a land use regulation is a taking depends on the reasonableness of the exercise of the police power, as justified by public necessity); Ambler Realty Co. v. Village of Euclid, 97 F. Supp. 307, 314 (N.D. Ohio 1924), *rev'd on other grounds*, 272 U.S. 365 (1926) (a court may sustain a law or ordinance only if it has a "real and substantial relation to the maintenance and preservation of the public peace, public order, public morals, or public safety"). For a critique of the continuing use of this means-ends inquiry, termed substantive due process, see *infra* notes 132-43 and accompanying text.

12. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), discussed *infra* notes 14-18 and accompanying text.

13. *See infra* notes 24-57 and accompanying text for a discussion of the approaches courts use to determine whether a particular land use regulation is a "taking." Courts frequently use the phrase "inverse condemnation" to describe those cases in which a landowner attempts to recover compensation for a taking when the government has neither condemned the property nor acquired title. *See, e.g.*, Thornburg v. Port of Portland, 233 Or. 178, 180 n.1, 376 P.2d 100, 101 n.1 (1962) ("inverse condemnation is a cause of action against a government defendant to recover the value of property which has been taken in fact by the government defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.").

Prior to the Supreme Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), some state courts refused to hold that temporary land use regulations may constitute takings requiring compensation. Rather, such courts would hold either that the regulation was a "reasonable" exercise of the police power, and therefore no compensation was due, or, if the court found an "unreasonable" or "excessive" exercise of the police power, the court would invalidate the regulation, facially or as applied. *See, e.g.*, Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) (a landowner may not transmute excessive police power exercise into a lawful taking); Fred F. French Inv., Inc., v. City of New York, 39 N.Y.2d 587, 593, 350 N.E.2d 381, 384, 385 N.Y.S.2d 5, 8 (1976) (distinguishing compensable taking and noncompensable regulation).

In *First English*, the Supreme Court held that, where the government has already worked a taking, no subsequent action can relieve the government of the duty to compensate the landowner for the period during which the taking was effective. 482 U.S. at 319.

14. 260 U.S. 393 (1922).

expressly reserved the right to mine the underlying coal.[15] Subsequently, the state legislature enacted a statute prohibiting the mining of coal in such a way as to threaten subsidence of houses and other structures. A holder of surface rights attempted to enjoin the coal company's underground mining based on this legislation.[16] The Court held that the statute caused an unconstitutional taking.[17] Justice Holmes, writing for the majority, stated that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[18]

The *Mahon* Court, however, failed to define when a regulation "goes too far," and thereby creates an unconstitutional taking. Consequently, *Mahon* has spawned a number of formulae and *ad hoc* approaches that courts use to determine when a land use regulation becomes a taking.[19]

Despite the different formulae, all regulatory taking analysis begins with a substantive due process[20] inquiry. The court, applying varying

15. *Id.* at 412.

16. *Id.*

17. *Id.* at 413. The Court recognized that, although the police power may limit property rights and the values incident to property, the constitutional provisions of due process and contract limit the police power. One factor to consider in determining such limits is diminution in value of the property. "When [diminution in property value] reaches a certain magnitude . . . there must be an exercise of eminent domain and compensation. . . ." *Id.*

18. *Id.* at 415. Holmes went on to say "that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

19. One author described the decisions concerning regulatory takings as "characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric." Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1971). *See* Note, *Just Compensation For Temporary Regulatory Takings: A Discussion of Factors Influencing Damage Awards*, 35 EMORY L.J. 729, 738 nn.48-49 (1986) (whether a land use regulation rises to a taking depends on the facts of each case); Note, *Just Compensation: The Constitutionally Required Remedy for Regulatory Takings*, 55 U. CIN. L. REV. 1237, 1245 nn.60-63 (1986-87) (state courts have adopted various approaches to resolve regulatory taking cases); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1464 n.9 (1978) (survey of recent case law reveals a lack of any universally accepted mode of deciding regulatory takings). *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (no set formula to determine where regulation ends and takings begin); Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978) (no "set formula" for determining when economic injuries caused by public action require compensation by government).

20. As originally understood, the due process clauses of the fifth and fourteenth amendments dealt only with procedural rights. The fifth amendment states: "No per-

levels of scrutiny,[21] asks whether the ends of the regulation are legiti-

son shall be . . . deprived of life, liberty or property, without due process of law; . . . ." U.S. CONST. amend. V. The fourteenth amendment states: "No state shall . . . deprive any person of life, liberty or property, without due process of law; . . . ." U.S. CONST. amend. XIV.

"Due process of law" originally meant that government processes must be fair and non-arbitrary. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) (non-arbitrary); Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986) (fairness). On occasion, courts have used the due process clause to invalidate government actions based on the fairness of the substance rather than the fairness of the process. *See* E. CORWIN, LIBERTY AGAINST GOVERNMENT 114 (1948) (the due process clause consecrated a mode of procedure, but increasingly reached substantive content of legislation). Essentially, under the substantive due process doctrine, courts review the substance of legislation to determine if the law furthers a legitimate state interest. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 56-57 (1905) (the due process clauses of the fifth and fourteenth amendments protect liberty of contract and private property against unwarranted government interferences).

This doctrine, when applied to private economic interests, greatly expanded constitutional protection to these interests. Today, economic substantive due process review tends to be extremely lenient and deferential to the challenged laws. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 331-33 (1981) (various lenient tests are articulated in combined discussion of equal protection and substantive due process issues); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (legislative acts adjusting burdens and benefits of economic life come to the Court with a presumption of constitutionality); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (rejecting substantive due process doctrine). *But see* Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987) (overturning land use regulation on substantive due process grounds), discussed *infra* notes 30-36 and accompanying text.

Substantive due process doctrine, however, survives as a powerful judicial "veto" of legislation when the issues are non-economic and involve privacy, personhood and family. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (legitimate ends do not justify means that invade protected freedoms, and thus, a law which prohibits use of contraceptives is invalid); Roe v. Wade, 410 U.S. 113 (1973) (laws regulating abortion are invalid, based on constitutional privacy right recognized in *Griswold*). These cases do not apply substantive due process by name, but are nevertheless widely considered to be substantive due process decisions. *See* M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICY-MAKING BY THE JUDICIARY 115, 117-18 (1982) (substantive due process labeled constitution's "perennial hobgoblin"); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 664-66 (1980) (the Court is reluctant to admit the role of substantive due process in the new right of privacy). *See generally* G. GUNTHER, CONSTITUTIONAL LAW 501-59 (11th ed. 1985) (placing discussion of these cases within chapter on substantive due process); G. STONE, CONSTITUTIONAL LAW 840-95 (1986) (placing discussion of these cases within chapter on substantive due process).

21. The court, when making a substantive due process inquiry, applies various "levels of scrutiny" to the challenged law. The level of scrutiny that the Court applies depends on the private interest upon which the law impinges. The more important or "fundamental" the interest, the more demanding is the Court's means-ends inquiry.

The least intensive judicial review occurs under the rationality standard. Under this standard, the court inquires whether the law is rationally related to a legitimate govern-

mate or important and, if so, whether the means justify those ends. Courts generally invalidate a land use regulation if the ends sought are "arbitrary, capricious, or unreasonable," or if the means are not rationally related to its ends.[22]

If a regulation comports with substantive due process analysis, courts then apply one of four tests to determine whether its impact on the landowner's interests qualify it as a taking.[23] Those tests include

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ment purpose. The courts generally apply the rationality standard to economic regulations. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 525 (1934) (due process demands only that laws regulating property and contract rights select a means having a real and substantial relation to the end, and the end is not "arbitrary, capricious, or unreasonable). It is rare today that the Court will overturn economic legislation under the rationality standard. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 356 (3rd ed. 1986) [hereinafter NOWAK]. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955). ("The day is gone when this Court uses the Due Process Clause [to] strike down state laws, regulation of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("[W]e do not sit as a super-legislature. . . . [The] state legislatures . . . may within extremely broad limits control practices in the business-labor field,. . . ."). *See also* G. GUNTHER, CONSTITUTIONAL LAW 540 (10th ed. 1980) (the Court applies a "hands off" approach to economic substantive due process challenges).

Although the Court has deferred to the legislatures on economic matters, a stricter substantive due process analysis is available to protect individual liberties or "fundamental" rights. Where a fundamental right is involved, the Court applies "heightened" or "strict" scrutiny, in which the law's proponents must show that the law is "necessary" to protect a compelling state interest. *See* NOWAK, *supra* at 357; *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (legitimate ends do not justify means that invade protected freedoms, and thus a law which prohibits use of contraceptives is invalid).

In Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987), Justice Scalia, writing for the majority, pointed out that in the takings field, the level of scrutiny is not simple rational relation. The Court has required that the regulation "substantially advance" the "legitimate state interest." Agins v. Tiburon, 447 U.S. 255, 260 (1980). This formula appears to be intermediate level scrutiny, requiring a closer nexus between the ends and the means than required by simple rational basis review, yet not requiring the "compelling" state interest of strict scrutiny.

22. *See supra* note 20 for examples of cases that turn on substantive due process inquiry.

23. For a similar view of regulatory takings analysis, see Stoebuck, *supra* note 11, at 1058. Stoebuck views the "unreasonable" part of the "arbitrary, capricious, or unreasonable" test as the broadest of the three terms, involving a three part inquiry: 1) does the regulation serve a public end or purpose?; 2) if so, are the means adopted reasonably necessary to attain that end?; 3) are the means unduly oppressive upon the persons regulated? *Id.* This Recent Development separates the substantive due process inquiry, Stoebuck's first and second prong, from the "takings" test, Stoebuck's third prong, for two reasons. First, the courts rarely overturn economic regulations based on the substantive due process inquiry. *See supra* note 20. Second, it seems logical that a land use

the physical invasion test, the noxious use test, the balancing test and the diminution in value test.

A. *Physical Invasion Test*

The physical invasion test applies to traditional eminent domain takings. It also includes indirect government intrusions on a claimant's land when, for example, the government builds a dam that floods the claimant's land.[24]

The Supreme Court has invariably found that the government's physical invasion on a claimant's land is a taking. Two Supreme Court

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regulation can be "reasonable," yet still result in a taking as applied to a particular landowner. *See, e.g.*, First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) (land use regulation, though reasonable, is a taking where the regulation denies virtually all use of property).

The fifth amendment, after all, contemplates "reasonable" government takings: No matter how reasonable the taking, just compensation is due. Stoebuck's analysis suggests that only "unreasonable" regulations can be takings.

24. *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 174-84 (1871) (compensation required where dam constructed under statute caused flooding of plaintiff's land); Department of Pub. Works & Bldgs. v. Wilson & Co., 62 Ill. 2d 131, 141, 340 N.E.2d 12, 17 (1975) ("right of access" is a private property right inherent in real estate, and when action of the state eliminates or materially impairs access, compensation is due the landowner); Seawall Associates v. City of New York, 74 N.Y.2d 92, __, 542 N.E.2d 1059, 1063-64, 544 N.Y.S.2d 542, 546-47 (1989) (a case for compensation occurs when government, through its agents or the public at large, regularly uses or occupies space or a thing which theretofore was under private ownership); Helix Land Co., Inc., v. City of San Diego, 82 Cal. App. 3d 932, 945, 147 Cal. Rptr. 683, 690 (1978) (compensable taking requires a physical invasion or direct legal restraint); Nueces County Drainage & Conservation Dist. No. 2 v. Bevly, 519 S.W.2d 938, 943 (Tex. Civ. App. 1975) ("taking" means an actual physical invasion or an appropriation of land); Nollan v. California Coastal Comm'n., 483 U.S. 825, 832 (1987) (physical invasion occurs where government grants the public a right to traverse private property). *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (city had to pay compensation when it authorized cable television company to place its wires and switchboxes on private property without consent of owner) *with* FCC v. Florida Power Corp., 480 U.S. 245 (1987) (FCC regulation of rates chargeable by utility companies for rental of utility pole space to cable television companies was not a "taking" because the regulations did not require the utilities to rent pole space, and therefore, there was no physical occupation).

In *Mahon, supra* notes 14-18, the Court implicitly rejected the physical invasion test as the sole measure of a taking. The Court held that a land use regulation involving no physical occupation still gave rise to a taking. However, in Penn. Central Trans. Co. v. City of New York, 438 U.S.104 (1978), the Court declared: "We do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." 438 U.S. at 122 n.25.

cases, *Loretto v. Teleprompter Manhattan CATV Corp.*[25] and *Nollan v. California Coastal Commission*,[26] illustrate the Court's strict application of the physical invasion test. In *Loretto* the New York legislature enacted a law prohibiting landlords from interfering with the installation of cable television facilities on the landlord's property.[27] The landlord who challenged the law argued that the cable company's installations on her property represented an unconstitutional taking without just compensation.[28] The Court reasoned that the cable company's installations on the landlord's property was a physical occupation and therefore a *per se* taking.[29]

The Supreme Court has also found a physical invasion when government authorizes temporary public access to private property. In *Nollan*[30] the purchasers of an ocean-front lot located between two public beaches sought permission from the California Coastal Commission (CCC) to replace the existing bungalow with a larger home.[31] The CCC granted a permit on the condition that the landowners' give the public an ocean-front easement across their land to assure public access.[32] The landowners challenged the condition as an unconstitutional taking.[33]

Justice Scalia, writing for the majority, held that the easement

25. 458 U.S. 419 (1982).

26. 483 U.S. 825 (1987).

27. 458 U.S. at 423 n.3 (citing New York Exec. Law § 828 (McKinney Supp. 1981-1982)).

28. *Id.* at 424. The plaintiff's case was a class action on behalf of all owners of real property in the state on whose land Teleprompter had placed CATV components pursuant to § 828 of the Executive Law. *Id.* The New York Supreme Court, Special Term, granted summary judgment to the cable company and intervenor City. *Id.* at 424. The New York Supreme Court, Appellate Division, First Department, affirmed. *Id.* The landlord appealed to the Court of Appeals of New York, which affirmed, holding that the law was reasonably related to a legitimate public purpose, that the regulation did not have an excessive economic impact on the landlord's investment-backed expectations, and that physical appropriations are not *per se* takings. *Id.* at 424-25.

29. *Id.* at 426, 434-35. Physical invasion remains the strongest taking case, usually triggering a *per se* rule for compensation. *See* Michelson, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165, 1184 (1967) ("The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy," private property.).

30. 483 U.S. 825 (1987).

31. *Id.* at 827-28.

32. *Id.* at 828.

33. *Id.* at 829.

amounted to a "permanent physical occupation" of the land by the public "passing to and fro . . . even though no particular individual is permitted to station himself permanently upon the premises."[34] Even though the easement may not have significantly impaired the value of the land, as Justice Brennan argued in dissent,[35] the Court nevertheless held that trivial intrusions by individuals with government-granted access results in a physical invasion.[36]

B. *Noxious Use Test*

The noxious use test holds generally that if a land use regulation only prevents a harmful or noxious use of land, then a taking will not result regardless of its impact.[37] In *Hadacheck v. Sebastian*,[38] for example, the Supreme Court upheld an ordinance prohibiting the operation of a brickyard within certain specified boundaries[39] despite specific findings that: 1) use of the land for making bricks was its most efficient use; 2) when the landowner established the brick factory, the area was sparsely populated; and 3) the value of the claimant's land was drasti-

34. *Id.* at 832.

35. *Id.* at 853-55 (Brennan, J., dissenting).

36. Unlike *Loretto*, the *Nollan* Court did not find that a physical invasion results in a *per se* taking. Rather, the *Nollan* Court applied substantive due process analysis under "heightened scrutiny," *see supra* note 21, to find the land use regulation invalid. Whether Justice Scalia will apply heightened scrutiny to non-invasive land use regulations is unclear. *See* Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U.L. REV. 627, 670 (1988) (the reach of *Nollan* is unsettled). Justice Scalia, however, cites Agins v. City of Tiburon, 447 U.S. 255 (1980), to support his application of heightened scrutiny. *Agins* involved a non-invasive zoning regulation.

37. *See, e.g.*, Sibson v. State, 336 A.2d 239, 243 (N.H. 1975) (denial of permit was a valid police power exercise denying a future harmful use, and, therefore, there was no taking); Hadacheck v. Sebastian, 239 U.S. 394, 410-12 (1915) (it is not a taking when an ordinance prohibits brickmaking in a designated region, even applied to one who owned the brickyard before the municipality annexed it and where the land's use as a brickyard was its most valuable use); City of Minot v. Freelander, 426 N.W.2d 556, 560 (N.D. 1988) (city's demolition of house because of structural deficiencies and unhealthful conditions did not entitle homeowner to compensation). *Compare* State Plant Bd. v. Smith, 110 So. 2d 401, 406-07 (Fla. 1959) (when the state exercises its police power and destroys decayed fruit, unwholesome meat or diseased cattle, no compensation is required) *with* Department of Agric. and Consumer Serv. v. Mid-Florida Growers, Inc., 521 So. 2d 101, 104 (Fla. 1988) (when the state destroys healthy orange trees to prevent spread of citrus canker, compensation is required).

38. 239 U.S. 394 (1915).

39. *Id.* at 411-12.

cally reduced.[40]

Traditionally, noxious use has meant a use of land that is deleterious to the health and safety of others.[41] Many courts have expanded this definition by increasing the types of situations that the government can regulate applying the noxious use test. Some situations may be only marginally related to protection of health and safety. Specific examples include: (1) upholding an ordinance banning off-site billboards for aesthetic and traffic safety reasons;[42] (2) upholding restrictions on land use via zoning by applying the noxious use rationale;[43] and (3) upholding a "safety ordinance" which effectively prohibited a claimant from continuing a sand and gravel mining business that he had operated for thirty years, notwithstanding indecisive evidence concerning risks posed by excavation.[44]

Other courts, applying a noxious use rationale, have upheld land use regulations that have nothing to do with health and safety. Examples include: (1) upholding an ordinance imposing architectural restrictions;[45] (2) upholding historic landmark preservation ordinances;[46] and (3) upholding the taking of a department store in order to develop a well-balanced community.[47]

C. *Balancing Test*

Courts also use a balancing test to weigh the harm to the claimant against the benefit to the public.[48] In *State v. Johnson*,[49] for example,

40. *Id.* at 405. Specifically, claimant's unrefuted testimony showed that the value of the clay deposits fell from $800,000 to $60,000 as a result of the ordinance.

41. *See* BERGER, LAND OWNERSHIP AND USE 716-17 (3rd ed. 1983).

42. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980).

43. Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

44. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

45. State ex rel. Stoganoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970).

46. Penn Central Trans. Co. v. City of New York, 438 U.S. 104 (1978).

47. Berman v. Parker, 348 U.S. 26 (1954).

48. Some commentators view the balancing text as a consequence of Holmes' *Mahon* opinion. *See* BOSSELMAN, CALLIES & BANTA, THE TAKING ISSUE 321 (Council on Environmental Quality, 1973).

This takings test (balancing private harm against public benefit) is a singularly indefensible approach to takings analysis, and is not a consequence of Holmes' taking formula. Presumably, in State v. Johnson, *infra* notes 49-53, if the public benefit were greater, there would be no taking even though the landowners' interest would be completely destroyed. This is exactly the kind of government action that the just compensation clause was meant to prevent, and that Holmes recognized in *Mahon*. *See supra*

the Maine Supreme Court held the Wetlands Act[50] void as applied to claimant's land.[51] Application of the Act to claimant's land deprived the claimant of all reasonable use of it.[52] The court balanced this deprivation against the public interest in protecting wetlands. In the court's view, this public interest failed to outweigh the private interest because the wetland held by the claimant was "but a minute part . . . of [a] state-wide concern."[53]

D. *Diminution in Value Test*

The diminution in value test[54] focuses strictly on the impact of the land use regulation on the landowner. If the landowner's use is restricted such that the value of his property is drastically diminished, a taking exists no matter how great the benefit to the public. Before finding a taking, some courts require that the regulation so restrict the use of the property that it leaves no reasonable use.[55] Other courts adhere to a lesser standard, finding takings where the existing use is substantially prevented.[56] Whatever standard a court chooses to apply, it is apparent that most courts allow substantial diminution in property value before they will find that a regulation has "gone too far."[57]

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note 18 and accompanying text. The public must pay for the benefit derived from the landowner's loss.

49. 265 A.2d 711 (Me. 1970).

50. 12 ME. REV. STAT. ANN. tit. 12, §§ 4701-4709 (1964).

51. 265 A.2d at 716.

52. *Id.*

53. *Id.*

54. The diminution in value test originated in *Mahon*, *supra* notes 14-18.

55. *See, e.g.*, Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938) (an ordinance that permanently so restricts the use of property that it cannot be used for any reasonable purpose is a taking); Agins v. City of Tiburon, 24 Cal. 3d 266, 277, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979) (a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property); Reel Enterprises v. City of La Crosse, 146 Wis. 2d 662, 674, 431 N.W.2d 743, 748 (Ct. App. 1988) (a regulatory taking requires that the restriction deprive the landowner of all, or practically all, of the land's use).

56. *See, e.g.*, Q C Corp. v. Maryland Port Admin., 68 Md. App. 181, 208, 510 A.2d 1101, 1115 (1986) (deprivation of the existing use is sufficient to demonstrate a taking).

57. *See, e.g.*, HFH Ltd. v. Superior Court, 15 Cal. 3d 508, 512-14, 542 P.2d 237, 240-41, 125 Cal. Rptr, 365, 368-69, *cert. denied*, 425 U.S. 904 (1975) (diminution in value of land from purchase price of $388,000 to market value of $75,000 caused by zoning ordinance was not a taking); Gold Run Ltd. v. Board of County Comm'rs., 38 Colo. App. 44, 45-47, 554 P.2d 317, 318-19 (1976) (no taking where developer sought

The Supreme Court has applied an ad hoc approach to regulatory takings claims since *Mahon.*[58] Often, the Court has quoted the view that the just compensation clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[59] This "disproportionate burden" principle is the leitmotif of just compensation clause analysis. It provides a background against which to critique courts' decisions on the constitutionality of rent control laws.

III. RENT CONTROL AND TAKINGS JURISPRUDENCE

In the 1922 case of *Block v. Hirsch*,[60] the United States Supreme Court first upheld a rent control law against a landlord's taking chal-

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rezoning of land from agricultural to residential, such rezoning took several years, and in the meantime developer lost most of his property through foreclosure); William C. Haas Co. v. City of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979) (no taking where rezoning diminished value of land from $1,000,000 to $100,000).

58. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) (no "set formula" used to trigger compensation for economic injury caused by public action); Andrus v. Allard, 444 U.S. 51, 65 (1979) (regulatory "taking" determination requires exercise of judgment and application of logic).

59. Armstrong v. United States, 364 U.S. 40, 49 (1960). In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), Justice Scalia stated for the majority that having a publicly accessible beach may be a good idea, "but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization." 483 U.S. at 841. In *First English, supra* note 13, Chief Justice Rehnquist, writing for the majority, quoted the *Armstrong* "disproportionate burden" principle. 482 U.S. at 318-19. In Keystone Bituminous Coal v. DeBenedictus, 480 U.S. 470 (1987), Justice Rehnquist, in dissent, said that the taking clause prevents "the public from loading upon one individual more than his just share of the burdens of government . . . ." 480 U.S. at 512. The majority, however, found that the Subsidence Act, which required the claimant coal company to keep a certain amount of coal in the ground for surface support, merely abated a "public nuisance," and therefore was not a taking even though the coal company was burdened uniquely. 480 U.S. at 491. *See supra* notes 37-47 and accompanying text for a discussion of the "noxious use" test. In the rent control context, this "public nuisance" exception to the "disproportionate burden" principle of *Armstrong* is seen in Suppus v. Bradley, 101 N.Y.S.2d 557, 577-78 (N.Y. Spec. Term 1950) (rent control regulations are valid even though the burdens are borne disproportionately by landlords), *aff'd*, 278 A.D. 337, 105 N.Y.S.2d 48 (1951). For a criticism of the view that rent control prevents a nuisance, see *infra* notes 162-167.

60. 256 U.S. 135 (1921). For a review of the case law on the constitutionality of rent control preceding *Block*, see 11 A.L.R. 1252-1261 and 16 A.L.R. 178-80. In a companion case to *Block*, Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921), the Court upheld an emergency, temporary housing act similar to the rents act in *Block*. *Id.* at 170-71. The rationale was similar, and the same four Justices dissented. *Id.* at 198-200.

lenge. In *Block*, the landlord sought possession of the premises after expiration of the tenant's lease.[61] Relying on the District of Columbia Rents Act[62] the tenant refused to surrender the premises. Section 109 of the Act granted tenants a qualified right to continue occupancy after the lease expired.[63] The Act was an emergency measure that was to last no more than two years.[64] Congress sought to improve a crowded rental market in Washington, D.C., caused by an influx of people during World War I.[65] As such, the Court upheld the Act as a valid exercise of the police power.[66]

Applying substantive due process analysis, the Court reasoned that preventing profiteering by landlords was a legitimate end.[67] Rent control and tenant occupancy privileges were a means reasonably related to that end.[68] The Court explained that the level of scrutiny applied did not require that the means were necessarily the wisest, most cost-effective, or even most likely to achieve the desired end.[69]

In reaching its conclusion, however, the Court recognized an important restriction on the police power under the *Hirsch* facts. The Court held that landlords were entitled to a "reasonable rent."[70] By implica-

61. *Id.* at 153.

62. *Id.* The complete title of the Act was: Act of October 22, 1919, c. 80, Title II, 41 Stat. 297, "District of Columbia Rents." *Id.* at 135, 153.

63. *Id.* at 153-54. Section 109 conferred upon tenants the right to continue occupancy of rental property at the tenant's option, subject to regulation by the Commission created by the Act, so long as the tenant paid the rent and met other rental conditions established by the lease or the Commission. *Id.* This section also allowed the landlord to take possession of the premises for occupancy by himself or his dependents if he gave the tenant 30 days notice. *Id.* at 154. In *Block*, the landlord wanted the premises for his own occupancy, but he did not give the required 30 days notice because he denied the validity of the Act. *Id.*

The Act also conferred upon the Commission the power to determine whether the rents charged and other conditions of leases were "fair and reasonable," and if not, to adjust the rents or other conditions so that they were "fair and reasonable." *Id.* at 135.

64. *Id.* at 154.

65. *Id.*

66. *Id.* at 158.

67. *Id.* at 157-58.

68. *Id.* at 158.

69. *Id.* The court stated that "It was enough that the regulation bore a reasonable relation to the end." *Id.* This statement typifies the Court's deferential treatment of legislation under the low level scrutiny test. *See supra* note 21 for a discussion of the levels of scrutiny courts apply under substantive due process analysis.

70. 256 U.S. at 157. The Court said that § 106 of the Act provided the procedure to secure each landlord a reasonable rent.

tion then, the Court would strike down a rent control law that demanded a cap on rent at a level that would be confiscatory to landlords and would represent a windfall to tenants.[71] A "just and reasonable return" remains the standard today.[72]

The *Block* Court justified the regulation as a temporary emergency measure.[73] The Court stated that a permanent rent control regulation would be a different case,[74] although the Court did not go so far as to say that a permanent rent control regulation would be unconstitutional without compensation.[75]

In *Bowles v. Willingham*,[76] the Supreme Court re-examined *Block*'s "reasonable rent" requirement. Once again, the country was at war. Congress passed the Emergency Price Control Act of 1942[77] because of rental housing shortages in areas where armed forces or war production facilities were located.[78] Section 2(b) of the Act delegated to the

71. *Id.* at 157. The Court said that the act merely prevented landlords from "profiting by the sudden influx of people . . .," an unjust pursuit. *Id.*

72. *See, e.g.*, Parks v. Rent Control Bd. of Hazlet, 107 N.J. 217, 219, 526 A.2d 685, 686 (1987) (a fundamental requirement of a rent control ordinance is that it permits the landlord a "just and reasonable return" on the property); Flynn v. Cambridge, 383 Mass. 152, 160-61, 418 N.E.2d 335, 340 (1981) (an ordinance regulating condominium conversion of housing subject to rent control was not a taking because, *inter alia*, it allowed the owner a "fair net operating income" for each unit); Baskin v. City of Berkeley Rent Stabilization Bd., 206 Cal. App. 3d 708, 713, 253 Cal. Rptr. 791, 796 (1988) (constitutional standards require rent control laws to provide landlords "just and reasonable returns on their property.").

73. 256 U.S. at 157.

74. *Id.*

75. Justice McKenna, however, vigorously condemned the Court's "emergency" exception. *Id.* at 169 (McKenna, J., dissenting). The dissent made what some economists today call a supply-side argument:

> Houses are a necessary of life, but other things are as necessary. May they too be taken from the direction of their owners and disposed of by the Government? Who supplies them, and upon what inducement? And, when supplied, may those who get them under promise of return, and who had no hand or expense in their supply, dictate the terms of retention or use, and be bound by no agreement concerning them?

Id. at 161.

The dissent would have held that the Act violated not only the fifth amendment's just compensation clause but also the Article I, § 10 provision that "No state shall . . . pass any . . . law impairing the obligation of contracts . . . ." *Id.* at 163-64 (citing U.S. CONST. art. I, § 10).

76. 321 U.S. 503 (1944).

77. Pub. L. No. 77-421, 56 Stat. 23 (repealed 1946).

78. *See* 7 Fed. Reg. 3193 (1942) (declaration by Administrator of the Office of Price Administration that defense activities resulted in increased rents in designated areas).

Administrator of the Office of Price Administration the authority to set "generally fair and equitable" rents in designated areas.[79] As such, the Administrator issued a "Maximum Rent Regulation" establishing maximum rents in these defense areas.[80] A landlord challenged the constitutionality of the Rent Director's order to lower her rents.[81]

The plaintiff distinguished *Block's* Washington, D.C., rent control act. The *Block* statute allowed fair rental to *each* landlord,[82] while the *Bowles* statute provided for "generally fair and equitable" rents in a designated area.[83] Such a scheme, the landlord argued, may be unfair and inequitable as applied to a particular landlord. As such, the plaintiff argued that the Act was an unconstitutional taking as applied to such landlords.[84]

The Court reasoned that fixing rents on an ad hoc basis would be impractical, and consideration of this impracticality was germane to the constitutional issue.[85] Price control schemes by their nature may reduce the value of property, but that does not mean the scheme is unconstitutional.[86] The Court cited previous cases where it upheld the state's power to regulate prices, including schemes that established price controls for a class of commodities or services.[87] In stark contrast to the "disproportionate burden" principle of *Armstrong v. United States*,[88] the *Bowles* Court stated that a "member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police

79. 321 U.S. at 506 n.2.

80. *Id.* at 508.

81. *Id.* at 509-10. Besides a fifth amendment taking claim, the landlord challenged the Act as an unconstitutional delegation of power and as a violation of fifth amendment due process requirements. *Id.* at 514, 519. The Court upheld the Act against all these challenges. *Id.* at 516, 517, 519.

82. *See supra* note 70 and accompanying text for discussion of reasonable rent.

83. 321 U.S. at 516.

84. *Id.* at 516-17.

85. *Id.* at 517.

86. *Id.*

87. *Id. See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934) (state had power to fix the maximum and minimum price of milk); Munn v. Illinois, 94 U.S. 113 (1876) (state had power to set maximum prices chargeable by warehouses in a near-monopoly situation).

88. 364 U.S. 40 (1960). *See supra* note 59 and accompanying text for a discussion of the *Armstrong* "disproportionate burden" principle and its appearance in several important 1987 Supreme Court taking clause cases.

power."[89] Thus, the *Bowles* Court effectively altered the "just and reasonable return" standard of *Block* to mean that a blanket rent ceiling will survive an "as applied" constitutional challenge if the rent ceiling allows landlords generally to make a just and reasonable return.[90]

After *Bowles*, the Supreme Court did not again address the issue of whether rent control laws constitute regulatory takings[91] for forty-four years.[92] Many lower federal courts and state courts, however, have

89. 321 U.S. at 518.

90. In reaching its decision, however, the *Bowles* Court did not enunciate the limits of the police power. In *Mahon*, *supra* note 14, Justice Holmes said that at some point, a land use regulation "goes too far" and becomes a taking. Twenty-two years later in *Bowles*, Justice Douglas, although finding no taking, suggested there were constitutional limits to price-fixing legislation, but like Holmes before him did not establish those limits. As in *Block*, *supra* note 60, the *Bowles* Court considered the emergency housing shortage addressed by the rent control statute. In so doing it suggested that such regulation in peace time or in absence of an "emergency" may not pass constitutional muster. *Block*, 321 U.S. at 519.

Douglas seems to make the argument that the greater power includes the lesser when he said that a "nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property." *Id.* Following this logic, one may ask: what limits a government that can demand the ultimate sacrifice of its citizens?

91. A 1947 case, Woods v. Cloyd W. Miller Co., 333 U.S. 138, presented a challenge to the rent control provisions of the Housing and Rent Act of 1947, 50 U.S.C. §§ 1891-1910, on the grounds that the authority of Congress to control rents under its war powers ended, and thus the Act became ineffective, after hostilities ceased. 333 U.S. at 140. *See* Proclamation 2714, 12 Fed. Reg. 1 (1947) (declaring a termination of hostilities on December 31, 1946). Consequently, the claimant argued that the war power upon which rests Congress's authority to control rents also terminated. 333 U.S. at 140. *See supra* notes 60-90 and accompanying text for discussion about the *Block* and *Bowles* cases, which held that the war power sustains the rent control provisions Congress enacts in times of war emergency. The *Woods* Court upheld the Act, stating that the war power extends beyond the time hostilities cease to reach the residual "evils" of the war effort. 333 U.S. at 141-42. From a taking clause perspective, the *Woods* case is of limited importance. It does make clear, however, that *Block* and *Bowles* are based on wartime emergencies and should be, therefore, of limited precedential value in non-emergency cases. The concept of "emergency," however, expanded to include any rental housing shortage. *See infra* note 96 and accompanying text.

92. The paucity of rent control challenges from the mid-1950's until the early 1970's is easily explained; with the exception of some New York state localities, the country was virtually free of rent control. *See* M. LETT, RENT CONTROL 5 (1976). Rent control on a national scale resurfaced in 1971 when President Nixon, as an anti-inflationary measure, invoked a 90-day freeze on wages, prices and rents. Exec. Order No. 11,615, *Providing For Stabilization of Prices, Rents, Wages and Salaries*, 36 Fed. Reg. 15727 (1971). Several phases of stabilization measures followed, including a measure to restrict (with certain exemptions) rent increases to 2.5 percent plus specified allowable cost increases. 6 C.F.R. Part 301 (1972). Although the national rent control

addressed the issue because of the plethora of state rent control laws.[93] Courts now generally hold that rent control laws are constitutional so long as the laws represent an emergency response and allow the landlord a "just and reasonable return."[94] Courts are extremely deferential to legislative or agency findings based upon these two factors.[95] The emergency need not be a war or similar disaster, but can be any perceived rental housing shortage.[96] If rent control itself exacerbates the

effort ended with the final phases of the stabilization program, numerous state and local rent control measures preceded and followed these federal efforts. Exec. Order No. 11,695, *Further Providing For Stabilization of the Economy*, 38 Fed. Reg. 1473 (1973).

93. *See* M. LETT, *supra* note 92, at 5.

94. *See, e.g.*, Bucho Holding Co. v. Temporary State Hous. Rent Comm'n, 11 N.Y.2d 469, 473-74, 184 N.E.2d 569, 571-72, 230 N.Y.S.2d 977, 980 (1962) (protection of public against rent increases in a time of rental unit shortage is a valid legislative purpose, although an unreasonably low return on landlord's investment, if shown by landlord, would be "confiscatory" and unconstitutional); Kress, Dunlap & Lane, Ltd. v. Downing, 193 F. Supp. 874, 878, 880 (D.V.I. 1961) (shortage of rental units justifies use of police power to regulate rents, although a court must construe the statute fixing rents so as to allow landlord a "fair and equitable return" for statute to be constitutional); Niles v. Boston Rent Control Adm'r, 6 Mass. App. Ct. 135, 147, 374 N.E.2d 296, 303 (1978) (landlord failed to show that the rent adjustment provided by regulation did not allow a "fair net operating income," and therefore the rent control rate was not confiscatory); Leone Management Corp. v. Board of Comm'rs, 130 N.J. Super. 569, 578, 328 A.2d 26, 31 (N.J. Super. Ct. Law Div. 1974) (ordinance providing percentage ceiling on rent increases based on Consumer Price Index was not per se unconstitutional). *But see* Nash v. City of Santa Monica, 37 Cal. 3d 97, 106 n.6, 688 P.2d 894, 901 n.6, 207 Cal. Rptr. 285, 292 n.6 (1984) (rent control does not give rise to a regulatory taking where property retains some value).

95. *See, e.g.*, Hotel Ass'n. of New York City v. Weaver, 3 N.Y.2d 206, 216, 144 N.E.2d 14, 19-20, 165 N.Y.S.2d 17, 25 (1957) (legislative enactment of State Residential Rent Law is presumed constitutional, and evidence that 53% of hotels in New York City have a 17.21% vacancy rate is not enough to rebut presumption that legislation addressing the finding of a rental space emergency shortage is unconstitutional as applied to these hotels); Kahn v. Wall, 68 A.2d 862, 863 (D.C. 1949) (court was unwilling to override recent Congressional extension of Rent Act by taking judicial notice of the end of housing accommodations shortage); Warren v. City of Philadelphia, 382 Pa. 380, 384, 115 A.2d 218, 220 (1955) (rent and eviction controls designed by the state for the "health and welfare of its citizens" is a valid police power exercise); Marshall House, Inc. v. Rent Review and Grievance Bd. of Brookline, 357 Mass. 709, 714, 260 N.E.2d 200, 204-05 (1970) (state need show only a "reasonable basis in fact" that a housing emergency exists to exercise its police power and control rents); Helmsley v. Borough of Ft. Lee, 78 N.J. 200, 209, 394 A.2d 65, 69 (1978) (requiring only a "rational basis" for enactment of rent control ordinance), *appeal dismissed*, 440 U.S. 978 (1979). *But cf.* City of Miami Beach v. E. J. Frankel, 363 So. 2d 555, 557 (Fla. 1978) (court held invalid a proposed rent control ordinance where state's enabling legislation required a showing of a "grave" housing emergency, and city council failed to make such a showing).

96. *See, e.g.*, Kress, Dunlap & Lane, Ltd. v. Downing, 193 F. Supp. 874, 878

rental housing shortage,[97] then a paradox arises such that the shortages that rent control creates justify its continuation.

In *Pennell v. City of San Jose*,[98] the United States Supreme Court reiterated the view that rent control is constitutional so long as an emergency rental housing shortage exists and the landlord receives a just and reasonable return. The *Pennell* Court affirmed a California Supreme Court decision upholding San Jose's rent control ordinance against a fifth amendment taking claim.[99] San Jose's rent control ordinance allowed landlords an automatic annual rent increase by up to eight percent. If, however, the landlord demanded an increase of more than eight percent, a tenant could object. The ordinance required a hearing officer to determine whether the proposed increase in rent was reasonable under the circumstances. In determining whether the proposed rent increase is reasonable, the hearing officer considers, *inter alia*, financing costs, maintenance, service history and "the hardship to the tenant."[100]

The landlords' association argued that the tenant hardship provision violated fifth and fourteenth amendment prohibitions against the taking of private property for public use without just compensation. They argued that when the hearing officer reduces the rent increase based on the tenant's hardship, the rent drops below the "reasonable" level. The resulting reduction in the rent increase, argued the landlords, constitutes a taking.[101] Citing the *Armstrong* "disproportionate burden" principle,[102] the landlords argued that "although the purpose to be advanced by the hardship provisions (providing financial assistance to poor tenants) is a proper one, that burden cannot constitutionally be placed on individual landlords who happen to have hardship

(D.V.I. 1961) (shortage of rental units justifies use of the police power to regulate rents); Apartment and Office Bldg. Ass'n of Metro. Washington v. Washington, 381 A.2d 588, 590 (D.C. 1977) (rent control act which is a legislative response to an emergency housing shortage was a valid police power exercise, even absent wartime conditions).

97. Economic theory and empirical data suggest that rent control causes rental unit shortages. *See infra* note 131.

98. 485 U.S. 1 (1988), *aff'g* 42 Cal. 3d 365, 721 P.2d 1111, 228 Cal. Rptr. 726 (1986).

99. 485 U.S. at 15. The Court also upheld the ordinance against due process clause and equal protection clause challenges. *Id.* at 11-14.

100. *Id.* at 5.

101. *Id.* at 9-10.

102. *See supra* note 59 and accompanying text for a discussion of the *Armstrong* "disproportionate burden" principle.

tenants."[103]

In an opinion which one commentator called a "judicial nonevent,"[104] Chief Justice Rehnquist, writing for the majority, said that the case was not ripe for consideration because the hearing officer had not actually applied the tenant hardship clause to reduce a rent below the amount it would have been reduced to pursuant to the ordinance.[105] Although he did not reach the merits of the claim, the Chief Justice reiterated his view that rent control laws are generally constitutional because the end of "prevent[ing] excessive and unreasonable rent increases" resulting from a rental unit shortage is a "legitimate exercise of appellee's police power."[106]

In dissent, Justice Scalia criticized the majority for refusing to reach the merits of the landlords' taking claim. Distinguishing "facial" challenges from "as applied" challenges, Scalia argued that where a facial challenge exists the Court need not wait until the government misapplies the statute to reach the merits of the constitutionality challenge. The question in a facial challenge is "whether the mere enactment of the statutes and regulations constitutes a taking." [107]

The dissent found the tenant hardship provision unconstitutional under the *Armstrong* "disproportionate burden" principle. Public aid to hardship tenants is a public function, argued the dissent, and therefore should come from general revenues, not from landlords or co-tenants who happen to live in the same building as the protected class of tenants.[108]

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103. 42 Cal. 3d 365, 371, 721 P.2d 1111, 1115, 228 Cal. Rptr. 726, 730 (1986).

104. *See* Epstein, *supra* note 3, at 752. (Rehnquist's opinion that the taking issue in *Pennell* was not ripe resulted in a "judicial nonevent.").

105. 485 U.S. at 9-10. For a criticism of Rehnquist's ripeness decision, see Epstein, *supra* note 3, at 752 n.30 (there is no reason to wait for the misapplication of a facially unconstitutional statute; this ripeness argument is an effort to quash constitutional takings challenges).

106. 485 U.S. at 9.

107. *Id.* at 15-19 (Scalia, J., dissenting).

108. *Id.* at 19-23. Justice Scalia noted the political economy of rent control, stating that:

> The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of "hardship" tenants. It seems to me doubtful, however, whether the citizens of San Jose would allow funds in the municipal treasury, from wherever de-

In *Seawall Associates v. City of New York*[109] the highest court of the State of New York invalidated New York's "Single Room Occupancy" (SRO) law[110] as an uncompensated taking. New York City passed the law in response to a shrinking stock of low-cost rental units. The law prohibited owners of "SRO" properties from demolishing, altering, or converting such properties. The law also obligated owners to restore all such units to habitable condition and to leave them at controlled rents.[111] In *Seawall*, real estate developers challenged the law as an unconstitutional taking of property without just compensation.[112] The court agreed, holding that the SRO law constituted a taking, under both "physical invasion"[113] and "disproportionate burden" analyses.[114]

The court found a physical invasion in the city's forced control over the owner's property; most importantly, the owner's right to exclude others.[115] Citing *Loretto*,[116] the court reasoned that the physical possession need not be by the government, but may be by third parties under government authority.[117] In reaching its conclusion, the court distinguished previous decisions which upheld rent control laws. The court stated that:

> The rent control and other landlord-tenant regulations that have been upheld by the Supreme Court [e.g., *Bowles*] and this court merely involved the restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing. . . .[T]hose regulations [unlike the SRO law] did not force the owners, in the first instance, to subject their

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rived, to be distributed to a family of four with income as high as $32,400 a year—the generous maximum necessary to qualify automatically as a "hardship" tenant under the rental ordinance.

Id. at 22-23.

109. 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989).

110. Local Laws, 1987, No.9 of City of New York § 7.

111. 74 N.Y.2d 92, __, 542 N.E.2d 1059, 1060-61, 544 N.Y.S.2d 542, 544 (1989). *See infra* notes 130-31 and accompanying text for the argument that rent control contributes to shrinking stocks of rental units.

112. *Id.* at __, 542 N.E.2d at 1062, 544 N.Y.S.2d at 545.

113. *Id.* at __, 542 N.E.2d at 1065-69, 544 N.Y.S.2d at 545-48.

114. *Id.* at __, 542 N.E.2d at 1062-65, 544 N.Y.S.2d at 548-52.

115. *Id.* at __, 542 N.E.2d at 1062-63, 544 N.Y.S.2d at 545-46.

116. *See supra* notes 25-29 and accompanying text for a discussion of the *Loretto* case.

117. 74 N.Y.2d at __, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546.

properties to a use which they neither planned nor desired. [118] Once it determined that a physical invasion had occurred, the court's finding of an uncompensated taking was nearly inevitable.[119]

The court went beyond the "physical invasion" rationale, however, in holding that the SRO law was facially invalid as a "regulatory taking." In other words, the law failed the *Armstrong* "disproportionate burden" analysis.[120] The court found that the law failed both prongs of the regulatory taking analysis: substantive due process analysis and disparate impact on the landowner.[121] Using substantive due process analysis, the court found that the end of the SRO law—alleviating homelessness—was of great social importance.[122] Applying *Nollan's* "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships,"[123] the court found that the means to that important end were inadequate.[124] The court relied on empirical evidence showing that the law would do little to resolve the homeless crisis.[125] Also, the court found that the law was imprecise because the SRO units preserved by the law were not earmarked for the homeless or potentially homeless and low-income families.[126] Finding that the benefits to the homeless and low-income families were indirect, conjectural and did not "substantially advance" the law's putative purpose, the court held that the law was not justified.[127]

The court also found that, even if the law was "reasonable" and passed the substantive due process inquiry, it could still be a taking

118. *Id.* at __, 542 N.E.2d at 1064-65, 544 N.Y.S.2d at 547-48.

119. *See supra* notes 24-36 and accompanying text for a discussion of the physical invasion test and its accompanying review standard.

120. 74 N.Y.2d at __, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548.

121. *Id.* at __, 542 N.E.2d at 1065-66, 544 N.Y.S.2d at 548-49. *See supra* notes 20-22 and accompanying text for a discussion of the two-prong view of regulatory taking analysis.

122. 74 N.Y.2d at __, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551.

123. See *supra* note 21 and accompanying text for a discussion of the *Nollan* "semi-strict" scrutiny of regulations under takings analyses.

124. 74 N.Y.2d at __, 542 N.E.2d at 1068-69, 544 N.Y.S.2d at 551-52.

125. *Id.* at __, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551. The "Blackburn Study," which reported on the status of SRO housing in New York City, supplied the empirical data upon which the court relied. Apparently, this study acknowledged that a ban on converting, destroying, and warehousing SRO units would do little for the homeless. *Id.*

126. *Id.*

127. *Id.* at __, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552.

because of the severe impact on the landowner's property rights.[128] The court reasoned that the SRO law substantially impaired each of the three basic rights of ownership: possession, use and disposal.[129] The SRO law thereby deprived the landowners of the economically viable use of their property.

IV. ANALYSIS

Economists agree that rent control laws exacerbate rather than improve rental housing shortages.[130] In a free market, a housing shortage will cause a rise in rents as renters bid up the price of the limited housing space. The bidding up of rent forces some people to economize on space, by doubling up and renting less space than one would if housing were not in short supply. Also, rising rents provide an incentive to homeowners to rent space previously off the market. Finally, higher rents act as a strong stimulus to new construction of homes and apartments. In sum, the price mechanism helps to bring about an equilibrium between the supply and demand of housing, as it does for any

128. *Id.* at __, 542 N.E.2d at 1066-68, 544 N.Y.S.2d at 549-51.

129. *Id.*

130. *See* Frey, Pommerehne, Schneider & Gilbert, *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 AM. ECON. REV. 986 (1984) (more than 98% of American economists surveyed agreed with the proposition: "a ceiling on rents reduces the quantity and quality of housing available."). This consensus cuts across ideological persuasions. For example Gunnar Myrdal, an architect of the Swedish Labour Party's welfare state, said: "Rent control has in certain western countries constituted, maybe, the worst example of poor planning by governments lacking courage and vision." Rydenfelt, *The Rise and Fall of Swedish Rent Control*, in RENT CONTROL A POPULAR PARADOX: EVIDENCE ON THE ECONOMIC EFFECTS OF RENT CONTROL 169 (1975). Gunnar Myrdal is ideologically opposed to his 1974 Nobel Prize co-winner, Frederick Hayek, but on rent control they agree. *See* Hayek, *The Repercussion of Rent Restrictions*, in PARADOX, *supra* at 80. Prof. Assar Lindbeck said: "In many cases rent control appears to be the most efficient technique presently known to destroy a city—except for bombing." DEPARTMENT OF ECONOMICS AND RESEARCH, NAT'L. ASS'N. OF REALTORS, RENT CONTROL: A NON-SOLUTION 3 (1977). In Kristof, *The Effects of Rent Control and Rent Stabilization in New York City*, in RENT CONTROL: MYTH AND REALITIES 125 (The Fraser Inst. ed. 1981), the author interspersed pictures of rent controlled buildings and bombed buildings and challenged the reader to guess whether bombs or rent control caused the damage in each case. *See generally* INSTITUTE OF ECONOMIC AFFAIRS, VERDICT ON RENT CONTROL (1972) (the lesson from five countries and 50 years of rent control is that such policies do more harm than good); C. BAIRD, RENT CONTROL: THE PERENNIAL FOLLY (1980). *But see* Atlas and Dreier, *The Phony Case Against Rent Control*, THE PROGRESSIVE 26 (April, 1989). *See also* Tucker, *Where do the Homeless Come From*, NAT'L REV. 32 (Sept. 25, 1987) (low vacancy rates are characteristic of rent control).

commodity.[131] Rent controls destroy the price mechanism.

Rent control's failures, however, are not the basis upon which to declare rent control laws a regulatory taking. Rent control would constitute a taking even if it were an overwhelming success. The argument proposed in the following section is that rent control laws are regulatory takings because 1) they violate the fundamental "disproportionate burden" principle often quoted by the Supreme Court; and 2) they are physical invasions, and thus are *per se* takings. Before making these arguments, however, this Recent Development argues for the elimination of the substantive due process inquiry,[132] even though such an inquiry helps overturn rent control laws by allowing courts to consider the failures of rent control.

A. *Economic Substantive Due Process*

Those who adhere to a "strict construction"[133] or "interpretivist"[134]

131. *See generally* C. BAIRD, *supra* note 130; Friedman & Stigler, *Roofs or Ceilings? The Current Housing Problem*, in VERDICT ON RENT CONTROL, *supra* note 130, at 17. In Swanstrom, *No Room at the Inn: Housing Policy and the Homeless*, 35 WASH. U.J. URB. & CONTEMP. L. 81, 87 (1989), the author claims that housing supply, being a "lumpy" and expensive good, is slow to respond to demand. *Id.* at 87. This unsubstantiated statement is contrary to the results of a classic 1946 study by Milton Friedman and George Stigler. *See* Friedman and Stigler, *supra* at 19-20. The authors compared the San Francisco housing market after the 1906 earthquake with the same rental market after rent control imposition in 1946. Within one month after the 1906 earthquake, which destroyed one-half the housing stock, there were apartments and houses advertised for sale or rent. People had "doubled up" and new construction began apace. In 1946, by contrast, the housing shortage was only ten percent, but rent control assured a stagnant housing market and low vacancy rates. Advertisements by persons seeking rental housing far outstripped advertisements by renters: the reverse of the 1906 experience. Ironically, Swanstrom, after blaming the market for a slow response to housing shortages, says in the next paragraph that, because of massive government intervention, a free market in housing is a myth. Swanstrom, *supra*, at 87. How can one say that the market fails to respond to housing shortages when the market is untried? *See* Epstein, *supra* note 3, at 749 ("[Housing] congestion is a transitory phenomenon for which the regulatory cure is worse than the disease.").

132. *See supra* note 20 for a description of economic substantive due process.

133. "Construction" as applied to constitutional provisions refers to the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text. 1 W. CARRINGTON, COOLEY'S CONSTITUTIONAL LIMITATIONS 97 (8th ed. 1927). "Strict constructionists" advocate that courts must apply without construction those constitutional provisions that are clear and unmistakable, and where construction is necessary — that is, where a constitutional provision is unclear — the court is to construe meaning by reference to the intent of the framers, where discoverable, and other provisions within the Constitution. *See* Wright v. United States, 302 U.S. 583, 589 (1938) (a constitutional provision, which is positive

theory of constitutional law, should oppose substantive due process doctrine. The framers' intended "due process" to refer to procedural rights. Substantive due process doctrine supplies activist judges with a powerful tool to invalidate laws they dislike. Justice Black stated that "there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written. . . ."[135] Justice Douglas agreed, stating that "[t]he Due Process Clause. . .has proven very elastic in the hands of judges."[136] Strict constructionists, in fact, condemn substantive due process rationale when applied to non-economic issues such as privacy, personhood and family.[137]

Conservatives, however, generally disagree with economic regulation and are therefore caught in a dilemma. Their laissez-faire, economic philosophy leads them to support invalidation of much economic regulation, such as rent control. Their strict constructionist philosophy, however, leads them to oppose judicial activism. In the conservative intellectual circle, the laissez-faire philosophy seems to be enjoying somewhat of a revival, as many conservative leaders call for a revival of

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and free from all ambiguity, must be accepted by courts as it reads, and no construction is permissible). *But cf.* Antieau, *Constitutional Construction: A Guide to the Principles and Their Application*, 51 NOTRE DAME L. REV. 358 (1976) (the rule of construction which demands that the intent of the framers be given effect is perilously difficult).

134. "Interpretivism," represented by Justice Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), is the view that "judges deciding constitutional issues should confine themselves to enforcing norms" that the framers of the Constitution "stated or clearly implied" in the text. "Noninterpretivism," represented by Justice Chase, is the view that judges should go beyond the text of the Constitution and enforce norms that are not discoverable within "the four corners of the document." J. ELY, DEMOCRACY AND DISTRUST (1980).

135. Harper v. Virginia State Board of Elections, 383 U.S. 663, 675 (1966) (Black, J., dissenting).

136. Boddie v. Connecticut, 401 U.S. 371, 384 (1971) (Douglas, J., concurring).

137. *See, e.g.*, C. WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM THE CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 307 (1986) (characterizing Roe v. Wade as "the most raw exercise of judicial power since *Dred Scott*."); Forrester, *Truth in Judging: Supreme Court Opinions As Legislative Drafting*, 38 VAND. L. REV. 463, 476-77 (1985) (the abortion cases are based on the fiction that the novel rules governing abortion are based on the due process clause); R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN 189 (1987) (we should direct our disaffection with the constitution which the framers designed to the amending process of article V, not the judiciary). *Cf.* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 2 (1982) (the Constitution does not bind the court; the Court instead engages in noninterpretive review, applying its own values and making policy).

Lochner era economic substantive due process.[138]

Those who remain true to strict-constructionist views attack *Lochner* on several grounds. As previously discussed, substantive due process allows courts to exercise powers that the due process clauses never conferred upon the judiciary. The doctrine allows the courts to supplant the legislatures. As such, courts perform as "super-legislatures" accepting economic regulations which the majority likes, and invalidating those they do not like. Courts are ill-equipped to make decisions about the need for and impact of economic regulations. As strict constructionists argue, these decisions are better left to elected officials and administrative agencies.

For example, in *Seawall Associates v. City of New York*,[139] the New York Court of Appeals struck down the city's Single Room Occupancy Law on a substantive due process ground.[140] Relying on data which showed the law's ineffectiveness in increasing available low-cost housing, the court struck it down because it did not "substantially advance" the legitimate purpose.[141] By invalidating the SRO law on the basis of empirical data, the court substituted its judgment for that of the legislature.

As more courts apply substantive due process rationale, they may

138. *See, e.g.*, Siegan, *The Constitution and the Protection of Capitalism*, in HOW CAPITALISTIC IS THE CONSTITUTION 106, 126 (1982) (advocating a reinvigorated economic substantive due process test in which only those economic regulations that further compelling government interests are constitutional); Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L. Q. 91, 93 (1983) (regulations restricting entry to an occupation must be "necessary to further a state interest of overriding importance to be constitutional"); W. WILLIAMS, THE STATE AGAINST BLACKS 125-40 (1982) (advocating the return of *Lochner*-era constitutional laissez-faire doctrine in which courts invalidated economic regulations on substantive due process grounds); Karlin, *supra* note 36, at 670-71 (Scalia's "heightened scrutiny" in *Nollan* restored importance to the just compensation clause). Some commentators advance arguments against distinguishing economic and civil rights, and thereby grant economic rights the same protection as personal rights. *See, e.g.*, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46 (to most people, economic rights such as freedom of occupation are at least as important as personal rights such as freedom of speech); R. POSNER, ECONOMIC ANALYSIS OF LAW 637 (3rd ed. 1986) (government control over livelihood may stifle dissent); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 251 (1980) (those dependent on government economic support are not likely to criticize their benefactors).

139. 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989). *See supra* notes 109-28 and accompanying text for a discussion of *Seawall*.

140. *Id.* at __, 542 N.E.2d at 1068-69, 544 N.Y.S.2d at 551-52.

141. *Id.* at __, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551.

overturn more rent control laws, particularly if they apply the *Nollan* Court's heightened scrutiny analysis.[142] A reinvigorated economic substantive due process doctrine, however, is not an attractive approach to overturning rent control laws for the reasons already stated.[143] A better approach is to reinvigorate the just compensation clause by revealing the shortcomings of the various tests courts use to determine whether a regulatory taking has occurred. For example, the just compensation clause does not say that, if the government interest outweighs the private interest, then government can destroy the private interest without compensation. Yet that is exactly what the balancing test[144] approach says. The just compensation clause does not say that government can impair the value of property for a public purpose so long as the property's value is not completely destroyed. Yet that is exactly how courts apply the diminution in value test.[145] The just compensation clause holds that government may take property for a public purpose, whether the purpose is compelling, important or merely legitimate. But the just compensation clause also holds that when government takes property it shall pay the deprived property owner compensation, whether the value of the interest taken is small, moderate or substantial. The other tests imply that a "good" or "important" public purpose defeats the obligation to compensate the deprived property owner. They hold that so long as the regulation is "reasonable" no taking exists. This view is antithetical to takings jurisprudence and the clear reading of the just compensation clause.

B. *Rent Controls: A Disproportionate Burden*

Rent control laws violate the fundamental purpose of the just compensation clause by placing a disproportionate burden on landlords. Through rent control, government attempts to prevent homelessness and to protect low and fixed-income tenants by taking the landlord's

142. *See supra* note 21 for a discussion of the *Nollan* Court's heightened scrutiny application. *See also* Boraas v. Village of Belle Terre, 476 F.2d 806, 814 (2d Cir. 1973) (heightened scrutiny requires that the means are in fact substantially related to the ends, not just reasonably or theoretically related).

143. For a contrary point of view, see Karlin, *supra* note 36, at 670-71 (Scalia's heightened scrutiny of the land use regulation in *Nollan* restored importance to the takings clause and restored judicial control over legislative outbursts).

144. *See supra* notes 48-54 and accompanying text for a discussion of the balancing test in regulatory takings analyses.

145. *See supra* notes 54-57 and accompanying text for a discussion of the diminution in value test.

leasehold interest and transferring it to the tenant. Rent control statutes compel landlords to convey a leasehold to a tenant for additional terms of years at government-fixed, below-market prices.[146] Consequently, landlords bear the costs of these government programs that, in fairness, the public as a whole should bear.

Some courts apply a "noxious use"[147] rationale to construe an exception to the disproportionate burden principle.[148] Under this rationale, landlord "profiteering" when rental unit supply is short is a noxious use of land similar to pollution, excessive noise, or some form of private misconduct causing a nuisance. Rent control prevents this noxious use, and is thereby relieved of the disproportionate burden restraint. Noxious use, however, was traditionally applied to situations involving health and safety threats, and only recently did courts expand it to include aesthetic concerns.[149]

One commentator asks: "How are health and safety improved if the landlord is stripped of the financial resources that are necessary to comply with applicable health and safety regulations?"[150] This question makes the cogent point that the means of rent control are not rationally related to the legitimate ends of protecting health and safety. Because this Recent Development has already rejected the substantive due process rationale,[151] it now argues instead that a rent increase in a competitive market is never a noxious use.[152]

The view that rent increases during times of rental unit shortages are

146. *See* Epstein, *supra* note 3, at 744-45 for an explanation of the property interest that rent control takes.

147. *See supra* notes 37-47 and accompanying text for a discussion of the noxious use test.

148. *See, e.g.*, Suppus v. Bradley, 101 N.Y.S.2d 557, 577-78 (N.Y. Spec. Term 1950) (rent control regulations are valid even though the burdens are borne disproportionately by landlords).

149. *See supra* notes 37-47 and accompanying text for cases applying the noxious use doctrine to health and safety concerns, and other cases applying the doctrine to aesthetic concerns.

150. *See* Epstein, *supra* note 3, at 747-48.

151. *See supra* notes 133-43 and accompanying text for the argument that economic substantive due process should be abandoned. This argument is not a criticism of Professor Epstein's point. It is simply an argument that, in a judicial forum, the substantive due process rationale is a tool that should be unavailable to judges. The author supports the use of substantive due process rationale—that is, arguing that rent control is neither rationally related to, nor substantially advances, any legitimate government purpose—in the public forum and in regulatory and legislative proceedings.

152. In all fairness, Professor Epstein also makes this point. *See* Epstein, *supra* note 3, at 747 ("[T]he rent control statutes are not directed towards private misconduct, or

a noxious use of land would expand the noxious use doctrine beyond any meaningful bounds. For example, it would not be a noxious use of land when a farmer raises the price of crops following a summer drought which reduces crop yield. This theory effectively holds that one who provides an essential good may not raise the price of that good in response to the law of supply and demand. But where is the private misconduct when a seller raises the price of a commodity and a willing buyer agrees to purchase at that price? The noxious use doctrine prevents a landowner from using the land in a manner that endangers his or her neighbors, or adversely affects the value of their lands. A rent increase does not threaten the neighbors' life, health or property value.

C. *Rent Control As A Physical Invasion*

As stated above, the typical rent control law compels the landlord to convey to the tenant a lease renewal at a controlled price.[153] The purpose of this conveyance is to provide security of tenure to the occupying tenant. Without such a conveyance, the landlord would probably not renew leases because most rent control laws include some form of vacancy decontrol.[154] The effect of this involuntary conveyance is an authorization by the government for one to occupy the private property of another. Therein lies the physical invasion.[155]

The rationale of *Loretto* and *Nollan* lead *a fortiori* to the conclusion that a forced conveyance of the leasehold is a "physical invasion." *Loretto* held that a government-authorized permanent physical occupation[156] is a taking regardless of the public purpose.[157] Forced lease-

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toward the amorphous concerns of public beautification, . . . or even towards the health and safety of tenants as a class.").

153. *See Id.* at 744-45.

154. *See* Baar, *supra* note 1, at 826-29 for a discussion of the types of vacancy decontrol provisions. Basically, vacancy decontrol provisions allow a landlord to set the initial rent for a new tenant without controls, or with minimal controls. *Id.* at 826. Vacancy decontrol provisions are politically attractive because they are satisfying to landlords, and tenants are not particularly vehement in opposition because they will not face the impact of vacancy decontrol so long as they don't move. *Id.* at 829.

155. *See supra* notes 24-36 and accompanying text for a discussion of the physical invasion test as used in regulatory takings

156. 458 U.S. 419, 427 (1982). The Court distinguished "permanent" physical occupations and "temporary" physical invasions, the former being *per se* takings, the latter being a factor in a taking analysis, but not determinative. 458 U.S. at 434. In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court upheld a state constitutional requirement that shopping center owners permit individuals to picket and exercise petition rights on their property, which was already open to the general public.

hold conveyances represent substantial amounts of landowner's space and serious interferences with the landowner's use of the land. They differ substantially from the trivial interferences that the Court found to be a taking in *Loretto*.[158] The *Loretto* Court described property rights as the right "to possess, use and dispose of . . . ."[159] The forced leasehold conveyance destroys each of these rights. The landlord has no right to possess the rental unit and no power to exclude the tenant. According to *Loretto* the owner may have "the bare legal right to dispose of the occupied space by transfer or sale, [but] the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make use of the property."[160] Ironically, the Court cited *Bowles* and *Block* to support the contention that *Loretto* does not upset the state's power to regulate the landlord-tenant relationship without compensating for every economic injury caused thereby.[161] In effect, the *Loretto* Court argues that a trivial physical invasion is a taking no matter how important the government purpose. But the substantial physical invasion caused by a forced leasehold conveyance is not a taking.

The *Nollan*[162] Court found that a permanent physical occupation

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Because the physical invasion in *PruneYard* was temporary and limited in nature, and because the owner had not exhibited an interest in excluding all persons from the property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." *Id.* at 84. The Court said that the owners were also free to restrict the solicitors' activities to minimize interference with the owners' commercial functions. A forced leasehold conveyance is easily distinguishable from the "temporary" physical invasions of *PruneYard*. The physical invasion by a tenant in an involuntary leasehold is not limited in nature; it continues so long as the tenant pleases. A rental unit is not a "public forum" to which the landowner has invited the tenant for an indefinite period; the original lease most likely included a duration term, thus exhibiting a right of the landlord to retain a reversionary interest. Finally, unlike *PruneYard*, the landlord cannot regulate the tenants' activities so as not to interfere with the landlord's commercial interest; the leasehold is the commercial interest.

157. 458 U.S. 419, 432-33 and n.9 (1982).

158. *Id.* at 430. *See also* Lovett v. West Virginia Central Gas Co., 65 W. Va. 739, 65 S.E. 196 (W. Va. 1909) (laying a gas line on claimant's land was a taking regardless of minimal impact); Southwestern Bell Tel. Co. v. Webb, 393 S.W.2d 117, 121 (Mo. Ct. App. 1965) (land is taken to the extent it is invaded, though no land was actually taken, by installing underground cable).

159. 458 U.S. at 435 (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).

160. *Id.* at 436.

161. *Id.* at 440.

162. 483 U.S. 825 (1987).

had occurred when the government authorized the public easement across the landowner's ocean-front property.[163] Although the Court found that a taking had occurred, it did not find a *per se* taking as had the *Loretto* Court. Instead, the Court adopted substantive due process analysis, using heightened scrutiny, to find that granting an easement along the ocean-front did not "substantially advance" the state's legitimate purpose in providing visual access to a public beach.[164] Applying the same substantive due process rationale to rent control would allow the Court to examine evidence of the failure of rent control. Rent control could pass low level scrutiny. That is, one could argue that rent control is a rational, though perhaps not the wisest or least onerous, approach to the problems of rental unit shortages. Heightened scrutiny, however, would require a showing that rent control actually does substantially advance legitimate state interests.[165] The evidence of rent control's failures would present a strong case against the proposition that these laws substantially further the public purpose.[166]

V. CONCLUSION

This Recent Development has proposed an analysis of rent control laws which radically departs from the conventional judicial interpretation. It proposes that the courts finally lay to rest economic substantive due process, a doctrine on the critical list for 50 years, but which has enjoyed a surprising revival in *Nollan*. It also proposes that the courts view rent control laws as effecting physical invasions of landowners' property interests, and, as such, constitute *per se* takings. The fundamental purpose of the takings clause is to prevent government from imposing a burden upon a few which it should in fairness impose on the public. Rent control laws violate this fundamental purpose. Although rent control is a demonstrated failure, the taking clause does not turn upon the wisdom or success of the government's means. Even

163. *Id.* at 832.

164. *Id.* at 834-42 and 834 n.3.

165. *See supra* note 125 and accompanying text. Recall that the *Seawall* Court, applying substantive due process doctrine with heightened scrutiny, used data from a study showing that the Single Room Occupancy law would likely fail in its objective of preserving low-income housing to find that the law was a regulatory taking.

166. *See supra* note 145.

if rent control were a resounding, unqualified success, it would still constitute a taking.

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