

How The Courts Affect Social Change Through Rent Control

Alexander Garcia

ABSTRACT

This article explores the Supreme Court's attitude toward one solution to the unaffordability of rental housing: rent control. This policy, more formally known as rent stabilization, allows jurisdictions to cap the amount landlords can charge for rent to curb exploitative practices. The policy is controversial, as some economists believe it is inefficient and ineffective at making housing more affordable. In contrast, others view it as a quick, easy, and relatively low-cost remedy to an ongoing crisis. The Supreme Court has upheld rent control laws, though not without exceptions, as this article outlines. These laws are drafted, debated, enacted, and implemented by other branches of government in cities and states. The Court generally steps aside to let the democratic process decide whether a city or state adopts or rejects this policy. This article argues that courts cannot affect social change regarding rent control because they are limited by the legislative process and their own judicial doctrines. Despite these constraints, the Supreme Court's deference helps maintain these laws in cities where they have been enacted, thereby assisting many in affording their homes.

Though John Oliver Wendell Holmes has deemed housing a “necessary of life,”¹ efforts making it affordable have always competed with protections guarding property against perceived government overreach.² The Supreme Court has generally supported affordable housing regulations, but its role in affecting relevant policies is more complicated than Justice Holmes’ quotation indicates. This paper examines rent stabilization as a solution to housing affordability, the status of those policies in the United States, and their legal context. Because rent control is enacted, crafted, and implemented through the democratic process, the Court is left either to support or strike down such laws, making justices respondents to, rather than leaders of, social change in this area of social welfare. Constrained as they are by their inability to create or enforce policies, justice’s adherence to precedent and judicial doctrine, and by rogue lower court action, the Supreme Court’s support serves as a necessary legitimizing function that is part of a system helping millions afford their homes in an ongoing crisis.

Rent Control as a Solution to Unaffordable Housing

High demand, lack of supply, and surging prices have placed an unprecedented housing burden on the U.S. population:³ a concerning trend that is only worsening.⁴ Vacancy rates, the amount of available housing that indicates market pressure, have fallen to historic lows, reaching 5.8 percent in 2021.⁵ Affordability is a national issue, as economists supporting rent stabilization have pointed out, “There is not a single state where a worker earning a full-time minimum wage salary can afford a modest two-bedroom apartment.”⁶ The proportion of those “moderately cost-burdened” families, spending almost a third of their income on housing, has risen by six percentage points

1. *Block v. Hirsch*, 256 U.S. 135, 156 (1921).

2. Karl Manheim, “Rent Control in the New Lochner Era,” *UCLA Journal of Environmental Law & Policy* 23, no. 2 (December 22, 2005), 213, https://link.gale.com/apps/doc/A156203130/AONE?u=tel_middleten&sid=ebsco&xid=aab174eb.

3. “Housing Affordability in the US,” *Moody’s.com*. Moody’s Analytics Inc., May 16, 2023, www.moody’s.com/web/en/us/about/insights/data-stories/us-rental-housing-affordability.html; Joint Center for Housing of Harvard University, *America’s Rental Housing*, 2022, 32, <https://www.jchs.harvard.edu/americas-rental-housing-2022>

4. Joint Center for Housing of Harvard University, 15.

5. Joint Center, 23.

6. Mark Paul, et al., “Re: Tenant Protections for Enterprise-Backed Multifamily Properties Request for Input,” July 28, 2023, https://peoplesaction.org/wp-content/uploads/2023/07/Economist-Sign-on-Letter_-FHFA-RFI-Response_-1.pdf.

since 2001.⁷ Compounding these problems for low-income households is that landlords can charge nearly as much for apartments in poor neighborhoods as they do in wealthier areas,⁸ often making immense profits.⁹ High rents are part of a system that reduces the amount of money left over for much else,¹⁰ and can have incredibly destabilizing consequences for individuals¹¹ and communities.¹²

There have been many proposed solutions to these issues; however, their creation, implementation, and enforcement fall outside the scope of judicial authority. It is within state legislatures and municipal governments where policymakers address these problems; the solutions they craft falling into supply and demand-side concentrations. Building more housing through re-zoning, government subsidies for investments, and tax credits are solutions that incentivize developers to increase the available stock of rental property.¹³ Through cash transfers, governments can also provide those in need with subsidies, vouchers, and rental assistance.¹⁴ However, this system does not address a core concern: landlords can still exploit tenants through high rent.¹⁵ In this way, vouchers can become a wealth transfer from the public to landlords.¹⁶ These needs, lowering rent and

7. Joint Center, 4.

8. Matthew Desmond, *Evicted: Poverty and Profit in the American City* (London: Penguin Books, 2016), 78.

9. Desmond, 154.

10. Joint Center, 4.

11. Mark Paul, et al. “Re: Tenant Protections”

12. Desmond, *Evicted: Poverty and Profit*, 75.

13. Jack Favilukis, Pierre Mabilie, and Stijn Van Nieuwerburgh, “Affordable Housing and City Welfare,” *Review of Economic Studies* 90, no. 1 (January 2023): 293, 298, <https://doi.org/10.1093/restud/rdac024>; Petition for writ of certiorari at 1, Community Housing Improvement Program, et al. v. City of New York, New York, et al., No. 22-1095 (S. Ct. cert. denied. Oct. 2, 2023). https://www.supremecourt.gov/DocketPDF/22/22-1095/266353/20230508153206175_CHIP%20Petition%20for%20Cert.pdf

14. Joint Center, 36.

15. Vicki Been, Ingrid Gould Ellen, and Sophia House, “Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws,” *Fordham Urban Law Journal* 46, no. 5 (October 1, 2019), 1074-1075, <https://ezproxy.mtsu.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=edsgao&AN=edsgcl.607543639&site=eds-live&scope=site..>

16. Tom Slater, *Shaking Up the City: Ignorance, Inequality, and the Urban Question*. (Oakland, California: University of California Press, 2021), 90.

ending landlord exploitation, present another basic solution, albeit controversial: rent control.¹⁷

Despite the subject's reputation, there has been little research on modern-day rent stabilization laws;¹⁸ the available data is from studies that are either short-term,¹⁹ limited to one city,²⁰ or based on outdated data.²¹ Still, there is a prevailing sense that economists see rent control as, at best, an inefficient policy and, at worst, counterproductive to achieving its well-intentioned objectives.²² These arguments are important to consider when evaluating the legal system's role in affecting social change because litigants often use them as support for their claims against the policy. Some scholarship has found that because rent control limits profitability and unit value,²³ it leads to decreased stock.²⁴ However, other research has yet to find much overall effect on housing supply.²⁵ Another concern is that the lack of profit motive discourages maintenance and lowers the overall quality of rental property.²⁶ The limited research has been mixed in this regard: some studies suggest reduced upkeep,²⁷ while others show no substantial evidence for that

17. Slater, 103.

18. Arnott, Richard. "Time for Revisionism on Rent Control?" *Journal of Economic Perspectives* 9, no. 1 (January 15, 1995): 99–120. <https://www.jstor.org/stable/2138358>, 114.

19. NYU Furman Center, *Housing Stability and Tenant Protection Act: An Initial Analysis of Short-Term Trends*, (2021), 21, https://furmancenter.org/files/Rent_Reform_7_1_A_remediated.pdf.

20. Been, "Laboratories of Regulation," 1046.

21. Been, 1077.

22. Arnott, "Time" 99; Shoked, "American Courts' Image of a Tenant," 278.

23. NYU Furman Center, *Housing*, 21.

24. Brian J. Asquith, "Housing Supply Dynamics under Rent Control: What Can Evictions Tell Us?" *AEA Papers and Proceedings* 109 (May 1, 2019), 41-42, <https://www.jstor-org.ezproxy.mtsu.edu/stable/26723978>; Rebecca Diamond, Tim McQuade, and Franklin Qian, "The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco," *The American Economic Review* 109, no. 9, (September 1, 2019), 3366, <https://www.jstor.org/stable/26773267>; Slater, *Shaking Up the City*, 99.

25. John I. Gilderbloom, and Lin Ye, "Thirty Years of Rent Control: A Survey of New Jersey Cities," *JOURNAL OF URBAN AFFAIRS* 29, no. 2 (January 1, 2007), 214. <https://search-ebscohost-com.ezproxy.mtsu.edu/login.aspx?direct=true&db=edswss&AN=000245895200005&site=eds-live&scope=site>.

26. Charles K. Gehrlich, "Stronger than Ever: New York's Rent Stabilization System Survives Another Legal Challenge," *Fordham Law Review* 90, no. 2 (November 1, 2021), 858, <https://heinonline.org/HOL/P?h=hein.journals/flr90&i=849>.

27. David P. Sims, "Out of Control: What Can We Learn from the End of Massachusetts Rent Control?" *Journal of Urban Economics* 61, no. 1 (January 1, 2007), 150, <https://doi.org/10.1016/j.jue.2006.06.004>.

claim.²⁸ Overcoming the gap in research, much of the prejudice is based on outdated and obsolete policies,²⁹ or couched in abstract and unrealistic economic models that bear no semblance to reality.³⁰ Housing is not a perfect market,³¹ and should not be treated as such, especially when rent control's benefits to social welfare are substantial.³²

Rent Control in the United States

Ideally, rent control protects tenants from economic and social conditions that negatively affect affordability,³³ although it is up to legislators and other policymakers, not judges, to formulate the details of effective policy. As Gerald Rosenberg suggests, “effective implementation of significant social reform requires long-term planning and serious consideration of costs.”³⁴ As such, the adversarial nature of the legal system in the United States is inherently misaligned with the demands of coherent economic policy creation; policymakers that craft these regulations account for a great deal. In the 1970s, responding to a wave of social welfare mobilization, several cities enacted rent stabilization ordinances, which allowed for mandated gradual rent increases to limit economic exploitation.³⁵ Hallmarks of these laws include housing emergency triggers,³⁶ variations in sizes and types of buildings on which regulations apply, and time-bound allowances for deregulation.³⁷ Other tenant protections include safeguards against harassment and evictions, a tenant-friendly appeal process for rent increases, maintenance and quality assurances, and restrictions on how and when owners can convert property

28. NYU Furman Center, *Housing Stability and Tenant Protection Act*, 21; Asquith, “Housing Supply Dynamics under Rent Control: What Can Evictions Tell Us?” 41.

29. Arnott, “Time” 118.

30. Mark Paul, et al. “Re: Tenant Protections”

31. Manheim, “Rent Control in the New Lochner Era,” 212.

32. Favilukis, “Affordable Housing and City Welfare,” 294.

33. Christina McDonough, “Rent Control and Rent Stabilization as Forms of Regulatory and Physical Takings,” *Boston College Environmental Affairs Law Review*, (June 22), 364, <https://ezproxy.mtsu.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=edsgao&AN=edsgcl.165626401&site=eds-live&scope=site>.

34. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: The University of Chicago Press, 2023), 27.

35. Been, “Laboratories,” 1043-1044; Arnott, “Time,” 101-102

36. Brief of respondents N.Y. Tenants and Neighbors, et al. at 7, Community Housing Improvement Program, et al. v. City of New York, New York, et al., No. 22-1095 (S. Ct. cert. denied. Oct. 2, 2023) https://www.supremecourt.gov/DocketPDF/22/22-1095/272733/20230724144605563_22-1095%20Brief%20in%20Opposition.pdf.

37. Been, “Laboratories,” 1049-1052.

from rental stock to condominiums for sale. Through decontrol and hardship provisions, modern rent control upholds evenhandedness, protecting the right to reasonable returns on investments.³⁸ These measures require the kind of careful formulation and expertise beyond the “episodic case-by-case” nature of litigation.³⁹

Though many economists condemn rent control, it is within the democratic process that the policy is supported or banned. There is no constitutional right to affordable housing, so any policy that addresses these concerns must have support from the electorate and from political actors.⁴⁰ Favorable polling reflects approval for the policy; however, this does not necessarily translate to victory at the ballot box.⁴¹ Referenda offer mixed results in California and have repealed rent control in Massachusetts, though the three cities with rent control there voted to keep it, indicating its popularity.⁴² Tenant-led organizations often champion the cause, including N.Y. Tenants and Neighbors, Community Voices Heard, and the Coalition for the Homeless, who have all defended New York City’s Rent Stabilization Law (RSL) in court.⁴³ Whether rent control is passed or banned, the courts defer to the democratic process, and so remain on the side of public opinion, wherever that may sway. Prominent politicians, including former New York Governor Andrew Cuomo and former New York City Mayor Bill De Blasio, are

38. Arnott, “Time” 102.

39. Michael McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism*, (Ithaca: Cornell University Press, 1986), 226, quoted in Rosenberg, *The Hollow Hope*, 27.

40. Gerald N. Rosenberg, *The Hollow Hope*, 15.

41. Mark Baldassare, et al., *PPIC Statewide Survey: Californians and Their Economic Well-Being* (Public Policy Institute of California, November 2023), 37. <https://www.ppic.org/?show-pdf=true&docraptor=true&url=https%3A%2F%2Fwww.ppic.org%2Fpublication%2Fppic-statewide-survey-californians-and-their-economic-well-being-november-2023%2F>; UMass Amherst, *Toplines* (Amherst: University of Massachusetts Amherst, April 2023), 9, https://polsci.umass.edu/sites/default/files/AllToplinesApril2023_0.pdf.

42. Jennifer Ludden, “Rent control expands as tenants struggle with the record-high cost of housing,” NPR, November 28, 2022, <https://www.npr.org/2022/11/28/1138633419/rent-control-economists-tenants-affordable-housing-ballot-measures>; Scott Wilson, “California voters reject efforts to repeal gas tax and rent-control limitations,” *Washington Post*, November 7, 2018. https://link-gale-com.ezproxy.mtsu.edu/apps/doc/A561380514/ITOF?u=tel_middleten&sid=bookmark-ITOF&xid=d1e07e12; “Battle Goes On as Rent Control Is Defeated in Massachusetts,” *New York Times*, November 22, 1994, https://link-gale-com.ezproxy.mtsu.edu/apps/doc/A174491086/ITOF?u=tel_middleten&sid=bookmark-ITOF&xid=e4558687.

43. Slater, *Shaking Up the City*, 92; No. 22-1095 (S. Ct. cert. denied. Oct. 2, 2023). https://www.supremecourt.gov/DocketPDF/22/22-1095/266353/20230508153206175_CHIP%20Petition%20for%20Cert.pdf.

among rent control's supporters.⁴⁴ This backing not only contributes to the mix of voices calling for a just policy to ensure housing affordability; without it, any grassroots action would be stymied when these laws require executive authorization. Former Oregon Governor Kate Brown's support makes this necessity clear when, in 2019, she signed into law a bill implementing rent control state-wide, making Oregon the first to do so.⁴⁵ Additionally, crucial support comes from smaller political players, including state legislators and city council members, whose backing is needed for rent control's passage and implementation.⁴⁶ Rent control remains a political issue voters decide on through referenda and elections.

Diverging from a trend of welfare assurances in the 1970's, several states, beginning with Louisiana, enacted sweeping prohibitions banning rent control. Additionally, conservative lobbyists provided states with templates for rent control preemption laws;⁴⁷ thirty-two states ban these tenant protections.⁴⁸ Currently, California, Washington D.C., Maryland, New Jersey, New York, Minnesota and Oregon are the only states that allow rent control.⁴⁹ However, legislation has been proposed to remove bans against the policy in Florida, Colorado, Illinois, and Nevada.⁵⁰ Some of the longest-standing and most robust limits on rent are New York City's Rent Stabilization Laws (RSL). Enacted in 1974,⁵¹ they cover almost one million residents or forty four percent of tenant-occupied dwellings in the city.⁵² In June of 2019, the New York State Legislature strengthened

44.. Gehnrich, "Stronger than Ever," 833 and 866.

45. Lauren Dake, "Oregon's Experiment in Statewide Rent Control," NPR, March 2019, <https://www.npr.org/transcripts/708302378>.

46. Been, "Laboratories," 1060-1061; Shoked, "American Courts' Image of a Tenant," 254; Gilderbloom, "Thirty Years of Rent Control," 29; Rosenberg, *The Hollow Hope*, 39-40.

47. Shoked, 265.

48. Been, "Laboratories," 1049.

49. Been, 1049.

50. Slater, *Shaking Up the City*, 104.

51. Gehnrich, "Stronger than Ever," 836.

52.. Brief of respondents N.Y. Tenants and Neighbors, et al., 1.; Madeleine Parker, and Karen Chapple, "Revisiting Rent Stabilization in the Neighborhood Context: The Potential Impact of Rent Regulation on Community Stability and Security in the New York Metropolitan Region," *Fordham Urban Law Journal* 46, no. 5 (October 1, 2019), 1153, <https://ezproxy.mtsu.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=edsgao&AN=edsgcl.607543641&site=eds-live&scope=site>.

these existing laws by passing the Housing Stability and Tenant Protection Act, which has faced recent legal challenges.⁵³

Though the Court may favor rent stabilization, its efforts to alleviate housing unaffordability are often frustrated by an inability to enforce compliance. Enforcement often involves disclosure and proper documentation requirements, punishments for violations, and legal relief for abused tenants.⁵⁴ Most local governments administer rent stabilization through institutions beyond the court's influence.⁵⁵ As Rosenberg explains, "Court decisions, requiring people to act, are not self-executing."⁵⁶ For rent control to be effective, it needs competent and supportive administration; if bureaucracy is neither, any supportive court action produces no social change.⁵⁷ Political limitations, through elections or appointment, also offer pressures that may or may not align with court intentions.⁵⁸ Because compliance with legislation is necessary for effective implementation, and rent stabilization is a "tool [that] is administrative, not judicial,"⁵⁹ the Court's ability to create broad social change in this field is further constrained.

Rent Control in Court

Primarily, these are considerations for the democratic process, while the Court's main concerns center on rent control's legality when challenged. While judges are limited by the bounds of the dispute before them,⁶⁰ they are also constrained by precedent, further preventing their ability to craft competent policy that evaluates, and addresses rent control's complexities. Following the holding in the 1955 case *Williamson v. Lee Optical of Okla., Inc.*, the Supreme Court typically does not replace carefully crafted legislative action created by elected representatives for their own interpretations of narrow economic

53.. Brief of respondents N.Y. Tenants and Neighbors, et al., 6.

54.. Been, "Laboratories," 1066; Been, 1058.

55.. Shoked, "American Courts' Image of a Tenant," 284; Gehrich, "Stronger than Ever," 838.

56.. Rosenberg, *The Hollow Hope*, 20.

57.. Bigad Shaban et al., "Lack of Oversight May Be Allowing Some Oakland Landlords to Wrongfully Evict Families, Elderly," NBC Bay Area, Feb. 16, 2018, <https://www.nbcbayarea.com/investigations/Lack-of-Oversight-May-be-Allowing-Some-Oakland-Landlords-to-Wrongfully-Evict-Families-Elderly-474352123.html> Been, "Laboratories," 1057.

58.. Been, "Laboratories," 1060; Rosenberg, *The Hollow Hope*, 21.

59.. Shoked, "American Courts' Image of a Tenant," 283-284.

60. Rosenberg, *The Hollow Hope*, 27.

arguments.⁶¹ This attitude of deference for legislation explains much of the Court's general preservation of rent control laws.⁶² However, a further examination of precedent and constitutional law is necessary to understand the legal justifications for these types of price restrictions.

Challenges against rent control arise from interpretations of the Fifth Amendment, that applies to national governments, which states that "private property [shall not] be taken for public use, without just compensation."⁶³ This concept applies not only to the government physically taking property from owners, but also to imposed price restrictions, whereby landlords may be deprived of the rightful economic use of their property.⁶⁴ Other challenges focus on the Fourteenth Amendment, which applies to state and local governments and establishes the necessity of due process for deprivations of property.⁶⁵ Challenges of this nature are subject to rational basis review, which is generally deferential to legislative authority.⁶⁶ Two Supreme Court cases established tests for determining the legitimacy of these types of regulations. In *Penn Central Transportation Co. v. New York City*, the Supreme Court ruled that they would assess regulations by balancing the government's actions against the economic effects on property owners, a determination that proves to be more deferential to legislation.⁶⁷ In contrast, *Agins v. City of Tiburon* stipulated that a law is unconstitutional if it does not "substantially advance" an accepted state interest, a decision that places significantly more burden on regulators and favors landlord's interests.⁶⁸ These two tests have quite different levels of scrutiny, and the ruling in *Agins* opened the door for challenges on rent control based on the policy's effectiveness.⁶⁹

Two subsequent Supreme Court cases resolved the conflicting conclusions of *Penn Central* and *Agins*, though not without introducing their own complications. In *Pennell v. City of San Jose*, which dealt with a challenge to San Jose's rent control based on its use of a tenant hardship clause, the majority upheld the lower court's rulings in favor

61. 348 U.S. 483 (1955); Gehnrich, "Stronger than Ever," 867-868.

62. Shoked, "American Courts' Image of a Tenant," 266.

63. U.S. Const. amend. V.

64. McDonough, "Rent Control and Rent Stabilization," 362-363.

65. U.S. Const. amend. XIV § 1.

66. Gehnrich, "Stronger than Ever," 849.

67. 438 U.S. 104 (1978).

68. 447 U.S. 255 (1980).

69. Manheim, "Rent Control in the New Lochner Era," 229.

of the ordinance, using the *Penn Central* test in part.⁷⁰ Crucially, the Court determined that this case was premature, leaving open the possibility for future challenges. Justices Scalia and O'Connor dissented on the grounds that rent control based on hardship is a welfare system that overburdens landlords who are not responsible for that hardship, and so should be struck down.⁷¹ Over a decade later, in *Lingle v. Chevron U. S. A. Inc.*, the Court invalidated the *Pennell* dissent and the *Agins* test, reasoning that these arguments used a higher degree of scrutiny towards legislative action than precedent directed.⁷² This decision highlights how, in the context of rent control, doctrinal constraints in the form of following precedent protect the policy.

While the Supreme Court has been relatively supportive of rent control, lower courts have been less consistent and, in some cases, outright hostile. In several cases, the Ninth Circuit used the “substantially advance” test established in *Agins v. City of Tiburon* to strike down rent control laws as violating the Fifth Amendment’s takings clause based on arguments that the ordinances do not resolve their stated goal.⁷³ Other courts have had to decide whether, in cases where states do not explicitly ban the measure, they should interpret statutes as doing so. In these instances, lower courts have preempted legislative bans, thus limiting regulatory schemes as has happened in Connecticut, Maryland, Florida, Wisconsin, and Illinois. Lower courts have also been inconsistent regarding whether municipalities can enact rent control through Home Rule authorizations, which generally grant cities their own powers to promote welfare. This was the case in Pennsylvania, where the state’s highest court struck down a Philadelphia rent control ordinance.⁷⁴ Through these actions, lower courts have forged ahead on their own economic policy-making initiatives, breaking from the Supreme Court’s support of rent control’s constitutionality in a move suggestive of Rosenberg’s third constraint in *The Hollow Hope*.⁷⁵

70. 485 U.S. 1 (1988).

71. *Pennell v. City of San Jose*, 485 U.S. 1 (1988), 21-23.

72. 544 U.S. 528 (2005).

73. 447 U.S. 255 (1980); McDonough, “Rent Control and Rent Stabilization,” 373; Manheim, “Rent Control in the New *Lochner* Era,” 215-216.

74. Shoked, “American Courts’ Image of a Tenant,” 268-273.

75. Rosenberg, *The Hollow Hope*, 23.

Recently, the Supreme Court denied certiorari for a challenge to New York City's RSL.⁷⁶ This case highlights many arguments against rent control, the tenuous ground on which its constitutionality rests, and the political implications if such a challenge had succeeded. In *Community Housing Improvement Program v. City of New York*, landlord associations challenged New York City's RSL, claiming that it constituted a government taking per the Fifth and Fourteenth Amendments after a 2019 expansion, and so should be struck down.⁷⁷ Additionally, they asserted that the RSL does not further state interests, echoing the reasoning in *Agins v. City of Tiburon*.⁷⁸ Fundamentally, they asked for a limit on government power, hoping a counter-majoritarian court would protect property owners as a minority voting bloc.⁷⁹ Both the district court and the Second Circuit rejected these claims and, using rational basis scrutiny, determined the law satisfied due process challenges.⁸⁰ They dismissed the "substantially advance" theory outlined in *Agins* and *Pennell v. City of San Jose*'s dissent, instead following the precedent set in *Lingle v. Chevron U. S. A. Inc.* and *Penn Central v. New York City*.⁸¹ The landlord associations then petitioned the Supreme Court for certiorari, asking for a review of the Second Circuit's findings vis-a-vis their physical and regulatory takings claim.⁸² Using Justice Scalia's reasoning from his dissent in *Pennell*, the thrust of their argument was that basing a regulation on tenant hardship places a public burden on those who are not responsible for its cause. Whereas the Court found no actual instance of a hardship occurring in *Pennell*, concluding that the case was premature, the RSL mandated that hardship be factored into New York City's rate setting.⁸³

76. Adam Liptak, "Supreme Court Turns Away Challenge to New York's Rent Regulations," *The New York Times*, (October 2, 2023), https://link.gale.com/apps/doc/A767448010/STND?u=tel_middleten&sid=bookmark-STND&xid=21113850.

77. *Community Housing Improvement Program, et al. v. City of New York*, New York, et al., No. 22-1095 (S. Ct. cert. denied. Oct. 2, 2023); Gehrich, "Stronger than Ever," 847.

78. 447 U.S. 255 (1980); Gehrich, 856.

79. Petition for writ of certiorari, 29-32; See David G. Barnum, "The Supreme Court and Public Opinion: Judicial Decision Making in the Post- New Deal Period," *The Journal of Politics* 47, no. 2 (June 1, 1985), 653, <https://www-jstor-org.ezproxy.mtsu.edu/stable/2130901>.

80. Gehrich, "Stronger than Ever," 860.

81. 485 U.S. 1 (1988); 544 U.S. 528 (2005); 438 U.S. 104 (1978); Brief of respondents N.Y. Tenants and Neighbors, et al., 13-14; Gehrich, "Stronger than Ever," 860-861

82. Brief of respondents N.Y. Tenants and Neighbors, et al., 14.

83. Petition for writ of certiorari, 26-28.

The petitioners in *Community Housing* hoped to win facing a more conservative, property-rights friendly Supreme Court,⁸⁴ counting on a type of regime politics⁸⁵ that would be eager to help chip away at welfare regulations.⁸⁶ In this way, the courts would act as Rosenberg's "crusaders"⁸⁷ at the vanguard of a push to eliminate the law.⁸⁸ Their possible hope was justified considering that in *Pennell*, "one swing vote [was] all that [stood] in the way of the Court's scrapping ordinary peacetime rent control and, to an extent, returning the nation to its almost forgotten laissez-faire regime of constitutional law."⁸⁹ This theory is even more pertinent when one considers how lower courts have used the "substantially advance" test to strike down regulations. The Supreme Court could have advanced that reasoning, rejecting *Lingle v. Chevron U. S. A. Inc.*⁹⁰ Landlords may have also expected support given that the decision in *Pennell* was far from a "ringing endorsement" for rent control: rather than address the concern, the Court sidestepped the issue.⁹¹ This avoidance exhibits judicial constraints through the doctrines of ripeness and precedent where the Court deferred to legislatures regarding economic and social decisions as decided in *Williamson v. Lee Optical of Okla., Inc.*,⁹² and *Lingle*.⁹³ Both doctrines limit the social change courts can have.⁹⁴ Additionally, this recent episode

84. Gehnrich, "Stronger than Ever," 847.

85. See Jeb Barnes, "Bringing the Courts Back in Interbranch Perspectives on the Role of Courts in American Politics and Policy Making," *Annual Review of Political Science* 10, no. 1 (June 2007), 31, <https://doi.org/10.1146/annurev.polisci.10.080505.101210>; See Mark Tushnet, "The Supreme Court and the National Political Order: Collaboration and Confrontation," In *The Supreme Court and American Political Development*, ed. Ronald Kahn and Ken I. Kersch, (Lawrence, Kansas: University Press of Kansas, 2006), 117.

86. Charles H. Clarke, "Rent Control and the Constitutional Ghosts and Goblins of Laissez-Faire Past," *University of Dayton Law Review* 14, no. 1 (September 22, 1988), 134, <https://heinonline.org/HOL/P?h=hein.journals/udlr14&i=123>.

87. Rosenberg, *The Hollow Hope*, 16.

88. Brief of respondents N.Y. Tenants and Neighbors, et al., 10; See Michael McCann, "How the Supreme Court Matters in American Politics: New Institutional Perspectives," In *The Supreme Court in American Politics: New Institutional Interpretations*, ed. Howard Gillman and Cornell Clayton, (Lawrence, Kansas: University Press of Kansas, 1999), 69.

89. Clarke, "Rent Control and the Constitutional Ghosts," 116-117.

90. 544 U.S. 528 (2005).

91. Clarke, 128.

92. 348 U.S. 483 (1955).

93. Gehnrich, "Stronger than Ever," 860-861 and 867-868.

94. Rosenberg, *The Hollow Hope*, 16.

underscores the timeliness of the threats to rent stabilization and highlights the thin constitutional ice on which it currently walks.

When there is social change stemming from court judgment, it does not only arise from a decision but also from the litigation process itself. Stuart Scheingold explored this facet of legal mobilization in his determination that “constitutional litigation did, by way of a politics of rights, contribute *indirectly* to the emergence and success of the civil rights movement,” especially when that ongoing fight made national headlines.⁹⁵ It is possible that the petitioners in *Community Housing* knew that, even if their case failed at the Supreme Court, their arguments and willingness to fight would signal to the New York State Legislature and property rights watchers everywhere that there must be limits to these regulations. This message would suggest that unchecked state power could become the “draconian” government taking—one in clear violation of the Fifth Amendment—the high court would eagerly strike down, thus threatening the policy everywhere in the United States.⁹⁶ In this way, despite the Court’s decision, success for the petitioners would be to “elevate the salience of that issue in the public agenda.”⁹⁷ Even still, a favorable ruling for the landlords would not have ended the story. As defenders of the RSL have explained, the long history of the law is rife with challenges and amendments responding to the “push-and-pull of politics” that often balance both tenant and landlord interests.⁹⁸ Being politically popular,⁹⁹ it is probable that if the RSL in its current form were struck down, the New York State Legislature would rework the policy, and the fight would continue.¹⁰⁰ As Michael McCann explains, legislatures often anticipate and predict court action and are prepared for all eventualities.¹⁰¹ This potential result highlights how, rather than making or breaking social change on their own, courts work within an overall system that advances or prevents policy based on the interplay of various actors illustrative of an interbranch perspective of policymaking.¹⁰²

95. Stuart A. Scheingold, *The Politics of Rights*, University of Michigan Press, 2004, xx.

96. Petition for writ of certiorari at 23.

97. McCann, “How the Supreme Court Matters,” 71.

98. Brief of respondents N.Y. Tenants and Neighbors, et al., 29.

99. Petition for writ of certiorari, 31.

100. Josiah Johnson, “New York Rent Control: Could the End Be Near?” American Enterprise Institute - AEI., July 12, 2023, <https://www.aei.org/housing-center/new-york-rent-control-could-the-end-be-near/>.

101. McCann, “How the Supreme Court Matters,” 72.

102. Barnes, “Bringing the Courts Back In,” 27.

Conclusion

Landlords in *Community Housing* claim they are not the cause of their tenants' hardship.¹⁰³ While financial difficulties for many have myriad reasons, as cost burden analysis explains,¹⁰⁴ a major factor in making people's lives exponentially more difficult is the amount of money they pay for housing costs. Landlords are indeed connected to this issue and bear some responsibility for the welfare of their tenants and so should be barred from exploitative practices enabled by unfettered markets. Ultimately, the Supreme Court's denial of certiorari displayed the type of judicial restraint typical of collaboration with majoritarian politics.¹⁰⁵ The legal process is limited in its ability to affect broad social change because it is not the venue in which these policies are constructed, implemented, or enforced, and courts are constrained by doctrine and confounded by rogue lower court action. Despite these limitations and the impropriety of the Court being a venue for transforming the housing affordability crisis, the Supreme Court did the next best thing to a full endorsement of the RSL in *Community Housing*: they denied hearing the case, meaning that the lower courts' determinations stand, rent control is the law, and further decisions belong to the democratic process. Judges are not economists, and this policy has real effects on millions, so it should be left to the electorate and their representatives to craft and enforce. People should be able to determine where one's right to maximize profits on their property ends and where assurances of basic necessities begin

103. Petition for writ of certiorari, 33

104. Desmond, *Evicted: Poverty and Profit*, 4. ("Today, the majority of poor renting families in America spend over half of their income on housing, and at least one in four dedicates over 70 percent to paying the rent and keeping the lights on.").

105. Tushnet, "The Supreme Court and the National Political Order," 119.

Bibliography

- Arnott, Richard. "Time for Revisionism on Rent Control?" *Journal of Economic Perspectives* 9, no. 1 (January 15, 1995): 99–120. <https://www.jstor.org/stable/2138358>.
- Asquith, Brian J. "Housing Supply Dynamics under Rent Control: What Can Evictions Tell Us?" *AEA Papers and Proceedings* 109 (May 1, 2019): 393–96. <https://www-jstor-org.ezproxy.mtsu.edu/stable/26723978>.
- Baldassare, Mark. et al., *PPIC Statewide Survey: Californians and Their Economic Well-Being*. Public Policy Institute of California, November 2023. <https://www.ppic.org/?show-pdf=true&docraptor=true&url=https%3A%2F%2Fwww.ppic.org%2Fpublication%2Fppic-statewide-survey-californians-and-their-economic-well-being-november-2023%2F>.
- Barnes, Jeb. "Bringing the Courts Back In Interbranch Perspectives on the Role of Courts in American Politics and Policy Making." *Annual Review of Political Science* 10, no. 1 (June 2007): 25–43. <https://doi.org/10.1146/annurev.polisci.10.080505.101210>.
- Barnum, David G. "The Supreme Court and Public Opinion: Judicial Decision Making in the Post- New Deal Period." *The Journal of Politics* 47, no. 2 (June 1, 1985): 652–66. <https://www-jstor-org.ezproxy.mtsu.edu/stable/2130901>.
- "Battle Goes on as Rent Control Is Defeated in Massachusetts." *New York Times*, November 22, 1994. *Gale General OneFile* (accessed November 17, 2023). https://link-gale-com.ezproxy.mtsu.edu/apps/doc/A174491086/ITOF?u=tel_middleten&sid=bookmark-ITOF&xid=e4558687.
- Been, Vicki, Ingrid Gould Ellen, and Sophia House. "Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws." *Fordham Urban Law Journal* 46, no. 5 (October 1, 2019): 1041. <https://ezproxy.mtsu.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=edsgao&AN=edsgcl.607543639&site=eds-live&scope=site>.
- Brief of respondents N.Y. Tenants and Neighbors, et al., Community Housing Improvement Program, et al. v. City of New York, New York, et al., No. 22-1095 (S. Ct. cert. denied. Oct. 2, 2023). *available at* https://www.supremecourt.gov/DocketPDF/22/22-1095/272733/20230724144605563_22-1095%20Brief%20in%20Opposition.pdf.
- Clarke, Charles H. "Rent Control and the Constitutional Ghosts and Goblins of Laissez-Faire Past." *University of Dayton Law Review* 14, no. 1 (September 22, 1988): 115–46. <https://heinonline.org/HOL/P?h=hein.journals/udlr14&i=123>.

Dake, Lauren. "Oregon's Experiment in Statewide Rent Control." NPR, March 2019. <https://www.npr.org/transcripts/708302378>.

Desmond, Matthew. *Evicted: Poverty and Profit in the American City*. London: Penguin Books, 2016.

Diamond, Rebecca, Tim McQuade, and Franklin Qian. "The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco." *The American Economic Review* 109, no. 9 (September 1, 2019): 3365–94. <https://www.jstor.org/stable/26773267>.

Favilukis, Jack, Pierre Mabilie, and Stijn Van Nieuwerburgh. "Affordable Housing and City Welfare." *Review of Economic Studies* 90, no. 1 (January 2023): 293–330. <https://doi.org/10.1093/restud/rdac024>.

Gehnrich, Charles K. "Stronger than Ever: New York's Rent Stabilization System Survives Another Legal Challenge." *Fordham Law Review* 90, no. 2 (November 1, 2021): 831–72. <https://heinonline.org/HOL/P?h=hein.journals/flr90&i=849>.

Gilderbloom, John I., and Lin Ye. "Thirty Years of Rent Control: A Survey of New Jersey Cities." *Journal of Urban Affairs* 29, no. 2 (January 1, 2007): 207–20. <https://search-ebscohost-com.ezproxy.mtsu.edu/login.aspx?direct=true&db=edswss&AN=000245895200005&site=eds-live&scope=site>.

"Housing Affordability in the US." *Moodys.com*. Moody's Analytics Inc., May 16, 2023. www.moodys.com/web/en/us/about/insights/data-stories/us-rental-housing-affordability.html.

Johnson, Josiah. "New York Rent Control: Could the End Be Near?" American Enterprise Institute – AEI. July 12, 2023. www.aei.org/housing-center/new-york-rent-control-could-the-end-be-near/.

Joint Center for Housing of Harvard University. *America's Rental Housing*, 2022. <https://www.jchs.harvard.edu/americas-rental-housing-2022>.

Liptak, Adam. "Supreme Court Turns Away Challenge to New York's Rent Regulations." *The New York Times (Digital Edition)*, (October 2, 2023). https://link.gale.com/apps/doc/A767448010/STND?u=tel_middleton&sid=bookmark-STND&xid=21113850.

Ludden, Jennifer. "Rent control expands as tenants struggle with the record-high cost of housing." NPR, November 28, 2022. <https://www.npr.org/2022/11/28/1138633419/rent-control-economists-tenants-affordable-housing-ballot-measures>.

- Manheim, Karl. "Rent Control in the New Lochner Era." *UCLA Journal of Environmental Law & Policy* 23, no. 2 (December 22, 2005): 211. https://link.gale.com/apps/doc/A156203130/AONE?u=tel_middleten&sid=ebsco&xid=aab174eb.
- McCann, Michael. "How the Supreme Court Matters in American Politics: New Institutional Perspectives." In *The Supreme Court in American Politics: New Institutional Interpretations*, edited by Howard Gillman and Cornell Clayton, 63-97. Lawrence, Kansas: University Press of Kansas, 1999.
- McDonough, Christina. "Rent Control and Rent Stabilization as Forms of Regulatory and Physical Takings." *Boston College Environmental Affairs Law Review*, (June 22, 2007). <https://search-ebscohost-com.ezproxy.mtsu.edu/login.aspx?direct=true&db=edsgao&AN=edsgcl.165626401&site=eds-live&scope=site>.
- NYU Furman Center. *Housing Stability and Tenant Protection Act: An Initial Analysis of Short-Term Trends*. 2021. https://furmancenter.org/files/Rent_Reform_7_1_A_remediated.pdf.
- Parker, Madeleine, and Karen Chapple. "Revisiting Rent Stabilization in the Neighborhood Context: The Potential Impact of Rent Regulation on Community Stability and Security in the New York Metropolitan Region." *Fordham Urban Law Journal* 46, no. 5 (October 1, 2019): 1137–82. <https://ezproxy.mtsu.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=edsgao&AN=edsgcl.607543641&site=eds-live&scope=site>.
- Paul, Mark, et al. "Re: Tenant Protections for Enterprise-Backed Multifamily Properties Request for Input." July 28, 2023. https://peoplesaction.org/wp-content/uploads/2023/07/Economist-Sign-on-Letter_-FHFA-RFI-Response-1.pdf.
- Petition for writ of certiorari, Community Housing Improvement Program, et al. v. City of New York, New York, et al., No. 22-1095 (S. Ct. cert. denied. Oct. 2, 2023). https://www.supremecourt.gov/DocketPDF/22/22-1095/266353/20230508153206175_CHIP%20Petition%20for%20Cert.pdf.
- Rosenberg, Gerald N. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: The University of Chicago Press, 2023.
- Scheingold, Stuart A. *The Politics of Rights*. Ann Arbor: University of Michigan Press, 2004.
- Shaban, Bigad, et al. "Lack of Oversight May Be Allowing Some Oakland Landlords to Wrongfully Evict Families, Elderly." NBC Bay Area, Feb. 16, 2018. <https://www.nbcbayarea.com/investigations/Lack-of-Oversight-May-be-Allowing-Some-Oakland-Landlords-to-Wrongfully-Evict-Families-Elderly-474352123.html>.

Shoked, Nadav. "American Courts' Image of a Tenant." *Northwestern University Law Review* 117, no. 1 (January 1, 2022): 251–86. <https://heinonline-org.ezproxy.mtsu.edu/HOL/Page?handle=hein.journals/illlr117&div=12>.

Sims, David P. "Out of Control: What Can We Learn from the End of Massachusetts Rent Control?" *Journal of Urban Economics* 61, no. 1 (January 1, 2007): 129. <https://doi.org/10.1016/j.jue.2006.06.004>.

Slater, Tom. *Shaking Up the City: Ignorance, Inequality, and the Urban Question*. Oakland, California: University of California Press, 2021.

Tushnet, Mark. "The Supreme Court and the National Political Order: Collaboration and Confrontation." In *The Supreme Court and American Political Development*, edited by Ronald Kahn and Ken I. Kersch, 117–37. Lawrence, Kansas: University Press of Kansas, 2006.

UMass Amherst. *Toplines*. Amherst: University of Massachusetts Amherst, April 2023. https://polsci.umass.edu/sites/default/files/AllToplinesApril2023_0.pdf.

Wilson, Scott. "California voters reject efforts to repeal gas tax and rent-control limitations." *Washington Post*, November 7, 2018. https://link-gale-com.ezproxy.mtsu.edu/apps/doc/A561380514/ITOF?u=tel_middleten&sid=bookmark-ITOF&xid=d1e07e12