January 1986

Fisher v. City of Berkeley: Applying Due Process and Preemption to Rent Control Ordinances

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FISHER v. CITY OF BERKELEY:
APPLYING DUE PROCESS AND
PREEMPTION TO RENT
CONTROL ORDINANCES

I. INTRODUCTION

In Fisher v. City of Berkeley, the California Supreme Court addressed the validity of Berkeley’s latest rent control ordinance. With the exception of a retaliatory eviction provision, the court upheld the ordinance against all challenges. These challenges included alleged due process violations, and claims that certain provisions in the ordinance were preempted by state law.

The Fisher court discussed five relevant issues: 1) the facial validity of the ordinance’s rate of return standard; 2) the facial

2. Berkeley, Cal., Ordinance 5261-N.S., Rent Stabilization and Eviction for Good Cause Ordinance (June 1980) [hereinafter cited as Ordinance].
3. Id. § 14. This section creates a presumption that any eviction within six months after a tenant has exercised his or her rights under the ordinance is retaliatory. Id.
4. Fisher, 37 Cal. 3d at 652, 693 P.2d at 669, 209 Cal. Rptr. at 690. The court also addressed two other issues that will not be discussed in this Note. In 1982, the United States Supreme Court held that municipalities were subject to antitrust scrutiny. Community Communications Co. v Boulder, 455 U.S. 40 (1982). Based upon the arguments raised in Boulder, Berkeley’s landlords attacked the ordinance as violating the Sherman Antitrust Act. Fisher, 37 Cal. 3d at 655, 693 P.2d at 271, 209 Cal. Rptr. at 692. The United States Supreme Court granted certiorari to address that issue, and decided that Berkeley’s ordinance did not violate antitrust laws. See Fisher v. Berkeley, No. 84-1538, slip op. at 9-10 (U.S. Feb. 26, 1986). The California Supreme Court also addressed an equal protection argument, but it summarily dismissed that argument as bearing a debatable rational relationship to the legitimate public purpose of the ordinance. Fisher, 37 Cal. 3d at 684, 693 P.2d at 293, 209 Cal. Rptr. at 714.
5. CAL. CONST. art. I, § 7(a). “A person may not be deprived of life, liberty, or property without due process of law . . . .” Id. See also U.S. CONST. amend. XIV, § 1. “[N]or shall any State deprive any person of life, liberty or property without due process of law.” Id.
6. See CAL. CONST. art. XI, § 7. “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Id. (Emphasis added.)
7. Fisher, 37 Cal. 3d at 679, 693 P.2d at 289, 209 Cal. Rptr. at 710. This issue refers
validity of the ordinance’s rate adjustment procedures;\(^8\) 3) whether the ordinance constitutes an unreasonable restraint on the alienation of property;\(^9\) 4) the validity of the ordinance’s retaliatory eviction provisions;\(^10\) and 5) the validity of the ordinance’s rent withholding provisions.\(^11\) This Note will analyze the Fisher court’s thorough evaluation of each issue. Furthermore, this Note will consider the significance of future due process and preemption challenges to rent control in light of the Fisher decision.

II. BACKGROUND

The Fisher decision arose when residential landlords in the City of Berkeley challenged the validity of Berkeley’s rent control ordinance, and sued for injunctive and declaratory relief.\(^12\) The landlords raised concerns regarding the ordinance’s formula for establishing and adjusting rents, its ultimate effect on the value of rental properties, and the validity of certain provisions established to ensure compliance with the ordinance.\(^13\) To protect their interests, the landlords brought an action charging that the ordinance either violated their guarantee of due process or that the ordinance was preempted by state law.\(^14\)

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8. Id. at 687, 693 P.2d at 295, 209 Cal. Rptr. at 716. This issue refers to the validity of the procedures established by the ordinance for implementing the rate of return standard.

9. Id. at 691, 693 P.2d at 299, 209 Cal. Rptr. at 720. This issue refers to the potential preemption of provisions in the ordinance by California Civil Code § 711, which prohibits restraints on alienation; the provisions in the ordinance restrict rent adjustments that are necessary to cover cost increases resulting from the sale or refinancing of rental property acquired after adoption of the ordinance. CAL. CIV. CODE § 711 (West 1982).

10. Fisher at 693, 693 P.2d at 300, 209 Cal. Rptr. at 721. This issue refers to the potential preemption of a provision in the ordinance by California Evidence Code § 500, which allocates burdens of proof. CAL. EVID. CODE § 500 (West 1966). There are provisions in the ordinance that purport to protect tenants from evictions by landlords who retaliate against tenants who exercise their rights under the ordinance. One provision establishes a presumption regarding retaliatory evictions, and this issue refers to the validity of that provision. See supra note 3.

11. Fisher, 37 Cal. 3d at 699, 693 P.2d at 304, 209 Cal. Rptr. at 725. This issue refers to the due process and preemption challenges to the use of rent withholding by tenants to force landlords to comply with the ordinance.

12. Id. at 653, 693 P.2d at 270, 209 Cal. Rptr. at 691.

13. See generally id. at 679-709, 693 P.2d at 289-312, 209 Cal. Rptr. at 710-33.

14. Id.
Both due process and preemption are doctrines that have different meanings depending on the circumstances of each case. Generally, due process ensures that statutory procedures and purposes, at all levels of government, are "reasonable" under the circumstances. Preemption, on the other hand, is a limitation on inferior governmental entities that regulate in conflict with the statutory schemes of superior governmental entities. In Fisher, the court applied these doctrines to the specific provisions of Berkeley's rent control ordinance.

15. See Hannah v. Larche, 363 U.S. 420 (1960). "Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." Id. at 442. See also In re Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962). "[W]hether the state has fully occupied a field with respect to any given subject depends upon considerations which will necessarily vary and must therefore be determined in every case . . . ." Id. at 110, 372 P.2d at 899, 22 Cal. Rptr. at 859.


If the laws passed seem to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . .

Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . .

Id. at 537-39. Nebbia is regarded as the first case in which the United States Supreme Court abandoned the philosophy of economic due process, where regulated businesses had to be affected with a public interest before a regulation would be considered legitimate. See Olsen v. Nebraska, 313 U.S. 236, 245 (1941). In Nebbia, the Court repudiated its prior strict scrutiny approach to economic regulations, and declared that it would defer to the legislature unless a particular legislation was not rationally related to a legitimate public purpose. Nebbia, 291 U.S. at 537.


The doctrine of state preemption becomes a determining factor only when a political subdivision (not necessarily a chartered city) attempts to legislate under its admitted police power [CAL. CONST. art. XI, § 11] on a subject that the state also has legislated upon. The question then arises as to whether the subject matter of the legislation has not been preempted by the state.

60 Cal. 2d at 292 n.11, 384 P.2d at 168 n.11, 32 Cal. Rptr. at 840 n.11.

18. In order to facilitate a due process analysis, the general purposes of the ordinance are as follows:

'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 rental housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of this City with regard to low and fixed income persons, minorities, students,
The first group of provisions considered by the court deals with the ordinance's rate of return standard. The rate of return standard, or "fair return standard," establishes a formula for setting and adjusting rent ceilings. In Berkeley's ordinance, that formula is administered by a regulatory board that is required to apply the formula in different ways depending upon the prevailing circumstances. The most important section of the ordinance states, "No provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment." One

See Ordinance, supra note 2, § 3.

19. Fisher, 37 Cal. 3d at 679, 693 P.2d at 289, 209 Cal. Rptr. at 710.

20. See generally Baar, Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutgers L. Rev. 723, 781-817 (1983). The term "fair return standard" refers to the United States Supreme Court's declaration that failure to provide a fair return is a taking of property without due process of law. Smyth v. Ames, 169 U.S. 466, 546-47 (1898). There are an infinite number of potential rate of return formulas including: the maintenance of cash flow, the return on value, the percentage net operating income, the return on investment, and the maintenance of net operating income. See generally Baar, supra at 781-817. The use of various rate of return standards has been routinely accepted by the courts; in Fisher, the court reiterated, "[S]election of an administrative standard by which to set rent ceilings is a task for local governments—in this case the voters themselves—and not the courts." Fisher, 37 Cal. 3d at 681, 693 P.2d at 291, 209 Cal. Rptr. at 712. The court also added that, "[R]ent control agencies are not obliged by either the state or federal Constitution to fix rents by application of any particular method or formula." Id. at 680, 693 P.2d at 290, 209 Cal. Rptr. at 711 (citing Carson Mobilehome Park Owner's Assn. v. City of Carson, 35 Cal. 3d 184, 191, 672 P.2d 1297, 1300, 197 Cal. Rptr. 284, 287 (1983)).

21. See generally Ordinance, supra note 2. Section 6 of the ordinance established a nine member regulatory board and sets out its powers, duties, rules and procedures. Id. § 6. Section 11 provides:

In adjusting ceilings under this subsection, the Board shall adopt a formula or formulas of general application. This formula will be based upon the annual rent registration forms, surveys, information and testimonies presented at public hearings, and other available data indicating increases or decreases in the expenses relating to the rental housing market in the City of Berkeley set forth in this subsection.

Id. § 11(b).

22. Id. § 12(i). Berkeley's standard is actually a hybrid of the return on investment and maintenance of net operating income standards. The return on investment standard is calculated as follows: gross rent = operating expenses + mortgage payments + cash investments. The maintenance of net operating income standard is calculated as follows: gross rent = base date gross rent + (current operating expenses - base date operating expenses). Baar, supra note 20, at 784. Berkeley's ordinance, in §§ 10 and 11, established a base rent income and required adjustments to cover increases in costs, i.e., a maintenance of net operating income approach where actual profits stay the same. See Ordinance, supra note 2, §§ 10, 11. Section 12, on the other hand, provides, "It is the intent
of the major issues that faced the *Fisher* court was to determine whether a fair return on investment is valid under the due process clause.

A similar group of provisions challenged by the landlords is the rent adjustment procedures.\(^{23}\) In order to implement the rate of return standard, the ordinance includes certain mechanisms which may be used by the Regulatory Board.\(^{24}\) One mechanism is the general or citywide adjustment, which allows the Board to grant adjustments to general categories of residential properties.\(^{25}\) Another mechanism is the adjustment by individual petition.\(^{26}\) This method, however, is more time consuming than the general adjustment, and the landlords attacked the potential delay as violating their guarantee of due process.\(^{27}\)

Another alleged due process violation regarded the ordinance's rent withholding provisions.\(^{28}\) These provisions allow a tenant to withhold rents whenever a landlord does not comply with the ordinance.\(^{29}\) Specifically, tenants are allowed to with-
hold rents if landlords fail to comply with the ordinance's rent ceilings\textsuperscript{30} or with the ordinance's registration requirements.\textsuperscript{31} The basis of the landlords' argument was that the tenants were not qualified to interpret the ordinance, or to determine whether or not the landlords had complied with it.\textsuperscript{32} Alternatively, the landlords pointed to certain state statutes that govern rent withholding, and claimed that these statutes preempt the ordinance's rent withholding provisions.\textsuperscript{33}

According to the landlords, other ordinance provisions were preempted by state law. The Berkeley landlords were concerned about the ordinance's effect on the sale and financing of rental property, and therefore, they argued that certain provisions in the ordinance created an unreasonable restraint on the alienation of property.\textsuperscript{34} Specifically, the landlords pointed to provisions in the ordinance which establish that a landlord-owner may not obtain a rent increase based upon increased carrying costs arising out of a recent sale or a refinancing of rental property.\textsuperscript{35} It was the landlords' contention that this result was ex-

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\textit{Id.} \textsuperscript{30} This section provides for a base rent ceiling that sets ceilings at those rents being charged as of May 31, 1980. \textit{Id.} Changes in those rent ceilings are governed by the general and individual adjustment mechanisms contained in §§ 11 and 12 of the ordinance. \textit{Id.} §§ 11, 12.
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\textit{Id.} \textsuperscript{31} This section requires landlords to register with the Board, to provide certain specified information, and to pay a registration fee for each unit. \textit{Id.}
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\textit{Id.} \textsuperscript{32} \textit{Fisher}, 37 Cal. 3d at 699-704, 693 P.2d at 304-08, 209 Cal. Rptr. at 725-29.
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\textit{Id.} \textsuperscript{33} at 704-09, 693 P.2d at 308-12, 209 Cal. Rptr. at 729-32.
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\textit{Id.} \textsuperscript{34} at 691, 693 P.2d at 299, 209 Cal. Rptr. at 720.
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\textit{Id.} \textsuperscript{35} See Ordinance, supra note 2, § 12(d), (e). These sections provide in full: (d) No individual upward adjustment of a rent ceiling shall be authorized by the Board by reason of increased interest or other expenses resulting from the landlord's refinancing the rental unit if, at the time the landlord refinanced, the landlord could reasonably have foreseen that such increased expenses could not be covered by the rent schedule then in existence, except where such refinancing is necessary for the landlord to
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pressly prohibited by state law.\footnote{36}

The landlords also claimed that a retaliatory eviction provision in the Berkeley ordinance is in direct conflict with state law.\footnote{37} This provision establishes a presumption that any eviction within six months of a tenant's assertion of rights under the ordinance is retaliatory.\footnote{38} Of all the due process and preemption challenges raised in \textit{Fisher}, only this retaliatory eviction presumption was struck down by the California Supreme Court.\footnote{39} After discussing the five relevant issues of the case separately, the court severed the retaliatory eviction presumption from the rest of the ordinance.\footnote{40}

\section*{III. THE COURT'S DECISION}

The \textit{Fisher} court analyzed a number of issues challenged on make capital improvements which meet the criteria set forth in Section 12(c)(3). This paragraph shall only apply to that portion of the increased expenses resulting from the refinancing that were reasonably foreseeable at the time of the refinancing of the rental unit and shall only apply to rental units refinanced after the date of adoption of this Ordinance.

\textit{(e)} Except for cases of individual hardship as set forth in Subsection 12(i) of this Ordinance, no individual upward adjustment of a rent ceiling shall be authorized by the Board because of the landlord's increased interest or other expenses resulting from the sale of the property, if at the time the landlord acquired the property, the landlord could have reasonably foreseen that such increased expenses would not be covered by the rent schedule then in effect. This Subsection 12(e) shall only apply to rental units acquired after the date of adoption of this Ordinance.

\footnote{36. \textit{Fisher}, 37 Cal. 3d at 692, 693 P.2d at 299, 209 Cal. Rptr. at 720.}
\footnote{37. \textit{Id.} at 693, 693 P.2d at 300, 209 Cal. Rptr. at 721.}
\footnote{38. \textit{See Ordinance, supra} note 2, § 14. This section provides in part: \textit{In an action by or against a tenant, evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory. “Presumption” means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence. \textit{Id.} This retaliatory eviction provision was amended in 1982 when Berkeley enacted the Tenant's Rights Amendment Act of 1982 in order to revise certain sections of the ordinance.}
\footnote{39. \textit{Fisher}, 37 Cal. 3d at 698, 693 P.2d at 304, 209 Cal. Rptr. at 725.}
\footnote{40. \textit{Id.}}
either due process or preemption grounds. The ordinance's rate of return standard, the rate adjustment procedures, and certain rent withholding provision were attacked by the Berkeley landlords as violative of due process. Additionally, the landlords alleged that the retaliatory eviction presumption, the provision precluding a rent increase due to increased costs arising out of a recent sale or refinancing, and certain rent withholding provisions were preempted by state law. The court applied a different due process and preemption analysis to the various challenged ordinance provisions.

A. FACIAL VALIDITY OF THE ORDINANCE’S RATE OF RETURN STANDARD

The landlords contended that the return on investment standard in the Berkeley ordinance violated their due process rights. The court based its determination of whether the ordinance violated the landlords' guarantee of due process primarily upon its definition of the term "investment." Unless the landlords could have shown that the return on investment standard was unreasonable, the court could not have found that the standard was a confiscation of property without due process of law.

The court began its analysis by stating, "[W]hether rental regulations are fair or confiscatory depends ultimately on the result reached." Nevertheless, the court was willing to consider a facial challenge to the ordinance in order to determine whether its terms would permit those who administered it, to avoid confiscatory results in its actual application. The court decided that if the return on investment standard would afford sufficient flexibility in its administration and avoided confiscatory results, it would uphold the ordinance.

41. Id. at 679-709, 693 P.2d at 289-312, 209 Cal. Rptr. at 710-33.
42. Id.
43. Id. at 679, 693 P.2d at 289, 209 Cal. Rptr. at 710. Although most of the ordinance established a maintenance of net operating income standard, § 12(8) explains that it is the purpose of the ordinance to grant upward rent adjustments only to ensure landlords a fair return on investment. See supra note 22.
44. See supra note 16 and accompanying text.
45. Fisher, 37 Cal. 3d at 679, 693 P.2d at 289, 209 Cal. Rptr. at 710-11.
46. Id. at 679, 693 P.2d at 290, 209 Cal. Rptr. at 710.
47. Id. at 682, 693 P.2d at 291, 209 Cal. Rptr. at 712.
The landlords argued that a fair rate of return must be based on the fair market value of their properties rather than upon the investment they personally put into those properties. Some of the landlords had significant equity in their real estate with little or no investment, and they feared that the return on investment standard would leave them with little or no rental income; the landlords were concerned that any reasonable interpretation of the term investment would lead to a confiscatory result. The court, however, disagreed with this interpretation of the investment standard, and rejected the claim that a return on value standard was required by the ordinance.

Significantly, the court found that the ordinance does not confine investment to a restrictive interpretation. It asserted that, in appropriate cases, the Board may consider a landlord's personal labor in improving his property as an investment. Furthermore, the court explained that if a landlord has acquired his property by gift or inheritance, there is nothing in the ordi-

48. Id. at 680-81, 693 P.2d at 290-91, 209 Cal. Rptr. at 711-12.
49. Id. at 685, 693 P.2d at 294, 209 Cal. Rptr. at 715. In this context, "equity" means an interest in property in excess of claims or liens (such as mortgage indebtedness) against it; "investment" refers to an expenditure of money for income or profit—a capital outlay.
50. Fisher, 37 Cal. 3d at 685, 693 P.2d at 294, 209 Cal. Rptr. at 715.
51. Id. at 680-85, 693 P.2d at 290-94, 209 Cal. Rptr. 711-15. The return on value standard determines fair return by focusing on the market value of a landlord's property; this standard was first used in a railroad rate regulation case in which the United States Supreme Court held that railroads were entitled to rates sufficient to produce a fair return on the market value of their assets. Smyth v. Ames, 169 U.S. 466, 547 (1898). However, the holding in Smyth was rejected in a utility rate regulation case in which the Court stated that, "[R]ates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." Power Commission v. Hope Gas Co., 320 U.S. 591, 601 (1944). The Fisher court, after quoting this language from Hope Gas explained, "Implicit in this statement is the suggestion that a return on fair value standard is circular and unworkable." Fisher, 37 Cal. 3d at 681 n.33, 693 P.2d at 290 n.33, 209 Cal. Rptr. at 711 n.33.

The value of any income producing asset is a function of its earning potential; just as a bond providing 10% interest every year is more valuable than an identical bond providing only 5% in interest each year, a rental property producing $100 each month is more valuable than a similar property producing only $50 each month. If a potential buyer were to consider purchasing the two properties, he would logically consider the $50 difference in income each month in determining what he was willing to pay for the property; a logical buyer would be willing to pay up to the present value of the $50 difference each month on top of the original value of the first property. See Baar, supra note 20, at 798-803.
52. Fisher, 37 Cal. 3d at 685, 693 P.2d at 294, 209 Cal. Rptr. at 715.
53. Id.
nance to preclude the Board from using the transferor's investment in the property to determine the landlord's investment. Moreover, the court contended that the Board was not prohibited from considering certain forms of investment such as mortgage payments toward principal, or cash later invested to improve the property.

The return on investment standard was also attacked by the landlords as unfairly depriving them of the full long term appreciation value of their properties. In making this argument, the landlords tried to establish that they were entitled to the full market value of their rentals, if the properties were earning rents at a competitive market rate. As argued by the landlords, they were entitled to the full capitalization value of their properties, which is calculated by factoring the present value of rental income to be earned in the future and combining that with the properties' intrinsic land value.

The court rejected this contention, and premised its analysis upon "taking" cases that have upheld regulations except if an owner has been deprived of "substantially all reasonable use of the property." As explained by the court, some lessening of appreciation is a necessary result of rent control because appreciation is often a function of increased rental income. The court stated, "It is one of the very sources of long-term appreciation—inflated rents—that rent control measures are intended to restrict."

In a similar argument, the landlords requested the court to

54. Id.
55. Id. Ultimately, the court decided that the return on investment standard is flexible enough to allow the Board to avoid confiscatory results in the standard's application. Id.
56. Id. This is the same as demanding a fair return on value standard instead of a fair return on investment. See Comment, Rethinking Rent Control: An Analysis of "Fair Return," 12 Rutgers L.J. 617, 640 (1981). See also supra note 51 (explaining the relationship between property value and the potential rental income from that property).
57. Fisher, 37 Cal. 3d at 685, 693 P.2d at 294, 209 Cal. Rptr. at 715.
58. Id. See also supra note 51.
60. Fisher, 37 Cal. 3d at 685, 693 P.2d at 294, 209 Cal. Rptr. at 715.
61. Id. (citing Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App. 3d 280, 290, 195 Cal. Rptr. 825, 832 (1983)).
find that, as a matter or law, investment should include the effect of inflation on the landlords' initial investment.\textsuperscript{62} One section in the ordinance sets rent levels at the rents being charged as of May 31, 1980;\textsuperscript{63} the landlords argued that unless the investment standard would be interpreted to include the effect of inflation, their profits would steadily erode over time.\textsuperscript{64} As noted by the court, if a fixed profit amount eventually loses real value, that result is potentially just as confiscatory as if the Board had set its own confiscatory rate.\textsuperscript{65}

Although the court refused to invalidate the ordinance because the ordinance failed to account for the effect of inflation, the court basically accepted the landlords' inflation argument.\textsuperscript{66} The court's reasoning, however, prompted it to reach the opposite conclusion from that of the landlords; rather than using the absence of inflation language as a means of criticizing the ordinance, the court pointed to this omission as providing the Board with sufficient flexibility to avoid confiscatory results.\textsuperscript{67} The court found that it was not apparent that the ordinance precluded the application of necessary adjustments to account for inflation.\textsuperscript{68} Furthermore, it was even less clear that the Board would decline to invoke its powers to adjust individual profit amounts. The court explained, "'[I]t is to be presumed that the board will exercise its powers in conformity with the requirements of the Constitution; and if it does act unfairly, the fault lies with the board and not the statute.' "\textsuperscript{69}

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\bibitem{62} Fisher, 37 Cal. 3d at 682, 693 P.2d at 292, 209 Cal. Rptr. at 713.
\bibitem{63} See Ordinance, supra note 2, § 10.
\bibitem{64} Fisher, 37 Cal. 3d at 682, 693 P.2d at 291-92, 209 Cal. Rptr. at 712-13. If landlords' profits were fixed at the 1980 level, the real value of those profits would diminish over time; $1,000 of purchasing power in 1980, given, for example, an inflation rate of 10\%, would buy only $100 of the same goods 10 years into the future.
\bibitem{65} Id. at 683, 693 P.2d at 292, 209 Cal. Rptr. at 713. The court stated, "'[A]lthough defendants' ordinance may properly restrict landlords' profits on their rental investments, it may not indefinitely freeze the dollar amount of those profits without eventually causing confiscatory results.'" \textit{Id.} (Emphasis in original.)
\bibitem{66} Id. at 684, 693 P.2d at 293, 209 Cal. Rptr. at 714.
\bibitem{67} Id.
\bibitem{68} Id.
\bibitem{69} Id. (citing Butterworth v. Boyd, 12 Cal. 2d 140, 149, 82 P.2d 434, 439 (1938)).
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B. The Facial Validity of the Ordinance's Rate Adjustment Procedures

The court next decided the constitutional validity of the adjustment mechanisms used to implement the rate of return standard. A few years earlier, California's Supreme Court had considered the constitutionality of another Berkeley rent control ordinance, and had found that the adjustment procedures in that ordinance were confiscatory. According to that court, an adjustment mechanism "is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary."

The Fisher court praised Berkeley's present ordinance, however, for correcting all of the problems of the prior ordinance. The court decided that the current ordinance avoids the confiscatory delays inherent in the prior ordinance's unit-by-unit procedure; the current ordinance provides for general citywide increases to cover common costs that affect the entire city, thus avoiding the unnecessary delays inherent in hearing individual petitions. Additionally, for those peculiar situations that require review of individual petitions, the court found that the current ordinance's individual adjustment procedures are designed to assure reasonably prompt considerations of the landlords' claims.

According to the court, the original Berkeley ordinance placed the Regulatory Board in "a procedural strait jacket." That ordinance did not allow petitions unless they were accompanied by building code compliance certificates, it gave the Board no power to consolidate petitions, and it gave the Board no power to delegate its authority to review petitions. On the

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70. Fisher, 37 Cal. 3d at 687, 693 P.2d at 295, 209 Cal. Rptr. at 716.
72. Id. at 169, 550 P.2d at 1030, 130 Cal. Rptr. at 494.
73. Fisher, 37 Cal. 3d at 690, 693 P.2d at 297, 209 Cal. Rptr. at 718.
74. Id. at 691, 693 P.2d at 298, 209 Cal. Rptr. at 719 (citing Ordinance, supra note 2, § 11).
75. Fisher, 37 Cal. 3d at 691, 693 P.2d at 298, 209 Cal. Rptr. at 719.
76. Id. at 690, 693 P.2d at 297, 209 Cal. Rptr. at 718.
77. Id. at 690, 693 P.2d at 298, 209 Cal. Rptr. at 718-19.
contrary, the current ordinance requires the Board to consolidate petitions, make all adjustment decisions within 120 days, and appoint hearing officers if necessary.\(^7^8\) The result of these provisions, according to the court, is to provide the Board with sufficient flexibility to avoid confiscatory results.\(^7^9\)

C. WHETHER THE ORDINANCE CONSTITUTES AN UNREASONABLE RESTRAINT ON THE ALIENATION OF PROPERTY

Another issue considered by the court was whether the ordinance constitutes an unreasonable restraint on the alienation of property.\(^8^0\) Specifically, the court considered the validity of provisions that prevent the Board from granting a rent adjustment to cover increased costs arising from a recent sale or refinancing of rental property.\(^8^1\) The landlords argued that these provisions unreasonably restrain alienation and are, therefore, directly preempted by the California Civil Code.\(^8^2\)

The court not only rejected this preemption argument, but also upheld the provisions on due process, rational basis grounds.\(^8^3\) According to the court, the purpose of these provisions is to prevent landlords from manipulating their costs in order to create a higher rental income.\(^8^4\) To prevent this result, two "antispeculation" clauses are included to prevent landlords from passing on to their tenants the cost of the landlords' speculation in the housing market.\(^8^5\) The court concluded, "If this latter aspect were unregulated, use of the investment standard might defeat the purpose of rent price regulation."\(^8^6\)

Additionally, the court considered whether the provisions are directly preempted by the Civil Code.\(^8^7\) Section 711 of the Civil Code expressly prohibits restraints on the alienation of

\(^{78}\) See Ordinance, supra note 2, § 12.
\(^{79}\) Fisher, 37 Cal. 3d at 691, 693 P.2d at 299, 209 Cal. Rptr. at 720.
\(^{80}\) Id. at 691, 693 P.2d at 299, 209 Cal. Rptr. at 720.
\(^{81}\) See Ordinance, supra note 2, § 12(d)(e).
\(^{82}\) CAL. CIV. CODE § 711 (West 1982). "Conditions restraining alienation, when repugnant to the interest created, are void." Id.
\(^{83}\) Fisher, 37 Cal. 3d at 691-92, 693 P.2d at 299, 209 Cal. Rptr. at 720.
\(^{84}\) Id.
\(^{85}\) Id.
\(^{86}\) Id.
\(^{87}\) Id. at 692, 693 P.2d at 299, 209 Cal. Rptr. at 720.
Traditionally, however, this section has only applied to conditions in contracts of conveyance which are unreasonable restraints. In rejecting the preemption challenge in this area, the court found that the restraints in the ordinance are reasonable, and ultimately, that section 711 of the Civil Code has no application to restraints created by local ordinances.

The court noted that its review of the relevant section of the Civil Code revealed that the section was meant to address only private restraints on alienation, and was never intended to apply to municipal ordinances. According to the court, "[T]he rule against restraints on 'alienation is directed against the provisions in contracts or conveyances. It has no application to disabling restraints established by express statute.'" By interpreting "express statute" as including municipal ordinances, the court effectively dismissed any further preemption issue in this area.

D. VALIDITY OF THE ORDINANCE'S RETALIATORY EVICTION PRESUMPTION

Another preemption argument raised by the landlords was that a provision in the ordinance that creates a presumption regarding retaliatory eviction, directly conflicts with California's Evidence Code. Most rent control ordinances contain retaliatory eviction provisions to protect tenants when they attempt to exercise their rights. One important protection is the general rule that a retaliatory eviction is a complete defense to an unlawful detainer action. Berkeley's ordinance reiterates this defense, but adds a presumption that any eviction within six months of a tenant exercising rights created by the ordinance is

89. See Restatement (Second) of Property § 15.2 (1977). See also Coast Bank v. Minderhout, 61 Cal. 2d 311, 316, 392 P.2d 265, 268, 38 Cal. Rptr. 505, 508 (1964) (restraint in an equitable mortgage requiring consent by the creditor before the property could be transferred was found to be a reasonable restraint on alienation, and therefore, valid).
90. Fisher, 37 Cal. 3d at 693, 693 P.2d at 300, 209 Cal. Rptr. at 721.
91. Id.
92. Id. (citing 3 Witkin, Summary of Cal. Law (8th ed. 1973) and Restatement of Property §§ 403, 404 (1944)).
93. Fisher, 37 Cal. 3d at 694, 693 P.2d at 301, 209 Cal. Rptr. at 722.
94. See Baar, supra note 20, at 833.
The ordinance provides, "'Presumption' means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence." In contrast, section 500 of the California Evidence Code states, "Except as otherwise provided by law a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Pointing to this language, the landlords argued that the rent control ordinance is directly preempted by the Evidence Code.

The court agreed, and found that the Evidence Code directly preempts the retaliatory eviction presumption. In order to arrive at this conclusion, the court established that the ordinance creates a presumption affecting the burden of proof as set forth in section 500 of the Evidence Code. As a basis for its contention, the court relied upon two arguments used by the landlords. First, the language of the amended version of the ordinance is almost identical to the language of the Evidence Code that defines a presumption affecting the burden of proof. Second, the city's attempt to support the presumption on public policy grounds indicates that the presumption is one affecting the burden of proof; the Evidence Code defines these presumptions as implementing some type of public policy.

96. See Ordinance, supra note 2, § 14.
97. See id.
98. CAL. EVID. CODE § 500 (West 1966). This section refers to the party who has the burden of proof. Id.
99. Fisher, 37 Cal. 3d at 694, 693 P.2d at 301, 209 Cal. Rptr. at 722.
100. Id. at 698, 693 P.2d at 304, 209 Cal. Rptr. at 725.
101. CAL. EVID. CODE § 606 (West 1966). This section states, "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." Id.
102. Id. § 605. A presumption affecting the burden of proof is intended to establish some public policy; a presumption affecting the burden of producing evidence, on the other hand, is one intended to facilitate only the determination of the particular action in which it is applied, and is not intended to establish or implement any public policy. Id. § 603. It should be noted that the pre-amendment version of the ordinance contained a presumption completely identical to Evidence Code § 603 defining a presumption affecting the burden of producing evidence. The change in language is another indication that the city did not intend the retaliatory eviction presumption to affect the burden of producing evidence.
Additionally, the court noted that the "[e]xcept as other­wise provided by law" language of section 500 of the Evidence Code\(^{103}\) combined with section 160 of the Evidence Code,\(^{104}\) fur­ther indicates preemption.\(^{105}\) Section 160 of the Evidence Code defines "law" as including constitutional, statutory, and deci­sional law.\(^{106}\) Moreover, the court, relying on precedent, asserted that the legislature never intended municipal ordinances to be included in the exception for law provided in the Evidence Code.\(^{107}\) Although the court pointed to cases in which other courts have suggested that the term statute may include local ordinances, the Fisher court decided that an ordinance is void to the extent that it purports to establish rules of evidence.\(^{108}\)

E. Validity of the Ordinance’s Rent Withholding Provisions

The landlords’ final challenge was to the rent withholding provisions in the ordinance.\(^{109}\) Two provisions in the ordinance allow tenants to withhold rents whenever landlords fail to com­ply with either the rent ceilings in effect or with the ordinance’s registration process.\(^{110}\) The landlords challenged these provisions on both due process and preemption grounds.\(^{111}\)

1. The Due Process Challenge

The Berkeley landlords aimed their due process challenge of the rent withholding provisions at the provision that allows a tenant to unilaterally withhold rents if a landlord fails to comply with the ordinance.\(^{112}\) Specifically, this provision allows a tenant to withhold rents, and provides that in an action to recover rents or possession, a landlord will be denied rent if he has failed to comply with the ordinance, and denied possession if the tenant

\(^{103}\) See id. § 500 (West 1966).
\(^{104}\) See id. § 160 (West 1966).
\(^{105}\) Fisher, 37 Cal. 3d at 698, 693 P.2d at 304, 209 Cal. Rptr. at 725.
\(^{106}\) See CAL. EVID. CODE § 160 (1966).
\(^{107}\) Fisher, 37 Cal. 3d at 698, 693 P.2d at 304, 209 Cal. Rptr. at 725.
\(^{108}\) Id. at 698, 693 P.2d at 303, 209 Cal. Rptr. at 724.
\(^{109}\) Id. at 699, 693 P.2d at 304, 209 Cal. Rptr. at 725.
\(^{110}\) See Ordinance, supra note 2, § 15(a)(1).
\(^{111}\) Fisher, 37 Cal. 3d at 699-709, 293 P.2d at 304-12, 209 Cal. Rptr. at 725-32.
\(^{112}\) See Ordinance, supra note 2, § 15(a)(2).
has acted in good faith.\textsuperscript{113}

The due process challenge was made on several grounds. First, the landlords attacked the reasonableness of the provision.\textsuperscript{114} In general, all provisions must be reasonably related to the purpose of an ordinance.\textsuperscript{115} Second, the landlords claimed that the terms of the withholding provision are vague.\textsuperscript{116} This challenge suggested that the ordinance's terms fail to provide notice of what would constitute a legal withholding of rents.\textsuperscript{117} Third, the landlords argued that the rent withholding provision is confiscatory.\textsuperscript{118} The landlords claimed that they were being deprived of their rents without a fair hearing before a legitimate public authority.\textsuperscript{119}

Initially, the court decided that the rent withholding provision is reasonably related to the purposes of the ordinance. Under the ordinance, landlords are required to register their rental units with the Regulatory Board and are assessed a fee for each unit;\textsuperscript{120} these funds provide the Board with money to enforce the ordinance.\textsuperscript{121} Unfortunately, if the landlords failed to register, the Board would be unable to function. The Berkeley ordinance, however, establishes that a tenant may withhold rent if a landlord does not register.\textsuperscript{122} Therefore, according to the court, the rent withholding provision is critical to ensure landlord registration; the registration process is rationally related to the ordinance's legitimate purposes.\textsuperscript{123}

The court also determined that the rent withholding provi-
sion is not unconstitutionally vague. As explained by the court, it would uphold the provision if the provision gives fair notice to the landlords of their responsibilities regarding compliance, and if it provides reasonably adequate standards to guide enforcement. The court decided that the ordinance includes an adequate description of who may use the remedy, who determines whether a landlord has violated the ordinance, what amount may be withheld, and when the rent withholding should be discontinued.

Furthermore, the court found that under the Berkeley ordinance, “tenant” is confined to a lessee, assignee, or sublessee who believes in “good faith” that he is being charged excessive rents or that he lives in an unregistered apartment. It also determined that the final arbiter of whether a landlord has complied with the ordinance is the trial court when the landlord sues to evict for nonpayment of rent. Moreover, the court concluded that the ordinance clearly establishes that a tenant may withhold up to the full amount of periodic rent up until the trial court confirms that a landlord has complied with the ordinance. According to the court, the terms of the ordinance provide adequate notice of the conduct required to comply with it, and establish reasonably adequate standards to guide enforcement.

Finally, the court ruled that the withholding provision does not create a confiscation of rent without due process; rather it provides a defense to an unlawful detainer action. The court stated, “[T]he applicability of the withholding provision and the qualified defense it confers comes into question only after the landlord has initiated a wrongful detainer action. The provision affords the landlord no less due process protection than he would have normally.” The court concluded that, at most, the provision establishes a “substantive defense to unlawful detainer

124. Id. at 703, 693 P.2d at 307, 209 Cal. Rptr. at 728.
125. Id. at 702, 693 P.2d at 306, 209 Cal. Rptr. at 727.
126. Id. at 702-03, 693 P.2d at 306-07, 209 Cal. Rptr. at 727-28.
127. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 704, 693 P.2d at 308, 209 Cal. Rptr. at 729.
132. Id. at 704, 693 P.2d at 307, 209 Cal. Rptr. at 728.
actions as a means of ensuring compliance with the ordinance.”

2. The Preemption Challenge

California has two different preemption doctrines in its constitution: a general doctrine covering most cities, and a specific doctrine relating to chartered cities. Although Berkeley is a chartered city, the landlords conceded that rent control is a municipal affair over which chartered cities are given exclusive power to legislate. Thus, Berkeley is subject to the general rule that a city may make and enforce regulations that are not in conflict with general laws.

The Berkeley landlords argued that the rent withholding provisions are not only in direct conflict with general laws, and therefore, directly preempted, but that the provisions are also impliedly preempted by extensive state regulation in the area. The landlords based their argument upon three specific statutes that they claimed occupy the field of “when rent is due.” However, the court rejected these preemption claims and concluded that the rent withholding provisions are not actually rent withholding provisions, but substantive defenses to eviction suits.

Initially, the court dealt with the direct preemption argument in terms of section 1161 of the California Code of Civil Procedure that describes when a person is guilty of unlawful detainer. Interestingly, the court dismissed the relevant provi-
sion as procedural, even though the court had already determined that the rent withholding provisions are substantive. Additionally, the court rejected the landlords' contention that two other statutes are preemptive; the court determined that these statutes do not concern defenses to eviction suits. The court concluded, "[M]erely because defendants' ordinance 'imposes restraints which the State law does not, does not spell out a conflict between State and local law. On the contrary, the absence of a statutory restraint is the very occasion for municipal initiative.'"

The landlords' preemption by implication argument was similarly rejected by the court. In dismissing this preemption challenge, the court relied upon an established three step preemption by implication analysis. This analysis is based upon an examination of state statutes regulating the same field, their volume and content, and the effect of the local regulation on transient citizens. As noted by the court, coverage of the field of rent withholding is not complete enough to indicate that it has become an exclusive matter of state concern. Furthermore, neither the quantity nor the content of the statutes imply a legislative intent to occupy the field of rent withholding to the exclusion of municipally created defenses to unlawful detainer actions. Finally, rather than adversely affect transient citizens, to the extent they may be affected, the court found that the ordinance will probably have a positive effect on these individuals.

141. Fisher, 37 Cal. 3d at 706, 693 P.2d at 309-10, 209 Cal. Rptr. at 730.
142. Id. at 707, 693 P.2d at 310, 209 Cal. Rptr. at 731.
143. Id. (citing Inganamort v. Borough of Fort Lee, 62 N.J. 521, _, 303 A.2d 298, 307 (1973)).
144. Fisher, 37 Cal. 3d at 707-09, 693 P.2d at 310-12, 209 Cal. Rptr. at 731-32.
145. Id. at 708, 693 P.2d at 311, 209 Cal. Rptr. at 732 (citing Galvan v. Superior Court, 70 Cal. 2d 851, 859-60, 452 P.2d 930, 935-36, 76 Cal. Rptr. 642, 647-48 (1969)). The three step analysis asks: 1) is the subject matter so fully and completely covered by general law so as to clearly indicate that it has become exclusively a matter of state concern; 2) has the subject matter been partially covered by general law and couched in terms that clearly indicate a paramount state concern which will tolerate no further local action; or 3) has the subject matter been partially covered by general law, and the subject is of such a nature that the adverse effect on the transient citizens of the state outweighs the possible benefits to the local community. Id.
146. See supra note 145 and accompanying text.
147. Fisher, 37 Cal. 3d at 709, 693 P.2d at 311, 209 Cal. Rptr. at 732.
148. Id.
149. Id. This result was predestined by the court's determination that the rent with-
IV. ANALYSIS

The court's analysis of the due process and preemption challenges raised in *Fisher* demonstrates that only in rare circumstances will the court strike down a rent control ordinance. The *Fisher* decision involved a variety of applications of due process and preemption. In general, there are two distinct approaches to analyzing due process and preemption, and these approaches can be further divided. A due process attack may refer either to procedural due process or to substantive due process. However, in both situations, a court's analysis is primarily concerned with the reasonableness and essential fairness of the terms involved. Preemption, on the other hand, may involve either a direct conflict with a state statute, or, in the case of preemption by implication, there may be certain factors that imply a legislative intent to exclusively occupy an area of law.

A. DUE PROCESS

The court's due process analysis raised two important issues: the reasonableness, or rational relationship of the terms of the ordinance to its legitimate purpose of regulating rents, and the distinction between procedural and substantive due process in the context of rent control. The court's discussion of these two issues demonstrates the limited future relevance of due process challenges to rent control.

Courts have consistently held that rent control is a reasona-
ble means for protecting local health and welfare, and that the objectives of rent control are a legitimate local concern, i.e., ensuring a heterogenous housing market, stabilizing rents, and providing shelter for the poor. Therefore, the potential result of regulating private property justifies the exercise of the state's police power, and establishes rent control as a legitimate means for enforcing that result. The court's conclusion that rent control is a legitimate means of enforcing local housing policy, however, reflects a general deference by the courts to economic legislation rather than an assumption that rent control is a means of enforcing local housing policy.

Rent control ordinances are not uniform, and the rational relationship between the terms of an ordinance and its legitimate purpose raises a number of due process issues. Generally, if there is any conceivable rationale for upholding economic legislation, the courts will do so. However, the Fisher court did provide some guidelines as to when rent control ordinance provisions will be rationally related to their legitimate purposes.

When discussing the ordinance's rate of return standard, the court referred to what constitutes a "reasonable" rate of return to landlords. When an economist discusses business costs, he includes in those costs, the return that can be made if a business' capital were invested in another enterprise with similar risks and information costs—the business' opportunity costs. This type of analysis accounts for the fact that if an investor can earn more in another enterprise with comparable costs, it would be illogical for him to remain in an enterprise earning less. When an ordinance ties its rate of return to investment, its meaning is

156. See generally Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (the existence of an "emergency" is not required to establish the legitimacy of rent control).
157. Id. at 146, 550 P.2d at 1013, 130 Cal. Rptr. at 477. "It is the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good." Id.
158. See supra note 16.
159. Id.
160. See D.N. McCloskey, The Applied Theory of Price 551 (1982). If one can obtain a 10% return on an investment in a tax free, risk free savings bond, but only a 9% return from renting property (after tax benefits, risk, and information costs have been discounted), landlords would be effectively losing 1% return; it would be irrational for them to continue in the rental business when their investment is worth more elsewhere. Id.
relative to the returns being made from other investments.\textsuperscript{161} The court recognized this relationship, and suggested that, "[A] just and reasonable return on investment is one that is commensurate with returns on investments in other enterprises having comparable risks."\textsuperscript{162} Therefore, when the court referred to confiscatory rates, it was referring to those rates that would encourage landlords to divest themselves of their rental properties and invest their monies elsewhere.\textsuperscript{163}

This interpretation by the court of confiscatory rates, enables landlords to challenge a local ordinance by using statistics that indicate the landlords' personal expenses and the returns being made in other industries with comparable risks. Although the landlords in Fisher raised challenges that were primarily based on a facial attack of the ordinance and not an attack of the ordinance as applied,\textsuperscript{164} it may still be possible to show that an ordinance is too inflexible on its face to allow for returns commensurate with other enterprises having comparable risks.

The returns in other industries analysis, however, is probably more appropriate for an attack of an ordinance as applied. In most cases, a facial attack of an ordinance's rate of return standard will be, in itself, unadvisable unless the standard sets specific profit amounts. If an ordinance provides for specific rents and adjustments without sufficient flexibility, a landlord can then attack the ordinance as too inflexible to account for changing returns in other industries and the relative effect on rental properties.

A more logical facial attack of an ordinance would be a challenge to the procedural process. In the area of procedural due process, the court seemed more willing to establish specific requirements for the legislature.\textsuperscript{165} Although the Fisher court

\textsuperscript{161} Id. If a person decides to operate a business in a vacuum, that person may decide that there is a minimum rate of return that would make the business worth his effort. Id. In a multi-business environment, however, an investor is interested in maximum returns, and therefore, achieving a maximum return relative to other industries with similar risks and information costs is what makes the business worth the effort. Id.

\textsuperscript{162} Fisher, 37 Cal. 3d at 683, 693 P.2d at 292, 209 Cal. Rptr. at 713.

\textsuperscript{163} See supra notes 162 and 163.

\textsuperscript{164} Fisher, 37 Cal. 3d at 653-54, 693 P.2d at 270, 209 Cal. Rptr. at 691.

\textsuperscript{165} Id. at 690-91, 693 P.2d at 298, 209 Cal. Rptr. at 718-19 (pointing out defects caused by delays in the procedures for implementing rate adjustments).
would still attempt to uphold an ordinance's procedural mechanism, the court has established certain requirements that could potentially be used to attack an ordinance in the future. For example, as far as the rate adjustment mechanism in Berkeley's ordinance, the court ruled that it would strike down any ordinance that caused a greater delay than was practically necessary to fulfill the ordinance's objective. This decision has, in effect, mandated a general adjustment mechanism for certain cost increases. Although the court upheld the procedural mechanisms in Berkeley's ordinance, there is no reason why that particular challenge cannot be effective against other ordinances that potentially cause a greater delay.

An example of how the court would continue to consider any explanation for the rationality of a procedural mechanism is the court's discussion of the rent withholding procedure. The court insisted that one of the rent withholding provisions in the Berkeley ordinance creates a "substantive defense to unlawful detainer actions as a means of ensuring compliance with the ordinance." This provision has two sections: one providing for withholding to ensure compliance, and one creating a substantive defense to an unlawful detainer if a tenant has acted in good faith. Significantly, the court determined from only one section in the provision that the rent withholding procedure is not procedural but is substantive. Since the court's interpretation was based upon the defense established by the provision,

166. Id. at 687, 693 P.2d at 295, 209 Cal. Rptr. at 716.
167. Id. at 687, 693 P.2d at 296, 209 Cal. Rptr. at 716. The court stated that a general adjustment provision, "[W]ill be required when the 'magnitude of the job to be done' so demands." Id. The court also upheld Berkeley's current ordinance, as opposed to the Birkenfeld ordinance, because it provided general adjustments for property tax and utility increases whereas the Birkenfeld ordinance did not. Id. at 690-91, 693 P.2d at 298, 209 Cal. Rptr. at 718-19.
168. Id. at 704, 693 P.2d at 308, 209 Cal. Rptr. at 729.
169. See Ordinance, supra note 2, § 15(a)(1), (a)(2). For the text of the relevant rent withholding provision, see supra note 29.
170. Fisher, 37 Cal. 3d at 704, 693 P.2d at 308, 209 Cal. Rptr. at 729. One author explains that, "Although much ink has been spilled by courts and commentators in the attempt to separate questions of substance and process, the attempt can never be wholly successful because the questions are functionally inseparable. See J.L. Mashaw, Due Process in the Administrative State 5 (1985). In the area of substance, a significant process development occurs when the state is precluded from legislating in certain areas; here, the process of who decides is at the forefront. Id. In the procedural area, questions regarding who should decide an issue are fundamentally directed at what is to be decided; the substantive result is the overriding concern of the parties. Id.
the court has provided drafters of rent control ordinances with a means of escaping a procedural due process challenge; they simply have to add a qualified defense to the rent withholding provision.

B. Preemption

California's Constitution allows all cities and counties to make and enforce regulations and ordinances not in conflict with general laws. Historically, it has been up to the courts to decide what is meant by "in conflict with general laws." Over the years, courts have recognized two situations that may involve a conflict between state and municipal legislation: when a state statute expressly prohibits local regulation in the area (or a municipal regulation is duplicative of state law), and when a municipality imposes additional legislation in an area fully occupied by the state. The Fisher decision demonstrates the court's preemption analysis in both of these areas.

The retaliatory eviction presumption is an example of a regulation expressly prohibited by the state. According to the court, this presumption in the ordinance is directly preempted by one section in the Evidence Code. Part of this section provides, "Except as otherwise provided by law." The crucial issue in this area is the definition of "law" and its further refinement into the term "statute," and whether municipal ordinances fit into that definition. In order to determine whether a direct conflict exists between the language of a state statute and a local ordinance, the inquiry is one of statutory construction, semantics, and a consideration of certain factors such as custom.

The court's analysis was an historical one that examined the relationship between the statutory code and local regulation.

171. See CAL. CONST. art. XI, § 7.
172. See Comment, supra note 155, at 604.
173. See id. at 604-05.
174. Fisher, 37 Cal. 3d at 697, 593 P.2d at 303, 209 Cal. Rptr at 724.
175. Id.
176. See CAL. EVID. CODE § 500 (West 1966).
177. See id. § 160 (1966).
over time.\textsuperscript{178} As explained by the court, the Evidence Code has historically been an exclusive state affair; only the state can determine the rules of evidence and interpret them.\textsuperscript{179} Since local ordinances cannot construe the rules of evidence, the Evidence Code exception for statutes does not apply to municipal ordinances. This is a somewhat narrow view in contrast with other situations in which the courts have interpreted the term statute to include municipal ordinances.\textsuperscript{180} However, the court was satisfied that the legislature never intended to include local ordinances within the definition of statute as it relates to the Evidence Code.

As far as the restraint on alienation of property issue, the court found that the term statute does include municipal ordinances.\textsuperscript{181} The court's rationale for this, however, was that prior decisions had never applied the Civil Code's restraint on alienation language to statutes or ordinances; this language had always been applied to private restraints.\textsuperscript{182} The court's historical analysis in these two areas indicates that unless precedent has established that a statute was intended to exclude municipal ordinances, the court will uphold an ordinance. This approach to direct preemption tends to relieve the court of personal responsibility; it is probably a result of the court's general deference to economic legislation unless some actual conflict of purpose or treatment can be proved.

The rent withholding provisions in the ordinance provide an example of direct preemption by duplicative legislation and preemption by implication. In both areas, the court was concerned with three statutes introduced by the landlords.\textsuperscript{183} In general, legislation must be reasonable and appropriate to the needs of a particular locality.\textsuperscript{184} Since the court previously decided that the rent withholding provisions are reasonably related to the legitimate needs of the city, the court only pointed to the distinctions

\textsuperscript{178} Fisher, 37 Cal. 3d at 698, 693 P.2d at 303-04, 209 Cal. Rptr. at 724.
\textsuperscript{179} Id. at 698, 693 P.2d at 304, 209 Cal. Rptr. at 725.
\textsuperscript{181} Fisher, 37 Cal. 3d at 693, 693 P.2d at 300, 209 Cal. Rptr. at 721.
\textsuperscript{182} Id. at 693, 693 P.2d at 300, 209 Cal. Rptr. at 720-21.
\textsuperscript{183} See supra note 138 and accompanying text.
\textsuperscript{184} Natural Milk Producers Assn. v. City & County of San Francisco, 20 Cal. 2d 101, 109, 124 P.2d 25, 29 (1942).
between the cited statutes and the relevant rent withholding provisions.\footnote{Fisher, 37 Cal. 3d at 704-09, 693 P.2d at 308-12, 209 Cal. Rptr. at 729-32.}

The court determined that two of the statutes introduced by the landlords are additional legislation rather than duplicative, and therefore, are not preemptive legislation.\footnote{Id. at 707, 693 P.2d at 310, 209 Cal. Rptr. at 731 (§§ 1942 and 1947 of the Civil Code were found not to be preemptive legislation).} According to the court, the rent withholding provisions are a substantive defense to eviction suits and a means of enforcing the ordinance, and the cited statutes are unrelated to the rent withholding provisions.\footnote{Fisher, 37 Cal. 3d at 707, 693 P.2d at 310, 209 Cal. Rptr. at 731.} The court determined that as additional legislation, neither the quantity nor the content of the cited statutes imply any legislative intent to exclude further regulation.\footnote{Id.} Furthermore, the court noted that the imposition of restraints in an area that is not covered by state law, i.e., defenses to eviction suits and enforcing compliance with ordinances, is a valid exercise of the city’s police power.\footnote{Id.}

The one statute cited by the landlords that does relate to eviction suits was determined by the court to be unrelated to the rent withholding provisions.\footnote{Id. at 706, 693 P.2d at 309-10, 209 Cal. Rptr. at 730 (§ 1161 of the Civil Procedure Code was found to be procedural, whereas the provisions in the ordinance were found to create a substantive defense to an unlawful detainer action).} As explained by the court, this statute that defines unlawful detainer is procedural, whereas the ordinance creates a substantive defense to an unlawful detainer action.\footnote{Fisher, 37 Cal. 3d at 707, 693 P.2d at 310, 209 Cal. Rptr. at 731.} The court alleged that the "‘mere fact that a city’s exercise of the police power creates such a defense does not bring it into conflict with the state’s statutory scheme.’"\footnote{Id. (citing Birkenfield v. City of Berkeley, 17 Cal. 3d 149, 550 P.2d 1016, 130 Cal. Rptr. 480 (1976)).} On this basis, the court did not find a direct conflict.

Due to the court’s interpretation that the rent withholding provisions create a substantive defense to unlawful detainer, and that such a defense is not in conflict with statutory schemes relating to unlawful detainer, the court dismissed the presence of
preemption by implication.\textsuperscript{193} Although courts have stressed that preemptive legislation may be evidenced by a multiplicity of statutes or a single enactment,\textsuperscript{194} the \textit{Fisher} court observed that the three statutes raised by the landlords are insufficient for this purpose.\textsuperscript{195}

Only one of the three factors that determines whether an ordinance is preempted by implication could have applied; this factor considers whether an area that is partly covered by state law clearly indicates a paramount state concern that will not tolerate additional local action.\textsuperscript{196} Even if one could argue that the three cited statutes indicate a paramount state concern, the court's conclusion that the relevant rent withholding provisions are substantive defenses to eviction suits takes the ordinance completely out of the range of the three statutes.

V. CONCLUSION

The \textit{Fisher} decision demonstrates the courts' strong deference to legislation regarding economic issues. The majority of due process challenges involve attempts to get courts to consider the real effect of a regulation in achieving its intended purpose. However, these challenges fail because the intended purposes of regulations are subjective, and beyond the scope of the courts' "any conceivable rationale" approach in economic legislation.

In \textit{Fisher}, this deference by the courts also applied in the area of preemption uphold. Not only did the California Supreme Court uphold most of the provisions in the Berkeley rent control ordinance that were attacked by the Berkeley landlords on preemption grounds, but the court also showed a creative disposition toward maintaining economic legislation. The court's determination that a rent withholding provision in the ordinance is a substantive defense to an unlawful detainer is surprising. To keep preemption in perspective, however, the court did rely on an historical analysis where nontraditional interpretation was unnecessary.

\textsuperscript{193} \textit{Fisher}, 37 Cal. 3d at 709, 693 P.2d at 311, 209 Cal. Rptr. at 732.
\textsuperscript{194} \textit{See In re Martin}, 221 Cal. App. 2d 14, 17, 34 Cal. Rptr. 299, 301 (1963).
\textsuperscript{195} \textit{Fisher}, 37 Cal. 3d at 709, 693 P.2d at 311, 209 Cal. Rptr. at 732.
\textsuperscript{196} \textit{See supra} note 145.
In both the due process and preemption areas, the court appears to have struck a balance between competing interests, although in favor of the local regulation. Even though a standard due process analysis requires deference to economic legislation, the court did provide some limitations. Among these limitations are determinations by the court that long delays in rent adjustments due to inflation are confiscatory, and that a fair return on investment requires a return commensurate with other industries with comparable risks. In the area of preemption, municipalities are limited from legislating in those areas traditionally occupied exclusively by the state.

The balance established by the Fisher court seems to be a compromise between a greater deference in the area of preemption and a slightly heightened standard of reasonableness in the area of due process. Although the court demonstrated a creative disposition toward upholding local ordinances against preemption challenges, the court’s decision suggests that landlords are entitled to profits sufficient to ensure their continued presence in the rental market.

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