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Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis

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Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the *Nollan* Analysis?

I. INTRODUCTION

During World Wars I and II, the Supreme Court embraced temporary rent controls[1] as valid exercises of the police power.[2] In so doing, the Court acknowledged the need to preserve domestic price stability amidst international chaos. Because there was such strong public need for government action, and because the

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1 Rent controls impose governmental limits on how much landlords may charge tenants for rent. Rent controls first came onto the American housing horizon after the start of World War I. They were primarily voluntary in nature with the exception of statutes in New York and Washington, D.C., the latter of which was upheld against a constitutional challenge in Block v. Hirsch, 256 U.S. 135 (1921). John W. Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54, 69-72, 74 (1950). Rent control enjoyed a second wave of popularity after the bombing of Pearl Harbor; this wave took the form of a general federal price control in the Emergency Price Control Act. *Id.* at 79. Rent controls since World War II are known as "second generation" rent controls. These are peace time regulations which "attempt to equalize and balance rents in the private housing market." Richard E. Blumberg et al., *The Emergence of Second Generation Rent Controls*, 8 CLEARINGHOUSE REV. 240 (Aug. 1974). Today rent controls are usually local legislative acts setting fixed rents as of a certain date—usually the date on which the voters, or town council, passed the ordinance. Subsequent rent increases are then controlled through any number of mechanisms: a yearly statutory percentage, the consumer price index, a local rent control board, or a combination of these. CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW 314-29 (1977).

2 *See* Bowles v. Willingham, 321 U.S. 503 (1944); Block v. Hirsch, 256 U.S. 135 (1921).

The term "police power" has survived constitutional history without precise definition.

> A common account of the subject is found in the general language of *Lochner v. New York* . . . : "There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public."

RICHARD A. EPSTEIN, TAKINGS 108 (1985) (quoting Lochner v. New York, 198 U.S. 45, 53 (1905)).

Traditional taking jurisprudence holds that a valid exercise of the police power resulting in a loss of property rights does not require compensation. *Id.* at 109. This principle, combined with the expansive modern view of the police power, vastly increases government interference with private property and seriously jeopardizes the status of that property as private. *See id.* at 107-25.

rent control statutes guaranteed landlords "reasonable" rents, the Court held that the laws did not take private property for public use without just compensation. Accordingly, the rent control statutes did not violate the Fifth Amendment.[3]

Today rent control still flourishes. No longer justified as a temporary measure to prevent war-time price gouging, rent control is now seen as a way of equalizing the bargaining power between landlord and tenant. The Court has yet to address fully rent controls in this context.[4]

Not only has rent control grown from a temporary to a permanent measure, but it has also expanded from the setting of inner-city apartments to suburban mobile home parks.[5] The Supreme Court will examine the constitutionality of rent controls in a mobile home context in *Yee v. City of Escondido*.[6] Before the Court is the issue of whether a local rent control ordinance, coupled with a California mobile home protection law, works a taking without just compensation in violation of the Fifth Amendment.[7]

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3 The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken, without just compensation." U.S. CONST. amend. V.

4 *See* Pennell v. City of San Jose, 485 U.S. 1 (1988) (holding taking claim not ripe for review).

5 The relationship between landlord and tenant in the mobile home park differs from the analogous relationship in an apartment complex. In the mobile home context, the ownership of home and land is divided. In most circumstances, the "tenant" owns his mobile home, but rents the "pad" on which it sits from the owner of the park, the "landlord." Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 926, 955.

6 274 Cal. Rptr. 551 (Cal. Ct. App. 1990), *cert. granted in part*, 112 S.Ct. 294 (1991).

7 The petitioners presented four questions for the Court's consideration:

> (1) Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitutes [sic] an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?
>
> (2) Is there a violation of substantive due process under local rent controls for mobilehome parks, which do not provide for vacancy decontrol, where the effect of the ordinance is to merely transfer the value of the right to occupy at a reduced rate from the parkowner to the departing tenant, and in no way protects the present tenants in their tenancy from rent increases or decreases, and increases the cost to incoming tenants by the amount of the "premium" paid by said tenant to the departing tenant for the right to occupy at a reduced rate?
>
> (3) Since the federal right or claim does not ripen until the state has denied just compensation, did the federal claim even exist at the time the state courts purported to dispose of it?

This Comment undertakes the same task in a four part analysis. Part II sets the factual and procedural stage for the discussion. Part III examines the opinion of the California Court of Appeals. Part IV considers the various taking analyses which have been proffered in this area: the physical occupation analysis, the multifactor balancing analysis, and the dual nexus analysis. Finally, Part V suggests that *Nollan v. California Coastal Commission*,[8] a corollary to the regulatory taking test, should serve as the framework for the Court's opinion.

II. FACTUAL BACKGROUND

In 1988, the citizens of Escondido passed an initiative limiting rent in mobile home parks to the levels in place on January 1, 1986.[9] According to the ordinance, the park owners can seek rent increases only by applying to the city's Mobile Home Park Rental Review Board. Park owners must follow this procedure even when a mobile home in their park is sold to a new owner; that is, the ordinance does not provide for automatic vacancy decontrol.[10] Along with municipalities, the California legislature has acted on the behalf of mobile home owners, the tenants in this context. In 1978, the California legislature passed the California Mobilehome Residency Law.[11] The Residency Law limits the circumstances under which a landlord may evict a tenant;[12] restricts a landlord's

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(4) Does a federal "as applied" taking claim arise at the time of the passage of the rent control ordinance or sale of the coach for a premium, such that new federal claims, arising after the completion of state court proceedings, are now ripe for decision by the federal district court?

Petition for Cert. at (i)-(ii), *Yee* (No. 90-1947). This discussion will focus only on the taking issue.

8 483 U.S. 825 (1987).

9 ESCONDIDO, CAL., CODE art. 5, §§ 29-101 to 29-108 (1988). The statute specifically provides:

> Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986 . . . . No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board.

Id. § 29-103.

10 *Id.* Vacancy decontrol allows the landlord to freely raise rents when new tenants occupy vacant apartments or mobile homes.

11 CAL. CIV. CODE §§ 798-799 (West 1982 & Supp. 1991) [hereinafter Residency Law].

12 A landlord may evict a tenant only for one or more of the following reasons:

ability to terminate a month to month tenancy;[13] and requires park owners to accept new tenants if they are able to pay the current rent.[14] Two commentators concluded that "[t]he result of these changes in the law is that a tenancy ha[s] become tantamount to a fee ownership, and the landlord's ownership ha[s] become not much more than a monetary right to a fixed return on his investment."[15]

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, which constitutes a substantial annoyance to other homeowners or residents.

(c) Conviction of the homeowner or resident for prostitution or a felony controlled substance offense if the act resulting in the conviction was committed anywhere on the premises of the mobilehome park, including, but not limited to, within the homeowner's mobilehome . . . .

(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park which is part of the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute a failure to comply with a reasonable rule or regulation unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within seven days . . . .

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(e) Nonpayment of rent, utility charges, or reasonable incidental service charges; [though the tenant must be given time to cure] . . . .

(f) Condemnation of the park.

(g) Change of use of the park or any portion thereof . . . .

Id. § 798.56.

13 "(b) The management shall not terminate or refuse to renew a tenancy, except for a reason specified in this article and upon giving of written notice to the homeowner . . . ." *Id.* § 798.55.

14 Specifically, the Residency Law provides:

Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he will not comply with the rules and regulations of the park . . . .

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner in writing, of either acceptance or rejection of the application and the reason if rejected.

Id. § 798.74.

These excerpts do not exhaust the provisions of the Residency Law, but are those pertinent to this Comment.

15 Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399, 421-22

The Residency Law has an even greater effect when combined with the Escondido rent control ordinance. Because the rent control ordinance does not provide for vacancy decontrol, the tenant, when he sells his mobile home, can assure the buyer the tenant/seller's existing low rent. The value of the future rent, reduced below market levels by the rent control, constitutes a rent premium which the tenant is able to incorporate into the sale price of his mobile home.[16] Consequently, the rent premium raises the cost of the mobile home above market levels and thus gives the tenant a windfall. More importantly, this effect frustrates the purpose of the rent control ordinance by raising the costs of mobile homes.[17] It is the transfer of this premium from the landlord to the tenant and the resultant rise in mobile home price which the petitioners in *Yee* challenge as a taking.[18]

III. THE ANALYSIS OF THE CALIFORNIA COURTS

In 1988, the Yees and other mobile home park owners brought suit in the San Diego County Superior Court, alleging that the combined effect of these laws constituted a taking of their property without just compensation.[19] The city demurred and the court sustained the demurrer without leave to amend; it then dismissed the case for failure to state a claim for which relief could be granted. Petitioners appealed.[20]

The California Appellate Court was no more receptive to petitioners' claim. Petitioners urged the appellate court to reconsider *Oceanside Mobilehome Park Owners Ass'n v. City of Oceanside*[21]

(1988).

16 *Id.* at 425.

17 *Id.* at 431, 447.

18 Brief for Petitioners at 6, *Yee* (No. 90-1947).

19 *Id.* at 5-6.

20 *Id.*

21 204 Cal. Rptr. 239 (Cal. Ct. App. 1984). *Oceanside* addressed multiple challenges to a mobile home rent control ordinance. OCEANSIDE, CAL., CODE § 16B (1982). The *Oceanside* court reiterated a prior holding that "rent control legislation will be held constitutionally valid as a proper exercise of the police powers so long as it is 'reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property.'" *Oceanside*, 204 Cal. Rptr. at 245 (citations omitted). The ordinance at issue met these requirements.

The court also responded to a more tailored taking challenge. The plaintiffs argued that when the ordinance reduces rents below market levels, the result is not affordable mobile home park rents, but simply a transfer to the selling tenant of the unregulated profit which, in the absence of rent control, belonged to the park owner. *Id.* at 252. The court found that the initial premise of this argument was flawed. "The ordinance is struc-

in light of the Ninth Circuit's decision in *Hall v. City of Santa Barbara*.[22] The California Court of Appeals declined this invitation. Instead, it penned a two-pronged decision reaffirming its precedent and rejecting the *Hall* analysis. Both parts of the opinion will be evaluated in turn.

A. *The Court of Appeals' Own Disposition*

The California Court of Appeals began the first prong of its analysis by recognizing the relationship of mobile homes and mobile home park pads as complementary goods, that is, goods that are used together.[23] The prices of complementary goods are inversely related: as the price of one of the goods is lowered, the demand for the complementary good increases, raising the price of the latter. Thus, since rent control keeps the price of the mobile home park pad artificially low, the demand for mobile homes will rise, which in turn raises the price of the mobile homes.[24]

The appellate court next found that it is within the scope of the police power to decrease rents artificially through controls:

> Recognizing that "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims," decisions of the United States and California Supreme Courts have established that local governments may consistent with the police power adopt rent control ordinances where imperfections in the unregulated market for rental housing allow landlords to charge excessive rents.[25]

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tured to establish a fair base rent which reflects general market conditions and incorporates relevant pricing factors. Rents will not be 'reduced more than required for the purposes of the police power.'" *Id.* (citations omitted). Thus, the court left the ordinance undisturbed.

22 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988). In contrast to the *Oceanside* court, the Ninth Circuit in *Hall* held that the plaintiff's complaint could state a cause of action under the taking clause. The court found that, on the facts stated, the ordinance could work a physical occupation of the park owners land and could constitute a per se taking under the rule of Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419 (1982). *Id.* at 1276. More attention will be given to the *Hall* opinion in the context of the *Yee* court's criticism of that opinion. *See infra* Part II.B.2.

23 Yee v. City of Escondido, 274 Cal. Rptr. 551, 553 (Cal. Ct. App. 1990).

24 *Id.*

25 *Id.* (citing Fisher v. City of Berkeley, 475 U.S. 260, 264 (1986)). Some people believe that the market for mobile homes is especially in need of correction:

> [U]nlike those who rent apartments, renters of mobile home pads own the most costly part of their housing, which they have voluntarily placed on the property of another party.

The fact that the market for complementary goods—mobile homes—responds negatively to the rent control, the court concluded, did not transform the control into a taking. As long as the controlled rents allowed a fair and reasonable return, no taking occurred.[26]

B. Refuting Hall

The second part of the *Yee* court's opinion rebuffed the constitutional analysis put forth by Judge Alex Kozinski in *Hall v. Santa Barbara.*

1. The *Hall* Opinion

Hall presented a factual situation similar to that in *Yee.* In *Hall,* mobile home park owners brought suit alleging that the interaction between a Santa Barbara rent control ordinance[27] and the Residency Law worked a taking of private property without just

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> It is this aspect of divided ownership which, in combination with a high degree of specialization and high transaction costs, produces what economists call a "quasi-rent." This quasi-rent relates to the high cost of making available a particular specialized asset to another user.
>
> If a coach owner is confronted with a rent increase, he may decide to move his coach to a pad in a park where the rents are lower. Assuming both pads are of equal quality, an optimizing individual chooses the least costly solution. Consequently, the coach owner will move only if the present value of the expected difference in rent exceeds the costs of transporting the coach and preparing and landscaping the new site . . . .
>
> The fact that it is quite costly for a tenant to move after located in the park gives landlords the opportunity to seek larger rent increases than they otherwise would be able to obtain. Thus, the park owner earns a quasi-rent . . . .
>
> Mobile home park owners in pursuing their profit motives tend to appropriate the quasi-rent created by the coach owner's investment. This fact, one can assume, is, or at least should be, taken into consideration by mobile home owners when purchasing a coach and/or deciding where to locate it. The assumption of relocation costs by the mobile home tenant was arguably a *quid pro quo* of the less expensive mobile home tenancy.

Hirsch & Hirsch, *supra* note 15, at 419-20.

26 *Yee,* 274 Cal. Rptr. at 554.

27 The Ninth Circuit summarized the Santa Barbara rent control ordinance as follows:

> The ordinance requires mobile park operators to offer their tenants leases of unlimited duration. These leases must provide certain key terms: They must be terminable by the tenants at will, but by the mobile home operator only for cause, narrowly defined by the ordinance; rent increases are strictly limited; and disputes about rent or lease terms are made subject to binding arbitration.

Hall, 833 F.2d at 1273 (referencing SANTA BARBARA, CAL., ORD. § 26.080.040 A-D (1984)).

compensation as prohibited by the Fifth Amendment. The federal district court dismissed the cause of action for failure to state a claim for which relief could be granted.[28] In reviewing the district court's opinion, the Ninth Circuit undertook a three part analysis to determine whether the complaint stated a cause of action under the taking clause: (1) Did the government action amount to a taking? (2) Did the action advance a legitimate state interest? and (3) Was there just compensation?[29]

The Ninth Circuit stated that if it answered the first question affirmatively and either of the latter two negatively, the plaintiffs stated a cause of action under the taking clause of the Fifth Amendment.[30] Following this map, the Ninth Circuit held that there were grounds to find that the combined effect of the statutes worked a taking.[31] In evaluating the taking issue, the court noted a dual constitutional analysis for taking cases: regulations that just affect property rights are evaluated according to an ad hoc, multifactor balancing test; regulations that result in physical occupations are takings per se.[32] The court found that the com-

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28 *Id.* at 1274.

29 *Id.* at 1274-75.

30 *Id.*

31 *Id.* at 1282.

32 *Id.* at 1275. In resolving whether or not a particular regulation works a taking under the Fifth Amendment, the Supreme Court has had some difficulty in articulating a well-defined test and admits as much. In Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), the Court held that a landmark designation that prevented the owners from renovating—and increasing the rental value of—a train station did not work a taking within the meaning of the Fifth Amendment. In explaining its taking analysis, the Court stated:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Id. at 123-24.

Thus, the Court usually engages in a multifactor balancing test in which it considers the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the government action. *Id.*

When the regulation results in a physical occupation of the owner's land, either by the government or by a third party, the Court applies a different test. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). At issue in *Loretto* was a New York law which required landlords to allow cable companies to attach cable boxes to the rental buildings. The Court distinguished this kind of physical invasion from regulations which merely diminish the value of the owner's property. It stated that physical occupations are "qualitatively more intrusive than perhaps any other category of property regula-

bined effect of the Santa Barbara rent control ordinance and the Residency Law fell within the second category:

> When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in *Loretto, Kaiser-Aetna* [*v. United States,* 444 U.S. 164 (1979)] and their precursors. Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellant's claim would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto.*[33]

Judge Kozinski then addressed the latter two questions. In evaluating whether the ordinance substantially advanced a legitimate state interest, the court found that if the "ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families in seeking access to rental units in mobile park homes."[34] Because this result may occur, the combined effect of the actions may not meet the public use requirement of the Fifth Amendment[35]—that the legislature "'rationally

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tion," *id.* at 441, in that they deprive owners of fundamental property rights, namely the right to use the property as they wish and to exclude others from their property. *Id.* at 433. Thus, when a regulation results in the physical occupation of property, the Court treats this as a per se taking for which just compensation must be paid. *Id.* at 441.

33 Hall v. City of Santa Barbara, 833 F.2d 1270, 1276 (9th Cir. 1986), *cert. denied,* 485 U.S. 940 (1988).

34 *Id.* at 1281. Hirsch & Hirsch essentially concluded that in a *Hall*-type scenario this was the case:

> [I]f the purpose of rent control is to assure deserving tenants housing at a reasonable rent, the extent to which mobile home tenants are able to appropriate these benefits makes rent controls in a mobile home context unfair and perhaps even counterproductive in the long run. In the apartment context, unless the jurisdiction allows the tenant to sublet his apartment without rent restrictions, tenants are unable to appropriate the economic benefit of lower rents caused by rent controls. In contrast, tenants in mobile home parks can appropriate the placement values, or at least a large part thereof.

Hirsch & Hirsch, *supra* note 15, at 448.

35 *Id.* at 1280.

could have believed that the [Act] would promote its objective.'"[36]

Finally, in answering the last question, whether there was just compensation, the Ninth Circuit disagreed with the city that "fair and reasonable" rent provides just compensation.[37] The court found that rent compensated the landlords only for the use of the land during the time of possession and for the services provided during that time. However, if their claim were substantiated, the court continued, the Halls would be entitled to additional compensation for the taking of their property: the possessory interest in the land allegedly transferred to each of their tenants.[38] Thus, since the foregoing questions could be answered in such a way as to find a taking without a public use and/or just compensation, the Ninth Circuit concluded the motion to dismiss was granted in error.[39]

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36 Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (citing Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981)). In *Midkiff*, a state statute sought to "reduce the perceived social and economic evils of a land oligopoly traceable" to a prior feudal system. *Id.* at 229. "Under the Act, lessees living on single-family residential lots within tracts at least five acres in size [we]re entitled to ask appellant Hawaii Housing Authority (HHA) to condemn the property on which they live." *Id.* Those owning the condemned tracts challenged the statute as a violation of the Fifth Amendment's public use requirement on the grounds that the ordinance transferred land to private owners in the first instance. The Court held that the public use requirement was "coterminous with the scope of a sovereign's police power," *id.* at 240, and consequently the Court would not disturb the sovereign's use of eminent domain if the legislature "rationally could have believed that the [Act] would promote its objective." *Id.* at 242 (citations omitted). Thus, this particular act constituted a public use.

In looking at this element of the taking clause in *Hall*, the Ninth Circuit stated that the public use requirement for regulatory takings may be more stringent than that for eminent domain cases such as *Midkiff*. *Hall*, 833 F.2d at 1280. As support for this proposition the court quoted the standard of "substantially advances legitimate state interests" as set forth in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), a regulatory taking case. Though the court correctly examined public use as an element in the taking analysis, using *Agins* as support for this proposition confuses the issues involved in the two cases. In *Agins*, the "substantially advancing" language was used to determine whether a zoning law worked a taking. The test in *Midkiff* addressed another question: whether land was taken for a public use. Though it is difficult to imagine a scenario where a taking would pass the *Agins* test, but not pass the *Midkiff* test, the inquiries are independent and should be addressed separately. For a general discussion of the confusion arising out of the regulatory takings test, see Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 26-27 (1988).

37 *Hall*, 833 F.2d at 1281.

38 *Id.* The court continued, "It may well be that the rental payments (together with such increases as are permitted under the ordinance) adequately compensate the Halls for the taking of their property." *Id.* This was an issue which the lower court had to determine from a fuller record.

39 *Id.* at 1282.

2. The California Court of Appeals' Criticism of *Hall*

The *Yee* court found the reasoning of the Ninth Circuit flawed at many levels. First, the court believed that the Ninth Circuit improperly relied on *Loretto*.[40] The *Loretto* court made it clear that the purpose of its holding was not to interfere with states' regulation of the landlord-tenant relationship.[41] According to the *Yee* court, the Ninth Circuit's opinion was merely, as a dissenting Justice in *Loretto* foresaw, the attempt to "'shoehorn insubstantial takings in [Loretto's] 'set formula.' "[42]

The second of the *Yee* court's criticisms is analytically weaker than the first. The court continued:

> *Hall* fails to explain why the existing tenant's ability to "monetize" the future rent control savings and recapture it from later tenants is somehow critical to the takings analysis. If an owner's property has been taken by the government, it should be of no consequence to whom the property was given.[43]

However, the *Hall* court took pains to explain the relevance. If the monetization of the future rent results in higher prices to future mobile home owners, then the purpose of the law is frustrated and the public use requirement as put forth in *Hawaii Housing Authority v. Midkiff* may not be met.[44]

Finally, the *Yee* court saw *FCC v. Florida Power Co.*[45] as striking a fatal blow to the *Hall* analysis.[46] *Florida Power* is the Supreme Court's most recent resolution of a rent control issue[47] and per-

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40 *Yee*, 274 Cal. Rptr. at 555.

41 *Id.*

42 *Id.* at 555 (citing *Loretto*, 458 U.S. at 451 (Blackmun, J., dissenting)).

The court also found fault with the Ninth Circuit's failure to consider the appellate court's precedent of Oceanside Mobile Home Park Owners Ass'n v. City of Oceanside, 204 Cal. Rptr. 239 (Cal. Ct. App. 1984). *Yee*, 274 Cal. Rptr. at 555. This position is illegitimate in light of the fact that state court precedents are not binding on a United States Circuit Court in a matter of federal constitutional law. Additionally, the *Oceanside* court's treatment of the specific taking issue presented here was cursory at best and may be distinguished on the following grounds: The appellate court rejected the appellant's premise that the ordinance lowered rates below market value—the court here does not reject this contention. *Oceanside*, 204 Cal. Rptr. at 252.

43 *Yee*, 274 Cal. Rptr. at 555 (citations omitted).

44 *See supra* note 36 and accompanying text.

45 480 U.S. 245 (1987).

46 *Yee*, 274 Cal. Rptr. at 556.

47 The Court subsequently has entertained other taking challenges to rent control ordinances, but did not reach nor resolve the taking issue. *See, e.g., Pennell v. City of San*

tains to cable companies' use of public utility lines.[48] Since the Court upheld a federal rent control statute in this context, the California Court of Appeals believed that this disposed of all constitutional arguments against rent control. However, as the *Hall* court pointed out, this and prior decisions by the Supreme Court focused on rent controls which did not force landlords to accept new tenants and in which tenants were not able to monetize landlords' reduced future rents. The Court's analysis did not extend to regulations where the government, or "an interloper with a government license,"[49] forced itself upon a landowner.[50]

IV. THE ANALYTICAL CHOICES

Neither the California Court of Appeals nor the Ninth Circuit provides an analytical framework which the Supreme Court should use in addressing the Yees' taking claim. The California Court of Appeals relied too heavily on its own precedent, which is neither mandatory nor persuasive, to make its argument compelling in federal court. The Ninth Circuit's opinion does not suffer from this infirmity, but is nevertheless inapplicable to the Yees' claim because the Escondido rent control ordinance does not result in a physical occupation of the kind presented in *Hall.* Instead, the Court should look to its regulatory taking jurisprudence to guide its decision. The physical occupation and regulatory taking approaches are evaluated below.

A. The Physical Occupation Argument

The argument that the Escondido ordinance resulted in a physical occupation essentially mirrors the *Hall* analysis.

Jose, 485 U.S. 1 (1988).

48 *Florida Power* addressed the constitutionality of the Pole Attachments Act, 47 U.S.C. § 224 (1988). The Pole Attachments Act was passed "[i]n response to arguments by cable operators that utility companies were exploiting their monopoly position by engaging in widespread overcharging," *Florida Power,* 480 U.S. at 247, and was designed "to fill the gap left by state systems of public utilities regulation." *Id.* at 247-48. In reversing the Eleventh Circuit's decision that the Act resulted in a physical occupation and therefore worked a taking under the Fifth Amendment, the Court held that since the contracts were entered voluntarily, the "element of required acquiescence [which] is at the heart of the concept of occupation" was missing; *id.* at 252, therefore the Act did not work a taking.

49 *Id.* at 253.

50 *Florida Power* is addressed more fully in the discussion of physical occupations. *See infra* Part IV.A.

> Reduced to its essentials, appellants' claim is that the . . . ordinance has transferred a possessory interest in their land to each of their . . . tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value.[51]

There is some question, however, as to whether *Loretto*'s physical occupation analysis was meant to extend to rent control. In the *Loretto* opinion, Justice Marshall admonished:

> [W]e do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.[52]

Despite Justice Marshall's assurance, *Loretto* has filtered into the rent control area. As noted above, the Ninth Circuit relied on *Loretto*'s physical occupation analysis in *Hall.* Additionally, the Third Circuit, in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,*[53] set forth an analysis similar to *Hall* in an almost identical factual situation.[54] The Third Circuit accepted the landlords' contention that the ordinance "transferred . . . to the tenants an alienable and valuable possessory interest in a pad which 'constitutes a physical occupation in perpetuity' by present or future tenants."[55] Applying *Loretto*'s per se taking test, the court held that appellants stated a cause of action for a taking and reversed the lower court's dismissal for failure to state a claim for which relief could be granted.

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51 Hall v. City of Santa Barbara, 833 F.2d 1270, 1276 (9th Cir. 1986), *cert denied,* 485 U.S. 940 (1988).

52 Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 440 (1982). Justice Marshall cited various rent control decisions that he believed *Loretto* left undisturbed, including Bowles v. Willingham, 321 U.S. 503 (1941) and Block v. Hirsch, 256 U.S. 135 (1921).

53 898 F.2d 347 (3d Cir. 1990).

54 In *Pinewood,* mobile home park owners brought suit challenging a local rent control ordinance which, when combined with the state law regulating mobile homes, effected an unconstitutional taking of their property without just compensation. *Id.* at 348.

55 *Id.* at 351.

Even some members of the Supreme Court have entertained the physical occupation analysis in the rent control context. In his dissent to the denial of certiorari in *Fresh Pond Shopping Center, Inc. v. Callahan*,[56] Chief Justice Rehnquist expressed his willingness to consider a *Loretto* challenge to a Cambridge, Massachusetts rent control ordinance. Under the ordinance,

> [o]wners of rent-controlled property [were] also prohibited from evicting tenants without first obtaining a certificate of eviction from the Rent Control Board . . . . [The ordinance] preserve[d] the landlord's right to obtain a certificate of eviction to recover possession of the property only for occupancy by the owner or certain of his family members, or if the property [was] to be removed from the housing market through demolition or otherwise . . . .
>
> In effect, then, the Rent Control Board . . . determined that until the remaining tenant decide[d] to leave, appellant [would] be unable to vacate . . . the building.[57]

In Justice Rehnquist's view, "this deprive[d] appellant of the use of its property in a manner closely analogous to a permanent physical invasion, like that involved in *Loretto*. . . ."[58]

The Court in *FCC v. Florida Power Co.*[59] attempted to resolve the discrepancy between *Loretto* and the position taken by the courts in *Hall* and *Pinewood*,[60] and by Justice Rehnquist in *Fresh Pond*.[61] In *Florida Power*, the Court rejected the proposition that rent controls—specifically, limits on the rent that utilities may charge cable companies for use of poles—effected a physical occupation under the *Loretto* analysis.

> The Act authorizes the FCC, in the absence of parallel state regulation, to review the rents charged by public utility landlords who have voluntarily entered into leases with cable company tenants renting space on utility poles. As we observed in Loretto, statutes regulating the economic relations of landlords and tenants are not per se takings. "So long as these regulations do not *require* the landlord to suffer the physical occupa-

56 464 U.S. 875 (1983).

57 *Id.* at 876-77.

58 *Id.* at 877 (citations omitted).

59 480 U.S. 245 (1987). *See supra* note 48 and accompanying text.

60 Pinewood Estates of Michigan v. Barnegat Township Leveling Bd., 898 F.2d 347 (3d Cir. 1990).

61 Fresh Pond Shopping Ctr. Inc. v. Callahan, 464 U.S. 875 (1983).

> tion of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity."
>
> . . . [I]t is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.[62]

The difference, then, between *Florida Power* and *Loretto* on the one hand, and the rent control cases referred to above on the other, is that *Florida Power* in its holding and *Loretto* in its dicta anticipated only the shifting of burdens between current contracting parties. The facts in *Florida Power* did not present to the Court an occasion to decide if a forced acquiescence worked a physical occupation and therefore a taking.[63] *Hall, Pinewood,* and Rehnquist's dissent to the denial of certiorari in *Fresh Pond* simply anticipated how the Court would respond, given its reasoning in *Florida Power,* to a situation in which a landlord was forced to lease to a tenant chosen by someone other than the landlord.

As appealing as it may be to characterize the Yees' claim as a forced occupation and therefore a taking under *Loretto,* the facts of this case do not allow for such a quick and easy disposition. The Yees are suing the City of Escondido. However, it is not the Escondido ordinance that results in the physical occupation; it is the Residency Law that protects tenants from eviction and forces the mobile home park owner to accept qualified tenants. The Escondido rent control ordinance, on the other hand, only results in a physical occupation in two very narrow circumstances: (1) subleasing of units and (2) long term leasing of homes and pads, both owned by the park owner.[64] Though the physical occupation argument prevails as applied to these situations, it is a pyrrhic victory for the petitioners. Because the vast majority of the tenants in mobile home parks own their own mobile homes, they do not fall within the narrow "occupation" protections of the Escondido ordinance. Therefore, to wage a successful physical occupation attack that would encompass the latter set of tenants, the opponent must be the State. If the petitioners want to rest their taking

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62 *Florida Power,* 480 U.S. at 251-53 (alteration in original) (citing *Loretto,* 458 U.S. at 440).

63 *Id.* at 252-53.

64 ESCONDIDO, CAL., CODE art. 5, § 29-106 (1988).

claim on a physical occupation, they have sought relief against the wrong party.[65]

B. The Multifactor Balancing Test

Another test in the Court's taking jurisprudence is the multifactor balancing test. Under this analysis, those challenging regulations do not have to establish a physical occupation. Rather, the Court evaluates taking claims according to "the general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[66] The Court has listed a number of factors to determine whether the challenged regulation has gone too far: (1) economic impact of the regulation;[67] (2) character of the government action;[68] (3) investment backed expectations;[69] (4) offsetting reciprocal benefits;[70] and (5) abrogation of essential property rights.[71] The key inquiries in this multifactor analysis are the severity of the economic impact and the invasiveness (or intrusiveness) of the government action.

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as whole . . . .[72]

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65 The physical occupation claim, even if the petitioners had chosen to sue the state, may not be as fail-safe as presented. Though it could be argued that California's requirement that the park owner accept any new tenant may constitute "required acquiescence"—with the tenant being an "interloper with a government license"—the Court may also view the requirement another way. Despite *Florida Power*, the Court may not see *Loretto* as extending into the rent control area at all, based on Justice Marshall's admonition in *Loretto*. Therefore, it is just as plausible that as long as an invitation to rent is extended, the forced rental to an "acceptable" tenant does not materially alter the tenant's status from "invited" to "uninvited."

66 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

67 *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. New York City, 483 U.S. 104 (1978).

68 *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

69 *See* Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).

70 *See Keystone Bituminous Coal*, 480 U.S. 470 (1987); *Penn Cent.*, 483 U.S. 104 (1978)

71 *See* Hodel v. Irving, 481 U.S. 704 (1986); *Kaiser Aetna*, 444 U.S. 164 (1979).

72 *Penn Cent.*, 438 U.S. at 130. *Penn Central* presented the question of "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addi-

Thus, even if the Yees proved that the loss of their rent premium constituted a separable and important property interest, their claim would fail the *Penn Central* standard because of the rents and rights they retained.[73]

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tion to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation.'" *Id.* at 104. New York City's comprehensive program required city approval before an owner of a designated landmark site could alter the site in any way. Petitioners owned Grand Central Station, a designated landmark, and other properties in the surrounding area. In order to increase their income from the property, Penn Central entered into a lease with UGP Properties, Ltd. "Under the terms of the agreement, UGP was to construct a multistory office building above the Terminal. UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter." *Id.* at 116. Pursuant to agreement, Penn Central submitted two separate sets of plans for the renovation—both of which were rejected by the city's Landmark Preservation Commission. *Id.* at 117. Penn Central then brought suit alleging that the designation took its property without just compensation. The Court held that the economic impact of the landmark designation did not rise to the level of a taking because the statute allowed "reasonable beneficial use of the landmark site." *Id.* at 138. Furthermore, any economic impact was neutralized by the transfer development rights granted to the owner of the landmark site. *Id.*

Contrary to the majority, the dissent would have found that the valuable air rights, which the petitioner was unable to develop, were taken. The dissent would have remanded the case to the lower court to see if the transfer development right provided just compensation. *Id.* at 152. What distinguishes the majority from the dissent in *Penn Central* is, among others, the dissent's willingness to engage in "conceptual severance"—to view the property as a bundle of rights, each of which is a separate and compensable unit. Professor Radin coined the term "conceptual severance" in Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667 (1988).

73 There is always the opportunity for the Court to reconsider its stance on conceptual severance. Since regulatory takings came to the forefront of constitutional debate in *Pennsylvania Coal*, the question of the appropriate basis of comparison—the severed part standing alone or the "whole"—has been at the center of this debate. In *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), Justice Holmes characterized the Kohler Act—which required coal companies to leave sufficient structural support beneath certain public buildings and residences—as depriving land owners of all of their support estate; Justice Brandeis saw this as a mere restriction on the use of the whole. Similarly in *Penn Central*, Justice Brennan's "whole" was the entire block; Justice Rehnquist's vision was much different—destruction of all of the air rights above the building. Finally, in *Keystone Bituminous Coal*, Justice Stevens saw the Bituminous Mine Subsidence and Land Conservation Act—with provisions much the same as the Kohler Act—as only restricting the extraction of coal by two percent; Justice Rehnquist saw it as destroying all of twenty-seven million tons of coal and the entire support estate. Thus, there has been tension between the members of the Court as to what the proper basis for measuring "too far" is; in more cases than one the appropriate comparison has hinged on one vote. Perhaps, then, the Court's new members may reverse the latest trend against conceptual severance. If this is the case, the Yees have a stronger claim under the multifactor balancing test.

C. *Nollan: The Proper Standard*

The multifactor balancing test does not end the regulatory taking inquiry. In *Nollan v. California Coastal Commission*,[74] the Court more closely scrutinized government regulation that affected property rights. The Court revived two additional tests to prevent government from interfering with the private ownership and use of property: (1) the government regulation must substantially advance a legitimate state interest; and (2) the burden of the regulation must fall proportionately on those causing the problem.[75] *Nollan* resulted in increased scrutiny for regulatory activity that did not result in a physical occupation; the new approach required more from the Court than simply balancing factors, but did not reach the severity of the *Loretto*'s per se analysis. A look at the *Nollan* opinion reveals how much the Court expanded property protection in this decision.

1. The *Nollan* Opinion

The Nollans owned a piece of beach front property which they had previously leased with the option to purchase. Their option was conditioned on their promise to demolish the dishevelled shack on the property and replace it with a house in line with the other development along the shoreline.[76] To build along the coast, they had to obtain a development permit from the California Coastal Commission.[77] The Commission wanted to condition the grant of the permit on the Nollan's surrendering a public easement along their beach front, allowing passers-by to move from one stretch of public beach to the next.[78] The Commission claimed that this was necessary because the new house would "increase blockage of the view of the ocean, thus contrib-

74 483 U.S. 825 (1987).

75 Commentators Hirsch & Hirsch proposed that the *Nollan* analysis was the proper test by which to evaluate rent control ordinances in the mobile home context. The following discussion expands on their analysis and applies it to the facts that *Yee* presents. *See* Hirsch & Hirsch, *supra* note 15, at 460-63.

Recently, the Ninth Circuit also employed the *Nollan* analysis in part in analyzing the constitutionality of a Los Angeles mobile home rent control ordinance in conjunction with the Residency Law. *See* Azul Pacifico Inc. v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991).

76 *Nollan*, 483 U.S. at 827-28.

77 *Id.* at 828-29.

78 *Id.* at 828.

uting to the development of 'a 'wall' of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they had every right to visit.'"[79]

Justice Scalia, writing for a five-four majority, disagreed that the condition would alleviate the psychological barrier and consequently determined the condition was a taking. The Court found that:

> a "permanent physical occupation" has occurred, for the purposes of [the *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[80]

Under *Loretto* the forced conveyance of a public easement is a per se taking requiring just compensation. The Commission, however, did not force the Nollans to convey an easement, rather, it conditioned its grant of a permit on that conveyance. This led the Court to pose a second question: "[W]hether requiring [the easement] to be conveyed as a condition for issuing a land-use permit alters the outcome."[81] To answer this, the Court, instead of evaluating the condition under *Loretto*'s physical occupation analysis, rehabilitated prior regulatory inquiries to determine whether or not the Commission's action constituted a taking.[82] The first in-

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79 *Id.* at 828-29 (citations omitted).

80 *Id.* at 832.

81 *Id.* at 834.

82 In doing so, the Court assumed, without deciding, that "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches" were legitimate state interests. *Id.* at 835. It further assumed:

> [The] Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes unless the denial would interfere so drastically with the Nollan's use of their property as to constitute a taking.

Id. at 835-36.

However, this contradicts the Court's statement in footnote four:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.

Id. at 835 n.4.

quiry is whether the regulation "'substantially advance[s] legitimate state interests.'"[83] The Court found that the Fifth Amendment requires a nexus between the means employed and the ends to be accomplished. Under this test, the Commission's grant of the permit, conditioned upon the conveyance of a public easement, failed because the easement did not substantially advance the elimination of the psychological barrier which the public experienced.[84] As such, the easement worked a taking.[85]

The Court proposed that the condition may violate the taking clause in another way. In footnote four, the Court introduced a second nexus analysis: The state cannot force a citizen to bear the burden of a regulation for general public benefit unless that citizen contributed to the creation of the problem for which the regulation is the solution.[86] Thus, if the Nollans could prove that their building had not contributed disproportionately to constructing the psychological barrier, they alone should not bear the

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Thus, the assumptions the Court made for the sake of argument are ones that may not withstand scrutiny in reality.

83 *Nollan*, 483 U.S. at 834 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). In dissent, Justice Brennan was highly critical of this part of the analysis, charging that Justice Scalia was substituting his judgment for that of the legislature and consequently forsaking the rule of judicial deference in due process cases. *Id.* at 846. Justice Scalia responded:

> Contrary to Justice Brennan's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."

Id. at 834 n.3 (citations omitted).

The majority goes on to say that there is no reason to believe these standards are one in the same. However, it need not go to such lengths to explain its position. When government action does not advance the ends it seeks to further, and citizens suffer as a result, citizens become the victims of arbitrary and capricious government action—a typical due process standard. Thus, even if the majority's analysis could be seen as altering the standard for due process cases, the analysis did not heighten the scrutiny to the extent Justice Brennan makes out.

For arguments that *Nollan* essentially puts forth a substantive due process analysis, see Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 ZONING AND PLAN. L. REP., Sept. 1990, at 57, 61.

84 The psychological barrier arose from people on the street not being aware of a public beach nearby; lateral access provided along the shoreline did nothing to alleviate this problem. Even after the easement was granted, the public on the street would remain unaware of the public beach. *Nollan*, 483 U.S. at 838-39.

85 *Id.* at 841-42.

86 *Id.* at 835 n.4.

burden of tearing it down. However, the Court did not decide this issue because it was not presented by the parties.[87]

2. Engaging the *Nollan* Analysis: Can the Yees rely on *Nollan*?

Nollan, at its broadest, seems to preclude regulations which strip citizens of their property rights—at least without just compensation—if the regulation fails either of the two nexus tests. However, commentators have not read *Nollan* this broadly. Professor Michelman proposed that *Nollan*, instead of giving property owners more protection through finding a greater number of regulatory takings, actually decreases the number of per se takings based on physical occupations.[88] If this were true, then the Yees could not rely on *Nollan* for relief since the ordinance does not result in a physical occupation. Professor Michelman rested his conclusion on the Court's statement that the granting of an easement constituted a physical occupation and therefore a per se taking under *Loretto*.[89] He believed a physical occupation is a prerequisite for entering the *Nollan* analysis; consequently, *Nollan* actually narrowed *Loretto*, changing the per se rule into one in which only a means-ends nexus was required. Thus, under Michelman's reading of *Nollan*, no longer is a physical occupation a per se taking; rather, a taking occurs only if the means chosen to effectuate the policy does not substantially advance that policy.

Nevertheless, Professor Michelman's position is not consistent with the majority opinion in *Nollan*. In assessing the validity of conditioning the permit on surrendering an easement, the Court in *Nollan* engaged in a regulatory taking inquiry that did not depend on a physical occupation. The "substantially advancing a legitimate state interest" requirement comes from *Nectow v. Cambridge*[90] and *Agins v. Tiburon*.[91] Neither of these cases involved a physical occupation; at issue in both cases were the effects of a zoning ordinance. Thus, that the test depends on a physical occupation is difficult to reconcile with the precedent on which the "substantially advancing" requirement is based.

If the Court's own opinion should not sufficiently rebut Professor Michelman's conclusions, other scholars have taken issue

87 *Id.*

88 *See* Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1608-09 (1988).

89 *Nollan*, 483 U.S. at 832. *See supra* note 32.

90 277 U.S. 182 (1928).

91 447 U.S. 255 (1980). *See supra* note 36.

with his interpretation as well. Professor Kmiec responded to the former's interpretation, saying:

> A partial explanation for this startling departure from the per se rule may be found in the premises indulged by Justice Scalia. In particular, his discussion leading up to this point merely assumes, without deciding, that the Coastal Commission could prohibit construction of the house altogether on the property "unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking."[92]

Justice Scalia assumed that it is within the state's power to regulate away the right to build.[93] This "assumed" power transforms the otherwise physical occupation case into a case involving regulatory analysis. However, it is clear that the Court seriously questions the power of the states to diminish property rights to this extent.[94] Therefore, any argument that *Nollan* relies on a *Loretto* physical occupation is lost. Since a physical occupation is not a prerequisite to engaging the *Nollan* analysis, the Yees can avail themselves of the *Nollan* taking test.

3. Conjunctive or Disjunctive: Is *Nollan* just a factor?

Knowing the Yees' claim can engage the *Nollan* analysis differs greatly from knowing exactly what the analysis entails. Primarily, the concern is whether the two nexuses of *Nollan* are requirements for an ordinance to withstand a taking challenge or whether they are merely other factors for courts to balance. If they are just other factors, the Yees face the conceptual severance problem discussed above.[95] However, if they are independent tests, they may present the Yees additional grounds upon which to challenge the rent control as a taking. The progression and development of the regulatory taking test reveal that the latter—*Nollan* as an independent requirement of the taking clause—is the correct characterization. It is clear from the *Nollan* opinion that the Court viewed the two nexuses as separate inquiries. The Court assumed, for the sake of argument, that a taking

92 Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1650-51 (1988).

93 The Court will decide this issue in the case of Lucas v. South Carolina Coastal Commission, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, 112 S.Ct. 436 (1991).

94 *Nollan*, 483 U.S. at 836 n. 4.

95 *See supra* note 72 and 73 and accompanying text.

had not occurred under the disproportionate burden nexus.[96] Nevertheless, the Court found a taking under the means-end nexus inquiry. Thus, the two nexuses produce a conjunctive test—the ordinance must satisfy both inquiries to withstand a taking challenge.

(*a*) *The Means-Ends Test*—As the means-ends nexus is conjunctive with the disproportionate burden nexus, it is also conjunctive with the multifactor balancing test. The means-end nexus is a discrete test rather than merely a component of the multifactor balancing test. This is true because, properly understood, the disproportionate burden nexus is a distillation of the multifactor balancing test. In articulating the disproportionate burden nexus, the Court said: "One of the principal purposes of the Takings clause is 'to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[97] This is the premise that the Court used to begin its analysis in *Penn Central.* However, the Court

> has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remaining disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depend largely "upon the particular circumstances [in that] case."[98]

Thus, as put forth in *Penn Central,* the multifactor balancing test is simply an attempt to articulate concretely the standard recited by the *Nollan* court in footnote four.[99] As such, the multifactor bal-

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96 *Nollan,* 483 U.S. at 835. If a taking had occurred under that analysis, the second inquiry into the means-ends nexus would not be necessary. A taking need not occur under all tests before compensation is required; otherwise, regulations that impaired property rights could never effect takings outside physical occupations.

97 *Nollan,* 483 U.S. at 835 n.4 (citing Armstrong v. United States, 364 U.S. 40, 49 (1964)).

98 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citations omitted).

99 Justice Scalia, undoubtedly, did not understand the disproportionate burden analysis as one in the same with the multifactor balancing test. Justice Scalia made this clear in his dissent in Pennell v. City of San Jose, 485 U.S. 1 (1988). *Pennell* involved a San

ancing test, under *Nollan*, is a separate inquiry from the means-ends nexus analysis.

The regulatory taking cases substantiate this dual analysis. In *Agins v. City of Tiburon*,[100] the Court resolved the issue of whether the zoning ordinance "substantially advance [a] legitimate governmental goals"[101] before it engaged in the multifactor balancing test. Furthermore, in *Penn Central*, the Court acknowledged that the petitioner had dispensed with any arguments based on the failure of the city's means to achieve its ends:

> Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal. They also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law.[102]

Jose rent control ordinance which allowed the rent control board to consider, along with many market controlled factors, an additional factor in determining "fair and reasonable rents"—tenant need. *Id.* at 5-6. Various apartment building owners contested the law as a taking under the Fifth Amendment. Unlike the majority, Justice Scalia found the taking question ripe for review and then analyzed the question using the disporportionate burden nexus.

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle [forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole] because there is a cause and effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly . . . .

Id. at 20.

This inquiry is not just the starting point for the multifactor balancing test, but a separate test altogether. *Id.* at 860. Justice Scalia never entertains the multifactor balancing test in this analysis.

Even if the Court has not seen this inquiry as a replacement for the multifactor balancing test, it is, at a minimum, a separate test for the Court to address in a taking challenge—one which is perhaps more in tune with the purpose of the taking clause. *See* Kmiec, *supra* note 92 (arguing that the disproportionate burden analysis properly reflects the original understanding of the taking clause).

100 447 U.S. 255 (1980).

101 *Id.* at 260.

102 *Penn Cent.*, 438 U.S. at 129 (citations omitted).

Thus, the way the Court has analyzed previous cases gives credence to addressing the means-ends nexus as an analysis separate from the multifactor balancing test.

(*b*) *The Disproportionate Burden Analysis*—The previous analysis may suggest that the disproportionate burden analysis and the multifactor balancing test are identical because they answer the same inquiry. This is not the case. The Court attempted to articulate the foundational principle of the taking clause—"'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'"[103]—through the multifactor balancing test. Yet, the Court entrenched itself in the articulation, losing sight of the principle. When the Court balances the factors, it may—and often does—come to a result which is wholly inconsistent with the principle. *Penn Central* is a good example. Under the multifactor balancing test, the Court held that the burden on the petitioner did not rise to the level of a taking.[104] However, under the disproportionate burden analysis, forcing *Penn Central* to bear the burden of preserving Grand Central Station as a landmark site was clearly disproportionate since the public as a whole benefitted from the preservation.[105]

Nollan attempts to lift the Court out of the morass the multifactor balancing test has created. It frees the Court, not to ignore the multifactor balancing test, but to renew the true inquiry behind the taking clause. Thus, the disproportionate burden analysis is not one and the same with the multifactor balancing test and must be evaluated independently of the latter test.

V. APPLYING *NOLLAN*

When one views *Nollan* as a distinct test for evaluating takings under the Fifth Amendment, applying it to the Yees' challenge is straightforward. The Court must undertake a two part analysis. First, it must determine whether the means of the governmental action substantially advance legitimate state interests. This inquiry may be very short; it is obvious from the face of most statutes

103 *Nollan*, 483 U.S. at 835 n.4 (citing Armstrong v. United States, 364 U.S. 40, 49 (1964)).

104 *Penn Central*, 438 U.S. at 131.

105 *Id.* at 147 (Rehnquist, J., dissenting).

what the purpose is and whether the action accomplishes that purpose. Second, the Court must determine whether the action properly allocates any burdens to the party that created the problems the regulation targets. If the action fails either one of these tests, it is a taking which requires just compensation.

In the Yees' case, the combined effect of the Escondido rent control ordinance and the Residency Law shows that the government action fails both the means-ends and the disproportionate burden analyses. Turning first to the purposes; proponents of mobile home rent control put forth three goals of rent control: to "(1) mitigate the adverse effects of an acute housing shortage, (2) prevent large and frequent rent increases which tenants cannot afford, and (3) reduce excessive profits of landlords."[106]

The first purpose—mitigating the adverse effects of an acute housing shortage—fails on both levels. The research of Hirsch and Hirsch showed that the "imposition of rent control increases the average price of a [mobile home] by an average of 32%."[107] The only difference the rent control ordinance makes is to shift the rent premium from the landlord to the tenant. The tenant then passes this increase to the new tenant when he sells his mobile home on the pad, and the new tenant recoups his costs when he sells, and so on. Thus, the Escondido rent control ordinance, against the background of the Residency Law, does not substantial-

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106 Hirsch & Hirsch, *supra* note 15, at 461.

Another commentator raised four additional arguments in favor of rent control generally: 1) Rent control assures that existing tenants will not suffer a decline in their standard of living; 2) likened to a public utility, rents should be controlled for the general public good; 3) "replacement of private owners by public or quasi-public entities, a possible result of rent control, will assure that the public interest is served more effectively;" and 4) rent control helps to control inflation, at least in the short term. Jakob S. Harle, Note, *Challenging Rent Controls: Strategies for Attack;* 34 UCLA L. REV. 149, 153-55 (1986). The commentator discounted these arguments for various reasons.

There is doubt as to whether those purposes articulated above apply to the statutes at issue. Both the Residency Law and the ordinance have as their primary focus the control of housing over the long run; both acts apply to future tenants and landlords with no provisions for vacancy deregulation or decontrol. As such the goal of the law is to preserve the mobile home market as the last bastion of affordable housing. *See also* Hirsch & Hirsch, *supra* note 15, at 401 ("[M]obile home living represents the most affordable and in many ways the most efficient form of home ownership.").

107 Hirsch & Hirsch, *supra* note 15 at 462. A more recent Ninth Circuit decision gives a concrete illustration of the rise in mobile home price: "One Mrs. Morrison, for example, testified that she bought a coach in Azul Pacifico's park for $77,000 and immediately sold [the coach] for $5000 and had it removed from the pad. When asked why, she responded: 'The use of the land was what I paid for more than the place.'" Azul Pacifico Inc. v. City of Los Angeles, 948 F.2d 575, 578 (9th Cir. 1991).

ly advance the interest of permanently preserving moderately priced housing, and therefore, fails the *Nollan* means-ends nexus. Furthermore, the mobile home park owners are not the cause of the acute housing shortage; they did not produce the influx of people into California, nor did they pass the zoning laws making mobile home parks scarce.[108] Thus, the park owners alone should not bear the burden of overcoming the acute housing shortage.

The second purpose—preventing rent increases that the tenants cannot afford—at first glance seems more promising for the City. Clearly, the ordinance advances this interest by lowering rents and requiring approval for any increases. However, the ordinance fails under the disproportionate burden analysis. The burden of providing low rents falls on the landlords that have no control over their tenants' ability to pay:

> But that problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages, or the citizens . . . holding higher paying jobs from which they are excluded.[109]

Thus, the burden of low rents should fall on the public who called for them—not the landlords.

There is still the goal of reducing the landlords' excessive profits.[110] Evaluated strictly according to *Nollan*, the laws do accomplish this purpose. Furthermore, the burden falls on those causing the "problem." It is difficult to fathom, however, that

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108 Hirsch & Hirsch, *supra* note 15 at 463.

109 *See* Pennell v. City of San Jose, 485 U.S. 1 (1988) (Scalia, J., dissenting).

110 Reducing the landlords' excessive profits includes eliminating the quasi-rents. *See supra* note 25 and accompanying text. Beyond the reasons proffered above, Hirsch and Hirsch answered the concern in the following way:

> One could argue that mobile home park landlords are the beneficiaries of large rent increases and the "hold up" potential of quasi-rents. But the nexus between owners of beach property and coastal access easements is at least as close as that between rent increases and landlords. The Nollan court indicated in a footnote that if the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the state's action, even if otherwise valid, might violate either the incorporated takings clause or the equal protection clause. The argument here, of course, is that rent controls were imposed on all mobile home landlords irrespective of the rental rates charged to tenants, the amount or frequency of rent increases, or the profits reaped by particular landlords.

Hirsch & Hirsch, *supra* note 15, at 463.

excessive profits alone would motivate either the California legislature or the Escondido voters to take such drastic action. It is more likely that reducing excessive profits was the logical means of effecting a stronger primary purpose. However, the more important question is whether forcing the landlords to endure less than market rents is a legitimate public use under the taking clause. Though *Midkiff* diluted the public use requirement,[111] the Court did not diminish public use to such an extent as to allow purely private takings without an overriding public policy. It seems that the ordinance here falls squarely within this category of purely private takings. If the purpose of the ordinance is merely to reduce the profits of the owner, without a public purpose as those discussed above, the ordinance merely transfers private property from one individual to another without a corresponding public use, violating the public use clause.

Evaluated according to the *Nollan* analysis, the Escondido ordinance works a taking of private property without just compensation. The Escondido ordinance does not substantially advance legitimate state interests, and it requires mobile home park owners to bear the burden of curing a social problem that they did not create. Therefore, the ordinance, evaluated under *Nollan*, violates the Fifth Amendment.

VI. CONCLUSION

Rent control has grown from its modest inception as a war time emergency measure into an all pervasive land-use regulation. Taking clause jurisprudence has failed to keep pace with this growth. The Supreme Court watered down the original taking analysis to a multifactor balancing test. *Nollan* reversed this trend by reinstating the protections the taking clause imparts to landowners through the means-ends and disproportionate burden analyses.

The Yees now petition the Court for relief from a local ordinance that forces them to subsidize the housing of their tenants. There is no constitutional basis for this relief in either the physical occupation analysis or the multifactor balancing analysis. The Escondido ordinance only results in the physical occupation of very few pads. Furthermore, the multifactor balancing test cannot provide relief either because the Court cannot, consistent with

111 *See supra* note 36 and accompanying text.

precedent, engage in conceptual severance. Therefore, the Yees and the Court must rely on *Nollan.*

Yee v. City of Escondido presents the Supreme Court with the opportunity to solidify its *Nollan* analysis in a factual situation in which the means clearly do not advance the ends that local governing bodies intended. Furthermore, the burden falls on landlords who are essentially innocent of the harm caused by the market system in which they operate. The Residency Law and the Escondido rent control ordinance work together to increase, not decrease, the long term housing costs in the mobile home market. In the process these actions strip landowners of valuable rights, forcing them to bear a burden better allocated, as with other types of social assistance, through the taxation process. Their combined effect fails the *Nollan* dual nexus analysis and therefore works a taking under the Fifth Amendment.

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Author's note: Just prior to publication of this Comment, the Supreme Court decided that the ordinance in question did not work a taking under the physical occupation analysis. The Court, however, left unanswered the regulatory taking question—the focus of this Comment. *Yee v. Escondido,* No. 90-1947, 1992 WL 60434 (U.S. Apr. 1, 1992). The regulatory taking analysis contained herein remains a viable means of evaluating property regulation.