

AMERICAN COURTS' IMAGE OF A TENANT

Nadav Shoked

ABSTRACT—What is the core of current American residential landlord–tenant law, and how was that core formed? This Essay argues that in the past few decades courts have settled on a two-pronged landlord–tenant law regime. The law provides tenants with assurances respecting the quality of the units they rent. It does not, conversely, provide them with any assurances respecting the price of the rental units—and, therefore, respecting their ability to remain in those units.

The first component of the regime was established through the well-known judicial creation and endorsement of the warranty of habitability. The second component's entrenchment is often attributed to legislative reforms that rejected rent control. In fact, however, courts played a major role in instating this component as well. Through a heretofore largely ignored resort to multiple local government law doctrines, courts have consistently rejected municipal measures aimed at regulating the pricing of rental units.

This prevalent distinction courts have instituted between quality controls (which they require) and price controls (which they reject) cannot be justified in traditional economic terms. The academic literature does not support the contention that one measure is more effective in aiding poor tenants than the other. The current regime can hardly be viewed, therefore, as geared toward redistribution and fairness. Rather, this Essay argues, the distinction between quality and price controls that characterizes American landlord–tenant law serves to operationalize a certain view of the meaning of tenancy in modern times. Courts engaged in what they perceived as a traditional common law exercise of updating the contours of the landlord–tenant legal relationship. In doing so, they were inspired by, and then implemented, an image of the new urban tenant as requiring—and expecting—certain amenities and rights. Importantly, this image of the modern tenant was general and class neutral. It thus lent support to measures benefitting—at least theoretically—all tenants, but not to those explicitly, and exclusively, focused on poor tenants.

AUTHOR—Professor of Law, Northwestern University Pritzker School of Law. This Essay was part of the *Northwestern University Law Review* 2021 Symposium, *Reimagining Property in the Era of Inequality*, and I am

NORTHWESTERN UNIVERSITY LAW REVIEW

grateful to all the participants and organizers, especially the law review's Senior Symposium Editor, Summer Zofrea. I also greatly benefitted from the comments of David Dana, Nestor Davidson, Tim Mulvaney, Chris Serkin, Laura Underkuffler, and participants at the 2022 Progressive Property Works in Progress Conference and in the Eighth Annual International and Comparative Urban Law Conference. Finally, special thanks to Phil Rich for extraordinary help in research.

INTRODUCTION	253
I. COURTS AND THE LANDLORD–TENANT REVOLUTION.....	256
A. <i>A Strong Judicial “Yes” to Quality Controls</i>	258
B. <i>A Strong Judicial “No” to Price Controls</i>	262
II. COURTS’ ANIMATING CONCERNS: PUBLIC POLICY REFORM OR THE MEANING OF TENANCY	275
A. <i>Quality and Price Controls as Public Policy Tools</i>	275
B. <i>Quality and Price Controls and a Legal Image of Tenancy</i>	280
CONCLUSION	286

INTRODUCTION

Modern landlord–tenant law came to embody 1960s hopes that reforms to law, and especially property law, could be tools in fighting poverty and inequality.¹ Property law was never an obvious vehicle for such a fight against inequality. Property law’s main concern is those who hold property. Thus, most of its doctrines can, if at all, only help the have-nots on the margins: for example, exceptions to the trespass tort—which is all about protecting the haves—could be somewhat expanded, thereby aiding, indirectly and in very specific circumstances, the homeless. Landlord–tenant law is different. It is the one domain within property law that centers directly, wholly, and explicitly on regulating the relationship between actors who are normally the haves, landlords, and actors who are often the have-nots, tenants. Reformers in the 1960s—that unique decade when a complete overhaul of America’s inequities appeared attainable—thus zeroed in on strengthening the rights of the residential tenant.² Those rights were to be the one effective tool within property law to address the harms of inequality, which property law otherwise sustains.

The ensuing campaign to bolster the legal rights of tenants vis-à-vis landlords was, in many ways, successful. It is a mainstay of reviews of American law in the field to note that the past half-century represented a revolution in landlord–tenant law.³

¹ A famous article launching the use of civil litigation to advance the war on poverty—which then led to the founding of Legal Aid Services through LBJ’s Great Society—is Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1334 (1964).

² See, e.g., THEA K. FLAUM & ELIZABETH C. SALZMAN, *THE TENANT’S RIGHTS MOVEMENT* 3–4, 16–18 (1969).

³ E.g., Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. Rev. 503, 503 (1982) (“It is generally acknowledged that the 1960’s and 1970’s saw a revolution of sorts in American landlord-tenant law . . .”).

More than fifty years later, and in the midst of a New Gilded Age characterized by inequality levels the instigators of the revolution could never have imagined,⁴ I would like to assess what that revolution has done to landlord–tenant law—and also what it has failed to do. The post-revolutionary settlement, I will argue, revolves around a specific understanding of the rights attached to a residential lease. A lease of a residential unit must be accompanied by an assurance of quality—but by no assurance of price, and thus of stability. A tenant in current American law has a right, which she can enforce in court, that the unit she inhabits consistently meet minimal standards of habitability. She has no similar right that the landlord provide that unit for a specific rent, or refrain from increasing the current rent.

The route the law took toward establishing the first component of this regime—the assurance of quality—is well-known. Starting with the D.C. Circuit’s groundbreaking decision in *Javins v. First National Realty Corp.*, courts established a requirement that a leased unit abide by certain minimal standards of habitability.⁵ Judges, that is, led the charge in establishing this component of the law.

Conversely, according to common wisdom, judges played a secondary role in establishing the second component of the post-revolutionary landlord–tenant regime—the denial of price assurances. Rent control was felled by state legislatures that enacted laws banning local rent control measures. In this context, it is often noted that for more than a century, judges, for their part, have consistently refused to strike down rent control measures as violating the Federal Constitution’s Takings Clause. This view of judges as assuming an accommodating, or at least neutral, stance toward rent control is somewhat misleading, however. In actuality, through an array of state common law doctrines, state courts undermined rent control for years, and once legislative bans were enacted, gave these bans extremely broad readings. Thus, both components of modern low-income landlord–tenant law should be analyzed as largely—albeit not solely—judicial creations.

But on what grounds did the judiciary create these doctrines of landlord–tenant law? What motivated judges to embrace quality controls but deny price controls? To, that is, trust the market to efficiently set rental units’ pricing but then doubt its ability to efficiently assure those units’ quality? This two-pronged move hardly reflects accepted prescriptions for good policy. The academic literature on the law and economics of low-income

⁴ The most influential work on the current plight and exploitation of poor tenants is, unquestionably, MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

⁵ 428 F.2d 1071, 1072–74 (D.C. Cir. 1970).

housing does not unanimously embrace the warranty of habitability as an effective means to promote the interests of low-income tenants. Nor does the literature share the unyielding view of rent control as antithetical (though it is clearly sympathetic to this second component of the judicial formula). The academic literature simply does not perceive the clear demarcation between the efficacy and desirability of quality controls and price controls which the law has insisted on.

The structure of the law that American courts have constructed for low-income housing is thus not necessarily grounded in considerations of efficiency. Rather, I will argue here, it was built on traditional legal notions respecting tenancy as courts updated those notions through the application of (what courts viewed as) common law methods. The resulting structure reflects courts' perception of what tenancy, as a legal concept, *means*. The rules courts announced attempted to give concrete substance to a certain specific image of a tenant. The regime they generated, therefore, is not rooted in a desire to effectively combat inequality or redistribute wealth. Instead, it expresses an income- or class-neutral idea of tenancy and a desire to abide (or at least pretend to abide) by old common law conventions.

The goal of this brief Essay, therefore, is rather limited. I do not endeavor to make here a normative contribution. The Essay purports to break no new ground in justifying—or negating—the desirability of the warranty of habitability, rent control, or any measure in landlord–tenant law. Similarly, it offers no prescriptions respecting ways to better the law. Indeed, this is, explicitly, an exploration of the law on the books rather than in action; thus, it makes no claims about the extent to which the implied warranty of habitability and, when available, rent control have actually been meaningful legal interventions. While the main thrust is to explicate existing law, even this aspiration has its limits. It would be too pretentious to contend that I (or for that matter, anyone else) can definitively explain why various American judges made certain choices in diverse decisions in disparate cases. But I can describe those choices, highlight the contradictions they embody, and suggest potential concerns that could have animated them. The goal is to craft a new—and I hope both interesting and helpful—lens through which readers can observe elements of the law they already know well.

Accordingly, Part I presents the current structure of the law. It traces the well-known role of courts in reforming landlords' maintenance duties and also the much less well-known role of courts in sabotaging efforts at rent control. Part II attempts to explain this current structure. It provides a review of the legal and economic literature, concluding that the literature does not find a stark difference between the effects of quality and price controls on low-income housing. The judicial attitude insisting on the distinction

between the two is then attributed not to a concern with efficiency—or equality—but to a certain image of the modern tenant which, importantly, is class and race neutral.

This exploration of the way courts established key components of modern landlord–tenant law and their motivations in doing so aids in explicating the state of this important body of law. More generally, it also helps in assessing the potential for combating property inequality through common law courts. Based on the story told here, little reason exists for much optimism respecting that potential. Efforts at meaningful reform should focus on other arenas.

I. COURTS AND THE LANDLORD–TENANT REVOLUTION

At common law, a tenant’s rights were harshly limited. Into the second half of the twentieth century, the law viewed the lease as a grant of an estate—originally, a nonfreehold estate⁶—and thus it placed few obligations on the grantor landlord. The landlord only had to transfer the estate; that is, a formal right to the specific property for the defined period.⁷ Once she did that, her obligations mostly ceased.⁸ The radically anti-tenant nature of this view is perhaps easiest to grasp through one of its most extreme ramifications. If, following the signing of the lease, a tenant could not enter the leased land because a wrongful possessor was occupying it (for example, a former tenant who refused to leave), most American courts would have found no claim in the tenant against the landlord.⁹ The tenant would have needed to evict the occupant herself. After all, with the lease a mere conveyance of title, the landlord was only obligated to transfer a formal right to possess the land, not to deliver actual possession.¹⁰

The legal status of the tenancy as a transfer of an estate—and nothing beyond that—left the regulation of the relationship between the landlord and tenant to the lease alone. Freedom of contract reigned supreme. But even that statement underappreciates the landlord’s legal powers in traditional law. For the lease was not actually subject to contract law doctrines that normally generate obligations for both contracting parties, thereby somewhat capping

⁶ 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 38, 111 (2d ed., Liberty Fund 2010) (1898).

⁷ ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 1:1, at 1–3 (1980).

⁸ Milton R. Friedman, *The Nature of a Lease in New York*, 33 *CORNELL L.Q.* 165, 166 (1947).

⁹ 1 HERBERT THORNDIKE TIFFANY, *A TREATISE ON THE LAW OF LANDLORD AND TENANT* § 182, at 1147–54 (1910).

¹⁰ *Id.* at 1154. In England, and a number of American states, the landlord had to deliver actual possession. See *Teitelbaum v. Direct Realty Co.*, 13 N.Y.S.2d 886, 887–88 (Sup. Ct. 1939).

the powers of the stronger party to the transaction.¹¹ Because the lease itself was viewed as a conveyance of property rather than a contract, duties sounding in contract law—such as the duty of good faith¹² or the duty to mitigate damages¹³—did not burden the landlord.

This conception of tenancy, originating in the common law's medieval days and granting the tenant no rights beyond those she bargained for, grew less and less adequate as the nineteenth and twentieth centuries progressed. By the late nineteenth century, industrialization, immigration, and urbanization had transformed the market for housing, especially in major cities.¹⁴ The plight of tenement dwellers became a major cause for reformers, and then for some state legislatures, in the Progressive Era.¹⁵ In the aftermath of the New Deal, and even more meaningfully, following World War II, the federal government poured resources into efforts at improving living conditions.¹⁶ Around the same time, often prodded by activists and commentators,¹⁷ courts also began questioning the tenets of the old common law of landlord–tenant¹⁸—about which Justice Holmes was still noting, as late as 1918, that “it is a matter of history that has not forgotten Lord Coke.”¹⁹ Judges thus proceeded to usher in the revolution in landlord–tenant law.

¹¹ Also, and importantly, the contract doctrine of mutual dependence of promises, developed in the late eighteenth century, was not imported into the law governing leases. Glendon, *supra* note 3, at 511. This doctrine would have allowed a tenant to renege on her promise to pay rent if a landlord breached any of his promises in the lease.

¹² *E.g.*, Kendall v. Ernest Pestana, Inc., 709 P.2d 837, 844, 847 (Cal. 1985) (explaining that traditionally, courts did not apply the good faith requirements to consent clauses in leases).

¹³ Heckel v. Griese, 171 A. 148, 149 (N.J. 1934).

¹⁴ *See generally* JONATHAN LEVY, AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES 243–49 (2021) (discussing industrialization and the growth of cities). Urban population jumped from 6.2 million in 1860 to 30 million in 1900. *Id.* at 248.

¹⁵ The first such law was the New York Tenement House Law of 1867, 1867 N.Y. Laws, ch. 908, §§ 1–19, applicable only to New York City. It was almost immediately followed by a Massachusetts law that applied to Boston. 1868 Mass. Acts, ch. 281, §§ 1–18. On the reform movement supporting these efforts, see generally LAWRENCE M. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION 38–41 (Morton Grodzins ed., 1968) (discussing the housing reform movement that emerged in the Progressive Era and targeted “evil” landlords exploiting “ignorant” tenants).

¹⁶ *E.g.*, Housing Act of 1949, Pub. L. No. 81-171, § 2, 63 Stat. 413, 413 (1949) (declaring that “the general welfare and security of the Nation and the health and living standards of its people require . . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family”); Housing Act of 1954, Pub. L. No. 83-560, § 220(a), 68 Stat. 590, 596 (1954) (broadening the New Deal Era’s “slum clearance” into “urban renewal” programs).

¹⁷ *See, e.g.*, FLAUM & SALZMAN, *supra* note 2, at 16–18 (describing contemporary housing shortages and ensuing tenants’ actions in the battle for reform).

¹⁸ 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 16B.08[2][e] (Michael Allan Wolf ed., 2007) (noting that starting in the 1950s and 1960s courts allowed tenant tort claims against landlords for breach of housing codes).

¹⁹ Gardiner v. William S. Butler & Co., 245 U.S. 603, 605 (1918).

This Part will first review what that revolution achieved, focusing on the judicial embrace of the implied warranty of habitability, and then turn to what it did not achieve, focusing on entrenched judicial opposition to rent control.

A. A Strong Judicial “Yes” to Quality Controls

Courts’ abandonment of the old common law’s notion of the lease as mere conveyance of an estate led to the reversal of the most extreme ramifications of that traditional conception, such as those noted above respecting the landlord’s lack of obligation to deliver actual possession or to mitigate damages.²⁰ But unquestionably, the most dramatic element of the revolution in landlord–tenant law was the imposition on the landlord of a duty to maintain the unit she leased to the tenant.

The old common law had no such duty. With the lease seen as mere conveyance, the notion of caveat lessee governed.²¹ Unless the lease stated otherwise, the leased premises had to meet no quality standards.²² An oft-cited and, to modern eyes, shocking illustration is the decision of a court to mandate that a tenant pay rent even after the building she leased had burned down.²³

The common law did recognize one doctrine that seemingly had some relevance and aided tenants: the covenant of quiet enjoyment. Because the lease was a conveyance of the right of possession, the landlord was prohibited from interfering with the tenant’s quiet enjoyment of her possession. Such interference would undermine—indeed, negate—the

²⁰ Forty-two states and D.C. now impose a duty to mitigate damages. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 296 (Tex. 1997). Also see an 1860 New York statute that provided:

[T]he lessees or occupants of any building, which shall, without any fault or neglect on their part, be destroyed or be so injured by the elements or any other cause as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury.

Suydam v. Jackson, 54 N.Y. 450, 453 (1873).

²¹ *Franklin v. Brown*, 23 N.E. 126, 127 (N.Y. 1889) (“It is uniformly held in this state that the lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. As was said by the learned General Term when deciding this case: ‘The tenant hires at his peril and a rule similar to that of *caveat emptor* applies and throws on the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects.’”).

²² As late as 1965, a major treatise could proclaim: “In the absence of statute, and in the absence of a controlling covenant, a lessor is not under a duty to maintain leased land in a state of repair.” WILLIAM E. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* § 64 (3d ed. 1965).

²³ *White v. Molyneux*, 2 Ga. 124, 126 (1847).

transaction.²⁴ A landlord's interference with quiet possession could take the most obvious form: actual eviction—physical exclusion of the tenant from all or part of the premises.²⁵ But by the mid-nineteenth century, courts decided that an eviction need not be actual.²⁶ If a landlord created circumstances rendering the property unfit for possession, the tenant could demonstrate an eviction by construction of the law.²⁷ Forced to leave due to landlord-created circumstances, the tenant would be viewed by a court as evicted—in violation of the covenant of quiet enjoyment.²⁸

To meet the requirements of a claim under the covenant, the tenant had to be able to show that the unit was rendered wholly unlivable and, as a precondition for this claim that the unit was now unlivable, leave the unit and renounce possession.²⁹ These elements reflected the doctrine's logic that the landlord should only become liable if she evicted a tenant during the lease period. But these elements also harshly curtailed the doctrine's reach. It

²⁴ *Metropole Const. Co. v. Hartigan*, 85 A. 313, 314 (N.J. 1912). In earlier times, rent payments under the feudal system were based upon the theory that productive use of the land was necessary to produce the rent. Therefore, if the landlord directly or indirectly deprived the tenant of the use of any part of the land, rent payments were suspended until the landlord removed the obstacle. *Id.* In this respect, courts' perception of the lease as the conveyance of an estate could work in favor of the tenant. If the landlord merely partially evicted the tenant (removed her from only part of the premises), the tenant could stop paying rent entirely while staying in the remaining portions. It was irrelevant that the space to which the tenant had been deprived of access was relatively small or unimportant to her use and enjoyment of the premises. It merely had to be "[o]utside the rule de minimis." *Smith v. McEnany*, 48 N.E. 781, 781–82 (Mass. 1897).

²⁵ *Smith*, 48 N.E. at 781. Additionally:

This rule of the common law is inflexible. For rent which by the terms of the demise would accrue during the continuance of the eviction the landlord can neither sue, nor can he distrain for the rent reserved, or any part of it; nor can he recover for use and occupation, although in either case the tenant has continued in possession of the remaining part of the premises demised.

Morris v. Kettle, 30 A. 879, 880 (N.J. 1895).

²⁶ *Townsend v. Gilsey*, 7 Abb. Pr. (n.s.) 59, 63 (N.Y. Super. Ct. 1869) ("Anciently, nothing short of an actual expulsion operated an eviction; but, in modern times the rule has been liberalized in favor of the tenant; and now any intentional and injurious interference by the landlord with the beneficial enjoyment of the premises will discharge the tenant from his obligation for the rent.").

²⁷ The American case announcing the rule was *Dyett v. Pendleton*, 8 Cow. 727, 727 (N.Y. 1826), where the landlord habitually brought "lewd women under the same roof with the demised premises . . . by which nocturnal noise and disturbance were made; and, in consequence, the lessee quitted the premises and remained away, with his family." This, the court held, should bar the landlord from collecting rent, "the same as on an actual or physical entry and expulsion of the tenant." *Id.*

²⁸ The leading English case on constructive eviction was *Upton v. Greenlees*, 139 Eng. Rep. 986, 994 (1855) (defining a constructive eviction as "an act of a permanent character done by the landlord in order to deprive, and which had the effect of depriving, the tenant of the use of the thing demised, or of a part of it").

²⁹ "A tenant cannot claim uninhabitability, and at the same time continue to inhabit." *Two Rector St. Corp. v. Bein*, 234 N.Y.S. 409, 412 (App. Div. 1929). SCHOSHINSKI, *supra* note 7, § 3:5, at 97 (explaining that to be tantamount to an eviction, the landlord's acts must be "so injurious to the tenant's enjoyment and use of the property as to justify abandonment by the tenant.").

could provide very little help to tenants in substandard housing units. Particularly the demand that the tenant abandon the unit for any claim to be considered—“we know of no case sustaining the doctrine that there can be a constructive eviction, without a surrender of the possession”³⁰—rendered the doctrine almost wholly useless for poor tenants, whose housing options were limited, if not nonexistent. Furthermore, as a doctrine which low-income tenants could hardly enforce, the covenant of quiet enjoyment could carry no meaningful deterrent effect and did not incentivize landlords to maintain units they were renting out.

Against this background in 1970, the D.C. Circuit introduced the implied warranty of habitability.³¹ In *Javins v. First National Realty Corp.*, tenants in a Washington, D.C. slum stopped paying rent after their landlord had failed to fix hundreds of housing code violations.³² In one of the most famous property law decisions authored by an American jurist, Judge J. Skelly Wright denied the landlord’s eviction action for nonpayment of rent. He held that all leaseholds signed in the city must be read as containing a landlord promise to abide by the city’s housing code.³³ Further, he insisted that a tenant’s obligation under the lease to pay rent was dependent upon this implied obligation to comply with the code the landlord had assumed under the same lease.³⁴ These two moves established a “warranty of habitability.”³⁵

The warranty placed on the landlord a meaningful maintenance duty that tenants could effectively enforce. To rely on the *Javins*-announced warranty, a tenant need not have left her unit; indeed, she need not even have turned to a court. She could just stop paying rent and then raise the warranty as a defense to a landlord’s eviction claim.

State and local legislatures had been enacting and refining housing codes and tenement laws since the Progressive Era.³⁶ The tight resources of governmental enforcement agencies had always, perhaps inevitably,

³⁰ *Boreel v. Lawton*, 90 N.Y. 293, 297 (1882).

³¹ *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1072–73 (D.C. Cir. 1970). Arguably, courts in Hawaii and Wisconsin had done so earlier. Wisconsin’s highest court introduced the warranty in *Pines v. Persson*, 111 N.W.2d 409, 412 (Wis. 1961). However, the case was, at least one commentator argued, overruled sub silentio by *Posnanski v. Hood*, 174 N.W.2d 528, 533 (Wis. 1970). See Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 8 n.14, 9 n.25 (1979). And in Hawaii, *Lemle v. Breeden*, 462 P.2d 470, 472–74 (Haw. 1969), decided a year before *Javins*, engaged in full discussion of the existing law and reasons to reform it.

³² 428 F.2d at 1073.

³³ *Id.* at 1081–82.

³⁴ *Id.* at 1082.

³⁵ *Id.* at 1072–73.

³⁶ See *supra* note 15.

suppressed those measures' effects.³⁷ The warranty of habitability could transform these measures' promise into a reality. Withholding rent made it easy for tenants to force their landlord to make the repairs necessary under the applicable housing code. No longer would tenants have to somehow draw the attention of overburdened city officials or "initiate court proceedings in what may appear to be a 'frightening' system."³⁸

Javins was tremendously influential. By the end of the decade, its holding became law in a clear majority of states. Courts around the country adopted the implied warranty of habitability, and state legislatures, acting in concert with courts or independently of them, codified the warranty.³⁹ Today, it is part of the law in forty-nine states.⁴⁰

Given the warranty's current inclusion in many states' lawbooks, it is simplistic—and plainly misleading—to refer to the implied warranty of habitability as a purely judicial or common law creation. But there is no debating the leading role that judges took in the warranty's development and entrenchment. After all, the doctrine was first introduced through a court decision. Courts further fortified the protections of the warranty by banning retaliatory evictions: the eviction of a tenant who had earlier raised a warranty complaint.⁴¹ Through such and similar court decisions (and the legislative acts they engendered), the warranty became an uncontested component of American landlord-tenant law.

That is not to say that the trend in modern law has always, and unwaveringly, been to expand the warranty's reach. More recently, certain reforms have curtailed its effects. Examples include demands that a tenant raising a claim for breach of the warranty deposit in escrow any rent they withhold;⁴² that the tenant alert local officials;⁴³ that the landlord be afforded

³⁷ Cunningham, *supra* note 31, at 15 ("[A]ll observers agree that local governments have been notably ineffective in code enforcement.").

³⁸ See *Bos. Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 840 (Mass. 1973) (quoting James H. Angevine & Gerald Taube, *Enforcement of Public Health Laws—Some New Techniques*, 52 MASS. L.Q. 205, 228 (1967)).

³⁹ See Cunningham, *supra* note 31, at 6–9.

⁴⁰ Arkansas is the one holdout. See Stephen R. Giles et al., *Non-Legislative Commission on the Study of Landlord-Tenant Laws*, 35 U. ARK. LITTLE ROCK L. REV. 739, 764 (2013) (noting that "[t]he implied warranty of habitability . . . is now law in every state except for Arkansas").

⁴¹ The leading case was *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 857 (D.C. Cir. 1972).

⁴² See, e.g., UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.105(a) (UNIF. L. COMM'N 1972); Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 13–14 (2016).

⁴³ See *Dugan v. Milledge*, 494 A.2d 1203, 1206 (Conn. 1985).

enough time to repair defects after receiving notice;⁴⁴ and that the tenant prove that subpar conditions were the only reason for withholding rent.⁴⁵ Even if courts did not introduce all, or even most, of these limiting rules, courts have done little if anything to push back or narrow the application of such restrictive legislative demands. In this respect, courts' dedication to the doctrine has not been absolute. Furthermore, in their factual findings, courts are perhaps at times not as pro-tenant as could be hoped for.⁴⁶ Still, in none of these instances have courts questioned or unsettled the validity of the doctrine as a whole.

Courts might not find a breach of the warranty in every case, and they might not be as committed to aggressively enforcing it as its instigators would have liked. But courts initiated the attachment of a quality assurance to rental units—and in the more than fifty intervening years since they introduced it, they have never questioned that assurance's doctrinal grounding.

B. A Strong Judicial "No" to Price Controls

The tale of American law's regulation of the price tenants are charged for those units they rent is very different. Unlike the development of the maintenance-related elements of landlord-tenant law—where the judiciary often took the lead—tenant-empowering reforms in this realm were almost all legislative. In fact, courts often resisted these efforts. Because courts' role in reversing the most radical of legislative reforms targeting rental units' pricing is largely unacknowledged, this Section's discussion will be somewhat more detailed than the preceding discussion of courts' well-known role in establishing maintenance duties.

⁴⁴ See, e.g., *Berzito v. Gambino*, 308 A.2d 17, 22 (N.J. 1973) (explaining that "a reasonable period of time to . . . repair" a defect is "a prerequisite to maintaining" an action based in the warranty); RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 5.5(4) (AM. L. INST. 1977); TEX. PROP. CODE ANN. § 92.052(a)(1) (West 2007) (requiring that a tenant specify the condition of the property in a notice to the landlord before a landlord is obligated to commence repairs).

⁴⁵ See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 425–26 (2011).

⁴⁶ E.g., *280 Broad, LLC v. Adams*, No. HDSP-137382, 2006 WL 2790909, at *7 (Conn. Super. Ct. Sept. 26, 2006) (finding that "the evidence does not support the finding that the Tenant was relieved of the obligation to pay rent due to the condition of the premises. Although the Tenant was not satisfied with the Landlord's efforts to address the furnace issue, the evidence fails to demonstrate that the furnace problems caused the premises to be rendered unfit an [sic] uninhabitable"); *Glasoe v. Trinkle*, 479 N.E.2d 915, 920 (Ill. 1985) (insisting that "[t]he condition complained of must be such as to truly render the premises uninhabitable in the eyes of a reasonable person").

1. Legislatures Take the Lead

Given the common law's original notion of the lease as the conveyance of an estate—of the right to possess property for a given amount of time—the law placed no obligation on the landlord to renew the lease.⁴⁷ At the end of the lease's term, a landlord was free to evict the tenant or insist on raising the rent as he saw fit.⁴⁸

Twentieth-century legislation altered certain aspects of the landlord's termination rights. The most prevalent and long-lasting reform removed the landlord's right to resort to self-help to evict a tenant at the end of a lease. Almost all states now require—mostly by statute—that landlords turn to courts to remove a tenant who refuses to leave at the end of her lease.⁴⁹ These laws only address the procedures that must precede an eviction—they do not mandate that the landlord provide the tenant with the option of signing a new lease. A few states have adopted some form of for-cause eviction laws, which can carry that effect.⁵⁰ But even under the most far-reaching of these laws, New Jersey's 1974 statute, a landlord is allowed to insist on increased rent in the new lease.⁵¹ The only exception that the New Jersey law makes is for “unconscionable” rent increases.⁵² While courts there eventually agreed to place the burden of proving that the increase is not unconscionable on the landlord,⁵³ they hardly ever rule against landlords on this issue.⁵⁴ Thus, even

⁴⁷ Then and now, several types of tenancies existed. Blackstone identified the estate for years—now known as a term of years—which ends at the expiration of the period fixed, no other notice being required; tenancy at will, which could be terminated by either party at any time; and the tenancy at sufferance, which described the status of a tenant who had wrongfully stayed beyond the expiration of her rights. 2 WILLIAM BLACKSTONE, COMMENTARIES 140–50. A century or so later, another form became popular: the periodic tenancy, which runs continuously from period to period—say, month to month—until one party terminates it by giving proper notice, usually equivalent to the length of the measuring period. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 6.16 (3d ed. 2000).

⁴⁸ Indeed, the landlord could even rely on self-help to remove the tenant at the lease's conclusion. “The landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with ‘violence and quarrels and bloodshed.’” *Lindsey v. Normet*, 405 U.S. 56, 71 (1972) (quoting *Entelman v. Hagoood*, 22 S.E. 545, 545 (Ga. 1895)); *see also* *Foley v. Gamester*, 170 N.E. 799, 800 (Mass. 1930) (finding that a landlord who leased to a tenant “for as many years as desired” could terminate at will).

⁴⁹ SCHOSHINSKI, *supra* note 7, § 6:5, at 400–02. The requirement does not always apply to commercial tenancies. *See, e.g.*, *Brown v. State Cent. Bank*, 459 F. Supp. 2d 837, 842 (S.D. Iowa 2006).

⁵⁰ *See* D.C. CODE § 42-3505.01. A Connecticut law provides some protections to the elderly and persons with disabilities. CONN. GEN. STAT. § 47a-23c. New Hampshire limits evictions in certain circumstances. N.H. REV. STAT. ANN. §§ 540:1-a, 540:2 (2018).

⁵¹ N.J. STAT. ANN. § 2A:18-61.1(f) (West 2013).

⁵² *Id.*

⁵³ *Fromet Props., Inc. v. Buel*, 684 A.2d 83, 87 (N.J. Super. Ct. App. Div. 1996).

⁵⁴ *Marine View Hous. Co. No. 1 v. Benoit*, 457 A.2d 1241, 1242 (N.J. Super. Ct. Law Div. 1982) (“[T]o prevail on a defense of unconscionability in a dispossess action the tenant bears the heavy burden

the most extreme version of the legislative reforms limiting the landlord's common law right to evict does little to provide a tenant with any price assurance, or the attendant assurance that she would be able to renew her lease under its current terms.

A different form of legislative reform has sought to achieve that goal: rent control. Rent control statutes were first introduced in the United States as temporary measures by a few cities and states in the World War I era to deal with the upheaval in urban housing markets wrought by the war economy.⁵⁵ Then, during World War II, the federal government reintroduced rent controls as part of its general price control program.⁵⁶ These programs all expired by 1947, with new federal legislation leaving it to states to decide whether to retain or alter rent control measures.⁵⁷ In the early 1970s, in order to deal with what came to be known as "stagflation," President Nixon issued executive orders instituting caps on increases in rents (as well as in prices and salaries) that lasted for several months.⁵⁸ These federal orders spurred cities and states to enact a second wave of rent control laws in the mid-to-late 1970s.⁵⁹

These more recent rent control laws did not bluntly cap rents at below market rate. Instead, after setting a historical base rate for units, they allowed annual increases at a limited rate fixed in accordance with some formula.⁶⁰ Such measures also did not apply to all properties in the underlying jurisdiction; rather, they only covered a certain portion of the local rental market.⁶¹ Most also allowed landlords, even of covered units, to increase

of proving that a rent increase is 'monstrously harsh and shocking.'" (quoting *Hill Manor Apts. v. Brome*, 395 A.2d 1307, 1315 (Essex County Ct. 1978))).

⁵⁵ See, e.g., Kenneth K. Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement*, 28 HASTINGS L.J. 631, 634 (1977).

⁵⁶ Emergency Price Control Act of 1942, 50 U.S.C. § 902(b); see also John W. Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54, 79 (1950) ("By January, 1945, Scranton, Pennsylvania, was the only city of more than 100,000 population not under control, and there were only six cities of more than 50,000 population . . .").

⁵⁷ EDWARD L. GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* 58–59 (2008).

⁵⁸ Exec. Order No. 11,615, 36 Fed. Reg. 15,727 (Aug. 15, 1971); Exec. Order No. 11,627, 36 Fed. Reg. 20,139 (Oct. 16, 1971). The President was exercising powers granted to him by the Economic Stabilization Act of 1970, Pub. L. No. 91-379, §§ 201–206, 84 Stat. 796, 799–800 (1970).

⁵⁹ See Baar, *supra* note 55, at 640–41.

⁶⁰ Kenneth K. Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 766–67 (1983). A landlord can also petition for an individual adjustment to assure that he receives a "fair" return. *Id.* at 728.

⁶¹ See *id.* at 756–57 (explaining that "ordinances typically exempt units in owner-occupied dwellings containing less than a specified number of units . . . ; units which are rented primarily to transient guests; rooming houses; nonprofit facilities, including cooperatives; extended health care facilities; and units

rents beyond the allowable annual increase when a tenant moved out.⁶² Indeed, many of the measures deemed a unit “decontrolled” once it became vacant. At that point, the initial rent for the new tenant was no longer subject to rent controls.⁶³ Perhaps inevitably, these laws also limited the permissible grounds for eviction or for nonrenewal of leases.⁶⁴

Rent control laws thus stand as the major tool in American law limiting landlords' ability to increase rent. But this tool has not been faring particularly well. Starting in the late 1970s, state legislatures moved not only to abolish state rent control laws, but also to prohibit local governments from adopting their own rent control ordinances. Louisiana enacted the first such law in 1977.⁶⁵ The social transformations of the late 1970s and the 1980s—the political shift to the right and the fall from academic grace of Keynesian notions of planned economies—deeply delegitimized price controls and led to the passage of more such anti-rent-control laws in the 1980s.⁶⁶ The American Legislative Exchange Council (ALEC), a conservative, pro-business lobbying group, suggested a model rent control preemption law that multiple states then adopted in the late 1980s and 1990s.⁶⁷ The tide has turned so dramatically that at the time of writing, in 2022, rent control is prohibited in thirty-two states and practiced in only seven—and even in those states, often only in a handful of cities.⁶⁸

2. *The Judicial Role in Rental Price Regulation*

This story of American law's attempt at regulating the pricing of rental units is well-established: efforts were introduced, and then mostly withdrawn, by legislatures. Yet the story contains another layer, which is

constructed after the adoption of the ordinance. . . . Other types of exemptions which have been adopted include: all dwellings with less than a specified number of units, regardless of whether or not they are owner-occupied, 'substantially rehabilitated' units, 'luxury' units, and units which become vacant after a certain date.”).

⁶² Vicki Been, Ingrid Goud Ellen & Sophia House, *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 *FORDHAM URB. L.J.* 1041, 1061 (2019).

⁶³ Baar, *supra* note 60, at 826.

⁶⁴ See, e.g., David Shulman, *Real Estate Valuation Under Rent Control: The Case of Santa Monica*, 9 *J. AM. REAL EST. & URB. ECON. ASS'N* 38, 40 (1981).

⁶⁵ LA. STAT. ANN. § 9:3258 (1977).

⁶⁶ E.g., WASH. REV. CODE § 35.21.830 (1981); COLO. REV. STAT. § 38-12-301 (1981); MINN. STAT. § 471.9996 (1984); GA. CODE ANN. § 44-7-19 (1984); S.C. CODE ANN. § 27-39-60 (1985).

⁶⁷ *Rent Control Preemption Act*, AM. LEGIS. EXCH. COUNCIL (Jan. 28, 2013), <https://alec.org/model-policy/rent-control-preemption-act> [<https://perma.cc/42ES-XA9A>]. The language is used in Michigan's law, MICH. COMP. LAWS § 123.411 (1988), South Dakota's, S.D. CODIFIED LAWS § 6-1-13 (1990), Arkansas's, ARK. CODE ANN. § 14-16-601 (1993), Tennessee's, TENN. CODE ANN. § 66-35-102 (1996), Illinois's, 50 ILL. COMP. STAT. 825/5 (1997), and elsewhere.

⁶⁸ See data collected in *Rent Control Laws by State*, NAT'L MULTIFAMILY HOUS. COUNCIL (July 19, 2022), <https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state> [<https://perma.cc/FLD6-NWUP>].

often overlooked: the role judges played. To date, it has largely been assumed that judges were mostly passive observers as the tale of rent control unfolded.⁶⁹ This account is, as this Section will show, inaccurate, but the misconception is understandable. Early and consistently, the Supreme Court rejected all challenges to the constitutionality of rent control laws.⁷⁰ Landlords have repeatedly argued that when a government enacts these laws limiting their ability to remove a tenant, it takes their property without paying them just compensation in violation of the Constitution's Fifth and Fourteenth Amendments. The Supreme Court never accepted these claims, and accordingly it became easy to view American courts as embracing rent control—and thus as not responsible for the demise of rent control laws.⁷¹

However, the traditional focus on federal constitutional litigation—specifically, the obsession with the Takings Clause—obscures the important role *state* law has assumed in combating rent control, or indeed, any policy aimed at regulating rental units' pricing. The next Sections examine some specific tools courts have used to undermine rent control.

⁶⁹ *E.g.*, Mitch Kahn & Dennis Keating, *Rent Control in the New Millennium*, SHELTERFORCE (May 1, 2001), <https://shelterforce.org/2001/05/01/rent-control-in-the-new-millennium/> [<https://perma.cc/3QNA-DFGG>]. Kahn and Keating attribute the demise of rent control to landlord trade groups that

lobbied to cut off federal Community Development Block Grant funds to any municipality with rent control and got the Reagan Administration to push for this sanction each time the program came up for authorization. [The] organizations [also] encouraged their state affiliates to initiate local and statewide referenda on rent control and provided research materials, expertise and guidance for these campaigns. These efforts coincided with a growing conservative and anti-regulatory sentiment in many sectors of the voting population.

See also Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 529 (1984) (“To summarize, the courts’ abandonment of the ‘emergency’ requirement has increased the incidence of rent control ordinances. Although there are some limits on the scope of ordinances that will be upheld, the general judicial trend has been to uphold ordinances that impose fairly harsh restrictions on landlords.”); Elizabeth Naughton, Comment, *San Francisco’s Owner Move-In Legislation: Rent Control or Out of Control?*, 34 U.S.F. L. REV. 537, 537 (2000) (“The federal and California judiciaries have long accepted rent control’s basic tenets.”); Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 272 (2019) (arguing that the state legislature was responsible for decades of “dormancy in the area of rent control”).

⁷⁰ *Pennell v. City of San Jose*, 485 U.S. 1, 4 (1988); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 250 (1922); *Block v. Hirsh*, 256 U.S. 135, 157–58 (1921).

⁷¹ State courts have also mostly upheld rent control laws against constitutional takings challenges, though some struck down extreme measures that would not allow the landlord to go out of business or move into the unit herself. *E.g.*, *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1062–64 (N.Y. 1989) (striking down as a taking an anti-warehousing ordinance that prohibited landlords of single room occupancy hotels from going out of business). Still, in *Nash v. City of Santa Monica*, the Supreme Court of California upheld a rent control ordinance that blocked a landlord from demolishing her building. 688 P.2d 894, 911 (Cal. 1984).

a. Implied state preemption of local initiatives

The most effective weapon state courts have wielded against rent control has been their easy resort to preemption—particularly implied preemption—when dealing with local rent control ordinances. As noted, anti-rent-control state laws work to bar local governments (such as cities and counties) from adopting rent control ordinances. Given that in current American law local governments are formally subservient, the state legislature is normally free to preempt their actions in this fashion.⁷² Thus, once enacted, state bans on rent control leave little wiggle room for local governments—and hence little discretion for courts when asked to sanction a local rent control measure.

However, often in preemption cases the question is not whether the state has the power to preempt a local action—as noted, it almost always does—but rather whether it has chosen to exercise that power. In other words, if a state statute does not clearly ban a given local action, a court must decide whether the statute should still be read as intending to do so. This concept of implied preemption leaves it to a court to determine if the relevant state law blocks the specific local action.

This judicial power has proven disastrous for measures attempting to regulate the pricing of rental units. Through implied preemption, courts have undermined local efforts at rent controls in two ways: by finding grounds to preempt localities from acting even in the absence of a state law expressly preempting rent control, and once such express laws were adopted, by interpreting these preempting state laws extremely broadly.

In earlier cases, courts would read laws that did not specifically prohibit rent control as still preempting local rent control ordinances. In 1957, the Supreme Court of New Jersey found that when the state legislature allowed its World War II-era rent control law to expire (while enacting another law still authorizing rent control) it indicated an intention to preempt a Newark ordinance adopted under the previous law.⁷³ Two years later, the Connecticut

⁷² As described by the Supreme Court:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. . . . In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

⁷³ Wagner v. Mayor of Newark, 132 A.2d 794, 801 (N.J. 1957).

Supreme Court similarly held that the termination of a state rent control statute expressed the notion that as a “matter of public policy” such measures were not necessary and thus implied a preemption of local measures.⁷⁴

Courts would even attribute a preemptive effect to laws that did not address rent control at all. Maryland’s highest court detected implied preemption in the state’s general laws dealing with the landlord–tenant relationship.⁷⁵ Those laws set procedures for the eviction of tenants holding over after the expiration of their lease. The contested Baltimore rent control ordinance prohibited evicting certain tenants and thus, the court argued, prohibited an action the state law permitted. Even though the state law said nothing about rent control and did not purport to assure landlords an absolute right to evict, the law’s mere treatment of eviction sufficed for preemption.⁷⁶ Nearly two decades later, in 1972, the Supreme Court of Florida similarly read its state laws dealing with tenancy—specifically, those allowing either party to terminate a tenancy-at-will and classifying a holdover tenant as a tenant at sufferance—as preempting Miami Beach’s rent control ordinance. Though the state law did not ban localities from doing anything, or even touch upon the pricing of rental units, the court deemed it preempting local rent control measures.

These rulings relied on an idea of field preemption. They were grounded in the notion that the state had fully occupied the field of landlord–tenant regulation. Thus, because rent control inevitably dealt with landlord–tenant law, any local rent control measure represented an intrusion into this site of exclusive state regulation.

While such holdings’ effects could be far-reaching, their importance declined in the ensuing decades. As states’ anti-rent-control legislative efforts grew more explicit—as reviewed above—courts striking down local rent control ordinances as preempted no longer needed to read preemptory intent into neutral state statutes. Courts now exhibited their anti-rent-control inclinations in preemption cases in a different way: by interpreting the anti-rent-control state laws in a manner that expanded their reach. Specifically, courts resorted to an exceptionally broad definition of rent control (the policy the laws preempted), one that is rather removed from traditional political and economic understandings of rent control.

Probably most impactful has been many courts’ holdings that inclusionary zoning measures qualify as rent control—and are thus

⁷⁴ *Old Colony Gardens, Inc. v. City of Stamford*, 156 A.2d 515, 517 (Conn. 1959).

⁷⁵ *Heubeck v. City of Baltimore*, 107 A.2d 99, 103 (Md. 1954). This postwar court was faced with a very similar factual setting to those found in New Jersey and Connecticut, yet unlike them it did not view the repeal of the state rent control law as implying the preemption of local ordinances. *Id.*

⁷⁶ *Id.*

preempted. Inclusionary zoning policies were designed as a counter to exclusionary zoning: the use of zoning tools, such as minimum lot size requirements or prohibitions on multiunit dwellings, to prevent the construction of affordable housing in affluent neighborhoods.⁷⁷ Inclusionary zoning programs require or incentivize private developers to price below market rate a certain percentage of units in a given project they seek to build. The inclusion of such units can be a condition for a zoning variance or permit necessary for the development, or it could serve as basis for the award of a density bonus—an allowance to the developer to increase the size or unit count of the development beyond existing zoning rules.⁷⁸ In both policy motivation and in legal design, therefore, inclusionary zoning (as its name also implies) lies squarely within the realm of traditional zoning or land use law.⁷⁹

With its substantive and formal roots in zoning law, inclusionary zoning operates very differently from rent control.⁸⁰ It restricts only certain developments in the jurisdiction (as opposed to all rental units). It focuses the restrictions on new developments (as opposed to currently occupied units). It is imposed as part of a bargain with a developer who voluntarily agrees to assume the restrictions (as opposed to being a forced regulation).

Still, multiple courts have somehow characterized local inclusionary zoning measures as rent control and thus held them preempted by anti-rent-control state laws.⁸¹ Courts in Colorado,⁸² Wisconsin,⁸³ and California⁸⁴ all rejected localities' claims that inclusionary zoning ordinances could not logically qualify as rent control. For the California court, a Los Angeles set-aside ordinance was still preempted because the anti-rent-control state statute

⁷⁷ See Tim Iglesias, *Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs*, 36 ZONING & PLAN. L. REP. 1, 1 (2013).

⁷⁸ For a discussion of the mechanics of inclusionary zoning, see Audrey G. McFarlane & Randall K. Johnson, *Cities, Inclusion and Exactions*, 102 IOWA L. REV. 2145, 2154–60 (2017).

⁷⁹ See, e.g., Nadia I. El Mallakh, *Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?*, 89 CALIF. L. REV. 1847, 1872–74 (2001) (detailing the different rationales and purposes behind rent control and inclusionary zoning).

⁸⁰ *Id.* at 1873–74 (discussing material differences between rent control and inclusionary zoning).

⁸¹ The Supreme Court of Virginia took an even more convoluted path to arrive at the same result. It struck down an ordinance requiring private developers to set aside 15% of housing as low and moderate income as exceeding the state's zoning authorization law—which somehow expressed “legislative intent . . . to permit localities to enact only traditional zoning ordinances directed to physical characteristics and having the purpose neither to include nor exclude any particular socio-economic group.” *Bd. of Supervisors v. DeGroff Enters., Inc.*, 198 S.E.2d 600, 602 (Va. 1973).

⁸² *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000), *as modified on denial of reh'g* (June 26, 2000).

⁸³ *Apartment Ass'n, Inc. v. City of Madison*, 722 N.W.2d 614, 625 (Wis. Ct. App. 2006).

⁸⁴ *Palmer/Sixth St. Props. L.P. v. City of Los Angeles*, 96 Cal. Rptr. 3d 875, 886 (Ct. App. 2009).

established a landlord's "right to establish the initial rental rates."⁸⁵ The Wisconsin decision was perhaps even blunter: the anti-rent-control state law preempted any local effort that "regulate[d] the amount of rent that property owners in . . . specified circumstances may charge for rental dwelling units."⁸⁶

A more recent decision from Illinois, not dealing with inclusionary zoning, provides a striking illustration of this judicial tendency to read anti-rent-control laws broadly to encompass any local measure concerning rental units' pricing. In spring 2021, an Illinois appellate court struck down a Chicago ordinance requiring the owner of a foreclosed rental property to pay a current tenant residing therein a \$10,600 relocation fee or renew her lease at a rate not exceeding 102% of the current rent.⁸⁷ To bring this ordinance into the realm of rent control—which a state statute preempts—the court truly had to exert itself.

First, it had to write off the fact that a landlord could avoid the ordinance's specter by paying the relocation fee. Dismissing the city's reliance on this attribute of its measure, the court explained:

[T]his reasoning strains logic because under that analysis, no rent control measure would ever be contrary to the Act because rent control, even as traditionally understood, does not require a property owner to rent the property. An owner is always free to decline to rent his property and, as such, avoid any restrictions on the amount of rent that can be charged.⁸⁸

Logic is indeed strained here—but by the court's reasoning rather than the city's. Traditional rent control might allow a landlord to refrain from renting out a regulated unit, but it does not allow her to pay a lump sum (and a pretty low one at that) to remove a protected tenant and rent out the unit on the free market.

But this was not the only contrived move the court made in its unyielding effort to expand the reach of the state's anti-rent-control statute. The court could not, and did not, deny the City's contention that the challenged measure bore little resemblance to traditional rent control, which the state legislature had sought to ban. The court simply wrote off this seemingly highly pertinent fact as irrelevant.⁸⁹ It explained that whether or not it resembled rent control as commonly understood or as imagined by the

⁸⁵ *Id.*

⁸⁶ *Apartment Ass'n*, 722 N.W.2d at 625.

⁸⁷ *Rivera v. Bank of N.Y. Mellon*, No. 1-19-2188, 2021 WL 1732244, at *2 (Ill. App. Ct. Apr. 30, 2021).

⁸⁸ *Id.* at *4 (emphases omitted).

⁸⁹ *Id.* (referring to the City's argument that this is a meaningful distinction as "pure sophistry").

state legislature, the measure represented an attempt to “regulate or control” pricing and was hence preempted.⁹⁰

The Illinois court’s decision is noteworthy for the purposes of this Section’s review of American law, not due to its practical result. The specific measure struck down there, unlike in the inclusionary zoning cases discussed above, was rather unique. But the decision exemplifies in an extreme manner the trend seen in the cases dealing with the much more prevalent inclusionary zoning measures. Courts insist on a reading of anti-rent-control laws that goes well beyond their background or wording to reach any local price regulation of housing.⁹¹

b. Lack of local authority to initiate

Courts’ enduring animosity toward local attempts at regulating rental prices also manifests when no allegedly preempting state statute is involved. From the first widespread introduction of local rent control measures in the aftermath of World War II to our own days, courts have employed myriad doctrines to explain why localities simply lack the power to introduce such measures—even when states do not disallow them. Thereby, courts independently perform the same task that anti-rent-control statutes perform when and where they exist.

In American law, as noted, local governments enjoy no inherent powers.⁹² Any local action must thus be grounded in some state-level measure empowering the locality to act. The older and most restrictive approach, which still applies in some places, is known as Dillon’s Rule. Dillon’s Rule holds that a city must pinpoint some specific state-level enabling act as the basis for any action it takes. Under the Rule, therefore, the city only enjoys powers expressly granted in a state statute, powers implied or incidental to those granted powers, or powers that are essential.⁹³ The Rule further insists that even if the city can identify a state enabling act, that enabling act will always be interpreted narrowly.⁹⁴ A second approach also exists. In many places, constitutional reforms have overruled Dillon’s Rule and granted certain cities Home Rule powers. These allow cities to act

⁹⁰ *Id.*

⁹¹ Ironically, and tellingly, in the one case where a broad reading of the meaning of rent control would have aided a city measure, a court rejected that reading. In the case of *Tri County Apartment Ass’n v. City of Mountain View*, 242 Cal. Rptr. 438, 443–44 (Ct. App. 1987), the city sought to justify as a rent control measure its ordinance mandating extended notice before a landlord could increase rent, which it was empowered to adopt under state laws. The court decided the policy was one pertaining to notification, not rent control, and hence prohibited. *Id.*

⁹² See *supra* note 72 and accompanying text.

⁹³ JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 55 (1872).

⁹⁴ *Id.* (“Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the [municipal] corporation, and the power is denied.”).

even in the absence of a specific enabling act if the matter is deemed to be “local.”⁹⁵

Rent control has not fared particularly well under either approach. Under Dillon’s Rule, several courts found that any city enacting a local rent control ordinance must identify a state statute specifically authorizing rent control; the power to adopt such regulations cannot be incidental or necessary to the grant of another, more general, power.⁹⁶ Courts also applied this framework to non-rent-control measures meant to maintain affordable housing stock, insisting on reading narrowly any potentially relevant enabling act.⁹⁷ Consequently, cities’ attempts to characterize state statutes delegating to them police powers as enabling acts for rent control measures have mostly failed. A majority of courts have insisted that rent control cannot be authorized by a state granting a local government general police powers to promote health, safety, and welfare.⁹⁸ As the Connecticut Supreme Court so perspicuously explained: “Rent controls are an exercise of the police power. It does not necessarily follow, however, that a delegation of police power in general terms by the state to a municipality includes authority to impose rent controls.”⁹⁹ The Supreme Court of Pennsylvania, although acknowledging that rent control was authorized as part of a city’s state-enabled police powers, insisted that that was only the case in times of emergency.¹⁰⁰ It then proceeded to determine—with little but its own reading

⁹⁵ GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 174–76 (6th ed. 2015).

⁹⁶ See, e.g., *Tietjens v. City of St. Louis*, 222 S.W.2d 70, 73 (Mo. 1949) (en banc) (“A city has no inherent police power. Its authority to exercise such power with a particular field must come from a specific delegation by the state or in certain cases from the express or fairly implied grant of powers of its charter.”).

⁹⁷ *Greater Bos. Real Est. Bd. v. City of Boston*, 705 N.E.2d 256, 257–58 (Mass. 1999) (striking down a city’s attempt to protect units in converted buildings, which had relied on an enabling act awarding certain rights to tenants when buildings are converted).

⁹⁸ *City of Mia. Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 804 (Fla. 1972) (“The weight of authority is that without specific authorization from the state, the cities cannot enact a rent control ordinance either incident to its specific municipal powers or under its General Welfare provisions.”); see also *Ambassador East, Inc. v. City of Chicago*, 77 N.E.2d 803, 807 (Ill. 1948) (holding that the police power does not extend to control of hotel rates), *as modified on denial of reh’g* (Mar. 15, 1948); *Old Colony Gardens, Inc., v. City of Stamford*, 156 A.2d 515, 516 (Conn. 1959) (holding that delegation of police power does not necessarily convey authority to impose rent controls). *But see Inganamort v. Borough of Ft. Lee*, 303 A.2d 298, 306 (N.J. 1973) (holding that the grant of broad police powers enabled municipalities to adopt a rent control measure).

⁹⁹ *Old Colony Gardens*, 156 A.2d at 516 (citations omitted).

¹⁰⁰ *Warren v. City of Philadelphia*, 127 A.2d 703, 705 (Pa. 1956).

of some statistics to guide it—that Philadelphia's 3% vacancy rate did not qualify as a housing emergency warranting rent control.¹⁰¹

Cities' Home Rule powers have also often proven insufficient in the eyes of courts to legitimize rent control. Courts have vacillated on the question of whether rent regulation is a local rather than state concern, and thus covered by the Home Rule authorization for city "local" initiatives.¹⁰² Even when courts deign to deem them "local" enough, rent control efforts can still fail. One court found that though local, rent controls regulated a private law relationship (between landlords and tenants) and thus fell under the "private law" exception to Home Rule powers enumerated in the constitution of that state (and many others).¹⁰³ Another court found that rent control, while a local concern, was also of state concern—it was a measure of mixed concern—and thus ineligible for Home Rule immunity (which that state's constitution provided) from state interference.¹⁰⁴

c. Miscellaneous constitutional infirmities

Courts' heavy reliance on local government law doctrines—preemption, Dillon's Rule, police powers, Home Rule¹⁰⁵—to undermine local rent control efforts has been supplemented by sporadic resort to varied other state constitutional doctrines. Rent control has been struck down through anti-delegation principles (which allegedly ban cities from delegating legislative powers to rent control administrators without concrete guidelines),¹⁰⁶ due process requirements (which allegedly mandate a mechanism to provide effective and prompt adjustment of rents),¹⁰⁷

¹⁰¹ *Id.* at 706; *see also* *City of Mia. Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 771 (Fla. 1974) (Roberts, J., concurring in part and dissenting in part) ("The mere inability by a group of tenants to meet rent payments is not such an emergency as to justify government controls . . .").

¹⁰² 2 POWELL, *supra* note 18, § 16A.02 (reporting that "[c]ase law is still unsettled in this area"). The same courts were liable to change their mind on the issue. *Compare* *Wagner v. Mayor of Newark*, 132 A.2d 794, 801 (N.J. 1957) (holding that rent control did not fall within a municipality's Home Rule powers), *with* *Inganamort*, 303 A.2d at 304–05 (holding the opposite, sixteen years later); *compare* *Fleetwood Hotel*, 261 So. 2d at 804 (holding that the Home Rule does not empower local governments to enact rent control ordinances), *with* *Forte Towers*, 305 So. 2d at 766 (holding that, following the passage of a new law, "municipalities now are empowered to enact [rent control] ordinances").

¹⁰³ *Marshal House, Inc. v. Rent Rev. & Grievance Bd.*, 260 N.E.2d 200, 204–05 (Mass. 1970).

¹⁰⁴ *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 32–33 (Colo. 2000), *as modified on denial of reh'g* (June 26, 2000).

¹⁰⁵ Specifically, limits to Home Rule initiative powers, the private law exception to those, and the conditions for Home Rule immunity.

¹⁰⁶ *Forte Towers*, 305 So. 2d at 765.

¹⁰⁷ *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1030 (Cal. 1976) ("The charter amendment is constitutionally deficient in that it withholds powers by which the rent control board could adjust maximum rents without unreasonable delays and instead requires the Board to follow an adjustment procedure which would make such delays inevitable.").

prohibitions on legislation through local referenda,¹⁰⁸ and state constitutions' takings clauses.¹⁰⁹

* * *

It would be inaccurate to claim that courts are wholly responsible for the demise of rent control in America. Clearly, a main culprit has been legislatures (the bodies which also first instigated these measures). However, it is impossible to deny the marked antipathy American courts have expressed through the decades toward these measures regulating rental units' pricing. In a hypothetical world with no anti-rent-control laws, courts' common refusal to acknowledge local powers to establish rent control would have defeated those efforts. In our current world, with anti-rent-control laws, courts enforce these laws with gusto to preempt local measures, consistently expanding the laws' reach and often disregarding their original logic. Counterexamples of course exist,¹¹⁰ but the trend is unmistakable.

Similarly unmistakable is the contrast between this trend and the judicial attitude toward the regulation of rental units' quality. Courts did not wait for legislatures to act when they first *undermined* rent control (which legislatures then often proceeded to ban). Courts did not wait for legislatures to act when they first *adopted* the warranty of habitability (which legislatures then often proceeded to codify). Courts employed neutral statutes addressing the landlord–tenant relationship to strike down rent control but never saw those laws as inhibiting the warranty of habitability. The same American courts that embraced rental housing quality regulation have opposed any form of rental housing price regulation.

¹⁰⁸ *Cheeks v. Cedlair Corp.*, 415 A.2d 255, 262 (Md. 1980).

¹⁰⁹ *Bd. of Supervisors v. DeGross Enters., Inc.*, 198 S.E.2d 600, 602 (Va. 1973); *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (Ct. App. 1983); *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1062 (N.Y. 1989).

¹¹⁰ In one counterexample, an Oregon court found that

the legislature did not intend to broadly prohibit any regulation that could tend to have a restraining effect on rent. Rather, the statute is solely directed at prohibiting local “rent control,” which the legislature intended to mean the direct regulation of the amount of rent to be paid to a landlord.

Owen v. City of Portland, 470 P.3d 390, 393–94, 396 (Or. Ct. App. 2020). The court therefore allowed a local ordinance forcing the payment of relocation assistance to tenants if the tenant terminated a tenancy after a rent increase of 10% or more. *See also Foster v. Britton*, 195 Cal. Rptr. 3d 800, 803 (Ct. App. 2015) (finding that state law allowing landlords to change the terms of a lease—i.e., increase rent, with thirty days' notice—did not preempt an ordinance prohibiting eviction for violating unilaterally imposed terms, like rent increases, that were not in the original lease).

II. COURTS' ANIMATING CONCERNS: PUBLIC POLICY REFORM OR THE MEANING OF TENANCY

The preceding Part identified a certain duality in American courts' attitudes toward low-income rental housing. As the traditional common law of landlord–tenant was reformed to accommodate modern realities, courts assumed a leading role in creating—and protecting—a tenant's right to receive a unit that met minimum quality standards. At the same time, courts mostly undermined efforts to protect a tenant's right that the unit be provided for a certain price, and that she be assured a right to stay therein. What explains this judicial choice?

If, as activists in the 1960s hoped and observers thereafter often contended, courts perceived the law of landlord–tenant as an arena for combating the plight of the poor,¹¹¹ courts might have made a rational decision that one tool (quality controls) promoted low-income tenants' welfare and the other (price controls) did not. Judges may have intuited (and then kept in existence to this day) an efficient regime.

To see if that was the case, the academic literature assessing both policies' effects on low-income tenants should be reviewed. As the review in the first Section of this Part will show, the literature does not support the distinction between quality and price controls that American judges so clearly endorse. Therefore, the second Section will proceed to advance an alternative explanation for this distinction instituted in current landlord–tenant law. That explanation views American courts as mostly uninterested in promoting equality, or any other general public policies, in their move to establish a modern view of the tenant in American law. Rather, it argues, they engaged in a traditional common law exercise seeking a general—and class-neutral—image of the contemporary tenant.

A. Quality and Price Controls as Public Policy Tools

Almost immediately upon its introduction, the implied warranty of habitability became a locus for debates among commentators. Those debates often encapsulated the deep fault lines between the left and the right in legal academia that materialized in the aftermath of the 1960s. Indeed, if the warranty of habitability itself was, as noted, very much a child of the 1960s, the academic debate surrounding it was a wholly 1970s–1980s phenomenon.

¹¹¹ Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 153 (2020) (“[T]he doctrine [of the implied warranty of habitability] was adopted with the expectation that it would bring transformative change to the landlord–tenant relationship. Advocates and scholars believed that the law would level the playing field in eviction cases, compensate for ineffectual code enforcement systems, and serve as a strong deterrent mechanism against landlord property neglect.”).

The warranty became a flashpoint for the much broader battle over the efficacy of regulatory interventions in markets.

The doctrine of the implied warranty of habitability was swiftly assailed as an inefficient governmental intrusion into the market for housing. Freedom of contract assures economic efficiency, while government intervention defeats it. Constructing what quickly became the “mainstream” view among writers on housing law, analysts argued that any new duty placed on landlords, rendering their product more expensive to produce, must ultimately be paid for by the consumers—the tenants.¹¹² Following the introduction of the warranty, some substandard rental housing stock would be upgraded, resulting in increased rents due to added maintenance costs.¹¹³ This would force tenants to pay higher rent or give up their units. Other substandard housing units would be removed from the market by landlords who determine that required repairs would not be covered by income from the units—leaving even fewer units available for low-income tenants.¹¹⁴ Consequently, even if in the short term (when a landlord cannot, or simply does not, increase rents) some tenants might benefit from improved living conditions, as a class and over time, low-income tenants stand to lose much more due to the warranty than to gain from it.¹¹⁵ The warranty of habitability hurts the people it aimed to help.

The warranty’s defenders attempted to counter this mainstream view by questioning its general applicability. That is, left-leaning commentators argued (as they did elsewhere at the time and since) that the mainstream view of the warranty relies on too simplistic a view of markets that presumes that all markets operate in an identical and efficient way.¹¹⁶ They stressed that the mainstream view made several assumptions respecting the elasticity of both the demand and supply curves for low-income housing that could not be taken for granted in all settings. In some situations, these commentators

¹¹² Edward Rabin was the first to allude to this argument as the mainstream view. See Rabin, *supra* note 69, at 558.

¹¹³ Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 893 (1975).

¹¹⁴ *Id.*

¹¹⁵ *E.g., id.* (describing how the warranty of habitability diminishes housing stock); Chester W. Hartman, Robert P. Kessler & Richard T. Legates, *Municipal Housing Code Enforcement and Low-Income Tenants*, 40 J. AM. INST. PLANNERS 90, 96 (1974) (describing how the warranty of habitability fails to ensure safe living conditions); Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175, 1187–88 (1973) (describing how increased code enforcement may decrease housing stock).

¹¹⁶ Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1100 (1971); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: “Milking” and Class Violence*, 15 FLA. STATE U. L. REV. 485, 485, 519 (1987).

explained, a landlord might not be able to charge higher rents from tenants—say, because low-income tenants cannot afford to pay any more (and would thus move out to board with others).¹¹⁷ Similarly, a landlord might not be able to leave the market to avoid the warranty—say, because the unit she owns cannot be shifted to a more upscale (or nonhousing) market.¹¹⁸ Market conditions could thereby force a landlord to react to the warranty by actually upgrading units she owns with no attendant costs to tenants. Thus, the argument goes, in some places and markets, the warranty can help poor tenants without necessarily hurting them.¹¹⁹ In accordance with this argument, the warranty is efficient when applied selectively in certain markets.¹²⁰

As a theoretical matter, therefore, even the warranty's academic supporters did not argue that quality controls will always improve the lot of low-income tenants. They lent very limited support to across-the-board adherence to the warranty, although they rejected the mainstream view's across-the-board objection to the warranty. Whether viewed as substantial or not, this disagreement should have been soluble by empirical testing. Yet empirical studies have been painfully indeterminate. The housing market of the 1970s was subject to so many upheavals that isolating the alleged effects of the warranty's initial introduction on pricing or supply was impossible.¹²¹ Later empirical studies into the effects of the warranty on the availability of affordable housing have been widely inconsistent in their findings.¹²² Regardless, the more recent empirical work has mostly left behind the grand debate about the desirability of the warranty. Instead of researching the

¹¹⁷ Ackerman, *supra* note 116, at 1105.

¹¹⁸ *Id.* at 1104.

¹¹⁹ *Id.* at 1096; Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194, 1196 (1973) (“Professor Komesar cannot be said to undermine my essay’s first thesis: that under certain economic conditions, a morally viable code-subsidy-litigation strategy will significantly ameliorate the conditions of the poor tenant.”); Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815, 1817 (1976) (arguing that some tenants will benefit from the warranty); Kennedy, *supra* note 116, at 486.

¹²⁰ See also Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 FORDHAM URB. L.J. 159, 170 (1993) (arguing that selective enforcement of the codes against repeat offenders and symbolically important buildings has a salutary impact without any significant increase in rents).

¹²¹ Rabin, *supra* note 69, at 577–78.

¹²² See David Listokin & David B. Hattis, *Building Codes and Housing*, 8 CITYSCAPE 21, 42 (2005) (finding that studies on the subject have claimed that building code regulations increase housing costs anywhere between 1% and 200%); see also Michael A. Brower, Comment, *The “Backlash” of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 884 (2011) (finding a statistically significant relationship between the existence of an implied warranty of habitability and increased rent rates).

warranty's effects on the pricing or availability of housing, it has focused on tenants' ability to actually employ the warranty in eviction proceedings.¹²³

The academic literature, in sum, is very far from providing an absolute, ringing endorsement of the warranty of habitability as a means to aid tenants. Empirical research is limited and indeterminate, while the theoretical literature—which thrived in the 1970s and then mostly died off—is at best mixed in its endorsement. Even those who dissent from the mainstream critical view of the warranty only argue that the warranty is salutary in some situations.

The picture is largely identical as far as the literature dealing with rent control is concerned. Here, economists, rather than legal scholars, have produced most of the research. Reflecting the rejection of price controls in the aftermath of the stagflation of the early 1970s,¹²⁴ the consensus among American economists is that rent control measures are inefficient.¹²⁵ They argue that by limiting the return on rental units, such measures disincentivize landlords from leasing or improving units.¹²⁶ Rent controls thus depress supply.¹²⁷ They also distort the spending and location decisions of existing tenants, further reducing supply.¹²⁸

Several recent studies generate slightly more nuanced conclusions. Some argue that unlike the traditional cap-based rent control laws, the more finely tuned rent control measures adopted since the 1970s can be efficient in certain markets.¹²⁹ These scholars stress that no rigorous empirical

¹²³ The most illuminating of these articles is Summers, *supra* note 111, at 174.

¹²⁴ Ben Casselman & Jeanna Smialek, *Price Controls Set Off Heated Debate as History Gets a Second Look*, N.Y. TIMES (Jan. 13, 2022), <https://www.nytimes.com/2022/01/13/business/economy/inflation-price-controls.html> [<https://perma.cc/BZ6G-C5EA>].

¹²⁵ A poll of economists at top American universities conducted in 2012 found that 81% of economists believed that rent control did not have a positive impact over the past three decades on the amount and quality of affordable rental housing in cities that have used them. *Rent Control*, CHI. BOOTH INITIATIVE ON GLOB. MKTS. (Feb. 7, 2012), <https://www.igmchicago.org/surveys/rent-control/> [<https://perma.cc/LQT6-D82J>].

¹²⁶ See, e.g., Richard Arnott & Elizaveta Shevyakhova, *Tenancy Rent Control and Credible Commitment in Maintenance*, 47 REG'L SCI. & URB. ECON. 72, 82 (2014) (“[T]enancy rent control will indeed lead to the reduction and postponement of maintenance within a tenancy.”).

¹²⁷ Rabin, *supra* note 69, at 581. One commentator even argued that rent control is responsible for homelessness. William Tucker, *Where Do the Homeless Come From?*, NAT'L REV., Sept. 25, 1987, at 32, 41. This study, however, was heavily criticized. E.g., John M. Quigley, *Does Rent Control Cause Homelessness? Taking the Claim Seriously*, 9 J. POL'Y ANALYSIS & MGMT. 89 (1990) (responding to Tucker's findings).

¹²⁸ By depressing the price of living space, rent control encourages tenants to use more space than they otherwise would. They thus generate waste. Rabin, *supra* note 69, at 581–82.

¹²⁹ E.g., Richard Arnott, *Time for Revisionism on Rent Control?*, 9 J. ECON. PERSPS. 99, 108 (1995) (explaining the efficiency-based argument for second-generation rent controls); TOM SLATER, SHAKING

literature currently exists supporting the contentions of those many authors who generalize and argue that all rent control measures are counterproductive.¹³⁰ Studies focusing on European cities (where rent control is still more of a reality than in the United States) found that the detrimental effects of rent control in its modern form might be exaggerated. For example, one study determined that in a city that had adopted rent control, rents in noncontrolled areas did not meaningfully increase.¹³¹ Another concluded that rent control's most problematic impact was the spatial misallocation of tenants (who chose to stay in controlled units even when jobs were elsewhere) and noted that these costs could be addressed through other policies, such as improvements to a city's public transit system.¹³²

Still, indisputably, the literature remains largely hostile to rent control.¹³³ Yet it is striking that this skeptical attitude is not markedly different from that identified when quality controls were reviewed. In both cases, the literature is largely doubtful of the policy's beneficial impact, at most conceding that the policy might attain the desirable results of protecting low-income tenants in very specific, well-defined circumstances.¹³⁴ Furthermore, little in the economics-grounded opposition to price controls in the market for rental housing entails support for quality controls in that market (other than for quality controls addressing latent defects).¹³⁵ Whereas courts have chosen to treat the measures very differently, nothing in the literature breeds the inference that the warranty of habitability benefits low-

UP THE CITY: IGNORANCE, INEQUALITY, AND THE URBAN QUESTION 101–03 (2021) (describing flaws in the “efficiency myth” associated with traditional rent control measures). *But see* Kaushik Basu & Patrick M. Emerson, *The Economics of Tenancy Rent Control*, 110 *ECON. J.* 939, 958 (2000) (arguing that at least some of the more modern forms of rent control are still inefficient).

¹³⁰ Been et al., *supra* note 62, at 1076–77.

¹³¹ Morten Skak & Gintautas Bloze, *Rent Control and Misallocation*, 50 *URB. STUD.* 1988, 2003 (2013) (discussing Denmark).

¹³² Guillaume Chapelle, Etienne Wasmer & Pierre-Henri Bono, *Spatial Misallocation and Rent Controls*, 109 *AEA PAPERS & PROC.* 389, 392 (2019) (discussing Paris). On how rent control has detrimentally affected spatial decisions, see generally Are Oust, *The Removal of Rent Control and Its Impact on Search and Mismatching Costs: Evidence from Oslo*, 18 *INT'L J. HOUS. POL'Y* 433 (2018) (discussing Norway).

¹³³ *See, e.g.*, Rebecca Diamond, Tim McQuade & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 119 *AM. ECON. REV.* 3365, 3393 (2019) (“If society desires to provide social insurance against rent increases, it may be less distortionary to offer this subsidy in the form of government subsidies or tax credits.”).

¹³⁴ *See Note, Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 *HARV. L. REV.* 1835, 1855 (1988) (concluding that rent control can serve as an effective partial solution to displacement of low-income tenants in a gentrifying housing market); Nadav Shoked, *The Community Aspect of Private Ownership*, 38 *FLA. STATE U. L. REV.* 759, 810 (2011) (“Rent control is probably the only tool that can effectively help tenants stay in a gentrifying community.”).

¹³⁵ *See, e.g.*, Basu & Emerson, *supra* note 129, at 959–60 (advocating for “free contracting in the rental housing market”).

income tenants more effectively than do rent controls. The clear demarcation courts have drawn between the two policies finds little support in research respecting the policies' efficacy in improving the lot of low-income tenants.

B. Quality and Price Controls and a Legal Image of Tenancy

In light of the foregoing review of the academic literature, judges' opposite attitudes toward the warranty of habitability and rent control—supporting the former, objecting to the latter—are not justifiable if the policy goal those judges had in mind was helping tenants, particularly poor tenants. But what if that were never the goal? This concluding Section of the Essay provides some support for that proposition. It explains that courts' embrace of the warranty of habitability was grounded in a general view of the common law meaning of tenancy, rather than in redistributive (or even efficiency) concerns. Accordingly, that embrace does not stand in conflict with the courts' rejection of rent control.

The common perception of the revolution in landlord-tenant law—and of the warranty of habitability that registers as its greatest achievement—has come to attribute it, as noted, to judges' desires to address 1960s-era concerns about poor tenants' plight.¹³⁶ This impression is perhaps inevitable, as the judicial move followed years of agitation by activists dedicated to aiding the poor.¹³⁷ The towering figure of Judge Skelly-Wright, who authored the *Javins* decision famously adopting the doctrine, also clearly colors our understanding and memory of the doctrine. Skelly-Wright was, and remains, one of the great liberal judges in American history, whose willingness to employ the law—and innovate the law—to address problems of inequality and poverty was manifest. In later pronouncements, he made no secret of the public policy concerns that animated him when deciding *Javins*:

I was . . . influenced by the fact that, during the nationwide racial turmoil of the sixties and the unrest caused by the injustice of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white. There is no doubt in my mind that these conditions played a subconscious role in influencing my landlord and tenant decisions.

I came to Washington in April 1962 after being born and raised in New Orleans, Louisiana for 51 years. . . . It was my first exposure to landlord and tenant cases I didn't like what I saw, and I did what I could to ameliorate, if not

¹³⁶ See also Meyers, *supra* note 113, at 882 (attributing the change in law to "the moral principle of redistribution of wealth from landlord to tenant").

¹³⁷ See *supra* note 17.

eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital.

I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust.¹³⁸

Such statements provided fodder to the 1970s right-wing writers who were already revolting at what they perceived as the Warren Court's earlier excesses. Cast in this light, the *Javins* decision and its progeny could easily be portrayed as judicial activism.¹³⁹ On that view, the warranty was the product of 1960s liberal judges legislating their progressive agenda from the bench. Even a commentator who concluded that the "revolution" in landlord-tenant law was not that revolutionary, but was rather the culmination of longstanding trends that had already transformed private law generally over the century, reckoned that underlying the changes was the "idea that shelter is a basic human necessity, and that public regulation of the terms and conditions on which it is offered and held is therefore appropriate."¹⁴⁰ For both its avid champions and avowed enemies, the warranty materialized as the quintessential example of a judicial attempt to change society.

Yet the process whereby the doctrine entered American law often belied this notion. More often than not, the actual court decisions announcing the warranty did not indicate that lofty goals of battling inequality were the guiding light.¹⁴¹ The desire to redistribute power, which drove much of the fight for tenants' rights, was underrepresented in judicial opinions.¹⁴² Those were instead grounded in much more traditional common law considerations.

The most common rationale courts, including the *Javins* court, provided for their decision to recognize the warranty related to the parties'—and especially, the tenants'—expectations. Courts reasoned that modern tenants—unlike their ancient predecessors—viewed themselves as renting houses rather than land.¹⁴³ These tenants thus desired and assumed that the house they received from the landlord continuously meet minimal standards.

¹³⁸ Rabin, *supra* note 69, at 549 (quoting Letter from J. Skelly Wright, J., U.S. Ct. of Appeals for the D.C. Cir., to Edward H. Rabin, Professor, Univ. of Cal., Davis Sch. of L. (Oct. 14, 1982)).

¹³⁹ See, e.g., Cunningham, *supra* note 31, at 75.

¹⁴⁰ Glendon, *supra* note 3, at 504–05.

¹⁴¹ One of the earliest cases gesturing at a warranty did not even mention issues of inequality or bargaining power. *Lemle v. Breeden*, 462 P.2d 470, 474 (Haw. 1969). The same was true elsewhere. See *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 213–17 (Ill. 1972); *Steele v. Latimer*, 521 P.2d 304, 307–09 (Kan. 1974); *Berzito v. Gambino*, 308 A.2d 17, 19–20 (N.J. 1973).

¹⁴² Super, *supra* note 45, at 402.

¹⁴³ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075, 1078–79 (D.C. Cir. 1970); *Berzito*, 308 A.2d at 21.

The warranty of habitability reflected these assumptions and thus merely built on existing common law precepts. Many courts cited the old doctrine that subjected furnished dwellings to a warranty of fitness:

One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use.¹⁴⁴

That expectation, courts now argued, in current times informed all tenants—not just those renting furnished units.¹⁴⁵ Furthermore, as modern housing units were not the simple structures of old, the landlord knew much more than the tenant about construction conditions and about the state of the house's mechanical conditions.¹⁴⁶ Unlike tenants of yore, tenants thus were now expecting the landlord to maintain the unit's many, and vital, amenities.¹⁴⁷

And when individual parties' expectations were not enough to explain the judicial insertion of the warranty into leases (say, in cases where one could argue that tenants were aware of the substandard conditions when they leased the unit), courts would cite the existence of legislative mandates in the form of building and housing codes.¹⁴⁸ Courts were enforcing a policy of the legislature.¹⁴⁹ Just as important, they claimed that the parties must be presumed to have been aware of the statutory demands which therefore formed part of their own agreement.¹⁵⁰

Even when judges did reference policy concerns about inequality in these decisions, they mostly refrained from focusing specifically on poor

¹⁴⁴ *Ingalls v. Hobbs*, 31 N.E. 286, 286 (Mass. 1892).

¹⁴⁵ *Pines v. Persson*, 111 N.W.2d 409, 412–13 (Wis. 1961); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 217 (Ill. 1972).

¹⁴⁶ *Kline v. Burns*, 276 A.2d 248, 251 (N.H. 1971).

¹⁴⁷ *Pines*, 111 N.W.2d at 413; *Kline*, 276 A.2d at 252.

¹⁴⁸ *Green v. Superior Ct.*, 517 P.2d 1168, 1175 (Cal. 1974); *Steele v. Latimer*, 521 P.2d 304, 309–10 (Kan. 1974); *Kline*, 276 A.2d at 251.

¹⁴⁹ *Pines*, 111 N.W.2d at 412–13.

¹⁵⁰ *Steele*, 521 P.2d at 309–10 (“Under familiar legal principles the provisions of the city’s housing code relating to minimum housing standards were by implication read into and became a part of the rental agreement ‘It is a general rule that contracting parties are presumed to contract in reference to the existing law; indeed, they are presumed to have in mind all the existing laws relating to the contract, or to the subject matter thereof.’” (quoting 17 AM. JUR. 2D *Contracts* § 257 (1974))).

tenants.¹⁵¹ Rather, they stressed the gap in bargaining power between tenants—all tenants—and landlords.¹⁵²

This point is key. Courts wrote about the standing of a tenant qua tenant, not about the standing of poor tenants specifically. They introduced a policy that was grounded in the standing of tenants—all tenants. In the decisions they authored, judges described the modern tenant and the difficulties she might face, not necessarily the poor (let alone minority) tenant.¹⁵³ Indeed, the doctrine of the implied warranty was at times first introduced to protect commercial tenants,¹⁵⁴ in other places it followed the introduction of warranties protecting buyers of new homes,¹⁵⁵ and still elsewhere it was inspired by the trend in the law of implying warranties of fitness and merchantability into contracts for sales of chattels.¹⁵⁶ The doctrine thus built on other doctrines that had little to do with poor tenants—or any other poor individuals.

Of course, the decisions implying a warranty of habitability into leases were likely to be, and inevitably were, of much greater meaning for poor tenants (who were and are likelier to lack the means to negotiate for such warranties). But the decisions did not create any special rules for those tenants. Rich and poor, white and Black, in upscale neighborhoods or in the “ghetto,” all tenants enjoyed this new right to insist on habitable units.

Once it becomes clear that courts were focused on the position of all tenants when justifying the warranty of habitability, and that they viewed it as a common law construct, their decisions supporting the doctrine are much more in line with the rent control decisions. Rent control, unlike the warranty of habitability, is clearly a special rule applicable to certain, weaker, tenants. Not all tenants everywhere are eligible for its protections. It is, explicitly and undeniably, a redistributive tool. Furthermore, the tool is administrative, not

¹⁵¹ Even a court that was specifically concerned with the weak position of poor tenants—who might endure unhealthy living conditions—was just as concerned with the effects of their suffering on surrounding nonpoor, residents:

A disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises. Housing conditions, such as the record indicates exist in the instant case, are a health hazard, not only to the individual tenant, but to the community which is exposed to said individual. . . . [S]uch housing conditions are at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for the conscientious landowners.

Foisy v. Wyman, 515 P.2d 160, 164–65 (Wash. 1973).

¹⁵² *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970); *Mease v. Fox*, 200 N.W.2d 791, 794–95 (Iowa 1972); *Kline*, 276 A.2d at 251.

¹⁵³ *E.g.*, *Lemle v. Breeden*, 462 P.2d 470, 474 (Haw. 1969) (“It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor.”).

¹⁵⁴ *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 274 (N.J. 1969).

¹⁵⁵ *See, e.g.*, *Carpenter v. Donohoe*, 388 P.2d 399, 402 (Colo. 1964).

¹⁵⁶ *Lemle*, 462 P.2d at 473.

judicial. Unlike the warranty, which relies on traditional court-centric contract enforcement litigation, rent control standards are defined and enforced by administrative boards (which set allowable rent levels). Cases striking down rent control measures due to anti-delegation or due process concerns¹⁵⁷ expressed courts' unease with this attribute of the policy. Rent control cannot easily be grounded in parties' expectations or in any other traditional common law property or contract concerns. Hence, courts could not readily accept rent control.

When they were promoting the warranty of habitability, as when they were sabotaging rent control, courts were, to a great extent, engaged in a traditional common law practice. They were adjusting existing doctrines as the underlying realities allegedly informing those doctrines—parties' expectations or the legislature's policies—were shifting.

Courts were, in other words, employing and updating the common law's idea of what it legally means to be a tenant. This idea they promoted was, perhaps inevitably, informed by an image of a tenant they had in mind. To be able to extract the alleged expectations of a current tenant—the expectations that, as noted, justified the new warranty of habitability—courts must imagine a certain tenant. In their opinions, judges were depicting the tenant they imagined and the needs that model tenant had. They were thinking of the modern tenant and what she needed—not necessarily a poor tenant and her needs. Their image of a tenant was a general, seemingly class- and race-neutral one.

This concept of image as used here draws on the work of political scientists on imaginaries. The claim is that “shared practices—political, social, economic—are enabled by way of a collective imagining concerning their purpose and significance.”¹⁵⁸ Charles Taylor famously expounded on how modern social imaginaries (for example, the imaginary of the market) facilitated the rise of Western modernity and individuals' understanding of their experiences and roles within the social system.¹⁵⁹ Alice Kessler-Harris introduced the notion of the “gendered imagination,” which frames social organizations and influences what people conceive as feasible and fair.¹⁶⁰

¹⁵⁷ See *supra* notes 106–107 and accompanying text.

¹⁵⁸ John Grant, *On the Critique of Political Imaginaries*, 13 EUR. J. POL. THEORY 408, 411 (2014).

¹⁵⁹ Taylor defined social imaginaries as

the normal expectations that we have of one another, the kind of common understanding which enables us to carry out the collective practices that make up our social life. . . . [Our] sense of how things usually go . . . is interwoven with an idea of how they ought to go, of what missteps would invalidate the practice.

Charles Taylor, *Modern Social Imaginaries*, 14 PUB. CULTURE 91, 91–92, 106 (2002).

¹⁶⁰ ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 5–6 (2001).

Specifically in the context of property law, I have argued elsewhere that at any given time a certain image of the owner—the quintessential owner—affects all property thinking and then generates specific legal rules to sustain it. As that image changes over time—say, from the image of the yeoman owner to that of the suburbanite owner—property rules change as well.¹⁶¹

Those images of property, of owners, and of tenants affect all facets of thinking about a specific legal field. They inform the notions all members of society—including, inevitably, judges—hold respecting what is necessary and fair in social interactions. Inevitably, these images oversimplify. They govern all who fall into the category they regulate, irrespective of those individuals' specific needs and preferences. Indeed, the images' appeal is that they can be imagined as neutral and as inclusive. They are thus bound to be, in a sense, conservative, as they reflect hegemonic notions and are not primarily concerned with the weaker members of society who have special needs or do not perfectly fit into the reigning ideal.

To the extent landlord–tenant law experienced a revolution, that revolution was grounded in the shift from one image of tenancy to another. The revolution operationalized a new image that reflected the modern city dweller. It was the image of the tenant as a consumer, the consumer of an urban housing unit. In this image the tenant occupied a unit that was often attached to other units, and which was useless unless benefitting from certain well-operating amenities (plumbing, electricity, heating, etc.). A certain unit was imagined, not a certain price. Thus the image entailed certain assurances of quality—which all tenants, irrespective of their social status, could theoretically enjoy—but no assurances respecting pricing—which, in the capitalist urban system, was to be governed by the market. The tenant was now conceived as a consumer, and modern consumer protection laws shield consumers from defective products. They do not set prices or explicitly redistribute wealth to consumers.

Activists and academic observers might have imagined—might have desired—that the new landlord–tenant laws would work to redistribute resources to the poor. The new laws probably, even if to a limited extent, have. But that was merely a side effect. In crafting these doctrines, courts were concerned with what—to their minds—it legally means to be a tenant, not necessarily with doing whatever was needed to help poor tenants.

¹⁶¹ Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 *YALE J. ON REGUL.* 91, 149 (2011).

CONCLUSION

A review of the state of American landlord–tenant law as it emerged from its alleged revolution brings to mind a quip: “We don’t answer our questions, we get over them.” Consistently, in the decades following the revolution, American courts have retained quality controls for rental units—the warranty of habitability—but rejected price controls—rent control. After vigorously debating the merits of those original decisions, particularly those establishing the warranty of habitability, most of the legal literature in the field has moved on. Most legal actors have, to one extent or another, settled on, or come to terms with, a meaning attributed to tenancy in current law: a tenant is entitled to be assured that her unit abide by certain quality standards, but is not entitled to get, or keep, that unit for a certain price.

This result illustrates courts’ lack of enthusiasm—if not flat-out refusal—to engage in class-based redistribution when setting property rules or settling property disputes. This observation is relevant today as activists pin ever-greater hopes on courts. Courts are now being asked to sanction corporate malfeasance, promote environmental justice, remedy the plight of the homeless, and more. Yet unfortunately, throughout American history, and as the rent control cases illustrate, courts have much more often undermined efforts at battling economic inequality than promoted them.

The common law of property is a poor vehicle for fixing economic ills, and we should not expect judges to reshape housing markets. Even when promulgating an alleged revolution in landlord–tenant law, judges were anything but true revolutionaries.

Dramatic change to the distribution of wealth, if it is to come, must originate in our governments. Seeking such change, some state and city governments have recently begun experimenting with reforms to property laws; in a handful of places, they have even reintroduced rent control. These governments—reflecting the preferences of their constituents—can be agents of change. The best courts can do is not stand in their way.¹⁶²

¹⁶² In a very recent case, a California appeals court did just that, as it found that an anti-rent-control state law did not preempt San Francisco’s ordinance barring a landlord from imposing a bad-faith rent increase to coerce the tenant to vacate the unit in circumvention of the city’s eviction laws. *S.F. Apartment Ass’n v. City & Cnty. of San Francisco*, 289 Cal. Rptr. 3d 373, 378 (Ct. App. 2022).