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Yee v. City of Escondido--A Rejection of the Ninth Circuit's Unique Physical Takings Theory Opens the Gates for Mobile Home Park Owners' Regulatory Takings Claims

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Ownership of private property in the United States provides the owner with rights of possession, use, and disposition.[1] These rights are rooted in property principles originating from the thirteenth century,[2] and are protected by the Takings Clause of the United States Constitution.[3] The Takings Clause forbids the federal and state governments from taking private property from the owner for public use without providing compensation.[4]

Traditionally, governmental takings of private property have been categorized as either physical or regulatory.[5] A physical taking occurs when the government compels a property owner to submit to a permanent physical occupation of the owner's property by the government or a third person.[6] A regulatory taking has traditionally been found when government heavily regulates an

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1. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); United States v. General Motors Corp., 323 U.S. 373, 378 (1945). Depending on the type of estate classification, the owner may not own the complete rights to use, possession, or disposition of the land. RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY §§ 172-260, at 11 (reprint 1979, abridged ed.) (analyzing the various estates in land).

2. POWELL & ROHAN, *supra* note 1, § 172, at 11; *see id.* § 177, at 17 (providing that, before the end of the thirteenth century, the owner of the fee simple had an established right of free alienation). In 1290, England recognized the right of alienation of property by enacting the Statute Quia Emptores. *Id.*

3. *See* U.S. CONST. amend. V (providing that private property will not be taken for public use without just compensation).

4. *Id.* The Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897).

5. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

6. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); *see infra* notes 29-42 and accompanying text (discussing *Loretto* and physical takings).

owner's land so as to unfairly single out the property owner to bear a burden which should be borne by society as a whole.[7] Applying physical and regulatory takings law, California mobile home park owners have recently attacked state mobile home regulations and local rent control regulations as a violation of their constitutional rights as protected under the Takings Clause of the Fifth Amendment.[8] On the state level, the California Mobilehome Residency Law[9] regulates park owners with respect to eviction of tenants, removal of mobile homes, and disposition of leases.[10] On the local level, many cities have rent control ordinances which limit the amount a park owner may charge a tenant for rent.[11] Mobile home park owners have claimed that when the state and local laws are applied concurrently, the regulations result in a physical and/or regulatory taking of property without just compensation.[12]

In *Yee v. City of Escondido*,[13] the United States Supreme Court rejected a mobile home park owner's contention that state and local government regulations effected a physical taking.[14] While the Court did not address the issue of whether the ordinance had effected a regulatory taking, the Court did note that mobile home park owners might use many of the Yees' arguments to

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7. Armstrong v. United States, 364 U.S. 40, 49 (1960). For example, a regulation which banned a coal mining company from mining coal from its own property was held to be a regulatory taking. Pennsylvania Coal v. Mahon, 260 U.S. 393, 414-16 (1922); *see infra* notes 43-46 and accompanying text (discussing *Pennsylvania Coal*); *infra* notes 47-49 and accompanying text (discussing the various regulatory takings analyses applied by the Supreme Court).

8. *See* Yee v. City of Escondido, 224 Cal. App. 3d 1349, 1352, 274 Cal. Rptr. 551, 553 (1990) (challenging an Escondido rent control ordinance as a physical taking of property); Hall v. City of Santa Barbara, 833 F.2d 1270, 1273-74 (9th Cir. 1986), *aff'd.*, 112 S. Ct. 1522 (1992) (challenging a Santa Barbara rent control ordinance as a physical taking of property), *cert. denied*, 485 U.S. 940 (1988).

9. *See* CAL. CIV. CODE §§ 789-799.7 (West 1982 & Supp. 1993); *infra* notes 109-22 and accompanying text (discussing the California Mobilehome Residency Law).

10. CAL. CIV. CODE §§ 789-799.7 (West 1982 & Supp. 1993); *see infra* notes 109-22 and accompanying text (discussing the California Mobilehome Residency Law).

11. *See* KENNETH K. BAAR, CALIFORNIA CONTINUING EDUCATION FOR THE BAR; CALIFORNIA RESIDENTIAL LANDLORD TENANT PRACTICE, § 9.5, at 758 (1985 & Supp. 1992) (providing that 40 cities and several counties have adopted some form of mobile home rent regulations).

12. *See, e.g.*, Yee v. City of Escondido, 112 S. Ct. 1522, 1527 (1992); Hall v. City of Santa Barbara, 833 F.2d 1270, 1273-74 (9th Cir. 1986) (challenging local rent control ordinances as violations of the Takings Clause of the United States Constitution), *cert. denied*, 485 U.S. 940 (1988).

13. 112 S. Ct. 1522 (1992).

14. *Yee*, 112 S. Ct. at 1534.

prove a regulatory taking.[15] While the Yees lost on the physical takings claim, the Supreme Court's dicta implies that California mobile home park owners may be able to bring a successful regulatory takings claim on similar facts.

Part I of this Note will discuss the legal background of the physical takings doctrine and the various tests the courts apply to determine whether a government has effected a regulatory taking.[16] Part I will further analyze the approach taken by the United States Supreme Court and the California appellate courts when applying the physical and regulatory takings doctrines to rent control and California Mobilehome Residency Law.[17] Part II will discuss the majority and the concurring opinions of *Yee v. City of Escondido*.[18] Finally, Part III will present the potential legal ramifications of *Yee* and analyze how the California mobile home park owners may successfully attack rent control ordinances after the *Yee* decision.[19]

I. LEGAL BACKGROUND

A. The Takings Clause

The Takings Clause of the United States Constitution forbids federal and state governments from acquiring private property for public use without providing just compensation to the owner.[20]

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15. *See id.* at 1528-29 (noting the relevance of the Yees' arguments to the regulatory takings analysis); *infra* notes 222-284 and accompanying text (discussing the significance of the Court's dicta).

16. *See infra* notes 29-90 and accompanying text.

17. *See infra* notes 91-146 and accompanying text.

18. *See infra* notes 147-216 and accompanying text.

19. *See infra* notes 217-285 and accompanying text.

20. U.S. CONST. amend. V. The Takings Clause also applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV; Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897). The California Constitution provides that compensation is required when property is taken or damaged. CAL. CONST. art. I, § 19 (West 1983 & Supp. 1993). California's "damage" provision widens the scope of compensable injury. B.E. WITKIN, 8 SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 940, at 492 (9th ed. 1988); *see* Rose v. California, 19 Cal. 2d 713, 719-20, 123 P.2d 505, 510 (1942) (discussing the damage provision of the California Constitution); Bacich v. Board of Control, 23 Cal. 2d 343, 349, 144 P.2d 818, 822-23 (1943) (providing that the government will compensate the owner for damage which the

Takings cases separate into two distinct categories--physical takings and regulatory takings.[21] A physical taking occurs when a government compels a property owner to submit to a permanent physical occupation of the owner's property by the government or a third person.[22] Additionally, government action effects a physical taking when the government acquires title and possession of property by condemnation.[23] On the other hand, courts have found a *regulatory* taking when a government regulation either goes so far as to unfairly single out a property owner to bear a burden which society should bear as a whole,[24] or completely

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government causes that society generally does not suffer). *See generally* Robert Kratovil & Frank J. Harrison Jr., *Eminent Domain-Policy and the Concept of Eminent Domain*, 42 CAL. L. REV. 596, 596-615 (1954) (discussing the concept of governmental takings).

21. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that where the government authorizes a physical occupation of property, the Takings Clause requires compensation); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (holding that where the government regulates the use of property such as to unfairly single out the property owner to bear a burden that should be borne by the public as a whole, the Takings Clause requires compensation).

22. *Loretto*, 458 U.S. at 426; *see infra* notes 29-42 and accompanying text (discussing *Loretto* and physical takings).

23. Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992). Eminent domain is defined as "[t]he power [of the government] to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character." BLACK'S LAW DICTIONARY 523 (6th ed. 1990). This power is limited by the Takings Clause of the United States Constitution. *Id.; see* United States v. Clarke, 445 U.S. 253, 255 (1980) (defining eminent domain as the legal proceeding in which the government asserts its authority to condemn property); Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 221-61 (1931) (discussing the use of eminent domain to acquire absolute title to property). *See generally* Note, *Valuation of Conrail Under the Fifth Amendment*, 90 HARV. L. REV. 596, 596-615 (1977) (discussing the government's physical taking of property for the use of railroads). Eminent domain, the power to take private property for public use without the owner's consent, is universally accepted as an inherent power of federal and state governments. ROGER A. CUNNINGHAM, ET AL., THE LAW OF PROPERTY, § 9.1, at 510 (Student ed. 1984).

24. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (analyzing whether a government regulation substantially advances the purposes of the regulation); *see also infra* notes 50-74 (discussing the multi-factor balancing test for determining when the government has required too much of a landowner or group of landowners).

The essential interests which a landowner enjoys are the rights to possess, use and dispose of the property. United States v. General Motors, 323 U.S. 373, 377-78 (1945); *see infra* notes 43-89 and accompanying text (discussing regulatory takings). Courts view regulatory takings as less serious than physical takings, since regulatory takings usually leave the landowner with some ownership rights still intact. *Yee*, 112 S. Ct. at 1520.

diminishes the value of the owner's land.[25] More recently, a regulatory taking has been found when the government's land-use regulations do not substantially advance the purposes of the regulations.[26] Of the two types of takings recognized by the Supreme Court, the physical taking analysis, applying the reasoning of *Loretto v. Teleprompter Manhattan CATV Corp.*,[27] is more concrete and understandable than the regulatory takings analysis.[28]

1. Physical Takings--Loretto v. Teleprompter Manhattan CATV Corp.

Until 1922, a taking only occurred when the government physically occupied or encroached upon a landowner's property.[29] In addition to the physical occupation requirement, Supreme Court cases stated or implied that physical invasions by the government

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25. *Penn Central*, 438 U.S. at 138 n.36; *see infra* note 57 (discussing the effect a diminution in the value of an owner's land has on the regulatory takings analysis). When state or local governments regulate land they are normally exercising their police powers. JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 11.10, at 423-24 (4th ed. 1991); *see id.* (discussing the government's police powers). Police power is the power of the government to regulate human conduct to protect or promote "public health, safety, or the general welfare." *Id.; see, e.g.*, Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395-97 (1926) (declaring that a land use ordinance did not effect a taking); Anne R. Pramaggiore, Comment, *The Supreme Court's Trilogy of Regulatory Takings:* Keystone, Glendale, *and* Nollan, 38 DEPAUL L. REV. 441, 442 (1988) (stating that government may regulate land uses that may have a detrimental impact on society, by exercising its police powers).

26. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-42 (1987); *see infra* notes 76-89 and accompanying text (discussing *Nollan* and the substantial nexus test).

27. 458 U.S. 419 (1982).

28. *Loretto*, 458 U.S. at 432.

29. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967). A physical taking may also occur where the governmental occupation is indirect; *see infra* notes 43-46 and accompanying text (recognizing Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), as the first case to find a regulatory taking); *see, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall) 166, 174-81 (1871) (holding that when a government builds a dam and, as a result, private property is flooded, the owner of the property must be compensated). Although the Supreme Court once required a substantial intrusion in order to find a taking, *Loretto v. Teleprompter Manhattan CATV Corp.* recognized that this requirement had been abandoned by courts in the twentieth century. *See Loretto*, 458 U.S. at 430 (citing Lovett v. W. Va. Cent. Gas Co., 65 S.E. 196 (W. Va. 1909) and S.W. Bell Tel. Co. v. Webb, 393 S.W. 2d 117, 121 (Mo. App. 1965)).

were also subject to a balancing process[30] before they could be found compensable.[31] In 1982, *Loretto v. Teleprompter Manhattan CATV Corp.* abandoned the balancing approach.[32] The United States Supreme Court held that physical takings were always compensable.[33] The *Loretto* analysis has been widely accepted as the modern test for finding a physical taking.[34]

In *Loretto*, the Court addressed the issue of whether there was a physical taking where a statute required landlords to permit cable television companies to install cable facilities on the landlord's property.[35] The Court held that when the government authorizes a permanent physical occupation of property, the government's actions are a taking irrespective of the magnitude of the interference[36] or the importance of societal interests.[37]

The *Loretto* Court adopted a per se taking[38] rule, because of the extremely serious character of any physical invasion.[39] A physical occupation deprives the landlord of the essential rights of property ownership--to possess, use, and dispose of the property.[40]

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30. *See Loretto*, 458 U.S. at 432 (noting that the traditional physical takings analysis of the Supreme Court considered such factors as the economic impact of the regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action).

31. *Id.*

32. *See id.* at 435-38.

33. *Id.*

34. *See, e.g.*, Yee v. City of Escondido, 112 S. Ct. 1522, 1528 (1992); FCC v. Florida Power Corp., 480 U.S. 245, 251-53 (1987); Cox Cable San Diego, Inc. v. Bookspan, 195 Cal. App. 3d 22, 26-27, 240 Cal. Rptr. 407, 409 (1987) (applying the reasoning of *Loretto*).

35. *Loretto*, 458 U.S. at 421.

36. *See id.* at 422 (stating that Teleprompter's occupation of property consisted of cable which was merely one-half inch in diameter and approximately 35 feet long).

37. *Id.* at 426.

38. The *Loretto* Court recognized that courts have labeled physical takings as *per se* takings since these types of takings occur without regard to other factors that a court may ordinarily examine such as the economic impact of the regulation, the extent to which the regulations interfere with reasonable investment-backed expectations and the character of the taking. *Id.* at 432.

39. *Id.* at 435-36.

40. *Id.* Physical takings are particularly serious because such a taking completely diminishes the land of all its value. *Id.* Teleprompter's installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building completely occupying the space immediately above and upon the roof and along the building's exterior wall. *Id.* at 438. A complete diminution in value occurs because the owner is deprived of all rights except the right to dispose of the occupied space. *Id.* at 435-36. Even the right to dispose essentially becomes valueless since prospective purchasers would be unable to make use of the property. *Id.* at 436.

Even though the Court in *Loretto* created a per se taking rule, the Court limited the scope of its holding. In order for a physical taking to occur, the court must find that the government required the invasion and that the invasion is permanent.[41] Additionally, *Loretto* was further limited since it noted that the physical takings analysis would not substantially affect the government's power to regulate landlord-tenant relationships.[42] While *Loretto* provides a clear test for courts to apply in physical takings cases, the analyses to determine whether a regulatory taking has been effected is much less clear.

2. *Regulatory Takings*

In *Pennsylvania Coal v. Mahon*[43], the Supreme Court recognized regulatory takings for the first time.[44] The *Pennsylvania Coal* Court found that when a government heavily regulates an owner's land, the regulation may constitute a taking if the regulation diminishes the land's value by a certain extent.[45]

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41. *Id.* at 426. In *Federal Communications Commission v. Florida Power Corp.*, the Supreme Court emphasized the narrow scope of *Loretto*. *See* Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 251 (1982). The *Florida Power* Court stated that the statute must specifically require the landowner to permit permanent occupation of the property in order to amount to a physical taking. *Id.* Since the Act in question in *Florida Power* only applied after utility companies had already allowed cable television systems to use it's utility poles, the taking was not found to be required by the statute. *Id.* at 252.

42. *Loretto*, 458 U.S. at 440. Since *Loretto* mandates that the statute require the invasion, an ordinance regulating landlord-tenant relationships is only a physical taking if the ordinance forces the owner to rent the property to the tenant. *Id.* The Court noted that no rent control ordinances had ever been found to effect a permanent physical taking. *Id.*

The *Loretto* majority rejected the defendant's argument that the landlord could have avoided the regulations by ceasing to rent. *Id.* at 439 n.17. The Court ruled that allowing this as a basis for justifying the regulation would surely lead to manipulative abuse. *Id.* With such a windfall, the government could enact crippling regulations and still escape having to compensate the owner. *Id.*

43. 260 U.S. 393 (1922).

44. *See id.* at 413. The issue before the Court in *Pennsylvania Coal* was whether a governmental regulation could ever be severe enough to constitute a taking of property without compensation. *Id.* The statute prohibited the mining of coal if the mining caused the subsidence of improved property. *Id.* at 412-13. The owners who challenged the statute had the right to mine land on which other owners had the right to build. *Id.* at 412.

45. *Id.* at 415.

The Court's only guidance was that a regulatory taking should be found when the regulation "goes too far."[46]

Since *Pennsylvania Coal*, regulatory takings have been found under three types of analyses. First, a regulatory taking exists when a regulation goes so far as to unfairly single out a property owner to bear a burden which society should bear as a whole.[47] Second, a court will find a regulatory taking when a land-use regulation does not substantially advance legitimate state aims.[48] Third, a regulatory taking will be found when the government regulates property to such an extent that the property ceases to possess any economically viable use.[49]

a. The Multi-Factor Balancing Test -- Determining Whether A Property Owner Has Been Unfairly Singled Out To Bear A Burden Which Society Should Bear As A Whole

A court may find a regulatory taking when a government regulation goes so far as to unfairly single out a property owner to bear a burden which society should bear as a whole.[50] Determining when the government has imposed this unfair burden has caused substantial confusion among the courts.[51] The United States Supreme Court has recognized that there is no set formula

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46. *Id.*

47. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see infra* notes 50-74 and accompanying text (discussing the multi-factor balancing test used to determine when a regulation has unfairly singled a out a property owner).

48. *See infra* notes 76-89 and accompanying text (discussing the "substantial nexus" test used to determine whether the regulation substantially advances a legitimate state purpose).

49. *See infra* note 57 (discussing the standard for finding a regulatory taking as a result of limiting a properties economically viable use). Since the significance of this branch of regulatory takings is outside the scope of this Article, it is addressed only briefly.

50. Armstrong v. United States, 364 U.S. 40, 49 (1960).

51. *See* Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63 (stating that the application of this vague regulatory taking test has led to a "crazy quilt pattern" of rulings). *Compare* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1927) (finding that a statute prohibiting the mining of coal to prevent subsidence damage of land was a regulatory taking) *with* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (upholding a statute that prohibited particular types of coal mining that would cause subsidence damage to land).

to determine whether the government has unduly burdened the property owner.[52] In *Pennsylvania Central Transportation Company v. New York City,*[53] the Supreme Court identified five factors which must be considered when determining whether the government has taken property without just compensation.[54] The five factors which the *Penn Central* Court identified are: (1) The economic impact of the regulation on the owner; (2) the extent of interference with the owner's reasonable investment-backed expectations; (3) the character and nature of the regulation; (4) the extent to which the owner benefits from the regulation; and (5) the nature and importance of the public interests which the regulation serves.[55] The first factor which the courts must consider is the economic impact of the regulation on the owner of the property.[56] In applying this factor, courts consider the amount of money the owner loses as a result of the regulation.[57] The courts will also

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52. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

53. 438 U.S. 104 (1978).

54. *See id.* at 125. In *Penn Central,* the issue was whether a landmark preservation law was invalid as a taking of private property without just compensation. *Id.* at 107. The appellants sued New York City, because the landmark commission had determined that the *Penn Central* building was a landmark and had prohibited the appellants from building a fifty story tower above the edifice. *Id.* at 116-17. The *Penn Central* Court upheld the landmark preservation law since the law's restrictions promoted substantial societal interests and at the same time allowed the owner reasonable beneficial use of the property. *Id.* at 138.

55. *Id.* at 124-28, 134.

56. *Id.* at 124.

57. *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225-26 (1986) (discussing the mitigation and moderation of the impact of a regulation). The Supreme Court rarely finds that the economic impact is so great that there is a taking without regard to the other four factors. *Penn Central,* 438 U.S. at 138 n.36. The *Penn Central* Court stated that in order to obtain relief the appellants would have to prove that the land had ceased to be economically viable as a result of the governmental action. *Id.*; *see* Jason W. Rose, *Forced Tenancies As Takings Of Property in* Seawall Associates v. City of New York: *Expanding* on Loretto *And* Nollan, 40 DEPAUL L. REV. 245, 261 n.156 (1990) (stating that the clear implication of footnote 36 of *Penn Central* was that the owner must show a total loss of economic value to prove that a taking has occurred). Recent cases have also held that a taking has occurred when an owner's land ceases to be economically viable. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 309 (1987); Agins v. Tiburon, 447 U.S. 255, 262 (1980). *But see* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992) (providing instead that the issue for determining whether there has been a regulatory taking because of diminution in value is whether the property still has beneficial and productive use).

The *Penn Central* Court also established that when considering the value of the property after it is regulated, courts should consider the parcel as a whole. *Penn Central,* at 130. The Court expressly rejected the appellant's argument that when evaluating a taking, a court should divide a

consider any provisions within the regulation which moderate and mitigate the individual landowner's loss.[58] The second factor is the extent to which the regulation interferes with the landowner's reasonable investment-backed expectations.[59] To find the property owner's reasonable investment-backed expectations, courts measure the pervasiveness of regulations in a particular field.[60] For example, if the owner invests in an area where property is already heavily regulated, the owner will reasonably expect to use the land subject to those regulations.[61] The courts will also consider the investor's expectations lower if the owner should have known at the time the owner invested capital that the property may be subject to future regulations.[62]

The third factor to consider is the character or nature of the taking.[63] In determining the character of the regulation, the *Penn Central* Court drew a distinction between physical invasions[64] and regulations.[65] The Court in *Penn Central* recognized that it would more likely find a taking where there was a physical invasion of the owner's land, as opposed to when the government merely sought to adjust the benefits and burdens of economic life to

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single parcel into different interests, such as the airspace above the building, and then determine whether the worth of that particular interest has been completely abrogated. *Id.*

58. *Penn Central*, 438 U.S. at 137 (providing that the Landmark Preservation Act granted rights to build above other parcels to the owners); Connolly v. United States, 475 U.S. 211, 225-26 (1986) (discussing the mitigation and moderation of the impact of a regulation).

59. *Penn Central*, 438 U.S. at 124-25. Although the *Penn Central* Court did not specifically make a distinction between the economic impact and the effect on investment backed expectations, the Court has adopted the two as distinct factors. *See id.* at 124 (stating that the courts must look at the economic impact "and, particularly" the extent to which the regulation interferes with the owner's reasonable investment-backed expectations); Connolly v. Pension Guar. Corp., 475 U.S. 211, 225-27 (1986) (analyzing economic impact and affect on investment backed expectations as two distinct categories).

60. *See Connolly*, 475 U.S. at 227 (holding that the plaintiff employers had more than sufficient notice to know that pension plans were closely regulated and would likely be subject to more regulations in the future).

61. R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 S.U. L. REV. 1019, 1069 (1992).

62. *Connolly*, 475 U.S. at 227.

63. *Penn Central*, 438 U.S. at 124.

64. *See supra* notes 29-42 and accompanying text (discussing physical takings).

65. *Penn Central*, 438 U.S. at 124; *see Connolly*, 475 U.S. at 225 (discussing the distinction between physical and regulatory takings).

promote the common good.[66] The Supreme Court has expanded the analysis of the character of the regulation to include determining the extent to which a regulation restricts a recognized property right, such as the right to exclude other people from the owner's property.[67]

The fourth factor to consider when determining whether a regulatory taking has been effected is the "average reciprocity of advantage."[68] Under this theory, regulations that diminish the value of property by limiting its use may be justified, or at least partially offset, by an increase in the value of the complaining landowner's property as a result of similar restrictions on neighboring properties.[69] For example, the government may design zoning ordinances, which may limit the use of an owner's land, to maintain the general character of the area or to assure orderly development.[70]

The fifth factor for determining whether a regulatory taking exists is the nature and importance of the public interests which the regulation serves.[71] A regulation is more likely to be upheld if the regulation promotes the health, safety, morals and general welfare

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66. *Connolly*, 475 U.S. at 225.

67. *See* Hodel v. Irving, 481 U.S. 704, 716 (1987) (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

68. *Penn Central*, 438 U.S. at 140 (Rehnquist, J., dissenting). For an excellent discussion of the history and application of the average reciprocity of advantage theory, see generally Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward A New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990).

69. *Penn Central*, 438 U.S. at 139-40 (Rehnquist, J., dissenting) (citing Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922)). Although the Court did not explicitly recognize "average reciprocity of advantage," as a factor, the majority did implicitly recognize its importance by analyzing *Penn Central*'s claim that they were not benefitted by the Landmark Preservation Act. *Id.* at 134.

70. *Id.* at 139 n.2 (Rehnquist, J., dissenting). The majority found that the Legislature determined that New York citizens would benefit both economically and by improving the quality of life in the city as a whole. *Id.* at 134. The *Penn Central* majority held that this was a significant reciprocal benefit of the Landmark Preservation Act. *Id.* The Court also noted that the owner benefitted because the "air rights" were transferable to other buildings in the city which the owner possessed. *Id.* at 135. *See* Hodel v. Irving, 481 U.S. 704, 715 (1987) (analyzing "average reciprocity" to determine whether there was a regulatory taking).

71. *Penn Central*, 438 U.S. at 124.

of the public.[72] For example, the Court has upheld a law prohibiting a landowner from operating a brickyard because the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses, because of the fumes, gases and smoke the brickyard produced.[73]

Courts must weigh and balance each of these five factors on a case-by-case basis to determine whether a regulation unfairly burdens a landowner.[74] If the Court does not find a regulatory taking under this multi-factor balancing test, it may nevertheless find a regulatory taking under the test presented in *Nollan v. California Coastal Commission.*[75]

b. Determining Whether A Regulation Substantially Advances Legitimate State Aims -- Nollan v. California Coastal Commission

A court may also find a regulatory taking where a land-use regulation does not substantially advance legitimate state aims.[76] The Supreme Court first established this rule in *Nollan v. California Coastal Commission.*[77] The *Nollan* Court addressed the issue of whether there was a regulatory taking where a condition attached to a building permit for a coastal residence required the owner to grant an easement along the beach to the public.[78]

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72. *Id.* at 125. In *Penn Central,* the societal interest factor outweighed all others. *Id.* at 138. The Court found that the regulation, which placed restrictions on the development of individual historical landmarks, was a reasonable means of promoting important general welfare interests in environmental control and historic preservation. *Id.*

73. *See* Hadacheck v. Sebastian, 239 U.S. 394, 408, 414 (1915). The *Penn Central* Court cited *Nectow v. Cambridge* as an example of a public interest defeating a regulatory taking claim. *Penn Central,* 438 U.S. at 125 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)). In *Nectow,* the Court upheld a regulation even though it adversely affected a property interest. *Nectow,* 277 U.S. at 188. The regulation in *Nectow* promoted the health, safety, morals and general welfare, and was thus within the police powers of the state. *Id.*

74. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) (providing that a court must analyze each case on its particular facts); *Penn Central,* 438 U.S. at 124 (providing that the Court will engage in an ad hoc factual inquiry).

75. 483 U.S. 825 (1987).

76. *Id.* at 834.

77. *Id.*

78. *Id.* at 828.

Nollan held that the conditional permit amounted to a regulatory taking, because it did not substantially advance the aims of the regulation.[79] The Court developed a two part test to determine whether a regulation results in a regulatory taking.[80] First, there must be a legitimate state interest in enacting the regulation.[81] Second, the regulation must substantially serve the same governmental interest which the government purported to accomplish by enacting the statute.[82] If the court finds the

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79. *See id.* at 838-39. Although the majority's argument initially mirrored a physical takings analysis, as illustrated by its reference to the conditional easement as a permanent physical occupation, the *Nollan* Court did not use the categorical physical takings rule to find a taking. *See id.* at 837; Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1650-51 (1988) (providing that the *Nollan* Court did not use the physical invasion argument to ultimately find the conditional easement invalid); R.S. Radford, *supra* note 61, at 1024 n.38 (stating that the facts and language of the *Nollan* opinion clearly distinguish *Nollan* from physical takings cases); Kari Anne Gallager, Comment, Yee v. City of Escondido: *Will Mobile Homes Provide an Open Road for the* Nollan *Analysis?*, 67 NOTRE DAME L. REV. 821, 841 (1992) (providing that the origin of the "substantially advancing a state interest" requirement in non-physical takings cases proves that *Nollan* was not a physical takings analysis). *But see* Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1608-09 (1988) (stating that the "rational nexus" test only applies to government actions deemed physical takings); Neal Stout, Comment, 38 WASH. U. J. URB. & CONTEMP. L. 305, 311-15 (1990) (opining that Justice Scalia applied the physical invasion test in *Nollan*).

80. *Nollan*, 483 U.S. at 836-37.

81. *See id.*

82. *See id.* In *Nollan*, the *Nollan* Court applied what has traditionally been called either "mid-level," "intermediate," or "heightened" scrutiny. *See* Kmiec, *supra* note 79, at 1650-51 (noting that the *Nollan* Court applied heightened intermediate scrutiny); Michelman, *supra* note 79, at 1608 (writing that *Nollan* expressly endorsed a form of semi-strict or heightened judicial scrutiny); Rose, *supra* note 57, at 250-51 (observing that *Nollan* applied a heightened scrutiny standard). The Supreme Court has applied this intermediate level of review in other cases involving interests which the Court thought to be substantially important, but not constitutionally "fundamental." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-33, at 1610 (2d ed. 1984). Normally, courts give great deference to economic regulations by applying rational basis, low-level scrutiny. *Id.* § 8-7, at 581-86 (2d ed. 1984); *see* United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938) (declaring that the Court would uphold a regulation in the socioeconomic sphere if any facts known or reasonably inferable afforded support for the legislative judgment); Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (using hypothetical facts and reasons to justify legislation); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (upholding legislation without any apparent substantive reasons).

Cases involving gender discrimination, discrimination against aliens, discrimination against illegitimate children, and restrictions on commercial speech have all demanded the use of the intermediate level of review. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (holding that a law which discriminates against illegitimate children will only survive when they are substantially related to a legitimate state interest); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730-33 (1982) (invalidating a statute which excluded males from enrolling in a state supported professional nursing school, because the state failed to show that the classification substantially and directly

regulation had no legitimate purpose, or that it did not substantially serve the regulation's intended purpose, a taking will be found.[83]

In *Nollan*, the state claimed that the purpose of the restriction was to prevent beach front housing congestion, and to protect the public's ability to see the beach.[84] The state attempted to advance these interests by requiring that the petitioner grant an easement along the beach to the public.[85] Since the easement did not protect the public's ability to see the beach[86] or prevent beach front housing congestion,[87] the easement did not substantially advance either of the state's purported purposes.[88] Thus, the Court held that a taking occurred.[89]

Courts apply *Nollan* and *Penn Central* to determine whether a regulation of property effects a regulatory taking. Therefore, a rent control ordinance must pass both the *Nollan* and the *Penn Central* tests to be held constitutional. The Supreme Court has decided very few cases which analyze the constitutionality of rent control under the Takings Clause. However, the Court has recently given its general approval to the constitutionality of rent control in *Pennell v. City of San Jose*.[90]

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related to its proposed objective); Central Hudson Gas & Elec. v. Public Servs Comm'n, 447 U.S. 557, 564 (1980) (holding that restrictions on commercial speech must directly advance the state interest and may not be sustained if the restrictions provide only an ineffective or remote support for the government's purpose); Mathews v. Lucas, 427 U.S. 495, 505 (1976) (holding that, since illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society, discrimination must be subject to a intermediate level of review); Craig v. Boren, 429 U.S. 190, 204 (1976) (invalidating a statute which set the allowable drinking age for 3.2% beer at 18 for women but 21 for men because it did not substantially relate to the achievement of the statute's purported purposes); Trimble v. Gordon, 430 U.S. 762, 772-73 (1977) (finding that the Illinois Probate Act which restricted illegitimate children from inheriting from their fathers was invalid because the restrictions were too attenuated from the purposes of the Act).

83. *Nollan*, 483 U.S. at 837.

84. *Id.* at 835.

85. *Id.* at 828.

86. *See id.* at 838 (reasoning that a requirement that people already on the beaches be allowed to walk across the Nollan's property could not possibly reduce any obstacles to viewing the beach created by the new house).

87. *See id.* at 838-39 (noting that it is impossible to understand how the easement helps to remedy any additional congestion).

88. *Id.* at 839.

89. *Id.* at 841-42.

90. 485 U.S. 1 (1988); *see infra* notes 101-06 and accompanying text (discussing the *Pennell* case).

B. Constitutional Review of Rent Control

Rent control is a regulatory device which enables state and local governments to keep a landlord's rent below the fair market rental value of the property.[91] The Supreme Court first upheld the constitutionality of rent control during World War I in *Block v. Hirsh*.[92] In *Block*, the Court concluded that the rent control statute was constitutional, because of the government's important purpose of providing a temporary emergency measure to counteract a severe shortage in housing during the war.[93]

When the Supreme Court held rent control constitutional in *Block*, the regulatory takings doctrine did not yet exist.[94] Therefore, the *Block* Court did not analyze the statute under the Takings Clause.[95] Three years after the Court decided *Block*, the

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91. Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 746 (1988).

92. Block v. Hirsh, 256 U.S. 135, 154 (1921) (providing that Congress sought to improve an impacted rental market in Washington, D.C. caused by an influx of people during World War I); *see* Bowles v. Willingham, 321 U.S. 503, 518-19 (1944) (upholding a rent control ordinance as an emergency measure during World War II); BAAR, *supra* note 11, § 9.3, at 757 (discussing the Supreme Court's review of emergency rent control statutes). In addition to upholding the rent control ordinance as an emergency measure, the *Block* Court applied a substantive due process analysis. *Block*, 256 U.S. at 157-58. The *Block* Court reasoned that preventing landlords from taking advantage of the emergency shortage by charging inflated rents was a legitimate end. *Id.* The *Block* Court then concluded that rent control was a means reasonably related to the end of preventing such profiteering. *Id.* at 158. The *Block* Court also held that landlords were entitled to a reasonable rent. *Id.* at 157; *see Bowles*, 321 U.S. at 517-18 (upholding an ordinance because it allowed landlords to make a just and reasonable return).

93. *Block*, 256 U.S. at 154.

94. *See supra* notes 43-46 and accompanying text (providing that in 1922, *Pennsylvania Coal* became the first case to apply a regulatory takings analysis).

95. There are three types of non-takings challenges to rent control. Marc J. Korpus, Comment, *Rent Control and Landlords' Property Rights: The Reasonable Return Doctrine Revived*, 33 RUTGERS L. REV. 165, 175 (1980). First, rent control is a violation of the Due Process Clause, which provides that a person will not be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V & XIV. In order to withstand a due process claim, a rent control regulation must enable the owner to receive a just and reasonable return on rented property. *Block*, 256 U.S. at 157; *see also* Pennell v. City of San Jose, 485 U.S. 1, 13 (1988) (providing that a provision would be invalid under the Due Process Clause if it allowed the landlord a reasonable return on investment); Fisher v. City of Berkeley, 37 Cal. 3d 644, 679-80, 693 P.2d 261, 289-90, 209 Cal. Rptr. 682, 710-711 (1984) (upholding regulations which contained a fair return on investment standard); Parks v. Rent Control Bd. of Township Hazlet, 526 A.2d 685, 686-87 (N.J. 1987) (upholding requirement with a just and reasonable return standard); *cf.* Baker v. City of Santa Monica, 181 Cal. App. 3d 972, 978-79, 980, 226 Cal. Rptr. 755, 759 (1986) (providing that the trial court used a standard which took

Supreme Court, in *Chastleton Corp. v. Sinclair*,[96] held that the same rent control statute upheld in *Block* could effect a regulatory taking.[97] The Court ruled that the rent control regulation was no longer consistent with the Fifth Amendment since there was no presence of an emergency.[98] With the exception of the Court's approval of rent control as an emergency measure during World War II,[99] the Supreme Court did not review the constitutionality of rent control until 1988.[100]

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the property's fair market value at the time the government dedicated the property to public use); Jonathan M. Ross, Comment, *California Rent Control as Applied: Assessed Value as a Measure of Fair Return*, 27 SANTA CLARA L. REV. 715, 728-30 (1987) (suggesting that courts should adopt an "assessed value standard," which analyzes whether an owner has received a "fair return" from controlled rent according to the assessed value of the building). The second non-takings constitutional challenge to rent control has been made under the equal protection clause. *See* U.S. CONST. amend. XIV, § 1, cl. 4 (providing that "[n]o [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the law"). The Supreme Court has rejected these arguments holding that rent control laws treating classes of buildings, tenants, and land unequally were not unconstitutional under the equal protection clause. Korpus, *supra* at 175; *see* Bowles v. Willingham, 321 U.S. 503, 516-19 (1944) (rejecting the argument that fixing rents by class or type of apartment is unconstitutional under the Equal Protection Clause, because rent-fixing would place too great a burden on government); Bucho Holding Co. v. Temporary State Hous. Rent Comm., 184 N.E.2d 569, 573-74 (N.Y. App. Ct. 1962) (rejecting the argument that treating landlords differently because of their locality is a violation of the Equal Protection Clause); 8200 Realty Corp. v. Lindsay, 261 N.E.2d 647, 653-55 (N.Y. App. Ct. 1970) (upholding a regulation challenged under the Equal Protection Clause which treated housing units differently depending on their date of construction). The courts which have rejected the equal protection claim have indicated that a statute will not be invalidated under the Equal Protection Clause unless the classification involves a suspect group, infringes on fundamental rights, or is arbitrary and unreasonable. Korpus, *supra* at 176.

The third challenge to rent control has come under the Contracts Clause. *See* U.S. CONST. art. I, § 10 (providing that "[n]o State shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts. . . ."). No such challenge has been successful. Korpus, *supra* at 176; *see* Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 198 (1921) (providing that a regulation, as applied in favor of tenants holding over under an expired lease in disregard of their covenant to surrender, did not violate the Contracts Clause); Kargman v. Sullivan, 582 F.2d 131, 134 (1st Cir. 1978) (providing that the fact that owners subsidized under the National Housing Act (FHA) received significantly less than FHA approved rents as a consequence of rent control was not a violation of the Contracts Clause).

96. 264 U.S. 543 (1924).

97. *Id.* at 546-49.

98. *Id.*; *see* Radford, *supra* note 61, at 1029 (providing that *Chastleton* underscored the significance of the existence of exigent circumstances and the absence of regulatory takings when the Court decided *Block*).

99. *See* Bowles v. Willingham, 321 U.S. 503, 516-19 (1944) (holding that rent control was constitutional in light of the emergency of World War II).

100. BAAR, *supra* note 11, § 9.3, at 757 (providing that New York was the only state to continue rent controls after World War II until the 1970's). *Id.* § 9.4, at 757-58 (providing that Washington, D.C., Miami, Boston, and cities in New Jersey and California all had rent control

In *Pennell v. City of San Jose*,[101] the Supreme Court addressed the issue of whether a rent control ordinance had effected a regulatory taking where it allowed a city-appointed employee to consider the financial hardship of the tenant, in addition to six other factors, to decide whether a landlord could raise the rent.[102] The Court ruled that, since the city had never applied the financial hardship provision to a particular tenant, the Court could not declare that the regulation amounted to a regulatory taking.[103] However, the Court recognized the general validity of rent control, despite the absence of an emergency justification, by ruling that the regulation was not a violation of due process.[104] The Court noted that the express purpose of the rent control ordinance was to prevent excessive and unreasonable rent increases due to housing shortages.[105] The Court held that this purpose was sufficient to withstand the landowner's due process

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regulations during the mid 1970's). Although the Court emphasized the emergency requirement in *Block* and *Chastleton*, several state courts disregarded this requirement. *See, e.g.*, Birkenfield v. City of Berkeley, 17 Cal. 3d 129, 156-57, 550 P.2d 1001, 10221, 130 Cal. Rptr. 465, 485 (1976) (noting that recent court opinions upholding rent control had not referred to the emergency requirement); Westchester West No. 2 Ltd. Partnership v. Montgomery County, 348 A.2d 856, 865 (MD. 1975) (concluding that an emergency shortage of housing was no longer needed to uphold rent control); Hutton Park Gardens v. Town Council of the Town West Orange, 350 A.2d 1, 12 (1975) (ignoring the emergency requirement when formulating the scope of review for rent control).

101. 485 U.S. 1 (1988).

102. *Id.* at 4. The ordinance provided that, in order for a landlord to obtain an increase in rent, the landlord must first obtain permission from a mediation hearing officer. *Id.* at 5. In deciding whether the landlord could raise the rent, the hearing officer must consider seven factors. *Id.* at 9. The first six factors assist the officer determine whether a raise the rent is objectively reasonable. *Id.* The seventh factor provides that the homeowner should consider the financial hardship to the particular tenant or tenants. *Id.* The plaintiffs argued that since the first six factors are designed to determine what is reasonable, the seventh factor would reduce the rent to below that reasonable amount. *Id.* The plaintiffs claimed that this additional reduction represented a regulatory taking since it unjustly forces the landlord to subsidize the poor tenants. *Id.*

103. *Id.* at 9-15; *see* Epstein, *supra* note 91, at 752 (calling the *Pennell* decision a "judicial non-event" because the Court never reached the regulatory takings claim).

104. *See Pennell*, 485 U.S. at 13-14 (providing that the San Jose rent control regulations were a rational attempt to protect the tenants while guaranteeing a fair return to the landlord, and therefore, withstood the Due Process Clause challenge).

105. *Id.* at 12-13.

attack, as long as the regulation guaranteed a fair return to the landlord.[106]

Since *Pennell*, the Supreme Court has not granted certiorari for review of any rent control ordinances. Nevertheless, state courts have recently considered the issue of whether particular rent control ordinances effect takings, and have generally upheld rent control ordinances as constitutional when the ordinance provides a reasonable rate of return to the landlord as required by *Pennell*.[107] However, an exception to this general agreement exists due to a direct conflict between the California Court of Appeal and the Ninth Circuit Court of Appeals as to the constitutionality of rent control within mobile home parks.[108] Since state law also closely regulates the mobile home park owners' property, the courts also considered the effect of California Mobilehome Residency Law on the takings challenges.

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106. *Id.* at 13-14. In his dissent, Justice Scalia stated that he would find that this statute amounted to a taking since the law clearly forced some people to bear public burdens which should be borne by the public. *Id.* at 15, 21, 23 (Scalia, J., dissenting).

107. *See, e.g.*, Fisher v. City of Berkeley, 37 Cal. 3d 644, 679-82, 693 P.2d 261, 289-91, 209 Cal. Rptr. 682, 710-12 (1984) (holding that a city rent control ordinance which paid a fair return on investment was constitutional); Benson Realty Corp. v. Beame, 409 N.E.2d 948, 949 (N.Y. 1980) (providing that rent control is presumptively constitutional); Spring Realty Co. v. NY City Loft Bd., 487 N.Y.S.2d 973, 977 (N.Y. 1985) (upholding a rent control law since the means adopted were reasonable under the circumstances); Apartment & Office Bldg. Ass'n of Metro Washington v. Washington, 381 A.2d 588, 590 (D.C. 1977) (upholding rent control on its face due to a housing crisis).

108. *See* Yee v. City of Escondido, 224 Cal. App. 3d 1349, 1351, 274 Cal. Rptr. 551, 552 (1990) (holding that a rent control ordinance combined with state laws did not effect a physical taking), *aff'd*, 112 S. Ct. 1522 (1992); *cf.* Hall v. City of Santa Barbara, 833 F.2d 1270, 1276 (9th Cir. 1986) (holding that a rent control ordinance combined with state laws effected a physical taking), *cert. denied*, 485 U.S. 940 (1988).

C. The California Mobilehome Residency Law

In most mobile home parks, the mobile home owners rent the pads[109] on which the mobile home sits, while the tenants own the mobile home itself.[110] In addition to supplying the pads, the mobile home park owners often accommodate their tenants with roads, a swimming pool, lakes, and a clubhouse.[111] In 1978, the California Legislature enacted the California Mobilehome Residency Law[112] which limits the circumstances in which the mobile home park owners could evict mobile home owners in order to provide mobile home owners with protection from the high cost of moving.[113] The California Mobilehome Residency Law also limits the circumstances in which the mobile home park owner can remove the tenant's mobile home.[114] The Legislature found the protection against eviction necessary for two reasons. First, eviction forces the tenant to pay the high cost of moving the mobile home, and to risk damaging the mobile home during the move.[115] Second, eviction forces the tenant to pay the high cost of preparing another lot for installation of the mobile home.[116]

The California Mobilehome Residency Law protects the mobile home owner from eviction and the forced removal of the mobile home in three ways. First, the California Mobilehome Residency

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109. *See* Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399, 405 (1988) (defining pad as the land which is rented for placement of the mobile home).

110. *See* Hirsch & Hirsch, *supra* note 109, at 405 (providing that in 1987, 95% of all mobile homes were owned by the tenants).

111. Kirkpatrick v. City of Oceanside, 232 Cal. App. 3d 267, 271, 283 Cal. Rptr. 191, 193 (1991); *see* Hirsch & Hirsch, *supra* note 109, at 405-06 (providing that in most parks, the operator will provide amenities such as roads, access to water and electricity, pools, and lakes).

112. *See* CAL. CIV. CODE §§ 789-799.7 (West 1982 & Supp. 1993).

113. *See id.* §§ 789-799.7 (West 1982 & Supp. 1993); *see* Hirsch & Hirsch, *supra* note 109, at 420 (opining that the California Mobile Home Residency Law was one of the causes of an erosion of mobile home park landlords' property rights).

114. CAL. CIV. CODE §§ 789-799.7 (West 1982 & Supp. 1993); *see* Hirsch & Hirsch, *supra* note 109, at 420 (opining that California Mobile Home Residency Law was one of the causes of an erosion of mobile home park landlords' property rights).

115. CAL. CIV. CODE § 798.55(a) (West Supp. 1993); *see* Hirsch & Hirsch, *supra* note 109, at 404-05 (discussing the difficulty involved when moving a mobile home).

116. CAL. CIV. CODE § 798.55(a) (West Supp. 1993); *see* Hirsch & Hirsch, *supra* note 109, at 404-05 (providing that relocation will cost between $200 to $3,000).

Law limits the circumstances in which a park owner may evict a tenant.[117] The park owner may only evict when: (1) The tenant does not comply with a local or state law or regulation relating to the mobile homes; (2) the tenant engages in substantially annoying conduct which affects other residents; (3) the tenant is convicted for prostitution or possession of controlled substances while on the park premises; (4) the tenant violates a reasonable park rule after being given a warning; (5) the tenant does not pay rent; (6) the city condemns the mobile home park; or (7) the park owner wishes to change the use of his land.[118] Second, California Mobilehome Residency Law protects mobile home purchasers by prohibiting the park owners from requiring the seller to remove the mobile home when the mobile home is sold by the current renter of the pad.[119] Finally, under the California Mobilehome Residency Law, whenever a purchaser of a mobile home has the means to pay rent, the park owner must accept the purchaser as a new tenant.[120]

Thus, California limits the park owner's ability to evict tenants and to force tenants to remove their mobile homes.[121] Furthermore, cities may also limit the power of the park owner to raise the rental price for mobile home pads. The combined burden which local rent control ordinances and the state law places on the park owners has lead to claims by the park owners that the regulations have effected unconstitutional takings. The California Court of Appeal and the Ninth Circuit Court of Appeals were in direct conflict as to whether the combined effect of the state law and city ordinances could result in a physical taking. The Ninth Circuit Court of Appeals, in *Hall v. City of Santa Barbara,*[122] was the first to address this issue.

117. CAL. CIV. CODE § 798.56(a)-(h) (West Supp. 1993).

118. *Id.* §§ 789-799.7 (West 1982 & Supp. 1993).

119. CAL. CIV. CODE § 798.73 (West 1982 & Supp. 1993).

120. *Id.* § 798.74 (West 1982 & Supp. 1993). The California Mobilehome Residency Law does not provide for any controls on rent. *Id.* §§ 789-799.7 (West 1982 & Supp. 1993).

121. *Id.* §§ 798.55-798.61 (West 1982 & Supp. 1993).

122. 833 F.2d. 1270 (9th Cir. 1986), *cert. denied,* 485 U.S. 940 (1988).

1. Hall v. City of Santa Barbara

In *Hall v. City of Santa Barbara*, the Ninth Circuit Court of Appeals addressed the issue of whether a physical taking was effected where a mobile home park ordinance effectively granted low rent leases in perpetuity.[123] The appellate court held that requiring a lease to perpetually continue at a low market price could effect a permanent transfer of a possessory interest in land to the initial tenant, and this transfer of interest could amount to a physical taking.[124] The court defined this possessory interest as the right to occupy land in perpetuity at a rate substantially lower than its market value.[125] Since the California Residency Law requires the landowner to accept new tenants if they have the ability to pay rent, the original tenants can sell the right to occupy in perpetuity to subsequent tenants.[126] The *Hall* court found that the high sale price of the tenants' mobile home to subsequent tenants reflected the transfer of the right to occupy at sub-market rates.[127]

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123. *Id.* at 1273-74; *see* BLACK'S LAW DICTIONARY 1141 (6th ed. 1990) (defining perpetuity as continuing forever); *In Re* Estate of Steele, 124 Cal. 533, 537, 57 P. 564, 565 (1899) (defining perpetuity as any limitation which may take away or suspend the absolute power of alienation for a period beyond the continuance of lives being). The Santa Barbara Ordinance limited the park owners' property rights in three ways. *Hall*, 833 F.2d at 1273. First, the ordinance required leases of unlimited duration. *Id.* Second, tenants could terminate their leases at will while park operators could only terminate when: (1) The tenant failed to comply with local or state mobile home regulations; (2) the tenant engaged in conduct which constituted a substantial annoyance to other residents; (3) the tenant failed to comply with lease provisions or reasonable park rules; (4) the tenant failed to pay rent or other charges; (5) the park was condemned; or (6) the owner changed the use of the park. *Id.* at 1273 n.2. Third, the ordinance strictly limited the amount of rent which the operator could charge. *Id.* at 1273; *see id.* at 1273 n.3 (stating that a park owner may increase rent once a year by 3% and may raise the rent by up to 10% when a space becomes vacant); *cf.* CAL. CIV. CODE §§ 789-799.7 (West 1982 & Supp. 1993) (providing similar limitations on mobile home park owners with the exception of strict limits on rent increases).

124. *Hall*, 833 F.2d at 1276.

125. *Id.* The court rejected the city's argument that the landlord's ability to remove for cause lessened the impact of the statute on the landlord to such an extent as to defeat the physical takings claim. *Id.* at 1277. The court noted that this factor lessened the economic impact somewhat, but it was not enough to change the fact that a possessory interest is transferred to the initial tenant as a long as the subsequent tenants pay the rent and act respectfully. *Id.*

126. *Id.* at 1279.

127. *Id.*

The *Hall* court noted that the policy behind the per se physical taking found in *Loretto v. Manhattan Teleprompter CATV Corp.*[128] strongly supported the recognition of the right to perpetually occupy land at a sub-market price.[129] The Ninth Circuit court noted that, like the statute in *Loretto*, the ordinance in *Hall* deprived the owner of the rights to use, possess, and dispose of a property interest without providing compensation.[130] The impact of the holding in *Hall* on California law was substantially weakened when it was expressly rejected by the California Court of Appeal of the Fourth Appellate District in *Yee v. City of Escondido.*[131]

2. Yee v. City of Escondido -- *An Explicit Rejection of* Hall

In *Yee v. City of Escondido*, the California Court of Appeal of the Fourth Appellate District addressed the issue of whether a rent control ordinance, together with the California Mobilehome Residency Law, could effect a physical taking.[132] Rejecting the holding of *Hall*, the *Yee* court found that such an ordinance could not affect a physical taking for two reasons.[133] First, the *Yee* court stated that the *Hall* opinion misapplied the reasoning of *Loretto.*[134] *Loretto* explicitly stated that the physical taking analysis would not effect the landlord-tenant relationship unless the regulations required the landlord to submit to a physical occupation

128. 458 U.S. 419 (1982); *see supra* notes 36-40 and accompanying text (providing that the *Loretto* Court based its decision on the policy protecting the essential rights of the landowner to possess, use, and dispose of private property).

129. *Hall*, 833 F.2d at 1277.

130. *Id.* The deprivation of these rights, as the *Loretto* Court noted, is an invasion of an unusually serious character. *Id.; see supra* notes 32-42 and accompanying text (discussing *Loretto*).

131. 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990), *aff'd*, 112 S. Ct. 1522 (1992).

132. *Id.* at 1352, 274 Cal. Rptr. 551, 552. The plaintiffs in *Yee* modeled their claim to conform to the reasoning of the *Hall* opinion. Yee v. City of Escondido, 112 S. Ct. 1522, 1527 (1992).

133. *Yee*, 224 Cal. App. at 1357-58, 274 Cal. Rptr. at 556-57.

134. *Id.* at 1358, 274 Cal. Rptr. at 557.

of the property by a third party.[135] Second, the *Yee* court found the fact that the tenant could sell the tenant's mobile home at an inflated rate irrelevant to the physical taking question.[136] The inflated price is irrelevant because the rent control ordinance's effect on the mobile home park owner is the same as any other rent control ordinance, despite the windfall given to the initial tenant.[137]

Having found the physical taking analysis inapplicable,[138] the court addressed the regulatory taking claim.[139] Prior cases established that, as long as the rent control ordinance provides a just and reasonable return on the property,[140] a court will not find a regulatory taking.[141] However, the court in *Yee* did not decide whether there was a just and reasonable return on the mobile home owner's property.[142] Since the park owners never attempted to raise the rents, the park owners could not claim that the ordinance deprived them of a just and reasonable return on their investment.[143] After the California Supreme Court refused to review *Yee*,[144] the United States Supreme Court affirmed the decision of the California Court of Appeal and similarly did not reach the regulatory takings claim.[145] However, the Supreme

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135. *Id.* at 1357, 274 Cal. Rptr. at 556. The court noted that *Loretto* expressly stated that its holding did not affect laws which governed the landlord tenant relationship. *Id.* at 1355, 274 Cal. Rptr. at 554-55; *see supra* notes 32-42 and accompanying text (discussing the reasoning of the *Loretto* Court).

136. *Yee*, 224 Cal. App. at 1356, 274 Cal. Rptr. at 555.

137. *Id.* The ordinance deprives the park owner of the same amount of value whether the original tenant or all the subsequent tenants receive the benefit of the rent control ordinance. *Id.* The court noted that the identity of the person who received the profit had never been of any constitutional significance. *Id.*

138. *Id.* at 1353, 274 Cal. Rptr. at 553.

139. *Id.*

140. *Id.; see supra* notes 91-108 and accompanying text (discussing the constitutional analysis of rent control).

141. *Yee*, 224 Cal. App. 3d at 1353, 274 Cal. Rptr. at 553.

142. *Id.*

143. *Id.* at 1354, 274 Cal. Rptr. at 554.

144. Yee v. City of Escondido, No. SO18658, Cal. LEXIS 353, at *1 (Cal. Jan. 21, 1991).

145. Yee v. City of Escondido, 112 S. Ct. 1522, 1532 (1992); *see infra* notes 168-211 and accompanying text (discussing the majority opinion in *Yee*).

Court provided strong dicta regarding the significance that similar rent regulations would have in a regulatory takings analysis.[146]

II. THE CASE

In *Yee v. City of Escondido*,[147] the United States Supreme Court granted certiorari to resolve a conflict between the Fourth District Court of Appeal of California[148] and the Ninth Circuit Court of Appeals of the United States.[149] The Supreme Court addressed the issue of whether a local rent control ordinance could affect a physical taking when applied concurrently with a state law regulating mobile home rental,[150] where the rent control ordinance limits the amount of rent a mobile home park owner can charge a tenant[151] and the state law limits the park owner's ability to evict, select new tenants, and remove mobile homes.[152]

A. The Facts

John and Irene Yee own a mobile home park in Escondido, California.[153] Since 1978, California mobile home parks have been subject to the California Mobilehome Residency Law.[154] In 1988, the City of Escondido passed a rent control ordinance which prohibits park owners from charging more rent for pads than park

146. *See Yee*, 112 S. Ct. at 1529-30 (noting in several places that the Yees' arguments are relevant to the regulatory takings).

147. 112 S. Ct. 1522.

148. *See supra* notes 131-143 and accompanying text (discussing the analysis and holding of the California Court of Appeal for the Fourth Appellate District in *Yee v. City of Escondido*).

149. *Yee*, 112 S. Ct. at 1527; *see supra* notes 123-130 and accompanying text (discussing the reasoning and holding of the Ninth Circuit in *Hall v. City of Santa Barbara*). The Court further stated that they granted review because of the size of California, its abundance of mobile homes, and the fear that this conflict would lead to forum shopping. *See Yee*, 112 S. Ct. at 1534.

150. *See Yee*, 112 S. Ct. at 1526-27; *supra* notes 131-143 and accompanying text (providing an analysis of the California Court of Appeal reasoning in *Yee*).

151. *Yee*, 112 S. Ct. at 1526-27.

152. *Id.*

153. *Id.* at 1527.

154. *Id.* at 1526; *see supra* notes 109-121 and accompanying text (discussing the California Mobilehome Residency Law).

owners charged in 1986.[155] Under the Escondido ordinance, a park owner may not increase rent for a pad unless the City Council approves the increase.[156] The Yees filed suit in California state court claiming that, as a result of the rent control ordinance and the Mobilehome Residency Law, the Yees' property had been unconstitutionally taken without just compensation.[157] The Yees argued that there were five factors which warranted a finding of a physical taking. First, relying on *Hall*, the Yees contended that the government transferred a distinct possessory interest in land--the right to occupy property in perpetuity--from the park owners to the tenants while only paying a fraction of its value.[158] Second, the Yees argued that the ordinance transfers wealth from park owners to the original tenants, as evidenced by the high cost at which the tenants can subsequently sell the mobile homes.[159] Third, the Yees argued that the ordinance only benefits the first tenant, because the subsequent tenants' low rent is offset by the high cost of the mobile home they purchase from the initial tenant.[160] Fourth, the Yees argued that the ordinance deprives petitioners of the ability to choose their incoming tenants, since the Yees may not threaten to increase rent for the prospective purchasers that the Yees disfavor.[161] Fifth, the Yees contended that the *Loretto* Court ruled that the government could not justify a physical invasion on

155. *Yee*, 112 S. Ct. at 1527.

156. *Id.* The Council must approve any increases it determines to be just, fair and reasonable, after considering the following factors: (1) Changes in the Consumer Price Index; (2) the rent charged for comparable mobile home pads in Escondido; (3) the length of time since the last rent increase; (4) the cost of any capital improvements related to the pad or pads at issue; (5) changes in property taxes; (6) changes in any rent paid by the park owner for the land; (7) changes in utility charges; (8) changes in operating and maintenance expenses; (9) the need for repairs other than for ordinary wear and tear; (10) the amount and quality of services provided to the affected tenant; and (11) any lawful existing lease. ESCONDIDO, CAL., ORDINANCE § 4(g), App. 11-12 (1988). These eleven factors are non-exclusive. *Id.*

157. *Yee*, 112 S. Ct. at 1527.

158. *Id.*

159. *Id.* at 1529-30.

160. *Id.*

161. *Id.* at 1530 n.1.

the grounds that a landlord has the option to stop renting to tenants.[162] In addition to the Yees' five arguments for a physical taking, the Yees asserted that the ordinance constitutes a regulatory taking under both *Penn Central* and *Nollan.*[163]

The Superior Court sustained the City's demurrer despite the Yees' argument that the Ninth Circuit's ruling in *Hall v. City of Santa Barbara* dictated that the Escondido ordinance constituted a physical taking.[164] The Court of Appeal also rejected *Hall,* stating that the *Hall* court had misapplied the reasoning of *Loretto's* physical takings analysis.[165] The California Supreme Court denied review.[166] The United States Supreme Court granted certiorari to resolve the conflict between the decisions of the federal and state courts.[167]

B. The Majority Opinion

In an opinion by Justice O'Connor, the Court held that the Escondido rent control ordinance was not a physical taking.[168] The Supreme Court held that the ordinance was not a physical taking under *Loretto,* since it did not *compel* the Yees to submit to a physical invasion.[169] However, the Court stated that many of

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162. *Id.* at 1530; *see supra* note 42 and accompanying text (discussing footnote 17 of *Loretto*). The *Loretto* Court held that a government could not condition the landlord's ability to rent his property on the surrendering of the right to compensation for physical occupation. Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 439 n.17 (1982).

163. *See Yee,* 112 S. Ct. at 1531; Brief for Petitioner at 17, 25, Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (No.90-1947) (arguing that the Escondido ordinance effects a regulatory taking under both *Penn Central* and *Nollan*); *supra* notes 76-89 and accompanying text (discussing *Nollan's* substantial nexus test); *supra* notes 50-74 and accompanying text (discussing *Penn Central's* multi-factor balancing test).

164. *See Yee,* 112 S. Ct. at 1527.

165. *See id.; supra* notes 133-137 and accompanying text (discussing the reasoning of the California Court of Appeal in the Fourth Appellate District for holding that there was no physical taking); *supra* notes 123-130 and accompanying text (discussing the opinion of the Ninth Circuit in *Hall*).

166. Yee v. City of Escondido, No. S018658, Cal. LEXIS 353, at *1 (Cal. Jan. 21, 1991).

167. *Yee,* 112 S. Ct. at 1527.

168. *Id.* at 1534.

169. *See id.* at 1528 (noting that the Escondido ordinance, even when considered in conjunction with the California Mobilehome Residency Law, does not compel a physical invasion of property).

the Yees' arguments would be relevant in determining whether the ordinance effected a regulatory taking.[170]

1. The Physical Takings Claim

The Court rejected the Yees' argument that the physical takings claim was within the scope of the *Loretto v. Teleprompter Manhattan CATV Corp.*'s physical taking doctrine.[171] Under *Loretto*, the Court held that, when a government authorizes a permanent physical occupation of property, the courts will automatically consider the government's actions to be a taking, without regard to the magnitude of the interference or the importance of the societal interests.[172] The *Yee* Court explained that the Yees did not have a claim for a physical taking, because they lacked an essential element--compulsion.[173] In order to state a claim for a physical taking, the Yees must show that the government required them to submit to a physical taking.[174] The government did not require the Yees to submit to a physical taking, because they voluntarily decided to rent the mobile home spaces.[175] Additionally, the Yees were not forced to continue renting, since it was within the Yees' power to evict tenants if they wanted to change the use of the land.[176]

Next, the Court ruled that it is irrelevant that the ordinance may have deprived the Yees of the benefit of the property.[177] Since

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170. *See id.* at 1529-30 (highlighting the arguments of the Yees which are relevant to the regulatory takings argument).

171. *Id.* at 1528; *see supra* notes 32-42 and accompanying text (discussing the physical takings doctrine developed in *Loretto v. Teleprompter Manhattan CATV Corp.*); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 422 (1982). Justice O'Connor wrote the majority opinion and was joined by Chief Justice Rehnquist, and Justices White, Stevens, Scalia, Kennedy, and Thomas. *Yee*, 112 S. Ct at 1525.

172. *Loretto*, 458 U.S. at 426; *see supra* notes 32-42 and accompanying text (discussing the Supreme Court's holding in *Loretto*).

173. *Yee*, 112 S. Ct. at 1528.

174. *Id.*

175. *Id.*

176. *See id.* at 1528.

177. *See id.* at 1531-32 (explaining that since the Yees' did not apply for rent increases, as authorized by the ordinance, the Yees could only challenge the ordinance as unconstitutional on its face).

the Yees did not exhaust all administrative remedies which the ordinance made available,[178] the Court could not determine whether the ordinance, as applied, was unconstitutional.[179] The Court ruled that it could not determine the extent to which the ordinance deprived the Yees of the benefit of their land unless the Yees had taken all available measures that the ordinance provided in order to preserve the benefits of their land.[180] Thus, the extent to which the ordinance deprived the Yees of the benefits of their land was irrelevant.[181]

The Court then explained that *Loretto v. Teleprompter Manhattan CATV Corp.*[182] expressly limited the physical takings doctrine from reaching regulation of landlord-tenant relationships.[183] *Loretto* recognized that the government has a broad power to regulate housing conditions and the landlord-tenant relationship.[184] However, the Court in *Yee* noted that an examination of landlord-tenant regulations would still be appropriate in determining whether there was a regulatory taking.[185] Specifically, the Court explained that courts may still consider whether such regulations of the landlord-tenant relationship had "gone too far," and consequently, effected a regulatory taking.[186]

The Court then dismissed the Yees' complaint that the ordinance transfers wealth to the tenant, by allowing the tenant to

178. *See id* at 1531-32; *supra* note 156 (providing that the Escondido rent control ordinance allowed park owners to apply to the City Council in order to get an increase in the amount of rent which they could charge).

179. *See Yee*, 112 S. Ct. at 1532.

180. *See id.* at 1529, 1532.

181. *Id.* at 1532.

182. 458 U.S. 419; *see supra* notes 32-42 and accompanying text (discussing *Loretto*).

183. *Yee*, 112 S. Ct. at 1529; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (discussing landlord-tenant relationships).

184. *See id.* (quoting Loretto v. Teleprompter Manhattan CAT Corp., 458 U.S. 419, 440 (1982) and FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987)).

185. *Id.*

186. *See id.* (quoting Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922)); *supra* notes 43-46 and accompanying text (discussing *Pennsylvania Coal* and its introduction of the principle that a regulation could go "too far").

charge an inflated price for the sale of the tenant's mobile home.[187] The Court reasoned that such a wealth transfer is commonplace in the zoning context.[188] The Court stated that there is only one distinction between the wealth transfer effected by Escondido's regulation and wealth transfers effected by other zoning ordinances.[189] The sole difference is that the inflated sale price of the mobile homes merely makes the wealth transfer more visible.[190] Nevertheless, the regulation does not effect a physical taking, since there is no evidence that the government required the Yees to rent or continue renting the mobile home pads.[191]

The Court then addressed the Yees' argument that the rent control ordinance only benefitted the first tenant, due to the inflated prices paid by subsequent tenants for the mobile home.[192] The Yees argued that since the California Mobilehome Residency Law requires the landowner to accept any new tenant who has the ability to pay rent, the first tenant can sell the right to occupy to the subsequent tenant at an inflated price.[193] The Court rejected the application of this argument to the physical taking context, because the benefit to the initial tenant did not change the fact that the government did not require the Yees to submit to the physical occupation of their land.[194] The Court noted that the benefit for the first tenant would be relevant in finding a regulatory taking

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187. *See Yee*, 112 S. Ct. at 1529; *supra* notes 158-163 and accompanying text (discussing the Yees' arguments).

188. *Yee*, 112 S. Ct. at 1529. For example, the Court explained, when a property owner is prohibited from mining coal on his land, the value of his property may decline but the value of his neighbor's property may rise. *Id.*

189. *See id.* (citing Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 743 (1988)); Epstein, *supra* note 91, at 743 (opining that *all* rent control is unconstitutional).

190. *Yee*, 112 S. Ct. 1529 (citing Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 758-59 (1988)).

191. *See Yee*, 112 S. Ct. at 1529 (stating that the existence of the transfer itself does not convert regulation into a physical invasion).

192. *See id.* at 1530.

193. *Id.* at 1529-30.

194. *Id.* at 1530.

under *Nollan v. California Coastal Commission.*[195] Under *Nollan*, a court will consider a regulation of property a taking if that regulation does not substantially advance the aims of the regulation.[196] The Court noted that a rent control ordinance which only benefitted the initial tenant may indicate that the aims of the ordinance are not being substantially advanced,[197] and thus, would constitute a regulatory taking.[198]

Next, the Court stated that the fact that the ordinance might deprive the park owners of the opportunity to choose tenants was irrelevant to the physical takings claim, because the ordinance did not *compel* the Yees to open the property to occupation by others.[199] The Court again noted that this fact might be relevant to establishing a regulatory taking claim.[200] Specifically, the Court noted that depriving the park owners of the opportunity to choose the tenants would be relevant to the *Penn Central* multi-factor balancing test.[201] Courts use the *Penn Central* test to determine whether a regulation goes so far as to unfairly single out a property owner to bear a burden which society should bear as a whole.[202]

Finally, the Court rejected the Yees' contention that, under *Loretto*, the government could not justify a physical invasion on the grounds that a landlord has the option to stop renting the mobile

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195. *See id.*; Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (finding a regulatory taking because the city's restrictions did not substantially advance the purposes of the restrictions); *supra* notes 76-89 and accompanying text (discussing the reasoning of *Nollan*).

196. *Nollan*, 483 U.S. at 834.

197. *See Yee*, 112 S. Ct. at 1530 (noting that the benefit to the initial tenant would be relevant to show the absence of a substantial nexus between the effect of the ordinance and the objectives it is supposed to advance).

198. *See id.*

199. *See id.* (stating that the inability to choose incoming tenants does not convert regulation into the unwanted physical occupation of land).

200. *Id.*

201. *See id.* (noting that this argument could be considered to determine whether the ordinance was disproportionately concentrated on a few persons); *supra* notes 55-73 and accompanying text (discussing the factors presented in *Penn Central*).

202. *See Yee*, 112 S. Ct. 1530; *supra* notes 50-74 and accompanying text (discussing the multi-factor balancing test recognized in *Penn Central*).

home pads.[203] The Court ruled that this argument was based on a misreading of *Loretto*.[204] The Escondido Ordinance had not initially compelled the Yees to rent their property.[205] Since there was no initial requirement to rent, the Yees could not argue, as the Court in *Loretto* had argued, that the ordinance forced the Yees to forfeit the right to compensation.[206] Thus, the Court rejected all five of the plaintiffs' arguments regarding physical takings.[207] Although the Court repeatedly indicated that these arguments were applicable to a regulatory takings analysis, the Court refused to address the regulatory taking claim.[208]

2. *The Court's Refusal To Address the Regulatory Takings Claim*

The Supreme Court in *Yee* repeatedly indicated that the Yees' arguments would be relevant to a regulatory takings analysis. However, the Court refused to rule on the regulatory takings issue for several procedural and policy reasons.[209] Although the Yees submitted a brief of the regulatory takings arguments to the Supreme Court, the Court ruled that it would not review the regulatory taking claim, since it was not listed in the petition for certiorari.[210] Therefore, the holding of *Yee* remains narrow. The

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203. *Yee*, 112 S. Ct. at 1530; *see supra* note 42 and accompanying text (discussing footnote 17 of *Loretto*).

204. *See Yee*, 112 S. Ct. 1530-31.

205. *Id.* at 1531.

206. *Id.* at 1530-31.

207. *See id.* 1528-31.

208. *Id.* at 1532.

209. *Id.* at 1532-34.

210. *See id.* at 1532-33. The Court noted that the Supreme Court was bound not to review questions which were not listed in the petition for certiorari. *Id.* A presumption against review exists and is based on the policy of conserving the Court's resources and insuring that the respondent is fully prepared to contest the petition for certiorari. *Id.* at 1533; *see id.* (stating that notice to the respondent enables the respondent to sharpen the arguments as to why certiorari should not be granted); *id.* (providing that the Court must limit itself to resolving only particularly important questions). The Court stated that the presumption against reviewing questions not listed in the petition was not overcome by the Yees. *Id.* at 1534. Justice O'Connor also explained that, since the Yees had not exhausted all their administrative remedies, the claim that the ordinance as applied effected a regulatory taking was not ripe. *Id.* at 1531.

Escondido ordinance did not effect a physical taking because it did not require the property owners to submit to a physical taking.[211]

C. Concurring Opinions by Justices Blackmun and Souter

Justice Blackmun, in a concurring opinion, agreed with the majority's holding that the Yees did not state a claim for a physical taking.[212] However, Justice Blackmun did not decide whether the Yees' arguments were relevant to a regulatory takings claim.[213] Justice Blackmun stated that the regulatory takings claims were not properly before the Court, and therefore, the Court should not have considered the relevance of regulatory takings law at all.[214]

Justice Souter also agreed with the majority's holding that the Yees did not state a claim for a physical taking.[215] However, without explanation, Justice Souter stated that he did not concur with the Court's references to the relevance and significance of the Yees' allegations to the regulatory taking analysis.[216]

III. LEGAL RAMIFICATIONS

The United States Supreme Court's decision in *Yee v. City of Escondido*[217] settled a dispute between the Fourth District Court of Appeal of California and the Ninth Circuit Court of Appeals of

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211. *See id.* at 1530.

212. *Id.* at 1534 (Blackmun, J., concurring).

213. *See id.* 1534-35 (Blackmun, J., concurring).

214. *Id.* Although Justice Blackmun expressed no opinion as to whether he thought the Yees' arguments were relevant to a regulatory takings claim, he may have abstained from joining the majority's opinion because of its reference to the significance of *Nollan v. California Coastal Comm'n.* Justice Blackmun dissented in *Nollan,* because he disagreed with the Court's "rigid interpretation" of the necessary correlation between the burden created by a land development and the regulation imposed to mitigate that burden. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 865 (Blackmun, J., dissenting). Justice Blackmun stated that such a close nexus would prevent the creative solutions needed to correct the land-use problems of this country. *See id.* This disagreement with the decision in *Nollan* was probably the cause of Justice Blackmun's reluctance to join in the majority's suggestion that the Yees' arguments might have relevance to the *Nollan* analysis.

215. *Id.* at 1535 (Souter, J., concurring).

216. *Id.*

217. 112 S. Ct. 1522 (1992).

the United States by holding that a rent control ordinance could not effect a physical taking unless the ordinance *required* the owner to rent or continue renting the owner's property.[218] The test for finding a physical taking remains extremely narrow:[219] A court will only find a physical taking of property where the government requires the owner to submit to the physical occupation of land.[220] Since Escondido's rent control ordinance did not *compel* the Yees to rent or continue to rent their property, the ordinance did not effect a physical taking.[221] Nonetheless, California mobile home park owners should, on the same facts as *Yee*, be able to prove a regulatory taking without just compensation. The Supreme Court indicated that when determining whether the government has effected a regulatory taking, courts should analyze the rent control ordinance under the *Penn Central Transportation Company v. New York City* multi-factor balancing test or the *Nollan v. California Coastal Commission* substantial nexus test. Under the *Penn Central* multi-factor balancing test, the courts will weigh and balance five factors to determine whether a regulation unfairly singles out the owner to bear a burden which society should bear.[222] Under the *Nollan* substantial nexus test, the courts will engage in a dual inquiry to determine whether a regulation substantially advances a legitimate state objective.[223] The *Yee* Court indicated that most of the arguments the Yees advanced are relevant to the *Penn Central* multi-factor balancing test or the *Nollan* substantial nexus test.[224] Since the outcome of a regulatory takings analysis

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218. *Id.* at 1528, 1534; *see supra* notes 168-208 and accompanying text (discussing the holding of *Yee*).

219. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (discussing the limited reach of the Court's physical takings analysis).

220. *Yee*, 112 S. Ct. 1528, 1534.

221. *Id.*; *see supra* notes 168-208 and accompanying text (discussing the holding of *Yee*).

222. *See supra* notes 50-74 and accompanying text (analyzing the *Penn Central* multi-factor balancing test).

223. *See supra* notes 76-89 and accompanying text (discussing *Nollan*).

224. *See supra* notes 185-202 and accompanying text (highlighting the dicta in *Yee* which applies to the mobile home park context).

depends on the specific facts of each particular case,[225] the outcome of *Yee* under *Nollan* and *Penn Central* may not be the same for the rent control ordinances of other cities. An analysis of the facts of *Yee* under *Nollan* and *Penn Central*, however, will demonstrate to future litigants how the courts may view factors which are common among most rent control ordinances regulating mobile home parks.

Under an application of the *Penn Central* and *Nollan* tests to Escondido's rent control ordinance, there are two possible outcomes. First, using the *Penn Central* multi-factor balancing test, the Yees would not be able to prove a regulatory taking.[226] Second, the Yees would likely be successful in proving that the ordinance does effect a regulatory taking under *Nollan v. California Coastal Commission.*[227] The following analyses will demonstrate the possible ramifications of the dicta in *Yee* on regulatory takings law in the California mobile home park context.

A. Application of the Multi-Factor Balancing Test--A Weak Argument for Park Owners

The application of the *Penn Central* multi-factor balancing test determines whether a rent control ordinance unfairly singles out the property owners to bear a burden which society should bear.[228] The courts will examine the following five factors to make the determination: (1) The economic impact which the regulation has on the owner; (2) the extent to which the regulation interferes with the owner's reasonable investment-backed expectations; (3) the

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225. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) (providing that the point at which the government "goes too far" depends upon the particular facts of the case); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (stating that the constitutionality of the restriction depends on the particular circumstances in that case); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1985) (explaining that a court must make an essentially *ad hoc* factual inquiry to determine whether the government has effected a regulatory taking).

226. *See supra* notes 50-52 and accompanying text (discussing the underlying policy of the *Penn Central* test).

227. *See supra* notes 76-89 and accompanying text (discussing the requirements of *Nollan*).

228. *See Penn Central*, 438 U.S. at 123.

character and nature of the taking; (4) the extent which the regulation benefits the owner; and (5) the degree to which the regulation advances societal interests.[229]

1. Economic Impact of the Regulation on the Owner of the Property

To determine the economic impact of the regulation upon the owner, the courts will consider the amount of money the landowner loses as a result of the regulation.[230] The courts will also consider any mitigating provisions in the regulation.[231]

The Escondido rent control ordinance's economic impact on the landowner is readily calculable. As a result of the Escondido ordinance, the Yees must continue charging the same rental rates they charged in 1988, despite any increase in the fair market rental value of the property. The financial loss which the regulation causes to the Yees is the difference between the fair market rental value and the rate set by the Escondido rent control ordinance.

The courts would next look at any mitigating provisions in the Escondido rent control ordinance. Under *Pennell v. City of San Jose*[232] and several other California state court cases,[233] a regulation will be upheld if it affords the owner a fair or reasonable rate of return.[234] The Escondido rent control ordinance contains a provision directing that the city afford a "fair and reasonable return" to the park owner.[235] Therefore, it would seem that the economic impact factor of the *Penn Central* test would not favor

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229. *Penn Central*, 438 U.S. at 124-25; *see supra* notes 50-74 and accompanying text (analyzing the *Penn Central* multi-factor balancing test).

230. *See supra* note 57 and accompanying text (discussing the economic impact factor and the diminution in value test).

231. *See supra* notes 56-58 and accompanying text (discussing the first factor of the multi-factor balancing test).

232. 485 U.S. 1 (1988); *see supra* notes 101-107 and accompanying text (discussing *Pennell*).

233. *See supra* note 107 (providing the California state court cases which have upheld rent control ordinances which provide a fair or reasonable rate of return).

234. *Pennell*, 485 U.S. at 13.

235. Brief for Respondent at 27, Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (No. 90-1947); *see infra* note 267 (setting out the exact wording of the ordinance's purpose).

the finding of a regulatory taking, because Escondido has expressly complied with the *Pennell* requirement.

The *Pennell* Court explicitly stated that it did not determine whether a court could find as unconstitutional a rent control ordinance as applied to a specific landowner.[236] Thus, the Yees could argue that the Escondido ordinance, while providing for a "fair and reasonable rate of return," did not *in fact* supply them with a reasonable rate of return. The Yees could demonstrate the absence of a fair and reasonable return by proving that there is an inordinately large disparity between controlled rent rates and the fair market value.[237] However, *Pennell* will still make it difficult for the Yees to show that the economic impact of the Escondido rent control ordinance is any different from any other rent control ordinance. Although the *Pennell* Court explicitly limited its holding to a due process analysis, it stands for the proposition that rent control, as a general matter, is constitutional.[238] The courts' general acceptance of rent control in *Pennell* would significantly weaken the Yees' claim that the Yees are subject to a substantial economic impact. In order to distinguish the Escondido ordinance from rent control ordinances in general, the Yees must show that the Escondido ordinance exacts an unusually large amount of money. No one factor is determinative in the *Penn Central* multi-factor balancing test. Thus, the courts will also consider the extent to which the Escondido ordinance interferes with the Yees' reasonable investment-backed expectations.

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236. *Pennell*, 485 U.S. at 9-10.

237. *See, e.g.*, Kirkpatrick v. City of Oceanside, 232 Cal. App. 3d 267, 271, 283 Cal. Rptr. 191, 193 (1991) (claiming that an Oceanside ordinance as applied, did not yield a fair and reasonable return). The Kirkpatricks claimed that they receive only $272.55 per space a year, a mere 2% return on an investment of $3,500,000. *Id.* at 271, 283 Cal. Rptr. 191, 193 (1991).

238. *See* Epstein, *supra* note 91, at 753 (stating that *Pennell* was a reiteration of the Court's view that rent control, as a general matter, is constitutional); *supra* notes 101-107 and accompanying text (discussing the significance of *Pennell*).

2. *Interference With Reasonable Investment Backed Expectations*

To find the extent of interference with the owners reasonable investment-backed expectations, courts will attempt to determine whether the owner should reasonably have known, before buying the property, that the government was or would soon be regulating the property.[239] The courts will analyze the pervasiveness of the regulations in a particular field.[240] The courts will also consider specific facts which tend to prove that the owner did have notice that the government might soon regulate the property.[241]

In 1988, studies indicated that 25% of all apartments in California had controlled rent.[242] Since 1978, the California Mobilehome Residency Law has heavily regulated mobile home parks in California.[243] The Yees purchased their property July 30, 1978.[244] Since the Yees invested money at a time when state and local governments heavily regulated mobile home parks in California, the Yees should have known that Escondido might subject mobile home parks to rent control regulation. Therefore, the courts must conclude that the government, by passing a rent control ordinance, did not interfere with the Yees' reasonable expectations.[245] After considering the investment-backed expectations of the owner, the Court would next consider the character and nature of the taking.

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239. *See supra* notes 59-62 and accompanying text (discussing the analysis for finding reasonable investment-backed expectations).

240. *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 227 (1985); *supra* notes 59-62 and accompanying text (discussing the importance of analyzing the pervasiveness of regulations when evaluating reasonable expectations).

241. *See Connolly*, 475 U.S. at 227; *supra* notes 59-62 and accompanying text (discussing the reasonable investment-backed expectations factor).

242. BAAR, *supra* note 11, § 9.5, at 758.

243. *Hirsch & Hirsch*, *supra* note 109, at 420.

244. Brief for the Respondent at 1, Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (No. 90-1947).

245. *See* Radford, *supra* note 61, at 1069 n.293 (stating that a showing that rent control was seriously and publicly being considered at the time of the investment would weigh in favor of the ordinance).

3. Character and Nature of the Taking

In *Penn Central*, the Supreme Court explained that courts must look at the character and nature of the regulation.[246] As an example, the *Penn Central* Court pointed to the difference between physical occupations and regulations.[247] However, subsequent Supreme Court cases have expanded the character analysis to include the inquiry of whether a regulation abrogates or restricts essential property rights.[248] The Takings Clause protects the essential rights which all property owners possess--the rights to use, possess, and dispose of the property.[249] Here, mobile home park owners could argue that Escondido has effectively taken their right to dispose of property. As explained by the Ninth Circuit in *Hall v. City of Escondido*,[250] the reason the initial tenant can sell the mobile home at such a high rate, is that the tenant is effectively transferring a right to occupy the property at a controlled rate.[251] Since the regulation allows the initial tenant to dispose of this right at will, the Yees could argue that the regulation is depriving them of the right to dispose of a part of the property. The courts would consider such a deprivation to be serious in character and, consequently, good evidence for finding a regulatory taking. In addition to considering the character of the regulations, the courts will consider the reciprocity of advantage accorded to the property owner.

4. Reciprocity of Advantage

Another factor the courts will likely consider is the extent to which the regulation affords the land owner an average reciprocity

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246. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977).

247. *See supra* notes 63-67 and accompanying text (analyzing the character and nature factor).

248. *See supra* notes 63-67 and accompanying text (analyzing the character and nature factor).

249. *See supra* notes 1-4 and accompanying text (discussing the rights of property owners).

250. 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 585 U.S. 940 (1988); *see supra* notes 123-130 and accompanying text (discussing *Hall*).

251. *See supra* notes 123-127 and accompanying text (discussing *Hall's* finding that a property interest is transferred by a Santa Barbara ordinance).

of advantage.[252] When analyzing reciprocity of advantage, courts will look to the benefit that the regulation affords the landowner.[253] In the rent control context, the reciprocity of advantage is not as concretely definable as the other *Penn Central* factors, because the benefits that an owner receives due to the limitation on the owner's income are not readily apparent. For example, in the zoning context, cities can argue that an owner benefits from the promulgation of an orderly development plan.[254] On the other hand, a rent control ordinance's benefits to the property owner are more abstract and, thus, more difficult to prove.

Escondido would likely argue that all citizens benefit from rent control since it prevents the problems which would result from excessive rents.[255] For example, Escondido could argue that the provision of low-to-moderate-income housing benefits the owner, because it removes many otherwise homeless people from the neighborhood streets. As a result, the price of real estate, and consequently, the fair market rental value of the land, would increase. Without empirical data, it would be difficult to show that homeless people are actually removed and that, as a result, real estate prices increase.

The Yees could counter that the initial tenant is the only person who will benefit from the rent control ordinance. Since the initial tenant collects the inflated purchase price from the unlucky subsequent tenant, the subsequent tenant must be financially capable of affording the inflated sale price of the mobile home. A court would find that a tenant with the means to pay such an inflated price for rent would not have been homeless without the enaction of the rent control ordinance. This fact would tend to disprove any claim that the rent control ordinance would cause a

252. *See supra* notes 68-70 and accompanying text (discussing average reciprocity of advantage).

253. *See id.*

254. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133-35 (1977).

255. *See* Coletta, *supra* note 68, at 345 (providing that all those burdened by rent regulations are parties to a "social contract" which prevents the turmoil that might result from excessive and unreasonable rents).

decrease in homelessness and a subsequent increase in real estate prices. Although the city would fail in proving an average reciprocity of advantage, the city may still rely heavily on the final factor in order to justify the rent control ordinance. The final factor is societal interests which the ordinance advances.

5. Nature and Importance of Societal Interests

The court will then analyze the nature and importance of the societal interests which the regulation serves.[256] The Escondido rent control ordinance purports to eliminate the inequities resulting from the scarcity of mobile home pads.[257] The city could rely heavily on *Pennell v. City of San Jose*.[258] *Pennell* upheld the general validity of rent control as a protection for the general welfare of persons with limited income.[259] The Escondido ordinance also protects the general welfare of society, particularly tenants with limited income.

A distinct factor in the mobile home context, as opposed to rent control in general, is the fact that mobile home park tenants tend to be much older than the average tenant.[260] The city may argue that there is an even greater interest involved in the mobile home park context, due to this saturation of the market by elderly people. Not only does the rent control ordinance provide assistance to the poor, the Escondido ordinance protects a class of society that people often neglect.

6. Determining the Outcome of the Balance

After applying the five *Penn Central* factors to the facts of *Yee*, courts would probably uphold an ordinance similar to Escondido's

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256. *See Penn Central*, 438 U.S. at 124.

257. Brief for Respondent at 27, Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (No. 90-1947); *see infra* note 267 (setting forth Escondido's purpose of enacting the rent control ordinance).

258. 485 U.S. 1 (1988).

259. *Pennell*, 485 U.S. at 13; *see supra* notes 101-107 and accompanying text (discussing *Pennell*).

260. *Hirsch & Hirsch*, *supra* note 109, at 414.

for two reasons. First, *Pennell* dictates that rent control, with its important societal purposes, is generally valid.[261] Second, the Yees were aware of the pervasive regulation of the mobile home market. When the Yees invested the money, they should have been aware that future regulation of their rents was possible. Thus, the court would likely conclude that the regulation did not effect a taking under *Penn Central.* However, Yees could still argue that the Escondido rent control ordinance does not meet the substantial nexus test set out in *Nollan.*

B. Nollan--*The Substantial Nexus Test*

Under *Nollan v. California Coastal Commission,*[262] courts engage in a dual inquiry to determine whether a regulation has effected a regulatory taking.[263] First, whether there is a legitimate state interest in enacting the regulation.[264] Second, whether the regulation substantially serves the same governmental interest which the government purported to accomplish by enacting the regulation.[265] An examination of the facts of *Yee* under this heightened standard of review will show that courts would rule that Escondido's ordinance effects a regulatory taking. This analysis will demonstrate to future litigants how the courts may view factors which are common among rent control ordinances which regulate mobile homes in California.

1. The City of Escondido Advances A Legitimate Purpose For Enacting the Rent Control Ordinance

In order to uphold a regulation of property as constitutional under *Nollan,* the courts must first find that there is a legitimate

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261. *See* Epstein, *supra* note 91, at 753 (stating that *Pennell* was a reiteration of the Court's view that rent control, as a general matter, is constitutional); *supra* notes 101-107 and accompanying text (discussing the significance of *Pennell*).

262. 483 U.S. 825 (1987).

263. *See supra* notes 76-89 and accompanying text (discussing *Nollan*).

264. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).

265. *Id.*

interest in enacting the regulation.[266] In the Brief for the Respondent to the Supreme Court, the City of Escondido argued that the purpose of the ordinance was to remedy the inequitable market situation caused by a scarcity of pads for mobile homes.[267] Other California cities are likely to advance similar purposes when defending city ordinances against regulatory takings claims.[268]

Nollan recognized that the Supreme Court had not elaborated on the standards for determining what constitutes a legitimate state purpose.[269] Nonetheless, courts will likely find that protecting tenants from the inequities of a scarce rental market are legitimate for two reasons. First, in recognizing the general validity of rent control, *Pennell* stated that the Court had long recognized that the protection of consumer welfare is a legitimate and rational goal of price or rate control regulation.[270] Courts would likely consider Escondido's goal of protecting tenants from the inequities of a scarce rental market, namely high rents, a legitimate and rational goal.[271] Second, courts frequently uphold rent control ordinances

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266. *Id.* at 834; *see supra* notes 76-89 and accompanying text (discussing the *Nollan* test).

267. Brief for Respondent at 27, Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (No. 90-1947). Escondido argued: "The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobile home spaces by protecting mobile home owners from unreasonable space rental increases therefore protecting the homeowner's investments, while also providing park owners with a just and reasonable return on the park owner's investment." *Id.* The Escondido ordinance itself provides no express purpose. Brief for Petitioner at 26, Yee v. City of Escondido, 112 S. Ct. 1522 (1922) (No. 90-1947).

268. *See* Hirsch & Hirsch, *supra* note 109, at 461. State and local governments often advance the purpose of protecting tenants from the inequities which housing shortages create. *Id.* Basically, governments advance three purposes to justify rent control: (1) The mitigation of adverse effects of acute housing shortages; (2) the prevention of large and frequent rent increases which tenants cannot afford; and (3) the reduction of excessive profits to landlords. *Id.*

269. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).

270. Pennell v. City of San Jose, 485 U.S. 1, 13 (1988); *see, e.g.*, Bowles v. Willingham, 321 U.S. 503, 513 n.19 (1944) (providing that a purpose of rent control is to protect tenants with limited income); FPC v. Hope Natural Gas Co., 320 U.S. 591, 610-12 (1944) (providing that the primary aim of the Natural Gas Act was to protect consumers against exploitation by natural gas companies).

271. *See, e.g.*, Birkenfield v. City of Berkeley, 17 Cal. 3d 129, 160, 550 P.2d 1001, 1023, 130 Cal. Rptr. 465, 487 (1976); Eisen v. Eastman, 421 F.2d 562, 567 (2d Cir. 1969) (finding that mitigating a housing shortage is a legitimate interest).

to protect tenants in emergency situations.[272] Courts may analogize a rent control ordinance, which protects tenants from shortages in the market, to the emergency measures which courts have accepted as legitimate.[273] Having found that Escondido's ordinance has a legitimate purpose, the courts will then determine whether the ordinance substantially advances that purpose.

2. *The Regulation Does Not Substantially Advance Its Stated Purpose?*

In order to pass the second prong of the *Nollan* test, the rent control regulation must substantially advance the city's stated goal of remedying an inequitable market situation.[274] The facts of *Yee* clearly indicate that the regulation does not substantially advance the rent control's purposes.[275] As noted in *Yee*, the rent control ordinance only protects the first tenant of the park pad.[276] The initial tenant may sell the right to occupy the pad for a low rent by charging an inflated sale price for his mobile home.[277] The rent control ordinance only remedies the inequities in the housing market for the period in which the initial tenant rents the pad.[278] Once the tenant decides to sell the mobile home, the tenant can charge an inflated price for the ownership of the home. The inflated price reflects the value of the right to live in a rent controlled space. Therefore, the rent control ordinance does not

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272. *See supra* notes 92-100 and accompanying text (discussing the decisions which upheld rent control as an emergency measure). State legislatures are mindful that rent control measures have survived the takings challenge only if they are "emergency" measures. Radford, *supra* note 61, at 1033. One commentator states that the most commonly cited "emergency" is a perceived shortage of rental housing. MONICA R. LETT, RENT CONTROL: CONCEPTS, REALITIES AND MECHANISMS 1-22 (1976).

273. *See supra* notes 92-100 and accompanying text (discussing the Supreme Court's requirement of an emergency justification in its first analyses of the constitutionality of rent control).

274. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); *see supra* note 266 (setting forth the Escondido ordinance's purpose).

275. *See supra* notes 187-198 and accompanying text (discussing the argument that the initial tenants of the pads reap the entire benefit of the rent control ordinance).

276. Yee v. City of Escondido, 112 S. Ct. 1522, 1529 (1992); *see supra* notes 192-198 and accompanying text (discussing the *Yee* Court's analysis of initial tenant's windfall).

277. *Yee*, 112 S. Ct. at 1529.

278. *Id.*

eradicate the inequity between the landowner and the initial tenant, but merely shifts that unfairness to the subsequent tenant. The subsequent tenants must suffer the consequences of a rental shortage by paying the high rent, in the form of an inflated mobile home sale price, which the ordinance was enacted to control.

Escondido could still argue that the ordinance corrects the inequities of the market as to all tenants despite the initial windfall to the first tenant. The city's claim would be that subsequent tenants may still reap the benefits of the ordinance. Although the subsequent tenants pay an inflated price for their mobile homes, those tenants may charge an inflated price when they choose to change residences. Arguably, when the subsequent tenant collects this money, the regulation could be said to substantially advance the ordinance's purposes. However, this argument will likely fail. The courts must also recognize that the subsequent tenants may not want to, nor be able to, sell. Requiring a tenant to sell a residence in order to reap the benefit of an ordinance designed to protect tenants is grossly unfair.

The courts must also recognize that the inequity of forcing the tenants to sell in order to receive the benefits of the ordinance is even greater when the courts consider the age group of the renters. Studies reveal that in California, the average age of a mobile home owner is about sixty-seven years old.[279] A court should find that the fact that the tenants are in a substantially older age group makes it less likely that the owners would want to, or be able to, sell the mobile homes. After rejecting the argument that a subsequent tenant could later reap the benefit of the ordinance by selling the mobile home, the court would conclude that it would be unlikely that anyone but the initial tenant would benefit from the rent control ordinance.[280]

The courts should also find that instead of substantially advancing the ordinance's purposes, the regulation exacerbates the problem of mobile home pad scarcity by causing a further decrease

279. Hirsch & Hirsch, *supra* note 109, at 414.

280. *Id.* at 414; *cf. id.* (providing that studies also indicate that there are an increasing number of young adults who are renting mobile homes).

in the availability of pads.[281] One study reports that, since the initial promulgation of rent controls in California, the construction of new parks has severely decreased.[282] Mobile home park owners should argue that the primary cause of the decrease in construction is the severity of the rent controls and its accompanying regulations.[283]

One commentator suggests that courts may also consider the existence of lesser intrusive alternatives when ruling on the legitimacy of challenged regulations.[284] There are several alternatives to rent control which might work in the mobile home context. First, Escondido could require the regulation of mobile home prices. Regulating the prices of mobile homes would ensure that the regulation carries out its purpose of protecting mobile home owners from the inequities of the market. The initial tenant would no longer be able to raise the price of the mobile home to collect money for the right to occupy the rent-controlled space. Second, the city could provide direct income subsidies, such as need-based housing allowances.[285] Instead of controlling the rents in a particular neighborhood or park, the city could distribute cash or cash vouchers based on the financial need of the tenant. Since the tenants would receive the subsidies directly from the city, local government could closely regulate the distribution of benefits. Such a regulatory system would prevent the tenant from reaping the entire benefit of the rent control ordinance on the sale of the mobile home.

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281. *See id.* at 463 (opining that the rent control of mobile home parks has caused a further decrease in the availability of mobile homes).

282. *Id.*

283. *See id.* (blaming the dearth in mobile home pads on severe rent regulation); *see also* Radford, *supra* note 61, at 1036 (providing that rent control typically creates incentives for owners of rental housing to convert their properties to higher values uses); Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 AM. ECON. REV. 986, 986 (1984) (providing that 98% of American Economists surveyed agree that a ceiling on rent reduces the quality and quantity of housing available).

284. Radford, *supra* note 61, at 1048.

285. *Id. See generally* Leonard Burman, *The Cost-effectiveness of the Low Income Housing Tax Credit Compared With Housing Vouchers: A CBO Staff Memorandum*, 56 TAX NOTES 493, 493-99 (July 1992) (comparing the benefits of low-income housing tax credits which provide incentives for investment in low-income housing with housing vouchers given to tenants to subsidize rents).

Overall, the Yees would have a strong argument for a regulatory taking under the *Nollan* analysis. It will be difficult for courts to ignore that the rent control ordinance, which purports to benefit all tenants of mobile home parks, makes only one wealth transfer to the initial tenant. Therefore, similarly situated mobile home park owners may now successfully argue that local government has effected a regulatory taking under *Nollan.*

CONCLUSION

The United States Supreme Court's decision in *Yee* reiterated the Court's view that its criteria for finding a physical taking will remain narrow.[286] In order to find a physical taking, a court must find that a government has *required* the owner to submit to the physical occupation of land.[287] Although the holding of *Yee* explicitly dismissed the theory that a rent control ordinance could effect a physical taking, the dicta of *Yee* provides an alternative argument for similarly situated mobile home owners. The courts must now decide whether a rent control ordinance such as the one in *Yee,* effects a regulatory taking. Under *Penn Central,* mobile home park owners would not likely be successful in proving a regulatory taking since most mobile home park owners should have reasonably expected that their investments might some day be subject to rent control. Additionally, the courts' recognition that rent control ordinances achieve important societal interests, will substantially impede mobile home park owners from proving a regulatory taking under *Penn Central.* On the other hand, it is likely that a mobile home park owner can successfully argue that a rent control regulation, similar to the one in *Yee,* effected a regulatory taking under *Nollan,* because the regulation does not substantially advance the purposes of the rent control ordinance.

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286. *See supra* notes 41-42 and accompanying text (discussing the limited application of the physical takings theory).

287. Yee v. City of Escondido, 112 S. Ct. 1522, 1534 (1992).