PROPERTY RIGHTS AND THE MODERN RESURGENCE OF RENT CONTROL

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The Americans couldn't destroy Hanoi, but we have destroyed our city by very low rents. We realized it was stupid and that we must change policy.[1]

INTRODUCTION

In a 1990 survey of professional economists, 93% agreed with the statement that "a ceiling on rents reduces the quantity and quality of housing availability."[2] In a more recent survey of 41 economists, only 2% agreed with the statement: "Local ordinances that limit rent increases for some rental housing units, such as in New York and San Francisco, have had a positive impact over the past three decades on the amount and quality of broadly affordable rental housing in cities that have used them."[3] And yet, in a 2018 survey of Californians asked to identify why housing in California is unaffordable, 28%—more than any other answer—responded that it was the lack of rent control.[4] It is not hard to understand why. Renters naturally think their rents are too high when they are too high. And in a world where nuance is often overshadowed by one-dimensional populist answers to complex questions, rent control is an obvious answer to high rents.

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1. *Foreign Minister Nguyen Co Thach, Journal of Commerce, quoted in* Dan Seligman, *Keeping Up*, FORTUNE, Feb. 27, 1989 (excerpt from Walter Block*, Rent Control,* THE CONCISE ENCYCLOPEDIA OF ECONOMICS, LIBRARY OF ECONOMICS AND LIBERTY, https://www.econlib.org/library/Enc/RentControl.html).

2. Richard M. Alston, J.R. Kearl & Michael B. Vaughan, Is There a Consensus Among Economists in the 1990 's?, AEA PAPERS AND PROCEEDINGS, 201, 204 (May 1992).

3. *Rent Control*, IGM FORUM (Feb. 7, 2012), https://www.igmchicago.org/surveys/rent-control/?mod=article_inline.

4. Liam Dillon, *Experts say California needs to build a lot more housing. But the public disagrees*, L.A. TIMES (Oct. 21, 2018), https://www.latimes.com/politics/la-pol-ca-residents-housing-polling-20181021-story.html. The USC Dornsife/*Los Angeles Times* survey asked respondents, "Why is California housing unaffordable?" The answers, with weight given for second answers, were: lack of rent control, 28%, lack of funding for low-income housing, 24%, environmental regulation, 17%, foreign buyers, 16%, influence of tech industry, 15%, too little homebuilding, 13%, Wall Street buyers, 10%, restrictive zoning rules, 9%. The margin of error was 3%.

But just as civilian casualties can be collateral damage of wartime bombing, so too the loss of housing stock can be a casualty of rent control. Indeed, as economist Assar Lindbeck drolly noted, "In many cases rent control appears to be the most efficient technique so far known for destroying cities—except for bombing."[5] Not only can rent control take away the incentives for developers to build new apartments that might be subject to rent control, if the rent control is draconian enough it can destroy the ability of landlords to maintain their apartments, leading to decay, abandonment, and eventual destruction. In a 1981 book by the Fraser Institute, there is a series of 15 black and white photographs of post-apocalyptic urban landscapes with the caption: *Bomb Damage or Rent Control?*[6] One must go to the index for the answer because it is otherwise impossible to tell. Comparing a block in the South Bronx to one in Nagasaki or Hiroshima may seem fatuous, but photographs (at least back then) don't lie: rent control can be terribly destructive.

I. Rent Control in the Early Twentieth Century

A little over a century ago, rent control was first imposed as an emergency wartime measure to combat the influx of workers into the Washington, D.C., war machine. Too many apartment seekers and too few apartments led to a call for the government to do something. Rather than building more housing itself, or paying others to do the building, the federal government instead imposed rent control tucked inside a larger statute, the "Food Control and District of Columbia Rents Act."[7] According to the statute, its provisions were "made necessary by emergencies growing out of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to public health and burdensome to public officers and employees." It had a two-year expiration date.

A similar situation arose after the first World War in New York City, where many returning soldiers landed and decided to stay. The

5. Assar Lindbeck, The Political Economy of the New Left (Harper & Row eds., 1st ed. 1972), *cited in* Rent Control: Myths and Realities 213, 230 (Walter Block & Edgar Olsen eds., 1981).

6. Rent Control: Myths and Realities, *supra* note 5, at 3, 35, 53, 85, 105, 123, 149, 161, 169, 187, 199, 231, 247, 265, 283.

7. Ch. 20, 41 Stat. 297 (Oct. 22, 1919).

city imposed rent control in 1920. Landlords in both cities sued, and their cases reached the Supreme Court in two cases, *Block v. Hirsh*[8] and *Edgar A. Levy Leasing Company v. New York*.[9] While the lower court in *Block* had rejected the law because it purported to imbue the private activity of leasing private property with the public interest, Justice Holmes rejected that concern. Writing for the Court, and without much of any supporting argument, he wrote that "[h]ousing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."[10] Because housing involved a public interest, it was appropriate that the government could regulate lease terms through rent control. As for the Court's role, it was limited when the government was regulating in the public interest: "The only matter that seems to us open to debate is whether the statute goes too far. For . . . it may be conceded that regulations of the present sort pressed to a certain degree might amount to a taking without due process of law."[11]

Four Justices, led by Justice McKenna, dissented. The dissent was unimpressed by Justice Holmes's argument: "Houses are a necessary of life but other things are as necessary. May they, too, be taken from the direction of their owners and disposed of by the government?" As for the justification that the war made the restrictions on liberty necessary, Justice McKenna quoted from a Civil War era case where a civilian from Indiana was sentenced to death by a military tribunal: "'[T]he Constitution of the United States is a law for rulers and people, equally in war and in peace'" and it's wrong to suggest that "'any of its provisions can be suspended during any of the great exigencies of government.'"[12]

A year after *Block v. Hirsh* was decided, the Court was confronted with New York City's wartime emergency rent control law. In *Edgar A. Levy Leasing Co. v. Siegel*, Jerome Siegel signed a two-year lease starting October 1, 1918, for an apartment at $1,450 per year, payable in monthly installments. In June of 1920, Siegel signed a new lease

8. 256 U.S. 135 (1921).
9. 258 U.S. 242 (1922).
10. *Block*, 256 U.S. at 156.
11. *Id.*
12. *Id.* at 165–66 (quoting *Ex parte* Milligan, 71 U.S. 2, 120–21 (1866)). In *Milligan*, the Court found that the non-combatant civilian living in a non-rebel state was entitled to a trial by jury in a civilian court.

for two more years, this time at $2,160 per year, an increase of nearly $60 per month. When it came time to paying the higher rent in October, Siegel refused. Levy Leasing sued to evict Siegel. But Siegel claimed that he was coerced into signing the lease under threat of eviction. Moreover, he argued that the higher rent was unfair and violated New York City's emergency rent control law that had just been adopted that year.

Levy Leasing responded by arguing that the rent control law was "unconstitutional, in that it impairs the obligation of the contract of lease . . . deprives the plaintiff of its property without due process of law; denies to it the equal protection of the law . . . and takes private property for a private use without compensation."[13] A month before *Block v. Hirsh* was decided, the New York Court of Appeals upheld the law.[14] Unsurprisingly, on appeal and a year after *Block v. Hirsh* was decided, the owner lost again. The Supreme Court of the United States found that the public interest in alleviating the problems and abuses caused by the city's housing shortage outweighed any constitutional objections:

> [A]ll agree: That there was a very great shortage in dwelling house accommodations in the cities of the state to which the acts apply; that this condition was causing widespread distress; that extortion in most oppressive forms was flagrant in rent profiteering; that, for the purpose of increasing rents, legal process was being abused and eviction was being resorted to as never before; and that unreasonable and extortionate increases of rent had frequently resulted in two or more families being obliged to occupy an apartment adequate only for one family, with a consequent overcrowding, which was resulting in insanitary conditions, disease, immorality, discomfort, and widespread social discontent.[15]

The Court never considered whether rent control would remedy any of these problems because it didn't think that was its job. As in *Block v. Hirsh*, the Court just accepted at face value the government's justifications for rent control. But there was not then (nor today) any evidence that rent control cures in any way "insanitary conditions,

13. Edgar A. Levy Leasing Co. v. Siegel, 230 N.Y. 634, 638, 130 N.E. 923, 925 (N.Y. 1921), *aff'd*, 258 U.S. 242, 42 S. Ct. 289 (1922).

14. *Id.*

15. *Edgar A. Levy Leasing Co.*, 258 U.S. at 246.

disease, immorality, discomfort, and widespread social discontent."[16] If a legislative body wishes to tax its citizens to try to solve these problems, so be it. Likewise, if a city wishes to establish health and safety standards, that too can help. In fact, there had already been housing regulations imposed in New York City to put a stop to the construction of lightless and ventilation-free tenements that had proliferated during the 19th century.[17]

The voters can decide easily enough whether the money has been well-spent. But when the costs of such programs are borne not by the general public, but by the distinct minority of people that own rental housing, then it behooves a court to take a careful look at whether impact on the rights of that minority comports with the constitutional standards.

The Framers of our Constitution were acutely aware of the potential for majoritarian overreach and the danger that a democracy could turn on those with more wealth than the majority. As James Madison warned in *The Federalist Papers*, an unchecked democracy can lead to "[a] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project."[18] For many years following the ratification of the Constitution, judges understood their role to render unconstitutional laws unenforceable.

But there were, at least in the early part of the 20th Century, *some* limits to the Supreme Court's deference to the wartime justification for rent control. After the two-year emergency law ended in Washington, D.C., the act was extended again in October of 1919 and then again in May of 1922. By this time, the great war had joined all prior wars between the pages of history books. Its effects on the lives of Washingtonians had faded. Nevertheless, tenants in an apartment building successfully petitioned the rent board for a rollback of a post-war increase in rents. The apartment owner sued, and when the Supreme Court got the case, it held that with the emergency clearly over, the time for deference had expired. Justice Holmes's opinion began by noting that "a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon

16. *Id.*

17. *See* RICHARD PLUNZ, A HISTORY OF HOUSING IN NEW YORK CITY (1st ed. 1990) (describing the early tenements).

18. THE FEDERALIST NO. 10 (James Madison). A "rage for paper money" refers to popular pressure for governments to print enough paper money to cause inflation which, in turn, would reduce debts.

the truth of what is declared." The opinion continued saying that "[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."[19] The Court sent the case back down to the district court for a factual determination of whether there was still an emergency.

The New York rent control laws died a slower but natural death by economic causation. To alleviate the lack of housing, New York City declared a decade-long tax holiday for new housing construction and exempted new units from rent control. Construction ensued. By 1929, vacancy rates approached 8%. Rent control in New York was abolished. It wasn't necessary or useful anymore.[20]

When the World War I rent controls were removed in New York, there was a massive increase in the construction of new housing:

> The 1920s produced a volume of new housing which has never again been equaled, quantitatively or qualitatively. Between 1921 and 1929, 420,734 new apartments, 106,384 one-family houses, and 111,662 two-family houses were constructed. The total of 658,780 new dwellings averaged 73,198 units per year, a figure unmatched even in the 1960s, also a period of substantial growth. In the most prolific year, 1927, 94,367 dwellings were built, compared with 60,031 in 1963, the peak year since.[21]

The lesson is simple: Removal of government disincentives to building housing will result in more housing and more affordable prices. Free markets work.

It took another world war to forget the lesson and for rent control to be resurrected from its peacetime crypt.

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World War II threw the economy into high gear, and the federal government's New Deal era penchant for planning was put on a diet of steroids. In 1943, the federal government adopted price controls—including controls on rents because it anticipated housing shortages.

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19. Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48 (1924).

20. TIMOTHY COLLINS, AN INTRODUCTION TO THE NEW YORK CITY RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM, NEW YORK RENT GUIDELINES BOARD 20 (2020), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/01/intro2020.pdf.

21. PLUNZ, *supra* note 17, at 122.

With sixteen million Americans serving the war effort, and with millions of those overseas, the war probably did not itself cause a housing shortage, except in those local areas in the states serving the war effort. But by the end of 1946, over 7 million soldiers had returned to civilian life.[22] Yet whatever crisis there may have been, it had dissipated enough that Congress let the 1943 Emergency Price Control Act expire, replacing it with the Federal Housing and Rent Act, which kept price controls only on buildings built before 1947. In 1950, the federal act expired, but rent control proved to be incredibly sticky in New York.

Rather than consign rent control to the dustbin of history, New York City carried on the federal program with its own local legislation. As a result, unless they have been converted, many non-luxury apartments built in New York before 1947 have remained under some sort of rent control ever since.[23] Newer buildings had to wait until 1969 before they were to fall under a kinder and gentler form of rent control: so-called rent stabilization.[24] This form of rent control refers to a more recent approach which has some flexibility to allow for inflation-based rent increases. In theory, this less drastic type of rent control is less likely to result in abandoned and derelict rental apartments. In New York City, "rent stabilization" covers those regulated rental units built before 1974 in buildings with six or more units. Rents may increase only in accordance with city guidelines. However, as described in the next section, new legislation adopted in 2019 by the State of New York severely limits the ability of landlords to recoup improvements, and then only for thirty years after the improvement. These and other changes bring rent stabilization a lot closer to the rent control of old and highlight the danger of adopting any form of "rent control lite" because it is only a gateway to the harder drug of punitive rent control.

Rent stabilization in New York was adopted in 1969 under the premise that the low-vacancy rates had created a housing "emergency."[25] Year after year, the city has since renewed its declaration of an emergency—until deciding to end the charade in 2019 by passing

22. ARMY SERVICE FORCES, LOGISTICS IN WORLD WAR II: FINAL REPORT OF THE ARMY SERVICE FORCES, CENTER FOR MILITARY HISTORY 218 (Chart 37, Returns to Civilian Life) (1993), https://history.army.mil/html/books/070/70-29/CMH_Pub_70-29.pdf.

23. COLLINS, *supra* note 20, at 23 n.42.

24. *Id.* at 27.

25. *Id.* at 26–27. *See* N.Y.C. ADMIN. CODE §§ 26-501 to 26-520.

straight-up punitive rent control. But what is an emergency? A flood in the process of inundating a city is an emergency. But water that covers a city for 50 years is no longer an emergency; it is a lake. As shown next, this lake is drowning an increasing number of cities and states.

II. THE MODERN REVIVAL OF THE OLD RENT CONTROL

Starting in the late 1960s and 1970s there was a resurgence of rent control across the nation. Recognizing that old-style rent controls too often led to problems ranging from an absence of new construction to entire buildings being abandoned, the advocates of new rent control tried to repackage their schemes to make them more flexible and palatable. New York calls its program "rent stabilization" and California guarantees a "fair rate of return." Are these differences in semantics or substance? Perhaps, before describing the developments in the various states, a few definitions are in order.

A. Definitions

Rent control. Rent control is the more traditional, and somewhat outdated, approach to rent regulation. In New York City, for example, "rent control" has a precise meaning: limits on rent increases for tenants in rent-controlled buildings constructed before 1947 in which a tenant (or the tenant's family successors) have lived in continuously since 1971.[26] There are very minor adjustments allowed, but rents remain essentially where they were almost fifty years ago. When a unit becomes vacant, it is either deregulated (for apartments with less than six units) or subject to rent stabilization. About 1% of New York City housing is subject to old-style traditional rent control. Being able to benefit from rent control in New York City has much more to do with luck than circumstances. It is a small enough number that many landlords can swallow their losses by requiring their other tenants to pay enough rent to help subsidize the 1%.

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26. *Directory of NYC Housing Programs, Rent Control*, NYU FURMAN CENTER, https://furmancenter.org/coredata/directory/entry/rent-control (last visited Sept.22, 2021); NEW YORK UNIVERSITY FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, FACT BRIEF, RENT STABILIZATION IN NEW YORK CITY 1 (2011) https://furmancenter.org/files/HVS_Rent_Stabilization_fact_sheet_FINAL_4.pdf.

Rent stabilization. Rent stabilization was the term given to the type of rent control imposed by New York City starting in the 1970s. In theory, it allowed amortization and recoupment of capital improvements, modest yearly rent increases, owner move-in rights, market readjustments with tenant turnover, and tenant income ceilings—above which rent controls would not apply.[27] As discussed below, these rent control "reforms" were largely phased out with amendments in 2019.

Fair return: In some jurisdictions, like California, landlords are guaranteed a "fair rate of return," a term borrowed from the regulation of utility rates.[28] The devil is in the details—such as which costs can be included, who decides which costs are allowable and which are not, and what, exactly, is a "fair rate of return?" A veritable cottage industry has sprung up in California's legal profession where some attorneys specialize in fighting with rent boards over when an investment or improvement cost can be factored into a fair rate of return.

California law also requires a due process mechanism for those seeking a rent increase so a landlord can achieve a fair rate of return.[29] However, if a rent board denies an increase, and if a landlord successfully appeals a denial of a rent increase in court, the rent board is not responsible for any losses; only future rents may be adjusted to recoup the deficiency.[30] If this means the only way to make up for the denied increase is to raise rents above market rates, so be it. The owner has no other recourse.

In New York, one case made it clear that just because an owner was denied a "reasonable return" that didn't necessarily mean that the regulation effected a regulatory taking by denying the "owner's

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27. *Id.*; *see also* COLLINS, *supra* note 20, at 26–37 (discussion of rent stabilization and subsequent amendments).

28. Birkenfeld v. City of Berkeley, 17 Cal. 3d, 129, 165, 550 P. 2d 1001, 1027 (Cal. 1976) (requiring a "just and reasonable return on their property."); *id.* at 156, 1021 (no exigent circumstances required to justify "price control outside the traditional public utility areas."). *See also* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 601 (1944) ("'[F]air value' is the end product of the process of rate-making."); MICHAEL ST. JOHN, FAIR RETURN AND THE CALIFORNIA COURTS 15–16, https://www.stjohnandassociates.net/propertyManagementArticles/FRATCC.pdf (last visited Sept. 22, 2021) (discussion of fair return principles in other regulated industries such as public utilities).

29. *Birkenfeld*, 17 Cal. 3d (requiring a "just and reasonable return on their property"); Vega v. City of W. Hollywood, 223 Cal. App. 3d 1342, 1349 (1990).

30. Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761 (1997), *cert. denied*, 118 S. Ct. 856 (1998).

economically viable use of his land" because the proper standard is "whether the owner is precluded 'from realizing any profit whatsoever.'"[31] And in a recent California case alleging a denial of fair return, a court of appeals rejected consideration of borrowing costs used to acquire the property.[32] Without being able to account for capital costs in the acquisition of property, the market in rental housing will diminish and may result in a reduction of new building.

Vacancy control: Vacancy control means that a new tenant takes the rental unit at the same controlled rent as the prior tenant.[33] When a tenant leaves a rent-controlled apartment, landlords will naturally want to adjust rents to market rates. But tenant advocates often argue that the new tenants should also enjoy the below-market rent-controlled rates as the prior tenants did.

Vacancy control protects tenants from constructive evictions, but it also disincentivizes new rental housing construction or even maintaining existing rental housing stock. The political capital for vacancy controls is also somewhat muted because the strongest support for rent control comes from existing renters, not those who have not yet replaced them.

In jurisdictions with vacancy decontrol in place, the rents of new tenants may be adjusted to market rates. After that, increases are limited by the community's rent control laws.

B. Rent Regulation by State[34]

States either (1) mandate some form of rent regulation on a statewide basis, (2) permit localities to impose rent regulation (with or without statewide rules), (3) prohibit localities from adopting rent

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31. Rent Stabilization Ass'n v. Dinkins, 805 F. Supp. 159, 163 (S.D.N.Y. 1992), *aff'd* on procedural grounds at 5 F. 3d 591 (2d Cir. 1993) (lack of standing).

32. Colony Cove Properties, LLC v. City of Carson, 888 F.3d 445, 453–54 (9th Cir. 2018).

33. COLLINS, *supra* note 20, at 26 (defining "vacancy decontrol"). *See also* Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. REV. 399, 449 (1988) ("Under vacancy decontrol, a landlord is allowed, to some extent, to raise rents when a vacancy occurs").

34. A good graphic summary of rent regulations in the 50 states, with links to the relevant state and local laws, has been prepared by the National Multifamily Housing Council. *See Rent Control Laws by State*, NAT'L MULTIFAMILY HOUSING COUNCIL (Sept. 2, 2020), https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/.

regulation, or (4) have no rules mandating or prohibiting rent regulation.

1. States with Statewide Rent Control

Three states have sweeping statewide rent regulations: New York, California, and Oregon. Of these, New York has the oldest, with their beginnings rooted in the world wars, but was recently made much more tenant-friendly in 2019. California's rent control started out as a city-by-city project of the activists of the 1970s.[35] In 2019 the legislature adopted a statewide measure. Oregon's rent control law is the most recent, having been adopted in 2019. These will be looked at in more detail.

a. California

Following his anti-war-hero days, Tom Hayden of Chicago 7 fame spearheaded a tenants' rights movement in California which led to rent control being adopted by a number of cities, including Los Angeles, San Francisco, San Jose, and Hayden's political base, Santa Monica. In total, 21 California jurisdictions adopted some form of rent control. Their terms varied widely.[36] Some of the existing ordinances, for example, limit rent increases to a *fraction* of the CPI,[37] some regulate apartments only, and others mobile homes only. Landlords complained loudly that their investments were being destroyed—especially in those jurisdictions where rent increases could not keep up with expenses or inflation. They brought a number of lawsuits and had only a mixed record of success. Some of the court failures led to legislative relief. Some of the key developments follow.

Is there a right to exit the rental market?

In *Nash v. Santa Monica*,[38] a landlord tried to exit the regulated rental market by converting his apartment building to condominium

35. Los Angeles adopted rent regulations in 1978, San Francisco in 1979.

36. *See Rent Control Laws by State*, *supra* note 34.

37. Under California law this is okay, even if the rents decline year after year, so long as the landlord receives a fair return—as calculated by the local rent board.

38. Nash v. City of Santa Monica, 37 Cal. 3d 97 (1984).

ownership. He claimed a property right to put his apartment building to some use other than rental. But, the state supreme court held that there is no right to exit the rental business. Once a building is rented out, a city can require it to always be rented out subject, of course, to rent control. In response, the California legislature passed the Ellis Act.[39] The Ellis Act gives landlords the right to exit the rental business, provided tenants are paid "reasonable relocation costs."[40]

These relocation costs have ranged from the payment of a tenant's moving expenses to a forced payment to the tenant of several years' worth of the difference between rent-controlled rents and free-market rents. In San Francisco, an elderly couple owned a small two-story home with a one-bedroom apartment on each floor. In 2014, they sought to move from the upstairs unit to the downstairs apartment so they would no longer have to climb the stairs. San Francisco demanded that they pay the downstairs tenant two years of the difference between rent-controlled apartments and the actual market price—a sum of $118,000. Represented pro bono by attorneys with Pacific Legal Foundation, they sued in *Levin v. City and County of San Francisco*.[41] A federal district court struck down the requirement, holding that it violated the Takings Clause of the Fifth Amendment to the Constitution.

A similar challenge is underway in Oakland. There, Lyndsey and Sharon Ballinger rented out their small house while on a temporary military assignment to Washington, D.C. Upon their return, however, they were told that a new ordinance required them to pay $6,500 to their tenant before they could move in. Here, in *Ballinger v. Oakland*, where the owners are also represented by attorneys with the nonprofit Pacific Legal Foundation, the district court declined to follow the *Levin* case out of San Francisco and upheld the payment scheme.[42] An appeal is pending.

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39. CAL. GOV'T CODE § 7060.7, *et seq.* (West 1985).

40. *See* Press Release, Assemblyman Richard Bloom, Governor signs measure closing abusive loopholes in the Ellis Act, along with other Tenant protection measures (Oct. 8, 2019) (*available at* https://a50.asmdc.org/press-releases/20191008-governor-signs-measure-closing-abusive-loopholes-ellis-act-along-other).

41. *See* Levin v. San Francisco, 71 F. Supp. 3d 1072, 1074 (N.D. Cal. 2014) (lump sum payment to displaced tenants for relocation costs due under prior ordinance or new enhanced amount that was 24 times the difference between apartments' current monthly rental rate and alleged fair market value of comparable apartments, whichever was greater, effected an unconstitutional monetary exaction).

42. Ballinger v. Oakland, 398 F. Supp. 3d 560 (2019) (appeal pending in 9th Circuit, Case

Newer units are exempt from rent control—for the time being

With rent control ascendant in major California cities, developers avoided apartment house projects in those cities. It soon became apparent that there was a supply problem. In response, the legislature passed the Costa-Hawkins Act.[43] It prohibits local rent-control on single-family homes, condominiums, and units built after 1995.[44] For units subject to rent regulation, the act established vacancy decontrol, allowing a landlord to increase rents as when one set of tenants is replaced by new tenants. Until recently, this law gave developers the assurance that they could recoup their investments in rent-controlled cities. However, in 2018, tenant advocates led by the Aids Healthcare Foundation put Proposition 10 on the ballot. If passed, it would have repealed Costa-Hawkins. It failed by a 20-point margin after $97 million was spent by both sides. The same proponents tried and lost again in 2020 by nearly the same margin. These two propositions proved to be the two most costly ballot fights in the state's history.

Landlords, like utilities, have a right to a reasonable rate of return

In the early days of rent control in California, landlords sued the City of Berkeley, arguing that the city had no right under California law to impose rent control. They failed. In *Birkenfeld v. City of Berkeley*,[45] the California Supreme Court disagreed and upheld the right of cities to impose rent control. However, the court also held that under due process requirements, landlords are entitled to a "just and reasonable return" and the procedures for adjusting rents must likewise provide a meaningful opportunity to ensure such a return. The "fair return" rubric is borrowed directly from the law of utility rate regulations. In other words, owners of apartment buildings are to some degree functionally equivalent to the electric company or other regulated utilities.

No. 19-16550, and argued October 20, 2020). Information about the case can be found here: https://pacificlegal.org/case/ballinger-v-city-of-oakland/.

43. CAL. CIV. CODE § 1954.50, *et seq*. (West 1995).

44. In localities that already had rent regulations, rent regulations apply only to units built before that locality's rent regulation ordinance.

45. 17 Cal. 3d 129 (1976).

There is no meaningful remedy for an unlawfully denied rent increase

In order to raise rents, a landlord must seek permission from a city's rent control board. During proceedings before the board, the landlord must demonstrate that the increase is necessary to ensure a fair rate of return based on the landlord's expenses. If a landlord is wrongly denied a rent increase, he/she may sue. The legal process and appeals, however, can take years. During that time, the lost rents may total substantial sums of money. In *Kavanau v. Santa Monica Rent Control Board*,[46] a landlord, after proving that the rent board had wrongfully denied an adequate rent increase, sought to force the board to pay the lost rents—since seeking the back rents from the tenants would have been a largely futile gesture. The state supreme court disagreed and held that the only remedy was to make up the difference in *future* rentals. In other words, the landlord might have to charge future tenants for rent not paid by past tenants—even if the rents would exceed the market. The problem is, however, that existing tenants may not have been the ones benefitting from the low rents. Moreover, recoupment might not be possible if it would cause the total rent to exceed the market rents.

Does rent control advance any legitimate governmental purpose?

In the standard rent control ordinance in California and elsewhere, cities usually provide a list of reasons for rent control. The ordinances generally claim that rent control will help the poor, minorities, disabled, elderly, less educated, and those otherwise economically and socially disadvantaged. Protecting the interests of such people falls well within the scope of a community's police power. But that begs the question: does rent control meaningfully accomplish any of those goals?

In *Santa Monica Beach v. Superior Court*,[47] a property owner (represented by Pacific Legal Foundation attorneys) contracted for an economic study that compared the demographics of renters in selected rent-regulated jurisdictions with those in neighboring free market jurisdictions.[48] As predicted by economic theory, in every comparison,

46. 16 Cal. 4th 761 (1997), *cert. denied*, 118 S. Ct. 856 (1998).

47. Santa Monica Beach v. Superior Court (Santa Monica Rent Control Board), 19 Cal. 4th 952 (1999).

48. The study is available from the author.

the populations living in rent-regulated jurisdictions were whiter, richer, better educated, and less disadvantaged in all respects. That follows theory because those people with greater stability in their lives—those who are whiter, richer, etc.—are able to stay in a single place for a long enough time to fully reap the benefits of rent control. They are also more adept at working the market to find rent-controlled units when they become available, leaving the poor and less stable populations less able to profit from rent control. In other words, the rent control laws were *harming*, not helping, the vulnerable populations that were supposed to benefit from rent regulation.

Armed with this evidence, an apartment owner in Santa Monica sued and claimed that the city's rent regulation ordinance "failed to substantially advance a legitimate governmental interest," a test for a regulatory taking at that time.[49] While the court of appeal agreed and ruled the ordinance violated the Takings Clause, the California Supreme Court reversed. That court found that rent regulations are subject to a deferential standard of review and that legislative bodies, not the courts, should determine whether a law is working. Moreover, according to the court, the ordinance advanced the general legislative goal of keeping rents low.

Is rent control for mobile homes a special case?

Mobile homes present a unique rent regulation challenge. Tenants own their own homes but lease the space under their homes. Mobile homes, however, are not particularly mobile. Once a home is moved onto a pad with utility hookups in a park, homeowner-tenants cannot easily move their homes, making them more susceptible to market-indifferent rent hikes. But when rent regulation is combined with vacancy control,[50] existing tenants enjoy a windfall premium when selling their homes.

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49. Later, the U.S. Supreme Court ruled that this test was, in fact, a due process test, not a takings test. The distinction is important because the government gets a more deferential standard of review in due process cases than takings cases. *See infra* text accompanying note 58.

50. Vacancy control means that a new tenant takes the rental unit at the same controlled rent as the prior tenant. This protects tenants from constructive evictions, but it also disincentivizes new rental housing construction or even maintaining existing rental housing stock. The political capital for vacancy controls is also somewhat muted because the strongest support for rent control comes from existing renters, not those who have not yet replaced them.

Existing tenants sell not only their mobile homes but also the right to live in a rent-regulated park where the pad leases will be forever below market value. In regulated apartment buildings this is equivalent to "key money" which is often illegally paid to existing tenants by new tenants in a vacancy-controlled apartment. Because the new mobile-home-owning tenants pay more, often much more, for a used mobile home in a rent-controlled park, the buyers of the used home do not enjoy the same economic rewards of rent regulation that the original tenant enjoyed. Instead, the original tenant often realizes a five or six figure premium when selling a used mobile home coach.

For example, if a used mobile home is worth $50,000 on the open market, the owner may be able to sell it for $150,000 if the coach is located in a rent-controlled park with vacancy control. The extra $100,000 goes directly into the pocket of the mobile homeowner.[51] This premium is essentially the amortized value of the below-market pad rental compared to the same pad in a non-rent-regulated park. In other words, a buyer will be willing to pay a lot more for a coach if he/she understands that the rent payments for the pad space will be forever lower than market value because of rent control. The park owner, who leases out his/her land to the mobile homeowners, does not realize any of these tangible economic benefits realized by the original tenant upon the adoption of rent control. Instead, these benefits come out of the pocket of the park owner. Nor will the home buyer realize any of the economic benefits enjoyed by the owner of the coach when rent control was instituted. Instead, the buyer paid all these benefits in the form of the inflated cost of the coach. These facts have led to some unique takings claims against mobile home rent regulation.

In *Yee v. City of Escondido*,[52] the owners of a mobile home park argued that the rent control constituted a "physical taking." As described by Justice Sandra Day O'Connor, the owners alleged that

> the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner. Petitioners contend that what has been transferred from park owner to mobile

51. For a discussion of the economics of vacancy decontrol in mobile home parks, see Hirsch & Hirsch, *supra* note 33, at 423.

52. 503 U.S. 519 (1992).

> home owner is no less than a right of physical occupation of the park owner's land.[53]

The Court did not agree. First, it held that there was no physical invasion because the park owners could choose to remove the tenants and exit the business. As the Court wrote, "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."[54]

Second, to the argument that the premium garnered by the home owner was the equivalent of the taking of the park owners' cash, the Court likewise was unmoved: "The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more visible than in the ordinary case . . . but the existence of the transfer in itself does not convert regulation into physical invasion."[55] Instead, the Court suggested that the transfer might be relevant to the existence of a regulatory taking—the sort of taking that occurs when a regulation takes away the use and value of property.

But the Court was not about to opine on the possibility of a regulatory taking. When the owners asked the Court to review the case, they asked only that the Court review the question whether there had been a physical invasion type taking. They did not ask whether the regulation and premium might constitute a regulatory taking. For that reason, the Court refused to rule on that issue, leaving it for later courts to decide. That would come a decade later in the Ninth Circuit in a case out of Cotati, California, a small city an hour north of San Francisco.

In *Cashman v. City of Cotati*,[56] the owner of a mobile home park argued that allowing the original coach owner to capture a premium upon sale of a mobile home took money from the park owner while doing nothing to alleviate the problem of high rental costs for subsequent tenants. In other words, the ordinance "failed to substantially advance a legitimate governmental interest." That's significant because in an earlier 1979 case, the Supreme Court held in *Agins v.*

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53. *Id.* at 527.

54. *Id.* at 528.

55. *Id.* at 529–30.

56. 374 F.3d 887 (9th Cir. 2004), *reh'g granted and opinion withdrawn*, 415 F.3d 1027 (9th Cir. 2005). Cashman was represented by attorneys from Pacific Legal Foundation.

Tiburon that if a regulation "failed to advance a legitimate governmental interest" it would be considered a regulatory taking—for which compensation had to be paid.[57] Moreover, the onus was on the government to prove that its regulation made sense.

In *Cashman*, the owners argued that the mobile home rent control law did nothing to alleviate a lack of affordable housing; all it accomplished was to give a windfall to current coach owners who could pocket the premium by charging coach buyers much more money than the coach was worth. The net result was that housing was no less expensive with rent control and therefore, it failed to accomplish its purpose. The Ninth Circuit initially agreed, holding that because the ordinance did not provide a mechanism to prevent the capture of that premium, the law failed to substantially advance a legitimate governmental interest. In other words, under the *Agins* test there was a regulatory taking. But the victory didn't last.

Shortly after the Ninth Circuit decided in favor of the park owners, the Supreme Court took up another takings case involving gas station leases in Hawaii, *Lingle v. Chevron U.S.A. Inc.*[58] Among other things, the high Court there held that it had made a mistake with its earlier "failure to substantially advance" test of *Agins*. It now held that the test was irrelevant to takings cases. It might be a violation of the Constitution's due process clause, but the challengers would have a much heavier burden of proof. As a result, the Ninth Circuit withdrew its original opinion and upheld the ordinance.

More challenges, mostly technical, to rent control in California have come and gone, but rent control remains firmly entrenched in the Golden State. Recently, a panel from the Ninth Circuit scathingly dismissed a rent control challenge by saying: "Simply put, when buying a piece of property, one cannot reasonably expect that property to be free of government regulation such as zoning, tax assessments, or, as here, rent control."[59] The court continued that, "those who buy into a regulated field such as the mobile home park industry cannot object when regulation is later imposed."[60] There is only a reasonable expectation of being paid *some* rent, not a "starry eyed hope of winning the jackpot."

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57. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
58. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
59. Rancho de Calistoga v. City of Calistoga, 800 F.3d 1083, 1091 (9th Cir. 2015).
60. *Id.* (quoting Guggenheim v. City of Goleta, 638 F.3d 1111, 1120 (2010)).

If anything, it's getting only more difficult for landowners with the expansion of rent control by the legislature in 2019.

2019 legislation, AB 1482[61]

In 2018, California voters soundly defeated by 20 points Proposition 10, which would have repealed statutory limitations on rent and vacancy control on apartments built after 1995. Less than a year later, the legislature gave its collective middle finger to the voters by imposing *statewide* rent and vacancy controls for buildings more than 15 years old. In other words, while most local jurisdictions had never adopted rent regulations, they all now will have state-imposed rent regulations.

AB 1482 prohibits landlords from increasing rents in a 12-month period by more than 10% or 5% + CPI, whichever is less. This bill was not opposed by some players in the rental industry, who feared that worse could be passed. The bill prohibits no-cause evictions. For certain no-fault just cause evictions (e.g., landlord move-ins), the landlord must refund the last month's rent. There are exceptions for units less than 15 years old: hospitals, residential care facilities, dormitories, hotels, and single-family homes owned by individuals. No mechanism is provided to increase rents beyond the stated amount, even to reach a fair rate of return or to establish reasonable base rents. The new law went into effect January 1, 2020.

COVID-19

But, just in case landlords thought they could weather AB 1482, COVID-19 has increased their difficulties. The state court Judicial Council first adopted a rule not to hold eviction hearings, thus forcing landlords to allow an increasing number of non-paying tenants to occupy apartments rent-free—without having to even prove a COVID-19 related hardship. Landlords, represented by attorneys from Pacific Legal Foundation, sued the Judicial Council arguing that the courts did not have the power to unilaterally abrogate state statutes.[62] The Judicial Council relented, and rescinded its regulation—effective

61. *The California Tenant Protection Act of 2019, AB-1482* (*available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1482).

62. Christensen v. California Judicial Council, No. BCV-20-101361 (Kern County Superior Court) (filed June 15, 2020).

only after the state legislature adopted AB 3088 which imposes a statewide ban on evictions on tenants with COVID-related hardships. Moreover, there are proposals to extend the no-eviction rules to well beyond the end of the crisis while giving tenants over a year to pay their back rent.

b. New York

For many years, New York state law has permitted larger cities, like New York City, to adopt rent regulations when certain conditions existed, such as low-vacancy rates and pro-forma declarations of emergency. As noted above, New York City has had dual programs of rent control and rent stabilization. Currently, sixty-six jurisdictions in New York state have some form of rent regulation.

New York City began its modern rent stabilization regime in 1969. It established a Rent Guidelines Board and covered units constructed after 1947 (with many of those before 1947 under the older rent control scheme). In 1971, vacancy decontrol was adopted, only to have many of these units re-regulated in 1974. Over the following decades, various laws and political jockeying changed, amended, and changed back various facets of the rent stabilization regime. The city passed new "emergency" ordinances every few years, claiming that low vacancy rates necessitate more of the policies that have been failing for years.

In 2019, everything changed again when the state legislature passed, and governor signed, the Housing Stability and Protection Act of 2019.[63] It is very comprehensive and makes significant changes to the law, including the following.

- Localities with less than 5% vacancy rates may enact rent regulations.
- Rent regulations were made permanent in the sense that no more emergency declarations are necessary. In other words, the continuing fiction of an emergency that had its roots in the wartime emergencies has been set aside.

63. Housing Stability and Tenant Protection Act, 2019 N.Y. ALS 36, 2019 N.Y. Laws 36, 2019 N.Y. SB 6458 (McKinney's 2019) (*available at* https://legislation.nysenate.gov/pdf/bills/2019/S64580).

- The law expands the possibility of rent regulation across New York State.
- Vacancy controls were adopted.
- The new law eliminates the ability to raise "preferential" rents. Those are rents that were set by the landlord at below market but for which the landlord had the option of increasing to market when new tenants moved into the unit or upon a lease renewal. Now, if a tenant vacates voluntarily, rents can be increased only to a regulated maximum.
- The ability to remove units from rent stabilization if the rents were high enough (over $2,775) or if the tenant earned enough (over $200,000) has been eliminated. This removes any pretense that rent regulation is designed to help only financially insecure populations.
- The statute of limitations for challenging overcharges increased from one to six years.
- Deposits are limited to one month's rent.
- "Hardship" extensions may delay evictions for up to one year.
- Fuel pass-alongs are disallowed.
- In New York City, for rent stabilized apartments, rents may be raised only by the lesser of 7.5% or the five-year average approved rent increases as established by the rent board.
- For all nonregulated tenancies, there are requirements for tenant notice if rent increases more than 5%.
- There are limits on eviction fees, despite what a lease may provide (i.e., no attorneys' fees in default judgments).
- No "owner-use" evictions for tenancies over 15 years are permitted.
- The maximum capital improvement for individual apartments for which rent can be recouped is limited to $15,000 over 15 years.
- Rent increases for individual apartment capital improvements must be spread over thirty years after which the increase ends; amortization increases are capped at 1/168 (<35 units) or 1/180 (>35 units); this maxes out capital improvement increases to $89 or $83/month, respectively.
- There is a 2% cap on major apartment building capital improvements with the amortization set at 12/12.5 years (+/- 35 units).

- Tenant "blacklists" are banned.
- Condominium conversions require 51% of tenants to agree (up from 15%).
- Late fees capped at $50 or 5% of total rent.
- Manufactured home rent increases capped at 3% plus expenses.

On July 15, 2019, a coalition of apartment owners filed a complaint in federal district court challenging New York's rent stabilization law plus the new state law. The 121-page complaint in *Community Housing Improvement Program v. City of New York*[64] alleges that the law violates the Due Process Clause and affects both physical and regulatory takings. It doesn't call for compensation for past takings but for an injunction to stop the "application and enforcement" of the rent regulations. The defendants include the city and its agencies, plus state officials responsible for enforcing the state law.

The decision not to ask for damages may have been a political calculation. Because of the magnitude of the economic impacts of rent regulation, and because the primary interest of plaintiffs is to overturn the law, there may have been a fear that some judges would be reluctant to find takings liability if that would involve potential monetary costs to the city.

Another group of landlords filed a second lawsuit, *74 Pinehurst LLC v. State of New York*[65] on November 14, 2019. The 97-page complaint challenges the existing rent stabilization laws as well as the 2019 state legislation on theories of physical and regulatory takings, both facial and as-applied, the Contract Clause, and the Due Process Clause. It seeks declaratory and injunctive relief as well as just compensation.

The federal district court in New York rejected the landlords' claims in both suits. It held that there was no taking because, among other reasons, landlords did not lose all use and value of their properties and they had no reasonable investment-backed expectations that New York wouldn't alter its rent control regulations because most of them had acquired their rental properties when there was some

64. Complaint, Community Housing Improvement Program v. City of New York (No. 19-cv-4087) (E.D.N.Y. 2019).

65. Complaint, 74 Pinehurst LLC v. State of New York (No. 19-cv-6447) (E.D.N.Y. 2019).

form of rent regulation in place. These cases have been appealed to the Second Circuit and briefing was underway in early 2021.

According to the *Wall Street Journal*, there have been drastic devaluations of rental property in New York City because of the new laws. Two months after passage of the new law in 2019, the *Journal* reported, "Two New York landlords with large portfolios of rent-regulated apartments are behind on payments on more than $200 million in real estate loans, a sign that new state rent laws are starting to hurt investors."[66]

Likewise, the *Journal* also reported that with the advent of increased rent control in New York, rental apartment building sales fell by 51% in late 2019.[67] Instead of dealing with rent control, "investors are shifting to parts of the country that face little or no restrictions on rising rents."[68] By reducing investments, this will only make supply shortages worse. As the head of one investment firm put it, "We're not producing enough housing in this country . . . [t]hat continues to drive up rent levels."

What's more, while the value of rent-controlled units has plummeted, the value of buildings free from rent control has risen. Six months into the new law, the *Wall Street Journal* reported, "The near collapse of rent-regulated-building sales also produced some anomalies in residential sales. . . . because of the decline in regulated-building sales, sales of more valuable buildings with market-rate units predominated . . . driving up the average price per square foot tabulated in market reports."[69] In other words, some prices (and

66. Will Parker & Konrad Putzier, *After New York Rent Reform, Some Landlords Are Falling Behind*, WALL ST. J. (Oct. 26, 2019), https://www.wsj.com/articles/after-new-york-rent-reform-some-landlords-are-falling-behind-11572098400. *See also* Josh Barbanel, *New York Landlords Slow Apartment Upgrades, Blame New Rent Law*, WALL ST. J. (Dec. 19, 2019), https://www.wsj.com/articles/new-york-landlords-slow-apartment-upgrades-blame-new-rent-law-11576756800?mod=searchresults&page=2&pos=9 (noting that landlords can no longer fully pass on upgrade costs to tenants); Daniel Geiger, *Blackstone halts Stuy Town upgrades in wake of rent-regs overhaul*, CRAIN'S N.Y. BUS. (July 12, 2019), https://www.crainsnewyork.com/real-estate/blackstone-halts-stuy-town-upgrades-wake-rent-regs-overhaul?mod=article_inline.

67. Peter Grant & Will Parker, *Investors Aim to Avoid Rent Control in New Apartment Deals*, WALL ST. J. (Jan. 21, 2020), https://www.wsj.com/articles/investors-aim-to-avoid-rent-control-in-new-apartment-deals-11579630224.

68. *Id.*

69. Josh Barbanel, *Sales of New York City Rent-Regulated Buildings Plummet After New Law*, WALL ST. J. (Feb. 27, 2020), https://www.wsj.com/amp/articles/sales-of-new-york-city-rent-regulated-buildings-plummet-after-new-law-11582754189.

rents) are increasing more than they otherwise would, making the overall merit of rent control on steroids elusive.

c. Oregon

At one time Oregon, with limited exceptions, prohibited rent regulation, noting "that the imposition of general restrictions on housing rents will disrupt an orderly housing market, increase deferred maintenance of existing housing stock, lead to abandonment of existing rental units and create a property tax shift from rental-owned to owner-occupied housing."[70] But in 2019, Oregon adopted 2019 OR S.B. 608.[71] It applies to buildings fifteen years and older. Key provisions of the law include:

- **No-cause evictions** are eliminated after the first year of occupancy. Cause for evictions can include owner move-in, major rehab, and removal of unit from rental market. No-cause eviction is allowed when an owner lives on a property with two units or less. One month's rent relocation fee must be paid to tenant, except where there are four or fewer units. Notice requirements vary according to circumstances.
- **Rent caps:** A landlord may not increase the rent by more than 7% plus CPI in a 12-month period. No increases are permitted in the first year. A 90-day notice of increase is required.
- **Local rent regulation is preempted.**
- **Impacts**: According to MultiFamily NW, multifamily investment has dropped 38% in the wake of that state's adoption of rent regulations.[72] There is additional concern over a potential legislative push to tighten Oregon's rent regulation provisions even further.[73]

70. OR. REV. STAT. § 91.225 (2020).

71. OR. REV. STAT. § 90.323 (2020).

72. Emily Anderer, *Following Statewide Rent Cap Oregon Multifamily Investment Drops 38%*, MULTIFAMILY NW (June 18, 2019), https://www.multifamilynw.org/news/following-statewide-rent-cap-oregon-multifamily-investment-drops-38.

73. *Id.*

2. States that Lack Statewide Rent Regulations but Permit Local Jurisdictions to Adopt Rent Regulation[74]

Two states, New Jersey and Maryland,[75] as well as the District of Columbia,[76] have rent control on a local basis. New Jersey's history is particularly interesting.

a. New Jersey

In 1957, the state supreme court held in *Wagner v. Newark* that local governments were preempted by state law from adopting rent control.[77]

But when rents in New Jersey began increasing faster than inflation, tenants took notice and a strong tenants' rights movement surfaced in the early 1970s, which agitated for statewide rent control.[78] In this era, Martin Aranow led the tenants' rights movement in New Jersey.[79] He was an unlikely tenants' rights hero: a 33-year-old politically inexperienced "business machine company president who lived in a luxury high-rise in Fort Lee."[80] The tenants' rights movement that he led (until succeeded by his wife after he died an early death) engaged in intense lobbying at state and local levels. While it never resulted in statewide legislation, in time, over 100 local jurisdictions adopted rent control in New Jersey.

While the interests of low-income tenants were not the motivating force behind the movement, the tenants did use the movement to advance their own interests—especially the interests of those living in the public housing projects in Newark.[81] Apparently, one government

74. This is apart from the standard landlord-tenant law that all states have per their common and statutory law. Such laws do not traditionally impose limitations on the rent a landlord may ask of a tenant outside narrow contexts, such as tortious retaliation and unlawful discrimination.

75. For details, *see Rent Stabilization*, TAKOMAPARKMD.GOV, https://takomaparkmd.gov/government/housing-and-community-development/rental-housing/rent-stabilization/.

76. For details, *see* D.C. CODE § 42-3502, *available at* https://code.dccouncil.us/dc/council/code/titles/42/chapters/35/subchapters/II/.

77. Wagner v. Newark, 24 N.J. 467, 132 A.2d 794 (1957).

78. Kenneth K. Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement*, 28 HASTINGS L J. 631 (1977). Some of the impetus for statewide controls came in the wake of President Nixon's imposition of wage and price controls, which ended in 1973.

79. *Id.* at 645.

80. *Id.*

81. *Id.* at 644 n.83.

solution to low-income housing, public projects, had become an abject failure with "deplorable" conditions.[82] One politician and leader of low-income tenants said his tenant organization fully backed Aranow's group and "thanked landlords for exploiting highrise residents along with slum dwellers."[83]

This push for rent control took on urgency after President Nixon's imposition of wage and price controls expired in 1973. While the state legislature never adopted a state law, a number of municipalities did, 18 of them, in months following the lifting of President Nixon's order.[84] When challenged, a superior court judge in *Iganmort v. Fort Lee* distinguished the prior Supreme Court decision in *Wagner* and, dispensing with any pretense of judicial neutrality, went on to pontificate that,

> [e]very human being has a right to be housed. And to some degree, he has a continuing right not to be uprooted annually.
>
> . . . .
>
> Statements that rent control will hurt tenants, landlords, builders and homeowners are a myth.
>
> . . . .
>
> Food, clothing and shelter are perhaps more fundamental to life than free speech, freedom of worship and other inalienable rights. . . . [T]he right to food, clothing and shelter are not only inalienable rights, but rights that are essential to life itself. They do not, therefore, require constitutional affirmation.
>
> . . . .
>
> But someone must speak for a membership [i.e., tenants] inarticulate in the law.

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82. *Id.* The failure of public projects to provide safe housing is beyond the scope of this Article. But the problem continues to this day. *See* Jenna Wang, *New York City Housing Authority Agrees to $2B Settlement Over Massive Health Violations*, FORBES (June 14, 2008), https://www.forbes.com/sites/jennawang/2018/06/14/new-york-city-housing-authority-culpable-for-massive-health-violations-lead-poisoning/?sh=6247bd8822ad.

83. Baar, *supra* note 78, at 644 (quoting THE RECORD (Hackensack, N.J.) Oct. 22, 1969, at B-16, col. 3).

84. *Id.* at 653.

> The judicial imagination, the police power, and the right to shelter should go to greater lengths than ever before in extending the constitutional umbrella over the dignity of a regulated landlord-tenant relationship.[85]

The decision is extraordinary in its willingness to depart from the law and embark on a dissertation of progressive political philosophy. That rent control's potential to cause harm is a "myth" is not a judicially determined fact; it is a political statement that is contradicted by economists of all political persuasions.[86] And the notion that material rights are more important than speech and religious rights is contrary to the fundamentals of Western political thought and classical liberalism.[87] It is the duty of government to allow "life, liberty and the pursuit of happiness" (as stated in the Declaration of Independence). To do that, government provides courts, security, and an environment where people may worship, speak, and pursue an honest living without interference from a tyrannical government—but not free food, free shelter, and free internet.

As Judge Posner put it in a case denying a "right" to public safety,

> The modern expansion of government has led to proposals for reinterpreting the Fourteenth Amendment to guarantee the provision of basic services such as education, poor relief, and, presumably, police protection, even if they are not being withheld discriminatorily. . . . To adopt these proposals, however, would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others.[88]

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85. Inganamort v. Fort Lee, 293 A.2d 720, 742, 744 (N.J. L. Div. 1972). The decision was upheld on appeal, albeit without the extreme rhetoric, at 303 A. 2d 298 (NJ 1973).

86. Alston, Kearl & Vaughan, *supra* note 2.

87. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 11 (Hackett Publ'g 1978) (1859) ("the appropriate region of human liberty [includes] "liberty of conscience . . . liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects . . ."); *see also* Judge Posner's discussion in Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.").

88. *Jackson*, 715 F.2d at 1203–04 (citation omitted).

While the New Jersey Supreme Court was right when it later tried to stop exclusionary zoning rules that prevented people from obtaining decent housing,[89] this trial court was quite wrong to suggest here that it should take over the free market in housing. This ruling is far more an exposition of a half-baked Marxist construct than it is a judicial opinion. Nonetheless, this excursion in leftist ideology is in the New Jersey case law.

Several months after the federal wage and price controls were lifted, the state supreme court affirmed the trial court's decision, albeit in less colorful terms, concluding simply that "[t]he police power is vested in local government to the very end that the right of property may be restrained when it ought to be because of a sufficient local need."[90]

Roughly 100 localities in New Jersey now have rent control regulations that vary by local ordinance.[91]

Certainly, rent control in New Jersey did not alone cause the growing unavailability of affordable housing. Much of the blame should be placed on exclusionary zoning policies which the state supreme court later found to be unconstitutional because zoning that kept out the development of modest multifamily housing was contrary to public policy . In striking down an exclusionary zoning ordinance from Mt. Laurel Township, the court reasoned that "all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws" and "must promote public health, safety, morals or the general welfare."[92] Because exclusionary zoning failed to do, it was unlawful.

3. States that Preempt Rent Regulation (and Have No Statewide Controls)

Thirty-one states preempt rent regulation altogether. These include: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia,

89. S. Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 336 A. 2d 713 (1975).

90. Inganamort v. Fort Lee, 62 N.J. 521, 303 A.2d 298, 307 (1973).

91. *2009 Rent Control Survey*, N.J. DEP'T CMTY. AFFS., DIV. CODES & STANDARDS, https://www.nj.gov/dca/divisions/codes/publications/pdf_lti/rnt_cntrl_srvy_2009.pdf.

92. S. Burlington NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713, 725 (1975). The court noted that there was a shortage of 400,000 housing units in New Jersey alone and ten-million nationwide. *Id.* at 203, 740 (Pashman, J., concurring.)

Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin. Recent initiatives to adopt rent regulations in several of these states are worth noting:

a. Florida

Miami adopted a rent control ordinance in 1969. In a 1975 case, *City of Miami Beach v. Forte Towers, Inc.*, the Florida Supreme Court held that as a matter of state constitutional law, rent regulations can be adopted by local governments.[93] However, Miami Beach's rent regulation law was struck down because it delegated too much municipal power to an administrator. Today, as a practical matter, Florida statutes make the adoption of rent regulation very difficult and only of limited duration.

Florida Statutes 125.0103[94] and 166.043[95] severely restrict the ability of county local governments to impose rent regulation. Both statutes begin by prohibiting any local government from "imposing price controls upon a lawful business activity . . . unless specifically provided by general law."[96] With respect to rent regulation, the Florida Statute 125.0103 says:

> (2) No law, ordinance, rule, or other measure which would have the effect of imposing controls on rents shall be adopted or maintained in effect except as provided herein and unless it is found and determined, as hereinafter provided, that such controls are necessary and proper to eliminate an existing housing emergency which is so grave as to constitute a serious menace to the general public.
> (3) Any law, ordinance, rule, or other measure which has the effect of imposing controls on rents shall terminate and expire within

93. 305 So. 2d 764 (Fla. 1974). The supreme court held that the home rule statute, even insofar as it authorized rent regulation measures, was not unconstitutional; and that evidence presented at trial was insufficient to overcome city council's finding that an emergency existed requiring adoption of rent regulation measures, but that the rent regulation measures constituted an unconstitutional delegation of council's powers to the rent regulation administrator.

94. FL. STAT. § 125.0103 (2013), https://www.flsenate.gov/Laws/Statutes/2013/125.0103.

95. FL. STAT. § 166.043 (2013), https://www.flsenate.gov/Laws/Statutes/2013/166.043.

96. *Id.* § 125.0103.

> 1 year and shall not be extended or renewed except by the adoption of a new measure meeting all the requirements of this section.[97]

The section continues with an exception for luxury rentals—defined as those being in excess of $250/month.

Recently, there has been an effort to repeal these restrictions. HB 6013 and SB 1390 would eliminate section 3 of Statutes 125.103 and 166.043. Both bills died in their respective committees without hearings in May of 2019. However, they were reintroduced in October 2019.[98] According to the *Orlando Sentinel*,

> it would restrict the reasons for which landlords can evict tenants; require landlords to provide leases and eviction notices in tenants' preferred language; prohibit evictions during a state of emergency; prevent landlords from charging exorbitant application fees and require them to refund fees when no units are available. It also would require landlords to provide tenants three months of notice if raising rents more than 5%; and protect renters who have been victims of domestic violence or who receive federal housing vouchers from being denied housing, among other things.[99]

The bills died in committee.[100]

b. Illinois

Illinois adopted a ban on rent regulation in 1997.[101] HB 2430, a legislative proposal to lift the ban, was defeated in a House judicial-civil committee by a 4–2 vote in March 2019.[102] Another bill, HB

97. *Id.* § 125.0103(2)–(3).

98. Caroline Glenn, *With Orlando rents averaging $1,217, lawmakers renew push for rent control and tenant protections*, ORLANDO SENTINEL (Oct. 8, 2019), https://www.orlandosentinel.com/business/os-bz-florida-eskamani-rent-control-20191008-kjic6atg5baddhuv4pcbkqsefa-story.html.

99. *Id.*

100. Florida Senate bill history found at https://www.flsenate.gov/Session/Bill/2020/6013 (HB 6013) and http://www.flsenate.gov/session/Bill/2019/1390 (SB 1390).

101. The law states that governmental entities "shall not enact, maintain, or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property." ILL. COMP. STAT. 825/5 (1997) (*available at* https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=748&ChapterID=11).

102. Steven Stahler, *Bill to lift ban on rent control fails in Springfield*, CRAIN'S CHI. BUS. (Mar. 27, 2019), https://www.chicagobusiness.com/government/bill-lift-ban-rent-control-fails-springfield.

2192, would establish regional boards with power to regulate rents. On March 29, 2019, it was referred to the rules committee.[103] In the meantime, a group calling itself the "Lift the Ban Coalition" is actively agitating for a repeal of the ban with HB 255. Chicago has passed nonbinding resolutions in support of lifting the ban, and the current governor, J.B. Pritzker, has expressed his support for lifting the ban.[104] As of early 2021, the ban remains in place.

c. Massachusetts

In 1969 and 1970, the state of Massachusetts adopted laws allowing Boston, Cambridge, and other cities to adopt rent control laws. In 1994, property owners in Cambridge spearheaded a statewide referendum to ban rent regulation. It passed 51–49. Boston, Brookline, and Cambridge, which had adopted rent regulations, were without rent regulation by early 1995.[105] The repeal had a significant positive effect on housing supply and value. The National Bureau of Economic Research has estimated that from 1994 to 2004, property values in Cambridge rose in value by $1.8 billion, which included $1 billion in spillover value added to never-controlled rental units.[106] According to the study's conclusion:

> Under any reasonable set of assumptions, increases in residential investment stimulated by rent decontrol can explain only a small fraction of these spillover effects. Thus, we conclude that decontrol led to changes in the attributes of Cambridge residents and the production of other localized amenities that made Cambridge a more desirable place to live.[107]

Nevertheless, a push is underway to repeal the ban. HB 3373 was introduced in January of 2019, to institute vacancy control for tenants

103. *See Bill Status of HB2192*, ILL. GEN. ASSEMBLY (Jan. 13, 2021), https://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HB&DocNum=2192&GAID=15&SessionID=108&LegID=117947.

104. Maya Dukmasova, *Chicago tenants continue to demand "rent control now,"* CHI. READER (Oct. 16, 2019), https://www.ltbcoalition.org/.

105. Jay Fitzgerald, *The End of Rent Control in Cambridge*, NAT'L BUREAU ECON. RSCH., https://www.nber.org/digest/oct12/end-rent-control-cambridge.

106. *Id.* (citing David H. Autor, Christopher J. Palmer & Parag A. Pathak, *Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge Massachusetts* (NBER Working Paper, No. 18125, issued in June 2012), https://www.nber.org/papers/w18125.pdf.

107. Autor, Palmer & Pathak, *supra* note 106, at 31.

over 75 years of age for buildings with six or more units. Another bill, HB 3924, would give local communities the option to impose the full gamut of rent regulations and vacancy controls on apartments and mobile homes.[108] While advocates are pushing for the bill, Governor Charlie Parker has not expressed support, saying instead that the solution to the housing crisis is to build more housing.[109]

For a number of years, various attempts to regulate rents have failed. That has motivated the supporters of rent regulation to go big against the forces of "private property and greed" as characterized by tenant advocate Lisa Owens:

> A lot of our allies got together, saying that what we're asking for is so basic and it's the same forces coming down so strongly on the side of private property and greed . . . . There was this broad consensus after those losses that we have to fight for what's big and bold and what we really need, because if we fight for small things that are incremental, we still get the same forces coming back at us.[110]

As of early 2021, these efforts to eliminate the profit motive in rental housing have been unsuccessful.

d. Washington State

Washington State banned rent regulation in 1981 with RCW 35.21.830.[111] This does not sit well with the Seattle progressive political establishment, which is actively pursuing efforts to repeal the ban. As explained on the city's website:

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108. Chris Lisinski, *Rent Control Bill About Giving Communities Options, Sponsor Says*, WBUR NEWS (Mar. 27, 2019), https://www.wbur.org/news/2019/03/27/rent-control-bill-about-giving-communities-options-sponsor-says.

109. *Advocates call for a return of rent control in Massachusetts*, WBUR NEWS (Oct. 29, 2019), https://www.wbur.org/news/2019/03/27/rent-control-bill-about-giving-communities-options-sponsor-says.

110. Jared Brey, *Could Rent Control Return to Boston?*, NEXT CITY (Nov. 5, 2019), https://nextcity.org/daily/entry/could-rent-control-return-to-boston.

111. The statute states:

> The imposition of controls on rent is of statewide significance and is preempted by the state. No city or town of any class may enact, maintain, or enforce ordinances or other provisions which regulate the amount of rent to be charged for single-family or multiple-unit residential rental structures or sites.

WASH. REV. CODE § 35.21.830 (2020), https://apps.leg.wa.gov/rcw/default.aspx?cite=35.21.830.

> In addition to rent control, we also need to tax the rich, and big businesses like Amazon to fund a massive expansion of social housing (publicly-owned, permanently-affordable homes) and to fully fund homeless services. Our movement also needs to continue our ongoing successful fight for a full renters bill of rights.
>
> . . . .
>
> The goal is to build mass protests for the next session of the legislature in Olympia to make it clear that working people are not willing to accept continued inaction on the severe affordable housing crisis, and demand serious solutions, not lip service.
>
> Let us begin![112]

In the last six years, the Seattle area has added 400,000 new residents but only 135,000 new homes.[113] But the city politicians don't think more building is the answer. Instead, the city is planning to adopt its own rent and vacancy control ordinance in the event that the statewide ban is lifted: "State law currently prohibits rent control. [City Council Member] Sawant said her legislation, if passed, wouldn't take effect until that ban is repealed. The full city council likely won't take up the matter until December, after budget negotiations have ended."[114]

So far, the legislature has not moved forward with the city's symbolic agenda.

4. States with No Rent Regulation and No Preemption

Seven states have no statewide rent regulation but don't expressly preempt it. These states include: Hawaii, Delaware, Maine, Montana, Nebraska, Ohio, and Wyoming.

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112. Seattle City Council, *Rent Control FAQ's and Myths*, SEATTLE.GOV, http://www.seattle.gov/council/meet-the-council/kshama-sawant/rent-strike/rent-control/rent-control-faqs-and-myths.

113. Daniel Beekman & Brian Gutman, *Seattle area has undergone record growth. Now voters may reshape its politics.*, SEATTLE TIMES (Nov. 3, 2019), https://www.seattletimes.com/seattle-news/politics/seattle-area-has-undergone-record-growth-now-voters-will-decide-whether-to-reshape-its-politics/.

114. Joel Moreno, *Sawant's rent control proposal takes aim at Seattle's pricey housing market*, KOMO NEWS (Sept. 24, 2019), https://komonews.com/news/local/rent-control-proposal-takes-aim-at-seattles-pricey-housing-market.

Additionally, seven other states have the so called "Dillon Rule,"[115] meaning that while rent regulation is not preempted by state law, if a local government (which may be limited by size) can persuade the state legislature to give the local government permission to adopt rent regulation, they may. These states are Alaska, Nevada, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia.

C. Federal Rent Regulation Agitation

1. The "A Just Society: A Place to Prosper Act of 2019"—Representative Alexandria Ocasio-Cortez

With the national election season behind us, and with the rise of some progressives in Congress, there has been a call for the imposition of national rent regulation. Representative Alexandria Ocasio-Cortez has submitted the "A Just Society: A Place to Prosper Act of 2019."[116] It did not pass, but we can expect a new version in 2021. The law would have applied to owners with five or more units or mobile home park owners with two or more parks. The proposal would, among other things, impose nationwide rent caps with annual increases tied to the consumer price index or 3%, whichever is greater. It also has vacancy controls, forbids discrimination against Section 8 voucher holders, provides standing to tenants to sue, and overrides any arbitration clause leases. Evictions may not be commenced until a tenant is two months behind in her rent, and there will be a national program of free counsel to tenants facing evictions, with a fund of $6.5 billion annually to pay for the attorneys. It provides that state attorney generals may sue to enforce the act. The bill also would amend the Civil Rights Act to include people who receive income such as Section 8 vouchers to be a "protected class," meaning landlord discrimination against a tenant with such income would be actionable under 42 U.S.C. § 1983.

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115. The rule is derived from Iowa Supreme Court Justice Dillon's opinion in *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 1866 WL 173 (1868). As Justice Dillon put it, "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy." 24 Iowa at 475.

116. A copy can be found here: https://ocasio-cortez.house.gov/sites/ocasio-cortez.house.gov/files/A%20Just%20Society-%20A%20Place%20to%20Prosper%20Act.pdf.

Another element of the proposal would require owners with over 1,000 units nationwide, or 100 units in a metropolitan area, to disclose for a public database, any information about their business practices, including statistics on evictions, rents, code violations, standard leases, and details on corporate ownership.

2. Senator Bernie Sanders

Senator Sanders' "Housing for All"[117] plan would do many of the same things as the AOC plan. It would spend $1.4 trillion to restore and build new government housing, end discrimination against Section 8 recipients, impose a national rent cap of 3% or 1.5 times the CPI (whichever is higher) "to help prevent the exploitation of tenants at the hands of private landlords," implement just-cause eviction laws, allow states to adopt more stringent laws, and provide $2 billion for attorneys for tenants facing evictions. There are a host of other restrictions on house flipping, inclusionary zoning, and a tax on vacant homes.

D. Miscellaneous Provisions

Some localities have adopted restrictions on the ability of landlords to use criminal background checks for tenant screening.[118] Others put limits on rent deposits. Tenants represented by Pacific Legal Foundation attorneys have filed challenges to Seattle ordinances that prohibit criminal background checks and require landlords to rent to the first applicant that meets minimum standards. In December, the state supreme court upheld the ordinances. In doing so, the court overturned over a century's worth of precedent that had held the state constitution did more to protect property rights than the federal constitution.[119]

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117. The "Housing for All" campaign platform can be found at: https://berniesanders.com/issues/housing-all/.

118. *See, e.g.*, Jerimiah Jacobsen & Gordon Severson, *Minneapolis council approves new renter protections*, KARE11 (Sept. 13, 2019), https://www.kare11.com/article/news/local/minneapolis-council-approves-new-renter-protections/89-1cc7a2de-0098-4bf7-9564-fb14f5aa0107.

119. *See* Yim v. City of Seattle, 454 P.3d 694 (Wash. 2019); Chong Yim v. City of Seattle, 454 P.3d 675 (Wash. 2019).

CONCLUSIONS

As much as some politicians might try, no one has figured out a way to repeal the law of supply and demand. There can be no repeal, only workarounds. In some of the old (and current) communist states, the workaround was mass starvation. That lessened demand. Starvation, combined with political repression, staved off collapse. Venezuela has made conditions so miserable that millions have resorted to the workaround of mass emigration, leaving those in charge the masters of a much-diminished nation. And cities in California have had their own workaround: effectively putting the casualties of its housing policies onto the streets. But long term, the law of supply and demand is inexorable: if you restrict prices, supply will diminish, and demand will find substitutes, whether it be the streets, emigration, or death.

Rent control to a housing crisis is like pouring hot soup over a hungry person shivering in the freezing cold. At first it feels great. There's lots of warmth and soup. Then it cools off. The cold penetrates the soup-soaked clothing, and everything feels much colder than before. The food is wasted, the hunger is greater, and the cold is more bitter.

Rent control, whether it be of the traditional type or the more flexible version of rent stabilization, isn't designed just to establish minimum living standards. It is directed toward wealth redistribution that favors a politically active constituency. Where it has been adopted, it has only been effective in the short term. It lowers rents for some. But because it also discourages the only practical means of alleviating high housing costs—an increase in supply through new free market construction—it ends up doing more harm than good.

The rise in progressive activism during the Trump years may have been a reaction to the former president's incendiary politics and rhetoric. Whether progressives succeed on either the state or national level to impose more rent controls during the Biden-Harris administration remains to be seen. Landlords know how to band together and fight back, as they did in California to beat back two statewide initiatives. But so long as there is a housing shortage resulting in rents that are too high, rent control will remain in the hearts and minds of renters everywhere. If they can muster their political forces, they may well succeed. But if they do, will the nation's shortage of affordable housing be alleviated? Probably not.