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YEE v. CITY OF ESCONDIDO: THE SUPREME COURT STRIKES OUT AGAIN

Richard A. Epstein*

I. PLUS ÇA CHANGÉ, PLUS C’EST LA MÊME CHOSE

It is an incurable temptation of academic writers to stress the importance of change in the composition of the Supreme Court. Over the past twenty-five years the Warren Court has slipped away, to be replaced first by the Burger Court, and in more recent years by the Rehnquist Court. The changes in judicial personnel are said to relate to changes in the political temper of the time, and to presage change first in judicial philosophy and then in judicial decisions. The transition from the Warren to the Burger Court is surely overstated: It is sometimes forgotten that major decisions, such as Goldberg v. Kelly1 and, naturally, Roe v. Wade,2 were creatures of the Burger Court. Today, of course, there are similar, if not greater, anxieties because the last ten appointments to the United States Supreme Court have been made by Republican presidents, even though the Senate has been under Democratic control for large portions of that time.

Without doubt, an astute scholar could find many areas in which the shift in the Court’s composition and outlook has altered, for better or worse, Supreme Court decisions.3 And at the beginning of this past term, there were many who thought that the Court’s decision to grant certiorari in four cases4 involving private property and economic liberties was a sign that the troubled Supreme Court’s jurisprudence on the takings issue, as crafted during the Warren and Burger years, was about to be subjected to a searching reexamination. Regardless of whether that prospect was greeted with gloom or exhilaration—now that the dust has settled on the 1992 term—it has turned out to be a mirage. In at least

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2. 410 U.S. 113 (1973) (addressing right to abortion).
4. See infra notes 5-8 and accompanying text.
this area continuity, indeed intellectual torpor, has proved more powerful than any impulse for judicial innovation.

The evidence could not be clearer on the record. Of the four decisions before the Supreme Court, one—PFZ Properties, Inc. v. Rodriguez—was dismissed on the ground that certiorari was improvidently granted. A second, Nordlinger v. Hahn, resulted in a clean victory for the State of California with its “welcome stranger” system of real estate taxation. A third, Lucas v. South Carolina Coastal Council, gave some limited protection to landowners in land-use settings. But its importance is limited because the Court appears to have adopted a powerful “hands off” attitude to all forms of partial restrictions on land use—a subject that dwarfs the importance of the peculiar circumstances of Lucas, the total wipeout of all land uses. Finally, the decision on which I shall comment here, Yee v. City of Escondido, addressed the status of state and local regulation of mobile home parks and narrowly constrained the class of physical takings subject to heightened scrutiny under the Court’s current takings jurisprudence. These four decisions show that there remains, in some substantive areas at least, too much continuity between the work of the Warren and Burger Courts and the Rehnquist Court. These cases also confirm the worst fears of those who, like myself, regard the current body of takings law as a constitutional travesty in need of substantial judicial correction.

The major flaw of the law of takings before Lucas and Yee was that it conceded too extensive powers to the State, especially in the area of land use regulation. In Yee, this error has been compounded with a vengeance.

II. THE BACKGROUND OF YEE

A. The Contracting Problem

The facts of Yee have been well-discussed elsewhere and need only a brief summary here. Petitioners were owners of mobile home parks in Escondido, California. They claimed that a local rent control ordinance in conjunction with California’s Mobilehome Residency Law amounted to a physical taking of their property necessitating just com-

8. 112 S. Ct. 1522 (1992). For my views, see infra notes 9-72 and accompanying text.
10. Yee, 112 S. Ct. at 1526.
The term “Mobile Home” is in some sense a clear oxymoron, for these large homes are far from mobile. The cost of moving them (at least after they have been in use for several years) is so high relative to their value that in practice the mobile home, once situated on its “pad,” or plot of land, in a mobile home park stays there for the duration. The owner who wishes to leave his present location must typically sell or abandon the unit, for it cannot be taken with him. In an unregulated market, however, the physical interdependence between the land and the mobile home unit creates a bilateral monopoly or split estate situation. The only plausible buyer for the unit is the owner of the mobile home park in which the pad is located, and the temptation is to offer a price that is far below its market value.

The practical issue is how to prevent the park owner from exploiting his locational monopoly. One solution is to handle the problem by negotiation prior to the signing of the initial pad lease. If the contingency of blockade on resale surely arises frequently, there is little reason why the ordinary terms of a standard form lease should not be equal to the challenge, especially because the mobile home owners have an extensive investment (as most do) in their homes and can depend on their own association for instruction and guidance. Moreover, the problem here has arisen before, for example, with leasehold improvements in ordinary settings. One easy business response to the problem of landlord exploitation at the end of the lease is a contractual provision that requires the landlord to purchase the mobile home at a formula price. On this

11. See id.
12. See id.
14. On the power of these organizations, see William A. Fischel, Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?, 67 Chi.-Kent L. Rev. (forthcoming 1992) (manuscript on file with author). The Kozinski paradox refers to the argument, examined below, that it is odd to strike down this form of rent control statute when it is more efficient than ordinary rent control, which is now routinely held constitutional. The paradox is attributed to Judge Kozinski because it was first discussed in his important opinion in Hall v. City of Santa Barbara, 833 F.2d 1270, 1279 n.24 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988), rendered a dead letter after Yee. In Fischel’s view, the Takings Clause should strike down the form of rent control challenged in Yee while leaving ordinary rent control statutes untouched. See infra notes 37-43 and accompanying text.
15. Whether it be Blue Book (or standard) resale price or an assessed valuation, or some other method is not to the point in this context.
view there is a learning problem for the first generation, but not some systematic problem needing a mandatory collective response.

Many leases, of course, do not contain provisions that handle this situation. Contracting is costly and imperfect, but one legislative solution is to stipulate that, in the event of silence, a court should treat the contract as though it contained a specified mandatory buyout provision. The case for this approach is familiar: Default provisions under a contract should mirror the solution the parties themselves would agree to if the costs of contract formation were zero, or at least low enough to allow negotiations over the disputed term.

In addition, it is possible to tighten the notch one step further and to require a buyout on these terms regardless of the contract stipulations. At this point the law abandons its former respect for private ordering and requires the party to adopt a solution that is "efficient" under the circumstances, at least as the law understands the situation. Approaches of this sort are very dangerous, for they often reflect an incomplete understanding of the problem: It might well be the case that the scope of the holdout problem is less than that of the evaluation problem that is substituted in its place. But these difficulties are not my concern here, for the regulatory approach adopted in California was far more interventionist than any of those outlined above.

B. The Regulatory Framework

In California, the regulation of the relationship between the mobile home owner and the owner of the pad took place in two distinct steps. The first of these was introduced at the state level in the form of the Mobilehome Residency Law (MRL), which limited the grounds on which the tenancy of the mobile home owner could be terminated by the owner of the pad. Under that statute the permissible grounds for termination include the nonpayment of rent and the violation of the rules governing the mobile home park. And, in a point that is critical to the overall analysis, termination is allowed where the landowner is able to change the use of his land. As long as the rental agreement is in effect, however, the park owner is not allowed to impose any restraints on the mobile home owner's ability to transfer his interest in the home or in the use of the pad. No transfer fee may be exacted when the mobile home is

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18. Id. at § 798.56.
sold from one person to another, and the park owner cannot have the mobile home removed and recover possession of the property. The only grounds on which the prospective tenant can be refused entrance are those on which the initial owner could have been evicted: the failure to pay rent or the failure to conform to the rules of the park.

Taken alone, one possible justification for the state MRL is to prevent exploitation of the pad owner's weak bargaining position, given the immovable nature of the mobile home residence. But at the same time, nothing in the California statute limits the amount of rent that can be charged by the park owner under the lease, or the rent increase that could be demanded on its expiration of the lease. Standing alone, the statute represents a judgment, first, that private leasing arrangements cannot handle the assignment or renewal problem (which is probably false, as noted above), and that the park owner is relatively indifferent to the identity of his tenants, so that the forced assignment does not diminish the park owner's wealth. On this point, the statute tracks the emerging common law of leases in California, under which clauses requiring the landlord's permission for any sublease or assignment of the leased property are read as allowing the landlord to restrict assignment or sublease only if the proposed leasehold transfer adversely impacts the landlord's position. The net effect of this statute, standing alone, is to work a modest loss in social efficiency, relative to the contractual ideal, but so

19. This rationale, among others, was stressed by Professor Sax in his brief. "The property interest that petitioners claim was taken by the Escondido Ordinance is the product of the park owner's economic power over homeowners. That power grows out of immobility, not out of the natural force of supply and demand, and is thus a species of monopoly after the fact." Brief of Golden State Mobilehome Owners League, Inc., National Foundation of Manufactured Homeowners, and Designated Mobilehome Owners Associations as Amici Curiae in Support of Respondent at 6, Yee (No. 90-1947), reprinted in 25 Loy. L.A.L. Rev. at 1269. Sax does not mention the contractual antidote to the problem, and his mistaken insistence that these "new" forms of property require new solutions blinds him to the familiar parallel to the leasehold improvement case.

20. See Kendall v. Ernest Pestana, Inc., 40 Cal. 3d 488, 709 P.2d 837, 220 Cal. Rptr. 818 (1985). The case defends the limitation on the landlord's right to prevent a sublease or assignment on the ground that such limitation is consistent with the common-law rules of freedom of alienation. In so doing, it makes the common mistake of conflating restraints on alienation imposed as a matter of law with those imposed by private contract. The former may well be welfare reducing, but the latter usually are not; rather, they are instead an effort to control the externality problem (loss in value to the landlord upon change of the identity of the tenant), even at the cost of the holdout problem. Note that these clauses are almost always negotiated, and assume different forms—such as refusal not to be unreasonably granted—precisely because the magnitude of these two bargaining risks is not constant across the wide range of different contractual settings. Needless to say, California's MRL narrows the grounds on which a landlord may block transfers beyond those imposed by the Kendall decision. See CAL. CIV. CODE § 798.74 (West 1982 & Supp. 1992).
long as there is freedom to vary the rent charged for the units, the impact is likely to be slight.

The situation changed radically in 1988, however, when local rent control regulation, Proposition K, was imposed on top of the transfer act. Under Proposition K the rents in question were rolled back to their 1986 levels, and further increases were allowed only with the approval of the City Council, which in turn was instructed to take into account (without limitation, of course) a laundry list of factors before granting a proposed increase in whole or in part. As with all schemes of this sort, the bottom line is that some rent increases will be allowed if only to avoid the charge of confiscation, but the allowable rent increases will also lag behind market value—the rentals that would be agreed upon between strangers—of the pads. As with all rent control statutes, this statute—with one instructive difference—takes the landlord’s reversion and transfers it to the tenant in exchange for partial compensation in the form of below market rentals paid by the tenants. It is as though the City condemned the property of the landlord and then relet it to the tenant at below-market rents where the City did not receive the rent but instructed the tenant to pay it directly to the landlord in lieu of any direct compensation from the City. It may well be perfectly proper for the City to issue rentals at below-market rates to tenants, but if so, the shortfall should be absorbed by the City (raised by general tax revenues) and not cast on the landlords who are asked to make do with the stipulated rentals.

In my view, the rent control ordinance, wholly without regard to the MRL, is a per se taking without just compensation—a position that has been squarely rejected by the Supreme Court in Yee and in earlier decisions, most recently Pennell v. City of San Jose. For Justice O'Connor and the majority of the Court which joined her opinion, Yee did not offer any occasion on which to reconsider the soundness of rent control statutes as a matter of first principle, at which point this case would have been easy to decide—the local rent control ordinance was un constitu-

21. This Proposition was approved in a local referendum and is described by Justice O'Connor in Yee v. City of Escondido, 112 S. Ct. 1522, 1527 (1992).
22. Factors include changes in the Consumer Price Index, the price of comparable units, the time since the last increase and changes in taxes or cost. Id.
tional whether or not California had passed the MRL. Instead, the Court asked whether the combined operation of the two regulations worked a condemnation of the landlord’s interest under circumstances where the mere rent control ordinance did not.

In order to answer this question, it is first necessary to identify the differences between the two legal regimes. In this instance, the difference is not on the loss that the statute imposed upon the landlord, but on the distribution of gain from the statute. With the ordinary rent control statute, the tenant is not allowed to transfer his leasehold interest. In principle at least, once a sitting tenant abandons a favorable lease, then the next letting of the property allows the next tenant to appropriate the gain in question—assuming that it has not been dissipated by expenditures the new tenant has to make in order to secure that favorable lease. But with the full regulatory scheme in Yee, that second round of dissipation will not take place. The only tenants who are able to obtain gain under the rent control ordinance are the sitting tenants. The newcomers, under this version of “a welcome stranger” statute, must pay the same amount for their pads as they would without regulation, the only difference lying in the identity of the parties receiving the consideration and (perhaps) in the time frame over which that money is paid. In a world without rent control, the full gain would inure to the holder of the pad and would normally be paid in a periodic fashion. With the local rent control ordinance and the MRL in place, some fraction of the gain now inures to the tenant who will normally receive it in a lump sum—although even here a system of installment payments, secured perhaps by a mortgage on the mobile home, might reintroduce some of the periodicity found in an open market lease, albeit at some transactional cost. The critical question is not timing, however, but the identity of the person—the tenant gets to keep part of the rent for the land, which is capitalized in the value of the unit.

26. Yee, 112 S. Ct. at 1528. “Petitioners do not claim that the ordinary rent control statutes regulating housing throughout the country violate the Takings Clause.” Id. Alas.
27. The existence of “key money,” however, could change the point in practice.
28. See supra note 6 and accompanying text.
29. The point is noted in Yee, 112 S. Ct. at 1529-30, where the Court shrugs its shoulders and only notes that the novel distribution of benefits does not work a physical taking. It is correct on the small point but oblivious to the resource costs of the statutory practice.
30. 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, 425-31 (1988). The calculations by Hirsch and Hirsch suggest that the value of the unit increases by one-third to reflect the renewal rights of the below-market lease. There have been individual incidents reported in which dilapidated mobile homes have been purchased for substantial sums of money only to be scrapped. See Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d
The explicit transfer makes clear the initial expropriation, but by the same token it makes the rent control statute more efficient in its operation because the second generation of secure property rights eliminates any rent-seeking behavior when the initial tenant wishes to vacate the premises. It is for this reason that Professor Fischel describes the Kozinski position as a paradox, which Fischel accepts, albeit with commendable caution. But it should not, for that reason, be assumed that this form of rent control is more efficient from a social point of view than the standard variety. In order to see why, it is necessary to evaluate the City's program along two distinct margins. The City of Escondido's version is more efficient once the rent control statute is in place, but its very efficiency in operation is the source of an offsetting social inefficiency. The Escondido variant of the rent control statute increases the returns to local renters from the passage of the rent control statute by allowing them to capture the full stream of future periodic expropriations from the landlord. That larger rate of return gives the renters a greater inducement for the passage of the rent control statute in the first place, and thus increases the likelihood that such a statute will be passed. As these statutes are generally less efficient than ordinary market solutions to the rent problem, the social outcome is indeterminate. There will be more bad rent control statutes on the books, but each such statute will have a less deleterious social effect. It is anyone's guess as to which of these factors will prove to be more dominant in practice.

The situation is made only more complex when activity along a third margin is also considered. The level of entry into the mobile park industry is not fixed by some law of nature but depends critically on the rate of return that is available for the activity. In this context, the decision of even a single local government to impose rent control on mobile home parks has powerful negative externalities because it signals to investors everywhere throughout the state, if not the nation, that similar restrictions on investment return could be imposed on their activities. The rate of entry into the business should therefore decline, which has

575 (9th Cir. 1991), withdrawn, No. 90-56066, 1992 WL 168953 (9th Cir. July 23, 1992), where buyers paid $77,000 when the mobile home was worth $5000. The consideration paid was for the pad, not the home. Id. at 578. The rent control statute is understood by all participants to transform the former pad owner into a first mortgagee on a variable payment mortgage.

31. Fischel, supra note 14 (manuscript at 2-3).

32. Note too that where the rollback applies to rent increases contemplated under existing leases, there is also a clear violation of the Contracts Clause. U.S. CONST. art. I, § 10. The debtors have voted themselves a form of debtor's release.

33. These statutes are even less efficient than a market with just the Mobilehome Residence Act, but not rent control.
been observed in this line of business.\textsuperscript{34} The constriction in supply should not deter any local community from passing its rent control ordinance, for the implicit reduction in supply throughout the state (or nation) only works to increase the value of the pads that present tenants now control.\textsuperscript{35} It is therefore insufficient to look at the rent control ordinances only in terms of their post-enactment influence. Viewed in its broader perspective, there may be no Kozinski paradox at all. There are two different forms of rent control ordinance, each with its distinctive disadvantages, both inefficient relative to some market solution.

\section*{III. The Legal Analysis of Kozinski and Fischel}

Under a sound analysis of the Takings Clause, all this speculation is quite beside the point: So long as it is clear that both forms of rent control statute are uncompensated takings from the landlord, it is wholly irrelevant as to how the gain is distributed. Whether the gain goes to sitting or to future tenants, the statute is struck down. By the same token it is quite irrelevant which of these two systems leads to worse social results, so long, again, as both sets of outcomes are inferior to the market solutions that any form of rent control displaces. The right question to ask in the case of any ordinary physical dispossession is always, what has been taken, not what has been retained, and the same form of inquiry should apply when we deal with the taking of the landlord’s reversion for inadequate compensation paid by the sitting tenant. The paradoxical qualities of this case, as developed by Judge Kozinski, have nothing to do with its sound outcomes.

My view is thus in sharp contrast with that of Professor Fischel who seeks to make a virtue out of Judge Kozinski’s resourceful judicial opportunism in \textit{Hall v. City of Santa Barbara}.\textsuperscript{36} In Fischel’s view there is a principled reason to distinguish between the ordinary rent control statute and the mobile home variant. The key point is that landlords in ordinary

\begin{itemize}
  \item \textsuperscript{34} See Avinash Dixit, \textit{Irreversible Investment with Price Ceilings}, 99 J. Pol. Econ. 541 (1991), \textit{analyzed in} Fischel, \textit{supra} note 14 (manuscript at 13-14). Fischel argues that the same reduction in investment by park owners would take place regardless of the form of rent control. Fischel, \textit{supra} note 13 (manuscript at 14-15). But this argument assumes that the likelihood of passage is the same for both types of ordinance, which the above argument shows to be false. The adverse effects identified by Dixit should be more pronounced under the form of the rent control ordinance found in \textit{Yee}.
  \item \textsuperscript{35} Where mobile homes form an isolated submarket, ordinary landlords will not oppose the rent control system, as they will benefit from the overflow. The clean division in the rental market is a permanent part of state and local politics in California. \textit{See} Fischel, \textit{supra} note 14 (manuscript at 41-42). “None of the briefs for the park owners in the \textit{Yee} appeal [to the U.S. Supreme Court] was joined by apartment owners’ developers or retailers. \textit{Id.} at 42 n.80.
  \item \textsuperscript{36} 833 F.2d 1270 (9th Cir. 1986), \textit{cert. denied}, 485 U.S. 940 (1988).
\end{itemize}
rental markets have sufficient clout to resist rent control a fair portion of the time. The internecine warfare that characterizes the Santa Monica rent control statute has served as a warning to keep local rent control ordinances from being passed in Los Angeles.\textsuperscript{37} In Fischel's view, the vice of the mobile home rent control laws is that they are too easily passed at the local level, for mobile home owners turn out in mass at local elections to swamp any feeble opposition from park owners. As Fischel notes, mobile home owners are conservative, white and Republican, and their Republican representative does their bidding in Sacramento.\textsuperscript{38} In his view, rent control statutes should be allowed where there is a fair fight between factions and not where local majoritarian politics allow one faction to steamroll its opposition. There are few deadweight losses in securing a transfer in a one-sided fight, which only increases the unfairness of the statute. It is that political unfairness, not any inefficiency of rent control, that leads Fischel to attack the political process on these limited grounds.

Critical to the Fischel position is a distinction between two types of electoral distortion: on one side is majoritarian politics where the median voter prevails and destroys all in his path; on the other side is special interest politics where a minority is able to take control of the process and turn it to its own interest. Fischel is willing to strike down statutes that result from majority excesses but not from special interest dealing. The question to ask is, why should any one care about the origins of the cancer so long as the diseased state is clearly identified? Both forms of excesses produce inefficient regulation, and both trample on property rights. It hardly matters if the persons abused or the political strategies adopted differ from case to case. The Takings Clause protects all "owners whose property is taken without just compensation and is supremely indifferent to the precise form of the political machinations that have led to the prohibited result. Indeed, Fischel's efficiency analysis is incomplete for the reason noted above: While deadweight losses may be low in the context of mobile homes, the frequency of the legislation and its deterrents to entry are also efficiency losses to be counted.\textsuperscript{39}

It follows, therefore, that judgments about rent control statutes should not be made on subtle distinctions among various legislative schemes or the constellation of support that they can generate. It must rest on an overall conviction that they do not meet the just compensation requirements of the Takings Clause. Before the rent control system is

\textsuperscript{37} Fischel, \textit{supra} note 14 (manuscript at 35 n.65).
\textsuperscript{38} \textit{Id.} (manuscript at 40).
\textsuperscript{39} See \textit{supra} notes 31-35 and accompanying text.
imposed the landlord has complete ownership of the reversion; after it is imposed he becomes a creditor on a perpetual lease, and the equity of the property is shifted to the tenant, without the payment of just compensation. As long as the constitutional requirements of a compensable taking have been met, the political pathways that lead to it are irrelevant.

Fischel's effort to draw a line between two different forms of political pathology fails as an ordinary matter of constitutional interpretation. Thus, his effort to salvage some rent control statutes from constitutional challenge must rest not on textual arguments but on other grounds; and here he turns to a familiar extra concern—the want of competence of judges to make complex social judgments about the goodness or badness of given schemes. His skepticism takes a familiar form: If the legislative analysis of complex social institutions can so easily miscarry, then why should judges be trusted to do any better?

The answer to this question cannot be based on the apparent competence of the Justices to engage in the needed inquiry: Justice O'Connor's flaccid opinion in Yee is testimony enough on that score. But the answer does come in two parts. First, by imposing a tough standard of judicial review, legislation now has two hurdles instead of one to cross. Because most legislation is counterproductive in light of the interest group politics that generate it, the second barrier serves a useful function, even if we knew nothing about the relevant competence of legislatures and courts in making judgments about these systems. The chances are whichever body takes the negative view of proposed legislation is the correct one. To be sure, the rent control ordinance of the City of Escondido was enacted by referendum, but direct elections are no better at protecting individual rights than legislative deliberations or administrative actions. Again, the view that two hurdles is better than one seems fully supported.

Professor Fischel, in his desire to strike down the Escondido ordinance, supplies ample confirmation of the wisdom of the basic point when he chronicles in great detail the enormous social waste in the lobbying efforts by the mobile home unit owners to obtain their legislation goals over, of course, the protracted opposition of the smaller, but re-


41. Note the paradox: decide Yee as was done, and his point gains strength; decide it the other way, and his point is diminished.
sourceful lobby of park owners.42 This endless form of political competition generates system-wide, large deadweight losses and creates perverse incentives in the bargain. Both perils are averted by a forceful application of the Takings Clause to those cases that fall squarely within its prohibition.

There is a second way to look at the same problem. The approach of conscious deference that is today adopted for the Takings Clause stands in sharp opposition to the systems of more active supervision in other areas, such as speech under the First Amendment. One could in principle make the same argument that unelected judges are not responsive to democratic concerns, but does anyone think that we would be better off allowing flimsy justifications to undercut the constitutional guarantees of freedom of speech? The court that applies the First Amendment in straightforward fashion, and demands some compelling justification for any abridgement of ordinary liberties, by that one step, is more than halfway home in dealing with First Amendment issues. In light of the very weak justifications for rent control, the system would instantly tumble down.43 It is not necessary for courts to understand the functions of private property and a competitive economy to give a faithful application of the Takings Clause. They only have to require substantial justification for abridgment, and leave it to others to explain not what the Clause means, but why it is so important for the longstanding success of a constitutional democracy.

IV. JUSTICE O'CONNOR'S JUDICIAL TRANSFORMATION OF THE ENGLISH LANGUAGE

As an initial matter, it is clear that none of the considerations that move Judge Kozinski or Professor Fischel had the slightest influence on Justice O'Connor's perfunctory opinion in Yee. Rather, her decision could be regarded as a convenient exemplar of some common errors and confusions in the current jurisprudence of the Takings Clause. As is typical in this area, Justice O'Connor begins by distinguishing physical takings, those where the government occupies the land, from regulatory takings, where the government only restricts the owner's traditional com-

42. Fischel, supra note 14 (manuscript at 39-42).
43. For the demolition of those ideas advanced by Judge Wiener in Yee in the California court of appeal, Yee v. City of Escondido, 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990), aff'd, 112 S. Ct. 1522 (1992), see Fischel, supra note 14 (manuscript at 49). Judge Wiener's main point is that the landowners enjoy quasi-monopoly profits because of the zoning protection that they have received. Id. at 1533, 274 Cal. Rptr. at 553. He has given an argument for striking down the zoning regulation, not for sustaining the rent control ordinance.
mon-law power of use or disposition of the property in question. The consequence that attaches to this distinction is enormous, for if a taking is deemed to be physical, then the government behavior must satisfy a high degree of scrutiny before it escapes the obligation to pay compensation. But where the taking is said to be regulatory, then the lowest imaginable standards of scrutiny apply, except perhaps in those cases where the restriction on the use of property is regarded as total, where the standard may be higher. Justice O'Connor cites previous Supreme Court decisions that have embraced that distinction, most notably the unfortunate decision in *Penn Central Transportation Co. v. New York City.* But she offers no reasoned defense of the distinction, which may be just as well, because none can be articulated.

The conception of property as a bundle of rights in a discrete thing is one that is familiar to all students of the common law of property, but it is wholly disregarded in this context. To protect bare possession, while excluding use and disposition from serious constitutional protection, leaves landowners subject to massive regulatory risk without any offsetting social gain. To be sure, sometimes a justification may be found for restrictions on use and disposition, but the current Supreme Court doctrine demands that none be supplied. Where the Court grants an inch, state and local governments will quickly take a mile, so that virtually all productive use of property may be halted by the thankless stalemate between government veto and private desire: The state may block, but it may not occupy or develop. The bitter confrontation between individual landowners and government entities should not be regarded as a commentary on the character of individuals locked in deadly conflict with each other. It is attributable to the basic incentive structure created by a set of judicial rules that encourage public coercion and private resistance instead of voluntary agreement.

The distinction between physical and regulatory takings then has no analytical conviction to sustain it. But the subsidiary question in *Yee* deserves some closer attention. In *Yee,* Justice O'Connor holds that the rent control ordinance is a regulatory, and not a physical taking. To any person untutored in the subtleties of constitutional law, a physical occupation has taken place: The tenant has moved onto the property and is entitled to remain in possession of the pad in perpetuity. It may be that

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the occupation is not exclusive in the sense that the landlord can enter the pad for repairs or inspections. But even if the tenant's interest in the pad is not totally exclusive, it is equally that the landlord's interest has been very much attenuated. Under any ordinary lease, the tenant and not the landlord is in possession of the premises for the duration of the lease. Only in constitutional discourse does the obvious become false. And, in a sense, that linguistic doubletalk has to be the case. If the Yees' tenants have taken possession of the Yees' premises, then there is nothing to distinguish an ordinary rent control statute from the one at issue here, so that the entire edifice of rent control comes crashing down. It is not for nothing that Justice O'Connor concludes that the occupation of the premises by the tenant "is a regulation of petitioners' use of their property, and thus does not amount to a per se taking."48 But her resort to italics does nothing to conceal the poverty of her argument, for the word "use" has been drained of its traditional meaning. Before Yee, land use regulation referred to the use restrictions placed on a single owner in possession, and thus determined what could be done with the land. Now "use" refers to who can occupy the land—the tenant or the landlord. In Yee the tenant may use what the landlord may not. If that is not a case of dispossession, then it is hard to see what is.

Justice O'Connor also bolsters her conclusion with a second line of argument. In her view, the landlord may not protest the local ordinance because the landlord has voluntarily allowed the tenant to enter in possession; nor is the landlord required to keep the tenant in possession. Here there is a peculiar interaction between the antidiscrimination laws and the law of eminent domain. Thus Justice O'Connor writes: "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land."49 And elsewhere, she elaborates: "Because they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals"50—with a citation51 to Heart of Atlanta Motel, Inc. v. United States.52

The entire argument rests on a massive equivocation on the meaning of "requires" and "voluntary." In ordinary English, a relationship is voluntary if the burdens in question were assumed by agreement. The obligations found under the contract determine the scope of the voluntary

48. Yee, 112 S. Ct. at 1531.
49. Id. at 1528.
50. Id. at 1530.
51. Id. (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964)).
undertaking, and these cannot be enlarged without a violation of the rights of the promisor. The principle here is an old one at common law. The holdover tenant may not be regarded as a trespasser because the initial entry was made under a license from the landlord. But upon the expiration of the lease, the landlord has one of two options, to continue with the tenancy on a month-to-month basis, with rent set at market levels, or to treat the (former) tenant as a trespasser and to move for summary eviction. There has never been any suggestion that the tenant at his own option could holdover at the rent below market value.

Analogous principles apply to the rent control statutes. The tenants are entitled to remain on the premises only so long as their lease allows them to do so. If they stay on past the terms of that engagement, when asked to go, then they are trespassers and should be treated as such. The circumstances of the initial entry, on which Justice O'Connor places such great reliance, are wholly irrelevant once the lease or other arrangement has expired. The entire body of property law has developed a wide range of limited possessory interests, and each interest is paired with some reversionary interest of the landlord.

The dangerous doctrine, which receives a regrettable boost from the Yee decision, is that if the landowner voluntarily grants a limited estate, then the state can stretch that interest into a fee simple without paying just compensation. So often legislatures and courts look at the process from the wrong end of the telescope. The lease has already been granted, so what is wrong with helping out a tenant in need by expanding its duration? Wholly apart from any inequity to the landlord—an outcome that this Court regards as a philosophical contradiction in terms—the results of this outlook are insidious in the long run. There are all sorts of transactions in which both sides can gain from divided interests. Their utility in the future will be cramped by the political risk created by Yee. Any landlord who has agreed to allow a tenant in possession now has to face the risk, first, that the tenant cannot be evicted at the end of the

53. The Six Carpenters' Case, 77 Eng. Rep. 695 (K.B. 1610). There it was held that the doctrine of trespass ab initio did not apply where the landlord permitted the tenant to enter his premises for food and drink but did not thereafter pay the bill. The doctrine of trespass was reserved for those cases where the defendant entered as a matter of right, and then abused the privilege by causing physical damage. For example, the doctrine applies when a tenant enters a common and thereafter cuts down a tree that is owned jointly with others. The advantage of trespass in earlier times was that it was commenced by a writ of capias, which allowed arrest of the person. See RALPH SUTTEN, PERSONAL ACTIONS AT COMMON LAW 43-44 (1929).

54. See, e.g., Tonkel v. Riteman, 141 So. 344, 344 (Miss. 1932). "It is the duty of a tenant when his period of tenancy has expired to surrender the premises to his landlord or else to have procured a new contract, and, if he fails to do either, the landlord may treat him as a trespass or as a tenant under the previous terms, according to the option of the landlord." Id.
lease, and second, that the tenant, while allowed to remain in possession, will pay a rent equal to a fraction of the property's market value. Sometimes this knowledge will induce the owner not to become a landlord in the first place, as the cost of leaving land idle, or placing it out rent-free to a family friend, may be lower than the cost of running the political risk. The long term consequences of the decision in *Yee* can only be negative.

Justice O'Connor added yet another twist to the argument: The landlord was entitled to boot the tenant off the premises after all, notwithstanding the ordinance:55

At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Put bluntly, no government has required any physical invasion of petitioner's property.56

The rights that are so granted under the MRL, however, are a far cry from those that are granted under the lease. Before the statute, simple demand on expiration of the lease was all that was required. One tenant could be asked to leave while another could be allowed to stay. A new tenant could be allowed to enter the place vacated by the old tenant. But now all is changed. The period of statutory notice—which allows the tenants time to mount political initiatives against the eviction—is far greater than any allowed under the lease. Most importantly, the price for eviction is steep: the conversion of the land to a different use. If the land's best current use is as a mobile home park, then any threat to switch use is not credible, for the park owner will be put in a worse position by carrying out the threat. But even if some changes were desired, changes in land use just don't happen in California. An elaborate zoning and regulatory process must be negotiated before that change in use is authorized by the State. In effect, the MRL and the rent control laws do not “require” landowners to keep their land in the same use. They “only” say that you must pay a prohibitive tariff to shift land use. But however transparent the strategy, it seems to have worked. By precluding all forms of eviction, the MRL and the rent control ordinance might have drowned in some constitutional hot water. By leaving a remote, contingent and generally valueless right to change uses with the

55. *Yee*, 112 S. Ct. at 1528.
56. *Id.* (citation omitted).
park owner, a petty form of exaction is garbed in garments of constitutional probity. One can only imagine the parallel First Amendment argument, which says that a landowner is allowed to speak his piece so long as he converts his home into a public auditorium.

Justice O'Connor scarcely distinguishes herself in her treatment of physical takings. But it may be said that the regulatory takings line of attack is still open, as long as it is fairly raised next time round on certiorari. There is little reason to comment on Justice O'Connor's hair-splitting, which prevented the Supreme Court from examining the regulatory takings claim this time round. Suffice it to say that only the foolhardy would think that compensation would be awarded in this case when it has never been awarded in the history of takings law. The institution of property may be fundamental to a market economy, and it may well lie at the root of our own Lockean heritage. But if so, its power will have to be established in political arenas that are bent on its destruction. The bank has shut the window on complaints against the long line of applicants seeking redress. Just imagine if Jimmy Stewart had done the same thing in "It's a Wonderful Life"?

V. Que Sera Sera

So what then, will the future bring? Here it is always hard to say, but I can relate one set of arguments that come out of work that I have done as a consultant for the New England Legal Foundation in another important takings case, Preseault v. United States, which has already wound its way once to the Supreme Court and may well find its way back there again. The substantive takings issues in the Preseault case can be easily stated. In order to prevent out-of-service railroad lines from reverting to their original owners in accordance with the terms of the original grants or condemnation orders, Congress enacted the National Trails System Act Amendments of 1983, which changed the rules under which the Interstate Commerce Commission evaluates railroad applications for abandonment. Under the previous law, once the railroad moved to abandon its service on a given line, the ICC conducted a review to see if the application for abandonment should be granted or if the "public convenience and necessity" required continuation of all or part

57. See id. at 1531-34.
of the service, with or without conditions. In the course of these hearings, it was common to ask whether some of the lines in use should be transferred to another railroad for continuation of the services; and it was common for major customers of the railroad to petition for the continuation of some services.

The Rutland Railroad line, whose easements were at issue in *Preseault*, petitioned for abandonment of its services. No customers objected, and no other railroads sought the use of its line. In the ordinary course of events, the land in question would revert back to the Preseaults as successors in title of the initial grantors of the easements. The Rails to Trails Act, however, altered the rules for the abandonment of rail service that had applied under the 1920 Transportation Act. The pretext (no kinder word will do) of the Rails to Trails Act is that the railroad line is being banked for “future service” even though the rails have been torn out, and the right of way has been paved over with an eight-foot strip for use as a bicycle path through the middle of the Preseaults’ land. The question then arises whether the public use and occupation of the land in question amounts to a physical taking for which compensation is required. When that question was considered in the Second Circuit, Judge Pratt, in a brief and unsatisfactory opinion for a unanimous court, held that it did not matter if the Preseaults were stripped of their reversionary interests under state law. The case then

64. *Id.* at 827.
65. *Id.* at 823.
66. *Preseault* v. ICC, 853 F.2d 145, 151 (2d Cir. 1988), *aff'd on other grounds*, 494 U.S. 1 (1990). It is instructive to quote the court’s entire discussion, for it is symptomatic of the disrepute into which the Takings Clause has fallen.

Petitioners claim that § 1247(d), by permitting the ICC to issue a Certificate of Interim Trail Use to a carrier that has discontinued service and not to issue a Certificate of Abandonment, enables the ICC to “take” their property by indefinitely postponing the reversion of an interest that would otherwise vest under state law. We disagree. The ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railway carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest can or would vest. Thus petitioners’ reversionary interest, if any, is not postponed any more by the operation of § 1247(d) than it could otherwise be affected by the ICC’s continuing jurisdiction.

Preserving railway corridors for future railway use is a function that congress has recently delegated to the ICC, and it is, as discussed earlier, permissible under the commerce clause. For as long as it determines that the land will serve a “railroad purpose”, the ICC retains jurisdiction over railroad rights-of-way; it does not matter whether that purpose is immediate or in the future. To distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle congress’s creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country.
went to the Supreme Court, which did not address the compensation question, but which held, in a lark of its own,\(^6\) that the entire matter properly belonged in the Federal Circuit because Congress—which had tried to eliminate any compensation for the holders of the reversionary interests—nonetheless had impliedly granted its usual remedy under the Tucker Act.\(^6\)

As the case now sits within the Federal Circuit, the critical question is whether the occupation of the railroad track by the government constitutes a physical occupation. Here the legacy of Yee may yet poison the deliberations. The government's position is that there cannot be a physical taking because the Preseaults, having taken by purchase after the easements were created,\(^6\) never were in possession of the property, and therefore did not have it physically taken from them. It is as though a small child, who has lent a toy to his friend, is told that it is not taken if it is not returned. That which was given cannot be taken, even if it were given for an hour and taken in perpetuity. Yee is of course distinguish-

\(^{6}\)Yee v. City of Escondido, 494 U.S. 1, 12 (1990). The lark is not without its political consequences. Before the Supreme Court's decision in Preseault, the ICC was reluctant to devote old rails to new trails if it did not think that the railroad owned the fee, for there was no budget to pay for what was done. But now that the Tucker Act is said to be at the ready, the ICC has become more aggressive in its view of the entire matter. See 54 Fed. Reg. 8011 (1989).


\(^{69}\)The implications of this last expression are truly frightening. The government's position is that because the Preseaults acquired by purchase after the ICC modified its statute in 1920, they could not complain of the procedures in question because they had no "expectations" that their property interest would be protected. In effect if the government is correct, then whenever it passes any confiscatory statute, any subsequent sale of property is made with the understanding that the buyer sacrifices all constitutional protection. The state by legislation therefore will be able to tell people that the only way in which they can preserve their constitutional claims is not to sell their property. Here the government's position on expectations shows how a slippery concept can be allowed to run riot. The more extravagant the state misbehavior, the greater its entitlements—hardly the way to encourage probity in government action.
able from Preseault on the irrelevant ground that the initial interest in Yee was voluntarily created while in Preseault it was created by condemnation or by settlement under threat of compensation. But who knows whether these differences will matter given the Pickwickian interpretation that Justice O'Connor placed on the idea of physical takings in Yee.

I for one can only hope that at some point in time the Justices will draw some line in the sand saying this far the Congress may move, but no farther. But the trend in the cases is ominously in the other direction. When I wrote my Takings book in 1985, I was sharply critical of the Supreme Court's jurisprudence, and some\footnote{See, e.g., Gordon Crovitz, Is the New Deal Unconstitutional?, WALL ST. J., Jan. 13, 1986, at 24 (reviewing Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985)).} have wrongfully credited me with having some influence in revitalizing the Takings Clause in the past seven years. But while there have been occasional bright spots that have quickly turned to ashes,\footnote{See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). Both these cases have received narrow interpretations in the lower courts. See, e.g., Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991); Roscoo Holdings Inc. v. California, 212 Cal. App. 3d 642, 260 Cal. Rptr. 736 (1989). These developments are discussed in detail in my forthcoming book, Richard A. Epstein, Bargaining with the State (forthcoming 1993).} the inexorable flow of decided cases under the Takings Clause has been ever more supportive of big government and ever less respectful to the place of private property in our government regime. Yee in my view is but one of many regrettable decisions of the Supreme Court\footnote{To mention only a couple of the worst decisions: Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), is scarcely any better, but I shall write about it on some other occasion.}—disingenuous on doctrine, disastrous in consequence—in its Takings Clause jurisprudence. There are occasions in which doctrinal continuity is a genuine cause for regret.