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RENT CONTROL ≠ PRICE-FIXING: ANOTHER LOOK AT THE EMPEROR'S NEW CLOTHES

Robert N. Markle*

INTRODUCTION

Government, even in its best state[,] is but a necessary evil; in its worst state, an intolerable one. Government, like dress, is the badge of lost innocence; the palaces of kings are built upon the ruins of the bowers of paradise.

Thomas Paine, *Common Sense* ch.1 (1776)

A major source of the ills of mankind has been government. Its monopoly of force is an omnipresent reminder to those subject to its dictates that they have no choice but to capitulate. The evil that is government, even in its mildest incarnations, has typically set itself in opposition to those of its subjects who have been most productive. Aggregation of personal wealth has been deemed something to be feared and despised. Rather than praising those whose effort, ingenuity and productivity have created new wealth and raised the standard of living for all, government has seen fit, in the guise of its myriad social welfare programs, to expropriate the wealth from those who have created it in favor of those it deems less fortunate (and thus more deserving).¹

From this viewpoint, this article shall analyze the policy and effects of a typical municipal rent control ordinance and the novel, but ultimately unsuccessful, effort² of a group of property-owners to throw off the yoke of municipal oppression. Part I of this article outlines the procedural background of the challenge to the rent control ordinance of the City of Berkeley, California. Part II details ele-

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1. See U.S. CONST. amend. XVI and Title 26 of the U.S. Code. The so-called progressive income tax, in true Marxist spirit, penalizes productivity by extorting greater percentages of income from the more productive and transferring it to those who are less productive (after taking a rather large handling fee for itself).

2. See Comment, *Challenging Rent Control: Strategies for Attack*, 34 UCLA L. REV. 149, 155-70 (1986) and sources cited therein (series of suggested methods by which rent control ordinance may be challenged).

ments of the ordinance itself and the challenge through three levels of the state court system. Part III, in turn, discusses the three separate opinions of the United States Supreme Court on the issues of whether the ordinance violated federal antitrust law and was thus preempted or whether even if the action of the city were found to conflict with federal law it would be exempt as state action under the doctrine of *Parker v. Brown*.³

Part IV analyzes, *seriatim*: whether the Court correctly resolved the issue of the existence *vel non* of concerted action, a threshold requirement of a Sherman Act⁴ violation; whether the mere fact that one of the parties involved is a government entity should yield a different legal result if the economic consequences of the action are the same as if the party had been a private actor; whether a conspiracy to fix maximum prices should be treated the same as a conspiracy to fix minimum ones if both the purpose and effects of each are qualitatively and substantively different; and, whether the policy of rent control is rational given its stated purposes and its theoretical and actual effects.⁵

Finally this Article concludes that: the Court's technically correct reading of the Sherman Act has not been helpful in resolving the ultimate issue; the competitive market economy sought to be protected by the Sherman Act is ill-served by allowing price fixing merely because one of the parties to the conspiracy is a government entity; differences in purpose and effect between maximum and minimum price fixing arrangements justify allowing the former even if the latter are proscribed; and, the policy of rent control is at cross purposes with itself and is nothing more than government sanctioned theft of the assets of some for the benefit of others who have no superior claim to those assets.

3. See *infra* note 24.

4. See *infra* note 22.

5. G. STERNLIEB & J. HUGHES, *The Market Structure of the Rental Sector* in THE RENT CONTROL DEBATE 28 (P. Niebanck ed. 1985); see also M. LETT, RENT CONTROL: CONCEPTS, REALITIES AND MECHANISMS (1976). Professors Sternlieb and Hughes have pointed out that: [R]ent control acts as a disincentive to potential investors, whose funds will be required for the construction of rental housing. The smorgasbord of competing investments is far too attractive, and the uncertainties of residential rental properties under rent control are far too worrisome.

As a restraint on the housing supply, rent control runs the risk of undermining its own purposes.

I. BACKGROUND

The United States Supreme Court's decision in *Fisher v. City of Berkeley*⁶ involves a challenge to a rent control ordinance⁷ enacted pursuant to popular initiative.⁸ The ordinance imposes rent ceilings on certain residential rental properties within the city limits.⁹ A Rent Stabilization Board was created and empowered to impose the ceilings as well as to approve of any increases sought by the property owner-landlords.¹⁰

Appellants, a group of landlords, brought an action seeking injunctive and declaratory relief against the City, the City Council, and the Rent Stabilization Board. The action challenged the constitutionality of the ordinance on fourteenth amendment grounds as being violative of both the due process and equal protection clauses.¹¹

The state trial court granted appellee's motion for judgment on the pleadings, holding the ordinance valid both on its face and as applied.¹² The California Court of Appeal reversed, basing its ruling on the heavy burdens imposed on landlords by the rent adjustment procedures.¹³ These burdens were held violative of the landlords' due process rights, and the ordinance was thus declared invalid.¹⁴

While that appeal was pending, the decision of the United States Supreme Court in *Community Communications Co. v. City of Boulder*¹⁵ prompted certain *amici* to raise the question whether the ordinance was unconstitutional as being pre-empted by the federal anti-trust laws, specifically sections one and two of the Sherman Act.¹⁶ Thus, when the California Supreme Court rendered its decision,¹⁷ it chose to rely on both the fourteenth amendment challenge and the pre-emption claim.

Vacating the opinion of the Court of Appeal, the California Supreme Court held that there was no conflict between the ordinance

6. 475 U.S. 260 (1986).

7. Berkeley, Cal., Ordinance 5261-N.S. (June 3, 1980).

8. The ordinance was enacted as Measure D by a majority vote of the electorate at the city election on June 3, 1980.

9. Berkeley, Cal., Ordinance 5261-N.S., § 10 (June 3, 1980).

10. *Id.* at § 6.

11. U.S. CONST. amend. XIV, § 1.

12. *Fisher v. City of Berkeley*, No. 536602-6 (Cal. Super. Ct. October 10, 1980).

13. *Fisher v. City of Berkeley*, 148 Cal. App. 3d 267, 195 Cal. Rptr. 836 (1983).

14. *Id.*

15. 455 U.S. 40 (1982).

16. 15 U.S.C. §§ 1-2 (1982).

17. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984).

and the Sherman Act.¹⁸ The court also held the ordinance valid as against appellants' fourteenth amendment challenge.¹⁹

The United States Supreme Court noted probable jurisdiction limited to the antitrust pre-emption question.²⁰ The case was briefed on that issue and oral argument heard on November 12, 1985. On February 26, 1986, the court issued the ruling which is the subject of this paper. For a majority of seven, Justice Marshall held that the ordinance is not unconstitutional as being pre-empted by the Sherman Act.²¹ Being unilaterally imposed by the city on the landlords, the rent ceilings lack the element of concerted action required in order to be characterized as a *per se* violation of section one of the Sherman Act.²² The ordinance, placing complete control over maximum rent levels in the hands of the Rent Stabilization Board, avoided the threshold requirement of section one that there be a "contract, combination . . . or conspiracy, in restraint of trade."²³ The majority, having concluded there was no antitrust violation, found it unnecessary to reach the question of whether, had the ordinance *mandated* section one violations, it would still have been valid because it would be exempt under the so-called state action doctrine of *Parker v. Brown*²⁴ and its progeny.²⁵

Justice Powell, preferring not to decide the pre-emption question, espoused the position that the ordinance was plainly within the

18. *Id.* at 662-63, 693 P.2d at 277, 209 Cal. Rptr. at 698.

19. *Id.* at 604, 693 P.2d at 308, 209 Cal. Rptr. at 729.

20. 471 U.S. 1124 (1985).

21. *Fisher v. City of Berkeley*, 475 U.S. 260 (1986).

22. Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

23. *Id.*

24. 317 U.S. 340, 350-51 (1943) ("[N]othing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.").

25. *See, e.g.,* *Hoover v. Ronwin*, 466 U.S. 558 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Veh. Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

"state action" exemption of *Parker*.²⁶ He thus concurred in the judgment and declined to rule on the merits of the pre-emption issue.²⁷

Justice Brennan dissented.²⁸ Finding the city's imposition of the rent ceilings to be a vertical means of destroying horizontal competition, Justice Brennan would hold that the ordinance facially conflicts with the Sherman Act.²⁹ He found no "clearly articulated and affirmatively expressed"³⁰ state policy in favor of the city's action. Thus, the ordinance would not qualify for the *Parker* exemption from antitrust liability.

The ensuing sections reach the following conclusions: (1) while the Court is likely correct in its conclusion that there was no concerted action and thus no antitrust violation, it has only postponed deciding the inevitable, *viz.* when a municipal program is presented wherein the action is slightly less unilateral, will the ordinance be saved from invalidation on the basis of the *Parker* exemption; (2) if the Sherman Act is meant to be a "consumer welfare prescription,"³¹ then the policy that underlies that Act is not susceptible of a construction that would decide the legality *vel non* of a practice depending upon the identity of the *actor* in a given situation, i.e. if price fixing is to be condemned *per se* as a misallocation of resources, it can scarcely be relevant that the restraint is imposed by government; (3) that being so, however, there is a functional difference between setting minimum prices and setting maximum ones, and that the latter instance, if not considered legal, should not be subject to *per se* illegal treatment; (4) rent control as a policy has never accomplished the stated purposes of those who have sought to implement it. On the contrary, it has brought about or exacerbated the very conditions it has been implemented to prevent.

26. *Fisher v. City of Berkeley*, 475 U.S. 260, 270-74 (1986).

27. *Id.*

28. *Id.* at 274-81.

29. *Id.*

30. *See Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982).

31. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting R. BORK, *THE ANTITRUST PARADOX* 66 (1978)). Judge Bork's book incorporates much of the painstaking work on the legislative history of the Sherman Act initially appearing in Bork, *Legislative Intent and the Policy of the Sherman Act*, 2 J. L. & ECON. 7 (1966).

II. THE ORDINANCE AND THE CALIFORNIA COURT DECISIONS

A. *The Ordinance and its Purpose*

On June 3, 1980, the electorate of the City of Berkeley enacted an initiative entitled "Ordinance 5261-N.S., Rent Stabilization and Eviction for Good Cause Ordinance." As set out in section three, the purpose of the ordinance is to regulate and protect tenants from, unwarranted rent increases.³² To accomplish the designated purposes, the ordinance establishes base rent ceilings³³ that landlords may not exceed except as permitted by the Board. Annual general adjustment of rent ceilings to cover increases or decreases in utility and tax expense is provided by another section.³⁴ Should a landlord be dissatisfied with this general increase, he may petition for an individual adjustment.³⁵ The Board is allowed to consider many factors, but in no event may it deny a rent increase needed to allow a landlord a "fair return on investment."³⁶ A landlord who fails to register with the

32. Section 3 provides:

The purposes of this ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged.

Berkeley, Cal., Ordinance 5261-N.S., § 3 (June 3, 1980).

33. The base rent ceiling is that rent in existence as of the end of the month preceding enactment of the initiative. *Id.* at § 10.

34. *Id.* at § 11.

35. *Id.* at § 12(a).

36. Berkeley, Cal., Ordinance 5261-N.S., § 12(c)(8) & (10) (June 3, 1980). The fair return on investment standard has gone largely undefined. Courts which have attempted a definition have experienced difficulty with the circularity of result. For attempts to arrive at a definition, see, e.g., *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984); *Carson Mobilehome Park Owners Ass'n v. City of Carson*, 35 Cal. 3d 184, 672 P.2d 1297, 197 Cal. Rptr. 284 (1983); *Cotati Alliance for Better Housing v. City of Cotati*, 148 Cal. App. 3d 280, 195 Cal. Rptr. 825 (1983); *Helmsley v. Borough of Fort Lee*, 78 N.J. 200, 394 A.2d 65 (1978); *Troy Hills Village v. Township Council*, 68 N.J. 604, 350 A.2d 34 (1975); *Brunetti v. Borough of New Milford*, 68 N.J. 576, 350 A.2d 19 (1975); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1 (1975). Under this standard,

the rate of return is expressed as the annual percentage of initial investment or equity garnered by the landlord. This approach views apartment house ownership from the owner's perspective: as an investment of capital that will be returned in a certain time, during which the capital will be subject to a certain degree of risk.

Comment, *Rethinking Rent Control: An Analysis of "Fair Return,"* 12 RUTGERS L.J. 617, 649 (1981).

Board units covered by the ordinance or who fails to adhere to the maximum allowable rent set under the ordinance may be fined by the Board, sued by his tenants, or have rent legally withheld from him. Criminal penalties are prescribed for certain *willful* violations of the ordinance.³⁷

B. California Court of Appeal Decision

Appellants filed suit in August, 1980, alleging that the ordinance was unconstitutional on its face and as applied. The trial court granted Berkeley's motion for judgment on the pleadings.³⁸ Appellants then filed an appeal with the California Court of Appeal.

The appeal was based on three main contentions. First, the landlords asserted that the section of the ordinance³⁹ which precluded the Rent Stabilization Board from authorizing an individual rent increase (because of increased interest or other expenses resulting from sale or refinancing of the property if "the landlord could reasonably have foreseen that such increased expenses could not be recovered by the rent schedule then in existence")⁴⁰ constituted an unreasonable restraint on alienation in violation of the California Civil Code.⁴¹ To this contention, the court responded that another subdivision⁴² of the same section (which provided that no provision of the ordinance would be construed to prohibit an individual rent increase "demonstrated necessary by the landlord to provide the landlord with a fair return on investment")⁴³ was sufficient to prevent unreasonable restraints on alienation.⁴⁴ Moreover, the court held that Civil Code Section 711 did not apply to municipal ordinances.⁴⁵

The landlords' second contention was that a section of the ordinance⁴⁶ which exempted certain properties (specifically those with a

37. Berkeley, Cal., Ordinance 5261-N.S., § 19 (June 3, 1980).

Any landlord who is found . . . guilty of a willful violation of this Ordinance shall be subject to up to a five hundred dollar . . . fine and/or ninety . . . days in jail for a first offense and up to a three thousand dollar . . . fine and/or one year in jail for any subsequent offenses.

Id.

38. Fisher v. City of Berkeley, No. 536602-G (Cal. Super. Ct. October 10, 1980).

39. Berkeley, Cal., Ordinance 5261-N.S., § 12(d)-(e) (June 3, 1980).

40. *Id.* at § 12(d).

41. CAL. CIVIL CODE § 711 (West 1980) (provides that "[c]onditions restraining alienation, when repugnant to the interest created are void.").

42. Berkeley, Cal., Ordinance 5261-N.S., § 12(i) (June 3, 1980).

43. *Id.*

44. Fisher v. City of Berkeley, 148 Cal. App. 3d 267, 272, 195 Cal. Rptr. 836, 839 (1983).

45. *Id.*

46. Berkeley, Cal., Ordinance 5261-N.S., § 5(f) (June 3, 1980).

maximum of four units of which one was the landlord's residence, but only if such rental units would have been exempt had the ordinance been in effect at the end of the preceding calendar year) violated the equal protection clause to the extent that it excluded from the exemption any property that became owner occupied after the cut-off date.⁴⁷ The court's answer was that the challenged exclusion bore at least a debatable rational relationship to the purposes of the ordinance. The city electorate could reasonably have determined that the exclusion would prevent landlords from evicting tenants and moving into their rental units so as to avoid the restrictions of the ordinance.⁴⁸ Because the ordinance was supported by such a debatable rational relationship, the challenge would be rejected.⁴⁹

The third contention of the landlords was that the methods provided in the ordinance,⁵⁰ which required petitions for individual increases to reflect the effect of inflation on the rate of return on investment, violated the due process clause because they were insufficient to protect property owners from confiscatory rent levels.⁵¹ The court agreed with the landlords on this claim. It held that such procedures are "not reasonably related to the [ordinance's] stated purpose of preventing excessive rents and so would deprive [appellants] of due process of law if permitted to take effect."⁵² The procedure was deemed "constitutionally insufficient to relieve landlords from confiscatory rent levels"⁵³ The court found the rent adjustment procedure "inexcusably cumbersome."⁵⁴ Although the ordinance contained a severability clause,⁵⁵ that was not enough to save the ordinance since there was no way for the court to excise the invalid limitations from the rest of the ordinance.⁵⁶ Thus, the entire ordinance must fall.

C. California Supreme Court Decision

Appellees in *Fisher* filed a petition for hearing with the California Supreme Court in December of 1983. Such hearing is discretionary

47. *Fisher*, 148 Cal. App. 3d at 274, 195 Cal. Rptr. at 839.

48. *Id.*

49. *Id.*

50. Berkeley, Cal., Ordinance 5261-N.S., §§ 11, 12 (June 3, 1980).

51. *Fisher*, 148 Cal. App. 3d at 274, 195 Cal. Rptr. at 839.

52. *Id.* at 278, 195 Cal. Rptr. at 842 (quoting *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 173, 550 P.2d 1001, 1033, 130 Cal. Rptr. 465, 497 (1976)).

53. *Id.* (quoting *Birkenfeld*, 17 Cal. 3d at 167, 550 P.2d at 1028, 130 Cal. Rptr. at 492).

54. *Id.* at 279, 195 Cal. Rptr. at 842.

55. Berkeley, Cal., Ordinance 5261-N.S., § 16 (June 3, 1980).

56. *Fisher*, 148 Cal. App. 3d at 279, 195 Cal. Rptr. at 842.

with that court, not unlike the writ of certiorari issued by the United States Supreme Court.⁵⁷ Though *Community Communications Co. v. City of Boulder*⁵⁸ was issued nearly two years earlier than *Fisher*, neither party raised the antitrust issues in its petition. In fact, consideration of those issues was not requested until weeks *after* the granting of the petition and then only in a request by an *amicus* in support of appellants.⁵⁹

The court nonetheless permitted supplemental briefing on the anti-trust issues, reasoning that the court will generally consider on appeal a new point of law decided while the appeal is pending.⁶⁰ Also, the court believed, on appeal from a judgment granting or denying an injunction, the law current at the time of decision must be applied.⁶¹

Writing for a majority of five,⁶² Justice Mosk resolved all the issues in favor of appellees.⁶³ Since the United States Supreme Court did not reach the constitutional due process and statutory grounds on which the California court ruled, those rulings shall be treated summarily.

The court held that a rent control ordinance is valid if it guarantees each landlord a fair return on his investment.⁶⁴ Appellants had argued that the correct standard was the fair return on the value of the property.⁶⁵ Analogizing to the United States Supreme Court's public utility rate cases, the court disapproved that standard as being circular.⁶⁶ Since the market value of the property is, predominantly, a capitalization of the future rental income, it would be meaningless

57. Compare CAL. CIV. PROC. CODE § 1068 (West 1980) with 28 U.S.C. §§ 1254(1), 1257(3) (1982).

58. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

59. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 654, 693 P.2d 261, 271, 209 Cal. Rptr. 682, 692 (1984).

60. *Id.* at 654 n.3, 693 P.2d at 271 n.3, 209 Cal. Rptr. at 692 n.3. One cannot help but speculate, though, about the propriety of an appellate court deciding an issue not properly before it, i.e. not raised by either of the parties on appeal. The proper course may well have been to treat the issue as having been waived.

61. *Id.*

62. *Id.* at 644, 693 P.2d at 261, 209 Cal. Rptr. at 682. The court vacated the opinion of the Court of Appeal.

63. *Id.* at 698, 693 P.2d at 304, 209 Cal. Rptr. at 725. Burden of proof issue considered severable.

64. *Id.* at 686, 693 P.2d at 295, 209 Cal. Rptr. at 716.

65. *Id.* This standard would allow the landlord to charge based upon the unrealized capital appreciation.

66. *Id.* at 680 n.33, 693 P.2d at 280 n.33, 209 Cal. Rptr. at 711 n.33; see, e.g., *Power Comm'n v. Hope Gas Co.*, 320 U.S. 591 (1944); *Power Comm'n v. Pipeline Co.*, 315 U.S. 575 (1942).

to assign arbitrarily a value to something to ascertain a return on that value when that value is what is being attempted to be ascertained.⁶⁷

The process by which a landlord can secure individual adjustment of rents was deemed to be reasonably prompt and thus there were no confiscatory burdens placed upon the landlord.⁶⁸ On its face, then, the statute did not offend the due process clause. The rent withholding provisions of the ordinance, similarly, were held to comport with all due process requirements, and they were not pre-empted by applicable state law.⁶⁹

While the parties had spent much time arguing their respective views as to whether appellees' ordinance falls within or without *City of Boulder's*⁷⁰ state action exemption,⁷¹ the court found it unnecessary to reach that issue. Whether or not there is an applicable "exemption" need be decided only *after* it has been determined that there is "truly a conflict between the Sherman Act and the challenged regulatory scheme."⁷²

The court then traced the history of, and traditional methods of analysis under, the Sherman Act. Since the antitrust laws were deemed to be aimed chiefly at commercial activity, that fact should influence how and to what extent traditional antitrust rules are to be applied to municipal defendants.

The court read *City of Boulder* to suggest that municipalities and private businesses may well be subject to different standards.⁷³

Unlike a private business, a municipal government's decision to displace competition is generally motivated by the purpose of furthering local health, safety or welfare [C]ourts must be . . . sensitive to the legitimate motives behind municipal regulations [I]f unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate mu-

67. Whether there exist other methods of determining value, e.g. comparison of comparable rental property in non-rent controlled cities, and whether that would result in a "fairer" determination are not the subject of this article.

68. *Fisher*, 37 Cal. 3d at 691, 693 P.2d at 298-99, 209 Cal. Rptr. at 719-20.

69. *Id.* at 704, 709, 693 P.2d at 308, 311, 209 Cal. Rptr. at 729, 732.

70. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

71. *Id.* (term "state action exemption" used as a shorthand catch-phrase); see *Parker v. Brown*, 317 U.S. 341 (1943) (*Parker* held that when a state, acting as a sovereign, enacts a statute, it will not be held to violate federal antitrust law. The court never actually spoke of an "exemption," but rather framed its analysis in terms of pre-emption.); *Boulder*, 455 U.S. 40, 61-62 (Rehnquist, J., dissenting) (details differences between exemption and pre-emption).

72. *Fisher*, 37 Cal. 3d at 660, 693 P.2d at 275, 209 Cal. Rptr. at 696 (quoting *First Am. Title Co. v. South Dakota Land Ass'n*, 714 F.2d 1439, 1452 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984)).

73. *Fisher*, 37 Cal. 3d at 663, 693 P.2d at 277, 209 Cal. Rptr. at 699.

municipal regulation, we will not hesitate to cautiously depart from traditional rules.⁷⁴

Concluding that analysis under either the *per se* rule or rule of reason was totally inappropriate in the case of a municipal regulation, the court decided that it would “develop [a] test that recognize[s] a public welfare ‘defense’ to alleged violations of the antitrust laws by municipalities.”⁷⁵

The test, which would prevent judicial second-guessing of local decisions to accomplish proper local purposes,⁷⁶ was to be that “[i]f a municipal regulation has a proper local purpose, is rationally related to the municipality’s legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section one of the Sherman Act unless the plaintiff demonstrates that the city’s purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.”⁷⁷ Since, under this test, appellants had suggested no alternative or equally effective approach to achieving appellees’ legitimate local purposes by means that would have a less intrusive impact on federal antitrust policy, they were deemed to have failed to establish that the ordinance on its face conflicts with section one of the Sherman Act.

Appellants had also mounted a challenge to the ordinance as conflicting with section two of the Sherman Act.⁷⁸ The offense of monopolization has been held to consist of both possession of monopoly power⁷⁹ in the relevant geographical and product markets and willful acquisition of that power.⁸⁰ The court, while recognizing that the claim would likely have merit if appellees were private business parties, nonetheless applied the same test it had applied to the section one claim and reached the same result—no conflict with federal anti-

74. *Id.* at 664, 693 P.2d at 278, 209 Cal. Rptr. at 699.

75. *Id.* at 673, 693 P.2d at 285, 209 Cal. Rptr. at 705-706.

76. *Id.* at 672-73, 693 P.2d at 284, 209 Cal. Rptr. at 705. The term “proper local purposes” denotes generally, *inter alia*, local social welfare and economic regulation. Such regulations are frequently broad exercises of the police power, constrained only by federal constitutional or statutory provisions with which there is a conflict.

77. *Id.* at 675, 693 P.2d at 286-87, 209 Cal. Rptr. at 707-08. This test was adapted from the U.S. Supreme Court’s commerce clause cases.

78. 15 U.S.C. § 2 (1976) (provides in pertinent part, that “[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several states . . . shall be guilty of a felony . . .”).

79. *United States v. du Pont Co.*, 351 U.S. 377, 391 n.18 (1956). Monopoly power is “the power to control prices or exclude competition.”

80. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

trust law.⁸¹ Since the court found no conflict with any provision of the federal act, it likewise found it unnecessary to address the question whether the ordinance would be exempt from antitrust scrutiny under *City of Boulder*.

Concurring separately, Chief Justice Bird agreed with the majority concerning resolution of the fourteenth amendment issues.⁸² She also agreed with the substantive analysis of the antitrust issues. Her concern was with the "highly unusual manner" in which the antitrust issues were brought before the court, *viz.* they were not raised or argued by a party below and were raised for the first time by an *amicus curiae*.⁸³

She viewed this unusual means of presenting an issue as a double deprivation to the court. First, as the court has a discretionary right of review, it was deprived of the opportunity to consider whether review should be denied in light of the additional issue.⁸⁴ Second, the court was deprived of the lower court's views on and analysis of the issue.⁸⁵ According to the Chief Justice, the court, in all but the rarest cases, should refuse to consider a new issue raised in such a belated manner. Otherwise, *amici* will control the issues the court hears and decides.⁸⁶ Given that the United States Supreme Court decided to hear only the antitrust issues, the concern of Chief Justice Bird is indeed a valid one.

The opinion of Justice Lucas in dissent is noteworthy since he had only recently left the federal bench to take his seat on the California Supreme Court when the case was heard. He viewed the ordinance as being "invalid because it calls for the fixing of maximum rents in violation of federal antitrust law."⁸⁷ The status of the party as a municipality, he believed, should not shield it from existing federal statutory policy.⁸⁸

81. *Fisher*, 37 Cal. 3d at 676, 693 at 288, 209 Cal. Rptr. at 709. The court assumed, *arguendo*, that § 2 applies to a party who was not a competitor in the relevant market that it is accused of monopolizing. Whether the city was actually a competitor was at least a disputed factual issue. The landlords had alleged that the city was seeking to impair the value of some of the property with an eye toward eventual acquisition of it for conversion to public housing projects. On this view, the city could plausibly be deemed to have been a competitor in the relevant product market.

82. *Id.* at 709, 693 P.2d at 312, 209 Cal. Rptr. at 733 (Bird, C.J., concurring).

83. *Id.*

84. *Id.* at 713, 693 P.2d at 314, 209 Cal. Rptr. at 735.

85. *Id.*

86. *Id.*

87. *Id.* at 714, 693 P.2d at 315, 209 Cal. Rptr. at 736 (Lucas, J., dissenting).

88. *Id.* *see also* *Rice v. Norman Williams Co.*, 458 U.S. 654, 659-61 (1982).

The ordinance, according to Justice Lucas, is unquestionably an anticompetitive price-fixing scheme. As such, it conflicts with the Sherman Act, and it should be invalidated as being pre-empted under the supremacy clause of the United States Constitution.⁸⁹ He viewed the state action exemption as not extending to a state's subdivisions unless the state has clearly articulated and affirmatively expressed the anticompetitive policy being implemented by the local entity.⁹⁰ The state legislature here had not directly spoken on the subject of rent control.

Further, according to the dissent, the ordinance would fail even under the majority's more accommodating test.⁹¹ That test would require that there be equally effective, less intrusive alternative means available to the city in lieu of the chosen action. Here, such alternative means did indeed exist and were available to the city. The city could have provided direct rent subsidies, public housing projects, negotiated purchases or condemnation of the properties involved. Each of these alternatives would accomplish the same legitimate ends without employing the anticompetitive means challenged here. Moreover, any of these methods would be less intrusive and would spread the burden among *all* city taxpayers rather than singling out the landlords to be the bearers of the entire burden.

Appeal was taken to the Supreme Court,⁹² and probable jurisdiction was noted⁹³ limited to the antitrust pre-emption question.⁹⁴

III. THE UNITED STATES SUPREME COURT DECISION

A. *The Majority*

Writing for the majority, Justice Marshall affirmed the California Supreme Court's decision, though on grounds different from those relied on by that court. While the California court was correct in noting that consideration of the *Parker-City of Boulder* state action exemption was unnecessary unless an actual conflict with the anti-

89. *Fisher*, 37 Cal. 3d at 714, 693 P.2d at 315, 209 Cal. Rptr. at 736 (Lucas, J., dissenting) (citing U.S. CONST. art. VI, cl.2).

90. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982).

91. *Fisher*, 37 Cal. 3d at 718, 693 P.2d at 317-18, 209 Cal. Rptr. at 738-39 (Lucas, J., dissenting).

92. 28 U.S.C. § 1257(2) (1976).

93. 471 U.S. 1124 (1985).

94. Thus, the fourteenth amendment questions remain validly decided as a matter of California state law.

trust laws is established, the use of traditional antitrust analysis was deemed adequate to resolve the issue.⁹⁵

Relying on *Rice v. Norman Williams Co.*⁹⁶ and *Exxon Corp. v. Governor of Maryland*,⁹⁷ the Court recognized that a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect."⁹⁸ Rather, a state statute will be struck down on pre-emption grounds "only if it mandates or authorizes conduct that *necessarily* constitutes a violation of the antitrust laws in *all* cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."⁹⁹ The analysis would be the same, for pre-emption purposes, whether a statute or a municipal ordinance was at issue. Only when an irreconcilable conflict is found between the enactment and prevailing federal law would the level of government be relevant. A statute which might otherwise be pre-empted under *Rice* would be immune from antitrust scrutiny if found to be state action under *Parker*. The source of that immunity may be the state only, not its subdivisions.

The Court proceeded to recognize that if the appellants or any private group of landlords in the city cooperated voluntarily to stabilize rents, their activities would not be saved from attack under the Sherman Act by claims that they had done so out of humanitarian concern for the tenants' welfare.¹⁰⁰ Moreover, the Court concedes that the ordinance will have much the same effect on the residential housing market in the city as would such a voluntary association of landlords.¹⁰¹ "What distinguishes the operation of [the] Ordinance from the activities of a . . . landlord's cartel is not that [it] will necessarily have a different economic effect, but that the rent ceilings . . . have been unilaterally imposed by government upon landlords to the exclusion of private control."¹⁰²

Next, the Court points out a distinction it finds critical—the distinction between concerted and unilateral activity.¹⁰³ Given the lan-

95. *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986). Naturally, this decision supplants the test formulated by the California Supreme Court.

96. 458 U.S. 654 (1982).

97. 437 U.S. 117 (1978).

98. *Fisher*, 475 U.S. at 264 (quoting *Rice*, 458 U.S. at 659); see *Exxon*, 437 U.S. at 133.

99. *Id.* at 265 (quoting *Exxon*, 437 U.S. at 133).

100. *Id.* at 266; see, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

101. *Fisher*, 475 U.S. at 266.

102. *Id.*

103. *Id.* at 267.

guage of section one, its reach has always been limited to concerted action between distinct entities.¹⁰⁴ Independent activity by a single entity must therefore be distinguished from the concerted efforts of separate persons to fix prices, the former being routine business practice and the latter usually condemned as illegal *per se*.¹⁰⁵ Contrary to appellants' contention, there can be no concerted activity when the restraint is imposed unilaterally by government and has a coercive effect upon those who must obey the law. Since there is no meeting of the minds in this situation, there is no agreement or conspiracy present, either vertically between the city and the landlords or horizontally among the landlords themselves.

To narrow the scope of the decision somewhat, the Court recognized that there are some restraints imposed upon private parties which are not beyond the reach of section one.¹⁰⁶ Those "hybrid" restraints, such as the ones found illegal in *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*¹⁰⁷ and *Schwegmann Bros. v. Calvert Distillers Corp.*,¹⁰⁸ allow non-market mechanisms to enforce private marketing decisions. In contrast, appellees' ordinance has unilaterally imposed upon the landlords not only the controls, but also the rent ceilings they mandate.¹⁰⁹ Thus, the scheme is hardly a cloak for a conspiracy either vertically or horizontally.

Without the essential element of concerted action, the ordinance cannot be characterized as a *per se* violation of section one. It is not facially inconsistent with the federal antitrust laws. Like the California Supreme Court, the majority found it unnecessary to reach the question whether, if found to *mandate* section one violations, the ordinance would be exempt from antitrust scrutiny under the state action doctrine.¹¹⁰

104. *Id.*; see *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (corporation and its wholly owned subsidiary incapable of conspiring with each other since share same interests); see also *infra* note 105.

105. *Fisher*, 475 U.S. at 267; see *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

106. *Fisher*, 475 U.S. at 267-68.

107. 445 U.S. 97 (1980).

108. 341 U.S. 384 (1951).

109. Berkeley, Cal., Ordinance 5261-N.S., §§ 6, 10 (June 3, 1980).

110. *Fisher*, 475 U.S. at 270 n.2. Appellants did not strongly press the section two attempted monopolization claim, and the Court ruled that the inquiry demanded by the allegations goes beyond the scope of the facial challenge presented.

B. *The Concurrence*

Justice Powell concurred in the judgment but expressed no view as to the pre-emption issue decided by the Court. He felt that the Court should not have decided that question when a more straightforward and well-settled ground for decision was available.¹¹¹

The ordinance, according to the Justice, falls within the "state action" exemption of *Parker*.¹¹² "When a municipal government engages in anticompetitive activity pursuant to a clearly articulated state policy to displace competition with regulation, the 'state action' exemption removes the conduct from the coverage of the antitrust laws."¹¹³ The question should be whether the state has expressly delegated to the city regulatory power that foreseeably would lead to the anticompetitive effects challenged here.¹¹⁴

The state legislature, pursuant to a state constitutional requirement, had approved a prior city initiative enacting rent control in Berkeley. This plan was invalidated in *Birkenfeld v. City of Berkeley*¹¹⁵ on the ground that it lacked procedural safeguards required to protect landlords against confiscatory rent ceilings. According to Justice Powell, that decision did not withdraw authorization for rent control. It merely held that cities must couple rent control with procedures for adjusting rent ceilings to avoid fixing rents at confiscatory levels.¹¹⁶ This left the city's basic power to impose rent controls unaffected. The enactment of a state-wide comprehensive planning and zoning statute by the state left intact the city's pre-existing authority to adopt provisions like the one enacted by appellee.

The Justice would find, then, that the ordinance is exempt from the antitrust laws under *City of Boulder* and *Town of Hallie v. City of Eau Claire*,¹¹⁷ because the state, by ratifying the original rent control measure, had expressly authorized the city to control rents.¹¹⁸

C. *The Dissent*

Justice Brennan dissented, characterizing the ordinance as a price-fixing scheme. Using the formulation enunciated in *Rice*, he ruled

111. *Id.* at 270 (Powell, J., concurring).

112. *Id.*

113. *Id.* at 271; see also *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54 (1982).

114. *Fisher*, 475 U.S. at 271.

115. 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

116. *Fisher*, 475 U.S. at 273.

117. *Id.* at 273-74; see *Town of Hallie*, 471 U.S. at 38-39.

118. *Fisher*, 475 U.S. at 273-74.

that the ordinance "facially conflict[s] with the Sherman Act because it *mandate[s]* [price-fixing], an activity that has long been regarded as a *per se* violation of the Sherman Act."¹¹⁹

In Justice Brennan's view, precedents do not require the concerted action held by the majority to be necessary for a finding of pre-emption. Taking a broader view of pre-emption, the Justice held that the decisions in *Midcal*¹²⁰ and *Schwegmann*¹²¹ control the result in this case.¹²²

Just as the statute challenged in *Midcal* compelled wine wholesalers to charge prices set by wine producers, Berkeley's Ordinance compels landlords to charge prices set by the city. [W]hen [landlords] are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing.¹²³

Even if he were to accept the Court's analysis of the antitrust pre-emption issue, Justice Brennan found a functional combination here between the city and its officials on the one hand and the landlords on the other.¹²⁴ There is no basis for limiting the Sherman Act prohibition to *privately* arranged price-fixing schemes.¹²⁵ "The Ordinance eliminates price competition more effectively than any private 'agreement' ever could, and is therefore pre-empted by the Sherman Act."¹²⁶

Using the *City of Boulder* standard that municipalities, when enacting anticompetitive measures in the public interest, must do so pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation, the dissent found appellees' ordinance plainly not exempt from antitrust scrutiny.¹²⁷

Similarly unpersuasive were the appellees' contentions regarding the state's authorizing of the previously enacted rent control ordinance and its subsequent invalidation by the California Supreme Court. Such general grants of authority as these did not constitute the required mandate to engage in conduct which necessarily consti-

119. *Id.* at 274 (Brennan J., dissenting) (quoting *Rice*, 458 U.S. at 659-60) (emphasis in original)).

120. *Supra* note 107.

121. *Supra* note 108.

122. *Fisher*, 475 U.S. at 276 (Brennan J., dissenting).

123. *Id.* (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (emphasis in original)).

124. *Id.* at 276.

125. *Id.* at 277.

126. *Id.* at 278.

127. *Id.* at 279.

tutes a violation of the Sherman Act. When the state's position, as it is here, is one of mere neutrality, it cannot satisfy the *City of Boulder* standard of "clear articulation and affirmative expression."¹²⁸

In answer to appellees' concern that a finding of pre-emption in this case will severely restrict the city's authority to enact the myriad of public welfare measures that are peculiarly within its sphere, Justice Brennan would hold that the congressional commitment to the policy of free markets and open competition embodied in the anti-trust laws is supreme and does not admit the type of exception the city wishes implemented.¹²⁹ Rather, that concern is better addressed to Congress, which is free to enact the type of amendment to the Act which would give municipalities the broad discretion they now seek. As the Act stands currently, however, the state must clearly authorize a policy which would exempt ordinances like this one from the Act's proscriptions.¹³⁰

IV. ANALYSIS

A. Concerted Activity

The Sherman Act provides in section one that "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce . . . is declared to be illegal."¹³¹ Thus, on its face, the Act would seem to require some sort of collusion between distinct entities. Conduct not involving such collusion between distinct entities can scarcely, without torturing the language of the statute, be deemed to fall within its purview.

Unilateral activity, rather than concerted activity, is what the majority found in *Fisher*. This is very likely the correct finding based upon both precedent and logic. Mere acquiescence of a party or parties subject to the regulatory power of a governmental body cannot logically be deemed the kind of agreement the legislature contemplated in passing the Sherman Act.¹³² Agreement, at the very least,

128. *Id.*; see *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980); *New Motor Veh. Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

129. *Fisher*, 475 U.S. at 281.

130. *Id.*

131. Sherman Act § 1, 15 U.S.C. § 1 (1982). The Sherman Act was the Act of July 2, 1890, ch. 647, 26 Stat. 209, now codified at 15 U.S.C. §§ 1-7 (1982) (emphasis added).

132. Senator Sherman, in speaking about the bill which subsequently became the Sherman Act, emphasized that it

implies a willing, knowledgeable participation and the freedom of a party to the agreement to opt out. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."¹³³ The key word here is *invitation*. No one would argue that this term is the functional equivalent of the coercive effect appellees' ordinance had upon the landlords. By definition, an invitation is capable of being declined without the proverbial pound of flesh appellees will exact for non-compliance with the ordinance.¹³⁴

It is indeed true that "'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."¹³⁵ The appellants' actions in fixing maximum rents here stem not from the "sudden joining of economic resources that had previously served different interests,"¹³⁶ but rather from a very real threat to their individual economic well-being, *viz.* fines, penalties, and city-sanctioned tenant rent-withholding. The appellants have no real alternative but to comply with the municipality's command. Though there is language which suggests that coercive behavior by one party which exacts the desired compliance on the part of another is sufficient to subject the actor to liability under the Sherman Act,¹³⁷ that situation is still dis-

deals only with unlawful combinations, unlawful by the code of any law of any civilized nation of ancient or modern times. But associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the [control] of a few individuals

* * *

It is this kind of a combination we have to deal with now.

21 CONG. REC. 2455, 2457 (1890). *See generally*, 1 E. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS & RELATED STATUTES*, 7-363 (1978); W. THORNTON, *A TREATISE ON THE SHERMAN ANTI-TRUST ACT* 1-30 (1913); A. WALKER, *HISTORY OF THE SHERMAN LAW* 1-56 (1910); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7 (1966).

133. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

134. Naturally, the term is being used in its commonly accepted sense. An "invitation" from the Internal Revenue Service, from the Selective Service, or from the House Select Committee on Impeachment is a bird of a different semantic feather.

135. *Theater Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954).

136. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

137. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46-47 (1960).

[I]f a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each cus-

tinguishable from the present case. The retailer in *Parke, Davis*¹³⁸ could have chosen another supplier or could have done without the manufacturer's product altogether. Its submission to the desires of the manufacturer had at least some element of voluntariness about it.

Unlike the *take it or leave it* constraints of an adhesion contract, the imposition of rent control here can be more accurately characterized as a *take it or leave it* opportunity. It is, therefore, unrealistic to infer in this situation that there existed at any time "a conscious commitment to a common scheme designed to achieve an unlawful objective"¹³⁹ either between landlords and the city or between one landlord and another.

The Court, then, in the present case cannot be faulted for what is a technically correct reading of the statute.

B. Economic Effects Are the Same Regardless of the Identity of the Actor(s)

Both Justice Lucas and Justice Brennan in their respective dissents argue persuasively that the city ordinance imposes anticompetitive restraints on trade.¹⁴⁰ They see the ordinance as nothing more than an anticompetitive price-fixing scheme, which, had the landlords contrived voluntarily among themselves, would have been "speedily punished" as *per se* illegal.¹⁴¹

For the reasons so ably explicated by both Justices, it is illogical that activity deemed to have the deleterious effects that price-fixing and monopolization are conceded to have should be considered legal *vel non* depending upon the *identity* of the parties engaging in the proscribed conduct. "The Sherman Act was clearly presented and

tomers to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. . . . The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.

Id. at 46-47.

138. 362 U.S. 29 (1960).

139. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 111 (3d. Cir. 1980)); *accord* *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d. Cir. 1981), *cert. denied*, 459 U.S. 880 (1982).

140. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 715, 693 P.2d 261, 315-16, 209 Cal. Rptr. 682, 736-37 (1984) (Lucas, J., dissenting); *Fisher v. City of Berkeley*, 475 U.S. 260, 275-76 (1986) (Brennan, J., dissenting).

141. *Fisher*, 37 Cal. 3d at 715, 693 P.2d at 315-16, 209 Cal. Rptr. at 736 (Lucas, J., dissenting).

debated as a consumer welfare prescription."¹⁴² From this perspective, it can make no difference that the practice is mandated by an act of a municipality rather than as a result of a backroom meeting among the landlords.

That even the majority acknowledges the ordinance "will affect the residential housing market in much the same way as would [a price fixing cartel]"¹⁴³ illuminates the fact that the Court here, by means of a literal reading of the statute, has selectively allowed activity which paramount national policy has deemed harmful. Through the employment of its lawful monopoly of force and intimidation, the city is allowed to "eliminate[] price competition more effectively than any private 'agreement' ever could"¹⁴⁴ To permit a local government "to excuse a price-fixing scheme on the basis of asserted public health, safety or welfare considerations would enmesh the courts in an impossible task of weighing the 'apples' of social welfare with the 'oranges' of antitrust policy."¹⁴⁵

The traditional analysis of practices deemed restraints of trade (at least with respect to section one of the Sherman Act) has proceeded on one of two theories—the *per se* rule or the rule of reason. Before tracing the history and methodology of these rules, the following is an explanation of the goals which both rules seek to implement, i.e., maximizing consumer welfare through an allocatively efficient market.

Allocative efficiency is a concept which refers to the welfare of society as a whole. In other words, given a finite amount of inputs or resources, what use and assignment of these resources will make society best off? The best known exponent of this concept is Vilfredo Pareto, an Italian mathematician. His working definition of efficiency holds that a given assignment of resources is most efficient ("Pareto optimal") if no alternative assignment will make at least

142. R. BORK, *THE ANTITRUST PARADOX* 66 (1978); see also W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 85-95 (1965); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 40-41 (1976); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); cf. 1 E. KINTNER, *FEDERAL ANTITRUST LAW* 238-42 (1980).

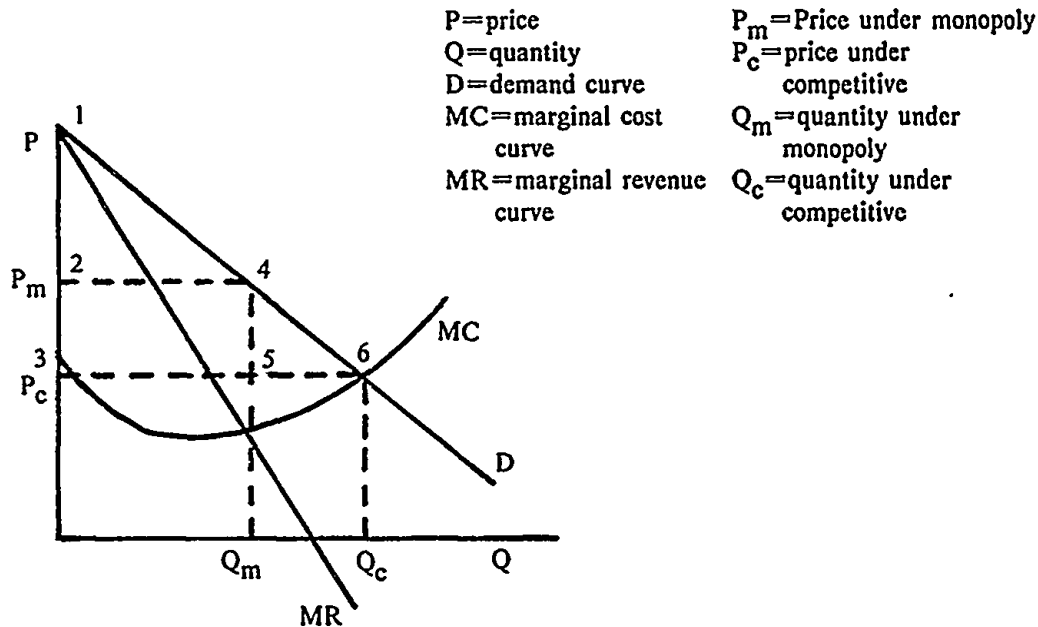
143. *Fisher*, 475 U.S. at 266 (distinguishes the municipal rent stabilization ordinance from a landlord's cartel by noting that the former is unilaterally imposed by government upon landlords to the exclusion of private control).

144. *Id.* at 278 (Brennan, J., dissenting).

145. *Fisher*, 37 Cal. 3d at 717, 693 P.2d at 317, 209 Cal. Rptr. at 738 (citing *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting)).

one person better off without making at least one person worse off as well.¹⁴⁶

The following diagram serves to illustrate why competitive markets (the kind that the antitrust laws are presumed to protect and promote) are more efficient ("Pareto-superior") than ones which have been monopolized or cartel-ized:



In a competitive market with price set at the producer's marginal cost, a rational producer, to maximize his profits, will set his price at P_c and produce Q_c amount of his product. When the producer is a monopolist, however (or a member of a cartel whose goal will be to approximate the same result), he can actually affect market price by reduction of output. Thus, the monopolist's profit-maximizing position will be attained at the intersection of his marginal cost and marginal revenue curves. This will result in less output at a higher price. The triangle represented by points 1-3-6 would be the consumers' surplus in a competitive market. A price fixing cartel will reduce the consumer surplus to triangle 1-2-4 with the resultant loss to consumers represented by 2-3-6-4. The cartel gain, however, is only 2-3-5-4, with the rest of the consumer loss, triangle 4-5-6, representing a deadweight loss, i.e. one that is lost to everyone (society) without a corresponding gain. Thus, although the cartel is richer, consumers are poorer by an even greater amount.¹⁴⁷ "The assumption that com-

146. See E. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 440 (4th ed. 1982).

147. See H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 45-91 (1985). A price fixing cartel, since its members face different marginal costs, is inherently unstable.

petition is the best method of allocating resources in a free market recognizes that all elements of a bargain . . . are favorably affected by the free opportunity to select among alternative offers."¹⁴⁸ An allocatively inefficient market will squander scarce resources by thwarting the demands consumers would otherwise make and by skewing the transactions actually engaged in away from the optimal point.

As previously mentioned, the traditional standards used to analyze a practice challenged as violative of section one of the Sherman Act are the rule of reason and the rule of *per se* illegality.¹⁴⁹

Under the rule of reason analysis, the court will engage in a wide ranging inquiry into the "reasonableness" of a challenged restraint.¹⁵⁰ This is because the Court decided soon after the Act was passed that the Act was not meant to prohibit every practice that may have some *incidental* effect on commerce. Rather, it was meant to "protect . . . commerce from being restrained by methods . . . which would constitute an interference that is an undue restraint."¹⁵¹ The reasonableness of a particular practice is judged not by considering "any argument [which conceivably] may fall within the realm of reason. Instead, [the inquiry will] focus[] directly on the challenged restraint's impact on competitive conditions."¹⁵² Essentially, a balancing test of procompetitive justifications versus anticompetitive effects will be entertained, and if the challenged restraint "merely regulates and perhaps thereby promotes competition"¹⁵³ instead of suppressing it, the practice will be upheld against the Sherman Act challenge. Since the overarching goal is the promotion of competition, however, the Court will not entertain the argument that competition is itself unreasonable.¹⁵⁴

While the illustration is not exactly accurate with respect to this situation, it is, in theory, what the cartel ideally would like to achieve.

148. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978); see also *Standard Oil Co. v. Trade Comm'n*, 340 U.S. 231, 248-49 (1950) (discussing the importance of competition).

149. See *supra* text accompanying note 19.

150. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1980); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

151. *Standard Oil Co.*, 221 U.S. at 60.

152. *National Soc'y of Professional Eng'rs*, 435 U.S. at 688.

153. *Chicago Bd. of Trade*, 246 U.S. at 238.

154. *National Soc'y of Professional Eng'rs*, 435 U.S. at 695; see also *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

Treatment under the *per se* rule is reserved for practices deemed to have little or no procompetitive effects.¹⁵⁵ Where a practice usually results in significant adverse competitive effects, rarely is it justified by significant redeeming virtues; and when there are often less restrictive alternatives available, there is no reason for an extended trial before such practices will be condemned.¹⁵⁶ Chief among the practices¹⁵⁷ long deemed *per se* illegal are price-fixing schemes.¹⁵⁸ Because of the Court's experience with a particular practice and its effects, the Court has determined that a *per se* rule is economically reliable and possesses an ease of judicial administration.¹⁵⁹ The attitude so reflected is that this type of practice, if subjected to a full-blown rule of reason analysis, would virtually *always* be found unreasonable, *viz.* the predominance of anticompetitive effects which far exceed any significant procompetitive justifications.¹⁶⁰ Under this standard, then, all that need be shown is conduct which has the effect "of raising, depressing, fixing, pegging, or stabilizing the price of a commodity,"¹⁶¹ and the conduct will be condemned as a *per se* violation of the Sherman Act.

Justice Marshall, speaking for the Court in *United States v. Topco Associates*,¹⁶² asserted that

courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules. . . . [T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well in-

155. See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

156. See *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

157. Others are horizontal territorial or customer market division, concerted refusals to deal, resale price maintenance, and some tying arrangements. See, e.g., R. BORK, *supra* note 142, at 263-79.

158. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

159. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 667-71, 693 P.2d 261, 280-84, 209 Cal. Rptr. 682, 701-04 (1984).

160. Even those who see only limited usefulness for the *per se* rule in other areas cautiously support its use in price-fixing cases. E.g., Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1965).

161. *Socony-Vacuum Oil Co.*, 310 U.S. at 223.

162. 405 U.S. 596 (1972) (case involved horizontal market division held illegal *per se*).

tended or because they are allegedly developed to increase competition.¹⁶³

It is against this background that Justice Marshall, in the instant case, shifts the focus from the nature of the practice and its inevitable economic effect to the identity of the party who has spearheaded the challenged practice.¹⁶⁴ Rather than presuming the benevolence of appellee or any other municipality, the Court has held that "[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we [have been] especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach."¹⁶⁵ The Court's faith in the noble purposes of the municipality assumes a far too deferential posture since the net result will be no different, with respect to both landlords and present and prospective tenants, than had the identical course of conduct been pursued by some less beneficent private actor.

While the federalism concerns involved are legitimate ones,¹⁶⁶ much of their force has been blunted by the Court's pronouncement in *City of Boulder* that while ours remains a dual system of government, that system "has no place for sovereign cities."¹⁶⁷ Local displacing of the competitive markets which have already been declared to be the national norm is an affront to the supremacy clause.¹⁶⁸ Congress has resolved the balancing of interests,¹⁶⁹ and, if that balance is to be upset, it should be upset by Congress alone.

C. *The Concept of Maximum Price Fixing Differs from that of Minimum Price Fixing*

The position this author has taken so far closely parallels that of Judge Bork, viz. "that consumer welfare is the only proper criterion

163. *Id.* at 609-10 (footnote and citations omitted).

164. *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986).

165. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412-13 (1978) (plurality opinion).

166. These are perhaps more theoretical than real given the Court's general retreat from a broad construction of the tenth amendment.

167. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (emphasis added).

168. See Easterbrook, *Antitrust And The Economics of Federalism*, 26 J. L. & ECON. 23, 40 (1983) ("Far from assisting federalism the *Parker* doctrine undermines the effectiveness of exit in producing legal rules that maximize the welfare of each state's residents.").

169. *Fisher v. City of Berkeley*, 475 U.S. 260, 279 (1986).

for antitrust"¹⁷⁰ The model of free market competition produces a system wherein

each productive resource tends to move to that employment in which the value of its marginal product, and hence the return paid to it, is greatest. Output is then maximized because there is no possible rearrangement of resources that could increase consumer want satisfaction A consumer-oriented antitrust law, therefore, should permit those market structures, agreements, and acts which reflect or create efficiency while prohibiting those which create restrictions of output.¹⁷¹

Maximum price fixing yields pro-consumer-welfare results and should be viewed as distinct from schemes which set *minimum* prices.¹⁷² Since, "[a]s a general rule, any action by a supplier to reduce the market power of its dealers makes both the supplier and consumers better off, . . . antitrust policy . . . should approve bona fide maximum [price fixing] agreements."¹⁷³

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,¹⁷⁴ the petitioner was a wholesaler who charged that respondent distiller-distributors had agreed to sell only to wholesalers who agreed to resell at prices fixed by respondents. The prices involved were maximum prices above which the wholesaler could not sell. After a verdict and judgment for petitioners at trial, the Seventh Circuit reversed, holding that fixing maximum resale prices promoted rather than restrained competition.¹⁷⁵ The Supreme Court reversed, and, with a now famous quote, held that "such agreements, no less than those to fix minimum prices cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."¹⁷⁶ The freedom of traders, however, "has nothing to do with consumers' welfare."¹⁷⁷

In *Albrecht v. Herald Co.*,¹⁷⁸ the respondent was a newspaper publisher. Petitioner was a carrier who was granted an exclusive territory within which to sell respondent's newspapers. Respondent had set a maximum resale price per paper, which price petitioner ex-

170. Bork, *Resale Price Maintenance & Consumer Welfare*, 77 YALE L.J. 950, 950 (1968).

171. *Id.* at 951.

172. See Blair & Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461 (1981) (an analysis of maximum price fixings); Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

173. H. HOVENKAMP, *supra* note 147, at 265 (emphasis added).

174. 340 U.S. 211 (1951).

175. 182 F.2d 228 (7th Cir. 1950).

176. *Kiefer-Stewart Co.*, 340 U.S. at 213.

177. Easterbrook, *supra* note 172, at 888.

178. 390 U.S. 145 (1968).

ceeded. When respondent terminated petitioner's route, the latter brought an action charging a section one violation. The Supreme Court reversed the holding of the lower courts for respondent.¹⁷⁹ Adhering to *Kiefer-Stewart* as being correctly decided, the Court ruled that

[m]aximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market . . . [I]f the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.¹⁸⁰

The seller's price, however, in the long term will not be *erroneous*. The competitive market will force the seller to correct any errors he has made or suffer the economic consequences himself. In any event, the *non-erroneous* price will emerge giving consumers that which the antitrust laws were enacted to provide.

The other concern expressed by the Court, that the maximum price eventually becomes the minimum price, is a concern about what has become known as "limit pricing."¹⁸¹ This theory holds that the firms involved will set the maximum price at a level which is higher than the level that would prevail under competitive conditions, yet lower than their short-run profit-maximizing price (the approximation of the monopoly price), in order to deter the entry of firms perched on the edge of the market.¹⁸² This notion is difficult to sustain since even if limit pricing is determined to be harmful, it is rare. To show that a maximum price agreement is a type of entry-detering price, it would have to first be shown that the firms involved could have charged a monopoly price; second, that the limit retards entry; and third, that buyers cannot maneuver around the alleged limit price. "[T]he argument that maximum price agree-

179. *Id.* at 154.

180. *Id.* at 152-53.

181. For explanations by those expressing this concern, see F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 232-52 (2d ed. 1980); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 211 (1977); Gaskins, *Dynamic Limit Pricing: Optimal Pricing Under Threat of Entry*, 3 J. ECON. THEORY 306 (1971). *Contra* Easterbrook, *supra* note 172, at 296-97; McGee, *Predatory Pricing Revisited*, 23 J. L. & ECON. 289, 307-16 (1980); Pashigian, *Limit Price and the Market Share of the Leading Firm*, 16 J. INDUS. ECON. 165 (1968).

182. See H. HOVENKAMP, *supra* note 147, at 331; see also G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 20-22 (1983).

ments deter entry is ridiculous when referring to more efficient potential entrants and implausible when referring to entrants that must operate at a certain minimum scale to be efficient. It safely can be disregarded as a source of antitrust concern."¹⁸³

The Court has more recently expressed the same concern, and for largely the same reason, in *Arizona v. Maricopa County Medical Society*.¹⁸⁴ The case involved an agreement among competing physicians setting the maximum fees that they would accept in full payment for health services provided to policy-holders of specified insurance plans. The respondents contended that a *per se* illegal treatment of their arrangement was unwarranted since *maximum* prices were set which were alleged to have pro-competitive justifications. In ruling four to three that prior decisions foreclosed argument of procompetitive justification, the Court stated that the agreement was on the same legal, if not economic, footing as a minimum price fixing agreement.¹⁸⁵

This undiscerning approach to analyzing the effects of a particular practice will inevitably have a distorting effect on economic efficiency in general. While it may be true that "from time to time the Supreme Court explicitly states that it is sacrificing economic efficiency to other goals,"¹⁸⁶ by so doing it harms the very goal, consumer welfare, it has seen fit to champion. As Justice Harlan so aptly said in *Albrecht*, "to conclude that no acceptable justification

183. Easterbrook, *supra* note 172, at 908.

184. 457 U.S. 332, 348 (1981) ("Such a restraint . . . may discourage entry into the market and may deter experimentation and new development by individual entrepreneurs.").

185. *Id.* at 351 ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.").

186. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984); see, e.g., *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580 (1967); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). Though *Brown Shoe* was a merger case, it typifies the absurd lengths to which the Supreme Court has reached to achieve a desired result, to wit: "The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers." *Id.* Increased efficiency and consumer savings were thus penalized. This prompted the following:

The real vice of the *Brown Shoe* case, in our view, was the disposition of the issue of economic efficiency. The Government had urged that the Brown-Kinney consolidation was a menace to competition because the integrated company would have been more efficient, and would have been able to sell shoes of equal appearance and quality at a lower price than its unintegrated competitors. Brown's counsel, apparently applying the well-known legal principle that every Government action demands an equal and opposite reaction, found himself in the incomprehensible position of arguing that the merger produced no such economies or likelihood of benefit to the consumer.

Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 456-57 (1965).

for fixing maximum prices can be found simply because there is no acceptable justification for fixing minimum prices is to substitute blindness for analysis."¹⁸⁷

The Justice's own analysis revealed that "[p]rice ceilings . . . do not lessen horizontal competition; they drive prices toward the level that would be set by intense competition, and they cannot go below this level unless the manufacturer who dictates them and the customer who accepts them have both miscalculated."¹⁸⁸ Price ceilings can be justified by the proposition that they prevent parties, like the carrier in *Albrecht*, from taking advantage of consumers by virtue of the market power achieved as a consequence of the grant of their exclusive territories.

Justice Powell, dissenting in *Maricopa County Medical Society*,¹⁸⁹ recognized the folly of the Court's nearly reflexive reaction to an agreement it has characterized as price fixing.¹⁹⁰ To condemn that which the Sherman Act purports to promote, as the Court did in both cases, clearly "stands the Sherman Act on its head."¹⁹¹

An antitrust policy that prohibits maximum price agreements both harms the consumer and "protects the franchisee, whose interest in excess profits is not a legitimate concern of the antitrust laws."¹⁹² The result, of course, is that "prevailing antitrust law has the perverse effect of diminishing consumer welfare rather than promoting it."¹⁹³

It should be kept firmly in mind that "[t]he basic goal of antitrust is to break—and not to forge—chains upon competition as a vitalizing market force."¹⁹⁴ For the foregoing reasons, maximum price fixing is qualitatively different from minimum price fixing in both purpose and effect. The Court should not condemn such a practice when the result would be to impose the same type of restraints upon interstate commerce that it is the purpose of the Sherman Act to

187. 390 U.S. 145, 157 (1967) (Harlan, J., dissenting).

188. *Id.* at 159; see also *id.* at 159 n.4.

189. 457 U.S. 332, 357 (1981) (Powell, J., dissenting).

190. *Id.* "On its face, the plan seems to be in the public interest." *Id.* at 357. "The question is whether we should condemn this arrangement forthwith under the Sherman Act, a law designed to benefit consumers." *Id.* at 360 (emphasis in original). "[P]er se characterization is inappropriate if the challenged agreement . . . achieves for the public procompetitive benefits that otherwise are not attainable." *Id.* at 364 (emphasis in original).

191. *Albrecht v. Herald Co.*, 390 U.S. 145, 170 (1967) (Stewart, J., dissenting).

192. Blair & Kaserman, *supra* note 172, at 475.

193. *Id.* (footnotes omitted).

194. Elman, "Petrified Opinions" & Competitive Realities, 66 COLUM. L. REV. 625, 626 (1966). Elman was, at the time the article was written, the Commissioner of the Federal Trade Commission.

eradicate. Thus, the Court should reconsider the views expressed in *Kiefer-Stewart*, *Albrecht*, and *Maricopa County Medical Society*, with a view to making pro-competitive effects the sole criterion for resolution of a challenged practice.

D. Rent Control: Policy and Effects

The stated purposes of appellee's (and most other) attempt(s) to enact rent control ordinances are *inter alia*, "to protect tenants from unwarranted rent increases . . . to help maintain the diversity of the . . . community . . . to address the . . . housing crisis [and] advance the housing policies of the city with [respect] to low and fixed income persons" ¹⁹⁵ These purposes, in the long run, are not only *not accomplished* via the means employed, ¹⁹⁶ but the problems they seek to address are actually exacerbated by the implementation of such confiscatory measures. ¹⁹⁷ "The [continued] popularity of rent control is puzzling in view of the virtual unanimity among professional economists that rent control is . . . bad for all concerned" ¹⁹⁸

195. See *supra* note 32 and accompanying text.

196. If the interests of low and fixed income persons are of concern to rent control advocates, it is not readily apparent how those interests are served by effecting market distortions. "Price controls are almost always rationalized . . . as a desire to help the poor, yet it is remarkable how frequently they harm the poor. The difficulty intelligent laymen have in understanding this is testimony to the insights provided by even simple economic analysis." G. BECKER, *ECONOMIC THEORY* 108 (1971). Further, "[a]ttempts to diminish poverty by preventing price increases are self-defeating. The proscription of price movements greatly diminishes the efficiency of all economic activity and, therefore, ultimately must lead to lower incomes for most people." C. BAIRD, *RENT CONTROL: THE PERENNIAL FOLLY* 82 (1980). The so-called housing crisis is not likely to be remedied by measures which deter expansion of available housing. Rent control ordinances have just such an effect. See Ault, *The Presumed Advantages and Real Disadvantages of Rent Control*, in *RENT CONTROL: MYTHS AND REALITIES* 55, 66 (W. Block & E. Olsen ed. 1981); G. STERNLIEB, *THE URBAN HOUSING DILEMMA: THE DYNAMICS OF NEW YORK CITY'S RENT CONTROLLED HOUSING* (1972). Likewise, concern for low income persons is not shown by a system which favors a limited subset (i.e. tenants currently in possession of controlled units) of such persons. Note, *All in the Family: Succession Rights and Rent Stabilized Apartments*, 53 *BROOKLYN L. REV.* 213, 244 (1987). For an example of the bizarre, but not totally unexpected, effects of regulating rent, see Brooks, *Whose Apartment After the Breakup?*, *N.Y. Times*, Dec. 22, 1985, § 8, at 1, col. 3 (couple basing decision to separate on jeopardy to special asset, viz. a rent regulated apartment).

197. See *supra* note 196. The problems which are exacerbated by a rent control scheme are legion. See Malloy, *The Economics of Rent Control—A Texas Perspective*, 17 *TEX. TECH. L. REV.* 797, 800-01, 807-09 (1986). See generally *infra* notes 198-202 and accompanying text.

198. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 *CORNELL L. REV.* 517, 555 (1984). See generally *RENT CONTROL: MYTHS AND REALITIES* (W. Block & E. Olsen ed. 1981); *RENT CONTROL: A POPULAR PARADOX* (W. Block & E. Olsen ed. 1975). This series of essays shows, both in written and pictorial form, the devastation wrought by those in the "housing justice" brigade.

The effects of rent control have been shown repeatedly in studies conducted by people from a multitude of political and economic persuasions to be harmful to those they are presumed to benefit.¹⁹⁹ As a policy it has been thought to be "very much like drinking to excess—its benefits are realized first and the costs are paid at a later date."²⁰⁰

As real rentals fall below their market equilibrium levels, the aggregate amount of space in rental accommodations demanded on the market increases. At the control price the quantity of rental space demanded exceeds the quantity supplied. This leaves the inevitable housing shortage it was the purpose of the controls to combat.

In the long run, the stock of rental housing as a whole tends to decline relative to the population. Owners of the state-encumbered property will find it less and less profitable to continue in the rental market. A number of alternatives remain open to the landlord. One is to get out of the rental housing business altogether. Often this will be the only way to turn a profit or minimize a loss. This option, however, typically has been foreclosed to the property-owner. The same advocates who seek, through the machinations of state (or municipal) police power, to control "unwarranted" rental increases will generally have effectively whip-sawed the landlord through concomitant enactment of harsh provisions against the conversion of rental housing to owner-occupied (condominium or cooperative) status.²⁰¹

199. See, e.g., J. BRENNER & H. FRANKLIN, *RENT CONTROL IN NORTH AMERICA AND FOUR EUROPEAN COUNTRIES* 65-71 (1977); M. LETT, *supra* note 5, at 44-45; Fisher, *Twenty Years of Rent Control in New York City*, in *ESSAYS ON URBAN LAND ECONOMICS* 34 (J. Gillier ed. 1966); Gramp, *Some Effects of Rent Control*, 16 S. ECON. J. 425 (1950); Redwin, *Rent Control & Housing*, 27 SOC. RES. 302 (1950).

200. Muth, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691, 693-94 (1983).

201. Professor Baird notes accurately that:

[p]olitical activists attempting to impose rent control are often the same people who agitate most vociferously in favor of protecting the environment and preserving open spaces. These people help to create the housing shortages that lead to higher rents, and then they attempt to undo the harm they have done by making it illegal for rents to increase except as permitted by various formulas. But . . . far from undoing the harm the activists have created, rent control merely makes the rental housing shortage worse. Rent control especially harms the poor, the elderly, and the handicapped, who are the very people that the activists claim they want to help.

C. BAIRD, *supra* note 196, at 54-55. For a typical defense of rent control, see Achtenberg, *The Social Utility of Rent Control*, in *HOUSING URBAN AMERICA* (J. Pynoos ed. 1973); Seccombe, *The Hearth of the Matter*, in *BOOKS IN CANADA* (1976) (a Canadian viewpoint staking out the position that decent housing is a right, to be protected in part by rent control); *RENT CONTROL: A SOURCE BOOK* (J. Gilderbloom ed. 1981).

Assuming such a lock-in, *i.e.*, rent ceiling plus no conversion possibilities, the landlord will have an incentive to evade the harsh results that would otherwise ensue through withdrawal of capital in other forms. Some of the methods frequently employed are to fail to make repairs as needed, fail to make improvements to the property, or, in the extreme case, abandon the property altogether to a reluctant mortgagee who will find himself quite probably in a worse position. This is because he will be subject to the same governmental strictures as was his now-liberated predecessor in title. He will face, therefore, the same expenses plus the cost of the "neglected" repairs. Since he, too, is unlikely to be able to get the concession(s) he will need from the local rent board to make those repairs, either eventual decay or immediate eviction followed by destruction of the premises may well result. Naturally, this too has the effect sought to be avoided, *viz.* accentuation of the rental housing shortage.

Those who enact such measures often seek to temper the harshness of the ordinance by exempting new construction from their reach. Explained as an incentive for new construction, this type of provision will lead to the same inevitable result. Since potential entrants into the residential rental market will, quite naturally, fear that once built, their investment will become subject to rent control through future amendments of the ordinance, they will require a corresponding risk premium to undertake the project. Two results are, of course, possible. The first is that the risk premium required to be added to the present value of future rental income to attract the investment will be too high. The rational investor will then seek the next best investment alternative, and the construction will have been deterred altogether. The result is a sub-optimal allocation of societal resources. The second possible result is that the risk premium will take the form of construction of luxury apartments wherein the investor may be induced to maximize his short-run profits as a hedge against future confiscation through regulation. In either case, those for whose benefit the regulators have presumed to act will be deprived of that to which they were supposed to be "entitled."²⁰²

By reducing the overall stock of rental housing the controls may actually increase rather than reduce the actual rents paid.²⁰³ There

202. Muth, *supra* note 200, at 695-97; *see also* C. BAIRD, *supra* note 196, at 54-78 (Rent control is a tax on the capital of the owner. When a tax is imposed on an activity, less of that activity will be undertaken. Rent control thus leads to disinvestment.); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 721 (1983) (most harmful economic effect of rent control is impact on the production of housing).

203. Muth, *supra* note 200, at 696.

are a number of ways in which this will result even in the context of an existing rental, *i.e.*, one where the landlord has not abandoned the building, but rather has attempted to make a go of it. Since the rent ceilings are set below the levels of rent attainable in an unregulated market, the landlord may be expected to attempt to make up the shortfall by subterfuge. The means are limited only by the creative powers of the individual landlord. Notable methods, which in some regulated markets have become standard, are the exaction of large non-refundable security deposits or key deposits payable in full upon the tenant's taking occupancy. Other fairly common alterations in the previously existing relationship are agreements that the *tenant* will be responsible for all maintenance and repair payments, to be payable or reimbursable in full on performance of the service. Shifting the cost of utilities formerly paid by the landlord to the tenant is increasingly common even in non-rent control jurisdictions. It can be accepted as a given when the landlord is made subject to rent control encumbrances.²⁰⁴

While these can scarcely be said to be the results sought by representatives of the people (or in the case of ordinances such as appellate's, the electorate through an initiative measure), they are the ones that will follow inevitably, given a market system and rational, self-interested actors. Certainly, the alternatives suggested by Justice Lucas of the California Supreme Court²⁰⁵ can seem nothing but reasonable in comparison and may be implemented without effecting the severe economic dislocations inherent in a typical rent control scheme.

There are, of course, other adverse effects that result from the imposition of rent control beyond the housing shortage, deterioration, and price distortions already mentioned. In a system of voluntary exchange it is impossible to tamper with one segment of a market without consequences being felt in others. At market clearing rents, the general plans and actions of landlords and tenants are largely consistent. Rent control, however, creates an adversary relationship between landlords and tenants. Since rent control is a tax on landlords which is turned over to existing tenants, it is impossible for their interests to remain compatible. Because most rent control statutes allow rents to be raised upon vacation of the apartment by a current tenant, there arises a tension between classes of tenants as

204. C. BAIRD, *supra* note 196, at 58-59.

205. See *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 718, 693 P.2d 261, 318, 209 Cal. Rptr. 682, 739 (1984) (Lucas, J., dissenting) (direct rent subsidies, provision of low income housing, condemnations, negotiated purchases).

well as between tenants and landlords. The primary beneficiaries of a rent control ordinance are the tenants occupying the unit at the time of the imposition of the controls. It is in the landlord's interest to have them vacate. This interest will sometimes be manifested in the form of a bribe exacted from the landlord to vacate early.²⁰⁶ As should be expected, this transfer payment will be recouped, if at all, from the inflated rates that will be charged the new tenant. Once again, the price is artificially higher than it would have been under a system of voluntary exchange. Since nothing new is produced as a result of these transactions, they can be viewed as an inefficient allocation of society's scarce resources, *i.e.*, one that would not prevail were everyone allowed to determine his own actions based upon market mechanisms.

Another efficiency loss is felt in the labor market. Since those who are already in possession of a rent controlled unit will be far more reluctant to leave it, knowing that a new apartment free from the artificial rent subsidy will be *much* more expensive, they are likely to remain for a longer period than they would otherwise. People who, for a better job, ordinarily would have no qualms about relocating may well either turn the job down or require a salary far in excess of the one dictated by market forces.²⁰⁷ This results in not only a sub-optimal allocation of housing but also a sub-optimal division of labor. Society's resources are again depleted to the extent that productivity will be at a level lower than that which would prevail otherwise. It is unlikely that those who champion this type of ordinance would be willing to admit these results, much less be held accountable for them. Rather,

[a] rent control advocate is like Adam Smith's man of system who is apt to be very wise in his own conceit, and is often so enamored with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it . . . he seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chessboard; he does not consider that the pieces upon the chessboard have no other principle of motion besides that which the hand impresses upon them; but that, in the great chessboard of human society, every single piece has a principle of motion of its own, altogether dif-

206. Most rent control statutes are like Berkeley's and combine an "eviction for good cause only" provision with the actual imposition of controls. This frequently is extended by another common provision providing for nearly automatic, required renewals at the termination of the existing tenancy.

207. See C. BAIRD, *supra* note 196, at 62-63 (discussion of indirect economic ramifications of rent control).

ferent from that which the legislature might choose to impress upon it.²⁰⁸

Still another of the myriad problems precipitated by imposition of rent control is the set of beliefs it begins to engender among the populace. Rent control creates a set of "entitlements" that thereafter becomes a major obstacle to any attempt to modify or repeal the ordinance.²⁰⁹ What initially may be a mere experimental stab at implementation of rent control because it's seen as worth a try and unlikely to cause much harm since it can always be repealed if it doesn't work is far more likely to yield a mortal slash to the body politic. One scholar has pointed out that people submit to, as a result of rent control, other forms of government authority and pursue political, rather than market, mechanisms for economic advancement:

Because of rent restriction, large sections of the population in Western countries have become subject to arbitrary decisions of authority in their daily affairs and accustomed to looking for permission and direction in the main decisions of their lives. They have come to regard it as a matter of course that the capital which pays for the roof over their heads should be provided free by somebody else and that individual economic well-being should depend on the favor of the political party in power, which often uses its control over housing to assist its supporters.²¹⁰

That this sounds more like a description of daily life in some East European workers' paradise than one of a city like Berkeley in a Western democracy is not surprising. Every flirtation with the welfare state by an erstwhile free country has produced the same chronic dependency on continued government largesse. That these effects have only recently been recognized in this country (and then only in programs such as welfare and social security) is a testament to the prolonged illusion induced by the unprecedented social engineering unleashed by the New Deal programs for the past half-century.

Rent control, like any other transfer-payment swindle, produces the ends it seeks to prevent. This fatal flaw is inherent in its operation. Worse still is its continued popularity among the large segment

208. *Id.* at 96 (quoting A. SMITH, *THE THEORY OF MORAL SENTIMENTS* 380-81 (1759)).

209. *See* *Goldberg v. Kelly*, 397 U.S. 254 (1970), which provided that a state, to comply with due process requirements, must provide a pretermination hearing for one receiving welfare payments before those payments can be cut off by the state. A "property" right in the fruits of the labor of others is thus recognized.

210. C. BAIRD, *supra* note 196, at 68 (quoting F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 344 (1960)); *see also* F.A. HAYEK, *The Repercussions of Rent Restrictions*, in *RENT CONTROL: METHODS AND REACTIONS* (1977 Block & E. Olsen ed. 1981).

of the populace which has been led to expect something-for-nothing.²¹¹ Rent control is bad policy, hopelessly illogical and counter-productive, and therefore should not be implemented at the outset and should certainly be repealed where already enacted.

CONCLUSION

The Supreme Court, through its literal construction of the Sherman Act, has evaded for now a very real problem, *viz.* the extent to which a municipality may or may not evade the paramount national policy of competitive markets sought to be protected by the antitrust laws. The problem will likely arise again when a creative lawyer finds the proper way to allege and prove concerted action on the part of the actors involved.

If the Sherman Act was passed to protect the consumer through the maintenance of a competitive market system free from the dead-weight losses and general misallocation of resources produced by monopolies or cartels, the depredations the Act was designed to prohibit should not be tolerated merely because one of the actors is a governmental body. If price-fixing is thought to bring about the prohibited result, then the Act must prohibit governmental action when that action can fairly be characterized as price-fixing.

That being the case, however, the Court should look carefully at the differences in purpose and effect between conspiracies to fix minimum prices and conspiracies to fix maximum prices. Those differences are pronounced. Setting maximum prices often yields pro-competitive effects and should, under the stated purpose of the Act, *i.e.*, advancement of consumer welfare, not only not be subjected to *per se* illegality but should be allowed and even encouraged if the result is to benefit society by increasing efficiency and curbing the misallocation of its scarce resources.

The policy effectuated by the Berkeley ordinance, rent control, has never produced the results it seeks to achieve. It distorts the market, misallocates the very resources the antitrust laws seek to protect, and brings about more, rather than fewer, social problems. The cycle of dependency on government largesse and the quick-fix solutions it im-

211. The assertion by Seccombe, *supra* note 201, that decent housing is a *right*, with its implicit assumption that housing must be provided through expropriation of the fruits of another's labor, is effectively countered by Professor Block: "[W]hat is actually at stake here has nothing to do with rights at all. On the contrary, it is a disguised, and therefore quite insidious, demand for *wealth*." Block, *Postscript: A Reply to the Critics*, in RENT CONTROL: MYTHS AND REALITIES 285, 301 (W. Block & E. Olsen ed. 1981).

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plements produce a populace largely docile and acquiescent to the imposition of future government handouts. The form of economic independence and individual well-being envisaged by Senators Sherman *et al.* is ravaged by rent control as any solid foundation is weakened by parasitical invasion.

