Why Rent Control Is a Regulatory Taking

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WHY RENT CONTROL IS A REGULATORY TAKING

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The Fifth Amendment's Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."1 Exactly what comprises a "taking" of property has been, and remains, a subject of intense controversy.2 Since 1987, the United States Supreme Court has reviewed property regulations challenged under the Takings Clause on thirteen occasions,3 significantly strengthening constitutional protections for the rights of property owners.

A wide variety of regulations may be threatened by the stringent new constitutional standards established by the Supreme Court's recent takings jurisprudence. One clear example is rent control, which

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1. U.S. CONST. amend. V.


has never been subjected to a rigorous regulatory takings challenge under the Court's current ground rules.

Part I of this Article briefly summarizes the evolution of the Supreme Court's regulatory takings doctrine, which holds that governmental restrictions on the use of private property can so attenuate individual rights as to violate the Takings Clause unless the owner is compensated. Part II reviews the Supreme Court's record in passing on the constitutionality of rent control and demonstrates that no peacetime rent ordinance has ever been upheld against a regulatory takings claim. Part III examines two recent cases in which the New York Court of Appeals applied the regulatory takings doctrine to strike down rental property regulations. Part IV reviews recent empirical studies of rent control in California and Massachusetts, which demonstrate the failure of these regulations to meet the Supreme Court's current constitutional standards. Finally, this Article concludes that rent control laws will need to meet increasingly stringent standards to survive constitutional scrutiny under the criteria set forth in recent Supreme Court rulings.

I. Evolution Of The Regulatory Takings Doctrine

A. Early Formulations: From Pennsylvania Coal to Agins

It is an open question whether the Framers of the Fifth Amendment contemplated that government could take private property for public use by excessive regulation. Early cases brought under the Takings Clause almost always dealt with either outright governmental seizures of property or physical interference with the utility or accessibility of land.

Not only did Fifth Amendment takings claims initially focus on physical expropriations, but until nearly the dawn of the twentieth century it was not even possible to bring such actions against state and local governments. Thus, nineteenth century cases such as *Mugler v. Kansas*, frequently cited by advocates of regulation as bearing on regulatory takings law, were in fact litigated exclusively as violations of the Due Process Clause. It was not until thirty-five years after *Mugler* that the Supreme Court devised an alternative doctrine by

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4. See, e.g., Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 *Yale L.J.* 221, 225 (1931) ("[D]uring the early development of the law of this country a purely physical conception of the process of condemnation was amply sufficient.").


6. The Fifth Amendment's Takings Clause was held to apply to the states via the Fourteenth Amendment in *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).


which local property regulations could be struck down under the Takings Clause.

In Pennsylvania Coal Co. v. Mahon, the Supreme Court first acknowledged that government regulation can infringe upon the rights of private property owners in violation of the Fifth Amendment's Takings Clause. Justice Holmes eloquently voiced the Court's new standard: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Unfortunately, property owners were in for a long wait before the Court would elaborate on how to determine if a regulation "goes too far."

More than half a century after Pennsylvania Coal, in Penn Central Transportation Co. v. City of New York, the Supreme Court finally set forth a number of factors to determine whether a regulatory measure effects a taking of property. Prominent among these factors were the "character of the governmental action" and the "economic impact of the regulation."

These considerations were brought into sharper focus in Agins v. City of Tiburon. In Agins, the two-part Penn Central inquiry was recast in terms of whether the challenged measure: (1) substantially advances legitimate state interests, or; (2) denies the owner economically viable use of the land. This two-pronged test has been reiterated by the Supreme Court in every major regulatory takings decision since Agins. Despite the gradual refinement of the Court's terminology since Pennsylvania Coal, however, Agins' dual criteria were stated at a level of generality that left the Court ample room for further doctrinal maneuvering.

B. The Per Se Rules

In a decision that can best be described as a doctrinal detour, the Supreme Court temporarily set aside the two-part Agins test to announce a per se, or categorical, takings rule in Loretto v. Teleprompter Manhattan CATV Corp. In Loretto, Justice Marshall proclaimed that regulations authorizing an uncompensated permanent physical occupation of property invariably violated the Takings Clause. For regulations of this class, the "character of the government action" branch of the Penn Central analysis is determinative.

The rule set forth in Loretto was unique in that it had never previously been applied or articulated in any Supreme Court decision.

10. Id. at 415.
12. Id. at 124.
14. Id. at 260.
16. Id. at 426.
Loretto did not involve a direct physical invasion comparable to flooding or intrusive overflights by aircraft. Rather, the measure disputed in Loretto was a regulatory enactment limiting the royalties property owners could charge for the installation of cable television fixtures on their apartment buildings. As such, there is no obvious reason why the offending enactment could not have been brought under one prong or the other of the Agins analysis. In any event, the Supreme Court has never used the Loretto standard to strike down regulations in subsequent cases.

In contrast to the apparent doctrinal arbitrariness of Loretto, the Supreme Court announced a second per se rule in 1992, which flowed directly from Agins' second prong. In Lucas v. South Carolina Coastal Council, the South Carolina legislature, citing the value of open beaches to the state's tourism industry, enacted the Beachfront Management Act, which prohibited the construction of any permanent dwelling on petitioner David Lucas's property. Lucas did not dispute the validity of the regulation, in effect stipulating that the Act substantially advanced legitimate state interests. Nevertheless, the Supreme Court held that a regulatory taking results whenever "regulation denies all economically beneficial or productive use of land." The Court did not extend this categorical rule to cases involving the loss of only some viable uses of property, but indicated such claims would continue to be analyzed under the general Agins paradigm.

C. The Substantial Advancement Standard

If Lucas demonstrated the viability of Agins' second prong as a stand-alone test for regulatory takings, the Supreme Court's equivalent first-prong decisions were Nollan v. California Coastal Commission and Dolan v. City of Tigard.

1. Nollan v. California Coastal Commission

In Nollan, a family applied for a permit to demolish their small beach bungalow and replace it with a larger residence. The Califo-
nia Coastal Commission agreed to issue a permit only if the Nollans conveyed an easement granting public access across one-third of their beachfront property.28 The Supreme Court struck down the permit condition for failing to substantially advance legitimate state interests, regardless of its impact on the economic viability of the property.29

Clearly, Nollan's call for heightened scrutiny of regulations challenged under the Takings Clause was its most significant addition to the Court's regulatory takings doctrine. Since 1934, the Supreme Court had accorded extreme deference to economic regulations challenged on due process grounds.30 The general rule had been that such regulations will survive constitutional scrutiny if they are rationally related to their asserted purpose. At the extreme, the economic due process standard required only that a hypothetical legislator might imagine that a given regulation had some "rational basis."31

Many jurists and commentators had assumed that the economic due process standard was also the appropriate level of scrutiny for regulatory takings challenges.32 Nollan clearly dispelled this belief. Justice Scalia's opinion effectively recast Agins' "substantial advancement" test as a mandate for an elevated standard of judicial review under the Takings Clause.33 The regulatory takings standard was expressly distinguished from the deferential scrutiny historically applied to due process or equal protection cases.34 Nollan's substantial advancement test demands that regulations serve legitimate purposes, and that there be a close fit between a measure's objective and the means chosen to implement it.35

2. Dolan v. City of Tigard

The Supreme Court's second application of Agins' "substantial advancement" standard came in Dolan v. City of Tigard.36 Dolan suggested that a regulatory taking can occur even if the affected property suffers no deprivation of economic use whatever.37 Nollan's height-

28. Id.
29. Id. at 837.
32. See, e.g., Nollan, 483 U.S. at 843 (Brennan, J., dissenting).
33. "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved," Nollan, 483 U.S. at 835 n.3 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)), "not that the State could rationally have decided that the measure adopted might achieve the State's objective." Nollan, 483 U.S. at 835 n.3 (citations & internal quotation marks omitted).
34. "[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical." Nollan, 483 U.S. at 835 n.3.
35. See id. at 834-37.
37. Id. at 2316 n.6.
ened scrutiny requirement was reaffirmed, and in fact, strengthened, in *Dolan*. Indeed, Chief Justice Rehnquist likened the standard of review applicable to property regulations challenged under the Takings Clause to that employed in cases arising under the First Amendment.  

The *Nollan* Court left unanswered the question of how close a relationship must exist between regulatory measures and the mitigation of harms that would otherwise be caused by the proposed use of property. That question was answered in *Dolan*. Like *Nollan*, the *Dolan* case involved conditions attached to the issuance of a building permit. The condition required by the Coastal Commission in *Nollan* was found to be completely unrelated to harms that might plausibly be caused by the Nollans’ proposed enlargement of their home. Therefore, the challenged regulation was summarily struck down as “an out-and-out plan of extortion.”  

In *Dolan*, by contrast, the City of Tigard demanded mitigation of drainage and congestion problems that bore some plausible relationship to the Dolans’ proposed expansion of their small plumbing business. The City of Tigard had conducted extensive general studies of the relationship between new construction and the need to mitigate resulting congestion and storm drainage problems. The City had even issued findings relating to the probable impact of the specific development project at issue. However, the exactions imposed on Mrs. Dolan were struck down because the City had not shown that the expansion of her hardware store would impose a public burden roughly proportional to the exaction of a public greenway.  

The Oregon Supreme Court had upheld the City of Tigard’s greenway exaction because of the City’s finding that:

“[T]he proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.”  

We are persuaded that the transportation needs of petitioners’ employees and customers and the increased traffic congestion that will result from the development of petitioners’ land do have an essential nexus to the development of the site, and that this condi-

38. *Id.* at 2319-20.
40. *Id.* (citation omitted).
42. *Id.* at 2313-14.
43. *Id.*
44. *Id.* at 2321.
tion, therefore, is reasonably related to the impact of the expansion of their business.45

Reversing the Oregon Supreme Court decision, the United States Supreme Court established that such general findings of “reasonable relationships” are inadequate to sustain property regulations against a regulatory takings challenge. The Supreme Court indicated that conditions imposed on property use must be supported by an individualized determination that they are roughly proportional, both in nature and extent, to the mitigation of public harms that would otherwise result from the property’s unregulated use.46 Accordingly, the Supreme Court held that the City had not shown a sufficiently close nexus between the proposed land use and the required mitigation.47

The most dramatic element of the Dolan decision is that it expressly shifts the burden of proof to local governments defending regulations challenged under the Takings Clause.48 Such a shift had been implicit in Nollan’s heightened scrutiny requirement,49 but moved to center stage in Dolan. This development is a monumental setback for property regulators, who have grown accustomed to having their actions cloaked in a presumption of legitimacy.50

3. The Substantial Advancement Standard Applies to Economic Regulations

In an effort to evade the stringent requirements of the substantial advancement standards, some regulatory “hawks” responded to Nollan by mischaracterizing the decision as a “physical invasion” case, rather than a regulatory takings case.51 Although this argument was flatly preposterous on its face,52 it was embraced by a number of Cali-

45. Dolan v. City of Tigard, 854 P.2d 437, 443 (Or. 1993) [hereinafter Dolan II] (footnote omitted) (quoting Dolan v. City of Tigard, 22 Or. LUBA 617, 622) (Land Use Board of Appeals) [hereinafter Dolan I].
47. Id. at 2321.
48. Id. at 2320 n.8.
52. The facts and plain language of the opinion clearly distinguish Nollan from physical invasion cases. As Justice Scalia noted in dicta, if the California Coastal Commission had simply seized an easement across the Nollans’ property, that would
California appellate courts as a means to avoid applying heightened scrutiny to property regulations.53

Fortunately, the Supreme Court has put an end to these revisionist efforts. On the next court day following the Dolan decision, the Court expressly confirmed that the substantial advancement standard applies to regulations with solely monetary impacts. In Ehrlich v. City of Culver City,54 the Supreme Court vacated a California appellate decision that upheld the imposition of two development fees and remanded with instructions to reconsider the case in light of Dolan. Ehrlich's petition for certiorari urged the Court to affirm that Nollan's heightened standard of review applies to regulatory takings in the form of fees.55 By vacating and remanding for reconsideration under the Dolan analysis, the Supreme Court eliminated any doubt that it intended the heightened standards of Nollan and Dolan to apply to regulations not involving a physical interference with land.

II. THE SUPREME COURT ON RENT CONTROL AND TAKINGS

The Supreme Court has not tested a rent control ordinance since its rigorous regulatory takings standards were introduced in 1987. In fact, the Court has reviewed takings challenges to peacetime rent regulations on only three occasions,56 and has never sustained such measures against a regulatory takings claim.57

have amounted to a taking by physical occupation. Nollan v. California Coastal Comm’n, 483 U.S. 825, 831-32 (1987). But of course, that didn’t happen; it was never even proposed. The issue before the Court was the conditioning of a permit to coerce the “voluntary” dedication of an easement.

As the Court pointed out in Yee v. City of Escondido, 112 S. Ct. 1522 (1992), the essence of a physical taking is the forced acquiescence in the occupation of one’s property by third parties. Id. at 1528. In contrast, the Nollans were free to go about their business with no regulatory interference—so long as they did not attempt to exercise their right to build on their own property. In short, Nollan involved “a regulatory restriction on use, as opposed to a direct governmental trespass on possession.” Frank I. Michelman, Tutelary Jurisprudence and Constitutional Property, in Liberty, Property, & the Future of Constitutional Development 127, 140 (Ellen Frankel Paul & Howard Dickman eds., 1990).


57. In Chastleton Corp., the rent law was found to be unconstitutional; in Pennell, the takings question was not ripe for adjudication; and in Yee, the property owners failed to raise the regulatory taking issue.
The Supreme Court's first evaluation of rent control came in 1921, in the context of emergency regulations imposed to overcome market distortions during World War I. In *Block v. Hirsh* and *Marcus Brown Holding Co. v. Feldman*, a closely divided Court upheld rent ordinances against facial challenges on due process and other grounds. Justice Holmes carefully spelled out the Court's rationale:

[A] public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. . . . The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.60

The Supreme Court's first opportunity to pass on the validity of rent control as other than a temporary wartime measure came in *Chastleton Corp. v. Sinclair*.61 In *Chastleton*, the Court struck down the same District of Columbia regulation that had been upheld in *Block v. Hirsh* when Congress attempted to extend it beyond the wartime emergency. According to Justice Holmes, the "first and most important" issue in *Chastleton* was that "the emergency that justified interference with ordinarily existing private rights . . . had come to an end in 1922, and no longer could be applied consistently with the Fifth Amendment of the Constitution."62 Anticipating what would become a politically popular rationale for rent control in the 1970s, Justice Holmes went on to note that, if all that remained of the emergency was inflated prices, "that is not, in itself, a justification of the act."63

Since these early cases, the Supreme Court has done virtually nothing to elaborate on the applicability of the regulatory takings doctrine to peacetime rent control.64 In strongly worded dissenting opinions, three current Justices have expressed the view that the Court should have applied the Takings Clause to strike down rent regulations, but the majority of their colleagues have been unwilling to take up the question.65

In *Yee v. City of Escondido*,66 the Supreme Court upheld a mobile home rent control ordinance against a physical takings challenge based on *Loretto*. As noted by Justice O'Connor, the applicable standard in such cases is whether the government "requires the landowner

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58. 256 U.S. 135 (1921).
59. 256 U.S. 170 (1921).
60. *Block*, 256 U.S. at 156-57 (citations omitted).
61. 264 U.S. 543 (1924).
62. Id. at 546.
63. Id. at 548.
to submit to the physical occupation of his land,"67 which was not the situation in Yee. In that context, the Court rejected the petitioner's argument that the effect of the regulation was contrary to its stated purpose. However, the Court added that "[t]his effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."68

This is, of course, a reference to the substantial advancement standard of Agins, Nollan and Dolan. The Court seemed eager to apply this criterion to rent control,69 but was constrained because the property owners had not raised the regulatory takings issue in the lower courts.70

III. Post-Nollan Takings Challenges To New York Rent Regulations

The New York State Court of Appeals has used the Nollan and Dolan substantial advancement test to strike down regulations in both facial and as-applied takings challenges. In Seawall Associates v. City of New York,71 the Court of Appeals overturned a local ordinance that prohibited the conversion or demolition of single room occupancy ("SRO") residential hotels. Five years later, in Manocherian v. Lenox Hill Hospital,72 the Court of Appeals found a taking arising from a state law that required indefinite lease renewals for residential apartments rented by non-profit corporations.

A. Seawall Associates v. City of New York

Seawall involved a facial challenge to New York City's Local Law No. 9, a regulation that established a five-year moratorium on the conversion, alteration, or demolition of SRO housing, and required the owners to restore all such units to habitable condition and to lease them to others at controlled rents.73 Alternatively, the law allowed owners to "buy out" of the regulations by paying a fee of $45,000 per room to the City.74 The stated purpose of the ordinance was to alleviate homelessness by increasing the availability of SRO housing.75

67. Id. at 1528.
68. Id. at 1530 (emphasis added).
69. Id. at 1531.
70. Id.
72. 643 N.E.2d 479 (N.Y. 1994).
73. Seawall, 542 N.E.2d at 1061-62.
74. Id. at 1061.
75. Id. at 1068.
group of owners sued the City, arguing that, inter alia, Local Law No. 9 violated the Takings Clause on its face.\textsuperscript{76} 

Adhering to \textit{Nollan}, the trial court granted summary judgment in favor of the owners.\textsuperscript{77} Noting that "[t]he Nollan decision seems to indicate that most regulations will now be subjected to a higher level of scrutiny than that previously utilized in determining claims of regulatory takings,"\textsuperscript{78} the court applied what it saw as the "new standard of heightened scrutiny."\textsuperscript{79} According to the trial court, the law's cardinal defect was that it placed a disproportionate burden on a small class of property owners, who were forced to subsidize a low-income housing program.\textsuperscript{80} Moreover, the trial court was concerned that Local Law No. 9 was not the least intrusive means of achieving the City's goal of housing the homeless.\textsuperscript{81}

On appeal, the Appellate Division reversed.\textsuperscript{82} Disregarding \textit{Nollan}'s heightened scrutiny requirement, the appellate panel found the law constitutional because its provisions were not arbitrary or capricious,\textsuperscript{83} and cited to pre-\textit{Nollan} cases upholding similar regulations under a deferential standard of review.\textsuperscript{84} The Appellate Division flatly held that there cannot be a taking if an owner is not denied all economically viable use of the property,\textsuperscript{85} thereby reading \textit{Agins}' first prong out of existence.

The Appellate Division endorsed the city's assertion that Local Law No. 9 advanced a legitimate governmental purpose since the measure's goal was to provide shelter for the homeless.\textsuperscript{86} The court used the Blackburn study,\textsuperscript{87} a massive research report that had been conducted for the city as support for these goals. Unfortunately, the Appellate Division failed to analyze the actual findings of the Blackburn study, in reaching its decision. When the case reached the Court of Appeals, New York's highest Court, an amicus brief pointed out that the Blackburn study itself established that Local Law No. 9 would do little to resolve the plight of the homeless.\textsuperscript{88} Apparently, the ordi-

\begin{footnotes}
\item[76.] \textit{Id.} at 1062.
\item[77.] Seawall Assocs. v. City of New York, 523 N.Y.S.2d 353 (Sup. Ct. 1987).
\item[78.] \textit{Id.} at 365.
\item[79.] \textit{Id.} at 366.
\item[80.] \textit{Id.} at 361.
\item[81.] \textit{Id.}
\item[83.] \textit{Id.} at 968.
\item[84.] \textit{Id.} at 967.
\item[85.] \textit{Id.} at 968.
\item[86.] \textit{Id.} at 961, 966-68.
\item[88.] \textit{Id.} (citing Blackburn Study at 5-6).
\end{footnotes}
inance was adopted primarily as a cost-saving measure, to achieve control over private resources without paying for them. 89

The Court of Appeals struck down the ordinance, partly because of this evidence that Local Law No. 9 did not actually advance its stated goal. 90 Over a stinging dissent by Judge Bellacosa, a 5-2 majority found that “the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect and conjectural.” 91 Significantly, the Court of Appeals expressly recognized and applied “semi-strict or heightened judicial scrutiny of regulatory means-ends relationships” as required by Nollan. 92

The majority rejected the city’s argument that a taking did not occur because owners could avoid complying with the law by paying the $45,000 per unit buyout fee. Referring to this provision as a “ransom,” the Court of Appeals observed that “by equating the ‘cure’ with dollars . . . the terms of the Local Law No. 9 demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole.” 93

In dissent, Judge Bellacosa asserted the perspective that regulations of this kind had always been subjected to deferential review by New York courts. 94 Invoking the specter of Lochner, 95 Judge Bellacosa cautioned his colleagues against questioning the “wisdom or wholesomeness” of legislation. 96 This lament may have marked the end of an era of deference toward rental property regulations in New York.

89. Id. at 1069.
90. Id.
91. Id.
92. Id. at 1068.
93. Id. at 1069.
94. Id. at 1072-74 (Bellacosa, J., dissenting).
96. Seawall, 542 N.E.2d at 1072 (Bellacosa, J., dissenting). It should be noted that this entire debate is somewhat off the mark in the context of regulatory takings decisions like Seawall and Nollan. The heightened standard of review applied in these cases is grounded in the specific constitutional protections of the Takings Clause, not in substantive due process. See R.S. Radford, Regulatory Takings Law in the 1990’s: The Death of Rent Control?, 21 SW. U. L. REV. 1019, 1025 (1992).
B. Manocherian v. Lenox Hill Hospital

In October 1994, the Court of Appeals applied the Supreme Court’s substantial advancement analysis to a provision of New York’s Rent Stabilization Act in *Manocherian v. Lenox Hill Hospital.* The challenged enactment, chapter 940 of the Laws of 1984, known as the Lenox Hill Law, required perpetual lease renewals for rent stabilized apartments rented by nonprofit hospitals and subleased to members of their staff.

The measure at issue had been sponsored and shepherded through the New York legislature by Lenox Hill Hospital, a non-profit corporation that leases rent stabilized apartments as residences for its nurses and other staff. The law required property owners to offer annual lease renewals directly to Lenox Hill as their primary tenant, rather than to the hospital employees who subleased the apartments. Since Lenox Hill has a perpetual corporate existence, chapter 940 had the effect of denying the apartment owners any expectation of being able to reoccupy their property. Controlling a bloc of rent stabilized housing gave Lenox Hill ‘a major competitive edge in hiring nurses and other personnel, although it obviously did nothing to alleviate New York’s housing shortage or accomplish any other stated objective of rent control.

Now writing for the majority, Judge Bellacosa, who dissented in *Seawall,* cited that decision, together with *Nollan* and *Dolan,* as establishing a “constitutional minimum floor of protection which this Court lacks authority to diminish under the Supremacy Clause.” The Court of Appeals held that chapter 940 effected a taking because it “suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest” as required by *Nollan* and *Seawall.*

In concluding that chapter 940 effected a regulatory taking, the Court of Appeals dealt with a wide range of arguments commonly raised in support of rent control measures. For instance, the regulators had argued that there can be no regulatory taking if the law assures owners a “fair return” on their property. The Court of Appeals rejected this contention, noting that “[t]he sharply focused legal question under the controlling precedential and analytical princi-
pies may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus.\textsuperscript{104}

The Court of Appeals also applied Dolan's shifting of the burden of proof to counter the hoary notion that all legislative enactments are entitled to a presumption of constitutionality. This generalized presumption, according to the Manocherian court, "cannot substitute for the fundamental defect in chapter 940, to wit, no substantial advancement of a legitimate State interest and 'close causal nexus' required for the challenged regulatory enactment to survive scrutiny."\textsuperscript{105}

IV. RECENT EMPIRICAL EVIDENCE

As previously discussed, if rent control is to survive a regulatory takings challenge under Nollan and Dolan, it must be proven that the challenged measure substantially advances a legitimate state interest.\textsuperscript{106} As the Seawall decision demonstrates, the mere existence of a valid governmental objective is not sufficient to meet this standard. Courts must employ heightened scrutiny to confirm that the ordinance in question, as administered, substantially contributes to relieving public problems related to rental housing. This is an empirical question that cannot be answered by appeals to economic theory or political ideology.\textsuperscript{107}

The 1990 census provided a wealth of new data on the demographic impact of rent control. The raw statistics, which became generally available to researchers in 1992 and 1993, provide especially useful information when compared with 1980 data for cities that adopted rent control around the earlier date.\textsuperscript{108}

The first comparative study of the 1980-1990 impact of rent control was performed by a team of urban economists at St. John & Associates, a consulting firm in Berkeley, California.\textsuperscript{109} The St. John study examines the effect of rent control over the decade of the 1980s in Berkeley and Santa Monica\textsuperscript{110} and compares the observed impact with the stated objectives of these cities' rent regulations.\textsuperscript{111} The re-

\textsuperscript{104} Id.

\textsuperscript{105} Id. at 487.


\textsuperscript{107} See, e.g., Jason W. Rose, Note, Forced Tenancies as Takings of Property in Seawall Associates v. City of New York: Expanding on Loretto and Nollan, 40 DePaul L. Rev. 245, 277 (1990) (the heightened scrutiny required by Nollan and applied in Seawall "is important because it may require an actual statistical relationship between means and ends, not just a logical or plausible relationship").

\textsuperscript{108} Rents in Berkeley have been controlled continuously since 1978; Santa Monica's rent control law was adopted in 1979.

\textsuperscript{109} St. John & Assocs., Rent Control in Perspective: Impacts on Citizens and Housing in Berkeley and Santa Monica Twelve Years Later (Aug. 1993) [hereinafter St. John Study].

\textsuperscript{110} Id. figs. 4.3.3(2)-(3).

\textsuperscript{111} Id. at 55.
search methods of the St. John study were emulated the following year by economist Rolf Goetze, who documented the effects of rent control on housing in the Massachusetts cities of Cambridge and Brookline.112

The St. John and Goetze studies demonstrate that rent control on both coasts of the United States has reduced the supply of affordable housing and imposed harsh costs on the poor, minorities, the elderly, and other vulnerable population groups.113 The main beneficiaries appear to have been young, middle class professionals, who have a marked advantage in competing for the dwindling supply of rent controlled housing.114

A. Effects on the Housing Supply

Modern rent control ordinances routinely allege the existence of "emergencies" in order to justify their adoption. The most commonly cited emergency is a shortage of affordable rental housing.115 The need to mitigate the effects of a housing shortage has been accepted by many courts as a legitimate state interest.116 Under the deferential due process standard, however, the judiciary has shown little interest in determining whether such conditions actually existed.117

Regardless of the authenticity of an alleged housing shortage, the Supreme Court’s current regulatory takings doctrine requires a showing that rent control has helped mitigate the asserted emergency. Many analysts have linked rent control to a decrease in the quality and quantity of rental housing.118 These findings are strongly sup-
ported by the recent empirical evidence presented by the St. John and Goetze studies.

One of the most striking findings of the new research is that the rent controlled cities of Berkeley and Santa Monica, and Brookline and Cambridge, were virtually alone when compared with other cities in their respective states, in losing rental housing during the 1980s.\textsuperscript{119} While the regulated cities lost 8\% to 14\% of their rental housing stock, comparable locales without rent control increased their supply of rental units, typically by 5\% to 20\% over the decade.\textsuperscript{120}

Under any meaningful application of the Nollan and Dolan doctrines, advocates for rent control will be hard pressed to show that this policy, which clearly reduces the supply of affordable rental housing, substantially advances efforts to mitigate an affordable housing shortage.

**B. Distribution of Affordable Housing Under Rent Control**

The relationship between rent control and housing shortages is not only a question of the regulatory impact on aggregate supply. A sizable body of research suggests that rent control not only reduces the available stock of affordable housing, but also redistributes this dwindling supply regressively within the population of renters.\textsuperscript{121}


120. \textit{ST. JOHN STUDY}, supra note 109, at 55, figs. 4.3.3 (1)-(4); \textit{GOETZE STUDY}, supra note 112, at 7, fig. 4.

121. Recent studies have found that the largest financial benefits of rent control accrue to renters in the most exclusive neighborhoods. See John C. Moorhouse, \textit{Long-Term Rent Control and Tenant Subsidies}, 27 Q. Rev. Econ. & Bus. 21 (1987); Peter Salins & Gerard Mildner, \textit{Does Rent Control Help the Poor?}, NY: The City J. 39, 41 (Winter 1991) (citing 1989 research at Harvard's Joint Center for Housing Studies). See also, U.S. Comm. on Banking, Housing, and Urban Affairs, Report on the New York City Loan Program, S. Rep. No. 900, 94th Cong., 2d Sess. 14 (1976) ("There is no evidence to show that rent control benefits the poor. Quite the contrary, it helps a small, privileged group of long-time residents, largely middle class...""); \textit{ARTHUR D. LITTLE, INC., NEW YORK: HOW WELL IS IT HOUSED?} Executive Summary at ES-6 (1986) (rent control transfers 12.5 times more wealth to upper-income New Yorkers than to the elderly poor); Paul L. Niebanck, \textit{The Politics and Economics of Rent Control, in THE RENT CONTROL DEBATE} 3, 4 (Paul L. Niebanck ed., 1985) (in Fort Lee, New Jersey, the income of the typical beneficiary of rent control was found to be in the top 5\% of the state). Even research funded by the Santa Monica Rent Control Board confirms that the largest subsidies from rent control accrue to occupants of the city's most expensive rental units. Levine et al., \textit{Who Benefits from Rent Control?}, 56 AM. PLAN. ASS'N. J. 140, 144 (1990).
In California, rent control has tended to be adopted in cities with relatively wealthy electorates.\textsuperscript{122} The demographic evidence has never supported the claim that rent control was adopted in these cities to ease the burdens of the poor. Instead, as Devine and others have demonstrated, "the major beneficiary of regulatory controls in each case was (and still is) a population that is firmly entrenched in the middle class."\textsuperscript{123}

The Goetze and St. John studies confirm that the dwindling number of rent controlled apartments in California and Massachusetts has been parcelled out to a younger, wealthier, more upscale group of renters. Due to the reduced availability of affordable housing under rent control, the number of low-income and very low-income renter households living in Berkeley decreased by more than 2,000 between 1980 and 1990. The same decade saw rapid growth in the poverty-level population of the San Francisco Bay Area and California as a whole.\textsuperscript{124}

During the rent-controlled decade of the 1980s, Santa Monica experienced a loss of 775 low-income renter households, a decrease of nearly 12%.\textsuperscript{125} The city also lost 285 very low-income renter households over this time.\textsuperscript{126} Concurrent with this exodus of economically disadvantaged renters, Santa Monica experienced a 40% rise in the number of households with very high incomes.\textsuperscript{127} During this same period, Los Angeles County (which includes Santa Monica) saw an influx of 60,000 poor renter households.\textsuperscript{128}

In Massachusetts, the rent controlled cities of Cambridge and Brookline lost 10% and 26%, respectively, of their poverty-level households during the 1980s.\textsuperscript{129} By the end of this period, the per capita income of occupants of rent controlled apartments in Cambridge was higher than that in the uncontrolled sector.\textsuperscript{130}

In addition to displacing the poor, rent control in California had a devastating impact on the population of elderly renters and students. Under rent control in the 1980s, it was virtually impossible for the

\textsuperscript{122} Beverly Hills’ per capita income is 184% above the California average. COUNTY & CITY DATA BOOK, U.S. BUREAU OF THE CENSUS 604 (1988) [hereinafter COUNTY & CITY DATA BOOK]. The city adopted rent control in 1979. Palm Springs’ per capita income is 35% above the California average. COUNTY & CITY DATA BOOK at 620. The city adopted rent control in 1980. The cities of Berkeley and Santa Monica, which imposed rent control in the late 1970s, are notable for their concentrations of upscale young professionals, well above the California average in education and income. See, \textit{e.g.}, Devine, supra note 114, at 16-18.

\textsuperscript{123} Devine, supra note 114, at 26.

\textsuperscript{124} St. JOHN STUDY, supra note 109, at tbl. 4.4.1 (1).

\textsuperscript{125} \textit{Id.} at 80.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.} at tbl. 4.4.1 (3).

\textsuperscript{128} \textit{Id.} at tbl. 4.4.1 (2).

\textsuperscript{129} GOETZE STUDY, supra note 112, at 13-14.

\textsuperscript{130} \textit{Id.} at 14.
elderly to obtain rental housing in Berkeley. Meanwhile, existing elderly residents who died or moved away were replaced by younger, wealthier renters. As a result, over the decade of the 1980s, the elderly population of Berkeley increased by less than 1%—less than would be accounted for by the natural aging of the pre-rent-control population—compared with an increase of nearly 25% in the Bay Area.131

The effect in Santa Monica was even more remarkable. Despite a 15% increase in the elderly population of Los Angeles County in the 1980s, there was actually a drop in the number of elderly Santa Monica residents under rent control.132

During the decade of the 1980s, the number of Californians enrolled in college jumped dramatically. In Alameda County, college students accounted for 10.3% of the population in 1990, up from 8.9% ten years before.133 Yet, the number of college students able to find housing in Berkeley, home of the flagship campus of the University of California ("U.C.B."), actually fell during this decade of rent control.134 According to the university’s figures, the number of U.C.B. students able to find housing in Berkeley fell by more than 1500. Conversely, the number of U.C.B. students living in neighboring communities outside Berkeley rose by more than 2000 over the same period. This exodus has occurred despite an increase in the number of dormitory rooms provided in Berkeley by the university itself.135

Similar results occurred in Santa Monica, although the numbers are not as dramatic because Santa Monica is not home to a major university. Even so, it is clear that college students find it more difficult to find housing in Santa Monica today than they did before rent control, relative to any comparably sized community in Southern California.136

During the 1980’s, Santa Monica and Berkeley were virtually alone among comparable California cities in experiencing losses in rental housing and decreases in these especially vulnerable population groups. What makes this especially ironic is that students, the poor, and the elderly have been singled out for favored treatment by the official housing policies of both Berkeley and Santa Monica. As an empirical matter, it seems clear that the actual effects of rent control have run strongly contrary to the stated intentions of the policy makers.

Incredibly, in both California and Massachusetts, rent control in the 1980s was a powerful engine for uprooting the poor, the elderly, students, and other vulnerable population groups and forcing them to

132. Id.
133. Id. at fig. 4.4.3 (3).
134. Id. at 86.
135. See id. at 86-87.
136. Id. at figs. 3.4.3 (4)-(6).
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relocate elsewhere. Advocates of regulation may claim that these consequences were not intended when rent control was adopted.\textsuperscript{137} However, after more than a decade of evidence to the contrary, it can no longer be credibly argued that rent control \textit{substantially advances} the interests of disadvantaged groups. Ultimately these groups bear the heaviest burdens of rent control regulations.

CONCLUSION

Since 1987, the Supreme Court has greatly strengthened its protection of the rights of property owners under the Takings Clause of the Fifth Amendment. The government now bears the burden of proving, under a heightened standard of review, that property regulations substantially advance legitimate state interests.

The constitutionality of rent control has never been upheld under the Supreme Court's tough new regulatory takings doctrine. In what may be the start of a trend, the New York State Court of Appeals has twice struck down rental property regulations for failing the substantial advancement test set forth in \textit{Nollan v. California Coastal Commission} and \textit{Dolan v. City of Tigard}.

Recent empirical studies of rent control in California and Massachusetts have established that these regulations have caused a reduction in the supply of affordable rental housing. Moreover, the dwindling supply of rent controlled units has been allocated to a relatively wealthy, young, upscale population of renters. In contrast, the costs of regulation have been concentrated on the poor, students, the elderly, and other groups typically identified as the intended beneficiaries of such regulations.

Since the effects of rent control have been shown to run strongly counter to its stated intentions, these ordinances are highly vulnerable to a constitutional attack under the Supreme Court's regulatory takings doctrine. Consequently, rent control laws that cannot be shown to substantially advance legitimate state interests will not survive constitutional scrutiny under the criteria set forth by the Supreme Court in \textit{Nollan} and \textit{Dolan}.

\textsuperscript{137} Despite such protestations, overt discrimination cannot be ruled out as a motive for rent control. \textit{See Thomas W. Hazlett, U.S. Commission on Civil Rights: Issues in Housing Discrimination, Housing Discrimination in Rent Controlled Markets} (Nov. 1985).