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Rent Control and the Constitutional Ghosts and Goblins of Laissez-Faire Past: Pennell v. City of San Jose

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RENT CONTROL AND THE CONSTITUTIONAL GHOSTS AND GOBLINS OF LAISSEZ-FAIRE PAST: *Pennell v. City of San Jose,* 108 S. Ct. 849 (interim ed. 1988).

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I. INTRODUCTION

If one were told that rent control in ordinary peacetime might be unconstitutional, he would probably want to pinch himself to find out whether he was awake or dreaming. After all, New York City has had ordinary peacetime rent control for almost the last half century,[1] since it decided to continue the federal rent control program that was instituted during World War II.[2] Moreover, approximately ten percent of all private rental housing units in the nation were subject to rent control in 1983.[3] Consequently, it would seem unlikely that anything which has been around for so long and which is so widespread could be unconstitutional.

There was a time, of course, when the nation had a laissez-faire regime of constitutional law and during that period policies concerning economic regulation were very different.[4] At that time the market gov-

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1. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 502–03 (1980); Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade,* 35 RUTGERS L. REV. 723, 727 (1983); Comment, *Residential Rent Control in New York City,* 3 COLUM. J.L. & SOC. PROBS. 30, 32–33 (1967).

2. Comment, *supra* note 1, at 32–33. During World War II the Office of Price Administration implemented rent control polices pursuant to the Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 1–2, 56 Stat. 23, 24–26, *repealed by* Act of June 30, 1952, Pub. L. No. 82-429, § 201(a)–(b), 66 Stat. 296, 306–07. Although some cities continued to practice rent control policies in the decade following the end of the war, by 1956 New York City was the only remaining municipality in the continental United States which followed this regulatory practice. *See* Kress, Dunlap & Lane, Ltd. v. Downing, 193 F. Supp. 874, 878–79 (D.V.I. 1961) (noting the limited number of rent control ordinances that were still in effect as of 1956). For a general discussion of the history of rent control policies in New York City, see M. STEGMAN, THE DYNAMICS OF RENTAL HOUSING IN NEW YORK CITY 11 (1982); G. STERNLIEB, OFFICE OF RENT CONTROL, DEPARTMENT OF RENT AND HOUSING MAINTENANCE NEW YORK CITY HOUSING AND DEVELOPMENT ADMINISTRATION: THE URBAN HOUSING DILEMMA (1972); Cohen, *Rent Control After World War I—Recollections,* 21 N.Y.U. L. REV. 267, 268 (1946).

3. Baar, *supra* note 1, at 725 n.1 (noting that "approximately 3 million of the 26 million residential rental units in the U.S. are subject to rent controls").

4. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-4, at 570–74 (1988). Professor Tribe observes that during the "*Lochner* era" the Justices of the Supreme Court drew heavily upon the social and economic theories of Herbert Spencer, which advocated social Darwinism, and also

erned the nation's economic affairs and fixed most wages,[5] prices,[6] and rents.[7] Naturally, ordinary peacetime rent control was unconstitutional under this laissez-faire regime. A very active, centralized federal government emerged from the New Deal and World War II to replace this regime of laissez-faire with an extensively regulated welfare state. With laissez-faire gone, it might appear that the constitutional prohibitions against rent control should have disappeared as well. So it would seem, at least, to one who believes that things ought to be what they appear to be. Given the United States Supreme Court's recent holding in *Pennell v. City of San Jose*,[8] things may not be what they appear to be.

In *Pennell*, Justice Scalia was joined by Justice O'Connor in a dissenting opinion which seems to imply that ordinary peacetime rent control is unconstitutional.[9] Prior to the *Pennell* decision and before he became Chief Justice, Justice Rehnquist took a position that is in general agreement with the two dissenting justices in *Pennell*.[10] It is also

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upon "the conservative legal theories of Roscoe Pound, Thomas Cooley, and Christopher Tiedman, [which] advocat[ed] protection for individual freedom of contract and property through limitations on the reach of the police power." *Id.* at 570–71 (citations omitted).

5. *E.g.*, Connally v. General Constr. Co., 269 U.S. 385, 388 (1926) (holding that the state could not set a mandatory wage according to similar wages in a given locality); Adkins v. Children's Hosp., 261 U.S. 525, 557–59 (1923) (holding that the District of Columbia's minimum wage requirement for women was unconstitutional), *overruled in* West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

6. *E.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 239 (1929) (holding that a state cannot regulate gasoline prices because such regulation would improperly deprive sellers of property without due process), *overruled in* Olsen v. Nebraska, 313 U.S. 236 (1948); Tyson & Bros. v. Banton, 273 U.S. 418, 421 (1927) (holding that a state cannot regulate the resale price of theater tickets because doing so would constitute a violation of the owner's due process rights under the fourteenth amendment), *overruled in* Olsen v. Nebraska, 313 U.S. 236 (1948).

7. *See, e.g.*, Chastleton Corp. v. Sinclair, 264 U.S. 543, 546–48 (1924) (holding that if the emergency conditions which required the promulgation of a rent control act for the District of Columbia were no longer in existence, the act was unconstitutional); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (holding that a Pennsylvania statute which severely regulated the mining rights of the appellant coal owner was an abuse of the state's police power and a violation of the appellant's rights under the contract clause of the Constitution and the due process clause of the fourteenth amendment); *see also infra* notes 105–14 and accompanying text.

8. 108 S. Ct. 849 (interim ed. 1988).

9. *Id.* at 859 (Scalia, J., dissenting).

10. *See* Fresh Pond Shopping Serv., Inc. v. Callahan, 464 U.S. 875 (1983) (Rehnquist, J., dissenting). In *Fresh Pond*, Justice Rehnquist rejected the Court's summary affirmance of the validity of a particular rent control regulation, maintaining that the regulation in question constituted a violation of the takings clause vis-a-vis the fifth and fourteenth amendments. In discussing the unconstitutionality of the regulation, Justice Rehnquist noted:

> In previous decisions we have recognized that property ownership carries with it a bundle of rights, including the right " 'to possess, use, and dispose of it.' " Though no issue is raised here that the rent paid by the tenant is insufficient, that fact does not end the inquiry. What has taken place is a transfer of control over the reversionary interest retained by appellant. This power to exclude is one of the most treasured strands in an owner's

possible that a fourth justice, namely former Justice Powell, at least had doubts about the constitutionality of peacetime rent control.[11] In any event, three justices who were on the Court when *Pennell* was decided are unfavorably disposed towards the validity of peacetime rent control. What was three may very recently have become four with the addition of Justice Kennedy to the Court. Hence, one swing vote could be all that stands in the way of the Court's scrapping ordinary peacetime rent control and, to an extent, returning the nation to its almost forgotten laissez-faire regime of constitutional law.

This possibility is enhanced by what the *Pennell* decision actually held. Although Chief Justice Rehnquist appears to disfavor peacetime rent control, he did not join the two dissenting justices in *Pennell*. Instead, he wrote the opinion for the Court. Justice Rehnquist's opinion held that it would be premature to consider the constitutional challenge to the tenant hardship provision in San Jose's Rental Dispute Mediation and Arbitration Ordinance[12] (Rent Control Ordinance) based on the factual record before the Court.[13] Yet, despite the abstract nature of the constitutional challenge presented by the appellants, the dissent-

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> bundle of property rights[,] [because] even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger would ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." Nothing in the rent control provisions requires the Board to compensate appellant for the loss of control over the use of its property.

Id. at 878 (citations omitted) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982)); *see also infra* notes 119–29 and accompanying text.

11. Justice Powell was on the Court when it granted certiorari for the *Pennell* case on March 2, 1987. Pennell v. City of San Jose, 42 Cal. 3d 365, 721 P.2d 1111, 228 Cal. Rptr. 726 (1986), *cert. granted*, 107 S. Ct. 1346 (1987). However, he retired in June of 1987, *see* 107 S. Ct. 675 (1987), without participating in the actual decision. The *Pennell* case was not decided until February 24, 1988. *Pennell*, 108 S. Ct. at 849.

During the 1986 term, Justice Powell was one of the four dissenting justices in *Keystone Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1253 (1987), which—in effect—overruled *Mahon*, 260 U.S. at 393. In *Mahon*, the Court held that a particular mining regulation constituted a violation of the contract clause of the Constitution and the due process clause of the fourteenth amendment. *Id.* at 413. In support of this proposition, the Court noted:

> In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Id. at 416 (citation omitted). Much of the reasoning in the *Mahon* decision would be equally applicable to the constitutionality of ordinary peacetime rent control. Thus, it could be argued that by dissenting in *Keystone* Justice Powell sought to preserve the full vitality of the *Mahon* reasoning with respect to the unconstitutionality of rent control. The same may be said for Chief Justice Rehnquist, Justice Scalia, and Justice O'Connor who also dissented in *Keystone*. *See also infra* notes 152–65 and accompanying text.

12. SAN JOSE, CAL., MUNICIPAL ORDINANCE 19696, § 5701–5703 (1980).

13. *Pennell*, 108 S. Ct. at 858–59.

ing justices maintained that the tenant hardship provision of San Jose's Rent Control Ordinance should be invalidated.[14] The reasoning behind their argument for invalidating the hardship provision would appear to be equally applicable to almost all present peacetime rent regulations. In essence, then, the *Pennell* Court's ruling that the question of the validity of the tenant hardship provision was too abstract to decide was really a decision to put the constitutionality of rent control on hold until a more concrete case raises the issue again.

The *Pennell* decision suggests the possibility of a constitutional construction that would commit the setting of rents to laissez-faire and the marketplace. A case that offers to impose such a laissez-faire system upon the nation once more, against the wishes of the people and their elected representatives, deserves careful analysis. The following article will first consider the facts of *Pennell* and then offer an explanation for why the Supreme Court has chosen to question the constitutionality of peacetime rent control. This explanation will include arguments from the briefs of the parties as well as a consideration of the majority opinion and the dissenting opinion in *Pennell*. Afterwards, the Supreme Court's precedents that bear upon peacetime rent control will be examined. Finally, the article will discuss some allusions which have been made in recent Supreme Court opinions regarding the future viability of the ghosts and goblins of a laissez-faire system that was laid to rest long ago.

II. FACTS AND HOLDING

The rapidly growing city of San Jose, California is located in the heart of the Silicon Valley and has a population of approximately 720,000 people.[15] In the latter part of the 1970s the citizens of San Jose were faced with a growing shortage of housing, soaring inflation rates, and substantially increased costs for new housing.[16] Many city council members were concerned that this scenario would encourage abusive rent-pricing practices by landlords. Thus, in 1979 the city enacted a comprehensive Rent Control Ordinance which was designed to address this fear.[17] The Rent Control Ordinance, however, undertook to do more than simply hold rents at a uniform level to prevent them from becoming excessive. It also contained a tenant hardship provision that allowed the city to deny certain discretionary rent increases when such increases would cause "unreasonably severe financial or economic hard-

14. *Id.* at 861–63.

15. Brief for Appellees at 10, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (No. 86-753).

16. *Id.*

17. *Id.*

ship" to individual tenants.[18]

The landlords of San Jose did not contest the constitutionality of the uniform rate provisions of the city's Rent Control Ordinance.[19] Instead, they attacked the tenant hardship provision, claiming that it was unconstitutional for the city to mandate lower rents for hardship tenants when the legislated rent for ordinary tenants was set at a reasonable level.[20]

With regard to the interests of San Jose landlords, the city's Rent Control Ordinance is by no means penurious. Under the Ordinance a landlord may increase rents up to eight percent, annually, without being subject to any kind of review.[21] Increases in excess of eight percent are subject to challenge by the affected tenant, but under certain conditions the landlord is specifically entitled to such increases. First, a landlord has a right to an increase in excess of eight percent where the additional increment is comprised of a five percent increase in the monthly rent plus "pass-through" costs for capital improvements, maintenance, operation, or rehabilitation efforts.[22] Second, landlords who face increased costs on servicing the debt on their property may also institute rent increases in excess of eight percent.[23] Third, the ordi-

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18. SAN JOSE, CAL., MUNICIPAL ORDINANCE 19696, § 5703.29.

19. Pennell v. City of San Jose, 108 S. Ct. 849, 857 (interim ed. 1988).

20. *Id.* at 856.

21. SAN JOSE, CAL., MUNICIPAL ORDINANCE 19696, § 5703.2. This section of the Rent Control Ordinance provides:

> Increases Subject to Review. Except as hereinafter provided, any rent increase or combination of increases occurring after March 31, 1979, and prior to the effective date of this Ordinance, and any increase after the effective date of this Ordinance, which taken together with any increase which took effect in the twelve (12) month period immediately preceding such increase, exceeds an aggregate of eight percent (8%) shall be subject to review under the Hearing Process.

22. *Id.* § 5703.28(a). This subsection states:

> Increases Deemed Reasonable. Where the amount of the proposed rental increase consists only of passing through one or more of the following: (i) costs of capital improvements, (ii) increased costs of maintenance and operation, or (iii) costs of rehabilitation; plus no more than five percent (5%) of the monthly rent, they shall be deemed reasonable and the Hearing Officer shall allow the entire rental increase provided that:
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> (1) cost figures have been established to his reasonable satisfaction;
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> (2) the costs of capital improvements if any are averaged on a per unit basis and are amortized over a period not less than sixty (60) months;
>
> (3) the costs of rehabilitation if any are averaged on a per unit basis and are amortized over a period not less than thirty-six (36) months;
>
> (4) each of the costs proposed to be passed through to tenants, whether it be costs of capital improvements, increased costs of operation and maintenance, or costs of rehabilitation, bears a reasonable relationship to the purposes for which such costs were incurred and the value of the real property to which they are applied.

23. *Id.* § 5703.28(b). This subsection provides:

> When Costs of Debt Service Deemed to be Reasonable. Increased costs of debt service shall be deemed reasonable and allowed by the Hearing Officer where the aggregate

nance provides that other discretionary increases may be allowed by the hearing officer based upon a consideration of the rental history and physical condition of the premises, increases or decreases in housing services, the market value of rents for similar property, and other relevant financial information submitted by the landlord.[24]

It should be noted, though, that under the third option the Rent Control Ordinance also requires the hearing officer to consider whether the discretionary rent increase would cause a financial or economic hardship for the affected tenant.[25] The tenant bears the burden of prov-

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amount of debt from whence they arise constitutes no more than seventy percent (70%) of the value of the property as established by a lender's appraisal, and no more than eighty percent (80%) of the cost of such debt service is being passed through to the tenants. Where no lender's appraisal is available, the Hearing Officer may secure such appraisal to be paid for by the landlord as a cost of maintenance and operation.

It would appear that the California Supreme Court understood the Rent Control Ordinance to require mandatory increases *either* for certain debt service costs *or* for specified pass through costs, but not for both. Pennell v. City of San Jose, 42 Cal. 3d 365, 368, 721 P.2d 1111, 1113, 228 Cal. Rptr. 726, 728 (1986). However, the sole dissenting justice on the California Court of Appeals (the appellate court found the Rent Control Ordinance unconstitutional) read the provisions of the Ordinance to require mandatory increases for both debt service costs and pass-through costs. Pennell v. City of San Jose, 154 Cal. App. 3d 1019, ___, 201 Cal. Rptr. 728, 732–34 (1984). The City of San Jose itself took the position that the mandatory increases applied to both debt service costs and pass-through costs. Brief for Appellees at 3, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (86-753).

24. SAN JOSE, CAL., MUNICIPAL ORDINANCE 19696, § 5703.28(c). This subsection states:

Standards Applicable to Rent Increases Which Exceed the Foregoing. When the amount of any rent increase or portion thereof exceeds any of the foregoing standards under subsections (a) or (b) of this Section, the Hearing Officer shall determine what is reasonable under the circumstances taking into account any of the following factors on which he has received information:

(1) In the case of increased costs of debt service due to a sale or refinancing of the rental units or the building or property of which the units are a part within twelve (12) months of the increase: (i) the arms length nature of the transaction, (ii) the landlord's rate of return on the investment, (iii) the frequency of past resale or refinances, and (iv) the extent to which prior rental increases have made provisions for appreciation of asset value;

(2) the rental history of the unit or the complex of which it is a part, including: (i) the presence or absence of past increases; (ii) the frequency of past rent increases, (iii) the landlord's response to Proposition 13 savings, and (iv) the occupancy rate of the complex in comparison to comparable units in the same general area;

(3) the physical condition of the rental unit or complex of which it is a part, including the quantity and quality of maintenance and repairs performed during the last twelve (12) months;

(4) any increases or reduction of housing services since the last rental increase before the effective date of this Ordinance;

(5) other financial information which the landlord is willing to provide;

(6) existing market value of rents for units similarly situated;

(7) the hardship to a tenant as provided in Section 5703.29.

25. *Id.* § 5703.29. This section provides:

Hardship to Tenants. In the case of a rent increase or any portion thereof which exceeds the standard set in Section 5703.28(a) or (b), then with respect to such excess and whether or not to allow same to be part of the increase allowed under this Chapter, the Hearing

ing such economic hardship, but if a tenant qualifies for federal housing assistance the hearing officer will automatically assume that a rent increase would work a financial or economic hardship upon the tenant.[26] Under the third option of the Rent Control Ordinance, all or part of a discretionary rent increase can be denied by the hearing officer on the grounds of tenant hardship, depending upon what the officer considers to be "reasonable" under the circumstances.[27] At the base of this reasonableness requirement lies an explicit assurance that the landlords of San Jose will receive a fair and reasonable return on their investments.[28]

Finally, there are some clearly delineated exceptions to San Jose's Rent Control Ordinance. The Rent Control Ordinance exempts new housing construction from rent control regulation.[29] It also provides for decontrol of rental units when they become vacant, either voluntarily or for cause.[30] However, landlords are prohibited from declaring a vacancy for the sole purpose of increasing the rent[31] and retaliatory eviction is also forbidden.[32]

Overall, the emphasis of San Jose's Rent Control Ordinance is on protecting the city's existing tenants. The Rent Control Ordinance was designed to protect individuals with fixed or limited incomes, including elderly and disabled tenants.[33] It was also hoped that the Ordinance would prevent, or at least lessen, the expected increase in the number of the homeless accompanying the city's serious housing shortage.[34] With these goals in mind, the tenant hardship provision was in many ways the most significant element of San Jose's Rent Control Ordinance. The landlords evidenced their realization of this fact when they conceded that the general provisions of the Ordinance provided for a fair return on their property and challenged only the constitutionality

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Officer shall consider the economic and financial hardship imposed on the present tenant or tenants of the unit or units to which such increases apply. If, on balance, the Hearing Officer determines that the proposed increase constitutes an unreasonably severe financial or economic hardship on a particular tenant, he may order that the excess of the increase which is subject to consideration under subparagraph (c) of Section 5703.28, or any portion thereof, be disallowed.

26. *Id.*
27. *Id.*
28. *Id.* § 5703.28.
29. *Id.* § 5703.3(a).
30. *Id.* § 5703.3(b)(1).
31. *Id.* § 5703.3(b)(2).
32. *Id.*
33. Pennell v. City of San Jose, 108 S. Ct. 849, 859 n.8 (interim ed. 1988).
34. Brief for Appellees at 16–17, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (86-753).

of the hardship provision.[35] Yet, it is difficult—if not impossible—to challenge such a hardship provision without attacking the validity of the Rent Control Ordinance as a whole. Legislatively regulating the process by which a landlord may increase the amount of rent owed by a hardship tenant is, in essence, a form of rent control. Thus, whatever there is to be said for or against the hardship regulation is likely to be equally applicable to the provisions concerning the regulation of rent for ordinary tenants.

III. THE ARGUMENTS OF THE PARTIES: *Pennell v. City of San Jose*[36]

According to the landlords of San Jose, the city could not constitutionally deny a discretionary rent increase based solely on the grounds of tenant hardship.[37] Although the landlords conceded that the state could exercise its police power to prevent excessive rents, they objected to the denial of rent increases for hardship tenants where the same increases would be permissible under the Rent Control Ordinance[38] if the rental units in question were occupied by ordinary tenants.[39] The landlords maintained that such a denial would compel them to bear the state's burden of subsidizing economically disadvantaged tenants and, thus, constitute a "taking" under the fifth and fourteenth amendments to the United States Constitution.[40]

The city countered this position by invoking the "fair return" principle of public utility rate regulation.[41] Under this principle, the state is permitted to set rates within a zone of reasonableness that is "bounded at one end by the investor['s] interest against confiscation and at the other by the consumer['s] interest against exorbitant rates."[42] The City of San Jose maintained that its Rent Control Ordinance allowed for "pragmatic adjustments within the 'zone of reasonableness' " according to the individual facts and circumstances of each landlord and tenant.[43]

Rate distinctions between users of services have often been permit-

35. Brief for Appellants at 8, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (86-753).

36. 108 S. Ct. 849 (interim ed. 1988).

37. *Id.* at 856.

38. SAN JOSE, CAL., MUNICIPAL ORDINANCE 19696, § 5703.2.

39. *Pennell*, 108 S. Ct. at 856.

40. *Id.*

41. Brief for Appellees at 26–30, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (86-753).

42. Washington Gas Light Co. v. Baker, 188 F.2d 11, 15 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951); *see also* Federal Power Comm'n v. Natural Gas Pipeline Co. of Am., 315 U.S. 575, 585–86 (1942).

43. Brief for Appellees at 27, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (86-753).

ted under the fair return principle. Users of long distance telephone service, for example, once subsidized the rates for users of local service. Similarly, industrial consumers of energy from public utilities frequently pay more than residential consumers.[44] Thus, the city argued that it should be permissible for ordinary tenants in rental units to pay a higher rent than needy tenants in the same units, so long as the rent paid by all tenants provided the landlord with a fair return on his property.[45]

Furthermore, in some situations a landlord with hardship tenants could receive as much rental income as a similarly situated landlord without hardship tenants. This result could manifest itself under two factual scenarios: First, rental incomes would be equal if both ordinary tenants and hardship tenants paid the same rent.[46] Second, the rental income would also be equal if the ordinary tenants of the landlord with hardship tenants paid more rent than the ordinary tenants of the landlord without hardship tenants.[47] Since the purpose behind San Jose's hardship provision is to allow economically disadvantaged tenants some respite from the rental increases to which the ordinary tenant would be subjected, the first factual scenario discussed above would be unlikely to occur. However, the second scenario would be much more likely to occur and in such a situation the ordinary tenants of the landlord with hardship tenants would usually have to pay a higher rent than the ordinary tenants of an identically situated landlord without hardship tenants. Under the second factual scenario, the city could maintain that the landlord with hardship tenants has no legal basis for complaint, since he receives the same overall amount of rental income as an identically situated landlord without hardship tenants.

The city may have recognized the viability of the second factual scenario when it noted in its brief that it would be willing to grant discretionary rent increases beyond the required constitutional minimum, so long as hardship tenants were not always required to pay for the increases.[48] Such increases in the rents of ordinary tenants might provide the landlords of San Jose with an incentive to retain their

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44. Panhandle E. Pipeline Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951) (holding that a state may require an interstate pipeline carrier of gas to obtain a certificate of public convenience and necessity before making direct sales to industrial customers of local utilities where such sales would harm other customers of the local utility); *cf.* A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 344–45 (1969).

45. Brief for Appellees at 27, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (86-753).

46. *See* Property Owners Ass'n v. North Bergen, 74 N.J. 327, 329, 378 A.2d 25, 30 (1977).

47. *See id.*

48. Brief for Appellees at 17, 27, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (86-753).

rental property investments. Moreover, in combination with the city's exemption of new construction from rent control, these increases might encourage new investment in rental housing in the Silicon Valley area. These increases would—in all likelihood—result in differing rental incomes and rents for similarly situated landlords and tenants, but a uniform distribution of hardship tenants could serve to minimize these disparities. In any event, the fair return principle would still be observed by the city.

There are some differences between the rental housing industry and the public utilities industry which may bring into question the applicability of the fair return principle to rent control regulations. To begin, competition exists in the rental housing markets of most areas, whereas public utilities are usually monopolized. Furthermore, most public utilities receive approximately the same rate of return on their investments in the long run, while returns in the rental housing industry vary greatly from one landlord to another. Finally, public utilities regulation attempts to treat all persons within each class of customers equally. A rental housing market in a city with a hardship provision, however, would be likely to have disparate rates of return for the same class of landlords and unequal rents for ordinary tenants living in similar housing.

An acceptance of these disparities, though, may be the only way to provide regulatory aid for marginal hardship tenants. Moreover, a disparity of rents among ordinary tenants of the same class should be not viewed as objectionable by the landlords of San Jose, since tenants of the same class often pay different rents under various existing rent control programs that do not contain hardship provisions.[49] Likewise, the city is also justified in enforcing a tenant hardship provision if it is only required to provide the landlords of San Jose with a minimum constitutional rate of return on their investments. As the city noted in its brief, it would be a strange result if it were constitutional for a city to impose a stringent degree of regulation on all landlords, but unconstitutional for that same city to impose a less intrusive degree of regulation on some landlords.[50]

However, this appeared to be the approximate position of the landlords of San Jose. The landlords did not object to being held to a mini-

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49. *See* Baar, *supra* note 1, at 786. Both cash flow and fair return-on-equity standards permit different rents for comparable housing. *Id.* Furthermore, landlords frequently do not charge the same rent for comparable housing. *Id.* at 732. Rent control may serve to keep the differential rents in place. Brief for Appellants at 9, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (No. 86-753).

50. Brief for Appellees at 30, Pennell v. City of San Jose, 108 S. Ct. 849 (interim ed. 1988) (No. 86-753).

mum constitutional rent; instead, they maintained the state could only set rents at a uniform level for each rental unit regardless of whether such an amount would work a hardship on individual tenants.[51] This stance implies that the landlords of San Jose were really objecting to something more than just lower rents for hardship tenants. Essentially, the landlords' position was that it would be permissible for the city to set a higher affordable rent for ordinary tenants so long as the rent was set at a uniform level and the benefits of the increase went to the landlords, rather than the hardship tenants. Finally, the landlords may have also hoped that in the future it would be possible for them to enjoy more than just the benefits of the high side of a reasonableness zone of rent regulation. This possibility would only materialize, though, if rent control were seldom permissible during peacetime.

Although the landlords of San Jose did not present a direct challenge to the constitutionality of rent control, an extension of the logic behind their position leads one to the conclusion that ordinary rent regulations during peacetime should be regarded as unconstitutional. The landlords maintained that the state's power to regulate rents should be limited to preventing excessive rents by establishing reasonable uniform rates for all tenants.[52] Ironically, under this position a legislative majority would have the power to provide ordinary tenants with some relief from excessive rents, but that same legislative majority would be powerless to alleviate the suffering of hardship tenants who are facing the same problem.[53] Ultimately, this position implies that certain reasons for rent control should be off limits to the state and unavailable to both ordinary and hardship tenants as grounds for regulatory rent relief.

If a state's power to regulate rents was limited to preventing excessive rents, a return to a laissez-faire system of rent control would not be far behind. Since a high rent is not always an excessive one, limiting a state's regulatory authority to only excessive rents would leave the state powerless over all other rents—including high affordable rents for ordinary tenants. The "invisible hand" of the marketplace would be the only mechanism controlling these rents. In the author's opinion, this position is what the landlords of San Jose were truly advocating. Likewise, this position is what the dissenting opinion in *Pennell* was prepared to adopt and what the majority opinion in *Pennell* left open for future consideration.

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51. *Pennell*, 108 S. Ct. at 856–57.

52. *Id.* at 856.

53. *See infra* notes 80–83 and accompanying text (discussing the effects of persistent inflation and of permanent rise in land values).

IV. THE MAJORITY OPINION

A. *The Formal Issues*

In considering the *Pennell v. City of San Jose*[54] Court's holding on the tenant hardship provision, one must keep in mind the previously mentioned possibility of relieving tenant hardship by regulation without reducing the landlord's overall return on his property. If ordinary tenants were to pay extra rent to make up for a lower rent for hardship tenants, a landlord could receive just as much rent as he would have received if he did not have any hardship tenants. It would seem that those in the *Pennell* majority were aware of this possibility when they made their rulings and the dissenting opinion mentioned it as well.[55]

The landlords of San Jose claimed that the city's tenant hardship provision was facially invalid under the takings clause of the fifth amendment, the equal protection clause of the fourteenth amendment, and the due process clauses of the fifth and fourteenth amendments to the United States Constitution.[56] The Court divided the landlords' claims into two groups. In the first group of claims the landlords maintained that the tenant hardship provision was unconstitutional under the equal protection and due process clauses, regardless of whether the provision actually reduced the landlords' rental income.[57] The Court rejected these claims on the merits.[58]

However, the rulings of the Court on these first issues simply concerned the general validity of the "means" and "ends" of the hardship provision. The Court held that the purpose or objective of the provision was not an end which was foreclosed to the regulatory arm of the state by the due process clause.[59] Similarly, the Court held that although San Jose's Rent Control Ordinance resulted in differential treatment

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54. 108 S. Ct. 849 (interim ed. 1988).

55. *See id.* at 864.

56. *Id.* at 853. The pertinent language of the fifth amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The relevant language of the fourteenth amendment reads:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within in its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

57. *Pennell*, 108 S. Ct. at 857. The landlords claimed the the hardship provision rendered the rent control ordinance " 'facially invalid' under the Due Process and Equal Protection Clauses, even though no landlord ever has its rent diminished by as much as one dollar because of the application of this provision." *Id.*

58. *Id.* at 858–59.

59. *Id.* The Court noted the that the "hardship provisions are designed to serve the legitimate purpose of protecting tenants." *Id.* at 859.

between landlords with hardship tenants and landlords without hardship tenants, the hardship provision still bore a rational relationship to the governmental objective behind the Ordinance and, thus, satisfied the minimum rationality requirement of the equal protection clause.[60] Even the dissenting opinion agreed that the tenant hardship provision did not constitute a facial violation of either the due process clause or the equal protection clause.[61]

In ruling upon this first group of claims, the majority opinion stated: "The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established: 'Price control is unconstitutional . . . if [it is] arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . .' "[62] In support of this proposition the Court briefly discussed some illustrative cases. But this discussion seemed limited and guarded in that all of the explanatory cases cited involved regulation of public utilities, and price control during wartime, its immediate aftermath, or during economic depression.[63] The majority opinion in *Pennell* also indicated that a state can constitutionally enact a rent control ordinance in order to prevent abusive rent pricing practices during a housing shortage.[64] Finally, the Court observed in a footnote that "we see no need to reconsider the constitutionality of rent control *per se*."[65] Overall, the majority opinion in *Pennell* could be read as foreshadowing a future holding that rent control is only permissible in extraordinary situations in which the normal processes of the marketplace become inoperable.

In the second group of claims presented to the Court the landlords maintained that the tenant hardship provision constituted a facial violation of the takings clause to the extent that it would reduce a landlord's rental income below what it would have been for an ordinary tenant.[66] Over the protest of the two dissenting justices, the Court declined to adjudicate this claim on the merits.[67] The Court reasoned that it would

60. *Id.*

61. *Id.* at 859 (Scalia, J., dissenting).

62. *Id.* at 857 (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 769–70).

63. *Id.* at 857–59 (citing FCC v. Florida Power Corp., 107 S. Ct. 1107 (interim ed. 1987) (public utilities); FPC v. Texaco Inc., 417 U.S. 380 (1974) (public utilities); Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (public utilities); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) (public utilities); Bowles v. Willingham, 321 U.S. 503 (1944) (rent control during World War II); Nebbia v. New York, 291 U.S. 502 (1934) (price regulation during economic depression); Block v. Hirsh, 256 U.S. 135 (1921) (rent control immediately after World War I)).

64. *Pennell*, 108 S. Ct. at 857.

65. *Id.* at 858 n.6.

66. *Id.* at 857 n.5, 858 n.7.

67. *Id.* at 856–59, 864.

be premature to consider the claim since there was no indication in the record that any landlord had actually been denied a rent increase on the basis of the hardship provision.[68]

B. *The Abstractness Ruling: A Shortage of Facts?*

There was some support in the record for the Court's ruling that the takings claim was too abstract for an adjudication of the issue on the merits. A case will always be labeled as abstract when it requests an advisory ruling for a hypothetical protest against the general applications of a law.[69] However, the takings claim in *Pennell* was not abstract in this sense, because the City of San Jose was going to enforce the tenant hardship provision against the city's landlords.

A case will also be viewed as abstract when additional data is required to clarify the issues.[70] It was in this sense that *Pennell* was held to be abstract.[71] To begin, although the landlords of San Jose *thought* that the hardship provision would reduce their rental income, there was no evidence that any such a reduction had actually occurred. There was also no indication in the record of how large the rent reduction would be if one were to occur. Nor was the number of possible hardship tenants or the nature and extent of the hardship that they might suffer without the provision disclosed. Lastly, there was no evidence in the record regarding whether the concentration of hardship tenants would fall upon a small number of landlords who would be required to assume a noticeably disproportionate burden, or whether, instead, there might be a fairly even distribution of the hardship tenants among a relatively large class of landlords who would be asked to make sacrifices in proportion to their scale of operations. All of this missing information would have been relevant to a determination of the constitutionality of the hardship provision.

In the end, the record before the Court in *Pennell* was not suitable either for giving peacetime rent control a ringing endorsement or for dispatching it to the dustbin of unconstitutional laws. Consequently, the Court set aside the issue of the constitutionality of hardship provisions for another day. It should be noted, though, that the abstractness of a constitutional issue often depends upon the tenacity of the Court's

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68. *Id.* at 856–57.

69. United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89–90 (1947) (attack upon general applications of the Hatch Act that depoliticized federal civil service employment held hypothetical and speculative), *overruled in part by* Adler v. Board of Educ., 342 U.S. 485 (1952) *and in part in* Keyishian v. Board of Regents, 385 U.S. 589 (1967).

70. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967) (explaining how the ripeness doctrine prevents disagreement over and premature adjudication of administrative policies that have not yet been finalized), *overruled in* Califono v. Sanders, 430 U.S. 99 (1977).

71. *Pennell*, 108 S. Ct. at 857.

conviction about its merits, as well as the amount of data in the record to inform the Court's judgment. A straightforward application of the fair return principle of public utility rate regulation, for example, would seem to suggest that the hardship provision was clearly constitutional. On the other hand, the dissenting justices were completely convinced that the hardship provision was unconstitutional. They rejected the abstractness ruling, maintaining that the Court should treat this provision in the same way that it would treat a provision which made the permissibility of a rent increase turn upon the race of the landlord.[72] Accepting this persuasive line of reasoning by the dissent could lead one to the conclusion that the majority's abstractness ruling was prompted more by Chief Justice Rehnquist's disenchantment with peacetime rent control than by the particular factual situation in *Pennell*.

V. THE DISSENTING OPINION—A LAISSEZ-FAIRE GLOSS ON THE TAKINGS CLAUSE

The dissenting opinion in *Pennell v. City of San Jose*[73] came down squarely in favor of the landlords. Justices Scalia and O'Connor maintained that under the takings clause the only permissible purpose for state rent regulation is to prevent excessive rents by establishing a reasonable, uniform level for both tenants and landlords.[74] Similarly, the dissenting justices concluded that forcing the landlords to provide a lower rent for hardship tenants would exact an unconstitutional subsidy from landlords for the support of needy tenants.[75]

It was irrelevant to Justices Scalia and O'Connor that the "subsidy" might be paid by ordinary tenants, thus relieving the landlords of any financial burden worked by the tenant hardship provision. According to the dissenting opinion, such a curative possibility would also violate the takings clause.[76] In support of this proposition the dissent cited *Property Owners Association of North Bergen v. Township of North Bergen*,[77] a decision of the New Jersey Supreme Court which struck down a tenant hardship provision for needy senior citizens as a violation of the takings clause.[78] As an illustration of the inherent weakness of such a "tenant supported" subsidy the New Jersey court stated:

> For example, suppose that nine of ten tenants are Senior Tenants so that

72. *Id.* at 860 (Scalia, J., dissenting).
73. 108 S. Ct. 849 (interim ed. 1988).
74. *Id.* at 859, 862–63 (Scalia, J., dissenting).
75. *Id.* at 863–64 (Scalia, J., dissenting).
76. *Id.* at 864 (Scalia, J., dissenting).
77. 74 N.J. 327, 378 A.2d 25 (1977).
78. *Id.* at 339, 378 A.2d at 31.

> the financial burden would be imposed on the one remaining tenant. The relationship between this tenant and his cotenants does not justify imposing on him the duty of assisting in the payment of their rent. This is quite distinct from the public recognizing and assuming an obligation to assist the elderly or where the cost is spread over a large number of people so that the effect is minimal.[79]

The *Pennell* dissent held the view that providing rent relief for hardship tenants was an impermissible state regulatory objective.[80] The unspoken corollary of this proposition is that if the state cannot protect needy tenants from the conditions which make their housing situation perilous, the state also cannot protect ordinary tenants from such conditions. This leads one to inquire what conditions make the housing situation of hardship tenants precarious without having the same impact on ordinary tenants. Two readily apparent conditions are persistent, significant inflation[81] and a substantial rise in land values resulting from a permanent increase in demand for the property in question.[82] Thus, it seems that the dissenting justices in *Pennell* would invoke the takings clause to strike down any rent control program formulated in response to persistent, significant inflation or substantial increases in land values.

This construction of the takings clause is supported by the language in the *Pennell* dissenting opinion regarding emergency price regulation. Justice Scalia described the popular justification for emergency price regulation as follows:

> When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free-market economy operates, it is at least true that the owners reap unique benefits from the situation that produces the economic hardship, and in that respect singling them out to relieve it may not be regarded as "unfair."[83]

This language indicates that rent control is only appropriate to prevent *exorbitant* returns that would be *unique*. Clearly, these words do not

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79. *Id.* at 337, 378 A.2d at 30.

80. *Pennell*, 108 S. Ct. at 863 (Scalia, J., dissenting).

81. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 64 CORNELL L. REV. 517, 554–56 (1984) (primary purpose of rent control may be to protect tenants against inflation).

82. Rental unit values more than doubled and condominium values tripled in Santa Monica, California between 1975 and 1979. *See* Baar, *supra* note 1, at 838–39. Furthermore, rent and condominium conversion controls might have induced demolition of a substantial portion of the city's rental housing stock without the enactment of demolition controls. *Id.*

83. *Pennell*, 108 S. Ct. at 863 (Scalia, J., dissenting).

describe profits derived from rents that simply keep pace with substantial inflation. Nor do these words seem appropriate to describe large profits resulting from demand-induced, permanent and substantial increases in land values.

Furthermore, the constitutional inability to give special regulatory relief from substantial inflation or permanent increases in land value leads to a second implication of the *Pennell* dissent. It suggests that the ordinary marketplace, rather than the legislature, should be the constitutional regulator of rents. According to this line of reasoning, ordinary tenants do not need any regulatory relief from substantial inflation or permanent increases in land value, because they can adjust to such ordinary changes. Hardship tenants, on the other hand, may not be able to keep up with these ordinary changes. Hence, the *Pennell* dissent's solution for those who fall behind in the marketplace is public welfare assistance in the form of rent supplements rather than government regulation of a class of property owners.[84]

Of course, regulation by the marketplace instead of by the government, would occasionally need a little governmental assistance itself to protect the marketplace from disruptive forces. Justice Scalia noted, for example, that rent regulation would be permissible to deal with a serious housing shortage.[85] Such regulation would seem especially appropriate for a shortage which an inexhaustible supply of land and building materials could cure. New housing construction would eventually relieve the shortage and bring the market back into balance. In the meantime, the state could invoke rent control to prevent "exorbitant" and "unique" profits which would otherwise result from the shortage.[86]

Quite possibly, Silicon Valley and other parts of California have been experiencing this type of housing shortage. Perhaps this is why the dissenters in *Pennell* observed that San Jose's rent control ordinance, apart from its hardship provision, might be justifiable under an emergency price regulation rationale.[87] This may also be why the landlords did not challenge the ordinance's purpose of preventing excessive and unreasonable rent increases.

Price regulation would also be appropriate in various other extraordinary circumstances. One example would be a situation where the nation was engaged in a war that required the mobilization of all of its resources.[88] Ordinary market operations would simply have to be

84. *Id.* at 863 (Scalia, J., dissenting).
85. *Id.* at 862 (Scalia, J., dissenting).
86. *Id.* (Scalia, J., dissenting).
87. *See id.* (Scalia, J., dissenting).
88. Bowles v. Willingham, 321 U.S. 503 (1944) (upholding the constitutionality of rent control during World War II); Yakus v. United States, 321 U.S. 414 (1944) (upholding the con-

suspended for the war's duration and its immediate aftermath. Monopolies, such as those enjoyed by public utilities, are a another example of extraordinary circumstances which would warrant regulation by the government, rather than by the marketplace.[89] Likewise, severe economic depression,[90] or the threat of runaway inflation,[91] would permit appropriate price control regulations. Still, state price regulation would be the exception and not the rule if the market was the constitutional arbiter of prices. Thus, rent control in ordinary peacetime conditions would rarely be permissible.

The *Pennell* dissent's preference for regulation of rents by the marketplace is also demonstrated by the specific reasons which it delineates for limiting state power in the area of rent regulation to that of preventing excessive rents. According to the dissent, one of the primary reasons for this limitation is the fact that the landlords are not responsible for the economic conditions which make it difficult for hardship tenants to pay a high, but non-excessive rent. A second reason offered by the dissent is that the public at large, not a specific class of landlords, should bear the burden of helping hardship tenants pay their rent.[92] To these reasons, one might also add that requiring only landlords with hardship tenants to bear the costs of rental assistance would result in a disproportionate allocation of the burden among the landlords of San Jose.

All of these propositions seem to lead to the conclusion that, ordinarily, the marketplace should set rents. It is true that the landlords are not the immediate cause of the hardship tenants' difficulty in paying rent. However, the rental housing market is a cause. The rental housing market causes landlords to behave in the way that they do, and to say that the state cannot command landlords to behave differently is to say that, ordinarily, the state is forced to accept the consequences of the rental housing market.

Yet, even the dissenting opinion is willing to concede that under

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stitutionality of price controls during World War II); *see also* L. TRIBE, *supra* note 4, at 354.

89. FCC v. Florida Power Corp., 107 S. Ct. 1107, 1110 (interim ed. 1987); FPC v. Texaco, Inc., 417 U.S. 380, 347–98 (1974); Permian Basin Area Rate Cases, 390 U.S. 747, 769–70 (1968).

90. Nebbia v. New York, 291 U.S. 502, 538–39 (1934) (milk price regulation upheld during the Great Depression).

91. Western States Meat Packers Ass'n v. Dunlop, 482 F.2d 1401 (Temp. Emerg. Ct. App. 1973) (upholding the Economic Stabilization Act of 1970 which was designed to prevent inflation during the Vietnam War); *see also* Drubak, *Constitutional Limits on Price and Rent Control: The Lesson of Utility Regulation*, 64 WASH. U.L.Q. 107, 117 n.44 (1986); *cf.* Fry v. United States, 421 U.S. 542, 548 (1975) (commerce power authorizes imposition of pay freeze under Economic Stabilization Act for state employees).

92. *Pennell*, 108 S. Ct. at 862–63 (Scalia, J., dissenting).

certain conditions, state regulation of property owners is permitted.[93] The dissent would allow for such regulation when the adverse conditions in question are the result of actions taken by the property owners. For example, the state can validly enact zoning regulations such as setback lines, lot size restrictions and street dedication requirements.[94] In the absence of such regulations, subdividers would seek to maximize profits by placing as many units as possible on a given piece of land. Here, according to the dissent, the actions of the landowners would result in excessive congestion, thus warranting the state regulation.[95]

In reality, though, the market would be responsible for the excessive congestion discussed above. What the subdividers would do to bring on excessive congestion is a direct function of what the *market* demands of them. Placing as many dwellings as possible on a particular lot would satisfy the mandate of the market by maximizing the subdividers' profits and by providing buyers with low cost housing. As this analysis indicates, it is the market that controls the subdividers' actions, and thus, it is the market that causes the excessive congestion. Ultimately, the subdivider is offered three choices: (1) obey the mandate of the market and earn a substantial profit; (2) reject the mandate of the market and accept lower profits; or (3) abandon the market entirely and make no profit.

Similarly, market conditions usually tell landlords what rents to charge. A landlord cannot charge rents that are substantially higher than those in the prevailing market and they are unlikely to charge less. Landlords, like the subdividers discussed above, merely do what they have to do to survive in the market.

Although the real estate market is not responsible for the lower income of the hardship tenant, it is a cause—if not the only cause—of hardship tenants' difficulty in paying their rent. More importantly, the real estate market may be the only cause that the state can expediently address. Still, the position of the dissent would seem to be that the takings clause should compel the state to accept the consequences of ordinary market operations, including the adverse consequences which befall hardship tenants.

Surely the state should not be forced to stand idly by while hardship tenants are forced to choose between giving up their housing or giving up other necessities in order to pay their rent. Even in extraordinary times, when laissez-faire would permit rent control, hardship tenants would be constitutionally ineligible for special regulatory aid.

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93. *Id.* at 862 (Scalia, J., dissenting).

94. *Id.* (Scalia, J., dissenting).

95. *Id.* (Scalia, J., dissenting).

They would still have to keep up with ordinary tenants, as in ordinary times, or simply fall by the wayside. Such would be the inevitable consequence of making the marketplace the exclusive regulator of rents.

This laissez-faire regime of constitutional law for rent control would replace government by the people with government by the marketplace. The marketplace would become the allocator of other economic benefits from entrepreneurial property as well. Such a laissez-faire system would be diametrically opposed to this nation's constitutional experience since the New Deal era. It is appropriate to underscore this now, lest the return of constitutional laissez-faire might belie its disappearance for the past half century. Many years ago, in *Ferguson v. Skrupa,*[96] the Supreme Court observed that our constitution permits the people to choose between Adam Smith and Lord Keynes.[97] Since then, the Court has frequently held that the people should decide for themselves what allocation of the benefits and burdens of the nation's economic system will best promote the general welfare.[98]

Of course, rent control has its own severe hardships, including smaller profits for landlords and uneven profits among landlords. Moreover, increased state rent supplements may eventually be required regardless of whether the state retains the power to regulate rents. Still, if the people reasonably believe that the hardships of rent control are less than the hardships of unregulated rents, they should not have to repeal the great clauses of the Constitution to take the hard edge off the marketplace.

Hence, it is uncertain and even puzzling why some Supreme Court justices seem to espouse the opposite point of view and appear willing to do pioneering work in a territory where elected, experienced, and even conservative lawmakers find it inexpedient to tread. These justices may sense that the extensively regulated welfare state is on the decline and they may want to hasten the process. Nevertheless, the laissez-faire model ought to have to compete in the marketplace of ideas with the

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96. 372 U.S. 726 (1963).

97. *Id.* at 732.

98. *See, e.g.,* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224–28 (1986) (requiring an employer to contribute to pension plan does not constitute a "taking" because the employer's obligation is the result of a public program adjusting economic benefits and burdens for the common good); Andrus v. Allard, 444 U.S. 51, 65 (1979) (there is no exact method to determine the point at which a restriction on one's property constitutes a taking); Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (explaining that when there is an economic impact or physical invasion upon one's property the Court can more easily determine if a "taking" has occurred—unlike the situation in which one merely suffers interference from a government program); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–16 (1976) (explaining that legislation which adjusts the benefits and burdens of economic life is presumed to be constitutional and the burden is on the challenging party to demonstrate that it is arbitrary and irrational).

regulated welfare state model. Ultimately, the choice between the two must lie with the people.

Whether or not this competition will be allowed to continue indefinitely in the future, as it has in the past, now seems to be an open question. The majority opinion in *Pennell* gives laissez-faire a chance to defeat ordinary peacetime rent control in the courts, rather than in the marketplace of ideas. The majority opinion could simply have held that the tenant hardship provision was constitutional because it allowed for a reasonable return on the landlords' property. The Supreme Court could have said exactly that, if that had been exactly what it wanted to say. During the term immediately preceding *Pennell*, the Court's decision in *Keystone Bituminous Coal Association v. De Benedictis*[99] upheld severe restrictions on coal mining interests upon precisely these grounds.[100] In 1981 the Court reached a similar holding in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*[101]

The dissenting opinion in *Pennell* reminded the majority of these recent cases.[102] The dissent also professed an inability to understand how the facial challenge based upon the takings clause could be viewed as abstract when any valid application of the hardship provision would require a rejection of the facial challenge on the merits.[103] The majority opinion could simply have pointed to one valid application of the hardship provision and upheld it on that ground. Instead, the majority opinion made a questionable assertion that the issue was too abstractly presented to be decided under the factual circumstances of *Pennell*.[104]

VI. Rent Control in Peacetime—Some Supreme Court Precedents

In *Block v. Hirsh*,[105] an opinion written by Justice Holmes, the constitutionality of peacetime rent control in the immediate aftermath of World War I was upheld.[106] Justice Holmes cautioned, however, that making wartime rent controls permanent in peacetime might be unconstitutional.[107] Any uncertainty on this issue was resolved, three years later, in *Chastleton Corp. v. Sinclair*,[108] where the Court stated

99. 107 S. Ct. 1232 (interim ed. 1987).
100. *Id.* at 1242, 1246–48.
101. 452 U.S. 264, 245–46 (1981).
102. *Pennell*, 108 S. Ct. at 860–61 (Scalia, J., dissenting).
103. *Id.* at 859–60 (Scalia, J., dissenting).
104. *Id.* at 857, 859.
105. 256 U.S. 135 (1921).
106. *Id.* at 153; *see also* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).
107. *Block*, 256 U.S. at 153.
108. 264 U.S. 543 (1924).

in no uncertain terms that rent control under ordinary peacetime conditions would be unconstitutional.[109] In *Chastleton,* landlords in the District of Columbia challenged the same rent control provision that had been upheld in *Block.*[110] The landlords maintained that the emergency conditions which had justified the provision in *Block,* no longer existed.[111] The landlords claimed that new housing and other events had alleviated the District's wartime housing shortage.[112] Again, Justice Holmes wrote the opinion of the Court, and this time he stressed that peacetime rent control in the District of Columbia *would* be unconstitutional if the increased cost of living was all that remained of wartime conditions.[113] These rent control cases exemplify the laissez-faire regime of constitutional law that was swept away long ago.[114] Consequently, it would seem that the reasoning underlying these cases should have been swept away as well.

As this nation moved closer towards the regulated welfare state model, constitutional challenges to rent control became an anomaly. For example, in *Eisen v. Eastman,*[115] the Second Circuit Court of Appeals dismissed a constitutional challenge to New York City's rent control program in a single paragraph.[116] After observing that the Supreme Court had not had occasion to pass upon the constitutionality of rent control since the wartime regulations of World War II, the Court remarked that valid price control laws no longer required extraordinary, exigent circumstances for support.[117] The Supreme Court denied certiorari to the *Eisen* case.[118]

Similarly, in *Fresh Pond Shopping Center, Inc. v. Callahan,*[119] the Supreme Court found little merit in a constitutional challenge to a Cambridge, Massachusetts rent control regulation.[120] The landlord in *Fresh Pond* wanted to demolish a six unit apartment building in order to provide parking for a commercial tenant in a nearby shopping center.[121] Five of the six units in the apartment building were vacant,

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109. *Id.* at 546–48.
110. *Id.* at 546–47.
111. *Id.*
112. *Id.* at 548.
113. *Id.* at 547–48.
114. *See infra* text accompanying notes 165–74.
115. 421 F.2d 560 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970).
116. *Id.* at 567.
117. *Id.*
118. 400 U.S. 841 (1970). However, it should be noted that denial of certiorari is not a discussion on the merits. United States v. Carver, 260 U.S. 482, 490 (1923); *see also* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 264–70 (6th ed. 1986).
119. 464 U.S. 875 (1983).
120. *Id.* at 875.
121. *Id.*

but one was still occupied.[122] The Cambridge regulation forbade demolition under such circumstances.[123] The majority opinion in *Fresh Pond* summarily dismissed the landlord's constitutional challenge to the regulation on the grounds that it failed to raise a substantial federal question.[124]

The dissenting opinion, however, showed some faint signs of a developing restiveness with the concept of ordinary peacetime rent control. Justice Rehnquist's lone dissent protested the summary disposition of the case because the Court's judgment was upon appeal rather than upon certiorari and, thus, was a judgment on the merits.[125]

Justice Rehnquist's dissent in *Fresh Pond* sounded somewhat like Justice Holmes' majority opinion in *Block*. Without mentioning *Chastleton,* Justice Rehnquist noted that *Block* left open the question of whether wartime rent controls would be unconstitutional if they were made permanent in peacetime.[126] He also maintained that any state regulation which eliminates a landlord's power to evict a tenant who has paid a legislated rent is, in essence, a regulation which authorizes state occupation of the leased premises—especially where the landlord is unable to convert the vacant portions of the premises in question to other uses.[127] Justice Rehnquist ended his opinion by observing that however fair the amount of legislated rent may have been to the complaining landlord, "Nothing in the rent control provisions requires the . . . [state] to compensate the appellant for the loss of control over the use of its property."[128]

Fresh Pond was expressly reaffirmed in *FCC v. Florida Power Corp.*,[129] a case which was decided one year before *Pennell v. City of San Jose*.[130] The *Florida Power* decision held that price regulation of local public utility charges for cable television attachments does not constitute a taking.[131] *Florida Power* reaffirmed *Fresh Pond* by citing it for the proposition that whether state economic regulation of the landlord tenant relationship constitutes a taking depends upon a so-called ad hoc test rather than the rule that a state authorized permanent occupation of property is a taking per se.[132]

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 875–76 (Rehnquist, J., dissenting).
126. *Id.* at 878 (Rehnquist, J., dissenting).
127. *Id.* at 877 (Rehnquist, J., dissenting).
128. *Id.* at 878 (Rehnquist, J., dissenting).
129. 107 S. Ct. 1107 (interim ed. 1987).
130. 108 S. Ct. 849 (interim ed. 1988).
131. *Florida Power*, 107 S. Ct. at 1112.
132. *Id.*

The ad hoc test requires a court to consider the character of the intrusion upon the property, the extent to which the intrusion diminishes the value of the property and the degree of interference that the regulation will work on the investment-backed expectations of the property owner.[133] The terms of the test set forth in *Florida Power* give no indication as to whether a typical rent control provision would satisfy its requirements. What is significant, though, is the fact that the majority opinion in *Pennell* discussed *Florida Power,* without mentioning its reaffirmance of *Fresh Pond* or its discussion of the ad hoc test's adoption over the per se permanent occupation rule.[134]

In fact, the landlords in *Pennell* argued that the state restrictions upon their power to evict tenants should have triggered the permanent occupation rule and, thus, constituted a taking per se.[135] The *Pennell* majority declined to consider this challenge "not only because it was raised for the first time in this court, but also because it, too, is premised on a Hearing Officer's actually granting a lower rent to a hardship tenant."[136] According to the majority opinion this challenge, like the hardship provision challenge, was prematurely raised.[137] So even a timely presentation of the challenge would not have permitted its adjudication, despite the fact that the challenge raised by the landlords in *Pennell* was essentially the same challenge that the Court had summarily dismissed in *Fresh Pond* and expressly reaffirmed in *Florida Power* only one year earlier. In essence, the quoted language from *Pennell* can be read as a signal from the Court that *Fresh Pond* was not the final chapter on the issue of the constitutionality of peacetime rent control.

Additional confirmation on this matter appears in what the *Pennell* decision *did* have to say about *Florida Power.* The majority opinion in *Pennell* observed that the price regulation in *Florida Power* was justified by the monopolistic conditions involved in that case.[138] Moreover, the opinion pointed to language in *Florida Power* stating that "statutes regulating the economic relations of landlords and tenants are not *per se* takings."[139] To say that rent control regulation in peacetime is not a "per se" taking, still leaves open the possibility that rent control might only be permissible under certain extraordinary conditions. Thus, a close reading of the *Pennell* decision gives one several reasons

133. *See* Keystone Bituminous Coal Operators Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1247 (interim ed. 1987); Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978).

134. *Pennell,* 108 S. Ct. at 857–58.

135. *Id.* at 857 n.5.

136. *Id.*

137. *Id.*

138. *Id.* at 857–58.

139. *Id.*

to believe that the Court's early post World War I rulings about the unconstitutionality of ordinary peacetime rent control may soon be candidates for reaffirmation.

The fate of *Pennsylvania Coal Co. v. Mahon*[140] provides additional support for such a conclusion. In *Mahon,* a vintage landmark case from the early 1920s, the coal industry allowed several individuals to acquire ownership of the surface land in Pennsylvania's anthracite coal communities.[141] The coal industry, of course, retained ownership rights to the coal deposits underlying the surface land, including the right to remove the coal pillars which formed essential foundational support for the communities above the mines.[142] Eventually, the mining operations threatened these communities with a catastrophic collapse.[143] In order to save the communities, the Pennsylvania legislature enacted a law which prohibited the coal companies from removing any coal deposits that constituted subsurface support for the communities.[144] The *Mahon* Court struck down the Pennsylvania law as an unconstitutional taking of the coal companies' property.[145]

Once again, Justice Holmes wrote the opinion for the Court, just as he had done in the early rent control cases. Observing that the law left mining unrestricted when the surface and subsurface were in common ownership and that notice of the intention to mine would avoid risk to personal safety, Justice Holmes concluded that conservation of the surface land and protection of the public safety did not justify the hardships which the Pennsylvania law would work upon the mining companies.[146] With a sharp eye for what he perceived as "welfare benefits," he declared that the owners of the surface land were no more entitled to the subsurface property without paying for it than they would have been to the surface land itself.[147] According to Justice Holmes, the economic future of the coal communities had simply been bargained away, and the Supreme Court was going to hold the communities to their end of the bargain.[148]

Justice Holmes also noted that the law being challenged in *Mahon* had gone "beyond any of the cases decided by . . . [the] Court," including the recent post World War I rent control cases.[149] In Holmes'

140. 260 U.S. 393 (1922).
141. *Id.* at 412–14.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 415.
146. *Id.* at 413–14.
147. *Id.* at 415.
148. *Id.* at 416.
149. *Id.*

view the earlier cases had gone to the verge of the law, but the Pennsylvania law had gone over the edge.[150] The rent control regulation in *Block* was one of the laws which Justice Holmes characterized as being on the verge of unconstitutionality.[151] If a rent control regulation in the immediate aftermath of World War I was on the verge of being unconstitutional there can be little doubt as to how the *Mahon* Court would have viewed an ordinary peacetime rent regulation.

At first glance, it would seem that these aspects of *Mahon* should be irrelevant, since *Mahon* itself was merely a part of the constitutional laissez-faire system which disappeared nearly a half century ago. In fact, though, the *Mahon* decision survived intact until 1987 when *Keystone Bituminous Coal Operators Association v. De Benedictis*[152] was decided.

The only major factual difference between *Mahon* and *Keystone* is that the latter case arose in Pennsylvania's bituminous coal region, rather than its anthracite coal region.[153] However, the majority opinion in *Keystone* upheld a statute which prohibited coal companies from mining away subsurface support underlying various Pennsylvania communities.[154] The *Keystone* Court saw environmental and safety objectives in the protective law that were not apparent to the Court in *Mahon*.[155] But the *Keystone* Court also upheld the law as a means to protect the financial stability and, therefore, the economic future of Pennsylvania's bituminous coal communities.[156]

The majority opinion in *Keystone* held that the coal industry had no cause for complaint, *Mahon* notwithstanding, so long as it could still mine coal at a reasonable profit.[157] Furthermore, the majority observed that the factual situation brought before the Court in *Mahon* actually involved only a single dwelling.[158] On that ground alone, the *Mahon* Court could have ruled that the Pennsylvania statute was not supported by a valid public purpose. Instead, according to the majority opinion in *Keystone,* Justice Holmes launched into an "uncharacteristically . . . advisory" opinion.[159] Having labeled Justice Holmes' opinion largely advisory, the *Keystone* Court was able to distinguish the *Mahon* decision rather than expressly overruling it.

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150. *Id.*
151. *Id.*
152. 107 S. Ct. 1232 (interim ed. 1987).
153. *See id.* at 1232–33.
154. *Id.* at 1236.
155. *Id.* at 1242; *cf. Mahon,* 260 U.S. at 413–14.
156. *Keystone,* 107 S. Ct. at 1242–43.
157. *Id.* at 1242, 1246–48.
158. *Id.* at 1241.
159. *Id.*

With the *Mahon* decision all but overruled, it would seem that Justice Holmes' disapproval of ordinary peacetime rent control would be meaningless as well. However, there is a vast difference between curtailing property interests to protect the economic future of an entire region—which is what *Keystone* allowed—and doing the same thing to provide assistance for some people who have difficulty paying the rent in ordinary times. Allowing one does not automatically require allowing the other. So, despite the de facto overruling of *Mahon,* the *Keystone* Court may still have left the issue of peacetime rent control undecided.

Four justices dissented in *Keystone,* protesting the mistreatment of the *Mahon* decision.[160] The dissenting justices saw the two cases as virtually identical.[161] Moreover, three of the four dissenters have openly questioned peacetime rent control, namely Chief Justice Rehnquist,[162] Justice Scalia,[163] and Justice O'Connor.[164] Justice Powell was the fourth dissenter in *Keystone,* but his views on rent control remain undeclared—partially because he retired before the *Pennell* case was decided. Justice Powell was on the Court when *Fresh Pond* was decided, but his failure to join Justice Rehnquist's dissent should not be read as an express disapproval of it. Justice O'Connor was silent in *Fresh Pond* as well, but she later voiced her concerns about the constitutionality of peacetime rent control in *Pennell.*

Overall, it is possible that the four dissenting justices in *Keystone* wanted to preserve the *Mahon* decision in its entirety, including Justice Holmes' disapproval of rent control in ordinary peacetime. This possibility is strongly supported by what the *Pennell* decision did and did not say about the constitutionality of rent control. It would seem, then, that government by the marketplace may once again present a formidable challenge to the regulated welfare system that is currently in force in the United States.

VII. CONSTITUTIONAL GHOSTS AND GOBLINS OF LAISSEZ-FAIRE

A. Adkins v. Children's Hospital[165]

It is difficult to read the dissenting opinion in *Pennell v. City of San Jose*[166] without being reminded of Justice Sutherland's 1923 explanation in *Adkins* of why a living minimum wage law for women was

160. Justice Powell, Justice O'Connor, and Justice Scalia joined Justice Rehnquist in his dissent. *See id.* at 1253 (Rehnquist, J., dissenting).

161. *See id.* (Rehnquist, J., dissenting).

162. *See supra* note 10 and accompanying text.

163. *See supra* notes 74–75 and accompanying text.

164. *Id.*

165. 261 U.S. 525 (1923), *overruled in* West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

166. 108 S. Ct. 849 (interim ed. 1988).

unconstitutional.[167] Admittedly there are distinct differences between *Pennell* and *Adkins*. From a factual standpoint, *Adkins* involved the price of labor,[168] while *Pennell* involved the price of rent.[169] Also, *Adkins* concerned freedom of contract and the due process clause,[170] whereas *Pennell* primarily concerned property and the protection that property receives from the takings clause.[171] However, apart from these formal differences, both *Pennell* and *Adkins* are the same in that they both deal with the state's power to regulate private economic interests.

Speaking for the majority in *Adkins*, Justice Sutherland maintained that it would be arbitrary for a state to force an employer to pay a female employee more than her services were worth simply because she needed a higher wage to live.[172] The *Adkins'* majority correctly observed that the employer was not responsible for the conditions that caused the value of a female's services to be less than the wage she needed to live.[173] Justice Sutherland also correctly pointed out that if the female employee went to the butcher, baker, or grocer to buy food, she could not expect to receive more than her money's worth merely because she needed more.[174]

In fact, the majority in *Adkins* noted that a living wage law required the employer to provide for "a partially indigent person" and arbitrarily "shift[ed] to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."[175] The *Pennell* dissent made the same observation in regard to the landlords and rent control for hardship tenants.[176] Justice Scalia said that the landlords bore no more responsibility for the difficulties of hardship tenants than did the "grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages, or the citizens of San Jose holding higher paying jobs from which they are excluded."[177]

Actually, there is nothing in the *Pennell* dissent that would allow a viable, legislated rent for needy tenants to be distinguished from a legislated minimum wage for needy employees. However, the *Pennell* dis-

167. *Adkins*, 261 U.S. at 557–59.
168. *Id.* at 537–39.
169. *Pennell*, 108 S. Ct. at 859.
170. *Adkins*, 261 U.S. at 558.
171. *See Pennell*, 108 S. Ct. at 859.
172. *Adkins*, 261 U.S. at 557–58.
173. *Id.* at 557–58.
174. *Id.* at 558–59.
175. *Id.* at 557–58.
176. *Pennell*, 108 S. Ct. at 862–63.
177. *Id.* at 862.

sent would allow the state regulatory power over excessive profits.[178] Thus, it would appear that preventing substandard employers from making excessive profits by paying less than a living wage might justify minimum wage laws. But such excessive profits do not seem to be the kind that the dissenting opinion in *Pennell* would allow the state to control.

Instead, the *Pennell* dissenters would only permit the state to control profits which were excessive due to conditions that permitted most firms in an affected industry to make those excessive profits. For example, the dissenting opinion in *Pennell* emphasized that extraordinary malfunctioning of a given market was a prerequisite for price regulation.[179] The practice of price-gouging by only a few landlords would not be enough to justify imposing rent regulation on all landlords. Likewise, only a few employers should be able to obtain excessive profits through paying substandard wages, thus a minimum wage would not be justified. Conversely, if all or most employers in a given industry pay substandard wages, the market—through competition— should prevent excessive profits. As long as most employers pay a higher wage, then the specialized conditions that permit a substandard employer to make excessive profits from his lower wages will still not allow his higher wage competitors to do the same. In other words, substandard employers will always exist and their presence actually suggests that the market is operating normally. Consequently, the rationale of the *Pennell* dissenting opinion would seem completely incompatible with a legislated minimum wage.

B. Other Ghosts and Goblins

Constitutional rules that would make the market the regulator of the price of both real property and labor would, of necessity, also apply to the regulation of the price of goods. The result would be the restoration of the rule that price regulation is ordinarily unconstitutional except in the area of businesses affected with a public interest.[180] The businesses eligible for regulation under such a rule would be restricted to a few closed categories.[181] Yet, exactly such a rule was rejected in *Nebbia v. New York*.[182]

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178. *Id.*

179. *Id.*

180. Williams v. Standard Oil Co., 278 U.S. 235, 239 (1929) (regulation of price of gasoline or any other good was unconstitutional unless the regulated business was affected with a public interest); *see also* L. TRIBE, *supra* note 4, at 570–74; *cf.* Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 535, 544 (1923) (compulsory arbitration of labor disputes in meat packing industry held unconstitutional).

181. *Wolff*, 262 U.S. at 535.

182. 291 U.S. 502, 531, 536–37 (1934).

Under the above rationale, which follows from the dissenting opinion in *Pennell*, much of the prior laissez-faire regime might also be reinstated. For example, the right to follow a common calling[183] as well as the right to conduct ordinary business along customary lines[184] could return as constitutional rights, notwithstanding their complete rejection in *Ferguson v. Skrupa*.[185] Indeed, the Supreme Court has wondered aloud about resurrecting, as a constitutional right, the right to follow a common calling.[186] Even the majority opinion in *Pennell* recognized: "The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established: 'Price control is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . .' "[187] *Nebbia*, the source of this statement, was only the Court's *first* step in rejecting laissez-faire constitutional law during the onset of the New Deal.[188] The Court's current use of this statement, if taken literally, would put the Court back to where it was almost a half century ago.[189] Moreover, the *Pennell* majority's emphasis on this statement seems to ignore *Olsen v. Nebraska*[190] which held that the legislature is the exclusive judge of the wisdom, need and appropriateness of the regulation of the price that employment agencies charge for their services.[191]

During the Court's period of laissez-faire constitutional law, the due process clause was the handmaiden of the array of fundamental rights that made up the right of freedom to contract.[192]

However, the Supreme Court's construction of the commerce clause also made an important contribution to the constitutional law of laissez-faire. The commerce clause once placed the regulation of the nation's mines, mills, factories, and farms—or in essence most of the nation's producing activities—off limits to Congress.[193] Of course, the

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183. Smith v. Texas, 233 U.S. 630, 636 (1914).

184. Adams v. Tanner, 244 U.S. 590, 596–97 (1917), *overruled in* Ferguson v. Skrupa, 372 U.S. 726 (1963).

185. 372 U.S. 726, 728, 731 (1963).

186. Andrus v. Allard, 444 U.S. 51, 68 n.25 (1979); Exxon Corp. v. Governor of Md., 437 U.S. 117, 124–25 (1978); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–07 (1978); Board of Regents v. Roth, 408 U.S. 564, 572 (1972); *see also* NOWAK, CONSTITUTIONAL LAW 324–25, 358–59 (3d ed. 1986).

187. *Pennell*, 108 S. Ct. at 857 (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 769–70 (1968) (quoting *Nebbia*, 291 U.S. at 539)).

188. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 80–82 (1941).

189. *Cf.* NOWAK, *supra* note 186, at 358–59.

190. 313 U.S. 236 (1941).

191. *Id.* at 246–47.

192. *See Ferguson*, 372 U.S. at 729.

193. At one time, the commerce clause did not authorize Congress to regulate wages, hours

states were free to regulate the states' producing activities but they could only legislate substantial economic welfare benefits at the risk of handicapping state industries in their competition in national markets.[194] Together, then, the combined lack of authorized commerce power for Congress and practical commerce power for the states, over the nation's producing activities, helped to instill the marketplace as the constitutional allocator of benefits between employer and employee.[195]

Eventually, the laissez-faire law of the commerce clause was replaced.[196] But recently, an effort for partial restoration seems to have occurred in litigation over the extent to which Congress can regulate states as states. Although four justices wanted a retrenchment of the federal commerce power, they lost the most recent round in the contest in *Garcia v. San Antonio Metropolitan Transit Authority*.[197] The dissenting justices in *Garcia* emphasized immunity from federal regulation for traditional state functions and also expressly disclaimed any intention of reducing the vast power that Congress now exercises over the nation's commerce in the private sector.[198] Still, their attempt to frustrate the application of the Fair Labor Standards Act[199] with regard to state employees could have resulted in giving a constitutional right to the state, as an employer, to operate a sweatshop. Furthermore, the *Garcia* controversy elicited some nostalgic statements about the limited scope of Congress' commerce power prior to the New Deal.[200]

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and collective bargaining for the coal industry. Carter v. Carter Coal Co., 298 U.S. 238, 301–04 (1936). Similarly, Congress could not use the commerce clause to regulate the wages and hours in the food processing industry, *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546–49 (1935), or to prohibit child labor in the nation's producing activities, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled in* United States v. Darby, 312 U.S. 100 (1941).

194. United States v. Darby, 312 U.S. 100, 122 (1941); *Schechter*, 295 U.S. at 549.

195. *Cf. Carter*, 298 U.S. at 260–61, 268.

196. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 276 (1981), *overruled in* Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985). In *Hodel*, the Court held that Congress' commerce power now extends to any activity when there is a rational basis for the conclusion that it affects interstate commerce. In a concurring opinion, Justice Rehnquist protested that a substantial effect should be a prerequisite for Congress' exercise of its commerce power. *Id.* at 310–11 (Rehnquist, J., concurring).

197. 469 U.S. 528 (1985). *Garcia* held that the commerce clause authorizes Congress to apply the Fair Labor Standards Act, 29 U.S.C. §§ 206, 207 (1982 & Supp. IV 1986), to the states as employers in the performance of traditional state governmental functions. *Id.* at 530–31. *Garcia*, a five to four decision, overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), also a five to four decision, which had generally placed these state functions beyond the reach of Congress' commerce power. *National League of Cities*, 469 U.S. at 513. *National League of Cities*, itself, had overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968).

198. *Garcia*, 469 U.S. at 558.

199. 29 U.S.C. §§ 206, 207.

200. *See supra* notes 194–201 and accompanying text; *cf.* NOWAK, *supra* note 186, at 358–59.

VIII. CONCLUSION

In the final analysis, *Pennell v. City of San Jose*[201] is but one episode in an ongoing effort by a part of the Court to make some new version of economic laissez-faire the law of the Constitution once again. However, it seems that there are already almost enough laissez-faire pronouncements in the Court's recent opinions to give the impression that the constitutional law of laissez-faire was never really swept away.

Hence, the constitutional ghosts and goblins of laissez-faire are out, around and about. They appear, disappear and reappear softly, scarcely visible, as from a distance. These ghosts may remain restless for some time to come, until they find a new resting place. Where and when it will be is anyone's guess. They may even depart again, forever this time, as noiselessly as when they made their first return. Just the same, one has the feeling that although they are nearly out of sight at the moment, they are not out of mind. Instead, the ghosts and goblins of laissez-faire seem to be at the ready, waiting for some unforeseen combination of time, chance and circumstance to call them up for full service once more.

201. 108 S. Ct. 849 (interim ed. 1988).