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**Even Bad Laws Are Constitutional: A Discussion on Rent Control**

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## *Introduction*

Rent control has reemerged as the United States is experiencing an unprecedented lack of housing supply.<sup>1</sup> Citizens all over the country are calling for rent-control measures and legislatures are responding.<sup>2</sup> Rent-control policies, in some parts of the country, can date back to World War II. But that does not mean they such laws were immune from criticism and challenge, as rent control has always been a controversial topic. In this paper, I will first survey the history of rent-control laws to demonstrate their evolution. Second, I will survey the Supreme Court precedent on the constitutionality of rent control laws. There I will conclude that there are two separate analysis that apply to a takings claim. While the Supreme Court has precluded the physical takings doctrine, I still apply the doctrine to demonstrate only a slight modification is needed to overcome its unconstitutionality. The second takings doctrine, regulatory takings, pose little issue for rent control measures if the theoretical justification I put forth is adopted. Third, I distinguish between two claims. The first being that rent control laws are constitution and the second that they are ‘good policy.’ In this section, I will demonstrate that rent control laws are not good long-term policies on both moral grounds and policy grounds. Lastly, I will demonstrate that even if my constitutional analysis is incorrect, temporary rent control measures can be sustained as two alternatives are sought to address the long-term concerns raised in the previous section.

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<sup>1</sup> See Anna Bahney, *The U.S. Housing Market is Short 6.5 Million Homes*, CNN (Mar. 8, 2023), <https://www.cnn.com/2023/03/08/homes/housing-shortage/index.html>.

<sup>2</sup> See Julia Kauffman, ‘Overbearing’: Calls for Rent Control in Charlotte Growing Amid Rising Prices, WCNC (Aug. 26, 2022), <https://www.wcnc.com/article/money/markets/real-estate/housing-advocates-pushing-rent-control/275-1a63280e-7058-4883-8592-100b3754b6cd>; Sean Keenan, *Legislation to Repeal Georgia’s Rent Control Ban Stalls Out*, ATLANTA CIVIC CIRCLE (Mar. 2, 2023), <https://atlantaciviccircle.org/2023/03/02/bill-to-repeal-rent-control-ban-failing/>; Andrew Kenney, *Colorado Could Allow Rent Control. What Does History Say Might Happen Next*, CPR NEWS (Mar. 9, 2023), <https://www.cpr.org/2023/03/09/colorado-rent-control-explainer/>; Nikki McGee, Could Rent Control Make Nashville More Affordable, WKRN (April 11, 2022), <https://www.wkrn.com/special-reports/nashville-forward/could-rent-control-make-nashville-more-affordable/>.

### *History of Rent Control Laws in the United States*

First-generation rent controls were introduced soon after the country's entry into World War II. First-generation rent controls capped the amount landlords could charge a tenant. The only states enacting these legislative policies were in New York City and Washington D.C.<sup>3</sup> New York City passed "a series" of "emergency laws" to deal with the shortage of particular forms of housing, but the laws were thought to be inadequate.<sup>4</sup> On October 22, 1919 Washington D.C. passed the Ball Rent Act which established "a commission to fix 'fair and reasonable' rents and regulated evictions.<sup>5</sup> The Act was challenged but held constitutional by the Supreme Court, which will be discussed later. In the 1970s, another type of rent control was introduced, second-generation rent control. These regulations govern "allowable rent increases . . . conversion, maintenance, and landlord-tenant relations."<sup>6</sup> They also "commonly permit automatic percentage rent increases related to the rate of inflation."<sup>7</sup> Second-generation rent controls, were adopted more widely than its predecessor. However, by the time the second-generation rent controls were enacted, rent control generally received a bad reputation. Economists argued, that by placing a ceiling on rents, there would be a decrease in both the quantity and quality of available housing.<sup>8</sup> Additionally, economists agreed that rent controls result in a host of other harmful consequences, such as abandoning properties, reducing mobility, and exacerbating existing discrimination in rental housing.<sup>9</sup> This is further evidenced by the fact that the majority of states currently have rent control bans.<sup>10</sup> But if a majority of states have banned any form of rent control, then an

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<sup>3</sup> John W. Willis, *Short History of Rent Control Laws*, 36 CORNELL L. REV. 54, 70 (1950).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 71.

<sup>6</sup> Richard Arnott, *Time for Revisionism on Rent Control?*, 9 J. ECON. PERSP. 99, 102 (1995).

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* at 99.

<sup>9</sup> *Id.*

<sup>10</sup> *Rent Control Laws by State*, NMHC (July 19, 2022), <https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/>.

important question is presented for assessing the constitutionality of rent control measures. Is there a meaningful constitutional difference between first- and second-generation controls?

As Richard Epstein noted, “at this stage . . . I do not want to stress the differences among rent control systems.”<sup>11</sup> While it is clear that rent-control has undergone some important alternations, at the core the challenge by critics is still the same. Foundationally, any policy that seeks to limit what an individual may do with their property raises Fifth Amendment concerns, namely *takings*. Irrespective of the allowances made over time, landlords are correct in asserting that by not being permitted to charge market rates, states are essentially depriving them of the full economic benefit of their property. Furthermore, as will be discussed more fully later in the paper, the criticisms surrounding whether rent control policies are effective remain largely the same. The concern is that rent control policies are having the opposite effect than intended thereby not solely harming landlords but the individuals the policies were intended to aid and protect. But this raises a question – if rent control laws are in fact harming individuals, how can they be constitutional?

#### *Supreme Court Precedent and Rent Control*

The first Supreme Court decision to address the constitutionality of rent controls was issued in *Block v. Hirsh*. The Court decided that “a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation.”<sup>12</sup> As the legislature is permitted to limit height of buildings, so too they are permitted to limit the rent.<sup>13</sup> But *Block* was short lived. Only three years later, the Court in *Chastleton Corp. v. Sinclair* held that since the exigent circumstances presented in *Block* were no longer present, the rent controls imposed

<sup>11</sup> Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741, 746 (1988).

<sup>12</sup> *Block v. Hirsh*, 256 U.S. 135, 156 (1921).

<sup>13</sup> *Id.*

were no longer constitutional.<sup>14</sup> Moreover, the Court refused to put forth a rule which could be used to determine the constitutionality of rent control policies.<sup>15</sup> The next time the Court directly addressed the issue of rent controls was in its 1988 decision of *Pennell v. San Jose*, which was decided in 1988.<sup>16</sup> Here, the Court set aside the issue of the appellant's takings claim as it "would be premature to consider" given that the tenant hardship clause at issue was never "relied upon."<sup>17</sup> However, the Court did reaffirm that "a legitimate and rational goal or rate regulation is the protection of consumer welfare."<sup>18</sup> The case most important for the coming analysis is *Yee v. City of Escondido*.<sup>19</sup> Here, the Court stated, "while perhaps [rent control is] within the scope of our regulatory taking cases, [it] cannot be squared easily with our cases on physical cases."<sup>20</sup> This is important in responding to an highly influence article authored by Richard Epstein. Lastly, in *Lucas v. South Carolina*, the Court acknowledged that it has "engaged in [sic] essentially ad hoc factual inquiries" to determine whether a particular act constituted a taking.<sup>21</sup> But it has carved out "two discrete categories of regulator action as compensable."<sup>22</sup> The first concerns "regulations that compel the property owner to suffer a physical 'invasion' of his property," regardless of "how minute the intrusion and . . . public purpose behind it."<sup>23</sup> This rule was borne out of the Court's decision, *Loretto v. Teleprompter Manhattan CATV Corp.* The Court stated plainly "that a permanent physical occupation authorized by the government is a taking without regard to the public interest that it may serve."<sup>24</sup> The second concerns regulations

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<sup>14</sup> *Chastleton Corp v. Sinclair*, 264 U.S. 543, 547 (1924).

<sup>15</sup> See *id.* at 548.

<sup>16</sup> See *Pennell v. San Jose*, 485 U.S. 1 (1988).

<sup>17</sup> *Id.* at 9-10.

<sup>18</sup> *Id.* at 12.

<sup>19</sup> *Yee v. City of Escondido*, 503 U.S. 519 (1992).

<sup>20</sup> *Id.* at 527.

<sup>21</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

that “deny all economically beneficial or productive use of the land.”<sup>25</sup> From *Lucas* and the previously mentioned cases, the Court determines first if there has been a taking of a physical property or if there is a regulation that the claimant believes amounts to a taking. If there has been a physical taking, then *Lucas* is controlling. However, if a governmental policy is alleged to amount to a taking, then *Lingle v. Chevron* governs.<sup>26</sup>

When courts determine whether a specific policy, they use the factors put forth in *Lingle*. Here, the Court recognizes “that government regulation of private property may . . . be so onerous that its effect is tantamount to a direct appropriation or ouster.”<sup>27</sup> If the claim presented falls outside of the two categories of takings as put forth by *Lucas*, two factors must be considered. The first is “the economic impact of the regulation on the claimant.”<sup>28</sup> Court should especially consider “the extent to which the regulation has interfered with distinct investment-backed expectations.”<sup>29</sup> The second factor to be considered is “the character of the governmental action.”<sup>30</sup> This prong requires inquiry into “whether it amounts to a physical invasion or instead merely affects property interest through some public program adjusting the benefits and burden of economic life to promote the common good.”<sup>31</sup> Although the Court has stated that it would be difficult to square rent control laws with a *physical* takings claim, in the following section, I will determine if such laws are constitutional under both the *physical* takings doctrine and *regulatory* takings doctrine.

#### *Physical or Regulatory – A Game of Constitutional Roulette with Rent Control*

<sup>25</sup> *Id.*

<sup>26</sup> See *Lingle v. Chevron U.S.A, Inc.*, 544 U.S. 528 (2005).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 538-39.

<sup>29</sup> *Id.* at 539.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Beginning with the physical takings doctrine, it is important to note that rent control policies that have a “just cause” or no-cause eviction provision clearly fall within the first category of *Lucas*. One example of such provision is the recently passed Boston City Council rent control measure.<sup>32</sup> The bill specifies “that an owner shall not recover possession of a leased unit” unless, among other exceptions, “the tenant . . . has refused . . . to execute a written extension or renewal.”<sup>33</sup> Another example can be found in Oregon, which has implemented rent control measures statewide. Oregon only allows a non-renewal of lease in four specific circumstances.<sup>34</sup> Thus, it is not a question of whether the landlord will extend a renewal offer. Rather, there is an implicit dictate that the landlord must offer renewal of the rent-controlled apartment, which in effect “creates a Never-Ending Lease with the applicable Rent Controlled Cap.”<sup>35</sup> Since the landlord must offer renewal, thereby taking their option of whether to enter into a contract concerning their property, it is evident that the tenant is invading the landlord’s property despite government approval. As there are no means by which to remove the tenant, except those authorized by the state, the state has effectively made the tenant an owner. Thus, under *Lucas*, any rent-control provision is unconstitutional if it contains provisions like the one above. But this raises the question of removed. More specifically, if landlords removed this provision thereby not falling under the first categorical rule of *Lucas*, are rent control laws constitutional?

<sup>32</sup> See H.D. 3744, 193th Leg. (Ma. 2023), <https://malegislature.gov/Bills/193/H3744>.

<sup>33</sup> *Id.*

<sup>34</sup> Oregon Law Center & Legal Aid Service of Oregon, About Just Cause Eviction and Rent Increase Protections, OregonLawHelp.org, <https://oregonlawhelp.org/resource/about-just-cause-eviction-and-rent-increase-protections>. The four specific situations are: (1) the landlord intends to either demolish the unit or use the unit for something other than a residence; (2) the landlord intends to make repairs or renovations and the property will be unsafe to live in; (3) the landlord or the landlord’s immediate family member plans to move in; and (4) the landlord sold the unit to someone who plans to move in.

<sup>35</sup> Rich Vetstein, *Boston Rent Control Bill Will Wreak Havoc In City’s Housing Market*, THE MASS. REAL ESTATE L. BLOG (Mar. 9, 2023), <https://massrealestatelawblog.com/tag/boston-rent-control-bill/#:~:text=The%20bill%20gives%20tenants%20an,same%20unlimited%20right%20to%20renew>.

One practical problem that must first be addressed is incentive. If the renewal provision is removed – then landlords have no incentive to renew lease options. It may be that if the landlord evicts the tenant, then the unit would return to market rate thereby undercutting the purpose and prevalence of rent controlled units. The other concern may be that if the rent control policy mandates that the unit be capped at the initial lease rate for all renewals but allows for available units to start at the minimum rent amount plus the annually allowed increase, then landlords would not renew so as to increase what would be the new rent amount of a new tenant. But these concerns can be mitigated through a two-step process. The first step is by not allowing reversion on a rent-controlled apartment. By not allowing a reversion back to market price, the landlord's incentive to not extend a renewal offer is taken away. The second step is to allow for the rental increases at the start of each lease renewal. This allows the landlord to keep up with the rate of inflation as well as maintenance and other such operating costs. Ultimately, this side-steps the takings concern of the first category in Lucas. However, there remains the second category *Lucas* recognized.

Here, even if we concede that the goal of all rent control is “to ensure that the landlord’s rent is kept below the fair market rental of the property,” *Lucas* explicitly recognizes that *all* economically beneficial use of the property is denied. Rent control of any form does not deny the landlord of all economic use even if it is conceded that they are receiving less than what they would if the apartment was priced at market rate. The landlord is still receiving profit from the units they have rented to tenants. Moreover, if a tenant does stop paying rent, all rent control policies currently enacted entitle the landlord to seek the rent and if they are unable to, then to evict the tenant. Thus, it is evident that rent-control policies do not constitute a *physical* taking under category two of *Lucas*.

Lastly, under the revised model, a state would have to demonstrate that it has provided just compensation. Richard Epstein, a critic of the constitutionality of rent-control policies argues that the “just compensation inquiry asks whether the landlord has been supplied with the equivalent in value to the lost property interest.”<sup>36</sup> While Epstein would be correct if rent-controls were determined to be a taking, as evidenced by the previous discussion he is incorrect. Because the revised rent-control policy would not fall under one of the two categories formulated in Lucas, the government does not need to provide any compensation because the policies would not be considered a taking.

The next challenge rent-control policies must overcome are the factors set forth by *Lingle*. Under the first factor out forth by *Lingle*, a peculiar issue arises. By considering the investment expectations, it would seem that two distinct cases arise. The first is that those landlords who bought and operated a rental before rent control policies would be enacted would have a stronger claim than those who bought apartment buildings subsequent to rent control measures being enacted. More specifically, if it were the case that a landlord bought the rental property and there was no indication that rent control policies were to be enacted, he would have a greater expectation for the return on the property. If a landlord who bought a rental property when rental control measures were already enacted, it would follow that he would have less of an expectation of return on his rental property. Yet there remains a third case. Namely, what about those instances where there are serious discussions in the legislature about passing a rent control measure, but no bill has been put forth? Should the landlord’s return expectation be?

While the Court has not clarified this prong of the analysis, rent control measures at any stage satisfy this factor. One of the cardinal rules of investment is that an individual cannot

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<sup>36</sup> Richard Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741, 746 (1988).

guarantee any return. The very nature of investing is risk taking. Otherwise stated, a rental property owner cannot guarantee, even absent rent control measures, that they will “break even” or even make a profit. Therefore, at the beginning of any purchase of rental property, owners should reasonably have low return expectations as high expectations would be misplaced. However, with lower return expectations, the idea of rental control becomes more constitutional. This is because the loss in projected profits from a high expectation return would be diminished thereby approximately resembling the experienced loss due to rent control. One potential counterargument may be that while the argument advanced may theoretically work, the reality of the situation is that many property owners will engage risk management firms to project profits. However, this counterargument misses the point. A city or statewide program cannot be invalidated based off a single instance or even a few instances where the expected projection was significantly different than what the actual return is due to rent control measures. There would have to be a significant showing that the two did not align.

The second prong requires a demonstration that the rent control programs are aimed at “adjusting the benefits and burden of economic life to promote the common good.”<sup>37</sup> Again, as stated by Pennell, “a legitimate and rational goal of price or rate regulation is the *protection of consumer welfare*.”<sup>38</sup> Economically disadvantaged persons often face concerns such as “feared hunger, utility shut-offs, and evictions” due to the rent burden.<sup>39</sup> As noted in an interview conducted by Hernandez, one individual stated that in an attempt to “circumvent long delays in accessing housing benefits” she became “homeless in order to be given priority on the rolls for

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<sup>37</sup> *Lingle*, 544 U.S. at 539.

<sup>38</sup> *Pennell*, 485 U.S. at 13.

<sup>39</sup> Diana Hernandez, *Affording Housing at the Expense of Health: Exploring the Housing and Neighborhood Strategies of Poor Families*, 37 J. FAM. ISSUES 921, 933 (2016). I find this particularly relevant in light of the Boston rent control bill because this study was conducted in Dorchester.

subsidized housing.”<sup>40</sup> Furthermore, many individuals have to deal with “subpar housing environments and other housing quality issues” because they cannot afford market rate apartments.<sup>41</sup> Hernandez also noted that the most common housing problems “were related to pest infestation (63%), cracks, holes, mold, and leaks (46%) as well as heating/cooling or ventilation system deficiencies (39%).<sup>42</sup> Additionally, as rent controls are intimately tied to housing security it is important to examine this relationship. Pastor, Carter, and Abood wrote, that after the Great Depression in the 1930s, the United States government “has certainly tended to make housing stability a public policy goal.”<sup>43</sup> Statistics show that children experiencing insecure housing, due to the lack of affordable units, are reported to have “worse health status, increased developmental risks,” and a lower average weight as compared to those children not experiencing housing insecurity.<sup>44</sup> However, regardless of the numerous considerations just mentioned, Epstein argued that rent control policies fail the public use standard because “there is a naked transfer from A to B [of property interest] that the Constitution prohibits. But Epstein fails to adequately reconcile his argument with case law. In *Loretto*, the Court clearly stated, that a taking “may more be readily found” when government interference is “characterized as a physical invasion” as compared to “when interference arises from some sort of public program adjusting benefits and burdens of economic life to promote the common good.”<sup>45</sup> As stated at the beginning of this paragraph, the Court has held there is, as a matter of law, a public interest when

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Manual Pastor, Vanessa Carter & Maya Abood, *Rent Matters: What are the Impacts of Rent Stabilization Measures*, USC Dornsife Program for Env’t & Reg’l Equity 17 (2018), <http://aagla.org/wp-content/uploads/2019/10/USC-Dornsife-Rent-Matters.pdf>.

<sup>44</sup> Diana Cutts et al., *US Housing Insecurity and the Health of Very Young Children*, 101 AM. J. PUB. HEALTH 1508, 1511 (2011).

<sup>45</sup> *Loretto*, 548 U.S. at 426.

government seeks to regulate prices. Thus, this argument fails thereby rendering rent control laws constitutional.

### *What to do About Rent Control*

However, while rent control laws are constitutional, there is a gap between two important and distinct questions. The first question, which I have just explored, is a prescriptive account of the constitutionality of rent control. The second question, which I will explore in the following section, is a normative question. More specifically, is rent control a good policy that we should invest in and continue to implement. A law may be constitutional but may not make for good policy. In this section of the paper, I will explore two arguments against rent control as a long-term policy to remedy the housing crisis. I will then put forth a brief alternate solution which I believe would circumvent the question of rent control entirely and make for better policy concerning the inadequate housing supply.

#### *A. Moral Argument*

The first question presents a moral argument of sorts. The question posed is as follows: If we do not ask grocers to lower their prices, why do we ask landlords to lower theirs?<sup>46</sup> This presents a fundamental question rent control advocates must answer. They must provide “justification for imposing [a] burden” on landlords for providing housing below the market rate “merely because they invested in apartment buildings rather than other assets.”<sup>47</sup> This question is not only reflected in scholarly literature but was posed by the Court in *Armstrong v. United*

<sup>46</sup> See Walter Block et al., *Rent Control: An Economic Abomination*, 11 INT'L J. VALUE-BASED MGMT. 253, 256 (1998); see also Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control*, BROOKINGS INST. (Oct. 18, 2018), <https://www.brookings.edu/research/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control/>.

<sup>47</sup> *Id.*

States as well. Justice Black wrote, that the design of the takings clause was “to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole.”<sup>48</sup> The usual retort is that we should be concerned “with the well-being of certain people.”<sup>49</sup> However, this fails to answer the question posed. If this is a concern that society should share, then society as a whole should bear the responsibility. Incorporating the introductory question, the citizens of our society that are food insecure receive exclusively or in combination, goods that are voluntarily donated or government subsidies that are funded by the collective tax-payers.<sup>50</sup> Aside from the moral concerns that rent control laws invoke, rent control must demonstrate that it is a good economic and social policy.

### *B. Policy Argument*

Even critics of rent-control will concede that as a short-term solution, these policies are effective. Block stated, “yes, in the short run, controls lower rents below what would otherwise occur. This cannot be denied.”<sup>51</sup> However, the primary concern is rent-control policies’ long-term effect.

One concern is that these policies have a negative impact on the quantity of housing available thereby perpetuating the cycle of housing shortages. A study conducted by Diamond, McQuade, and Qiuan found that one long term consequence of San Francisco’s rent-control policy is that landlords who are subject to the rent control policies “respond[ed] over the long term by substituting other types of real estate.”<sup>52</sup> Primarily they converted the apartment building

<sup>48</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>49</sup> Stephen Dobkin, *Confiscating Reality: The Illusion of Controls in the Big Apple*, 54 BROOKLYN L. REV. 1249, 1249 (1989).

<sup>50</sup> See Edgar O. Olsen, *Is Rent Control Good Social Policy*, 67 CHI.-KENT L. REV. 931, 933 (1991).

<sup>51</sup> Block, *supra* note 32, at 254.

<sup>52</sup> Rebecca Diamond, Time McQuade, and Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365, 3366 (2019).

into condo “so as to exempt them from rent control.”<sup>53</sup> This move by landlords “shifted the city’s housing supply toward less affordable types of housing that likely cater to the tastes of higher income individuals.”<sup>54</sup> But Diamond and her colleges have not conducted the only study in which this conclusion was reached. Dirk Early conducted a study concerning New York City and the two types of rent controls mentioned earlier.<sup>55</sup> He found that “tenants in . . . rent controlled units would be better off if controls had never been established.” Tenants would have “a lower price of housing in the uncontrolled sector.”<sup>56</sup> Notwithstanding, the quantity issue of rent control policies, there is also a quality issues.

One major concern states have always had an interest in is lowering the crime rate. This has always been a public policy concern, especially more recently.<sup>57</sup> However, in a study conducted on the rent control policy in Cambridge Massachusetts, the researchers found “that rent decontrol caused an overall decline in crime of approximately 16 percent.”<sup>58</sup> Once rent controls were removed, there was “no evidence of a citywide displacement of crime, as crime rates did not rise in other nearby cities.”<sup>59</sup> Another concern that has been voiced regarding rent control policies is the condition of homes. If the landlord cannot increase the rent of the units by the next renewal period of the lease, through providing regular and superior maintenance, then

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Dirk W. Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits*, 48 J. URB. ECON. 185, 202 (2000).

<sup>56</sup> *Id.*

<sup>57</sup> See Richard Beck, *Is Violent Crime Rising?*, DEPT. OF CRIMINOLOGY, PENN AT ARTS & SCIENCES, <https://crim.sas.upenn.edu/fact-check/violent-crime-increasing#:~:text=Violent%20crime%20recently%20has%20been.increases%20have%20continued%20into%202022>; see also Ames Grawert and Noah Kim, *Myths and Realities: Understanding Recent Trends in Violent Crime*, BRENNAN CTR. FOR JUST. (May 9, 2023), <https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime>.

<sup>58</sup> David H. Autor, Christopher J. Palmer, and Parag A. Pathak, *Ending Rent Control Reduced Crime in Cambridge*, 109 AEA PAPERS & PROC. 381, 381 (2019).

<sup>59</sup> John M. MacDonald & Robert J. Stokes, *Gentrification, Land Use, and Crime*, 3 ANN. REV. CRIMINOLOGY 121, 126 (2020).

the incentive for landlords to provide such services are taken away.<sup>60</sup> This may lead to irregular maintenance on the units which may result in the units failing into a state of disrepair.<sup>61</sup> Lastly, another policy concern is the cost to implement rent control programs. Naravo noted, when Cambridge implemented its rent control program, the city had an annual budget of \$700,000 for the oversight board and related activities.<sup>62</sup> But “the \$700,000 constitut[ed] a small fraction of the \$5 million to \$10 million in lost property tax revenues.”<sup>63</sup> Thus, if such programs continue to be costly to implement with little return, then they are inefficient.

### C. Solution

As indicated in the policy argument, even critics of rent control programs conceded that rent control programs were effective in the short-term. This foundation provides us a solution to build upon. Even if it is posited that the constitutional case put forth is incorrect, there remains precedent that rent control measures are constitutional in times of emergency. Provided that the current housing crisis is well recognized and documented,<sup>64</sup> it may be that rent control is permissible for a short time period. During the time period in which it is held constitutional, legislatures would work on various reforms. One such reform may be reformulating density

<sup>60</sup> Richard Arnott & Elizaveta Shevyakhova, *Tenancy Rent Control and Credible Commitment in Maintenance*, 47 REG'L SCI. & URB. ECON. 72, 82 (2014).

<sup>61</sup> *Id.*

<sup>62</sup> Lisa Sturdivant, The Impacts of Rent Control: A Research Review and Synthesis, NMHC, <https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf> (Citing Peter Navaro, *Rent Control in Cambridge, Massachusetts*, 78 PUB. INT. 83, 93 (1985)).

<sup>63</sup> *Id.*

<sup>64</sup> See Jeffery Hayward, *U.S. Housing Shortage: Everything, Everywhere, All at Once*, FANNIE MAE (Oct. 31, 2022), <https://www.fanniemae.com/research-and-insights/perspectives/us-housing-shortage>; Jerusalem Demsas, Housing Breaks People’s Brains, The Atlantic (Nov. 23, 2022), <https://www.theatlantic.com/ideas/archive/2022/11/us-housing-supply-shortage-crisis-2022/672240/>; David Dworkin, *Two Issues Define America’s New Housing Crisis*, NAT. HOUSING CONF., <https://nhc.org/two-issues-define-americas-new-housing-crisis/>.

requirements to provide for more units per plot.<sup>65</sup> This would have the consequence of increasing the housing supply as well as acting as “a more sustainable way of developing our cities.”<sup>66</sup>

Another strategy that could be implemented during rent control measures’ temporary stay is a modification of land use regulations. As Torres-Lugo points out, current land use “regulations not only make it difficult for developers to meet the current demand for using” but also lead to higher rents.<sup>67</sup> While these solutions are not discussed in-depth, they accomplish the goal set forth in this paper, which is to overcome the constitutional challenges of rent control policies.

### Conclusion

The theme throughout this paper was twofold. During the first half of this paper, I demonstrated that rent control policies that include an automatic renewal provision would not pass constitutional scrutiny under the Lucas test. However, with two modifications, such policies easily overcome the constitutional challenge. Additionally, I demonstrated that while rent control may be unconstitutional under the regulatory takings doctrine, if the investment expectation is understood to include the inherent risk in all investment, then rent controls are plainly constitutional. I also aimed to distinguish two important questions that often get lumped together in scholarly literature. The distinction between constitutionality and whether rent control is a good economic policy are two distinct questions. Ultimately, I conclude that while rent control laws are constitutional, they are not good social and economic policy. Offering a way forward, I conclude that even if my analysis is incorrect on the constitutionality of rent control laws, they can be sustained as short-term measures while better long-term measures are introduced.

<sup>65</sup> Diego S. Torres-Lugo, *Rent Control: Good For Politicians, Bad for the People* 18 (Working Paper 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4042043](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4042043).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*