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After 9th Circuit Decision

Is Rent Control's Lease Over?

BY SAM KAZMAN

In 1921, the Supreme Court issued its first rent control decision. In a 5-4 opinion by Justice Oliver Wendell Holmes, the Court upheld a Washington, D.C., "wartime emergency" statute, noting that "space in Washington is necessarily monopolized in comparatively few hands." *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

Sixty-six years later, the war is long over; yet the "emergency" not only continues in D.C., but has spread in recent years to such cities as Cambridge, Mass., and Berkeley, Calif.

In Santa Barbara, Calif., the emergency even spread to mobile home sites, which went under rent control in 1984. Last August, however, a 9th Circuit panel unanimously ruled that that city's ordinance may well constitute an illegal taking by local government without compensation.

The opinion, which reversed and remanded for trial a district court dismissal, notes a "growing consensus that 'rent control causes a reduction in the quality of the existing rental housing stock and discourages investment in new rental property,' actually exacerbating the problems it is intended to ameliorate." *Hall v. City of Santa Barbara*, 797 F.2d 1493, 1503 n.26.

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Perverse Economics

The 1921 Supreme Court decision cited no authority for its characterization of several thousand building owners as monopolists; Judge Alex Kozinski's *Hall* decision cites one presidential commission and four economic works for its proposition. (In fact, it could probably have cited a hundred or so more economic writings in support.)

Is the end near for rent control? Rent control's perverse economics—its crippling of the housing stock, its subsidization of the middle and upper classes rather than aiding the poor—are so well established that they have become the grist not only of professional journals but of tabloids as well. A New York author writing a book on the subject recently ran classified ads offering a $50 weekly prize for the best story submitted about a rich or famous person paying cheap rent for classy digs.

Rent control's standing in informed opinion, however, has declined much more rapidly than its legal status. Less than a year ago, the Supreme Court's rejection of an antitrust attack on rent control in *Fisher v. Berkeley*, 106 S. Ct. 1045 (1986), suggested to many that its opponents had run out of legal theories. The usual, and usually unsuccessful, approach had been for a property owner to claim a "regulatory taking"—that is, to claim that his property had been rendered useless by regulation and thus, in effect, taken by the government without the compensation required by the Fifth Amendment.

The law of regulatory takings, however, is pretty much a mess these days. On the question of when a regulation becomes a taking, the best the Supreme Court has offered to date is the unhelpful answer that a taking occurs "if the regulation goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Lower courts have interpreted this to mean that there can be no regulatory taking if the property at issue has any remaining value whatsoever, an extreme requirement that few landlords (especially those who can afford to litigate) can meet. And the issue of what remedy is available in the rare event that a regulatory taking *is* found is one the Supreme Court has taken and then ducked in four of its last seven terms: *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980).

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The *Hall* decision avoids this morass by setting forth the novel theory that Santa Barbara's ordinance was a taking not by regulation but by *physical occupation*. In contrast to the law of regulatory takings, the law of physical occupation is simple: if there is a government occupation, then there is a taking.

In *Hall*, the court found that the mobile home tenants might well be viewed as agents of the city government, vested with leaseholds in perpetuity on their sites that they could either enjoy or—in a distinguishing feature of the Santa Barbara law—freely sell to others.

Economic analysis, although not essential to this line of reasoning, helps illuminate it. For example, the effect of the tenants' ability to sell their leasehold interests was concretely demonstrated by the huge increase in the price of sited mobile homes after enactment of the law.

Economic investigation does become essential, however, in considering the ultimate rationality of rent control as a supposed solution to housing shortages. It is *Hall's* questioning of that rationality that may prove to be its most important feature.

The rationality of rent control depends not on what legislators say about it, but on how people act under it. As in the old saw about the comparative worth of pictures and words, in disputes over human action, one good argument on incentives is often worth a thousand philosophical claims.

Consider, for example, Karl Marx's prescription, "From each according to his abilities, to each according to his needs." Of all that has been written about the famous dictum, possibly the most insightful observation is a simple prediction of its effect on human behavior—namely, that it is the best incentive yet discovered for people to magnify their needs and minimize their abilities.

Restraining the Urge to Acquire

It may not be immediately obvious, but the Fifth Amendment's takings clause itself rests on a rather sophisticated understanding of incentives: the tendency of government to acquire property when it or its constituents do not have to pay for it.

Imagine yourself at a conference of government land-use planners, presenting as an original proposition the notion that private property not be taken for public use without payment of fair-market value. Chances are that nine out of 10 persons present would decry the idea as fiscally extravagant and irredeemably anti-open space.

In fact, the takings clause is neither. On its face, it is a requirement of fairness to those whose property is taken for public use. More subtly, it restrains government's incentive to acquire property through the elegantly simple mechanism of making us pay for the acquisitions, thus roughly ensuring that we do not end up with more public property than we really want. Because land-use planning agencies are most directly constrained by this requirement, they are its most vocal opponents.

Understanding social incentives, of course, is nothing new, but one effect of the law-and-economics movement has been to refocus attention on them in a more critical manner. In antitrust, for example, the once uncritical judicial acceptance of predatory pricing as a plausible explanation for economic events has given way to a healthy skepticism based largely on published economic research. For the most recent example of this, see *Cargill Inc. v. Monfort of Colorado Inc.*, 55 U.S.L.W. 4027 (Dec. 9, 1986).

Incidentally, this use of outside literature should not seem surprising; it in no way differs from the Supreme Court's use in *Brown v. Board of Education* of sociological data on segregation's adverse educational effects. 347 U.S. 483, 494, n.11 (1954) (rejecting "psychological knowledge at the time of *Plessy v. Ferguson*" on the basis of "modern authority").

Returning to the question of whether rent control's end is near, *Hall* may well mark the turning point in judicial willingness to accept rent control unquestioningly as a solution to housing shortages. Regardless of how its holding on physical occupation fares on further appeal or in other courts, it is the recognition of rent control's true effects that I predict will prove to be the most enduring and significant aspect of this decision. □