Golden Gate University Law Review

Volume 7 | Issue 3 Article 2

January 1977

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Recommended Citation

Michael L. Marowitz, *Birkenfeld v. City of Berkeley: Blueprint for Rent Control in California*, 7 Golden Gate U. L. Rev. (1977).
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BIRKENFELD v. CITY OF BERKELEY: BLUEPRINT FOR RENT CONTROL IN CALIFORNIA

INTRODUCTION

Birkenfeld v. City of Berkeley[1] is the first case in which the California Supreme Court reviewed the validity of rent control legislation.[2] In the course of deciding that California's cities may enact rent control measures as valid exercises of the police power,[3] the court established that: (1) a housing emergency is not a prerequisite to the imposition of rent control;[4] (2) local rent control is

1. 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

2. *Id.* at 158, 550 P.2d at 1022, 130 Cal. Rptr. at 486.

3. *Id.* at 158-59, 550 P.2d at 1022-23, 130 Cal. Rptr. at 486-87.

4. *Id.* at 158 & n.27, 550 P.2d at 1022 & n.27, 130 Cal. Rptr. at 486 & n.27. The requirement that rent control is conditioned upon the existence of a public emergency is a remnant of the long discredited era of economic substantive due process. During the 1920s, the High Court was confronted with a series of challenges to rent control legislation following World War I. In Block v. Hirsh, 256 U.S. 135 (1921), the Court rejected an attack on a District of Columbia law which permitted tenants to remain in possession of leased premises beyond a lease's expiration date. *Id.* at 153-54, 158. The Court stated that the law was justifiable in light of its temporary nature and the housing emergency that the District of Columbia was experiencing. *Id.* at 154-56. "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Id.* at 157. The Court disposed of a similar attack on a New York rent control law in Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921). In Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922), the Court sustained New York's Emergency Housing Laws by focusing on the then-existing social emergency:

> The warrant for this legislative resort to the police power was the conviction . . . that there existed in the larger cities of the state a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even the peace of a large part of the people of the state. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary, as well as the most usual basis and justification, for exercises of that power.

Id. at 245. The mere recital of an emergency as a basis for the enactment of rent control was shown to be insufficient when the Court remanded Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924), for factual findings to substantiate the actual existence of emergency conditions.

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not preempted by state law;[5] and (3) the enactment of rent con-

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Economic substantive due process was discarded in 1934, when Justice Roberts wrote the five-to-four majority opinion in Nebbia v. New York, 291 U.S. 502 (1934), which upheld a New York law fixing the minimum price of milk: "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unwarranted interference with individual liberty." *Id.* at 539. The passing of economic substantive due process implied the abandonment of the need to rely on the emergency exception to justify rent control legislation. *See Residential Rent Control in New York City*, 3 COLUM. J. LAW & PROB. 30, 38 (1967). Nevertheless, even after *Nebbia*, most courts that examined rent control measures continued to sustain or strike down such enactments in light of the existence of emergency conditions. Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948) ("the war powers include the power 'to remedy the evils which have arisen from its rise and progress' and continue for the duration of the emergency"); Bowles v. Willingham, 321 U.S. 503, 519 (1944) (rent regulation by Congress during wartime emergency clearly justified); Stoneridge Apts., Co. v. Lindsay, 303 F. Supp. 677 (S.D.N.Y. 1969); Israel v. City Rent & Rehab. Adm'n, 285 F. Supp. 908, 910-11 (S.D.N.Y. 1968) (findings of fact substantiated continuation of emergency); Kress, Dunlap & Lane, Ltd. v. Downing, 193 F. Supp. 874, 878-79 (D.V.I. 1961) (continued rent regulation depended on continuation of emergency which gave rise to controls); City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 765 (Fla. 1975); City of Miami v. Fleetwood Hotel, Inc., 261 So. 2d 801, 805 (Fla. 1972); Amsterdam-Manhattan, Inc. v. City Rent & Rehab. Adm'n, 15 N.Y.2d 1014, 207 N.E. 2d 616, 616 (1965) (summary judgment based on public emergency justified by showing of 1.79% net rental vacancy rate); Bucho Holding Co. v. Temporary State Housing Comm'n, 11 N.Y.2d 469, 184 N.E.2d 569 (1962); Lincoln Bldg. Assoc. v. Jame, 8 N.Y.2d 179, 168 N.E.2d 528 (1960); Lincoln Bldg. Assoc. v. Barr, 1 N.Y.2d 413, 135 N.E.2d 801 (1956); Warren v. City of Philadelphia, 387 Pa. 362, 127 A.2d 703, 705 (1956).

The independent vitality of a public emergency as a prerequisite to rent control was repudiated in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969): "The time when extraordinary exigent circumstances were required to justify price control outside traditional public utility areas passed on the day Nebbia v. New York was decided." *Id.* at 567 (citation omitted). This position was also adopted by the Maryland and New Jersey Supreme Courts. *See* Westchester West No. 2 Ltd. Partnership v. Montgomery County, 276 Md. 448, 466, 348 A.2d 856, 865 (1975); Hutton Park Gardens v. Town Council, 68 N.J. 543, 561-62, 350 A.2d 1, 10 (1975). For further discussion of *Hutton Park* see notes 44-50 & 53-55 *infra* and accompanying text. *See generally* Baar & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control*, 7 URB. LAW. 447 (1975).

5. 17 Cal. 3d at 142-44, 550 P.2d at 1010-11, 130 Cal. Rptr. at 474-75. The limitations on municipalities to legislate regarding municipal affairs were outlined in *In re* Hubbard, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964). Where (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it is exclusively a matter of state concern, or (2) the subject matter is partially covered, but in couched terms which clearly indicate it is of paramount state concern which will not tolerate further or additional local action or (3) the subject matter is partially covered by general law, and is of such a nature that the interests of transient citizens outweigh those of the municipality, local legislation is preempted. *Id.* at 128, 396 P.2d at 815, 41 Cal. Rptr. at 399. The *Hubbard* tests were later refined to an examination of the legislative intent or purpose underlying a statewide scheme. *See* Galvan v. Superior Court, 70 Cal. 2d 851, 860-64, 452 P.2d 930, 935-40, 76 Cal. Rptr. 642, 647-52 (1969). The *Birkenfeld* court held that the purpose of rent control, *i.e.*, preventing excessive rents resulting from a housing shortage, was distinct from the purpose of California's laws pertaining to the payment and determination of rent. 17 Cal. 3d at 142, 550 P.2d at 1011, 130 Cal. Rptr. at 475. Moreover, rent control does not interfere with the operation of the statewide scheme. *Id.; see also*

trol measures may proceed by way of the initiative process.[6] However, rent control was approved in principle, but not without qualification. In a unanimous opinion written by Chief Justice Wright, the court held that the rent control scheme in *Birkenfeld* violated due process because it failed to provide adequate procedures for adjusting rent levels to prevent confiscatory consequences to landlords.[7] Additionally, the court concluded that a city could not interfere with a landlord's right to seek summary

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People v. Mueller, 8 Cal. App. 3d 949, 954, 88 Cal. Rptr. 157, 160 (1970).

Assemblymembers Campbell and Dixon of the California Legislature, apparently anticipating the *Birkenfeld* holding, introduced Assembly Bill 3788 on March 16, 1976. The bill was a declaration that the imposition of rent controls on private housing represented a matter of statewide concern; it prohibited local rent control without state authorization. Cal. A.B. 3788, Reg. Sess. 1975-76. The campaign to enact A.B. 3788 was marked by charges of massive spending by lobbyists acting on behalf of the California Housing Council, a group composed of some of California's "most influential apartment house developers, owners and managers." The Sacramento Bee, June 27, 1976, at A.3, col. 2. The bill was passed on August 30, 1976, but was vetoed on Sept. 30, 1976, the day before it would have become effective, by Governor Edmund G. Brown. 2 ASSEMBLY FINAL HISTORY (1975-76 Reg. Sess.) 1982. Governor Brown claimed that the decision to adopt rent control should be made at the local level. San Francisco Chronicle, Oct. 1, 1976, at 17, col. 2. On March 14, 1977, Assemblymember Papan introduced Assembly Bill 933, which proposed to add section 1954.5 to the Civil Code. The bill represented a declaration of the legislature's intention to occupy the entire field of regulation of landlord-tenant relations to the exclusion of local regulation. Cal. A.B. 933, Reg. Sess. 1977-78. The bill died in the Housing and Community Development Committee.

6. Subsequent to the trial court's decision, the enactment of legislation by initiative which limited property rights was upheld in San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974). In *San Diego Bldg. Contractors*, owners of lots adjoining the ocean were effectively prohibited from building highrise structures by a zoning ordinance adopted by initiative. The court stated that the

> decisions applying the due process requirements of notice and hearing have all involved governmental decisionmaking in an *adjudicative* setting in which the government's actions affecting an individual was determined by facts peculiar to the individual case; the present matter, by contrast, involved the adoption of a broad, generally applicable, *legislative* rule.
>
> The San Diego ordinance challenged . . . establish[es] a broad, generally applicable rule of conduct on the basis of general public policy. . . . [N]otice and hearing have never been constitutional prerequisites for the adoption of such a legislative enactment.

Id. at 212, 529 P.2d at 574, 118 Cal. Rptr. at 150 (emphasis in original) (footnotes and citations omitted). *See* Builders Ass'n of Santa Clara-Santa Cruz Counties v. Superior Court, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974).

7. *Id.* at 169-73, 550 P.2d at 1029-33, 130 Cal. Rptr. at 493-97. The court cited the combination of the amendment's adjustment procedures and the proposed rent rollback as the constitutional defect. *Id.* However, the rollback of rents, standing alone, was found to be acceptable. *See* notes 36-37 *infra* and accompanying text. Thus, the critical defect in the Berkeley rent control scheme was the absence of power to make upward adjustments in fixed rents, regardless of when and by what means rents were to be set. *See* text accompanying note 39 *infra*.

repossession of rental premises[8] but could create substantive defenses to unlawful detainer actions[9] in order to effectuate local housing goals.

This Comment will examine the rent control measure in *Birkenfeld* and will analyze the principal holdings in the decision. By comparing *Birkenfeld's* approach on the issue of due process with that of a recent New Jersey Supreme Court decision which upheld rent control legislation,[10] it will be shown that the California Supreme Court established that landlords subject to rent control are entitled to a reasonable opportunity to be heard whenever rent regulation fixes rent levels and makes increases contingent upon adjustment hearings. By considering how the court treated the eviction provisions contained in the *Birkenfeld* rent control measure, it will be shown that cities in California are now able to redefine the landlord-tenant relationship to protect or enhance local values which pertain to rental housing. Thus, the court conferred upon municipalities an authority that might heretofore have been thought preempted by state law or beyond the scope of the police power.

I. FACTS OF THE CASE

On June 6, 1972, the voters of Berkeley passed an initiative amendment to the Berkeley City Charter which provided for residential rent control within that city.[11] This measure was approved by the California Legislature on August 2, 1972.[12] The amendment's stated purpose was to establish a Rent Control Board

8. 17 Cal. 3d at 151, 550 P.2d at 1017, 130 Cal. Rptr. at 481.

9. *See id.* at 148-49, 550 P.2d at 1015-16, 130 Cal. Rptr. at 479-80; CAL. CIV. PROC. CODE §§ 1159-1179a (West 1972 & Supp. 1977) (statutory guidelines for repossession of rental units by landlords).

10. Hutton Park Gardens v. Town Council, 68 N.J. 543, 350 A.2d 1 (1975).

11. The City of Berkeley operates under a charter, known historically as a "Freeholders Home Rule Charter," as authorized under subsection 3(a) of article XI of the California Constitution. Subsection 3(b) of article XI provides that the amendment of a city charter may be proposed by initiative. CAL. CONST. art. XI, § 3(b). A petition signed by 15% of the registered voters of a city places a proposed amendment on a ballot which is then submitted to the general electorate "at either a special election called for that purpose or at any general or special election." CAL. GOV'T CODE § 34459 (West 1966). The Berkeley charter amendment was adopted by a vote of 27,915 to 25,301. San Francisco Chronicle, Oct. 2, 1976, at 4, col. 5.

12. Under the the then-existing provisions of CAL. CONST. art. XI, § 3, approval by concurrent resolution of both houses of the legislature was required in order to amend city charters. In 1974, this requirement was dispensed with when subdivision (a) of section 3 was amended. CAL. CONST. art. XI, § 3(a).

(Board) to regulate residential housing and rentals in order to alleviate the hardship caused by a

> growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising and exorbitant rents exploiting this shortage, and the continuing deterioration of the existing housing stock which constitutes a serious public emergency affecting the lives of a substantial proportion of those Berkeley residents who reside in rental housing.[13]

The Board was to consist of five popularly elected commissioners empowered to set and adjust maximum rents for all controlled dwelling units.[14] It was to establish base rent figures for all units by administering a "rollback of rents" to the lowest level in effect on or after August 15, 1971, or to a comparable prevailing rent for any unit that was not renting on that date.[15] This base rent fixed the maximum rent chargeable, but was subject to an individual rent adjustment.

Upon receipt of a petition from either a landlord or a tenant, the Board was to conduct a hearing to make appropriate adjustments, either upward or downward.[16] Any landlord seeking an upward adjustment was required to attach to the petition a certificate indicating that the premises had been inspected within the previous six months and found to be in compliance with applicable state health and safety codes and city housing codes.[17] The Board could consolidate a landlord's petitions relating to multiple units in the same building only upon the written consent of a majority of the tenants affected.[18] In the absence of such consent, the Board was to conduct hearings on a unit-by-unit basis. While there was no directive for the Board to schedule hearings within any specified period of time after receipt of a petition for adjustment, all affected parties were to be notified of the date of a hearing which was scheduled not less than sixteen days before

13. Amendment to Berkeley City Charter, art. XVII, § 1, 1972 Cal. Stats. 3372, *reprinted in Birkenfeld*, 17 Cal. 3d at 174, 50 P.2d at 1033, 130 Cal. Rptr. at 497 [hereinafter cited as City Charter, art. XVII and followed by page references in *Birkenfeld*].

14. City Charter, art. XVII, *supra* note 13, § 3(a) [17 Cal. 3d at 175, 550 P.2d at 1034, 130 Cal. Rptr. at 498.]

15. *Id.* § 4(a) [17 Cal. 3d at 176, 550 P.2d at 1036, 130 Cal. Rptr. at 500].

16. *Id.* § 5 [17 Cal. 3d at 177, 550 P.2d at 1036, 130 Cal. Rptr. at 500].

17. *Id.*

18. *Id.* § 6(h) [17 Cal. 3d at 178, 550 P.2d at 1037, 130 Cal. Rptr. at 501].

such hearing was to take place. The hearings were required to be open to the public and were designed to afford all parties rights equivalent to those available to a litigant, including the assistance of counsel or other designated advisor, a hearing record and the need for proof by a preponderance of the evidence that an adjustment was warranted.[19] All parties were to be sent notice of the Board's decision within fifteen days after the hearing, along with notification of the right of judicial review. No adjustments could be made without engaging in the hearing's formalities.

In addition to the maximum rent adjustment provisions, the charter amendment set forth certain restraints upon eviction proceedings involving rent-controlled units. It limited the grounds upon which a landlord could bring any action to recover possession, including, *inter alia,* where

> the tenant, who had a [lease] which has terminated, has refused after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are *not inconsistent with or violative of any provisions of this Charter Amendment* and are materially the same as in the previous agreement. . . .[20]

Beyond limiting the grounds for seeking repossession, the charter amendment required a landlord to apply to the Board to obtain a certificate of eviction before initiating unlawful detainer proceedings.[21] The application was required to contain a copy of the notice to quit served on the tenant(s) and the landlord's statement, under penalty of perjury, that the premises for which eviction was sought were free of code violations or, if any existed, that such violations were substantially caused by the present tenant(s). The Board was to notify all concerned tenants of the landlord's application for the certificate of eviction and their right to contest the issuance of the certificate by requesting a hearing within five days following receipt of the notice. There was no specified length of time after the submission of an application within which the Board was required to notify the tenants of their right to a hearing.

19. *Id.* § 6(d)-(g) [17 Cal. 3d at 177-78, 550 P.2d at 1037, 130 Cal. Rptr. at 501].
20. *Id.* § 7(a)(5) [17 Cal. 3d at 178, 550 P.2d at 1037-38, 130 Cal. Rptr. at 501-02].
21. *Id.* § 7(b) [17 Cal. 3d at 178, 550 P.2d at 1038, 130 Cal. Rptr. 502].

If a tenant requested a hearing to contest an imminent eviction, it was to be scheduled within seven days following the receipt of the tenant's request, and all parties were to be notified as to the hearing date, time and place. At the hearing, the landlord had the burden of proving by a preponderance of the evidence that

> (1) no Code violations exist[ed] on the premises or that any violations which d[id] exist were substantially caused by the present tenant(s); [and] (2) the eviction was not in retaliation for reporting Code violations or violations of [the Charter Amendment] or for organizing other tenants, or for enforcing rights under [the] Charter Amendment. . . .[22]

Each party was entitled to the same procedural rights as those provided parties at adjustment hearings. The Board was to grant or deny a certificate within five days after hearing, and either party was entitled to seek judicial review of the Board's decision. Any finding adverse to the landlord by reason of a failure to disprove any retaliatory motive or the existence of outstanding code violations would bar the issuance of a certificate of eviction for twelve months thereafter. Any landlord who sought to evict a tenant without first obtaining a certificate was subject to an injunctive action brought by either the affected tenant or by the Board.

The charter amendment was attacked in the Alameda Superior Court by a group of landlords in a class action seeking declaratory relief against the City of Berkeley (City). Three tenants and seven community organizations[23] were allowed to intervene in defense of the amendment's validity. After a lengthy trial, the superior court ruled that the amendment was unconstitutional and enjoined its enforcement.[24] The principal basis for this determination was that the evidence presented did not warrant the conclusion that Berkeley was experiencing a serious public emer-

22. *Id.* § 7(e) [17 Cal. 3d at 179, 550 P.2d at 1038, 130 Cal. Rptr. at 502].

23. The seven community groups, identified as the Fair Rent Committee, represented two types of interests: (1) students, disabled persons and other low-income tenants occupying rental housing in Berkeley; and (2) Berkeley residents asserting environmental interests in preserving the existing housing stock and preventing an exodus of low-income residents. The interveners participated in the trial and filed an appeal separate from that of the defendant City. *See* 17 Cal. 3d at 136-37, 550 P.2d at 1007, 130 Cal. Rptr. at 471.

24. *Id.* at 135, 550 P.2d at 1006, 130 Cal. Rptr. at 470.

gency, which the court believed was a constitutional prerequisite to the imposition of rent control under the police power.[25] The trial court also held that the initiative procedure had deprived the landlords of procedural due process by failing to provide adequate notice and the opportunity to be heard on the merits of the initiative prior to its enactment.[26] Finally, the court found that the provisions governing the grounds for eviction, as well as the procedures for obtaining a certificate of eviction from the Board, intruded into a field fully occupied by state law.[27]

II. THE PROPRIETY OF THE ENDS AND MEANS OF RENT CONTROL

A. THE *Birkenfeld* OPINION

The supreme court, in repudiating the landlords' contention that an emergency is essential to valid rent control legislation,[28] expressed the view that rent control is merely another form of regulating consumer prices.[29] Thus, the standard for judicial re-

25. *Id.*

26. *Id.* The supreme court's disposition of this issue is discussed at note 6 *supra.*

27. Birkenfeld v. City of Berkeley, 122 Cal. Rptr. 891, 902 (1975), *vacated,* 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

28. *See* note 4 *supra.*

29. 17 Cal. 3d at 159, 550 P.2d at 1023, 130 Cal. Rptr. at 487. The court recalled Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), wherein the court concluded that a "warranty of habitability is implied by law in residential leases in [California] and that the breach of such warranty may be raised as a defense in an unlawful detainer action." *Id.* at 637, 517 P.2d at 1182, 111 Cal. Rptr. at 718. The holding in *Green* was predicated on the recognition that the common law tradition absolving a landlord of any duty to maintain rental premises in habitable conditions was anachronistic—obtaining rental housing closely approximated the purchase and use of consumer products:

> When American city dwellers, both rich and poor, seek ["shelter"] today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Id. at 623, 517 P.2d at 1172, 111 Cal. Rptr. at 708, *quoting* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) (footnote omitted). *See also* Loeb, *Low Income Tenants in California: A Study in Frustration,* 21 HASTINGS L.J. 287 (1970); Moskovitz, *Rent Withholding and the Implied Warranty of Habitability,* 4 CLEARINGHOUSE REV. 49 (1970).

The landlords in *Birkenfeld* argued that the historic preference for real property dictated that more than a legitimate governmental purpose was required in order to constitutionally sustain the regulation of rental property. The *Birkenfeld* court dismissed this contention, citing instances in which property rights had been limited by the zoning power, *see, e.g.,* Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); Miller v. Board of Public Works, 195 Cal. 477, 234 P.

view was the one generally applied to governmental price regulation: "It is now settled in California law that legislation regulating prices or otherwise restricting contractual or property rights is within the police power if its operative provisions are reasonably related the accomplishment of a legitimate governmental purpose."[30]

The charter amendment's stated goal was to alleviate "a critically low vacancy rate, rapidly rising and exorbitant rents . . . and the continuing deterioration of the existing housing stock [caused by a shortage of housing units]."[31] From this declaration, the court articulated the constitutional test to be applied as follows:

> The provisions are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property. . . . [I]f it is apparent from the face of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's stated purpose, they are constitutionally confiscatory.[32]

The court rebuffed the contention advanced by the City and the interveners that possible confiscatory results could only be considered after rent control became operative. It stated that "[s]uch a regulation may be invalid on its face when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties."[33]

In measuring the constitutionality of the charter amendment, the court first considered whether there was, in fact, a rational basis for the exercise of the police power. The court concluded that the trial court's findings of fact[34] clearly established

381 (1925), and maintained that the use of property may also be limited by regulating rents as long as such regulation served the public welfare. 17 Cal. 3d at 159, 550 P.2d at 1023, 130 Cal. Rptr. at 487. *See* Block v. Hirsh, 256 U.S. 135, 156 (1921).

30. 17 Cal. 3d at 158, 550 P.2d at 1022, 130 Cal. Rptr. at 496. *See* Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 359, 420 P.2d 735, 742, 55 Cal. Rptr. 23, 30 (1966).

31. *See* text accompanying note 13 *supra.*

32. 17 Cal. 3d at 165, 550 P.2d at 1029, 130 Cal. Rptr. at 491.

33. *Id.* For a discussion of cases which have invalidated economic regulations because they were deemed facially confiscatory see notes 62-70 *infra* and accompanying text.

34. Despite the trial judge's conclusion of law that the housing problems of Berkeley did not amount to an emergency, *see* text accompanying note 25 *supra,* the findings stated

reasonable grounds for the imposition of rent control.[35] The court then examined the amendment's provisions for establishing base rents and found no constitutional infirmity with the rent rollback in general,[36] noting that it had been a typical method employed to set base rents.[37] The landlords argued that in light of spiraling

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that entire segments of Berkeley's population suffered from a serious housing shortage, that the vacancy rate for residential housing exceeded three percent, that such a vacancy rate was low, that the housing conditions of low-income persons in Berkeley were serious, that some of the aged and disabled persons in Berkeley suffered adverse conditions in their capability in finding reasonably low-cost housing and that housing conditions for such groups in Berkeley were serious. *Id.* at 161-62, 550 P.2d at 1024-25, 130 Cal. Rptr. at 488-89. There were other factual findings of so-called ameliorative conditions which the supreme court divided into two categories. The first encompassed general findings of improvements in the recent past and those anticipated in the immediate future. The court found these facts encouraging, but not sufficient to dispel the rational basis for enacting rent control. *Id.* at 163, 550 P.2d at 1025, 130 Cal. Rptr. at 489. The second category consisted of comparisons of vacancy rates in neighboring communities and the "finding" that the young people of marginal means, who were unaffiliated with the university but were attracted to Berkeley by its unique life style, were mobile enough to seek housing in surrounding, relatively high-vacancy areas. *Id.* The court retorted that these facts did not diminish

> Berkeley's power to safeguard and promote the health and welfare of persons who [chose] to live in that city. In a field of regulation not occupied by general state law such as rent control each city is free to exercise its police power to deal with its own local conditions which may differ from those in other areas . . . Berkeley is not constitutionally required to ignore any of its housing problems on the ground that they would not exist if some of its residents were to live elsewhere.

Id. at 163, 550 P.2d at 1026, 130 Cal. Rptr. at 490. *See* Galvan v. Superior Court, 70 Cal. 2d 851, 863-64, 452 P.2d 930, 940, 76 Cal. Rptr. 642, 652 (1969).

35. 17 Cal. 3d at 161, 164, 550 P.2d at 1024, 1026-27, 130 Cal. Rptr. at 488, 490-91.

36. *Id* at 166, 550 P.2d at 1028, 130 Cal. Rptr. at 492.

37. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503 (1944); Spaeth v. Brown, 137 F.2d 669, 670 (Emer. Ct. App. 1943); Hillcrest Terrace Corp. v. Brown, 137 F.2d 663, 664 (Emer. Ct. App. 1943); Taylor v. Brown, 137 F.2d 654, 662 (Emer. Ct. App. 1943); Chatlos v. Brown, 136 F.2d 490, 493 (Emer. Ct. App. 1943) (all upholding methods of rent control set forth in the Emergency Price Control Act of 1942 under which the administrator fixing rents was to give "due consideration" to their April 1, 1941 level with appropriate adjustment if defense activities in a given area had already led to rent increases prior to that time); Delaware Valley Apartment House Owners Ass'n v. United States, 350 F. Supp. 1144 (E.D. Pa. 1972), *affirmed*, 482 F.2d 1400 (Temp. Emer. Ct. App. 1973) (base rent figure fixed three months before actual freeze date, as promulgated by President's Price Commission pursuant to Economic Stabilization Act of 1970); Teeval Co. v. Stern, 361 N.Y. 346, 93 N.E.2d 884, 888 (1950) (upholding rollback of rents in New York City after May 1, 1950, to March 1, 1949 levels). A rollback is the most widely used method of fixing rents as of a given date. Willis, *Rent Control: The Maximum Rent Date Method*, 98 U. PA. L. REV. 654 (1950). It is favored because

> under this method rents are fixed at the levels which landlords and tenants have voluntarily agreed upon after free bargaining in a competitive market on a date prior to the time when [the special circumstances giving rise to the need for regulation] have affected the market.

taxes, increases in utility rates and other costs since 1973, authorizing August 15, 1971, as the rollback date would have necessarily reduced rents to confiscatorily low levels pending individual upward adjustments. The interveners pointed out that the three-year delay[38] in the amendment's operation had not been anticipated when the rollback date was selected and suggested that a court could set a new, more current rollback date or order other appropriate relief on remand. The court found such action unnecessary because "the charter amendment's provisions for *adjusting* maximum rents [were] constitutionally insufficient to relieve landlords from confiscatory rent levels even if the base rents were keyed to a more current date."[39]

The constitutional deficiency inhered in procedures which failed to provide adequate safeguards against the arbitrary imposition of confiscatory rent levels. Adjustments in the maximum rents set by the rollback could only be made on a unit-by-unit basis after a full adversarial hearing before the entire Board.[40] There was no mandate as to when Board hearings had to be scheduled. The maximum number of Board meetings per year for which compensation had been allocated was forty-eight.[41] When the unit-by-unit adjustment procedure was matched against the approximately 22,000 units which would have been subject to regulation, the court concluded that many or most of the rent ceilings imposed by the rollback would have been or would become confiscatory through unreasonable delay in making upward adjustments to offset changed circumstances or where base rent

Taylor v. Brown, 137 F.2d 654, 662 (Emer. Ct. App. 1943); *see* Marshal House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 701, 266 N.E. 2d 876, 886 (1971). An additional advantage of a rollback method is that if set early enough, the rollback date provides a safeguard against last minute increases made by landlords in anticipation of the controls. *Birkenfeld,* 17 Cal. 3d at 166, 550 P.2d at 1027, 130 Cal. Rptr. at 491; Marshal House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 701, 266 N.E.2d 876, 886 (1971).

38. The landlords filed the instant class action in October 1972, and a preliminary injunction against the rollback and any rent adjustment hearings was granted on April 26, 1973. Judgment in favor of the landlords was entered on June 22, 1973. 17 Cal. 3d at 167, 550 P.2d at 1028, 130 Cal. Rptr. at 492. The supreme court heard the case on June 16, 1976. *Id.* at 129, 550 P.2d at 1001, 130 Cal. Rptr. at 465.

39. *Id.* at 167, 550 P.2d at 1028, 130 Cal. Rptr. at 492.

40. *See* text accompanying note 19 *supra.*

41. Twenty-four hundred dollars was the maximum amount which could be received by any Board Commissioner. At $50 per meeting, 48 meetings were the maximum which could have been held. *See* City Charter, art. XVII, *supra* note 13, § 3(k) [17 Cal. 3d at 176, 550 P.2d at 1035, 130 Cal. Rptr. at 499].

figures did not reflect general market conditions.[42] The charter amendment placed the Board in a "procedural strait jacket:" it could not grant across-the-board increases which would counterbalance increases in general operating expenses, such as property tax or utility rate increases; it could neither delegate hearing responsibilities[43] nor suspend rent control for any units; it could not consolidate petitions for multiple units in the same building without the written consent of a majority of the building's tenants; it could not grant an increase without the presentation of a certificate proving that the unit had been inspected within the previous six months and was free of housing code violations. In short, the Board's powers were so limited by the amendment that it could not make adjustments without unreasonable delays for all but a few landlords lucky enough to be granted a hearing. The court held, therefore, that "the combination of the rollback to base rents and the inexcusably cumbersome rent adjustment procedure is not reasonably related to the amendment's stated purpose of preventing excessive rents and so would deprive the plaintiff landlords of due process of law if permitted to take effect."[44]

B. Another Modern Approach to Rent Control: *Hutton Park*

By comparing the reasoning in a 1975 New Jersey case, *Hutton Park Gardens v. Town Council,*[45] it will be seen that the extremely restrictive adjustment apparatus in *Birkenfeld* led the California Supreme Court to extend the applicability of facial invalidation of economic legislation. *Hutton Park* involved a constitutional challenge to two rent control ordinances on due process grounds. One of the ordinances (West Orange) established a

42. 17 Cal. 3d at 169, 550 P.2d at 1029-30, 130 Cal. Rptr. at 493-94.

43. The court rejected plans submitted by the Board's chief executive officer which called for hearings to be conducted by hearing officers with final decisions to be made by the Board. *Id.* at 173 n.36, 550 P.2d at 1032-33 n.36, 130 Cal. Rptr. at 496-97 n.36. "The difficulty with these plans is that they were beyond the Board's powers under [the adjustment hearing] section." *Id.* at 173 n.36, 550 P.2d at 1032 n.36, 130 Cal. Rptr. at 496 n.36. Despite the fact that the language of the adjustment hearing provisions did not expressly foreclose delegation to hearing officers, a reasonable construction indicates that the amendment directed the Board to conduct the hearings: "No . . . adjustment shall be granted until the *Board considers [a] petition at an adjustment hearing.*" City Charter, art. XVII, *supra* note 13, § 6(a) (emphasis added) [17 Cal. 3d at 177, 550 P.2d at 1036, 130 Cal. Rptr. at 500]. While "considering a petition" leaves open the possibility that others could have made factual findings from which the Board could have made decisions, "at an adjustment hearing" suggests that the Board, and not hearing officers, was to perform the factfinding function.

44. *Id.* at 173, 550 P.2d at 1033, 130 Cal. Rptr. at 497.

45. 68 N.J. 543, 350 A.2d 1 (1975).

base rent as of February 1, 1973, and provided for rent increases limited to an annual percentage increase in the Consumer Price Index (CPI) for the New York metropolitan area. In addition, landlords were permitted to pass along tax increases to tenants as long as the rent increase did not exceed five percent of the existing rent. In order to meet mortgage and maintenance costs, landlords were also permitted to apply to the local rent leveling board for a rent surcharge up to ten percent when there had been major capital improvements or increases. In no event was the aggregate of all additional increases and surcharges allowed in one year to exceed ten percent of the existing rent.

The other ordinance (Wayne Township) established rents as of May, 1972, as base rents and limited increases to fifty percent of the annual percentage increase in the CPI. The ordinance permitted landlords to apply to a rent leveling board for increases to alleviate hardships, but such increases were limited to fifteen percent of the tenant's existing rent charge. Finally, the ordinance permitted the landlord to apply for permission to impose an additional surcharge to pass through to the tenant increases in local taxes.

The plaintiff landlords, as in *Birkenfeld,* challenged the facial constitutionality of the two ordinances, claiming that they were confiscatory, arbitrary and unreasonable. At issue were the five percent ceiling on annual rent increases in the West Orange ordinance and the restriction of the annual rent increases to fifty percent of the CPI in the Wayne Township ordinance. The New Jersey Supreme Court rejected the landlords' contentions, ruling that price controls are confiscatory only when they do not permit an economically efficient operator to obtain a just and reasonable return on his or her investment.[46] This requirement does not place any undue restriction on the mechanism of regulation. The regulatory scheme need not take a particular predetermined form: "So long as the means chosen to accomplish the object are not

46. *See id.* at 568, 350 A.2d at 14-15; *see also* Federal Power Comm'n v. Texaco Inc., 417 U.S. 380 (1974): "Rate regulation unavoidably limits profits as well as income. 'The fixing of prices, like other applications of the police power, may reduce the value of the property which is regulated. But the fact that the value is reduced does not mean that the regulation is invalid.'" *Id.* at 391, *quoting* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 601 (1944). Regulation may stringently limit investors' returns, "for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." Permian Basin Area Rate Cases, 390 U.S. 747, 769 (1968). *See* Covington & Lexington Turnpike Co. v. Sandford, 164 U.S. 578, 596 (1896).

wholly arbitrary and unreasonable, the courts are concerned solely with the question of whether the return *actually permitted* is just and reaosnable *(sic)."*[47]

The New Jersey Court acknowledged that some rent control ordinances could be written in such a restrictive fashion as to preclude any possibility of a just and reasonable return. Nevertheless, the ordinances in question were not deemed so restrictive:

> Both . . . ordinances take the rent level set by the landlords at a recent date as the base rent. They permit the landlord to obtain annual increases as a matter of course and to obtain special increases to compensate for certain extraordinary expenses at the discretion of the leveling board or governing. . . . [W]e cannot say *a priori* that the ordinances preclude any possibility of permitting a just and reasonable return to apartment house owners in general. The return which landlords were obtaining at the base rent levels may well have been so far above the just and reasonable mark that the present diminished rate of return may still be more than just and reasonable even if current cost increases are outpacing permissible rent increases.[48]

The court disposed of the argument that limiting increases to a fraction of the rate of inflation was not rationally related to the purposes of rent control legislation. To the court, it was entirely conceivable that the base rent fixed by the rollback may have included an exorbitant or unreasonably high profit return, and in such circumstances, limiting increases to something less than the percentage increase in the CPI may have been the only means of protecting tenants from a perpetuation of unjust and exorbitant rents.[49]

C. Analysis of the Two Approaches

Hutton Park concerned a rent control method which established rent levels by specifying a base rent period and providing for annual percentage increases and pass-throughs.[50] The court

47. 68 N.J. at 569, 350 A.2d at 15. *See* Permian Basin Area Rate Cases, 390 U.S. 747, 768-70 (1968); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

48. 68 N.J. at 571-72, 350 A.2d at 16 (citation omitted).

49. *Id.* at 574-75, 350 A.2d at 18.

50. Pass-throughs are operating costs that can be transferred directly to tenants on

decided that limiting annual, automatic across-the-board increases to five percent of the existing rent or fifty percent of the CPI was sufficient to deny a claim of widespread confiscation to the landlords who would be subject to rent control. *Birkenfeld,* on the other hand, involved a legislative enactment that employed a "fair net operating income" scheme,[51] which limits landlord profits by taking into account changes in property taxes and operating expenses, capital improvements, substantial deterioration of property and failure to perform ordinary repairs. The *Birkenfeld* court held that the absence of power to grant general increases, to suspend rent controls, to delegate hearing authority, or to reduce the complexity of hearings rendered the "fair net operating income" method facially confiscatory by exposing landlords to unreasonable delays in obtaining upward adjustments.[52] While the differing facts in the two cases may seem to explain the difference in results, a closer examination reveals that unlike *Birkenfeld,* the judicial approach taken in *Hutton Park* was consistent with the general deference accorded to legislatures when economic regulations are scrutinized by courts.[53]

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a pro rata basis. *See* Blumberg, Robbins & Baar, *The Emergence of Second Generation Rent Controls,* 8 CLEARINGHOUSE REV. 240, 243 n.48 (1974). There are three primary methods for establishing rent levels: (1) specifying a base period rent with annual percentage increases and allowable pass-throughs; (2) a formula limiting landlord profits by fixing rents as of a base year from which fair profit levels are determined and considering individual requests for increases in light of objective factual data (such as taxes, operating expenses and capital improvements) as well as subjective judgments regarding the condition of a building (deterioration and maintenance); and (3) limiting the amount of rent a tenant must pay according to the tenant's financial ability. *Id.* at 243. The ordinances under attack in *Hutton Park,* as well as those adopted in over 80 other New Jersey municipalities and in the State of Maryland, are examples of the first method. *See* MD. ANN. CODE art. 53, § 45 (Supp. 1973) (expired 1974); Blumberg, Robbins & Baar, *supra* at 243 n.56. The second method, the "fair net operating income" formula, has been enacted in Maine and Massachusetts. MASS. GEN. LAWS ANN. ch. 40 App., § 1-7 (West Supp. 1977); ME. REV. STAT. ANN. tit. 30, § 5375 (West Supp. 1973). Both statutes served as legislative enabling acts for municipalities to adopt at their option. *See* Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement,* 28 HASTINGS L.J. 631, 637, 641 (1977).

51. *See* note 50 *supra.*

52. *See* note 42 *supra* and accompanying text.

53. In assessing the constitutionality of any given economic regulation, "[i]t is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (emphasis added). The "law need not be in every respect logically consistent with its aims to be constitutional." *Id.* at 487-88. Legislative bodies have wide latitude to control practices in the business-labor field; debatable issues in respect of business, economic, and social affairs are entrusted to legislative judgment. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423-25 (1952). *See* Olsen v. Nebraska, 313 U.S. 236, 246 (1941). Permissive review of economic legislation applies to examinations under the equal protection clause as well as under the due process clause. *See* New

Facial Confiscation

By presuming that a reduction in landlords' profit margins was a goal of rent control and by assuming that the present or future rate of return enjoyed by landlords would be reasonable,[54] the New Jersey Court placed a heavy burden on the challengers to demonstrate that the rents set by regulation precluded any possibility of a just and fair return.[55] As the *Birkenfeld* court itself recognized, whether any price is confiscatory depends ultimately on the results reached.[56] The consequences of price limitations can be viewed only by considering the actual rate of return allowed on investments,[57] which is not usually known until the regulatory scheme has been applied in individual cases over a period of time.[58] Without proof as to a regulation's actual effects, the typical court action has been to dismiss the suit without

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Orleans v. Dukes, 427 U.S. 297 (1976), *overruling* Morey v. Dowd, 354 U.S. 457 (1957); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 33, 38. The limited scope of judicial review of economic legislation was best articulated in United States v. Carolene Prods. Co., 304 U.S. 144 (1938):

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. . . . But by their very nature such inquiries . . . must be restricted to the issue whether *any state of facts either known or which could reasonably be assumed affords support for it.*

Id. at 153-54 (Stone, J.) (citations omitted) (emphasis added) (congressional act regulating transportation of adulterated milk products presumptively within the scope of commerce power and consistent with due process).

54. *See* text accompanying notes 48-49 *supra.*

55. 68 N.J. at 570-71, 350 A.2d at 16. *See* Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) (those charging confiscation bear "the heavy burden of making a convincing showing" that rates prescribed are "unjust and unreasonable in [their] consequences"); American Toll Bridge Co. v. Railroad Comm'n of California, 307 U.S. 486, 494-95 (1939) (in the absence of clear and convincing proof that reduced rates are less than reasonable, no deprivation of property without due process will be found); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 53 (1937); Marshal House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 706, 266 N.E. 2d 876, 889 (1971) ("fair operating income" rent control ordinance withstood facial attack when the plaintiffs failed to introduce evidence that the ordinance's operation would necessarily be confiscatory to them or the class of landlords they represented).

56. 17 Cal. 3d at 165, 550 P.2d at 1027, 130 Cal. Rptr. at 491, *citing* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). "If the total *effect* of the rate order cannot be said to be unjust and unreasonable judicial inquiry is at an end." *Hope Natural Gas,* 320 U.S. at 602.

57. Federal Power Comm'n v. Texaco, Inc., 417 U.S. 380, 392 (1974). *See also* Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942).

58. *Federal Power Comm'n v. Texaco,* 417 U.S. at 392.

prejudice or to remand the case for further factual findings under then-existing conditions.[59] It has been recognized that a fair return may vary owing to changes in conditions or circumstances.[60] However, the possibility that changed circumstances may lead to confiscation has not induced courts to invalidate regulations until actual figures are available to demonstrate such confiscatory impact.[61]

Nevertheless, as both the New Jersey and California courts observed, there have been rare instances when economic regulations have been adjudged so oppressive or restrictive by their terms as to render enforcement unavoidably confiscatory.[62] However, *Birkenfeld* does not fit within the principle of those cases. In *City of Miami Beach v. Forte Towers, Inc.*,[63] the Supreme Court of Florida invalidated a rent control ordinance because the ordinance failed to set forth sufficiently objective guidelines for administrative application, thereby violating the doctrine of unlawful delegation of legislative authority.[64] In a special concurring opinion, the ordinance's standards and guidelines were found so fixed and arbitrary as to prevent the rent administrator from allowing a fair rate of return in situations which demanded it in order to avoid confiscatory results.[65] The opinion expressed the

59. *See, e.g.*, Marshal House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 709, 266 N.E. 2d 876, 890 (1971) (remand where no facts presented on confiscation issue; ordinance deemed valid on its face); Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 330, 293 A.2d 720, 744 (Law Div. 1972) (suit dismissed; temporary order restraining operation of rent control ordinance dissolved).

60. *See* Baltimore & Ohio R.R. v. United States, 298 U.S. 349, 379-80 (1936); Los Angeles Gas & Elec. Corp. v. Railroad Comm'n of California, 289 U.S. 287, 306-08 (1933); 16A C.J.S. *Constitutional Law* § 690(c), at 1139 (1956).

61. *See* McCart v. Indianapolis Water Co., 302 U.S. 419, 422-23 (1938); Baltimore & Ohio R.R. v. United States, 298 U.S. 349, 379-80 (1936); Brush Elec. Co. v. Galveston, 262 U.S. 443, 446 (1923); Galveston Elec. Co. v. Galveston, 258 U.S. 388, 402-03 (1922). Courts have taken judicial notice of economic trends retrospectively, *see Baltimore & Ohio R.R. v. United States*, 298 U.S. at 379 (the Great Depression); *Galveston Elec. Co.*, 258 U.S. at 403 (the recession which followed World War I), but have not disposed of claims of confiscation on the basis of such recognition. In Los Angeles Gas & Elec. Corp. v. Railroad Comm'n of California, 289 U.S. 287 (1933), the Court discussed the propriety of using current costs of a complaining business to forecast fair returns in the immediate future and found them impossible to predict without available current figures. *Id.* at 307, *citing* St. Louis & O'Fallon Ry. v. United States, 279 U.S. 461, 465 (1929). In contrast, *Birkenfeld* conjectured about *future* economic events without any evidence as to the complaining landlords' present operating expenses or rate of return. *See* notes 71-72 *infra* and accompanying text.

62. *See* notes 32 & 47 *supra* and accompanying text.

63. 305 So. 2d 764 (Fla. 1974).

64. *Id.* at 765 (per curiam).

65. *Id.* at 768 (Dekle, J.).

view, therefore, that the provisions were arbitrary and unreasonable.[66] In *Mora v. Mejias,*[67] a number of rice importers appealed an administrative price-fixing order which regulated the entire rice-importing industry of Puerto Rico. Based upon a showing that the importers were forced to sustain severe financial losses, the First Circuit Court of Appeals held that the administrative order was arbitrary and unreasonable.[68] In *Kress, Dunlap & Lane, Ltd. v. Downing,*[69] the District Court for the Virgin Islands was confronted with a rent control law which, in 1955, had fixed rents at the levels that had been charged in 1947. In 1959, the petitioner attempted to raise the rent for one of his units and, upon a complaint by the tenant, was denied an increase. The rent control administrator recognized that the landlord was operating at a loss but disallowed an increase because the rent control law did not empower him to consider reasonable expenses of maintaining or operating rental premises in granting increases. The only basis for approving increases were costs attributable to major improvements or structural changes. The court struck down the law in its entirety because it failed to allow the rent administrator sufficient latitude to make adjustments so as to provide landlords with a fair and reasonable rent.[70]

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66. *Id.* at 769.

67. 223 F.2d 814 (1st Cir. 1955).

68. *Id.* at 819.

69. 193 F. Supp. 874 (D.V.I. 1961).

70. *See id.* at 886-87. There is another commonly cited case which, on its face, was held to be a taking of property without due process, but not because of confiscatory price levels. In Rivera v. R. Cobian Chinea & Co., 181 F.2d 974 (1st Cir. 1950), the court held that a section of a rent control law violated due process. *Id.* at 978. The disputed section did not limit the amount of rent that could be charged, but rather prohibited a landlord from recovering possession of rental premises except for specific purposes which did not include the withdrawal of the property from the rental market to devote them to business purposes.

> [I]t was within the power of the Legislature to regulate the procedure for the eviction of tenants and recovery of possession by landlords in view of the fact that such procedure might be availed of by landlords to circumvent the maximum rent ceilings which it was the primary purpose of the Legislature to impose. . . . [However, when the Legislature prohibited] a landlord who in good faith desires to [evict] to withdraw his property wholly from the rental market in order to devote it to his own personal use it went beyond the bounds of the police power and adopted an expedient which did not have any reasonable relation to the establishment and maintenance of rent ceilings. . . .

Id. at 977-78.

Each of these cases invalidated an economic regulation which, on its face, posed *immediate* economic losses to those subject to regulation because of defective administrative standards to be applied or regulations already promulgated. *Birkenfeld* is distinguishable from these cases inasmuch as the California Supreme Court speculated about *future* economic losses which might have been suffered by those who would not have be given an adjustment hearing. Without any evidence as to the present rate of return landlords were enjoying, the court assumed that the future course of the economy[71] necessitated a mechanism capable of granting upward adjustments without unreasonable delay to any individual landlord. A concern over future exigencies is tantamount to acknowledging that changed circumstances may cause an ordinance to become confiscatory in fact; however, such changes are typically remedied by the judiciary after, not before, they have occurred, and only if the complaining party demonstrates actual confiscation.[72]

Unlawful Delegation

The court's insistence on an adequate hearing mechanism was predicated on language from *Kugler v. Yocum,*[73] a California case that defined unlawful delegation of legislative authority. *Kugler* stated, in part, that legislation may be invalidated if the legislature "fail[s] to establish an effective mechanism to assure the proper implementation of its policy decisions. . . . The need is . . . for safeguards [which adequately protect against] unfairness or favoritism."[74] The *Birkenfeld* court reasoned that the powers withheld from the Board made delays in obtaining upward adjustments inevitable; therefore, the means of regulation chosen were arbitrary and unreasonable, affording insufficient protection to a substantial number of landlords.[75]

71. The court, sub silentio, apparently contemplated such factors as a general inflationary trend, increasing taxes, increasing utility rates, increases in interest rates, etc. *See* Note, *The Right to Reasonable Rent Regulation: A Newer Economic Due Process,* 65 CALIF. L. REV. 304 (1977), wherein the author suggests that the *Birkenfeld* court's analysis "rested on unstated assumptions about the rate of inflation, the cost-absorption potential of landlords, the long-term profitability of rental properties, the structure of property ownership, the length of time over which rates of return should be calculated, and the proportion of the landlord class discriminated against." *Id.* at 317. *But see* note 61 *supra* and accompanying text.

72. *See* note 61 *supra* and accompanying text.

73. 69 Cal. 2d 371, 445 P.2d 303, 71 Cal. Rptr. 687 (1968).

74. *Id.* at 376-77, 381, 445 P.2d at 306, 309, 71 Cal. Rptr. at 690, 693, *quoting in part* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.15, at 151 (1958).

75. *See* text accompanying notes 43-45 *supra.*

Application of *Kugler* in this instance is erroneous for two reasons. First, the evils sought to be prevented by the unlawful delegation doctrine, *i.e.*, unfairness or favoritism, do not entail the risk of confiscation to a regulated class. Rather, they involve abuses of administrative power which are fostered by vague administrative standards that lead to arbitrary decisionmaking[76] or by the delegation of price or ratemaking authority to interested third parties, which effectively enables them to regulate an entire industry to their competitors' disadvantage.[77] In *Birkenfeld*, neither of these dangers was present. The court itself maintained that there were sufficiently clear adminstrative guidelines to satisfy *Kugler's* requirement of adequately defined standards.[78] Fur-

76. "[T]he legislative exercise of the police power should be so clearly defined, so limited in scope, that nothing is left to the unbridled discretion or whim of the administrative agency charged with the responsibility of enforcing the act." City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801, 806 (Fla. 1972). *See* Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 484, 238 P. 703, 709 (1925) (in bank).

77. Self-motivated administrative decisionmaking, against which the unlawful delegation doctrine is a chief deterrent, was not found present in *Kugler*. There, a number of residents of the City of Alhambra brought a mandamus action to compel the members of the city council either to adopt a proposed initiative ordinance or to place it on the ballot at a special citywide election, as called for by the Alhambra City Charter. The ordinance directed the city manager to set and adjust minimum salaries of Alhambra's firemen at levels not less than those paid by the City of Los Angeles and County of Los Angeles to their firemen. The court found no delegation of legislative authority. 69 Cal. 2d at 383-84, 445 P.2d at 311, 71 Cal. Rptr. at 695. In disposing of the issue of an effective mechanism to assure the proper implementation of legislative policy, the *Kugler* court articulated the following: "[T]he important consideration is not whether the statute delegating the power expresses *standards*, but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by administrative action." *Id.* at 381-82, 445 P.2d at 310, 71 Cal. Rptr. at 694 (emphasis in original), *quoting* Warren v. Marion County, 222 Ore. 307, 314, 353 P.2d 257, 261 (1960). The policy of parity with the salaries of Los Angeles firemen entailed intrinsic safeguards, inasmuch as it was assumed that Los Angeles, the body actually setting salary levels, would attempt to minimize its wage scales; the interplay of competitive economic forces and bargaining power would tend to establish wages at a realistic level. This inherent safeguard prevented any possible abuse to those affected by the policy—Alhambra's firemen. Similarly, in Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966), the mere fact that the Alcohol Beverage Control Act (Act) required wholesale alcoholic beverage distributors to set and designate the price that each would charge for his or her product did not vest legislative authority in the dealers. The Act did not confer the power to regulate the business of one's competitors, *see* State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal. 2d 436, 254 P.2d 29 (1953) (in bank), nor the power to exclude potential competitors from an entire industry or occupation, *see* Blumenthal v. Board of Medical Examiners, 57 Cal. 2d 228, 368 P.2d 101, 18 Cal. Rptr. 501 (1962). Since the Act allowed each dealer to compete in the market place without restraint, excessive prices were prevented.

78. *See* 17 Cal. 3d at 168, 550 P.2d at 1029, 130 Cal. Rptr. at 493: "By stating its purpose and providing a nonexclusive list of relevant factors to be considered, the charter amendment provides constitutionally sufficient guidance to the Board for its determination of petitions for adjustments of maximum rents." *Id.*

ther, because the Board was to be elected, pricesetting authority would not lie with interested third parties. This would presumably ensure against discriminatory administration of legislative policy.[79] Possible hardships resulting from an inability to grant adjustment hearings to all landlords who might have requested them is not contemplated by the unlawful delegation doctrine.

Second, the safeguards or elements of protection required by the doctrine are nothing more than those that are required by ordinary procedural due process.[80] The adjustment hearing procedures in *Birkenfeld* more than satisfied each of the elements; on their face, they provided for notice and a hearing to landlords, an elaborate hearing procedure akin to a trial, a free copy of the Board's findings of fact and law upon which a decision was based, a copy of the official record of the adjustment hearing and notification of the right of judicial review.[81] The court maintained, however, that such procedures must be made available to a complaining party without a substantially greater incidence and degree of delay than is practically necessary.[82] Unfortunately, the court's reliance on a United States Supreme Court opinion, *Smith v. Illinois Bell Telephone Co.*,[83] as authority for this proposition is misplaced. *Smith* involved a due process violation of a rate schedule as applied, not on its face. The unreasonable delay of which the Court spoke was based on a finding that a regulatory agency had repeatedly refused to grant a hearing to a company which had suffered operating deficits for two years.[84] *Smith* does not serve as precedent for the facial invalidation of a regulatory enactment because of an anticipated delay in affording hearings to all members of a regulated class. Instead, *Smith* is generally recognized[85] as authority for the entitlement of an aggrieved party to seek equitable relief in federal court instead of suffering con-

79. Administrative officers are presumed to act in conformity with the Constitution. *See* Butterworth v. Boyd, 12 Cal. 2d 140, 149, 82 P.2d 434, 439 (1938); *see also In re* Flaherty, 105 Cal. 558, 562, 38 P. 981, 982 (1895).

80. "The elements of protection [against unfairness or favoritism] . . . include a hearing with a determination on the record, a requirement of findings and reasons, respect for consistency of principle from one case to another, and opportunity for check or supervision either by administrative . . . or . . . judicial review." 1 K. DAVIS, *supra* note 74, § 2.15, at 151.

81. City Charter, art. XVII, *supra* note 13, § 6(b), (d)-(g) [17 Cal. 3d at 177-78, 550 P.2d at 1036-37, 130 Cal. Rptr. at 500-01].

82. 17 Cal. 3d at 169, 550 P.2d at 1030, 130 Cal. Rptr. at 494.

83. 270 U.S. 587 (1926).

84. *Id.* at 589-91.

85. *See* 16A C.J.S. *Constitutional Law* § 690 (b), at 1137 (1956).

tinuing hardships through unreasonable delay in terminating confiscation.[86]

Meaningful Opportunity to Be Heard

The *Birkenfeld* court pointed out that a number of courts had concluded that regulating an enormous number of highly varied transactions wholly on a case-by-case basis was impracticable and therefore not constitutionally required.[87] The *Birkenfeld* court turned this position around full circle; it determined that when a regulation initially fixes prices and limits price adjustments to those authorized following individual hearings, the hearing apparatus must be sufficiently streamlined to process adjustment requests by the entire class of those subject to regulation in a reasonably prompt fashion or it will be constitutionally impermissible. In effect, *Birkenfeld* incorrectly extended the rationale of *Mullane v. Central Hanover Bank & Trust Co.*[88] to the field of economic regulation. *Mullane* enunciated the principle that "[w]ithin the limits of practicability," the government is obliged to afford to all individuals a meaningful opportunity to be heard preceding the deprivation of protected rights.[89] The meaningful opportunity requirement has been applied in a number of settings, both administrative and judicial, which have been characterized as adjudicative.[90] Although at one time, a hearing in ad-

86. The *Smith* Court articulated the proposition as follows: "[T]he injured . . . company is not required indefinitely to await a decision of the rate-making tribunal *before applying to a federal court for equitable relief.*" 270 U.S. at 591-92 (emphasis added). Such relief has also been available in state courts. *See* Staten Island Edison Corp. v. Maltbie, 58 N.Y.S.2d 818, 270 App. Div. 55 (1945), *affirmed*, 296 N.Y. 374, 73 N.E.2d 705 (1947). The *Birkenfeld* court may well have been concerned with an inundation of suits charging confiscation by reason of the Board's failure to grant adjustment hearings.

87. 17 Cal. 3d at 172, 550 P.2d at 1031-32, 130 Cal. Rptr. at 495-96, *citing, inter alia*, Permian Basin Area Rate Cases, 390 U.S. 747, 756-58, 768-70 (1968); Wilson v. Brown, 137 F.2d 348, 352-54 (Emer. Ct. App. 1943); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758 (D.D.C. 1971).

88. 339 U.S. 306 (1950).

89. *See id.* at 313, 318.

90. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (no evidentiary hearing required in order to satisfy due process prior to termination of Social Security disability payments); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (statute authorizing attachment without early hearing and prescribing filing of bond as only means of dissolving garnishment failed to comport with due process); Goss v. Lopez, 417 U.S. 565 (1975) (students subject to suspension from school for misconduct have a right to notice and hearing either before or shortly after suspension, whichever is more practicable); Arnett v. Kennedy, 416 U.S. 134 (1974) (sustaining validity of procedures by which a federal employee could be dismissed for cause); Morrissey v. Brewer, 408 U.S. 471 (1972) (notice and hearing must be afforded prior to revocation of an individual's parole status); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin statutes permitting prejudgment writs to issue for

vance of a deprivation of property rights or entitlements was not constitutionally required in the face of a legitimate governmental need,[91] the distinction between property rights and those of life and liberty has since been discarded for purposes of due process analysis.[92]

However, in most instances in which an appropriate hearing has been required, the deprivation of property was threatened by pending administrative or judicial proceedings which would have terminated rights.[93] In contrast, in *Birkenfeld,* the landlords were

repossession of household goods sold under conditional sales contract violative of debtor's possessory interest in chattels); Bell v. Burson, 402 U.S. 535 (1971) (notice and hearing before revocation of individual's driving license); Boddie v. Connecticut, 401 U.S. 371 (1970) (due process prohibits denial of indigents' access to courts when judicial dissolution of marriage sought in good faith but indigent unable to pay court costs and fees); Goldberg v. Kelly, 397 U.S. 254 (1970) (notice and hearing before termination of a welfare recipient's benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (notice and hearing must be afforded prior to garnishment of debtor's wages); Armstrong v. Manzo, 380 U.S. 545 (1965) (failure to provide notice of adoption proceeding to natural father violated due process); *accord,* Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) (statute authorizing garageman lien sales for unpaid costs of repair without affording vehicle owner an opportunity for a hearing is invalid); Randone v. Appellate Dept., 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (prejudgment attachment of checking account is unconstitutional); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (without a prior hearing on merits, claim and delivery law violative of due process); McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970) (prejudgment wage garnishment).

91. *See* Bowles v. Willingham, 321 U.S. 503, 520-21 (1944); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931); Marshal House, Inc. v. Rent Control Bd., 358 Mass. 686, 707-08 n.12, 266 N.E. 2d 876, 889-90 n.12 (1971). The sufficiency of administrative procedures is to be measured by weighing: (1) the private interest that will be affected by the official action; (2) the risk of deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *See* Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976); Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (Powell, J.) (concurring); *see also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands"); Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970).

92. *Compare* Mathews v. Eldridge, 424 U.S. 319 (1976) (termination of disability payments), *with* Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole status). Both cases balanced the private and governmental interests in determining what procedures satisfied due process. *See Mathews,* 424 U.S. at 332-35; *Brewer,* 408 U.S. at 481.

93. *See* cases cited at note 89 *supra.* The only case in which the government's failure to provide a hearing constituted a violation of due process was Boddie v. Connecticut, 401 U.S. 371 (1970). In *Boddie,* the Court held that due process prohibits the denial of an indigent's access to the courts when the inability to pay court costs and fees precludes obtaining a marital dissolution. *Id.* at 383. Because the marriage relationship is a fundamental right protected by due process, *see* Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and the state created and possessed the exclusive means for legally dissolving the relationship, judicial proceedings must be made

jeopardized by possible confiscation because of an apparent inability by the rent control board to take preventive action.[94] While *Mullane* and its progeny insist that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner,"[95] they do not mandate timely hearings to protect landlords from forces which operate in the general economy.

The conclusion of this analysis is that the *Birkenfeld* court was confronted with an unusually unwieldy administrative mechanism which is not invalid under traditional applications of either the principle of facial confiscation, the doctrine of unlawful delegation of legislative authority or the requirement that an opportunity for a hearing must be meaningful. Because the court speculated about the risk of future, as opposed to present, confiscatory consequences, it departed from the normal grounds for ruling an economic regulation facially confiscatory. Since the adjustment mechanism in the Berkeley charter amendment provided for the basic rights of procedural due process, did not delegate pricemaking authority to interested third parties and furnished adequate standards for the Board to enforce, the unlawful delegation doctrine was not properly applicable. Because the property interests of landlords were potentially endangered by governmental inaction, rather than by affirmative acts of government, a *Mullane*-type analysis was inapposite. When stripped of the legal arguments offered to justify its holding, *Birkenfeld* stands for the unprecedented principle that an economic regulatory body must be adequately empowered to avoid future confiscation to the entire class subject to regulation.

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available to those seeking divorce in good faith. *See also* Griffin v. Illinois 351 U.S. 12 (1956) (due process requires that states furnish indigents with transcripts to assure access to appellate process). *Boddie* seems applicable to the facts in *Birkenfeld; i.e.*, only the rent control board possessed the power to grant upward adjustments to landlords who might otherwise suffer confiscatory consequences. However, the landlords who did not get a prompt hearing could have petitioned for judicial relief on the ground that seeking an administrative remedy had proven futile. *See* note 85 *supra* and accompanying text. In contrast, rejection of the due process claims in *Boddie* would have presented an insurmountable obstacle to the exercise of the constitutionally protected right to sever a marital relationship. Because the adjustment procedures in *Birkenfeld* did not bar absolutely the vindication of the landlords' rights to a just and reasonable rent in a judicial forum, *Boddie* is inapposite.

94. *See* notes 40-44 and accompanying text.

95. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

D. Future Rent Control Legislation

Birkenfeld does not measurably restrict the enactment of rent control ordinances. Instead, it serves as an enabling act[96] which instructs drafters of future rent control legislation. The mere recital of the power to issue general increases or to suspend rent controls will be sufficient to avoid the constitutional defect perceived in *Birkenfeld*.[97] A rent control board need not grant across-the-board increases or suspend controls, but, in the absence of a unit-by-unit hearing mechanism capable of processing petitions without undue delays, the board must be authorized to take such action in order for the ordinance to withstand a facial constitutional attack.[98] Should the ordinance fail to vest such general powers in the rent control board, it must propose an adjustment hearing mechanism which provides for the delegation of hearings and/or the reduction of the complexity of hearings to manageable proportions.[99]

While *Birkenfeld* may be criticized as signaling the revival of the era of economic substantive due process,[100] perhaps its most

96. *See* Note, *supra* note 71, at 305.

97. The interveners cited a study which stated that under the Massachusetts rent control law, *see* Mass. Gen. Laws Ann. ch. 40 App., §§ 1-1 to 1-14 (West Supp. 1977), "[t]he average length of time between filing a petition and receiving a decision . . . ranges from four to five weeks in Somerville to 10 to 12 weeks in Brookline." 17 Cal. 3d at 172 n.36, 550 P.2d at 1032 n.36, 130 Cal. Rptr. at 496 n.36. The court responded: "But the Massachusetts statute gives local rent control boards the very powers which we have described as being withheld from the Berkeley Board. . . ." *Id.* The only power conferred upon the rent control boards in Massachusetts which was absent in *Birkenfeld* was the authority to make general adjustments for any class of controlled rental units. *See* Mass. Gen. Laws Ann. ch. 40 App., §§ 1-7(a), 1-8(b) (West Supp. 1977).

The *Birkenfeld* court did not discuss how the power to grant general increases necessarily affects the number of or speed with which individual adjustment petitions were processed in the Massachusetts study. It might be presumed that if general increases had been awarded, the number of individual petitions submitted to the Somerville and Brookline rent control boards would have been small, thereby making the boards' task more manageable. However, the court never inquired as to whether the Brookline or Somerville boards had ever issued general increases for any classes of rental units. The court's dismissal of the Massachusetts study was perfunctory, at best.

98. The *power* to avoid confiscatory results is the critical factor in determining the facial validity of a regulation. *See* text accompanying note 33 *supra*.

99. It is possible that an expedited unit-by-unit hearing process, standing alone, would not satisfy the court's concern about possible confiscation. There is language in the *Birkenfeld* opinion from which one could conclude that the power to issue general increases or suspend controls is mandatory, not permissive. *See* note 97 *supra*, which discusses the *Birkenfeld* court's approval of the Massachusetts rent control law. However, in other parts of the opinion, the court suggested that reducing the Board's task to manageable proportions would also have satisfied the constitutional requirements of due process. *See* text accompanying note 101 *infra*.

100. *See* Note, *supra* note 71.

serious shortcoming is its failure to discuss quantitative standards by which future courts should measure the adequacy of unit-by-unit hearing provisions. The court suggested that "the formulation and application of general rules, the appropriate delegation of responsibility, and the focusing of the adjudicative process upon issues which cannot be resolved in any other way"[101] might have saved the Berkeley charter amendment from invalidation. How these criteria are to be balanced against any particular number of potential petitioners is left completely unanswered. More likely than not, such questions will remain hypothetical; *Birkenfeld's* extremely restrictive adjustment provisions will not be replicated by future legislation and, with respect to facial confiscation, *Birkenfeld* will probably be regarded as sui generis.

III. EVICTION AND PREEMPTION

The Berkeley charter amendment contained provisions which limited the grounds for eviction and required landlords to obtain a certificate of eviction from the Board prior to seeking summary repossession by resorting to an unlawful detainer action.[102] The adoption of municipal eviction controls as a part of a rent control scheme has been challenged on preemption grounds; most cases on point have held such controls in conflict with existing state statutes governing eviction proceedings.[103] Notwithstanding the presence of severability clauses, these conflicts have generally rendered local rent control ordinances facially invalid.[104] *Birkenfeld* joins a minority of cases which have declined to rule local eviction controls preempted by state law.[105]

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101. 17 Cal. 3d at 171, 550 P.2d at 1031, 130 Cal. Rptr. at 495.

102. *See* text accompanying notes 20-21 *supra.*

103. Burton v. City of Hartford, 144 Conn. 80, 87-91, 127 A.2d 251, 254-56 (1956); City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801, 806 (Fla. 1972); Heubeck v. City of Baltimore, 205 Md. 203, 210-12, 107 A.2d 99, 104 (1954); F.T.B. Corp. v. Goodman, 300 N.Y. 140, 147-48, 89 N.E. 2d 865, 868-69, 96 N.Y.S.2d 140, 147-48 (1949).

104. *See* cases cited at note 103 *supra; see also* Rivera v. R. Cobian Chinea & Co., 181 F.2d 974, 977-78 (1st Cir. 1950) (prohibiting landlord from recovering possession of property at expiration of lease term in order to devote to business purposes was a taking without due process—not reasonably related to purpose of rent control, which was to maintain maximum rent ceilings). The courts have generally proceeded to strike down legislation containing eviction controls by first finding a conflict with state law and then deciding that eviction controls were essential to accomplishing the objectives of rent control. *See Burton, Heubeck and Goodman,* as cited in note 103 *supra.*

105. *See* Inganamort v. Borough of Fort Lee, 62 N.J. 521, 537, 303 A.2d 298, 307 (1973) (eviction controls in rent control scheme remedies different evil than general statutes—"a housing shortage and concomitant overreaching of tenants"); Warren v. City of Philadelphia, 382 Pa. 380, 385, 115 A.2d 218, 221 (1955) (alternatively: (1) the state merely set up

The *Birkenfeld* court maintained that the eviction restraints in the Berkeley charter amendment were not preempted if their purpose was sufficiently distinct from that of the statewide unlawful detainer laws.[106] The court found the purpose of the unlawful detainer statutes to be procedural.[107] Since the requirement of seeking a certificate raised procedural barriers between a landlord and the summary remedy of unlawful detainer,[108] it was in conflict with the swift recovery of possession of leased premises intended by the statutory scheme.[109] On the other hand, the charter amendment's limitations on the grounds of eviction operated to prohibit eviction of a tenant in good standing at the expiration of the lease's term because of the tenant's unwillingness to pay illegal amounts of rent or his or her opposition to an application of increases in rent ceilings.[110] Rather than interfering with the procedural remedies available to a landlord, the limitations on the bases for eviction simply gave rise to substantive grounds for an affirmative defense in an unlawful detainer action.[111] The court stated: "The mere fact that a city's exercise of the police power creates such a defense does not bring it into conflict with the state's statutory scheme."[112]

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procedure, while the city established substantive right to evict; *or* (2) the state and the city, even if both dealing with same subject matter, were not regulating in like manner or to same extent).

106. 17 Cal. 3d at 149, 550 P.2d at 1015, 130 Cal. Rptr. at 479. For a discussion of California's tests for preemption see note 5 *supra*.

107. *Id.; see also* Warren v. City of Philadelphia, 382 Pa. 380, 385, 115 A.2d 218, 221 (1955). The substance-procedure dichotomy has been employed by California courts to circumvent rigid legal doctrines in order to implement favored public policy. *See* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (Traynor, J.) (in bank) (survival of causes of action characterized as procedural, thereby avoiding application of place-of-injury choice-of-law rule which would have defeated plaintiff's cause of action for wrongful death); Lawson, *Policy in Choice of Law: The Road to* Babcock, 7 GOLDEN GATE U.L. REV. 469, 473-74 n.11 (1977).

108. *See* CAL. CIV. PROC. CODE §§ 1159-1179a (West 1972 & Supp. 1977).

109. 17 Cal. 3d at 152, 550 P.2d at 1018, 130 Cal. Rptr. at 482. *See also* Wilson v. Beville, 47 Cal. 2d 852, 306 P.2d 789 (1957) (city charter's claim-filing requirements invalid to the extent that they served as a condition to recovery for condemned property; field of assessing compensation for condemned property fully occupied by state law); Eastlick v. City of Los Angeles, 29 Cal. 2d 661, 177 P.2d 558 (1947) (city charter requirement of detailed information to support personal injury claims against city intruded into field fully occupied by state law; city could not impose more onerous conditions to recovery than those required by statute).

110. 17 Cal. 3d at 148, 550 P.2d at 1015, 130 Cal. Rptr. 479.

111. *Id.* at 149, 550 P.2d at 1015-16, 130 Cal. Rptr. at 479-80.

112. *Id.* at 149, 550 P.2d at 1016, 130 Cal. Rptr. at 480. The tenant's ability to raise this affirmative defense was deemed a reasonable means of enforcing rent ceilings. *Id.* at 148, 550 P.2d at 1015, 130 Cal. Rptr. at 479. Such eviction controls have been adjudged integral to the effectuation of rent control objectives. *See* note 104 *supra*.

As an example of this proposition, the court cited the holding in *Green v. Superior Court*[113] as establishing that violations of a city's housing code may form the basis for the defense of breach of an implied warranty of habitability.[114] However, *Green* did not approve a defense which had been created by a legislative exertion of the police power. Instead, it allowed that municipal housing codes could serve as standards of proof for an eviction defense which the court itself derived from the common law.[115] Until *Birkenfeld,* California courts had not recognized a municipality's ability to limit eviction grounds as a means of enforcing legitimate police power goals.[116]

The implications of this newly recognized municipal capacity are sweeping. It now appears possible for municipalities to enact limitations on a landlord's power to evict for a host of reasons which might otherwise have been thought preempted by state law. As long as the prohibitions on evictions are reasonably related to protecting the health, safety, welfare or morals of the local community and do not come into direct conflict with statutory language by interposing procedural barriers to unlawful detainer proceedings, they should be sustained on review. Possible acts by landlords which local governments may now prohibit include retaliation for organizing or becoming part of a tenants' union,[117] failure to bargain in good faith with a tenant union

113. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

114. 17 Cal. 3d at 149, 550 P.2d at 1016, 130 Cal. Rptr. at 480.

115. 10 Cal. 3d at 637-40, 517 P.2d at 1182-84, 111 Cal. Rptr. at 718-20.

116. The California Supreme Court had expanded the bases for the affirmative defense of retaliatory eviction so as not to thwart the state legislative purpose underlying Civil Code section 1942, the repair and deduct statute. *See* Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970). *See also* Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962) (racially motivated eviction gives rise to an affirmative defense).

Two months after *Birkenfeld* was filed, the court continued to expand the bases for asserting affirmative defenses in unlawful detainer in order to further congressional legislative policy. In S.P. Growers Ass'n v. Rodriguez, 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976), the court held that a corporate agricultural employer could not evict a farm laborer from company-owned housing in retaliation for his filing suit under a federal farm labor law. *Id.* at 730, 552 P.2d at 727-28, 131 Cal. Rptr. at 767-68.

117. On April 19, 1977, citizens of Berkeley again sought to enact a rent control measure through the initiative process. The initiative, which appeared on the ballot as Measure B, was framed as a repeal and reenactment of article XVII with amendments in compliance with *Birkenfeld.* It stated, in part, that "[n]o landlord . . . [could] be granted recovery of possession of a controlled rental unit . . . if it is determined that the eviction is sought in retaliation for the tenant . . . organizing other tenants." Rent Control Charter Amendment, art. XVII, § 7 (1977) (on file in the *Golden Gate University Law Review* Office). The amendment was rejected by a vote of 21,970 to 13,111. Berkeley

should the union gain the exclusive recognitional status of the tenants involved[118] or discrimination against those who are not recognized as suspect classifications.[119] The protections under *Green,* which call for substantial compliance with housing codes in order to satisfy the landlord's obligations under the common law implied warranty of habitability,[120] might be strengthened so as to require strict compliance.

Beyond setting up affirmative defenses to eviction, local governments may now impose additional obligations on landlords, the breach of which would entitle tenants to seek damages. For instance, *Birkenfeld* would seem to justify the requirement that a landlord return the interest which accrues on security deposits

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Gazette, Apr. 20, 1977, at 1, col. 1. Without such legislative disapproval, evicting a tenant for organizing other tenants is not unlawful. *See* Newby v. Alto Riviera Apts., 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976).

118. *Birkenfeld* would seem to authorize local enabling acts permitting tenants to organize or engage in other concerted activity for "the purpose of collective bargaining or other mutual aid of protection." *See* National Labor Relations Act § 7, 29 U.S.C. § 157 (1973). Concomitant with such a tenant right would be a declaration that it would be an unfair rental practice for a landlord to refuse to bargain in good faith with representatives of his or her tenants. *See id.* § 158 (a)(5). Prohibiting evictions when a landlord fails to bargain in good faith would be a reasonable means of enforcing collective bargaining between tenants and landlords.

The same ballot which contained a second attempt at rent control in Berkeley, *see* note 117 *supra*, also contained a proposal for a "Landlord Tenant Relations Board" to administer a plan for tenant-landlord bargaining. This proposal, designated as Measure F, was defeated by a vote of 20,375 to 14,175. Berkeley Gazette, Apr. 20, 1977, at 1, col. 1.

119. It has been held, for instance, that evicting tenants with children presents no cause of action for any enforceable right under the Unruh Act, CAL. CIV. CODE §§ 51, 52 (West Supp. 1977)(prohibiting "all arbitrary discrimination by business establishments"), the equal protection clause of the California or Federal Constitution or any California laws governing parental or marital rights. Flowers v. John Burnham & Co., 21 Cal. App. 3d 700, 702-03, 98 Cal. Rptr. 644, 645 (1971). *Cf.* Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962) (eviction because of race unconstitutional). "Because the independence, mischievousness, boisterousness and rowdyism of children vary by age and sex . . . , [r]egulating tenants' age and sex . . . is not unreasonable or arbitrary. 21 Cal. App. 3d at 703, 98 Cal. Rptr. at 645 (children in apartment complex restricted to girls of all ages and boys under five). With respect to Civil Code section 51, *Flowers* may be limited to the extent that the denial of housing accomodations therein was "rationally related to the . . . facilities provided" and that specific facts regarding "the nature of the property . . . , rent, its location, the size of the property, and the size of the entity or individual involved in the . . . rental of property" are determinative of what is discriminatory. *See* 58 Op. Cal. Atty. Gen. 608, 613 (1975).

If a local entity considered its housing supply to be detrimental to the health and well-being of children, *Birkenfeld* invites it to forbid eviction of parents with children under any circumstances. *See also* note 123 *infra.* Whether the Unruh Act would prevent eviction because of one's occupation, sexual orientation or marital status is problematical. *See* 58 Op. Cal. Atty. Gen. 608, 613 (1975). These bases for eviction could also be foreclosed absolutely by local legislative action.

120. 10 Cal. 3d at 637-38, 517 P.2d at 1182-83, 111 Cal. Rptr. at 718-19.

retained during the term of a tenancy.[121] Moreover, certain classifications of prospective tenants not currently protected from discrimination in obtaining housing might be empowered to seek damages or injunctive relief if a municipality were to outlaw discrimination against them. Groups which may be extended protection include: (1) students; (2) young people attracted to a city because of its particular ambience;[122] (3) homosexuals; (4) single people; (5) married couples; and (6) parents with minor children.[123] Whatever option(s) might be chosen, *Birkenfeld's* charac-

121. Civil Code section 1950.5 contains provisions governing the payment and retention of security deposits, including an allowance for a tenant to seek up to $200 in damages when a deposit is withheld by the landlord in bad faith for a period exceeding two weeks following the expiration of the tenancy. CAL. CIV. CODE § 1950.5 (West Supp. 1977). However, there are no statutory provisions for the landlord to place the deposit in an interestbearing escrow or trust account and to return the interest on a yearly basis or at the end of a tenancy. A number of states have enacted such provisions. CONN. GEN. STAT. ANN. § 47a-22 (West Supp. 1977); FLA. STAT. ANN. § 83.49 (West Supp. 1973); ILL. REV. STAT. ch. 74, §§ 91-93; MD. REAL PROP. § 8-203(f) (1974); MASS. GEN. LAWS ANN. ch. 186, § 15b (West 1977); MINN. STAT. ANN. § 504.20 (West Supp. 1977); MO. ANN. STAT. § 456.040 (Vernon 1956); N.J. STAT. ANN. § 46:8-19 (West Supp. 1977-1978); N.Y. GEN. OBLIG. LAW §§ 7-103, 7-105 (McKinney 1978); OHIO REV. CODE ANN. § 5321.16 (Page Supp. 1976); PA. STAT. ANN. tit. 68, §§ 511b, 512(b) (Purdon Supp. 1977-1978).

Despite the fact that Civil Code section 1950.5 deals with the same subject matter as would a local ordinance governing repayment of interest on security deposits, there is no indication that security deposits are a matter of paramount state concern, *see In re* Hubbard, 62 Cal. 2d 119, 128, 396 P.2d 809, 815, 41 Cal. Rptr. 393, 399 (1964), or that the legislature intended to fully occupy the field of security deposits, *see* Galvan v. Superior Court, 70 Cal. 2d 851, 860-64, 452 P.2d 930, 935-40, 76 Cal. Rptr. 642, 647-52 (1969). Moreover, local laws requiring the return of interest on security deposits would not interfere with, but would supplement, the operation of section 1950.5. *See Birkenfeld,* 17 Cal. 3d at 142, 550 P.2d at 1011, 130 Cal. Rptr. at 475. Thus, local entities are not preempted from imposing such an obligation on landlords. However, such laws may be of illusory benefit to tenants without existing rent controls, since landlords may simply raise rents in an amount at least equal to any interest which may be owed, claiming the increases are necessary to offset recordkeeping expenses.

122. *See* note 34 *supra.*

123. *See, e.g.,* Berkeley, Cal., Ordinance 4835 (Nov. 18, 1975), which provides in pertinent part that

> [i]t shall be unlawful for the owner, lessor, lessee, sublessee, real estate broker, assignee, or other person having the right of ownership, the rights of possession, or the right to rent or lease any housing accommodation, or any agent or employee of such person to:
>
> a. Refuse to rent or lease, or otherwise deny to or withhold from any person such accommodations because such person has a minor child or children who shall occupy the leased or rented premises with such person.
>
> b. Represent to any person because of the potential tenancy of a minor child or children that housing accommodations are not available for inspection or rental when such dwelling is in fact so available.

terization of unlawful detainer statutes as procedural greatly expanded the power of local government to regulate the landlord-tenant relationship to achieve local policy goals pertaining to rental housing.

CONCLUSION

While it first appears that *Birkenfeld* is a poorly reasoned vindication of landlord interests, it actually represents a flexible blueprint for valid rent control legislation in California. Local rent control may be adopted by a city council or by popular initiative as a valid exercise of the police power despite the absence of a housing emergency. To be constitutionally permissible, a rent control ordinance must authorize an administrative body to grant general across-the-board increases or to suspend rent controls, or must instead propose a unit-by-unit adjustment procedure capable of accommodating individual petitions for increases without unnecessary delay. Cities may enact eviction controls which are reasonably calculated to enforce the objectives of a rent control program. Thus, *Birkenfeld* reflects a consummate balancing of interests: (1) it augurs well for landlords, who will be spared serious threats of confiscation; (2) it expands the opportunities of tenants to assert defenses to eviction and to protest discrimination in obtaining rental housing; (3) it enlarges the

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> c. Make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the rental of housing accommodations that indicates any preference, limitation, or discrimination based on the potential tenancy of a minor child or children.
>
> d. Discriminate against any person in the terms, conditions or privileges of the rental of housing accommodations or in the provisions or services or facilities in connection therewith, because of the potential tenancy of a minor child or children.
>
> e. Refuse to rent after the making of a bona fide offer, or to refuse to negotiate for the rental of, or otherwise make unavailable or deny, housing accommodations to any person because of the potential tenancy of a minor child or children.
>
> f. Include in any lease or rental agreement of housing accommodations a clause providing that as a condition of continued tenancy the tenants shall remain childless or shall not bear children. . . .

Id. § 3. The ordinance further provides that "[a]ny person who willfully violates the [nondiscriminatory policy set forth in the ordinance] shall be liable to each person injured by such violation for reasonable attorney's fees and costs . . . , plus damages in the amount of five Hundred Dollars (*sic*)." *Id.* § 6. Presumably, such an ordinance could also prescribe injunctive relief to remedy a prospective tenant's injury when a landlord discriminates in any prohibited manner. *See also* note 119 *supra*.

power of municipalities to redefine the substantive rights of landlords and tenants in a manner which addresses local housing needs; and (4) it conserves judicial resources by avoiding needless litigation by landlords who would have been forced to seek relief in the courts had *Birkenfeld* been reversed.

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