

1-1-1985

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## Recommended Citation

Peter E. Millspaugh, *Municipal Low-Income Housing Controls: An Intrusive Special Interest Abuse of Police Powers*, 17 PAC. L. J. 349 (1986).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol17/iss2/3>

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## **Municipal Low-Income Housing Controls: An Intrusive Special Interest Abuse of Police Powers**

PETER E. MILLSPAUGH\*

The goal of a decent home and suitable living environment for every American family<sup>1</sup> remains to be realized for a substantial segment of households in the United States today. For decades, resources and incentives emanating from the public and private sectors alike, have been devoted to achieving this goal. The effort continues to fall short.

Over one-third of households in the United States are presently sheltered by rental housing.<sup>2</sup> At the same time, the stock of rental housing in many areas of the country is deteriorating and suffering depletion.<sup>3</sup> The costs for both owners and users of rental housing are on the rise. Experiencing the brunt of these shortages and rising

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1. Housing Act of 1949, §2, 42 U.S.C. §1441 (1964 & Supp. V. 1970).

2. THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING, 89 (1982).

3. M. LEA, RENTAL HOUSING: CONDITION AND OUTLOOK (U.S. Government Printing Office, 1981). This and the subsequent general observations concerning rental housing in recent years run through much of the primary literature on the subject. *E.g.*, G. STERNLIEB AND J. HUGHES,

costs, the renter-user is responding by pressuring local governments to impose controls on the private sector owners and operators of rental housing. In some instances, the governmental response has been dramatic. In the two years between 1979 and 1981 alone, for example, municipalities comprising over one-half the population of California enacted some form of rent control.<sup>4</sup> Rent controls have now been enacted in over 200 cities nationwide, affecting a substantial portion of the multi-family rental housing stock of the nation.<sup>5</sup> By contrast, in numerous other local jurisdictions rent control initiatives have been rejected by either city or town councils, or by the voters.<sup>6</sup>

The term "rent control" has become a modern day idiom which often encompasses governmental controls other than those directed solely at rents. With increasing frequency, rent control regimes have come to include the regulation of tenant eviction and the removal of rental units from the market.<sup>7</sup> The underlying public policy justifications commonly cited for rent control initiatives are: (1) to assure that the price of rental housing is commensurate with the financial means of low and moderate income users, and (2) to preserve the existing rental units against the forces of redevelopment, condominium conversion, and demolition. Noble goals, in and of themselves, however, cannot insure the workability and effectiveness of the devices adopted to achieve them. Increasing evidence indicates that in the American context, measures enacted in the name of rent control have been, and continue to be, prohibitively costly and often counter-productive.<sup>8</sup>

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AMERICA'S HOUSING: PROSPECTS AND PROBLEMS (1980); B. Frieden, *et. al.*, THE NATION'S HOUSING: 1975 TO 1985 (1977); T. HAZLETT, RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST; A. DOWNS, RENTAL HOUSING IN THE 1980s (1983); COMPTROLLER GENERAL OF THE UNITED STATES, RENTAL HOUSING: A NATIONAL PROBLEM THAT NEEDS IMMEDIATE ATTENTION, Rept. to Cong. CED-80-11 (General Accounting Office, 1979); THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING (1982).

4. NATIONAL MULTI HOUSING COUNCIL, THE SPREAD OF RENT CONTROL, 1-17 (1982).

5. T. THIBODEAU, RENT REGULATION AND THE MARKET FOR RENTAL HOUSING SERVICES 9 (1981).

6. The National Multi Housing Council has tracked the fate of rent control initiatives state by state in recent years. See National Multi Housing Council, Comments Regarding Rent Control, 17-22 (1982) (unpublished).

7. The rent control measure adopted by the City of Santa Monica, California, provides an illustration of combining these types of controls. See *infra* notes 19-77 and accompanying text.

8. See generally RENT CONTROL-MYTHS AND REALITIES (W. Block and E. Elsen eds. 1981); P. SALINS, THE ECOLOGY OF HOUSING DESTRUCTION: ECONOMIC EFFECTS OF PUBLIC INTERVENTION IN THE HOUSING MARKET (1980); T. SOWELL, KNOWLEDGE AND DECISIONS (1980); F. HAYEK, *et. al.*, *Rent Control: A Popular Paradox* (1975); M. LETT, RENT CONTROL: CONCEPTS, REALITIES, AND MECHANISMS (1976); T. HAZLETT, *supra* note 3, (chapter 10, 11); REPORT OF THE PRESIDENT'S COMMISSION, *supra* note 2. For literature in support of low-income housing controls, see generally J. GILDERBLOOM, RENT CONTROL: A SOURCE BOOK (1981); R. STUMBERG AND E.

In certain instances in the past, rent controls have been effective and justified. Nationwide controls to counteract the impact of large numbers of returning servicemen following World War II, and controls in Alaskan cities to offset the influx of pipeline workers can be singled out in this regard.<sup>9</sup> In stark contrast to modern rent control measures, however, these earlier controls were narrow, temporary, short term measures, which were promptly removed when the emergency or special circumstances that called them into being had passed. Archetypical of the contemporary acceptability of permanent controls is the infamous rent control system of New York City imposed under temporary emergency legislation in 1943.<sup>10</sup> The controls continue to this day.

The indictment against present day rent control regimes includes multiple counts.<sup>11</sup> Evidence clearly indicates that rent controls, even the prospect of impending controls, can become a severe disincentive to capital investment and new construction in housing. To those developing or financing the construction or rehabilitation of rental stock, the strictures which accompany rent controls are often chilling disincentives. Increases to the rental stock as well as the preservation of existing stock is thereby impeded or terminated.<sup>12</sup> Controls which prohibit a minimum market rate of return on investment coupled with the ever rising costs of facility upkeep cause owners to disinvest through reduced maintenance, conversion and/or abandonment.<sup>13</sup> In most instances, controls have been shown to drive down the value of controlled units. Beyond this reduction in the value, the local tax base often experiences a decline, shifting the increased burden to the owners of residential and other types of property.<sup>14</sup> While aggravating the

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WEINER, *THE NEED FOR RENT CONTROL* (1974). For a recent survey of rent control literature, see NATIONAL MULTI HOUSING COUNCIL, *AN ANNOTATED BIBLIOGRAPHY OF RENT CONTROL MATERIALS* (1979, & rev. 1982).

9. REPORT OF THE PRESIDENT'S COMMISSION, *supra* note 2, at 92.

10. *Id.*

11. The brief summary critique which follows is selective rather than comprehensive. Likewise, the supporting references are merely representative of a larger literature in many instances. Cf. Shenkel, *Rent Control: A Critical Review*, 39 J. PROP. MGT. 101 (1974).

12. Davidson, *The Impact of Rent Control on Apartment Investment*, 46 APPRAISAL JOURNAL 570 (1978); Olsen, *An Econometric Analysis of Rent Control*, 80 JOURNAL OF POLITICAL ECONOMY 1081 (1972); Serruya & Chan, *Effects of Rent Control on the Decision to Invest in Residential Construction: Some Empirical Evidence*, APPRAISAL INSTITUTE MAGAZINE, (July 1977).

13. Durst, *If the Cities Go Down, So Goes The Nation: An Urban Analysis and a Prescription for Housing Revival*, 11 J. OF THE INST. FOR SOCIOECONOMIC STUDIES, 25 (1977); *The New Landlords*, REALTOR, (Nov. 1980); Comment, *The Condominium Conversion Problem: Causes and Solutions*, 80 DUKE L.J., 306 (1980).

14. Note, *The District of Columbia Rental Housing Act of 1977: The Effect of Rent Control on the Real Estate Housing Market*, 27 CATH. U.L. REV., 607 (1978); Sternlied & Hughes,

shortage and subsidizing the price, controls increase the demand for governmentally regulated units. This in turn reduces user mobility, from which an array of undesirable side effects can emanate. One such effect, for example, can be the solidification of the existing *de facto* socioeconomic and racial segregation prevalent in many low-income urban and rural communities.<sup>15</sup> Longstanding rent control jurisdictions become vulnerable to the forces of an underground market, favoritism and nepotism, which combine to gradually shift the beneficial use of controlled units to middle and upper income occupants.<sup>16</sup> And finally, the growing social and economic costs to the public and private sector which attend rent control present an increasing concern.<sup>17</sup>

Under the weight of these problems and their supporting evidence, the facially appealing institution of rent control is being subjected to increased scrutiny. Undaunted, however, by mounting evidence that in fact such controls do not increase the quality of low-income housing in a community, proponents of rent control continue to find and exploit local conditions where controls can be marketed. A peculiar combination of moral righteousness and self-interest may be the Achilles' heel of the rent control movement however, as its agenda becomes more aggressive and consequently more provocative with time.<sup>18</sup>

Utilizing the recent experience of the City of Santa Monica, California, this article will explore the genesis and anatomy of a state-of-the-art American rent control measure. The four realms into which the controls intrude most deeply, and the nature of this intrusion, will then be addressed. Against this background, the Constitutional analysis which presently shields local rent control measures from judicial intervention will be examined. In conclusion, some observations concerning developments associated with the escalating controversy over rent controls will be offered.

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*Rent Controls Impact on the Community Tax Base*, J. PROP. MGT., (1980); K. Harney, *The Invisible Tax: What Home Owners Pay To Support Local Rent Controls* (1982) (unpublished).

15. Brief *Amicus Curiae* of the Urban Legal Foundation, Inc., 12-14, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

16. Brief *Amicus Curiae* of the Urban Legal Foundation, Inc. at 14. See generally, A. LINDBECK, *THE POLITICAL ECONOMY OF THE NEW LEFT: AN OUTSIDER'S VIEW* (1971).

17. Keen and Raiff, *Rent Controls: Panacea, Placebo, or Problem Child?*, BUSINESS REVIEW (Jan. 1974); Kriesfeld, *The Cost of Meeting Rent Control Requirements*, 44 J. PROP. MGT. 68 (1975); Olsen, *supra* note 12.

18. See *infra* notes 19-77 and accompanying text (analysis of the recently adopted rent control law by the City of Santa Monica, California).

THE SANTA MONICA EXAMPLE: THE GENESIS AND  
ANATOMY OF CONTROLS

The experience of the city of Santa Monica, California in adopting rent controls in the spring of 1979 provides an excellent illustration of the origins, psychology, politics, and statutory content of modern rent controls. The Santa Monica experience suggests some explanations for the paradox between the continuing appeal of rent control against its record of failure. A notable legal challenge to the Santa Monica controls serves as a vehicle to address the central legal issues as well as the broader dimensions of the rent control controversy.

The political appeal of rent control is in part attributable to the enduring public perception of the heartless, exploitative landlord versus the helpless, powerless tenant. Rent controls, with provisions that shift power, value, and property interests to the tenant can also be made to appear to be aimed at reforming centuries of injustice and inequality. The emotions engendered by this ancient orientation can yield the political high-ground and momentum sufficient for the legislative enactment of rent controls.<sup>19</sup> For example, the preamble to the Santa Monica rent control law unreservedly positions among its central concerns the alleged "exploitation" and "speculation" by landlords.<sup>20</sup>

Other factors related to the political success of installing rent controls are also discernable from the Santa Monica example. Demographics of the jurisdiction, for example, indicate a larger population of tenants than homeowners.<sup>21</sup> Although tenant majorities do not correlate with rent controls in every instance, controls are seldom found elsewhere.<sup>22</sup> The impact of special interest group activity on the political process at the local level often is evident in struggles over the enactment of rent control. Real estate and business interests opposed to controls become hard pressed to counter the political clout of a tenant majority acting in its perceived self-interest. This same majority often is allied with social activist groups from churches,

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19. See T. HAZLETT, *supra* note 3 at 277-78. For some data and analysis on the politics of rent control, see S.J. DECANIO, RENT CONTROL VOTING PATTERNS, POPULAR VIEWS, AND GROUP INTERESTS; T. HAZLETT, *supra* note 3 at 301-313.

20. Santa Monica City Charter, Art. XVIII, §1800 (Statement of Purpose, at 1).

21. The City of Santa Monica renters make up nearly 80 percent of the population. Granelli, *Santa Monica: Anti-Business?*, THE NAT'L L.J. Nov. 29, 1982.

22. National Multi Housing Council, *supra* note 6, at 17, 19. Interestingly, the common presumption that special interest laws are representative of a minority interest would not pertain in the case of rent control laws in jurisdictions where tenants outnumber homeowners. Indeed, most rent control laws are examples of the theoretical dilemma of the potential tyranny of the majority in systems of representative government.

poverty and welfare action agencies, and legal aid programs. Not surprisingly, the Santa Monica rent control law was initially drafted by a legal aid attorney active in the campaign to enact rent controls.<sup>23</sup>

#### A. *Background and Adoption*

In the late 1970's, the scarcity and increasing costs of rental housing converged with an alliance of political activist groups to set in motion a campaign to institute rent control laws in the City of Santa Monica. Landowners and proprietors of rental housing in the city moved to protect themselves when the proponents of controls rapidly secured a rent control referendum in 1978. This initiative fell short of passage by only a slight margin. Conversion and demolition of the low-income rental stock in the city began to increase. As beneficiaries of a self-fulfilling prophecy, the rent control forces then were able to point with alarm to what they characterized as a "demolition derby."<sup>24</sup> In April of the following year, the voters, nearly eighty percent of whom were renters, approved a comprehensive rent control amendment to the City Charter.<sup>25</sup>

With victory secure, the zeal of rent control movement was translated into an expansive, aggressive and controversial bureaucracy of regulators. Within three years, the budget of the newly created Rent Control Board was more than seven and a half times greater than that estimated when the law was being advocated.<sup>26</sup> A per unit fee increase from \$12.50 to \$72.00 levied on the City's landlords became necessary in order to support a threefold increase in staff and a \$2.3 million annual budget.<sup>27</sup> The terms of the Santa Monica law and their implementation have engendered a notable legal reaction as well. To informatively examine the legal issues currently surrounding rent control measures, some familiarity with the design and thrust of the Santa Monica measure is necessary.

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23. Subsequently appointed to the position of City Attorney for Santa Monica. See Granelli, *supra* note 21.

24. The city claimed that some 1,294 units (.2% of the total) were demolished and hundreds of others converted to condominiums during the fifteen months prior to the enactment of controls. See CITY OF SANTA MONICA, HOUSING ELEMENT TECHNICAL REPORT, 54, 142 (Jan. 1981).

25. Santa Monica City Charter, Art. XVIII (1979).

26. Curtius, *Rent Board Costs Dwarf Predictions*, Santa Monica California Outlook, June 20, 1981, 1, col. 4.

27. With rent controls, the annual increase in rents reportedly dropped during this period from 7 percent in 1979 to 5.5 percent in 1981. National Multi Housing Council, *supra* note 4, at 14.

### B. The Substance of Modern Controls

The electorate of Santa Monica adopted rent controls on April 10, 1979 as an amendment to the City Charter.<sup>28</sup> The city readopted a slightly revised version on November 6, 1984.<sup>29</sup> As with most rent control measures in recent years, the perception and characterization of the problem flawed the design and thrust of the Santa Monica law from its inception. Although the rent control law cites as the central underlying problem a growing shortage of housing units, the statute directs itself almost exclusively to the effects of the shortage—rising rents and the impact of high rents on the renter population of the city. Reflecting the visceral distrust of the institution of private property and the efficiency of free markets which lies just below the surface of modern rent control measures, the statute assigns the immediate cause of the troublesome rent increases to exploitation and speculation by unnamed landlords and landowners. The statute concludes that these alleged practices sufficiently endanger the health and welfare of Santa Monica tenants to invoke the police power of the city.<sup>30</sup> Thus, the force and effect of the controls are directed toward the symptoms rather than the underlying illness the City was facing.<sup>31</sup>

Typical of contemporary rent control regimes, the Santa Monica law creates a permanent government regulatory agency charged with implementing the provisions and intent of the statute.<sup>32</sup> This agency, known as the Rent Control Board, is given budget authority through a public hearing process, discretionary authority to hire temporary or permanent staff,<sup>33</sup> and is headed by five Commissioners elected for four-year staggered terms.<sup>34</sup> In addition to possessing general

28. Santa Monica City Charter Art. XVIII, §§1800-1812.

29. The revisions were relatively few and left the substance of the ordinance intact. The object of substantial litigation in the interim, the law now states that the intent of the 1984 revision is "to clarify the law and ensure that the Rent Control Board possesses adequate independent authority to carry out its duties . . . , to ensure due process of law for landlords and tenants, effective remedies for violation of the law . . . , consistency with constitutional requirements . . . , to enable the Board to provide relief to persons facing particular hardship and to protect and increase the supply of affordable housing in the City." *Id.* §1800.

30. *Id.*

31. *Id.* It should be noted that the Santa Monica statute also contains a decontrol provision which places authority with the Rent Control Board to decontrol "[i]f the average annual vacancy rate in any category, classification, or area of controlled rental units exceeds five (5) percent . . ." and other conditions are met under §1803(r). *Id.* §1803(r). New construction also can be exempt from controls at the Board's discretion under §1801(c)(5). *Id.* §1801(c)(5). These features arguably reflect some statutory concern for increasing the stock of the scarce housing.

32. Santa Monica City Charter Art. XVIII, §1803.

33. *Id.* §1803(f)(6).

34. *Id.* §1803(d), (e).



rulemaking powers to carry out the intent of the law,<sup>35</sup> the Board is assigned fifteen enumerated instances in which implementation of the various provisions of the statute require the Board to act.<sup>36</sup>

The provisions requiring Board implementation are so overreaching in relation to the statute's objectives that they cut an unnecessarily wide swath through existing law and practice. In addition to regulating rent levels, the Santa Monica law incorporates controls over the termination of tenancies and the removal of units from the market. The termination of tenancies is prohibited except for enumerated "good cause" reasons.<sup>37</sup> Statutory protection is extended specifically to concerted action by tenants in organizing against a landlord,<sup>38</sup> and certain procedural safeguards are added for the tenant suffering a lawful eviction.<sup>39</sup>

The first item addressed by the rent control provisions of the original Santa Monica law was to freeze rents at their existing levels for 120 days<sup>40</sup> and then roll them back to previous year levels.<sup>41</sup> This then became the statutory base level for determining future annual rent adjustments by the Board.<sup>42</sup>

Under the statutory rent regulation scheme, the Rent Control Board, the tenant, and the public become parties to ongoing rent-setting decisions.<sup>43</sup> General or annual rent adjustments, either upward on behalf of the landlord or downward on behalf of the tenant, are tied to a prescribed public hearing process and specified statutory standards.<sup>44</sup> The statute calls for a formal hearing of record initiated by written petition. This petition must be supported by prescribed documented evidence, and conducted by an appointed hearing examiner upon proper notice to the parties. Rent adjustment decisions must be supported by a preponderance of the evidence and may be appealed first to the Board, and then to the appropriate court within the

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35. *Id.* §1803(g).

36. For example, setting rent ceilings, setting and collecting the annual per-unit registration fee, conducting studies, surveys, investigations and hearings, etc. *Id.* §1803(f)(1)-(15).

37. *Id.* §1806(a)-(h). This section includes those causes commonly encountered by the landlord such as nonpayment of rent, creating a nuisance, and use of the premises for illegal purposes. *Id.*

38. *Id.* §1806(i).

39. *Id.* The landlord must state the cause for termination and allege and prove compliance with the Act. *Id.*

40. *Id.* §1804(a).

41. *Id.* §1804(b).

42. *Id.* §1805(a).

43. The statute also gives the Rent Control Board the authority to regulate the amount and use of security deposits. *Id.* §1803(s).

44. *See id.* §1805 (description of process). Specific adjustments for changes as to the costs of utilities, taxes, or maintenance are recognized by the statute. *Id.* §1805(b).

jurisdiction.<sup>45</sup> Preconditions placed on the landlord for use of this process in seeking a rent adjustment include compliance with all provisions of the rent control statute, the regulations and directives issued by the Rent Control Board, and any applicable state or local housing health or safety codes.<sup>46</sup> No equivalent preconditions are required of the tenant.

Violations of the controls are met by provisions for both civil and criminal remedies, and apply only to the landlord. The criminal remedy is prosecution for a misdemeanor. Conviction carries the punishment of a fine of up to five hundred dollars and/or imprisonment for up to six months.<sup>47</sup>

In any rent control scheme, the most serious and direct violation would be the act of receiving rents in excess of the ceiling imposed by law. The Santa Monica statute provides for civil actions by the Rent Control Board as well as the tenant in such instances. Preliminarily, the tenant may file either a civil action in the courts or an administrative complaint to the Board. Alternatively, the Board is authorized to file an action on behalf of the tenant. For the landlord that acts "willfully or with oppression, fraud or malice," treble damages are called for.<sup>48</sup>

Just beneath the surface of modern rent control regimes lies a smoldering outrage at the perceived injustice the tenant is suffering at the hands of the landlord. This social indignity seems to fuel the reformist impulse which in turn burdens most statutes with basic structural infirmities not normally associated with a legislative product. The Santa Monica law, for example, is devoid of any semblance of restraint or evenhandedness. The statutory provisions, without exception, assign obligations, duties, procedural burdens and sanctions solely to the landlord. The tenant is essentially a passive, duty-free beneficiary of an array of newly created statutory rights and benefits. These features, as well as their intrusive nature and legal impact, which are common to rent control measures, were brought to light through a legal challenge mounted against the Santa Monica law shortly after enactment.

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45. *Id.* §1808.

46. *Id.* §1805(h)(1) and (2).

47. *Id.* §1810.

48. *Id.* §1809.

### C. A Legal Challenge

The implementation of the Santa Monica rent control law has generated considerable legal resistance.<sup>49</sup> The challenge which engendered the most comprehensive judicial examination of the statute and the major issues of law raised by it was filed in late 1979. The litigation worked its way through the appeals court to the Supreme Court of California for decision some four years later.

Jerome K. Nash, owner of a six-unit apartment building in Santa Monica, became disillusioned with his tenants and the demands of landlordism. In December of 1979 he applied to the Rent Control Board for a removal permit under the provisions of the new rent control law.<sup>50</sup> His intention was to incur the additional cost of razing his building and retain the real property, hoping that at some future time it might be sold at a price whereby some of the lost value could be recouped. The primary purpose of this decision, however, was to divest himself of the risks, obligations, and demands that accompany the enterprise of landlordism in the interim. The Board rejected the Nash petition on the technical grounds that the lack of a "fair return" was a necessary preliminary finding, and that Nash would therefore be required to first petition the Board for a rent increase.<sup>51</sup> Having no interest in remaining in the business of landlordism, and therefore no interest in raising rents, Nash petitioned the Superior Court of the County of Los Angeles for a Writ of Mandate which would require the Rent Control Board to issue him a removal permit.<sup>52</sup>

The statutory provision that most directly entangled Nash required that a number of conditions be satisfied before a removal permit could be issued. Attendant to the granting of a permit, the statute requires the Rent Control Board to make the following findings: (1) that the unit is not presently occupied by a low to moderate income tenant, (2) that the rent charged for the unit is not affordable by a low-income family or person, (3) removal of the unit would not adversely affect the supply of housing, and (4) that the landlord cannot make a fair return on investment.<sup>53</sup>

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49. See *infra* notes 76-120, and accompanying text.

50. Santa Monica City Charter Art. XVIII, §1803(t).

51. *Id.*

52. Nash v. City of Santa Monica, *et. al.*, No. C-311502, slip op. (Superior Court, County of L.A., Cal., June 20, 1980).

53. Santa Monica City Charter, Chapt. XVIII, §1803(t) . . . the Board is required to make each of the following findings: (1) That the controlled rental unit is not occupied by a person or family of very low income, low income, or moderate income. (2) That the rent of the controlled rental unit is not at a level affordable by a person or family of very low

The Nash petition also faced Rent Control Board procedures and regulations that required a Category 1 permit. To qualify, the applicant must establish that the rent based upon family size exceed thirty percent of moderate income, and that the income of all tenants exceeds moderate income. Both measurements are to be made by the Board annually. Additionally, since the Board must find that the landlord cannot make a fair return on his investment by retaining the unit, the applicant must file a request for a rent increase concurrently with the petition for a removal permit.<sup>54</sup>

In support of his claim, Nash argued that the effect of this double layer of preconditions and their unachievability as a practical matter, was to make the statutory right to a permit illusory. Denial of a permit to remove his units, Nash argued further, constituted a denial of his basic right to go out of business in violation of the fourteenth amendment to the United States Constitution.

In defense, the City and the Rent Control Board argued that the statute generally, and those provisions in question, specifically, were in furtherance of stated California housing policy.<sup>55</sup> The city and Board asserted further that the provisions in question were proper local government concerns, which placed them within the purview of the

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income, low income, or moderate income. (3) That the removal of the controlled rental unit will not adversely affect the supply of housing in the City of Santa Monica. (4) That the landlord cannot make a fair return on investment by retaining the controlled rental unit. *Id.* Requirements (1) through (3) were omitted in the 1984 revision of the law having been declared unconstitutional as overly restrictive. *See Baker v. City of Santa Monica*, No. WEC 958763 (Superior Court, County of L.A., Cal., July 27, 1983).

54. Santa Monica Rent Control Board Regulations, Chapt. 5, §5014. Standards for Category 1 Permits:

- (a) A Category 1 removal permit will only be granted if the rent based upon family size exceeds 30% of moderate income as determined by the Board on an annual basis.
- (b) A Category 1 removal permit will only be granted if the income of all tenants exceeds moderate income as determined by the Board on an annual basis.
- (c) If determining whether or not the granting of a Category 1 removal permit will adversely affect the supply of housing in the city of Santa Monica, the board shall consider all relevant factors, including the city-wide vacancy rate, the cumulative impact of removal, and whether or not the proposed development offers housing opportunities for existing tenants of the rental units to be removed.
- (d) Since one of the required findings for a Category 1 removal permit is that the landlord cannot make a fair return on investment by retaining the controlled rental unit, the landlord will be required to file concurrently with its application under this Chapter an application for an individual rent adjustment under Section 1805 of the Santa Monica City Charter and Chapter 4 of these regulations. The Board will consider the application for an individual rent adjustment. As an alternative to granting a removal permit, the Board may adjust the rent level so that the landlord may make a fair return on investment by retaining the controlled rental unit.

*Id.*

55. CAL. GOV'T CODE §§65302, 65580(c) (requiring municipalities to plan for and conserve affordable low and moderate income housing).

police powers of the city. The city also argued that the statute should be viewed as a land use regulation for purposes of constitutional analysis. Such statutes need only evidence some nexus between the objectives of the regulation and a legitimate governmental purpose to satisfy state and federal constitutional standards of minimum scrutiny.<sup>56</sup>

Although a number of other issues and theories emerged later on appeal, at this stage the county Superior Court addressed only the merits of Nash's immediate claim that he was in effect, denied the right to terminate his business and raze the building. In a judgment for Nash, the court found the claimant unable to meet any of the statutory or Rent Control Board preconditions which together would entitle him to a permit.<sup>57</sup> Left with "no plain, speedy and adequate remedy in the ordinary course of law . . .,"<sup>58</sup> the court issued a Peremptory Writ of Mandate commanding the Board to issue Nash a removal permit.

The supporting rationale of the Superior Court is obscured somewhat by the abbreviated conclusions of law accompanying the decision. The court apparently considered that a property interest was ultimately at stake, and that the city rent control law effected a taking, thus requiring both due process and just compensation. In the words of the court, the refusal of the Rent Control board to issue the permit "violates the interdiction against the deprivation of property without due process of law contained in the fourteenth amendment to the Constitution. . . ." <sup>59</sup> Likewise, the refusal "violates the interdiction against the taking of private property for public use without just compensation contained in . . . the fifth amendment to the Constitution. . . ." <sup>60</sup> The case was promptly appealed to the California Court of Appeal where the case was accepted and argued in early 1983.<sup>61</sup>

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56. *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381 (1925); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

57. *Nash*, No. C-311502, slip op. at 5-6 (Superior Court, County of L.A., Cal., June 20, 1980).

58. *Id.* at 6.

59. *Id.* CAL. CONST. art I, §71(a) is also cited by the court as authority for its conclusion. *Id.*

60. *Id.* Also cited as authority for the conclusion is CAL. CONST. art I, §19. *Id.* at 7. The court proffered a third ground for its decision which was expressed in the following terms: "Petitioner is constitutionally entitled not to be compelled to sell the building as the only means of terminating his business and removing himself and his property from under the Board's regulator jurisdiction." *Id.*

61. Subsequent to the Superior Court decision, the litigation began to attract attention. Participating as *Amicus Curiae* at various stages were Pacific Legal Foundation, the Terminal Plaza Corporation, the National Trust For Historic Preservation, Californians For Preservation Action, and Listed Preservation Groups and Individuals.

Upon initial consideration, the California Court of Appeal became interested in a strict scrutiny standard of review in light of the burden placed by the Santa Monica rent control law upon the personal liberty interests of Nash. The court requested supplemental briefs on the issue following oral argument, and subsequently grounded the affirmation of the decision below largely on the nature of the liberty rights of the landlord which the statute placed at risk.<sup>62</sup> In defining its judicial task, the court stated it must “. . . determine the nature of the rights involved . . . and the appropriate standard of review.”<sup>63</sup>

Although affirming the judgment of the lower court, the Court of Appeal employed a different line of analysis.<sup>64</sup> Examining the impact of the Santa Monica law on the Nash situation, the Court of Appeal agreed with the trial court that a right to go out of business was at issue. The court reasoned that the close relationship between this right and other personal rights that are deemed fundamental, requires that a heightened scrutiny be employed in evaluating any infringement by the rent control law.<sup>65</sup> The California strict scrutiny standard requires that the law in question be justified by a “compelling state interest,” and “narrowly drawn to express only the legitimate state interests at stake.”<sup>66</sup> Upon application of this standard, the court concluded that the Santa Monica law was overly broad and not sufficiently justified by such a compelling state interest so as to override the burden the statute placed upon the personal freedoms of Nash as a landlord.<sup>67</sup>

The California Supreme Court, upon appeal, brought yet another orientation and perspective to Nash's claim.<sup>68</sup> Under the statute, the majority of the court was unwilling to find that Nash was denied the right to go out of business, primarily because the court felt that Nash retained other options through which he could realize the right.<sup>69</sup> Even if such a right could be established, the skeptical majority

62. *Nash*, 143 Cal. App. 3d 251, 191 Cal. Rptr. 717 (1983).

63. *Id.* at 253, 191 Cal. Rptr. at 719.

64. As Justice Grodin, writing for the majority, observed wryly when the case reached the California Supreme Court, “As is so often the case in constitutional litigation, the issues appear different depending upon one's perspective.” *Nash*, 37 Cal. 3d 97, 99, 207 Cal. Rptr. 285, 287, 688 P.2d 894, 896 (1984).

65. *Nash*, 143 Cal. App. 3d at 253, 191 Cal. Rptr. at 721 (1983).

66. *Perez v. City of San Bruno*, 27 Cal. 3d 875, 889, 168 Cal. Rptr. 114, 122, 616 P.2d 1287, 1295 (1980).

67. *Nash*, 143 Cal. App. 3d at 254, 191 Cal. Rptr. at 722 (1983).

68. *Nash*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

69. The most apparent and often cited is the option to sell the business and the property, assuming a buyer could be found. *Id.* at 103-104, 207 Cal. Rptr. at 289-290, 688 P.2d at 898-99.

reasoned, further, the infringement by the law merely was indirect and minimal.<sup>70</sup>

By discounting the proposition that the Santa Monica law posed a significant threat to landlord freedoms, the majority placed the statute in a position of sanctuary. In the absence of any fundamental individual complication, the statute could be treated as a routine land use law for purposes of judicial scrutiny. Accordingly, the majority ruled that the statute was reasonably related to a proper government purpose and therefore met the requisite minimum test.<sup>71</sup> The rent control law provisions in question were declared constitutional and the decision in the lower courts reversed.<sup>72</sup>

Chief Justice Bird, agreeing with the result reached by her colleagues in the majority, dissented as to the legal analysis employed. Justice Bird felt that Nash's right to go out of the landlord business was constitutionally protected, and that this right might have been impermissibly burdened.<sup>73</sup> Under these circumstances, she argued, the court was obligated to apply the strict scrutiny test to the Santa Monica law. The Justice noted, however, that she had no difficulty in finding that the Santa Monica law met the strict scrutiny test. Although Nash's right had been burdened, she argued, "it is not an unduly harsh one in view of the city's compelling interest in providing housing for its residents."<sup>74</sup>

In vigorous dissent, Justice Mosk also distanced himself from the majority.<sup>75</sup> Like Chief Justice Bird and the courts below, Justice Mosk saw the issue as the bar imposed by the Rent Control law to Nash's exit from the landlord business. The right to go out of business, he argued, is absolute in the sense that one willing to sacrifice the past, present and future interest in his enterprise in order to discontinue

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70. *Id.* at 103-104, 207 Cal. Rptr. at 289-290, 688 P.2d at 898-99.

71. Under both the California and federal constitutions.

72. *Nash*, 37 Cal. 3d at 108, 207 Cal. Rptr., at 293-94, 688 P.2d at 902-03 (1984). Although Nash's claim that he was denied the right to go out of business under the law failed to sway the court, it did influence the California legislature. See 1985 Cal. Stat. c. 1509, at \_\_\_\_\_. Since this writing, California has enacted a statewide prohibition against allowing such circumstances to arise again. *Id.* In the words of the statute, "No public entity. . . shall by statute ordinance, or regulation, or by administrative action . . . compel the owner of any residential real property to offer, or continue to offer, accommodations in the property for rent or lease." *Id.*

73. "If the city had fined Nash one dollar for ceasing to be a landlord, the majority would have had no difficulty that the asserted personal liberty interest had been burdened. Practically, the ordinance imposed a far greater burden than a small fine" *Id.* at 110-11, 207 Cal. Rptr. at 294, 688 P.2d at 903 (Bird, C.J., dissenting).

74. *Id.* at 110, 207 Cal. Rptr. at 294, 688 P.2d at 902-03.

75. *Id.* at 112, 207 Cal. Rptr. at 295, 688 P.2d at 904 (Mosk, J., dissenting).

that obligation must, in the end, be allowed that choice.<sup>76</sup> As additional support for his dissent, Justice Mosk adopted the views of the unanimous Court of Appeal below as his own.<sup>77</sup>

#### EXPLORING THE INTRUSIVE IMPACT

The legal challenges to local rent control measures throughout the country have met with a certain measure of success.<sup>78</sup> Inherent in the process of litigating, however, are constraints in which the issues become focused and narrow. Seldom does the opportunity present itself in litigation to draw the broad, larger objections to the target statute into issue, and this has yet to occur with respect to rent control regimes. The unnecessarily intrusive features inherent in most forms of rent control remain largely obscured and untouched by the fits and starts of piecemeal litigation. Seldom examined and articulated, the form, content, and extent of these intrusions are now beginning to emerge. Utilizing the Santa Monica law by example, and the Nash litigation as a stepping-off point, four major areas of statutory intrusion will be explored.

##### A. *Personal Liberty Consequences*

The reality of rent controls is that they do much more than merely regulate rent levels. For the property owner, regulation of rent levels is the capture of the rent decision which in turn, constitutes the central nervous system of the rental enterprise. The controls over removing units from the market included in most rent control laws, likewise take over the decision to terminate the business, the ultimate enterprise choice. Although somewhat late, the nature of rent controls as regulators of individual enterprise and thereby individual lives, may be gaining some recognition. In this context, the seizure of the enterprise through regulatory controls can constitute a significant intrusion into the basic rights and liberties of the private owner/operator of the enterprise. This asserted intrusion was brought to light primarily by the Nash litigation.

Significantly, of the three tribunals contemplating this general proposition on first impression in the Nash case, two in unanimity and

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76. "[I]f the question is whether a city may compel a landlord to remain in business against his will, and give him only the alternative of a forced sale, the answer is: not in a democratic society." *Id.* at 112, 207 Cal. Rptr. at 295, 688 P.2d at 904.

77. *Id.*

78. National Multi Housing Council, *supra* note 6, at 13, 17.



a minority on the third recognized constitutional complications. This concern for statutory intrusion into the zone of constitutionally protected personal liberty of the low-income rental property owners regulated by rent control triggered some formative attempts to identify and define the types of rights requiring protection.

As each tribunal addressed the proposition, a diversity of approach and perspective became apparent. The Superior Court pointed out, for example, that the most objectionable feature of the intrusion was that the sale of the property was the only means of exiting from the business.<sup>79</sup> To the Court of Appeal, the right to go out of business seemed in the nature of a personal freedom because "it touches the individual's ability to make a choice which greatly affects his or her lifestyle."<sup>80</sup> In turn, the right must fall into the category of a constitutionally protected fundamental right since the right involves "a personal decision concerning the individuals' role in the economy [and] protects the individual's ability to use his or her talents and resources in the manner best suited to bring life, satisfaction, and economic security."<sup>81</sup> The Court noted further that denial of the right to discontinue can have the corollary effect of imposing the positive duty to continue an endeavor indefinitely. In the words of the court, "[T]here exists an undefined yet real notion of freedom which is violated by the idea of compelling an individual to work in a given business."<sup>82</sup> The Appeals Court warned that restrictions on the individual, even though short of the traditional thirteenth amendment concept of involuntary servitude, can still be offensive to notions of personal liberty.<sup>83</sup>

Justices Bird and Mosk joined in dissent from the California Supreme Court's final ruling by noting also the changing orientation of the duties of a modern day landlord. Since such duties now

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79. *Nash*, 143 Cal. App. 3d at 255, 191 Cal. Rptr. at 721 (1983).

80. *Id.* at 253, 191 Cal. Rptr. at 719, 720.

81. *Id.* at 252, 191 Cal. Rptr. at 720. The court draws an analogy between the right to stop working and the "right to work for a living in the common occupations of the community", recognized in state law. *Id.* at 252, 191 Cal. Rptr. at 720. Arguably, denial of the right to stop working constitutes an intrusion of greater severity. Its denial leaves the victim shackled with the demands of time, energy, and resources required to continue the enterprise which would not attend a denial to enter into a particular endeavor.

82. *Id.* at 252, 191 Cal. Rptr. at 720. See Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants From Condominium Conversion*, 18 HARV. C.R.-C.L. L. REV. 179 (1983) (for a concept of tenant's interest, and an argument that the tenant interest be factored into the equation in considering rental housing controls, specifically condominium conversions).

83. *Id.*

“necessarily involve the rendering of personal services” to the tenant, thirteenth amendment concerns for the freedom to withhold the rendering of personal services become more germane.<sup>84</sup> Justice Mosk noted further the rapid expansion of legal risks and obligations attaching to the ownership and management of rental housing.<sup>85</sup> To expose the landlord to this universe of burgeoning criminal and civil liabilities against the will of the landlord, Justice Mosk suggests, makes the intrusive impact of the statute on the individual even more onerous.

The potential for personal intrusions inherent in the substance and implementation of a number of provisions common to rent control schemes is real. As the Nash predicament suggests, these intrusions exist and can cut deeply into the freedom of individuals to order their own lives and to employ their talents, energy and resources toward forms of life, satisfaction, and economic security of their own choosing. As the sweep and severity of rent control intrusion into personal liberties gain recognition, the call for constitutional protection will experience increased credibility.

### B. Housing Market Impact

The destructive and ultimately counterproductive economic and social effects of rent controls on a community and its housing markets over time, is now quite predictable. On this point, one finds most knowledgeable housing experts and economists in agreement.<sup>86</sup> Economic analysis articulates best the form and extent of the intrusion of rent controls into the market on behalf of a statutorily preferred class of housing.

Imposing legal controls on rent levels incapacitates free market functioning because the controls jam the necessary signals between the users of the commodity and the suppliers.<sup>87</sup> In fact, depressing rents

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84. *Nash*, 37 Cal. 3d 97, 110-14, 207 Cal. Rptr. 285, 294-97, 688 P.2d 894, 903-06 (1984).

85. The Justice lists examples of numerous new landlord obligations the courts have recognized in recent years. *See id.* at 114, 207 Cal. Rptr. at 297, 688 P.2d at 906.

86. *See generally* M. LEA, *supra* note 3. This conclusion has been drawn by other commentators as well. *See, e.g.,* Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 MAINE L. REV. 261 (1984); Pulliam, *Brandeis Brief For Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. L. REV. 435 (1983); Hirsch & Hirsch, *The Changing Landlord-Tenant Relationship in California: An Economic Analysis of the Swinging Pendulum*, 14 SW. L. REV. 27 (1983).

87. I am indebted to Thomas Hazlett for this particular analogy. *See* T. HAZLETT, *supra* note 3, at 279-81. Rent controls are also a form of price-fixing that attempts to monopolize the market by arbitrarily fixing and maintaining rents below the fair market value. The California Supreme Court has rejected this antitrust challenge to the Berkeley rent control law, but the U.S. Supreme Court has certified the case for review. *Fisher v. City of Berkeley*, 37 Cal. 3d 644 (1985).

to below levels which normal supply and demand forces would set, sends the *wrong* message to the market. The artificially lower rents set by law signal an adequate supply of housing units in relation to demand. By so incapacitating the pricing mechanism of the market, rent controls deny the market the ability to respond to the actual forces of supply and demand. Ironically, the artificially low rents imposed by controls encourage the very scarcity of housing which is the underlying justification for the imposition of controls in the first instance.

By paralyzing market mechanisms, rent restrictions cause economic injury which, in turn, can lead to debilitating side-effects.<sup>88</sup> These economic-related ramifications, becoming better understood and documented, are indigenous not only to the American experience with controls, but have appeared in other countries as well.<sup>89</sup> A listing of complications traceable to market disruption in this context has been attempted,<sup>90</sup> but some attention to the most troublesome will serve for purposes of this inquiry. Such complications comprise a segment of the evidence reflecting adversely on the efficacy of rent control as an instrument of social policy in a free-market setting.

Rent control has been shown to decrease property value which in turn lowers the tax base leading to either a decrease in necessary public services or a shifting of the tax burden onto other sectors.<sup>91</sup> Further aggravating this problem is the fact that the general economic base in rent control areas often stagnates and erodes under the imposition of controls.<sup>92</sup> Controls also exert a chilling effect on new investment and enterprise that could otherwise contribute to the local economy

88. *Supra* note 11-17 and accompanying text. The economic implications of rent controls are explored theoretically in various articles. See, e.g., Francena, *Alternate Models of Rent Control*, 12 URB. STUD. 303 (1975); Moorhouse, *Optimal Housing Maintenance Under Rent Control*, 39 S. ECON. J. 93 (1972); Olsen, *An Econometric Analysis of Rent Control*, 80 J. POL. ECON. 1081 (1972, cited in Hirsch & Hirsch, *The Changing Landlord-Tenant Relationship In California: An Economic Analysis of the Swinging Pendulum*, 14 SW. L. REV. 2, 33 at n.170 (1983)). See also A. SPORN, *EMPIRICAL STUDIES IN THE ECONOMICS OF SLUM OWNERSHIP* (1960); C. RAPKIN, *THE REAL ESTATE MARKET IN THE URBAN RENEWAL AREA* (1959).

89. See J. BRENNER AND H. FRANKLIN, *RENT CONTROL IN AMERICA AND FOUR EUROPEAN COUNTRIES* (Council for International Urban Liaison, Mercury Press 1977); S. HAMILTON AND D. BAXTER, *LANDLORDS AND TENANTS IN DANGER; RENT CONTROL IN CANADA* (1975); *European Experience With Rent Controls*, 100 MONTHLY LABOR REV. 8 (1977).

90. Shenkel, *supra* note 11 at 101. The evidence against rent control has evoked an especially strong response from some scholars and commentators. See, e.g., A. LINDBECK, *THE POLITICAL ECONOMY OF THE NEW LEFT* (1971) ("In many cases, rent control appears to be the most efficient technique presently known to destroy a city—except for bombing.").

91. Analysis and conclusions concerning the numerous harmful side effects can be found throughout the literature in other fields as well. Specifically on property values and taxes, see G. Sternlief, *supra* note 14.

92. See Sternlief, *supra* note 14.

and the scarcity of housing through rehabilitation and new construction. An entirely predictable increase in incidents of abandonment or conversion is the result.<sup>93</sup> The allocation of controlled units often falls prey to black market and other forces in jurisdictions laboring under rent control, impeding the access to controlled units by the class of renters the controls were initially intended to benefit.<sup>94</sup>

The economic and social harm is extended further under statutes such as that in Santa Monica where demolition and eviction controls are combined with rent restrictions. The dimensions added by removal controls alone is illustrative. Restrictions of this nature tend to encourage socioeconomic segregation.<sup>95</sup> They also eliminate property uses alternative to renting to the statutorily preferred economic class of tenants and instead make, development more attractive in more affluent, adjacent areas where demolition is in effect exempt from the lower economic and financial criteria imposed by controls. From another perspective, this discriminatory impact can also be criticized as an infringement on the right of lower income communities under rent control to attract outside investment capital to bolster their local economy and rehabilitate and replenish the scarce housing stock.<sup>96</sup>

Rent controls in their representative modern forms pose an anathema to economic analysis. Evidence abounds that the economic impact of most controls is devastating. By removing incentive and layering restrictions on ownership and management of the desired housing, controls chill new investment and entrepreneurship, paralyze the market, and set off an epidemic of disinvestment. Ultimately, this form of government regulation brings more harm than good to the intended beneficiaries. The counterproductive intrusion rent controls make into the economic environment of a community also weighs heavily in the case against controls.

### C. Landlord-Tenant Relationship

As do most rent control measures, the Santa Monica law also intrudes into the relationship between the providers of housing goods and services in the city, and the users. To gauge the nature and extent of this intercession, some semblance of the modern standard for the

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93. See *supra* notes 12 and 13 and accompanying text.

94. *Supra* note 16 and accompanying text.

95. Brief *Amicus Curiae* of the Urban Legal Foundation, Inc., at 12, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

96. *Id.* at 14.

relationship must be established. This requires a brief update concerning the rapid evolution of the landlord-tenant relationship in this country, and a look at the present parameters of the relationship.

The major foundational shift in the landlord-tenant relationship has been from initial property orientation of the relationship to that of contract.<sup>97</sup> The early notion that the residential tenant was in receipt of an estate of land entitling him to the nearly exclusive use for the term of the conveyance, was accompanied by the obligation to fully maintain the premises and pay the rent.<sup>98</sup> Modern statutory and judicial intervention in the name of various public policy objectives has utilized contract principles in re-ordering the relationship. When contract principles have become too burdensome in effecting periodic rearrangements, judicial and statutory fiat have been utilized.<sup>99</sup> Whatever its form, change has occurred rapidly since the middle of this century.

Triggered by the federal goal of a suitable living environment for all, as enunciated some thirty-five years ago,<sup>100</sup> municipal housing codes throughout the country shifted the fundamental burden of repair and maintenance of rental housing to the owner-landlord.<sup>101</sup> At the same time, a stream of tenant assistance devices began to gain legal acceptance, further reshaping the landlord-tenant relationship. Representative of such devices are forms of rent withholding,<sup>102</sup> the concept of repair and deduct,<sup>103</sup> premises receivership,<sup>104</sup> and the warranty of

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97. See generally Indritz, *The Tenants' Rights Movement*, 1 N. MEX. L. REV. 86 (1971).

98. Restatement (Second) of Torts §356 (1963), comment (a). Additionally, in the absence of the contract concept of mutually dependent covenants, tenant's obligation to pay rent could continue even though the premises may have become uninhabitable through no fault of the tenant. See Restatement of Contracts §290 (1932).

99. The Santa Monica Rent Control law is a prime example. Those aspects of the relationship necessary in the contemplation of the statute to achieve its objectives are simply taken over by its provisions. Rights and duties are assigned by mandate of law which define a large segment of the relationship between landlord and tenant.

100. See *supra* note 1 and accompanying text.

101. See generally Note, *Municipal Housing Codes*, 69 HARV. L. REV. 1115 (1966).

102. Tenant given the legal right to withhold rent due and owing from the landlord in response to serious code violations. A number of different statutory approaches exist in this area. See Flitton, *Rent Withholding: Public and Private*, 2 HARV. C.R.-C.L. L. REV. 181 (1966); Simmons, *Passion and Prudence: Rent Withholding Under New York's Spiegel Law*, 15 BUFFALO L. REV. 581 (1969).

103. Tenant given the right to make necessary repairs at his own expense initially and then deduct these expenses from subsequent rent due and owing. This device, within limits, has been adopted either by statute or case in at least twenty-one jurisdictions. W. HIRSCH, *A STUDY OF THE EFFECTS OF THE LEGAL ENVIRONMENT ON URBAN HOUSING MARKETS*, 11-13 (Prepared for H.U.D. 1975).

104. In order to correct code violations, the court is vested with the authority to appoint a trustee to take control of the premises from the landlord and effect the necessary corrections. See generally Rose, *Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low Income People*, 3 HARV. C.R.-C.L. L. REV., 311 (1968); Comment, *Receivership of Prob-*

habitability.<sup>105</sup>

On balance, the duties and obligations of the landlord have greatly increased. In addition, the scope of legal liability attending the ownership and management of rental housing in the United States has been expanded dramatically. As the law imposes liability on the landlord for the health, welfare, physical and emotional security of the tenant, the control laws reshape the underlying relationship further.<sup>106</sup> Against this revisionist landlord-tenant relationship that modern law and jurisprudence is constructing, the specific impact exerted by rent control measures can be examined.

Among the ledger of rent control intrusions, those experienced by the landlord-tenant relationship is perhaps the most understandable. As noted previously, rent control statutes seem to view the landlord as the problem, with the tenant as the injured party in need of protection. From this perspective, the relationship between the two is therefore the logical area in which to insert reform. The question then becomes one of what aspects of the relationship the statute chooses to manipulate.

By illustration, the Santa Monica statute concentrates on the two terms fundamental to the relationship between the provider and the user of residential housing: the price of the product and when the provider is entitled to repossess. The mechanism employed to secure regulatory dominance over these issues is straightforward.

The law sets base rent levels and institutionalizes a formal, elaborate public process for establishing any future rent adjustments. Control over rent decisions, traditionally an integral part of the relationship between landlord and tenant, is removed from the parties. Tenant participation in the rent setting process, however, is carefully protected and impliedly encouraged. Because of the peculiar vision of the statute, participation by either landlord or tenant presumptively is adversarial, requiring a formal petition from the party against an existing or proposed rent level.<sup>107</sup> In addition, a landlord's petition

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*lem Buildings in New York City and its Potential for Decent Housing of the Poor*, 9 COLUM. J.L. & SOC. PROB. 309 (1973).

105. Affords the tenant a breach of warranty action or defense in situations where serious housing code violations can be established. See Note, *Implied Warranty of Habitability in Housing Leases*, 21 DRAKE L. REV. 300 (1972); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law and the Landlord-Tenant?* 40 FORDHAM L. REV. 123 (1971).

106. Note, *Emerging Landlord Liability: A Judicial Offering of Tenant Remedies*, 37 BROOKLYN L. REV. 387 (1971). The courts have begun to extend landlord liability beyond the tenant to third party invitees of the tenant. See *Uccello v. Landenslayer*, 44 Cal. App. 3d. 504, 118 Cal. Rptr. 741 (1975) (landlord held liable for injury to tenant's invitee bitten by tenant's dog).

107. Santa Monica City Charter, Art. XVIII §1805(c). Presumably any latitude to bilaterally

to secure a rent increase is laden with preconditions,<sup>108</sup> investigatory and hearing procedures,<sup>109</sup> specific documentation requirements,<sup>110</sup> and the ultimate burden of proof.<sup>111</sup>

The provisions of law affecting a landlord's repossession decision are no less intrusive than those directed at rent-setting. By design, the repossession controls of the statute set up protections for the tenant and condition the landlords' right to evict upon compliance with them. This is accomplished by enumerating only those conditions under which an eviction is permissible,<sup>112</sup> and prohibiting the use of evictions in retaliation against tenants exercising lawful rights.<sup>113</sup> By confining the right of repossession of the landlord to a list of narrow, statutorily defined situations, the law has circumscribed the traditionally discretionary and unilateral right of the landlord. The terms and conditions attendant to the right to repossession, now defined and enumerated by statute, essentially have placed the decision beyond the control of the parties to fashion their own terms on the subject. The effect is to empty the landlord-tenant relationship of yet another central and traditional element.

The extent to which rent control provisions in combination can and do impact on the landlord-tenant relationship, also is suggested by the Nash predicament. When the rent, demolition and eviction controls in the Santa Monica law combined to force Nash to continue as a rental housing proprietor, they also froze him into a statutorily mandated landlord-tenant relationship against his will. Overreaching, disconnected provisions in any legislative scheme invite unintended, complicating results.

Landlord distrust and tenant helplessness are the primary misleading frames of reference endemic to rent control enactments. So characterized, an equitable and just relationship between landlord and tenant would certainly be unlikely to result. The implication is clear that the injustice the statute seeks to prevent is due, at least in part, to the failure of the traditional landlord-tenant relationship.

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adjust rents by mutual consent of the parties is closed out by controls. Included in the prohibition of bilateral adjustments are situations in which the tenant seeks an improvement or added service from the landlord for which the tenant is willing to pay an additional increment in rent.

108. Santa Monica City Charter, Act. XVIII, §1805(e),(h),(1),(2).

109. *Id.* §1805(a) and §1803(g).

110. *Id.* §1805(d)(4).

111. *Id.* §1805(d)(8) ("... the preponderance of the evidence submitted at the hearing").

112. *Id.* §1807. Listed are common situations such as failure to pay rent, breach of lease, causing a nuisance, and destructive or illegal use of the premises. *Id.*

113. *Id.* §1806(i).

Understandably then, rent control measures are quick to remove those matters of statutory concern from the discretion and mutual control of the parties. Further, under the terms of the statute, should a Santa Monica landlord and tenant enter into an understanding in their mutual interest that would entail a waiver by the tenant of any statutory benefit, the accord would be automatically void.<sup>114</sup>

The nature and extent of rent control intrusion into any relationship between landlord and tenant is predictable. Those matters between the parties that are of concern in the statute can be expected to be removed from the relationship and regulated under prescribed standards and/or processes. Rent control measures carry the implicit assumption that rent levels and the other concerns they may choose to embrace can no longer be entrusted to the principals themselves.

#### D. Enterprise Injury

The concept of private property in American law encompasses concern for the relationship between a person and that person's property. The relationship tends to be defined in terms of legally recognized rights running from the owner to the property. Characterized as property rights, these have been described by the Supreme Court as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it."<sup>115</sup>

By nature, rent controls intrude on property rights running to land and improvements. Their intrusive impact, touched on above,<sup>116</sup> will be examined subsequently in the context of fifth and fourteenth amendment infringements. Rent controls also intrude on an intangible form of property: the business of operating the subject housing property itself. In this case, the property is the enterprise itself and arguably gives rise to a separate and distinct group of enterprise rights. These rights, in turn, run to the owner of the enterprise, either the owner-operator, or one leasing from the owner of the realty for the purpose of conducting a rental housing business. The peculiar impact of rent control on this property interest will be analyzed next.

Returning to the Santa Monica statute for purposes of illustration, the impact the law has on the enterprise reveals a sweeping new

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114. *Id.* §1807. "Non-waiverability: Any provision, whether oral or written in or pertaining to a rental housing agreement whereby any provision of the Article for the benefit of the tenant is waived, shall be deemed to be against public policy and shall be void." *Id.*

115. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

116. *Supra* note 14 and accompanying text.



intrusive dimension. Examination of the statute has shown that the provisions are principally focused on controlling rents, evictions, and removals. Upon closer examination, however, the impact of the statute is also such as to regulate the prosecution of the business.<sup>117</sup> In particular, the case could be made that the ownership decisions that rent controls commandeer are so integral to the prosecution of the business as to be, in effect, property rights, themselves, and deserving of legal protection on that basis.

The decision to set prices lies at the center of managing any free market enterprise, particularly the rental housing business. Among other considerations, the rent-setting decision is necessary to maintain the status quo of the enterprise and is the key to achieving efficiency, economy, upgrading, and other forms of change. Traditionally one of the central considerations in the allocation of resources, rent-setting is the pricing mechanism of the rental-housing industry. As such, rent-setting is the manager's primary tool for effecting internal controls as well as the adjustments within the business necessary to accommodate change in the external environment.

Typically, treatment of the rent decision<sup>118</sup> by rent control provisions similar to those in the Santa Monica statute is to arbitrarily set a base rent level. Future rent adjustments are to be made against this statutorily mandated base level. Rent decisions are moved into the public domain and subject to a formal bureaucratic process of filings, hearings, third party decisions, and appeals. The landlord/proprietor is relegated to the periphery and allowed a perfunctory, adversarial role in petitioning and presenting testimony during the process. The rent decision is ultimately made by either an appointed hearing examiner or a part-time, publicly elected Rent Control Board. The factors that the Board can take into consideration in rent adjustments are statute-specific, which includes a "fair return" to the proprietor. The Board is authorized to establish a fair return formula based on an enumerated list of factors and subject to specific statutory limitations.<sup>119</sup>

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117. This observation arguably carries some relevance to the personal liberties analysis of the impact of local rent control statutes. See *infra* notes 121-202 and accompanying text. See *supra* notes 29-48 and accompanying text.

118. See *supra* notes 16-77 and accompanying text (outlining the major devices for rent control employed by the statute).

119. Santa Monica City Charter, Art. XVIII, §1805(e). In making individual and general adjustments of the rent ceiling, the Board shall consider the purposes of this Article and the requirements of law. The Board may adopt as its fair return standard any lawful formula, including but not limited to one based on investment or net

This rent-setting regimen along with other features of the law combine to effect an irreparable intrusion into the prosecution of the enterprise. From the perspective of the proprietor, the impact of the statute can take a number of forms. The time, energy, and costs associated with simply pricing the product become exorbitant. With the loss of control over pricing, the enterprise loses a concomitant measure of control over its present mode of operation and future direction.

Additionally, rent control regimes regulate business profits. Even more disconcerting is the frequently utilized statutory mechanism which, by assigning the profit decision to a board of elected regulators, in effect turns the profit decision over to the public through its representatives, a majority of whom can be expected to be renters in most rent control jurisdictions.<sup>120</sup> In addition, as the data necessary to rent and fair return decisions is gathered and examined in the required public forum, the inner workings of a once private enterprise become a matter of public record.

Beyond the contemplation or concern of the statute is the fact that the landlord and tenant also share a commercial relationship in that the tenant is a consumer of the product and services provided by the proprietor's enterprise. By addressing such matters as the cost and quality of the product and the right of the user to be heard, however, some of the concerns of rent control statutes coincide closely with those of the tenant as a consumer of housing goods and services. To a large extent, rent control measures can be viewed as consumer protection laws for the tenant.

Furthermore, by design and impact, rent control measures lock the enterprise into the mode of operation and market best suited to serve

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operating income. The Board shall consider all factors relevant to the formula it employs; such factors may include: increases or decreases in operating and maintenance expenses, the extent of utilities paid by the landlord, necessary and reasonable capital improvement of the controlled rental unit as distinguished from normal repair, replacement and maintenance, increases or decreases in living space, furniture, furnishing, equipment, or services, substantial deterioration of the controlled rental unit other than as a result of ordinary wear and tear, failure on the part of the landlord to provide adequate housing services or to comply substantially with applicable housing, health and safety codes, federal and state income tax benefits, the speculative nature of the investment, whether or not the property was acquired or is held as a long term or short term investment, the landlord's rate of return on investment, the landlord's current and base date Net Operating Income, and any other factor deemed relevant by the Board in providing the landlord a fair return.

*Id.*

120. A provision for some landlord representation on the Rent Control Board is absent from the Santa Monica statute. Representation such as this is a common feature of regulatory bodies in other areas and serves to insure a certain degree of evenhandedness in implementing the law.

that class of users selected by statute. This quickly becomes apparent, for example, in contemplating the regulatory obstacle course that would face the controlled enterprise desiring to upgrade its housing units and services in order to serve a higher income market. Any downgrading of the housing enterprise under rent controls is likewise precluded. Such a course of action would trigger code violations and tenant complaints invoking statutory sanctions.

The totality of the impact of rent controls on the enterprise providing the housing facilities and services is clear. Entrepreneurial incentive is removed while at the same time a number of disincentives are imposed. The contradiction of coupling a minimally acceptable return with a quantum leap in operational risks and burdens is imposed on the enterprise. The target market is monopolized while rates, expenses and capital investment are regulated in the interest of the consumer. The conclusion is irrefutable. Rent control effects a nonvolitional transformation from private enterprise to public utility. By capturing the market and removing profit potential, the entrepreneurial engine is disengaged. The result is a public enterprise, publically regulated, which remains private in name only.

#### THE CHALLENGE TO CONSTITUTIONAL SANCTUARY: SPECIFIC ISSUES AND GENERAL IMPLICATIONS

Opposition to rent control in the courts takes the form of a struggle over the constitutional analysis appropriate for scrutinizing this type of local governmental intervention.<sup>121</sup> More specifically, this opposition represents an attempt to defeat the doctrinal assumptions that have protected such local initiatives from meaningful judicial scrutiny for over half a century. This effort entails the introduction of some new perspectives and novel issues to encourage a reconsideration of some variants of recent jurisprudence.

Through the continuous efforts of the Nash and other contemporary challenges, the areas of constitutional turf representing the greatest threat to local rent control measures are becoming apparent.<sup>122</sup> Elements of the fifth and fourteenth in combination with the thirteenth amendments raise a myriad of questions in relation to the

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121. Excluding those isolated cases that have challenged on the basis that rent controls contravene a national policy measure such as anti-trust protections. *See supra* note 87 and accompanying text.

122. Federal constitutional analysis is the focus of this article. State constitutional considerations will be noted only when inseparable from, or illustrative of, a particular federal principle.

substance and impact of such enactments. The constitutional theory and perspective central to the Nash case is illustrative.

### A. *Substantive Due Process*

By claiming that the Santa Monica law in effect denied him the right to go out of the rental housing business, Nash was able to introduce the prospect that such laws may present a threat to the fourteenth amendment due process rights of the landlord. The courts were invited to consider the proposition that the statute impermissibly infringes on fundamental liberties of proprietors in contrast to the more common allegation that such laws merely infringe on a protected property right.

A panoply of federal Supreme Court precedent was spread before the judiciary in support of this line of inquiry.<sup>123</sup> As to the broad outline of the limitations on the exercise of police powers, the Supreme Court requires a showing "first, that the interests of the public generally, as distinguished from a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."<sup>124</sup> The first standard is arguably satisfied in the case of rent control statutes since ironically the particular class benefited usually makes up a majority of the 'public' in rent control jurisdictions. A showing that the modern generation of controls are reasonably necessary or not unduly oppressive, however, becomes increasingly problematical as their impact and general effectiveness has been drawn into question.

Specifically, Nash argued he was denied the right to go out of business, and that this is a fundamental freedom protected within the "liberty" protection of the fourteenth amendment.<sup>125</sup> Constitutional liberty guarantees, traceable to the Magna Carta and back through western political thought, have been addressed in their constitutional

123. Authority and argument on this point is central to the pleadings and briefs in *Nash*. See Brief *Amicus Curiae* of Pacific Legal Foundation In Support of Respondent at 6-14, *Nash v. City of Santa Monica*, 37 Cal. 3d. 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984). The substantive due process doctrine as a protection for individual economic and property rights has been largely shunned by the Supreme Court in the last half century. See, e.g., B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 184-203 (1980).

124. *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (*Reaffirming Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

125. U.S. CONST. amend. XIV, §2. In pertinent part: "No State shall . . . deprive any person of life, liberty or property without due process of law . . ." *Id.* (emphasis added).

context by the Supreme Court on numerous occasions over the years. The relevance of some of the specific rights included in the evolving constitutional definition of liberty to those denied to Nash under the rent control statute is compelling. A landlord in the Nash predicament would have difficulty in taking advantage of the Court's duly recognized right "to live and work where he will, to earn his livelihood by any lawful calling; to pursue any livelihood or vocation . . . ,";<sup>126</sup> "to contract, [or] to engage in any of the common occupations of life . . . ."<sup>127</sup> Indeed, the implicit Nash contention was that the right to go out of business was inseparable from the exercise of constitutionally recognized liberty rights and thereby required protection.<sup>128</sup>

Judicial review of alleged statutory infringements upon individual liberty interests requires the application of a standard of strict scrutiny.<sup>129</sup> Strict scrutiny requires the state to establish a compelling interest,<sup>130</sup> and the statute to employ the least restrictive means available to achieve that interest.<sup>131</sup> If Nash were able to establish that a fundamental liberty interest was at stake, he would realize a more probing judicial review of the Santa Monica law under the strict scrutiny standard.

The resistance encountered by Nash to this challenge to rent controls is instructive.<sup>132</sup> His due process claim encountered four lines of defense. The first concerned the right to go out of business, and whether going out of business qualified for constitutional protection. The City argued that because Nash intended to retain the land, he was claiming protection for an entitlement in the nature of a property

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126. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

127. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

128. The notion that the liberty of due process has come to include a freedom from government restraints or a right to be left alone can also be important here. See Berlin, *Two Concepts of Liberty* in *FOUR ESSAYS ON LIBERTY*, 118 (1969); L. HAND, *THE SPIRIT OF LIBERTY* 144-54 (3 ed. 1960) (cited in Brief *Amicus Curiae* of the Pacific Legal Foundation, *supra*, note 122, at 11). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 615 (1978), for the origins and content of an expanded constitutional concept of the rights of privacy and personhood upon which protections might also be extended to landlords in this context. See also, Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

129. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

130. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

131. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644 (1974).

132. The city's defense was not confined only to the merits of the challenge to the statute. The city also argued to the court that Nash is "less concerned with vindicating some alleged and undefined personal right than he is with circumventing Santa Monica's rent control law in order to maximize his profits." Appellant's Petition For Hearing at 22, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

right which, by constitutional design, was intended to be protected under a fifth amendment taking analysis.<sup>133</sup> Ultimately, the California Supreme Court viewed the right claimed by Nash as a property right by characterizing the rent control statute as imposing constitutionally permissible "limitations upon the use of private property."<sup>134</sup>

In questioning the protectability of a right to go out of business, the city argued that such a right should in no case be treated as absolute. As evidence of methods commonly employed to regulate business termination, the court pointed to provisions contained in federal bankruptcy and labor laws, as well as state and local plant-closing ordinances.<sup>135</sup> Citing the decision in *Brooks-Scanlon Co. v. Railroad Commission*,<sup>136</sup> the city argued further that the Supreme Court had condoned a regulation which specifically required the going concern to continue providing certain commercial services involuntarily. Nash distinguished the *Brooks-Scanlon* case on the basis that the holding dealt with the regulation of a public utility as opposed to a private business.<sup>137</sup> The second defense challenged the claim, *de facto*, that Nash had been denied the right to exit the landlord business. At least three alternatives to remaining in the business were available to landlords, the City proclaimed: (1) decline to re-let vacant apartments, (2) sell, or (3) abandon the property and business.<sup>138</sup> Nash countered that these alternatives are either of such questionable legality, or so unattainable or costly, that they do not constitute alternatives at all.<sup>139</sup>

Since tenants in compliance with the eviction control provisions of the statute in fact and reality receive a life tenancy in the apartment<sup>140</sup> the first alternative is simply illusory. This option would also require the landlord of a multi-unit facility to prohibitively subsidize the remaining tenants for an indefinite period in order to keep the premises open, operating, and maintained.<sup>141</sup> The second alternative of selling

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133. *Id.* at 23. (discussing fifth amendment impact). See *infra* notes 155-93 and accompanying text.

134. *Nash*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

135. Appellants' Reply Brief To Amicus Curiae at 20-22, *Nash*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

136. *Id.* at 22.

137. Appellee's Answer To Petition For Hearing at 24-25, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

138. Appellant's Reply Brief To Amicus Curiae at 17-18, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

139. Appellee's Answer To Petition For Hearing at 17-19, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

140. Santa Monica City Charter, Art. XVIII, §1806(a)-(h).

141. An assumption would most likely be made that the Rent Control Board would dispense

the premises does not exist in the absence of a market in which a private purchaser would be willing to assume the burdens, obligations and limitations associated with owning and operating controlled units. Further, absent some due process and just compensation safeguards, the sale, under coercion, would be constitutionally suspect.<sup>142</sup> Finally, the city offers no particulars as to how their final suggested alternative of abandonment can be exercised by the landlord and avoid the civil and criminal sanctions accompanying the gamut of modern landlord obligations from code requirements to strict liability for injury suffered by tenants and third parties on the premises.<sup>143</sup>

Third, the city argued that the denial of Nash's due process liberty escaped the requirement for heightened judicial scrutiny because the due process right in question was only incidentally infringed upon. Since the statute in question is primarily concerned with the regulation of land use, any concomitant regulation of a personal right is incidental,<sup>144</sup> and as such, constitutionally permissible.<sup>145</sup> *Amicus* on behalf of Nash argued that the court was obligated to apply those authorities utilizing a strict scrutiny standard of review,<sup>146</sup> and argued for characterizing the impact of the statute as more than incidental because the right at stake is so fundamental.

The final line of defense used by the city was the position that even if strict scrutiny of the statute was required in the Nash context, the statute would meet the standards. Focusing primarily on the demolition control provisions of the rent control law, the city argued, with supporting data, that such controls play a vital role in combating the scarcity of affordable rental housing in Santa Monica, and nationwide.<sup>147</sup> *Amicus*, on behalf of Nash, presented the emerging

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with the law's "fair return" requirement (§1805(e)) under these circumstances in light of the rent increases the Board would have to authorize for the remaining tenants in order to cover fixed operating expenses of the building.

142. Appellants' Jurisdictional Statement in the U.S. Supreme Court at 9, *Nash v. City of Santa Monica*, No. 84-1168.

143. The alternative of abandonment suggested by the city surely does not imply that as a matter of statutory policy, such actions are to be encouraged in such instances. Most likely the city would pursue its obligation to enforce the law against the landlord. That such an argument is seriously advanced to the court, however, is an extension of the general tone and demeanor toward the rights of the landlord reflected in the Santa Monica rent control statute itself.

144. Appellant's Reply Brief to *Amicus Curiae* at 6-7, *Nash, supra* note 68.

145. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Young v. American Mini Theatres*, 427 U.S. 59 (1976). *Cf. Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

146. Brief *Amicus Curiae* of Urban Legal Foundation, Inc. In Support of Respondent at 19-22 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)). *See Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632 (1974); *Shelton v. Tucker*, 364 U.S. 479 (1960).

147. Appellants' Reply Brief To *Amicus Curiae* at 36-37, *Nash v. City of Santa Monica*,

case law and supporting evidence that controls of this nature in fact disserve the community with harmful economic and social side-effects.<sup>148</sup> The city countered with the assertion that such social and economic considerations were misplaced as they avoided the legal merits at issue.<sup>149</sup> As noted previously, the argument made by the city regarding this issue persuaded Chief Justice Bird of the California Supreme Court that the compelling interest requirement of strict scrutiny was present, and thereby led to her concurrence in the decision.<sup>150</sup>

The contention that the demolition provision of the law also failed the 'least restrictive means' standard of strict scrutiny also proved troublesome. The Appeals Court, for example, found that the demolition provision did not meet the least restrictive means standard, pointing to features inserted in demolition controls in other jurisdictions that helped minimize their impact,<sup>151</sup> and suggested a minimizing feature of their own which could be incorporated into the statute.<sup>152</sup> Most local rent control laws do not include demolition controls. Of those that do, three contain specific exemptions for landlords willing to go out of business.<sup>153</sup> Not only was the demolition control feature of the Santa Monica law not the least restrictive, but, as the Appeals Court suggested, the provision was perhaps the most restrictive possible on landlord options.<sup>154</sup>

### B. A 'Taking' of Property

The trilogy of rent, eviction, and demolition controls, separately and in combination, also have been subjected to increasing fifth amend-

37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

148. Brief *Amicus Curiae* Of Urban Legal Foundation, Inc. In Support of Respondent at 22-28, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984). See also, *supra* notes 15-16, 95-96 and accompanying text.

149. Appellants' Reply To The *Amicus Curiae* Brief of Urban Legal Foundation, Inc. at 1-7, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

150. *Supra* note 72-73 and accompanying text.

151. *Nash v. City of Santa Monica*, 191 Cal. Rptr. 717, 723-24 (1983).

152. "Santa Monica could make new construction on lots formerly containing rent controlled property subject to rent control." *Id.* at 724.

153. Brief *Amicus Curiae* of Urban Legal Foundation, Inc., In Support Of Respondent at 22, *Nash v. City of Santa Monica*, 37 Cal. 3d 96, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

154. *Id.*, at 21-22; *Nash v. City of Santa Monica*, 191 Cal. Rptr. 717, 723 (1983). Technically the Appeals Court ruling was grounded on the due process clause of the California Constitution, as opposed to the federal standard for strict scrutiny. Derivative of the federal model however, the state standard is essentially identical. *Id. Cf. Perez v. City of San Bruno*, 27 Cal. 3d. 875, 890 168 Cal. Rptr. 114, 616 P.2d 1287 (1980).



ment scrutiny.<sup>155</sup> Utilizing a number of theories, landlords have begun to assert the claim that the impact of such controls constitutes an unconstitutional 'taking' of property without just compensation. The power and cogency of this analysis in a rent control context can be seen in the reaction to the Nash challenge to the Santa Monica law. Even though Nash deliberately avoided a 'taking' claim in his initial action against the Board and the City, fifth amendment analysis was introduced in the decision of the trial court,<sup>156</sup> and subsequently became joined with the substantive due process arguments through two levels of appeal.<sup>157</sup>

Contemporary constitutional analysis under the taking clause of the fifth amendment dates from the landmark ruling of the Supreme Court in *Village of Euclid v. Ambler Realty Co.*,<sup>158</sup> which upheld the constitutionality of a village zoning ordinance. Adopting a quantum departure from previous cases, the Court expanded the common law concept of public nuisance to include the prevention of anticipated future harm.<sup>159</sup> In the same stroke the Court shifted the burden from the government to the individual to establish that the legislative purpose is not "fairly debatable."<sup>160</sup> This, in turn, had the effect of creating a presumption of constitutionality for local land use laws, and reducing subsequent judicial scrutiny solely to the arbitrary nature or unreasonableness of such initiatives.<sup>161</sup>

To be reconciled with the traditional governmental eminent domain powers of compensable takings, is the strong trend toward governmental takings for which no compensation is required. Based on the law of nuisance, early American jurisprudence recognized the exercise of police powers to abate a public nuisance as appropriate, but uncompensable. Such takings or regulation did not call for compen-

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155. U.S. CONST. amend. V. In pertinent part: ". . . nor shall private property be taken for public use without just compensation." *Id.* Local housing control challenges based on fifth amendment taking arguments, have been technically instituted under the fourteenth amendment since the fifth amendment has been incorporated into the fourteenth amendment due process clause. See *Chicago, B & O R.R. Co. v. Chicago*, 166 U.S. 226 (1897); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

156. See *supra* note 59 and accompanying text.

157. Local rent controls have been challenged on other grounds in lower courts, but with little success. See, e.g., *Albigese v. Jersey City*, 127 N.J. Super. 101, 316 A. 2d. 483 (N.J. Super. Ct. App. Div. 1974) (equal protection); *Marshall House Inc. v. Rent Review and Grievance Bd.*, 357 Mass. 709, 260 N.E. 2d. 200 (1970) (*ultra vires* action).

158. 272 U.S. 365 (1926).

159. *Id.* at 394-96.

160. *Id.* at 388.

161. Pulliam, *supra* note 86, at 464. The latest comprehensive federal study on housing was critical of the *Euclid* decision for its "near-abdication of any meaningful judicial review . . . ." See, The Report of The President's Commission On Housing, *supra* note 3, at 201.

sating the owner because the governmental action was brought about by the owner through the use of the owner's property so as to encroach on the rights of others.<sup>162</sup> Takings for any non-nuisance purposes, however, required compensating the owner so that the burden of the taking could be shifted from the owner to the public for whose benefit the property was confiscated.<sup>163</sup> Under this enlarged definition of nuisance articulated in *Euclid*, the court found no compensable taking despite evidence of a three-fourths reduction in the value of the property of the landowner due to the impact of the ordinance.<sup>164</sup> The increasing virulence of local land use regulation in recent years has created an ever expanding ledger of uncompensable historic preservation, growth control, aesthetic, and environmental public takings at the expense of individual economic and property rights.<sup>165</sup> Pressure for the Supreme Court to intervene has been stepped up in light of recent evidence that the Court may be interested in examining the taking clause of the fifth amendment as a guarantee "designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole . . . ."<sup>166</sup> With the increasingly intrusive exercise of local police power in the name of land use regulation, the plea for judicial intervention under the taking clause and other constitutional guarantees will continue.

Against this orientation of the Supreme Court toward the constitutional conflict between property rights and the police power, the specific issues raised by the impact of contemporary rent control regimes in

162. For background on the evolution of the taking concept in this country, see generally, Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, n.1 (cited in Pulliam, *supra*, note 86 at 450).

163. A principle recognized in western legal theory and traceable to Roman law. See Comment, *supra* note 162, at 854 n.1. (cited in Pulliam, *supra* note 86, at 450.)

164. See also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (statute reduced owner's value by 87.5%).

165. An academic offensive against what is perceived as the growing abuse of police powers in regulating land use is also in evidence. See Delogu, *supra* note 86 at 261-65 (representative literature is noted and referenced).

166. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting). Justice Brennan, joined by three other Justices, argued further, "When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large . . . . The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken." *Id.* at 656-57. The Court has since taken other cases in which they could address this issue but which have eventually been diverted on a technicality. See, e.g., *Williamson County v. Hamilton Bank*, (S. Ct. No. 84-4, 1985). See generally, Michelman, *Property, Utility and Fairness*, 80 HARV. L. REV. 1165 (1967).

the context of a constitutional 'taking' can be examined. The Court dealt with an early version of rent and eviction controls imposed during World War I in *Block v. Hirsh*.<sup>167</sup> Challenged on the grounds that the law deprived the owners of "the power of profiting from the sudden influx of people to Washington . . .," the Court ruled that "restricting property rights in land to a certain extent without compensation" was justified under the "public exigency" of the wartime housing scarcity.<sup>168</sup> The emphasis Justice Holmes placed on the fact that the controls were merely temporary,<sup>169</sup> possibly allows the decision to be read as standing for the unconstitutionality of permanent restrictions without termination provisions. The permanent restriction argument can be advanced with regard to both rent and eviction controls. Tenant eviction protections coincidental to rent control impose severe restrictions on the rental housing owner for an unspecified duration. The recent ruling of the court in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>170</sup> seems to have lent impetus to this argument. In *Loretto*, the court found as compensable, the installation of cable television lines in the owner's building, because the action entailed the "permanent occupation of the landlords' property by a third party."<sup>171</sup> By analogy, the tenant's tenured occupation of the owner's premises under eviction restrictions creates a similar situation.<sup>172</sup> The unconstitutionality of a rent control statute *in toto* for lack of a specific termination date, also has been advanced with some success.<sup>173</sup>

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167. 256 U.S. 135 (1921). In *Nash*, the California Supreme Court majority solicitously decided there was no compensable taking under the decisional line established by the United States Supreme Court in *Penn. Central Transp. Co. v. New York City*, 538 U.S. 104 (1978), and *Maher v. City of New Orleans*, 426 U.S. 905 (1976). See *Nash*, 37 Cal. 3d 97, 103-04, Cal. Rptr. 285, 289, 688 P.2d 894, 898 (1984).

168. *Id.* at 156.

169. "The regulation is put and justified only as a temporary measure. 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 (citations omitted).

170. 458 U.S. 419 (1982). Landlord *Loretto* challenged a New York state law designed to prevent gouging of cable television companies by limiting the companies' payment to property owners to no more than one dollar for the installation of television cables on the premises. *Id.* at 420. The argument was made successfully that this intrusion constituted a compensable taking under the fifth amendment. *Id.* at 439.

171. *Id.* at 434. The Court excluded permanent intrusions associated with building codes, mail boxes, etc., a distinction which Justice Blackmun found indistinguishable from the regulation at issue. *Id.* at 438 (Blackmun, J. dissenting).

172. Support for this proposition has been evidenced occasionally in the lower courts. See *Palm Beach Mobile Homes v. Strong*, 300 So.2d 881 (Fla. 1974) (striking eviction limitation for mobile home parks). *Kennedy v. City of Seattle*, 94 Wash. 2d 376, 617 P.2d 713 (1980) (striking eviction limitation for moorage owners).

173. *Business Regulation v. National Manufactured Housing Federation*, 370 So. 2d 1132 (Fla. 1979); *Rivera v. R. Cobian Cinea & Co.*, 181 F.2d 974, 974 n.11 (1950). See *contra*, *Newell v. Rent Board of Peabody*, 378 Mass. 443, 392 N.E. 2d 837 (1979).

The right to exclude is another derivative property right that a permanent restriction denies the landowner. The Supreme Court has recently deemed the denial of the right to exclude as a compensable taking in *Kaiser Aetna v. U.S.*<sup>174</sup> In *Kaiser Aetna* the right to exclude arose in the context of an attempt by the government to impose a permanent, uncompensated public easement on the property of a private marina. The subsequent *Loretto* holding, utilizing the exclusion right of landowners to buttress the decision, injected new life and force into the concept.<sup>175</sup> By establishing that eviction or demolition controls, or both in combination, encroach on the zone within which the landlord may otherwise lawfully exclude tenants, the controls are susceptible to a 'taking' challenge.<sup>176</sup>

From the early applications of the power of eminent domain to acquire milldams and stagecoach roads,<sup>177</sup> the concept of a physical intrusion also has been important in fifth amendment takings analysis. The continuing vitality of this notion is evident in the reliance the Court placed on the physical infringement on the owner's property in both *Kaiser Aetna*<sup>178</sup> and *Loretto*.<sup>179</sup> In a rent control context, rent, eviction, and removal controls, either separately or in combination, can in effect constitute a permanent physical occupation of property. This view has found support in the lower courts and appears to have at least one adherent on the present Supreme Court as well. The Court recently dismissed an appeal in *Fresh Pond Shopping Center, Inc. v. Callahan*<sup>180</sup> wherein the Massachusetts courts had declined to overturn a refusal of the local Rent Control Board to grant the owner of an apartment building a permit for removal. In dissent, however, Justice Rehnquist seemed prepared to find a constitutionally impermissible taking because the impact of the rent control provisions effected "a physical occupation of the appellants' property."<sup>181</sup> Although not technically at issue, the same argument was advanced in *Nash*.<sup>182</sup>

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174. 444 U.S. 164, 179-80 (1979). "[The] 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id.*

175. *Accord*, Judson, *supra* note 82, at 212.

176. Respondent's Brief at 25-26, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

177. 2A C. NICHOLS, EMINENT DOMAIN §7.1 at 617 (rev. 3d ed. J. Sackman & P. Rohan 1980).

178. 444 U.S. at 180 ("physical invasion").

179. 458 U.S. at 432 ("physical occupation").

180. 104 S. Ct. 218 (1983).

181. *Id.*

182. Brief *Amicus Curiae* of Terminal Plaza Corporation at 16-19, *Nash v. City of Santa*

The final taking theory confronting rent control provisions centers on the right of an owner to property alienation, a principle long protected and encouraged at common law. The involuntary, devaluing and incapacitating effect of controls on the property of the landowner also entails an infringement on the owner's ability to transfer and/or change the use of property.

The latest generation of rent controls exerts such total dominance over private property interests that the owner and his property become hostage to the regulation. Restrictions on the discretionary control of an owner over property, arguably can constitute compensable takings to the extent that the cumulative effect of the controls "impresses the owner and his property into the mold of a public utility."<sup>183</sup> The controls operate as a ban on alienation and therefore effect a *pro tanto* taking.<sup>184</sup> To the extent that controls effectively deny the landlord other specific property-related rights, compensable takings also could be involved. Denial of the landlord's right to evict for personal use,<sup>185</sup> the right to evict in order to rehabilitate the premises,<sup>186</sup> and the right to evict and demolish in order to go out of business<sup>187</sup> or pursue another use,<sup>188</sup> are examples that have received some attention in this category.

The instinctive rebuttal to the ban-on-alienation objection to rent controls, is that the regulation does not constitute an absolute ban, and that the owner ultimately retains the option to sell. The ruling of the Supreme Court in *Bowles v. Willingham*,<sup>189</sup> however, can be read to require that rent control schemes including a specific opt-out provision for owners in order to escape taking clause applicability.<sup>190</sup> One of the burdens this rebuttal must bear is the often involuntary aspect of the transfer of property in a rent control environment.

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Monica, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984). Answered in Appellants' Reply Brief to *Amicus*. . . . at 31-34, *Nash v. City of Santa Monica*, 37 Cal. 3d 96, 207 Cal. Rptr. 285, 688 P.2d 894 (1984). The difficulty in interpreting the precedential value of this case was signalled in that the case was cited both as support for Nash in Mosk's dissenting opinion and support against him in the disposition of the case by the California Supreme Court. See *Nash*, 37 Cal. 3d 96, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

183. *Id.* 207 Cal. Rptr. at 296, 688 P.2d.

184. *Mayo v. Boston Rent Control Administrator*, 365 Mass. 575, 585-86, 314 N.E. 2d 118, 125 (1974).

185. *Rivera*, 181 F.2d 978.

186. *Mayo*, 314 N.E. 2d 125.

187. *Nash*, 37 Cal. 3d 96, 113, 207 Cal. Rptr. 285, 296, 688 P.2d 894, 905 (1984).

188. *Fresh Pond Shopping Center*, 104 S. Ct. 218 (1983).

189. 321 U.S. 503 (1944).

190. In upholding the rent control provision of the Emergency Price Control Act of 1942, the Court noted that the statute provided that the Act shall not be construed "to require any person to sell any commodity or to offer any accommodations for rent." *Id.* at 517.

Whether to avoid the generally onerous impact of controls, or to escape an entrapment such as Jerome Nash experienced under the Santa Monica law, the option to sell may well be nonvolitional. For government to force a transfer of property under these circumstances to a third party is no less a compensable taking than if the government were to condemn the property and take title itself.<sup>191</sup> Additionally, the government's sell option rebuttal can be questioned on the grounds that it is advanced merely as a device to avoid what would otherwise comprise an unconstitutional taking through rent control.<sup>192</sup> As the *Nash* litigation suggests, through the impact of rent control laws, the government can place the landlord in the untenable position of having to surrender one constitutional right to retain the ownership of property in order to exercise another constitutional right to go out of business.<sup>193</sup>

### C. *The Involuntary Servitude Factor*

The increasing restrictiveness of contemporary rent control regimes and the changing nature of the landlord business in response to the accumulation of recent tenant legal protections and benefits also have caused thirteenth amendment concerns. The coercive nature of controls or as they impact the landlord has caused thirteenth amendment arguments to be joined with the due process and taking theories just examined. Adding the involuntary aspect of the servitude concept lends force and further credence to the arguments. Beyond this supporting role, however, the involuntary servitude provision of the thirteenth amendment alone has yet to be accepted as a landlord protection in a rent control context. From its initial, relatively narrow constitutional proscription against involuntary servitude<sup>194</sup> in the context of

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191. Brief *Amicus Curiae* of Pacific Legal Foundation In Support of Respondent at 16, *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984).

192. *Midhiff v. Tom*, 702 F. 2d 788, 804 (9th Cir. 1983) (cited in *Nash*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984)).

193. Jurisdictional Statement, *supra* note 142 at 10. "Surely, where a government cannot directly impose either of two burdens on its citizens, it cannot cure the defects by compelling its citizens to choose between the two constitutional deprivations." *Nash*, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894 (1984). Justice Mosk characterized Santa Monica's argument that controls do not constitute a taking because the landlord can always sell, as contending "that the property owner has a duty to relieve the municipality of its invalid order by dispossessing himself of his property." *Id.* at 113, 207 Cal. Rptr. at 296, 688 P.2d at 905.

194. U.S. CONST. amend. XVIII. In pertinent part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . . ." *Id.*

peonage compelling an individual to work in order to pay off a debt,<sup>195</sup> the concept has found surprisingly little applicability in any modern idiom.<sup>196</sup> The relatively infrequent utilization by the courts of this guarantee has left an uncertain legacy as to its present-day reach.

As to the impact of rent control provisions on the landlord, the Supreme Court has only provided a few clues as to the role the involuntary servitude limitation might play. In *Marcus Brown Co. v. Feldman*,<sup>197</sup> the Court construed certain provisions of the World War I rent controls by noting that "traditions of our law" oppose compelling one individual to perform strictly personal services for the benefit of another. But the services provided by the landlord, the Court opined, "are so far from personal that they constitute the universal and necessary incidents of modern apartment houses . . . ."<sup>198</sup> Clearly the Court's latter observation reflects the turn-of-the-century attitude which prevailed prior to the onset of the tenants' rights revolution.<sup>199</sup> More recently, the concern expressed by the Court regarding the necessity of an escape for landowners under the World War II controls in a subsequent ruling of *Bowles v. Willingham* can be read as a sensitivity to thirteenth amendment proscriptions.<sup>200</sup> In particular, the Court noted the importance of a provision in the statute in question stating that "nothing in this Act shall be construed to require any person . . . to offer any accommodation for rent."<sup>201</sup>

Challenging the Santa Monica ordinance, *Amicus* advanced the argument on behalf of Nash that in denying the landlord the right to go out of business, the statute stood in violation of the Supreme Court dictate in *Textile Workers Union of America v. Darlington Manufacturing Co.*<sup>202</sup> This case, commonly read for the recognition of the right to go out of business entirely within the confines of the National

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195. *United States v. Reynolds*, 235 U.S. 133 (1914); *Pollack v. Williams*, 322 U.S. 4 (1944); *Bailey v. Alabama*, 219 U.S. 219 (1911).

196. The opposite is true of the other evil proscribed by the amendment, *i.e.*, slavery. *See, e.g.*, *TRIBE, supra*, note 128 at 258-61.

197. 256 U.S. 170 (1921).

198. *Id.* at 199.

199. *See supra* notes 97-105 and accompanying text.

200. *Bowles v. Willingham*, 321 U.S. 503 (1944).

201. *Id.* at 517 (emphasis added). In his *Nash* dissent, Justice Mosk was of the opinion that this statement placed the Santa Monica controls in conflict with the *Bowles* decision in that "the landlord is required to maintain his property as 'accommodations for rent' and to offer the rentals under the terms ordered by the city. [The landlord] is not permitted to opt out." *Nash*, 37 Cal. 3d 97, 113, 207 Cal. Rptr. 285, 296, 688 P.2d 894, 905 (1984).

202. 380 U.S. 263 (1964) (cited in *Amicus* Brief of California Housing Council In Support Of Respondent at 3-4, *Nash v. City of Santa Monica*, 37 Cal. 3d 96, 207 Cal. Rptr 285, 688 P.2d 894).

Labor Relations Act,<sup>203</sup> also carries involuntary servitude overtones. The applicability of the *Darlington* principle to the owner of rental housing subsequently has been endorsed in at least one federal court.<sup>204</sup> As noted earlier, this principle was pivotal to the dissent's analysis in the California Supreme Court ruling on the Nash challenge to Santa Monica rent control provisions.<sup>205</sup> Likewise, the unanimous Appeals Court below seemed prepared to invoke the thirteenth amendment to protect the "undefined yet real notion of freedom which is violated by the idea of compelling an individual to work in a given business."<sup>206</sup>

Thirteenth amendment protection for landlords under these circumstances would have to be confined to those instances of inextricable entanglement with the controls. Protection would not extend to landlords seeking to avoid contractual obligation voluntarily assumed, duties and liabilities of landlording while accepting the benefits, or provisions of the rent control law without constitutional justification.<sup>207</sup> Thirteenth amendment protection should extend to all other instances where the controls force landlords to remain in the rental housing business against their will. The tenant rights movement over the last fifty years has added a large personal service component to the rental housing business. Through the device of rent control laws, local government is conscripting the property and services of the private sector to provide public housing. Landowners, in need of a mechanism by which this abuse of police power can be tempered, should not be dissuaded from probing the involuntary servitude clause of the thirteenth amendment for help.

203. Justice Harlan for a unanimous court, wrote: "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent . . . . We find neither." *Textile Workers*, 380 U.S. at 270.

204. *Robinson v. Diamond Housing Corp.*, 463 F. 2d 853 (D.C. Cir. 1972). While holding that a landlord could not undertake a partial termination of business by demolishing one unit to effect a retaliatory eviction, Chief Justice Wright writing for the majority countered that: "None of this is to say that the landlord may not go out of business entirely if he wishes to do so, or that the jury is authorized to inspect his motives if he chooses to commit economic harakiri. There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." *Id.* at 867.

205. *Nash*, 37 Cal. 3d at 112, 207 Cal. Rptr. at 295, 688 P.2d at 904 (1984) (Mosk, J., dissenting).

206. *Nash*, 191 Cal. Rptr. 717, 720 (1983). "This freedom is protected from the most egregious infringements by the Thirteenth Amendment of the United States Constitution. Yet the degree to which the individual is restricted need not rise to the level of involuntary servitude before it offends this notion of personal liberty." *Id.* at 720.

207. This line of argument is developed in *Amicus* Brief of California Housing Council at 6-7 and 13-15.



### CONCLUSION

Today's local rent control initiatives aimed at the problem of a low-income housing shortage will not be listed among the crowning achievements of American municipal legislation. Often a product of majoritarian autocracy and special interest zeal, contemporary rent control schemes read like the tenant's revenge. The unmistakable signature of these enactments is their conspicuous lack of evenhandedness and restraint.

Crudely drawn and overreaching, modern housing control devices can intrude deeply into the personal freedom and individual autonomy of an effected landowner. These provisions, which reap counterproductive economic and social side-effects, continue in force seemingly uniform as to their impact. The landlord-tenant relationship is gutted beyond recognition by the statutory delegation of rent and eviction decisions to a public agency for implementation called for in the typical state-of-the-art statutes. The end result of a myriad of intrusions into the operation and markets of the low-income rental housing industry is to remove the private purpose of profit-seeking from the enterprise and substitute the public purpose of providing low cost rental housing. In combination, the trilogy of rent, eviction, and demolition regulation contained in the contemporary rent control regimes involuntarily convert private providers of rental housing into captive public utilities.

To date, the excesses of local housing controls have found sanctuary under prevailing constitutional analysis.<sup>208</sup> Segments of the fifth, thirteenth, and fourteenth amendments, however, contain the potential ingredients to assist in curbing this form of police power abuse. If the courts are to provide a heightened scrutiny of local housing control initiatives, the analytical vehicle must be found through which the merits of the accumulating case against such controls can be made. Continued local legislative autonomy that has nurtured the epidemic of increasingly restrictive housing control enactments, is merely an invitation to further mischief.

Proponents of rent controls, however, are now on the defensive. In defense of aggressive new controls, the courts are urged to cubbyhole landowner complaints by continuing to apply only a minimal judicial scrutiny. Such controls merely regulate the use of land, the

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208. The states of Arizona and Colorado have taken matters into their own hands by legislatively denying localities the power to enact or enforce rent control ordinances. See THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING, *supra* note 2, at 92.

rent control proponents argue, and therefore, the effect on the owner is at best economic and speculative. This anachronism unfortunately continues to provide an easy way out for those courts so disposed, but it also obscures the unpleasant realities with which the law must be realigned.

There are a number of specific problems and policy flaws associated with rent controls that can no longer be ignored. Various lines of constitutional analysis, within which these developments might be addressed by the courts, have remained largely unproductive. Yet, in exchange for some dubious tenant benefits in the short run, aggressive rent control regimes continue throughout many areas of the country, and continue to exact an enormous toll on the applicable housing market, the local economy, the landowner, and ironically the tenant ultimately. The municipalities themselves can be expected to continue to fight for the adoption and retention of rent controls because it is in their institutional interest to do so. Whereas such controls may be intrusive and costly to the economic and social life of the community, they are terribly convenient to the government. By transferring the function of providing low cost rental housing to the private sector, rent control schemes relieve the local government of establishing its own program and the costs, risks, and potential liability this would entail. Rent control laws must be recognized for what they are, i.e., the unwarranted, unenlightened, and injurious application of governmental authority. The protections and guarantees present in the constitution should be utilized to curb these excesses.

