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The Stable Legal Foundation Of Commercial Rent Stabilization

Guy Yedwab*

I. INDRODUCTION

Although some accept that excessive rents are just part of the cost of doing business in an urban area, others cry out "the rent is 'too damn high.'"[1] In the face of vacant storefronts and constant churn, small business advocates are increasingly turning to a common residential affordable housing tool: rent stabilization laws. The most developed proposal, New York City's Commercial Rent Stabilization bill ("NYC Commercial Rent Stabilization") gained the support of a majority of city councilmembers in late 2021[2] and remains active in the current session.[3] This note will explore the legality of commercial rent stabilization based on the history of legal challenges to past residential and commercial rent regulations.

A subset of rent regulation, rent stabilization laws protect tenants by limiting how much rents can increase each year.[4] While details differ, rent stabilization laws limit rent increases to a certain percent each year – either at a level set by an administrative agency or a flat percent in the statute.[5] In some cases, rent stabilization laws can

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[1] Tim Wu, Opinion, *New York's Commercial Rents Are 'Too Damn High'*, N.Y. TIMES (Oct. 11, 2020), https://www.nytimes.com/2020/10/11/opinion/nyc-commercial-rent-reform.html.

[2] N.Y.C. Council Intro. No. 1796 (N.Y.C. 2019); *see also* Bridget Bartolini, *City's Small Businesses Need Rent Stabilization to Survive COVID-19, Advocates Say,* CITYLIMITS (Apr. 6, 2020), https://citylimits.org/2020/04/06/citys-small-businesses-need-rent-stabilization-to-survive-covid-19-advocates-say/.

[3] N.Y.C. Council Intro. No. 0093 (N.Y.C. 2022).

[4] OFF. OF RENT ADMIN., N.Y. DIV. OF HOUS. AND CMTY. RENEWAL, FACT SHEET #1: RENT STABILIZATION AND RENT CONTROL 1 (2020), https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-01-09-2020.pdf.

[5] *Id.* at 1-2; Davina Ward, *Rent Control vs. Rent Stabilization – What's the Difference?*, APARTMENT LIST (Jun. 9, 2020), https://www.apartmentlist.com/renter-life/rent-control-vs-rent-stabilization

include other protections, such as requiring certain services, a right to lease renewal, or eviction protections.[6] Unlike rent control, rent stabilization does not dictate a maximum allowable rent.[7] Thus, although opponents frequently conflate the terms,[8] rent stabilization is more akin to a ban on price gouging, whereas rent control is akin to price controls. Rent stabilization is not as rigid as rent control and allows rents to rise with the market while preventing excessive rate increases.[9] Legislatures craft rent stabilization laws to provide many of the benefits of rent protection without depriving landlords of reasonable profits or discouraging housing maintenance.[10] While rent stabilization laws vary in implementation across the country, the laws follow those general contours.[11]

(describing CA rent stabilization law with 5% increases per year plus inflation).

[6] *See, e.g.*, OFF. OF RENT ADMIN., N.Y. DIV. OF HOUS. AND CMTY. RENEWAL, *supra* note 4, at 1.

[7] *Id.* at 1-2; Ward, *supra* note 5.

[8] *See, e.g.*, Post Editorial Board, Editorial, *NYC Council's rent control bill for stores will only sabotage recovery*, N.Y. POST (Sep. 16, 2021), https://nypost.com/2021/09/16/nyc-councils-rent-control-bill-for-stores-will-only-sabotage-recovery/ (mischaracterizing NYC Commercial Rent Stabilization as a rent control bill).

[9] *Compare* Ward, *supra* note 5 (describing CA rent stabilization law with 5% increases per year plus inflation), *with* Emily Nonko, *New York Apartment Guide: Rent Control vs. Rent Stabilization*, CURBED (Jan. 3, 2020, 10:48 AM), https://ny.curbed.com/2017/8/28/16214506/nyc-apartments-housing-rent-control (describing NY rent control law freezing apartment rents at rates from the 1970s).

[10] PRASANNA RAJASEKARAN ET AL., URB. INST., RENT CONTROL: WHAT DOES THE RESEARCH TELL US ABOUT THE EFFECTIVENESS OF LOCAL ACTION? 2 (2019) (citing John I. Gilderbloom & Lin Ye, *Thirty Years of Rent Control: A Survey of New Jersey Cities*, 29 J. OF URB. AFFS. 207 (2007)).

[11] EDWARD G. GOETZ ET AL., UNIV. OF MINN., MINNEAPOLIS RENT STABILIZATION STUDY 5-12, (2019).

In the residential market, approximately 200 municipalities have implemented some form of rent stabilization—the largest being New York City, Los Angeles, San Francisco, Oakland, and Washington D.C.[12] These rent stabilization laws eclipsed earlier, stricter rent-control laws.[13] Empirical studies on rent regulations have found that they have indeed been effective at both keeping rents low and preventing rapid rent increases.[14] Cambridge, Massachusetts, and other localities found lower rents over longer periods, particularly when rent stabilization did not admit exceptions like vacancy decontrol, which removes apartments from protection if they become vacant.[15] A case study of a weak form of rent stabilization in New

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[12] *Id*. at 1, 3, 11 (citing Richard Arnott, *Time for Revisionism on Rent Control,* 9 J. OF ECON. PERSPS. 99 (1999)); RAJASEKARAN ET AL., *supra* note 10, at 3 (citing *Rent Control Laws by State*, NATIONAL MULTIFAMILY HOUSING COUNCIL (July 19, 2022), https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/).

[13] RAJASEKARAN ET AL., *supra* note 10, at 3 (describing rent control as "first-generation rent control" and rent stabilization as "second-generation rent control").

[14] GOETZ ET AL., *supra* note 11, at 20 (citing David H. Autor et al., *Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge, Massachusetts*, 122 J. POL. ECON. 661 (2014); Dirk W. Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits*, 48 J. URB. ECONS. 185 (2000); Allan D. Heskin et al., *The Effects of Vacancy Control: A Spatial Analysis of Four California Cities*, 66 J. AM. PLAN. ASS'N 162 (2000); David P. Sims, *Out of Control: What Can We Learned from the End of Massachusetts Rent Control?*, 61 J. URB. ECONS. 129 (2007); W.A.V. Clark & Allan D. Heskin, *The Impact of Rent Control on Tenure Discounts and Residential Mobility*, 58 LAND ECONS. 109 (1982); Ned Levine et al., *Who Benefits from Rent Control? Effects on Tenants in Santa Monica, California*, 56 J. AM. PLAN. ASS'N 140 (1990)).

[15] GOETZ ET AL., *supra* note 11, at 20 (2019) (citing David H. Autor et al., *Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge, Massachusetts*, 122 J. POL. ECON. 661 (2014); Dirk W. Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits*, 48 J. URB. ECONS. 185 (2000); Allan D. Heskin et al., *The Effects of*

Jersey found that exemptions for new construction and "hardship appeals" could result in less impact on restricting rent increases.[16] However, studies have also found that even in jurisdictions with less strict protections, tenants were less likely to be displaced by rent increases.[17] Rent stabilization laws have become normalized as a tool for restraining rent increases and protecting tenants across the United States.[18]

Despite the long history of rent regulations, opponents assert that commercial rent stabilization is legally infirm.[19] Even as NYC Commercial Rent Stabilization builds support, some in the real estate industry continue to raise legal objections.[20] The campaign for, and resistance to, this bill in New York will be our case study for

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Vacancy Control: A Spatial Analysis of Four California Cities, 66 J. AM. PLAN. ASS'N 162 (2000); David P. Sims, *Out of Control: What Can We Learned from the End of Massachusetts Rent Control?*, 61 J. URB. ECONS. 129 (2007); W.A.V. Clark & Allan D. Heskin, *The Impact of Rent Control on Tenure Discounts and Residential Mobility*, 58 LAND ECONS. 109 (1982); Ned Levine et al., *Who Benefits from Rent Control? Effects on Tenants in Santa Monica, California*, 56 J. AM. PLAN. ASS'N 140 (1990)).

[16] RAJASEKARAN ET AL., *supra* note 10, at 4 (citing Joshua D. Ambrosius et al., *Forty Years of Rent Control: Reexamining New Jersey's Moderate Local Policies After the Great Recession*, 49 CITIES 121 (2015); Gilderbloom & Ye, *supra* note 10.

[17] RAJASEKARAN ET AL., *supra* note 10, at 4 (citing Gilderbloom & Ye, *supra* note 10).

[18] *See generally* RAJASEKARAN ET AL., *supra* note 10; GOETZ ET AL., *supra* note 11.

[19] *New York City Business Leaders Join Forces in Opposition to City Council's Proposed Commercial Rent Control Legislation*, REAL EST. BD. OF N.Y. (Nov. 14, 2019), https://www.rebny.com/content/rebny/en/newsroom/press-releases/2019_Press_Releases/New_York_City_Business_Leaders_Join_Forces_in_Opposition_to_City_Councils_Proposed_Commercial_Rent_Control_Legislation.html (mischaracterizing commercial rent stabilization as commercial rent control).

[20] *Id*.

examining the firm viability of commercial rent stabilization. After examining the need for this legislation – an important component of its legal foundations – this note will identify the common legal objections raised against rent regulations. Next, the note will examine how legal challenges raising those issues against previous commercial rent stabilization laws have consistently failed. Finally, this note will apply this history and precedent to see the firm legal footing of NYC Commercial Rent Stabilization. Through this analysis, this note will show that NYC Commercial Rent Stabilization is legally firm and can serve as a model to legislatures across the country interested in drafting similar legally defensible protections for local small businesses.

II. WHY REGULATE COMMERCIAL RENTS?

Many legal challenges to legislation turn on the question of whether the law fits the need it was passed to resolve.[21] Thus, before analyzing the strictly legal questions presented, it is critical to understand why legislatures today are turning their attention to regulating commercial rents. The impetus of such legislation is clear: aggressively rising commercial rents.

Across the United States, rising commercial rents threaten to displace or shutter small independent businesses.[22] Cities from Asheville, North Carolina to Portland, Oregon have seen sharp increases in commercial real estate.[23] In 2016, 59% of retailers

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[21] *See*, *e.g.*, Sveen v. Melin, 138 S. Ct. 1815, 1821-22 (2018) (explaining that the Contracts Clause test includes appropriateness of legislation to accomplish public purpose). *See also* Penn Cent. Transp. Co. v. New York City (*Penn Central*), 438 U.S. 104, 131 (1978) (providing a three-factor balancing test for Takings Clause challenges, of which one is whether law reasonably relates to promotion of the general welfare).

[22] OLIVIA LAVECCHIA & STACY MITCHELL, INST. FOR LOC. SELF-RELIANCE, AFFORDABLE SPACE: HOW RISING COMMERCIAL RENTS ARE THREATENING INDEPENDENT BUSINESS AND WHAT CITIES ARE DOING ABOUT IT 4-5, 8 (2016).

[23] *Id.* at 8.

reported worries about rising rents, and one-in-four saw it as their top challenge.[24] These concerns are strongest in the most vulnerable communities: a study found that 82% of immigrant small-business owners cited rent as the top concern, dwarfing challenges like regulations, access to capital, and short leases.[25] These concerns are well founded: successful small businesses can see rents increase strikingly, like the West Village's Cornelia Street Café, whose rent rose 77 times over 40 years[26] before finally being forced to close.[27]

New York City, a dense city with a hot real estate market, saw an increase of rents of roughly 22% from 2007 to 2017.[28] Although the pandemic unsettled rents, by 2021 rents in many shopping corridors had returned to pre-pandemic levels.[29] Steep rent increases

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[24] *Id.* at 9.

[25] LENA AFRIDI & DIANA DROGARIS, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., THE FORGOTTEN TENANTS: NEW YORK CITY'S IMMIGRANT SMALL BUSINESS OWNERS 4, 5 (2019) (defining immigrant-owned businesses as "independently owned, non-franchised businesses with twenty or fewer employees operated by a foreign born or first-generation New Yorker.").

[26] Giovanni Russonello, *Cornelia Street Café Celebrates 40 Years, With Some Concerns*, N.Y. TIMES (July 5, 2017), https://www.nytimes.com/2017/07/05/arts/music/cornelia-street-cafe-40th-anniversary.html.

[27] Kayla Kumari Upadhyaya, *West Village Art Haven Cornelia Street Café Will Close After 41 Years*, EATER NEW YORK, (Dec. 12, 2018, 1:52 PM), https://ny.eater.com/2018/12/12/18137945/cornelia-street-cafe-closure.

[28] SCOTT M. STRINGER, OFF. OF THE N.Y.C. COMPTROLLER, RETAIL VACANCY IN NEW YORK CITY: TRENDS AND CAUSES, 2007-2017 15 (2019), https://comptroller.nyc.gov/wp-content/uploads/documents/Retail_Vacancy_in_NYC_2007-17.pdf.

[29] Kim Velsey, *Most Storefront Rents in New York Are as High as Ever*, CURBED, (Oct. 6, 2021), https://www.curbed.com/2021/10/most-storefront-rents-in-new-york-are-as-high-as-ever.html; Oscar Perry Abello, *Can NYC's Storefront Registry Help Level the Playing Field for Embattled Commercial Tenants?*, NEXTCITY, (July 20, 2021), https://nextcity.org/urbanist-news/can-nyc-storefront-registry-level-the-playing-field-for-commercial-tenants.

in 2021 indicate that commercial rents are seeing a phenomenon similar to the residential markets, where rent concessions made during the pandemic were mirrored by steep rent increases during the recovery to recapture lost profits.[30] For example, Casa Adela, a restaurant at the center of historic Puerto Rican activism in the Lower East Side, received a proposed rent increase of 480% from its landlord.[31] The landlord rejected a counter-offer of a 122% increase.[32] Without rent regulations, New York City small businesses will continue to receive these exorbitant rent increases.

A 2021 hearing on NYC Commercial Rent Stabilization before the City Council provides a window into the case for commercial rent stabilization.[33] Over the course of a contentious seven-hour hearing, small businesses, landlords, and advocacy organizations from both sides outlined how they believed commercial rent stabilization would impact their livelihoods and communities.[34]

Many small business owners described how rising commercial rents disrupted their business' budgets directly.[35] As one observed, commercial rent "[i]s the basis of our operating costs."[36] Many

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[30] Misyrlena Egkolfopoulou & Claire Ballentine, *New York Renters Face 70% Increases as Pandemic Discounts Expire*, BLOOMBERG, (Sep. 15, 2021), https://www.bloomberg.com/news/articles/2021-09-15/new-york-city-rents-landlords-jack-up-prices-70-in-lease-renewals-post-covid; *see also* Abello, *supra* note 29 (observing that discounted leases offered during the pandemic were typically for one- or two- year terms).

[31] Eric Lach, *Casa Adela and the Dreams of Loisaida*, NEW YORKER, (Dec. 30, 2021), https://www.newyorker.com/news/our-local-correspondents/casa-adela-and-the-dreams-of-loisaida.

[32] *Id.*

[33] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.* (N.Y.C. 2021). Additional testimony on NYC Commercial Rent Stabilization was provided to New York City Council's Committee on Small Business on June 25, 2022.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 243 (statement of Jesse G. Galvez, Owner, Galleria J. Antonio).

business owners cited specific rent increases: one described a business whose rent rose from $2,500 to $25,000 per month,[37] another noted a hairdresser in Harlem whose rent rose from $1,100 to $2,800 per month just four months into the pandemic.[38] As these rents increase, revenues often do not rise to keep pace.[39] These unsustainable increases frequently result in the business losing their space.[40] In fact, the same business might be displaced multiple times; one cited being displaced four times by rent increases,[41] another displaced three times within eighteen months.[42] As one small business owner put it: "It's always the same. We move . . . we build out a space, we build relationships with the community, and then we get hit with a rent increase that we can't afford . . . so we scramble . . . and we repeat."[43] These repeated displacements leave small businesses rootless and create constant churn in neighborhoods.

Moreover, as rents climb higher and higher, it becomes difficult to find affordable commercial spaces, frustrating displaced

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[37] *Id.* at 157 (statement of Shabad Simon-Alexander, concerned citizen).

[38] *Id.* at 192-93 (statement of Paula Segal, Senior Staff Attorney, TakeRoot Justice).

[39] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, 237 (N.Y.C. 2021) (statement of Catherine Murcek, Worker-Owner, Samamkaya Yoga Back Care & Scoliosis Collective) (noting that size of the rented space limits future revenue).

[40] *Id.* at 176, 227, 237, 242-43, 305 (statements of Carina Kaufman-Gutierrez, Urb. Just. Ctr., Street Vendor Project; Lauren Gardner, Director, Babycastles; Catherine Murcek, Worker-Owner, Samamkaya Yoga Back Care & Scoliosis Collective; Jesse G. Galvez, Owner, Galleria J. Antonio; Khari White, Jamaica Branch, NAACP).

[41] *Id.* at 151 (statement of Rachel Nelson, small business owner).

[42] *Id.* at 300 (statement of Laura Weber, garment manufacturing facility owner).

[43] *Id.* at 227 (statement of Lauren Gardner, Director, Babycastles).

businesses[44] and aspiring entrepreneurs.[45] Such sharp shocks also close businesses permanently.[46] In New York City, these rent pressures have contributed to severe declines in local businesses—for example, the estimated 1,000 diners a generation ago have declined to less than 380.[47]

Beyond the direct impact on the livelihood of small business owners, high rents have a broader economic impact. During the hearing, the Yemeni American Merchants Association noted that many members had been forced to lay off workers due to rising rents,[48] and other small business owners discussed considering lowering wages or raising prices.[49] As small businesses employ half of all New

[44] *Id*. at 119-120 (N.Y.C. 2021) (statement of Ruth Lopez Martinez, Worker-Owner, Pa'lante Green Cleaning) ("There was no place to find after that. It's too expensive in this area. It's preventing our recovery.").

[45] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, at 121 (statement of Vanna Valdez, Worker-Owner, Bronx Clay) ("We have been searching for spaces where we can establish ourselves and serve our community. In our search we grew discouraged.").

[46] *Id.* at 157-58 (statement of Shabad Simon-Alexander, concerned citizen) (business owner whose rent was raised to $500,000 a month "had no choice but to retire" and "close her business, leaving her with few avenues to sustain her life in New York after that.").

[47] Charles Passy, *Evergreen Diner Joins Long List of New York Area Closures*, WALL ST. J. (Dec. 29, 2016, 4:45 PM), https://www.wsj.com/articles/evergreen-diner-joins-long-list-of-new-york-area-closures-1483047932.

[48] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, 114 (N.Y.C. 2021) (statement of Husam Khaled, Yemeni American Merchants Association).

[49] *Id.* at 221 (statement of Natasha Amott, Owner, Whisk) ("That may have been market rate, but it was damn near unaffordable and would have required pushing my staff's wages down to minimum wage.").

Yorkers,[50] these effects can have a devastating impact on New York's workforce.

Small businesses testified not only to their economic role as an employer, but also their role as a critical support for communities.[51] Unique small businesses often provide rich culture and history to neighborhoods, in addition to their goods and services.[52] Often, when these small businesses are displaced, they leave behind vacant storefronts, destroying these important community resources.[53] The result has been a phenomenon of "high-rent blight" that leaves clusters of vacant storefronts in otherwise vibrant neighborhoods.[54] These vacant storefronts leave behind "darker streets, poor sanitation, and safety issues" that damage "the vibrancy of street life in our neighborhoods."[55] One business owner described running the only

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[50] N.Y.C. OFFICE OF THE MAYOR, SMALL BUSINESS FIRST: BETTER GOVERNMENT. STRONGER BUSINESSES 3 (2015), https://www1.nyc.gov/assets/smallbizfirst/downloads/pdf/small-business-first-report.pdf.

[51] *Id.* at 165 (statement of Badr Fuad, member, Yemeni American Merchants Association) ("[W]e have been running a bodega in the Bronx for the past 30 years. My family knows the community and everybody in the community also knows . . . the service that we provide for the community and how important it is.")

[52] *Id.* at 249-50 (statement of Jenny Dubnau, Founding Member, Artist Studio Affordability Project).

[53] *Id.* at 178-79, 187-88 (statements of Beth Krieger, Upper West Side Save Our Stores; Anna Chiang, Owner, The Ink Pad).

[54] Tim Wu, *Why Are There So Many Shuttered Storefronts in the West Village?*, NEW YORKER (May 24, 2015), https://www.newyorker.com/business/currency/why-are-there-so-many-shuttered-storefronts-in-the-west-village; *see also* Steven Kurutz, *Bleecker Street's Swerve From Luxe Shops to Vacant Stores*, N.Y. TIMES, Jun. 1, 2017, at D7 [hereinafter Wu, *West Village*].

[55] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, 179 (N.Y.C. 2021) (statement of Beth Krieger, Upper West Side Save Our Stores).

surviving business on her block in Bedford-Stuyvesant, Brooklyn: "Many dreams around me are shattered."[56]

These vacancies become persistent because, in an unregulated rental market, large commercial landlords have economic incentives to keep storefronts vacant rather than accept lower rents.[57] Landlords with large portfolios are hesitant to reduce rents for fear of the ripple effect on other properties—even for landlords with over one hundred vacancies.[58] Given the longer terms of commercial leases (often ten or more years), large landlords would prefer to wait longer rather than get locked-in at a low price. Landlords planning over the long term can deduct the business losses against the income made once a higher-paying tenant arrives.[59] For this reason, the New York City Department of City Planning found that in "hot corridors," average rents have "increased notably" at the same time as widespread vacancy, because some landlords were holding out for high rents.[60] In one example, a movie theater operating since 1933 was closed due to rent in 2006 and has been vacant ever since because the landlord is

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[56] *Id.* at 173 (statement of Charlotta Janssen, Owner, Chez Oskar).

[57] VACANT NEW YORK, http://www.vacantnewyork.com/ (last visited Mar. 6, 2022); *see also* Wu, *supra* note 1.

[58] Wu, *supra* note 1.

[59] Susan Shapiro, Opinion, *Change the Math That's Keeping Too Many NYC Storefronts Vacant*, N.Y. DAILY NEWS (Apr. 16, 2018, 5:00 AM), https://www.nydailynews.com/opinion/change-math-keeping-nyc-storefronts-vacant-article-1.3932715; Wu, *West Village*, *supra* note 54; *but see* Carol Tannenhauser, *The Answer Column: Do Landlords Get Tax Breaks for Vacant Retail Space?*, WEST SIDE RAG (Mar. 21, 2019, 9:36 PM), https://www.westsiderag.com/2019/03/21/the-answer-column-do-landlords-get-tax-breaks-for-vacant-retail-space (quoting landlord acknowledging reduced tax burden from lower income and reassessment of property but denying tax incentives for vacancy).

[60] N.Y.C. DEP'T OF CITY PLAN., ASSESSING STOREFRONT VACANCY IN NYC: 24 NEIGHBORHOOD CASE STUDIES 6 (2019), https://www1.nyc.gov/assets/planning/download/pdf/planning-level/housing-economy/assessing-storefront-vacancy-nyc.pdf.

holding out for one million dollars per year in rent, an amount that no business has been willing to meet.[61] Despite areas of the city with condensed blocks of empty windows,[62] small businesses trying to fill these vacant storefronts are essentially competing with ghosts.[63]

While these points were made by small businesses and advocates during the 2021 hearing, real estate trade associations also voiced concerns about the impact of stabilization.[64] The Real Estate Board of New York spoke of fears that, rather than looking at the comprehensive data required by the legislation,[65] rates would be set based on political considerations.[66] Landlords also disputed the

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[61] Mark Levine, City Councilmember, Remarks at League of Independent Theater 2021 Meet the Candidates (Mar. 30, 2021); *see also* Gus Saltonstall, *Petition Started to Revive Long-Shuttered Metro Theater on UWS*, PATCH (Mar. 30, 2021, 1:16 PM), https://patch.com/new-york/upper-west-side-nyc/petition-started-revive-long-shuttered-metro-theater-uws.

[62] STRINGER, *supra* note 28 (documenting citywide vacancy); VACANT NEW YORK, *supra* note 57 (documenting citywide vacancy with case study in SoHo); *'It Has Become A Ghost Town': Broadway Storefront Vacancies Up More Than 75% Since 2017*, CBS NEWS N.Y. (Sept. 10, 2020, 6:36 PM), https://www.cbsnews.com/newyork/news/broadway-storefront-vacancies-up-more-than-75/ (including case study of 75% increase in vacancy along Broadway); OFF. OF COUNCIL MEMBER HELEN ROSENTHAL, SMALL BUSINESS HEALTH REPORT: COMMERCIAL VACANCIES ON THE UPPER WEST SIDE IN 2017 3, 5 (2017), http://helenrosenthal.com/wp-content/uploads/2011/04/Small-Business-Report-4.pdf (including case study of vacancy in the Upper West Side).

[63] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, 246 (N.Y.C. 2021) (statement of Guy Yedwab, President, League of Indep. Theater) (citing N.Y.C. DEP'T OF CITY PLAN., *supra* note 60).

[64] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, 126 (N.Y.C. 2021).

[65] N.Y.C. Council Intro. No. 1796 § 22-1203(f) (N.Y.C. 2019); N.Y.C. Council Intro. No. 0093 §22-1303(f) (N.Y.C. 2022).

[66] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, 117 (N.Y.C. 2021) (statement of Reggie Thomas,

characterization that vacancy benefits landlords.[67] They projected that in a stabilized market, landlords would be less likely to invest in their properties[68] or would find ways to move their properties outside of the legislation.[69]

Both sides, however, acknowledged that rents were closing businesses and that vacancy was a problem in the city.[70] Individual landlords argued that they were operating their businesses without doubling or tripling rent on their tenants.[71] This reinforces the lack of negative impact of the legislation, as made clear in a telling exchange

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Senior Vice President, Real Est. Bd. of N. Y.); VACANT NEW YORK, *supra* note 57. *But see* Wu, *supra* note 1.

[67] *See, e.g.*, *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, 126 (N.Y.C. 2021) (statement of Bill Abramson, Director of Sales and Leasing, Buckbinder & Warren).

[68] *Id.* at 133 (statement of Nicola Heryet, Principal, Avison Young); *But see* GOETZ ET AL., *supra* note 11, at 30 (surveying literature to conclude that impact on apartment maintenance depends on implementing regulations, incentives, and enforcement).

[69] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.*, 224 (N.Y.C. 2021) (statement of Josh Nachowitz, Senior Vice President of Economic Development, Alliance for Downtown New York).

[70] *Id.* at 123, 127-29, 134-35, 161-62, 169-70 (statements of Andrew Castelli, hospitality venue owner; Bill Abramson, Director of Sales and Leasing, Buckbinder & Warren; Imran Hossain, Staff Attorney, Micro-Enterprise Project, Volunteers of Legal Services; Eric Obenzinger, landlord; Hani Salama, Chair and CEO of Building Owners and Managements Association of Greater New York; Rui Li, Organizer, Street Vendor Project, Urban Justice Center).

[71] *See, e.g.*, *id*. at 140-41 (statement of Rachel Nicolazzo, musician and landlord) (citing annual rent increases for her tenants of 5%). *See also id.*, at 164 (statement of Olympia Kazi, Vice Chair of the New York City Nightlife Advisory Board) ("Let's be clear: good faith landlords like Rachel [Nicolazo] . . . are not gonna be impacted. What this law does is only ending [sic] predator landlords that have devastated our city and our neighborhoods.").

between the legislation's sponsor, and a witness from a landlord trade association:

> [COUNCIL MEMBER LEVIN]: A quick question. Among your members, what [are the] rental increases that they are imposing on a new lease, on average?
> JOSPEH CONDON: Um, a rental increase? I, I, honestly I have no sense . . . .
> COUNCIL MEMBER LEVIN: Right, but my issue is like if your members are not increasing rents exorbitantly upon a lease renewal or upon a new lease then why, why would it hurt them? Why would it hurt a landlord who is not gouging a tenant? . . . if landlords are actually increasing it, you know, at a reasonable amount annually, say 5% or whatever . . . then how would this bill hurt them?
> JOSEPH CONDON: If they're doing that, I suppose it wouldn't hurt them.[72]

As pointed out by Abigail Ellman, with the community development group Cooper Square Committee, the approach codified in NYC Commercial Rent Stabilization is a "hopeful vision" built on the approach already taken by those good landlords: "mutually beneficial leases between commercial tenants and landlords [with] stable, predictable rent increases."[73] The necessity of the legislation stems from the uncertainty of an unregulated market in which a landlord can choose between reasonable rent increases, or unexpectedly present a tenant with an exorbitant rent hike.[74]

The testimony of the impacted business owners, as well as the data that confirms their experiences, is an important component of the legal foundation of commercial rent stabilization laws. As will be shown, in every viable constitutional challenge, courts must consider

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[72] *Id.* at 254-55 (statements of Mark Gjonaj, City Council Chairperson; Joseph Condon, Community Housing Improvement Program).

[73] *Id.* at 182-83 (statement of Abigail Ellman, Director of Planning and Development, Cooper Square Committee).

[74] *Regulation of commercial rent: Int. 1796-2019 Before the N.Y.C. Council Comm. on Small Bus.,* 153, 187 *(N.Y.C. 2021)* (statements of Rachel Nelson, small business owner; Anna Chiang, Owner, The Ink Pad).

the appropriateness of the legislation relative to an important public purpose.[75] At least five significant bases are evident from the above testimony: (1) preventing the closure of small businesses (2) reducing barriers to the creation of new small businesses (3) protecting wages and preventing layoffs (4) protecting vibrant street life (5) preserving safe streets by preventing street blight. These key goals are the yardsticks by which commercial rent stabilization will be measured.

III. LEGAL ISSUES RAISED BY COMMERCIAL RENT STABILIZATION

Although cases typically uphold rent regulation laws, precedent shows a few options for a plaintiff to plead a case and perhaps get in through the courthouse door. Historical challenges have frequently alleged Constitutional violations, including violations of the Contracts, Takings, and Substantive Due Process clauses.[76] Although this note will not discuss state-specific or statutory challenges, another proposed basis for challenging rent regulations when passed by localities is that it is preempted by state or federal laws that touch on the landlord-tenant relationship.[77] Any court evaluating a challenge against a commercial rent stabilization bill will likely be asked to apply the relevant tests for these four legal areas.

A. Contracts Clause

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[75] *See, e.g.*, Sveen v. Melin, 138 S. Ct. 1815,1817 (2019); *see also* Penn Cent. Transp. Co. v. New York City, (*Penn Central*), 438 U.S. 104, 131 (1978) (the Takings Clause test includes threshold question of reasonably relating to promotion of the general welfare).

[76] This article will omit an analysis of a challenge under the Thirteenth Amendment, equating providing services to an unwanted tenant to slavery, which the Supreme Court considered but rejected. Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 199 (1921).

[77] *See, e.g.,* Alexander Lycoyannis and Dejan Kezunovic, Commentary, *Proposed New York City Commercial Rent Regulation: An Improper Usurpation of State Power*, N. Y. L. J. (Apr. 17, 2020) https://www.law.com/newyorklawjournal/2020/04/17/proposed-new-york-city-commercial-rent-regulation-an-improper-usurpation-of-state-power/?slreturn=20220924104930.

One common ground for challenges to rent regulations lies under the Contracts Clause of the Constitution. The Clause states that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[78] The application of the Contracts Clause to rent regulation is clear: leases are contracts between tenants and landlords, therefore, if a lease is held to be impaired by the law, the Constitution would be violated.[79]

Strictly and literally construed, the Contracts Clause would seem to bar any regulation with lease, yet courts have repeatedly rejected that approach.[80] As early as 1827, the Court cautioned that a "severe literal construction" of the clause could not have been the intent of the Constitution as it would nullify a wide variety of laws, including regulation of mortgages and insurance or bans on usury.[81] Over a century later, the Court upheld an emergency mortgage moratorium during the Great Depression against a Contract Clause challenge because "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."[82] Examining the history of jurisprudence to that point, the Court framed the question as whether the legislation is "addressed to a legitimate end and the measures taken are reasonable and appropriate to that

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[78] U.S. CONST. art. I, § 10, cl. 1.

[79] *See, e.g.,* Kargman v. Sullivan*,* 582 F.2d 131, 131-35 (1st Cir. 1978).

[80] *See, e.g.,* United States Tr. Co. v. N.J., 431 U.S. 1, 21 (1977); Melendez v. City of N.Y., 16 F.4th 992, 1016-26 (2d Cir. 2021) (summarizing historical shift of cases away from "strict construction" barring "impairments of any sort"); Kraebel v. N.Y.C. Dep't of Hous. Pres. & Dev., 959 F.2d 395, 403 (2d Cir. 1992) ("Although the language . . . appears to provide an unamibiguous bar, it 'does not operate to obliterate the police power'") (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978)); Kargman v. Sullivan, 582 F.2d 131, 132 (1st Cir. 1978) ("Plaintiffs acknowledge that the Contract Clause does not absolutely forbid any impairment of obligations . . . .").

[81] Ogden v. Saunders, 25 U.S. 213, 286-87 (1827).

[82] Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398, 428 (1934).

end."[83] This framing adopts a nuanced inquiry over a strictly literal construction.

Rooted directly in that nuanced inquiry, the most recent Supreme Court case applying a Contracts Clause analysis used a two-step test to determine whether there was a violation of the Constitution. As applied in *Sveen v. Melin*, the Court's test asks first if "the state law has 'operated as a substantial impairment of a contractual relationship.'"[84] To determine substantial impairment, the test looks to the degree to which the law undermines the contractual bargain, interferes with reasonable expectations, and prevents safeguarding or reinstating rights under the contract.[85] Only if the first step is met does the test proceed to the second step, inquiring whether the state law is drawn appropriately and reasonably to advance "a significant and legitimate public purpose."[86] This two-step test is, at its heart, a nuanced inquiry into the reasonableness of the legislation.

In applying this two-step test, certain factors influence whether the Court will find the legislation reasonable in the second step. Although some cases cite emergency as the legitimate public purpose, the Court has been clear that emergencies do not change the

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[83] *Id.* at 438; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 503 (1987) (noting that the historical "primary focus" of the Contracts Clause was to scrutinize debt forgiveness).

[84] Sveen v. Melin, 138 S. Ct. at 1821-22 (quoting *Allied Structural*, 438 U.S. at 244).

[85] *Id*. at 1822.

[86] *Id.* (quoting Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1978)). Prior to *Sveen*, lower courts articulated the test as a three-part test (dividing the "appropriate and reasonable" analysis from the "significant public purpose" analysis). *See, e.g.,* Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 368 (2d Cir. 2006) (citing *Energy Reserves*, 459 U.S. at 411-13). However, as at least one court has recognized, the difference in tests is not substantive. *Melendez*, 16 F.4th at 1031 ("No matter. The substance of the inquiry has remained the same.").

constitutional power of states.[87] Courts more strictly scrutinize the appropriateness of the legislation if the contract is more substantially impaired, or if the law impairs the state or locality's own contracts with private parties.[88] The Court also is more skeptical of challenges where the challenged law or regulation is reasonably foreseeable in the industry.[89] Where an industry is already regulated – for example, the energy industry, where pricing regulation is already common – it will have a harder time asserting that regulation of contracts is inappropriate. [90] These factors frequently inform the outcome of the Contract Clause test's second step.

Courts often use this two-step test to uphold rent regulations. For example, in the Second Circuit, a law that regulated the collection of rent was upheld as not significantly impacting the landlord's lease rights.[91] The court noted that real estate in New York is already heavily regulated, and that a landlord cannot express surprise that her contractual relationships with tenants was impacted by government regulation.[92] Similarly, the Ninth Circuit held that rent regulations are valid when pursued for a justified purpose.[93] Although it noted cases where rent regulations were invalid because the benefits of regulation flowed to a small few, it also looked to cases where rent regulations were upheld because of broad public benefit.[94]

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[87] Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 39 (1940) (rejecting distinction between emergency legislation and permanent legislation).
[88] *Allied Structural*, 438 U.S. at 244 ("The severity of the impairment measures the height of the hurdle the state legislation must clear." *Id.* at 245.).
[89] *Energy Rsrvs.*, 459 U.S. at 413-14 ("Significant here is the fact that the parties are operating in a heavily regulated industry.").
[90] *Id.* at 416 ("Price regulation existed and was foreseeable as the type of law that would alter contract obligations.").
[91] *Kraebel*, 959 F.2d at 403.
[92] *Id.*
[93] RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1170 (9th Cir. 2004).
[94] *Id.* at 1170.

This analysis holds true even where rent regulation also impairs the landlord's other contracts. For example, the First Circuit Court of Appeals upheld a Boston rent control ordinance despite its potential impairment of contracts signed by the landlord with the Federal Housing Association ("FHA").[95] The contracts with the FHA allowed rent increases subject to FHA approval; the Boston rent control law reduced the potential for and delayed rent increases.[96] Reasoning that the landlords did not have a constitutional right to charge the maximum rent allowed under the FHA contract, the court upheld the rent control law because it provided fair net operating income and a reasonable return on their investment.[97] Although the court noted a conflict between different regulatory or contractual obligations, it held that "the Constitution does not necessarily provide a remedy for bureaucratic problems of this type."[98]

Another key factor examined by courts is whether the allegedly impaired contract was signed before or after the challenged law was implemented. Contracts signed after the law's passage are not likely to be held to be impaired. For example, the Second Circuit rejected a Contracts Clause challenge to New York City's Rent Stabilization Law by a couple who acquired their property after the law had taken effect.[99] On the other hand, some courts are more skeptical of laws that apply retroactively.[100] Yet even retroactive laws can be upheld: the highest courts in both New York and New Jersey upheld rent regulations that applied retroactively.[101] Thus, the retroactive or

[95] *Kargman,* 582 F.2d at 134-35.
[96] *Id.* at 132.
[97] *Id.* at 132, 134.
[98] *Id.* at 134.
[99] Harmon v. Markus, 412 Fed. Appx. 420, 423 (2d Cir. 2011).
[100] *See, e.g.*, *RUI*, 371 F.3d at 1169-70 (Bybee, J., dissenting); Melendez v. City of New York, 16 F.4th 992, 1004-05, 1008 (2d Cir. 2021).
[101] Twentieth Century Assocs., Inc. v. Waldman, 63 N.E.2d 177, 177, 180 (N.Y. 1945) (upholding commercial rent control applied retroactively);

prospective application of the legislation is simply one factor examined by the court as part of its overall analysis.

Recent application of these tests can be seen due to a spate of laws affecting the landlord-tenant relationship during the COVID-19 pandemic. For example, the Ninth Circuit was presented with a Contract Clause challenge to an eviction moratorium enacted during the crisis.[102] The Circuit rejected the plaintiff's argument for an "outmoded approach" to the Contract Clause and held that modern jurisprudence supports upholding the moratorium, even if the landlord was unable to collect any rent during the period of the moratorium.[103] The court relied on the important public purpose of protecting health during the pandemic and on remedial frameworks available to landlords to mitigate the hardships caused by the impairment [104] Even if those remedial frameworks were complicated, the Circuit held that the existence of any avenue of relief for landlords satisfied the Contacts Clause.[105] The Circuit did not vary its analysis based on COVID-19 or because of a perceived "emergency." [106] Thus, the Circuit held, applying the same Contract Clause test applied by the Supreme Court in *Sven v. Mellin*,[107] that the purpose was proper and the moratorium was reasonable for accomplishing that public purpose.

In addition to the Ninth Circuit's ruling, a recent Second Circuit opinion in as-yet unresolved litigation over emergency COVID-19 measures provides additional insight. During COVID-19,

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Edgewater Inv. Assocs. v. Edgewater, 510 A.2d 1178, 1184-85 (N.J. 1986) (upholding legislation changing lease tenancies retroactively).

[102] Apartment Ass'n of L.A. Cnty. v. City of Los Angeles, 10 F.4th 905, 916-17 (9th Cir. 2021).

[103] *Id*.

[104] *Id.*

[105] *Id.*

[106] *Id.*; *see also* Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398, 425 (1934) (upholding moratorium despite observing "[e]mergency does not create power.").

[107] *Apartment Ass'n*, 10 F.4th at 913.

New York City Council was concerned that the owners of small businesses who had signed personal guarantees on the commercial leases of their small businesses would experience financial hardship because of the COVID-19 closures as landlords enforced rental debts against them personally.[108] In response, City Council passed legislation making personal guarantees unenforceable for any rents owed during the COVID-19 pandemic period.[109] Landlords filed a Contracts Clause challenge.[110] Although the District Court granted summary judgment dismissing the claim, the Second Circuit reversed summary judgment, remanding to further explore the Contract Clause claim.[111] The Second Circuit held that the personal guarantee suspension was a permanent impairment because the guarantee is treated as a separate contractual relationship under circuit precedent, and the guarantee was permanently and entirely suspended—in effect, City Council had completely dissolved an entire contract.[112] However, The Second Circuit held that the personal guarantee suspension was a permanent impairment because the guarantee is treated as a separate contract relationship under circuit precedent, and the guarantee was permanently and entirely suspended—in effect, City Council had completely dissolved an entire contract.[113] The Second Circuit only reversed the District Court on the narrow grounds that the personal guarantee suspension was permanent, despite the temporary nature of the emergency, and because the personal guarantee suspension was not targeted at the businesses that were shuttered.[114] Yet even while expressing skepticism on these points, the court noted that the ruling is limited to whether the City of New York could prevail on a motion to dismiss, and the City of New York could still offer evidence that the

[108] Melendez v. City of New York, 16 F.4th 992, 1040-41 (2d Cir. 2021).
[109] N.Y.C., N.Y., ADMIN. CODE § 22-1005; *Melendez*, 16 F.4th at 1004.
[110] *Melendez*, 16 F.4th at 1004.
[111] *Id.* at 996.
[112] *Id.* at 1034.
[113] *Id.* at 1034-35.
[114] *Id.* at 1038-1041.

legislation was reasonably tailored.[115] Thus, the Second Circuit's recent Contracts Clause analysis of a commercial landlord-tenant regulation admits the possibility of restrictions on what a landlord can collect, so long as the purpose is legitimate and the regulation is tailored to furthering that purpose.

In dissent, Judge Carney reached a different conclusion from the majority on the appropriateness of the personal-guarantee suspension because of a different reading of the purpose.[116] Where the majority narrowly construed the purpose of the legislation as protecting small businesses that were shut down during COVID, Judge Carney pointed to legislative history indicating a broader goal: protecting not only businesses directly shut down by the order, but other businesses that may have been impacted by the overall economic crisis, lack of customers, and other challenges.[117] By focusing on this broader goal, Judge Carney advanced persuasive arguments that the law was properly tailored in time and reach to meet those goals.[118] Judge Carney's dissent shows another road to surviving legal challenges, if legislatures are clear on their goals when passing the initial legislation.

These recent COVID-19 cases confirm the broader history of Contracts Clause challenges. Courts determining whether a law impermissibly impairs the contractual relationship will apply the Supreme Court's two-step test, looking for a legitimate purpose that is advanced by the legislation. When applied to commercial rent regulations through history, the nuances of this approach provide legislatures significant latitude to constitutionally limit rents.

B. Takings Clause

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[115] *Id.* at 1041.

[116] *See Melendez*, 16 F.4th at 1058-1060 (Carney, J., dissenting).

[117] *Id.*

[118] *Id.* at 1065-1067.

In addition to the Contracts Clause, rent regulations also face challenges under the Takings Clause of the Fifth Amendment.[119] The Takings Clause states that "private property shall [not] be taken for public use, without just compensation."[120] The clearest example of a taking is when the government uses eminent domain to take full title for privately owned land.[121] However, the Supreme Court has applied the constitutional requirements of "public use" and "just compensation" to two other types of taking: regulatory takings[122] and physical occupations.[123] Because rent regulation does not give the government title to the land or establish a permanent physical presence, the Court has indicated that such statutes should be approached as potential regulatory takings.[124]

Regulatory takings were first recognized in *Pennsylvania Coal Co. v Mahon*.[125] The Court struck down a Pennsylvania act burdening

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[119] *See, e.g.*, Ross v. Berkeley, 655 F. Supp. 820, 837 (N.D. Cal. 1987); Rivera v. R. Cobian Chinea & Co., 181 F.2d 974, 976-77 (1st Cir. 1950), *abrogated by* Gilbert v. Cambridge, 932 F.2d 51, 67 n.19 (1st Cir. 1991).

[120] U.S. CONST. amend. V, cl. 5. The Takings Clause is incorporated against state and local governments through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897).

[121] *See* Kohl v. United States, 91 U.S. 367, 372-73 (1875).

[122] Pennsylvania Coal Co. v. Mahon, (Pa. Coal), 260 U.S. 393, 415 (1922) (holding that regulation that "goes too far" can be a taking in some circumstances).

[123] Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 421 (1982) (holding that a minor but permanent physical property is a per se taking).

[124] Yee v. City of Escondido, 503 U.S. 519, 524-25 (1992) (holding that mobile home rent control is better analyzed under regulatory takings analysis, not physical occupation); *Rivera*, 181 F.2d at 978 (analyzing commercial rent control as a regulatory taking); *but see Ross*, 655 F. Supp. at 837 (analyzing commercial rent control as a physical occupation because removing right to evict is equivalent to permanent physical occupation).

[125] *Pa. Coal*, 260 U.S. at 415; Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1014 (1992) ("Prior . . . *Pennsylvania Coal* [], it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the

the right to mine under the surface because the act "destroy[ed] previously existing rights of property and contract."[126] Further, the Court outlined a "general rule" that "property may be regulated to a certain extent, [but] if regulation goes too far it will be recognized as a taking."[127] Such regulatory takings are "a matter of degree" because it would be impractical for governments to pay for every minor change to property values caused by regulation.[128] Justice Brandeis' dissent did not contest the concept of a regulatory taking, but proposed a 'whole parcel rule,' which would determine whether property rights had been destroyed by "value of the whole property," not just one right (e.g. the right to mine).[129] The regulatory takings concept outlined by the majority and dissent has been further refined, but remains the core of the Takings Clause analysis.

The Court articulated the current test for regulatory takings in *Pennsylvania Cent. Transp. Co. v. New York City*.[130] In sustaining a city landmarks designation that deprived the plaintiff of air rights, the Court looked to three factors to determine whether the regulation had gone too far: the "economic impact of the regulation," the degree of interference with "investment-backed expectations," and the "character of the governmental action."[131] The Court in that case held that the property as a whole had not been significantly impacted, embracing whole parcel rule from the *Pennsylvania Coal* dissent.[132] The Court also held that the plaintiff had not been frustrated in their

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functional equivalent of a 'practical ouster of [the owner's] possession.'") (citation omitted).

[126] *Pa. Coal*, 260 U.S. at 412-14.

[127] *Id.* at 415.

[128] *Id.* at 413.

[129] *Id.* at 419 (Brandeis, J., dissenting).

[130] Horne v. Dep't of Agric., 576 U.S. 351, 377 (2015) ("Most takings cases . . . proceed under the fact-specific balancing test set out in *Penn Central."*) (citing Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978)).

[131] *Penn Cent.*, 438 U.S. at 117, 124, 138.

[132] *Id.* at 136; *Pa. Coal*, 260 U.S. at 419 (Brandeis, J., dissenting).

"investment-backed expectations" because the plaintiff could still receive a "reasonable return on its investment."[133] In examining the government action's character, the Court compared the city's landmarks law to typically valid zoning regulations of a property's use.[134] Successive courts have used the *Penn Central* balancing test to identify where a regulation crosses too far and becomes a taking.

In assessing whether rent regulations have gone too far, courts have typically deployed the regulatory takings analysis before concluding that no taking had occurred. In *Yee v. City of Escondido*, the Court held that a rent law control law for mobile homes was best analyzed under the regulatory taking framework.[135] Lower courts have echoed this analysis. For example, citing *Yee*, the Second Circuit held New York's residential rent stabilization law was not a taking under the regulatory taking framework.[136] Echoing the Court's analysis in *Yee,* the Second Circuit held that a physical occupation had not occurred because the plaintiffs retained the right to recover possession and to evict tenants, even though the right to recover had regulatory limitations.[137] The Second Circuit has also rejected the argument that the open-ended duration of the Rent Stabilization Law transforms it

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[133] *Penn Cent.*, 438 U.S. at 136 (quotation omitted).

[134] *Id.* at 125-27. In detailing potentially invalid government action, the Court highlighted examples of physical occupation which *Loretto* later held are a per se taking regardless of other *Penn Central* factors. *Compare Penn Cent.*, 438 U.S. at 128 (citing United States v. Causby, 328 U.S. 256 (1946)), *with* Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 430, 434-35 (1982) (citing *Causby*, 328 U.S. 256; *Penn Cent.*, 438 U.S. at 128) ("In short, where the character of the governmental action is a permanent physical occupation . . . our cases uniformly found a taking.").

[135] Yee v. City of Escondido, 503 U.S. 519, 524-25 (1992); *see also* Brown v. Legal Found., 538 U.S. 216, 234 (2003) (citing Block v. Hirsh, 256 U.S. 135 (1921)).

[136] Harmon v. Markus, 412 F. App'x 420, 422 (2d Cir. 2011) (citing *Yee*, 503 U.S. 519, at 529).

[137] *Id.*

into a physical occupation.[138] These cases are typical of rent regulation cases, considering the laws as potential regulatory takings before rejecting the takings claims.[139]

Some lawsuits have claimed that the most recent Supreme Court takings case, *Cedar Point Nursery v. Hassid*, has changed the analysis under *Yee.*[140] *Cedar Point* reviewed a regulation requiring that farm owners allow union organizers onto their property for up to three hours a day for up to four, thirty-day periods in one calendar year.[141] The question was whether intermittent rights of access to a property were best analyzed as a regulatory taking under *Penn Central* or a per se physical occupation under *Loretto*.[142] At oral arguments, Justices echoed historic criticisms of the *Penn Central* test and chose instead to treat the intermittent right of access as a permanent

[138] Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626, 632 (N.Y. 1993).
[139] *Harmon*, 412 F. App'x at 422 (citing *Yee*, 503 U.S. at 529); *Rent Stabilization Ass'n*, 630 N.E.2d at 632.
[140] Bldg. & Realty Inst. of Westchester & Putnam Ctys., Inc. v. N.Y., No. 19-CV-11285 (KMK), 2021 U.S. Dist. LEXIS 174535, at *52-56 (S.D.N.Y. Sept. 14, 2021), *appeal filed*, No. 21-2448 (Sept. 28, 2021); El Papel L.L.C. v. Durkan, No. 2:20-cv-01323-RAJ-JRC, 2021 U.S. Dist. LEXIS 181390, at *46-47 (W.D. Wash. Sept. 15, 2021), *vacated as moot by* El Papel LLC v. Durkin, No. 2:20-cv-01323-RAJ-JRC, 2022 U.S. Dist. LEXIS 128839 (W.D. Wash. July 20, 2022); S. Cal. Rental Hous. Ass'n v. County of San Diego, 550 F. Supp. 3d 853, 865 (S.D. Cal. 2021), *stay granted* by S. Cal. Rental Hous. Ass'n v. County of San Diego, No. 21-55798, 2022 U.S. App. LEXIS 3992, (9th Cir. Feb. 14, 2022); Jevons v. Inslee, 561 F. Supp. 3d 1082, 1107 (E.D. Wash. 2021); *See generally* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).
[141] *Cedar Point Nursery*, 141 S. Ct. at 2069.
[142] *Id.* at 2072 (citing Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978); Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 430, 434-35 (1982)).

occupation.[143] Thus, Takings Clause analyses now admit some cases of permanent occupation even where the occupation is not constant.

However, despite the passing remarks by the Justices, *Yee*'s application of the regulatory taking test to rent regulations is unlikely to be disturbed by this ruling. In *Yee*, although some limitations were placed on evictions, the rent control laws were not a physical occupation because "tenants were invited by the petitioner, not forced upon them by the government" as was the case with the union organizers in *Cedar Point*.[144] Since *Cedar Point*, lower courts have continued to apply the same logic. The first Circuit Court to reconsider rent regulations in light of *Cedar Point* continued to apply *Yee* as controlling because the tenants were voluntarily invited onto the property.[145] Nearly identical analyses have been applied by multiple district courts, including the Southern District Court of New York when asked to review a fresh challenge to New York's Rent Stabilization Law.[146] Thus, *Yee* remains the controlling precedent, rejecting Takings Clause challenges for typical rent regulation statutes.

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[143] Transcript of Oral Argument at 51, 54, 68-69, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107) (critical questions posed by Justices Alito, Sotomayor, and Barrett).

[144] *Compare* Yee v. City of Escondido, 503 U.S. 519, 528 (1992), *with Cedar Point*, 141 S. Ct. at 2080 (law at issue "requires the growers to admit union organizers onto their premises.").

[145] Ballinger v. City of Oakland, 24 F.4th 1287, 1293 n.3 (9th Cir. 2022).

[146] Bldg. & Realty Inst. of Westchester & Putnam Ctys., Inc. v. New York No. 19-CV-11285 (KMK), 2021 U.S. Dist. LEXIS 174535, at *52-56 (S.D.N.Y. Sept. 14, 2021), *appeal filed*, No.21-2448 (Sept. 28, 2021); El Papel L.L.C. v. Durkan, No. 2:20-cv-01323-RAJ-JRC, 2021 U.S. Dist. LEXIS 181390, at *46-47 (W.D. Wash. Sept. 15, 2021), *vacated as moot* by El Papel LLC v. Durkin, No. 2:20-cv-01323-RAJ-JRC, 2022 U.S. Dist. LEXIS 128839 (W.D. Wash. July 20, 2022) (challenged moratorium expired and was not likely to be reinstated); S. Cal. Rental Hous. Ass'n v. County of San Diego, 550 F. Supp. 3d 853, 865 (S.D. Cal. 2021), *stay granted* by S. Cal. Rental Hous. Ass'n v. County of San Diego, No. 21-55798, 2022 U.S.

Therefore, when courts are confronted with legal challenges to a commercial rent stabilization law, they will likely need to analyze whether rent stabilization constitutes a taking. Even in light of *Cedar Point*, such courts would apply the three-factor regulatory taking test from *Penn Central*.[147] As will be discussed, such challenges have historically upheld typical commercial rent regulations.

C. Substantive Due Process

The final provision of the Constitution often cited in challenges to rent stabilization laws is the Due Process Clause. The Due Process Clause shared by the Fifth and Fourteenth Amendments protects from "deprivation of life, liberty, or property without due process of law."[148] Although in modern jurisprudence, "due process" has largely been cabined to procedure, it does in some cases limit the legislature substantively by preventing laws that deprive a fundamental liberty.[149] Substantive Due Process claims therefore require identifying a specific fundamental liberty that triggers greater Constitutional protections.[150] Fundamental rights that have been identified include privacy in marital or sexual relationships.[151] Frequently, plaintiffs assert economic freedom as a fundamental liberty cognizable by the Substantive Due Process Clause.

However, in the realm of economic regulation, Substantive Due Process has been thoroughly discredited. The high-water mark of so-called Economic Due Process was 1905's *Lochner v. New York*, which struck down a local labor standards law as infringing on the

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App. Lexis 3992, (9th Cir. Feb. 14, 2022); Jevons v. Inslee, 561 F. Supp. 3d 1082, 1107 (E.D. Wash. 2021), *appeal filed*, No.22-35050 (Jan. 18, 2022).

[147] *Ballinger*, 24 F.4th at 1293 n.3; *Bldg. & Realty Inst.*, at *52-56; *El Papel* at *46-47; *S. Cal. Rental Hous. Ass'n*, 550 F. Supp. 3d at 865; *Jevons*, 561 F. Supp. 3d at 1107.

[148] U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[149] *See, e.g.,* Obergefell v. Hodges, 576 U.S. 644, 663 (2015); Loving v. Virginia, 388 U.S. 1, 12 (1967).

[150] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[151] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564-65 (2003).

economic freedom of parties to freely contract with each other.[152] In subsequent years, some economic legislation was struck down under the precedent set by Lochner.[153] Yet, by the 1950s, the Court held that cases had "[t]he day is gone when this court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[154] Courts frequently and explicitly repudiate economic activity as a fundamental liberty protected under the Substantive Due Process Clause. In fact, in the most important Substantive Due Process case in the 21st Century, *Dobbs v. Jackson Women's Health Org.*, the current Supreme Court continued condemning *Lochner* in the strongest terms.[155] In justifying the Court's power of overturning precedent, the current court equated *Lochner* to *Plessy v. Ferguson* as clearly erroneous legislation that cannot be tolerated.[156] Thus, the Court has been consistent over nearly a century that the Substantive Due Process Clause is no longer a venue for challenging regulatory legislation.

In addition to the fundamental repudiation of the *Lochner* legal theory, modern courts also reject Economic Due Process challenges due to their overlap with the other Constitutional claims previously discussed. Courts prefer to analyze claims under explicit textual rights, where they exist, rather than the more generalized Substantive Due Process approach.[157] Rights to property and freedom of contract are already protected explicitly by the Takings and Contracts

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[152] Lochner v. New York, 198 U.S. 45, 64-65 (1905).

[153] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955); Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel Co. v. Parish, 300 U.S. 379 (1937).

[154] *Williamson*, 348 U.S. 488.

[155] Dobbs v. Jackson's Woman's Health Org., 142 S. Ct. 2228, 2247-48 (2022) (Alito, J.).

[156] *Id.* at 2278-79.

[157] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't. Prot., 560 U.S. 702, 721 (2010).

Clauses.[158] Thus, courts typically reject Economic Due Process challenges in cases where they have already analyzed Takings and Contracts Clause challenges, because there is no independent Substantive Due Process analysis left to perform.[159]

Although Economic Due Process is no longer directly applied by courts, the legacy of this legal theory influences how courts consider Contracts Clause and Takings Clause cases. In disapproving of *Lochner*, the Court said it was concerned that such rulings would cast courts in the role of a "superlegislature to weigh the wisdom of legislation."[160] The Court characterized this approach as "freewheeling judicial policymaking" and "an unprincipled approach."[161] These concerns have been cited by courts and commentators to avoid construing the limits imposed by the Contracts and Takings Clauses too strictly, to avoid a "back-door" into reinstating the same approach taken by the *Lochner* court.[162] These concerns prompt courts to defer to legislatures on Contracts and Takings Clause cases.

Thus, although courts may be asked to consider the Substantive Due Process implications of rent stabilization laws, they are not likely to waste much ink in such analysis. Rather than attempt to revive a long-discredited legal theory, courts typically examine the law under more established Constitutional grounds. In examining those other

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[158] Harmon v. Markus, 412 Fed. Appx. 420, 423 (2d Cir. 2011) (citing *Stop the Beach*, 560 U.S. at 721 (2010)).

[159] *Id.*; Jevons v. Inslee, 561 F. Supp. 3d 1082, 1112 (E.D. Wash. 2021).

[160] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

[161] *Dobbs*, 142 S. Ct. at 2248.

[162] LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 182 (1985); *see also* Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 371 (2d Cir. 2006) ("Such a high level of judicial scrutiny . . . would harken a dangerous return to the days of *Lochner*."); Peick v. Pension Benefit Guar. Corp., 724 F.2d 1247, 1265 (7th Cir. 1983) ("The danger of heightened scrutiny, and the reason it has been as sparingly applied since its heyday in the *Lochner* era, is that it can easily mask the imposition by the court of a . . . straightjacket on the legislature.").

Constitutional challenges, courts consider the lessons of *Lochner* and refrain from overly second-guessing the policy decisions of the legislature. Therefore, although commonly cited, Substantive Due Process challenges are not likely to significantly limit legislatures that wish to regulate commercial rent.

D. Preemption

Preemption is the legal doctrine that limits governments from passing laws that would conflict with laws passed by a higher authority.[163] State laws can be preempted by federal laws,[164] and local laws can be preempted by both state and federal laws.[165] Although commercial rents are not regulated federally, courts may be called upon to consider if commercial rent regulations adopted by localities are preempted by state regulations.

In states with home rule,[166] not every state law that touches on a subject preempts local laws in the same area. Local laws are preempted if they are directly inconsistent with provisions of state law, including prohibiting rights explicitly granted under state law or by adding additional restrictions.[167] For example, in a recent New York Supreme Court case, a local limitation on residential evictions was preempted by the state statute outlining residential eviction processes.[168] Further, where there is no conflict directly between

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[163] *Preemption*, BOUVIER LAW DICTIONARY (2012), Lexis, The Wolters Kluwer Bouvier Law Dictionary Desk Edition.

[164] U.S. CONST. art. VI, cl. 2.

[165] *See Preemption*, *supra* note 163.

[166] In states without home rule, localities would not be permitted to legislate without an explicit grant of power. *See* Richmond v. Bd. of Supervisors, 199 Va. 679, 684 (1958). In such states, legal preemption challenges would turn on statutory construction of a state-specific enabling statute. *Id.*

[167] Consol. Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 107-08 (1983).

[168] Pusatere v. City of Albany, No. 909653-21 at 4-7 (N.Y. Sup. Ct. Jun. 30, 2022) (Fordham Law Archive of Scholarship and History, Housing Court Decisions) https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1469&context=housing_court_all.

statutes, the entire field of legislation can be preempted if there is clear implicit or explicit evidence that the state intended to preempt local legislation.[169] Express preemption is accomplished by passing a statute with statutory text that limits the authority of local governments to regulate a given area.[170] Implicit preemption is where either a declaration of policy or a comprehensive regulatory scheme is clear that the intent is evident.[171] For example, a New York law adopted for the purpose of a "unified certificating procedure" that had broad powers to overrule local laws showed both types of implicit of the preemption.[172]

Unlike constitutional challenges, preemption challenges are tied specifically to the landscape of legislation within the state. For example, to determine whether commercial rent stabilization is expressly preempted, courts would look to whether a statute comments on the subject.[173] Thirty-two states currently bar local governments from adopting rent regulations.[174] For example, California has banned commercial rent control by statute.[175] Some states that do not completely bar rent regulations have statutes limiting local rent regulations.[176] In these states, statutory analysis would answer the question of preemption. However, in this area, using New York as a case study is helpful: as will be shown, the state has no laws expressly preempting commercial landlord-tenant regulations and has granted New York City home rule in this area. Therefore, an analysis of NYC Commercial Rent Stabilization provides a helpful guide to likely

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[169] *Consol. Edison Co*., 60 N.Y.2d at 105.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 105-07.

[173] *See, e.g.,* People ex rel. Spitzer v. Applied Card Sys., Inc., 11 N.Y.3d 105, 113 (2008) (looking first to whether an express statutory provision applies).

[174] RAJASEKARAN ET AL., *supra* note 10, at 3.

[175] CAL. CIV. CODE § 1954.27 (West 2010).

[176] RAJASEKARAN ET AL., *supra* note 10, at 4.

outcomes in a state where localities have the power to act and no express conflicts.

IV. Historical Examples of Commercial Rent Regulation

A. Puerto Rico's Reasonable Rents Act (1946 - 1995)

One early example of regulation of commercial properties was the Reasonable Rents Act in Puerto Rico, enacted in 1946.[177] As with residential rent regulations of the period, the Reasonable Rents Act was premised on declaring that a severe real estate shortage a public emergency.[178] The Reasonable Rents Act regulated both residential and commercial properties through both rent controls and a guaranteed right to renew leases.[179] The Reasonable Rents Act was a true rent control act, as it froze the rents at the rates which prevailed in 1942, only permitting rent increases on a case-by-case basis approved by the act's Administrator.[180] It also restricted the landlord's ability to evict tenants except for specific enumerated good causes.[181]

Early constitutional challenges were heard by the Supreme Court of Puerto Rico. First, the law was held inoperative until 1947 because the federal Emergency Price Control Act of 1942 and Price Control Extension Act of 1946 pre-empted the field and banned local rent control laws.[182] Upon expiration of the pre-empting federal laws, Puerto Rico's law became effective.[183] The court held that the power

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[177] 1946 P.R. Laws 1326; Rivera v. R. Cobian Chinea & Co., 181 F.2d 974, 975 (1st Cir. 1950).

[178] *Rivera*, 181 F.2d 974, 976.

[179] *Id*.

[180] *Id.*

[181] *Id*. The original act listed good causes for eviction where a tenant: (1) failed to pay rent, (2) used the property immorally or illegally, (3) sublet the property without approval, (4) caused malicious or considerable negligent damage to the property. *Id*. It also allowed eviction if the landlord in good faith sought to demolish the property for new construction or occupy the apartment as a personal residence. *Id*.

[182] Latoni v. Mun. Ct. of San Juan, 67 P.R. Dec. 140 (1947).

[183] *Id.*

to regulate commercial rents flowed from the state's police power, even if it had stood alone without reference to residential rents.[184] The court also held that the substance of the legislation did not violate the Takings Clause because of a provision that the tenant was required to pay "a fair and equitable rent," preserving the landlord's right to realize a reasonable rate of return.[185] Further, the court rejected the claim that such an emergency was restricted to a specific span of time – rather, the law was valid for as long as the conditions that justified it remained.[186] Having examined the law under a comprehensive set of challenges, the Supreme Court of Puerto Rico upheld the legislation.

The law remained operative without serious challenge, except for a narrow challenge against one specific provision argued before the First Circuit. In *Rivera v. R. Cobian Chinea & Co.*, all parties agreed that the legislature had the power to regulate commercial rents,[187] but the plaintiff argued that the law violated the Constitution by limiting evictions such that an owner could not recover possession of the property to operate their own business.[188] The court concluded that facially, a prohibition on recovering possession was reasonable to ensure landlords did not have a loophole to escape the rent regulation.[189] However, the court declared unconstitutional the provision as applied to a landlord who wanted to recover a commercial space with a good faith desire to run his own business in the space.[190] The court held that such a strict prohibition would violate the Takings Clause because it would "compel such a landlord to dedicate their property indefinitely to the rental market and to prevent him . . . from

[184] CintrÓn v. Mun. Ct. of San Juan, 67 P.R. 793 (1947).
[185] *Latoni*, 67 P.R. Dec. 140 (citing Block v. Hirsch, 256 U.S. 135 (1921)).
[186] Blanes v. Dist. Ct. of San Juan, 71 P.R. 325 (1950); *CintrÓn*, 67 P.R. 793.
[187] *Rivera,* 181 F.2d at 978.
[188] *Id.*
[189] *Id.*
[190] *Id.* at 978.

having the use of it himself."[191] This narrow, as-applied challenge was the only significant challenge to the Reasonable Rents Act after it took effect.

Yet even this narrowly successful challenge is no longer valid law. In 1991, the First Circuit overruled *Rivera*, stating that "time has passed it by" because it "stands at odds with a now venerable body of due process jurisprudence" and that such regulations should be upheld through a rational basis test.[192] Thus, under the First Circuit's current approach, the Reasonable Rents Act – despite draconian rent controls, a right to renew, and limitations on the ability of a landlord to retake possession for personal use – is valid because it bears a reasonable relationship to the state's interest in preventing displacement of small businesses.

The Reasonable Rents Act remained in effect until it was repealed by statute in 1995, surviving legal challenges and lasting nearly half a century.[193]

B. New York Emergency Commercial Rent Control Laws (1945 - 1963)

As in Puerto Rico, New York's emergency rent control laws[194] began as a response to real estate shortages stemming from World War

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[191] *Id.* However, the court remanded to consider whether a 1948 amendment to the Act, which allowed for good faith repossession for personal use, rescued the act. *Rivera*, 181 F.2d at 979. The unresolved question was whether the exception, which applied only to tenants with a fixed lease term, applied to the tenant at issue, who had an undefined lease term. *Id.*

[192] Gilbert v. Cambridge, 932 F.2d 51, 67 n.19 (1st Cir. 1991) (quoting *Tenoco Oil Co. v Dep't of Consumer Affairs*, 876 F.2d 1013, 1022 n.15 (1st Cir. 1989) (holding that Cambridge's rent control ordinance could prevent a landlord from removing a residential property from the market without approval because there are at least some reasonably conceivable facts that "could establish a rational relationship between the regulation and the government's legitimate ends.").

[193] P.R. LAWS ANN. tit. 17 §§ 181-198 (repealed 1995).

[194] The two commercial rent control laws were the Emergency Commercial Space Law and the Emergency Business Space Rent Control Law. Dennis

Two.[195] As in Puerto Rico, New York fixed the rents at a set level – fifteen percent higher than rents charged just prior to the time of enactment.[196] Landlords seeking to increase rent beyond that cap were required to submit to an arbitration process to determine rents that would allow a reasonable return – an important key to defeating Takings and Contract Clause challenges.[197] Finally, the legislation restricted eviction except where there is good cause.[198] As an emergency provision, the legislature provided for decontrol through vacancy, and slowly weakened the protections to encourage vacancy decontrol.[199]

The New York Court of Appeals sustained the laws' regulation of commercial spaces as a valid act of the police power in the face of Contracts Clause and Substantive Due Process challenges.[200] The court observed that because a "breakdown has taken place in the normal process of bargaining and freedom of contract has become an illusory concept," New York was justified in tackling spiraling rents.[201] The court held that the justification for retroactive commercial rent control was met through legislative history documenting "graphic illustrations of exorbitant rent" far beyond what landlords require for a reasonable rate of return.[202] Given that the problem was out-of-control rent, the court found "nothing arbitrary or

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W. Keating, *The Elmwood Experiment: The Use of Commercial Rent Stabilization to Preserve a Diverse Neighborhood Shopping District*, 28 WASH. U.J. URB. & CONTEMP. L. 107, 125 (1985). The two laws were essentially identical. *Id.* at 125 n.66.

[195] *Id.* at 125.

[196] *Id.* at 126.

[197] *See id.* at 126.

[198] Keating, *supra* note 194, at 127.

[199] *Id.* at 128.

[200] Twentieth Century Assocs. v. Waldman, 63 N.E.2d 177, 179, 180 (N.Y. 1945); *accord* Ct. Square Bldg. v. City of N. Y., 83 N.E.2d 843 (N.Y. 1948).

[201] *Twentieth Century Assocs.*, 63 N.E.2d 177-79.

[202] *Id.* at 579-80.

unreasonable" in applying controls to the rent, even retroactively.[203] Finally, the court noted that the law provided for an appeal for a reasonable rate of return through arbitration or judicial review, satisfying constitutional requirements.[204] The Supreme Court denied cert "for want of a substantial federal question," citing *Block v. Hirsch*, a case upholding the constitutionality of rent control because "the regulation of rates is one of the first forms [of public interest] in which it is asserted" where "[m]achinery is provided to secure to the landlord a reasonable rent."[205] When the Second Circuit upheld the law for substantially the same reasons, the Supreme Court denied cert again.[206] These cases tackled squarely the legal challenges often levied against commercial rent regulation, and the Supreme Court affirmed the rationale of the lower courts upholding the law.

Because of the structure of the rent control arbitration and appeals, the legislation was challenged frequently throughout its tenure but was never constitutionally invalidated or limited until it was sunset by the legislature in 1963.[207]

C. Berkeley Commercial Rental Ordinances (1986)

The City of Berkeley sought to regulate commercial rents three times. In 1978, a ballot initiative regulated rents city-wide for one year.[208] In 1982, Berkeley passed an ordinance regulating commercial

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[203] *Id.* at 581.

[204] *Id.*

[205] Twentieth Century Assocs. v. Waldman, 326 U.S. 697 (1946) (citing Block v. Hirsh, 256 U.S. 135, 157 (1921)).

[206] Finn v. 415 Fifth Ave. Co., 153 F.2d 501 (2d Cir.) (Hand, J.), *cert. denied*, 328 U.S. 839 (1946).

[207] Keating, *supra* note 194, at 128.

[208] Ross v. Berkeley, 655 F. Supp. 820, 823 (N.D. Cal. 1987). This initiative intended to reimplement residential rent control after a previous scheme was invalidated by the California Supreme Court. Keating, *supra* note 194, at 111-12; Birkenfeld v. Berkeley, 550 P.2d 1001, 1029-30 (Cal. 1976). Although the California Supreme Court accepted the right of a municipality to regulate rents, even without an emergency, it held that the law had failed

rents in the Elmwood District.[209] Finally, in 1985 a similar ordinance was enacted covering the Telegraph Avenue district.[210] The 1978 ballot initiative, entitled "Renter Property Tax Relief," was a partial property tax rebate for landlords, who were required to credit eighty percent of the savings to their renters, and landlords were prevented from recovering their lost rents by raising future rents.[211] This ballot initiative is of a different kind from other, long-term commercial rent regulations: here, the primary purpose of the ballot initiative was to temporarily subsidize rents through a one-time tax rebate.[212] The restriction on raising rents and requirement to lower rents by the amount of rebate received were both tools to ensure that the tenant would receive the benefits of the tax rebate.[213] Although the residential regulations were extended, the commercial regulations were not.[214] Due to the short duration of the control, it was only constitutionally challenged once, under the Contracts Clause.[215] California's First District Court of Appeals did not find a substantial impairment of commercial leases, because there had been prior residential rent control and because a reasonable rate of return was assured due to of the tax abatement compensating the landlords.[216] The court also reaffirmed that emergency is not required to enact such

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to provide a prompt process to ensure rents would not be held unconstitutionally low. *Id.*

[209] *Ross*, 655 F. Supp. at 823.

[210] *Id*.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] Keating, *supra* note 194, at 137.

[215] Rue-Ell Enters. v. City of Berkeley, 194 Cal. Rptr. 919, 925 (Cal. Ct. App. 1983). The plaintiff also asserted that the ordinance was pre-empted by California's property tax laws. *Id.*

[216] *Id.*; *see also Ross*, 655 F. Supp. at 841 (holding Takings claim not ripe until arbitration completes because a reasonable rate of rental return could be just compensation for rent regulation).

legislation.[217] Thus, the law was upheld as constitutional on all grounds.

Unlike the 1978 initiative, the Elmwood and Telegraph Avenue ordinances of the 1980s were intended to prevent displacement of local businesses by stabilizing local rents.[218] As such, in addition to rent stabilization, the ordinances prohibited eviction without good cause.[219] As with Puerto Rico's Reasonable Rents Act, the city manager argued that permitting an owner to evict a business in order to occupy the space for themselves would be a loophole in the regulation scheme, so such occupancy was not included in the list of good causes.[220] The eviction limitations of the Elmwood and Telegraph Avenue ordinances were challenged in a case before the California Northern District Court. The district court applied circuit precedent that held that if rent controls interfere with the right to control who will occupy the property, they go beyond "[t]he typical rent control statute" to change the property estates of both parties, and thus is a taking.[221] Under such precedent, the district court held that the Elmwood and Telegraph Avenue ordinances did not go beyond the "typical rent control statute" because the law gave the rent arbitrator broad discretion to allow the landlords a "reasonable rent increase" which would qualify as "just

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[217] *Rue-Ell*, 194 Cal. Rptr. at 924.

[218] *Ross*, 655 F. Supp. at 824 n.2.

[219] *Id.* at 823 n.3 (citing BERKELEY, CAL., MUN. CODE ch. 13 § 80.090). The good causes accepted by the ordinance were based on: (1) failure to pay rent; (2) substantial violation lease terms; (3) nuisance; (4) using the property illegally; (5) declining to extend or renew; (6) refusing the landlord access to make necessary repairs; (7) a landlord's desire to remove the premises from commercial use; and (8) a landlord's desire to make repairs that cannot be completed during the tenant's occupancy. *Id.*

[220] *Id.* at 825.

[221] *Id.* at 838-39 (quoting Hall v. Santa Barbara, 797 F.2d 1493, 1502 (9th Cir. 1986)). The court in *Hall* did not declare the legislation unconstitutional due to its restriction on evictions; rather, it remanded for trial on whether the city's asserted public purpose was substantiated, which would determine whether a taking had occurred. 797 F.2d at 1503, *cert. denied*, 485 U.S. 940.

compensation.[222] However, under a Contracts Clause analysis, it found that the burden on the right to contract was substantial and was not reasonable in comparison with preserving the character of the area because it only benefitted a narrow subset of businesses in the area.[223] Lastly, the court rejected the Substantive Due Process claim because it has been thoroughly discredited since the days of *Lochner* and replaced by the rational basis analysis.[224] Notably, however, the aspect of the Elmwood and Telegraph Avenue ordinances that the court held to be invalid were the controls on eviction as applied to existing leases, not the general regulation of rent rates.[225] Further, the court had explicitly distinguished these ordinances from "[t]he typical rent control statute" that would be presumed valid.[226]

Subsequently, the Ninth Circuit Court of Appeals clarified the narrow scope of the district court's ruling. The Ninth Circuit characterized the district court's invalidation of commercial rent regulation as rejecting "furnish[ing] benefits to a small class by retroactively impairing the contracts of another small class."[227] The Ninth Circuit compared the district court's analysis to that of another California appellate court, which upheld a general rent control law but struck down another rent regulation that only limited termination of residential boat slip tenancies.[228] In the eyes of the Ninth Circuit, the flaw of the Elmwood and Telegraph Avenue ordinances was not that they regulated rents generally, but rather because they only benefitted

[222] *Id.* at 838, 841.
[223] *Ross,* 655 F. Supp. at 833.
[224] *Id.* at 842.
[225] *Id.* at 844.
[226] *Id.* at 838.
[227] RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1169-70 (9th Cir. 2004) (Bybee, J., dissenting).
[228] *Id.* (citing Interstate Marina Dev. Co. v. County of Los Angeles, 202 Cal. Rptr. 377, 382 (Cal. Ct. App. 1984)).

a narrow constituency of businesses, and therefore, they did not provide a public benefit.[229]

Thus, the experience of Berkeley's commercial rent regulations in the 1970s and 1980s shows that although aspects that went beyond commercial rent stabilization ran into legal issues, the general legal framework is not inherently invalid.

D. Emergency COVID-19 Rent Control in the State of Washingtom

More recently, the COVID-19 pandemic led governors and local governments across the nation to implement emergency measures to respond to rapidly changing circumstances.[230] In many states, executive orders or proclamations were issued to close businesses and restrict people to their homes.[231] This one-two punch of closing most businesses and reducing customers to the businesses that remained open had a devastating effect.[232] Recognizing the deep impact on businesses of his state's stay-at-home orders, Washington Governor Jay Inslee issued an amendment to his emergency proclamation temporarily prohibiting rent increases and evictions for both residential and commercial tenants that were impacted by COVID-19.[233] It also banned threatening rent increases.[234] These provisions expired on June 20, 2021.[235]

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[229] *RUI*, 371 F.3d at 1170 (Bybee, J., dissenting).

[230] The Council of State Gov'ts, *2020-2021 Executive Orders* https://web.csg.org/covid19/executive-orders/ (last visited Mar. 6, 2022).

[231] *See id.*

[232] DANIEL WILMOTH, OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., THE EFFECTS OF THE COVID-19 PANDEMIC ON SMALL BUSINESSES, ISSUE BRIEF 16 (2021) (comparing economic impact to Great Depression); OFF. OF THE N.Y. STATE COMPTROLLER, SMALL BUSINESSES AND THE ECONOMIC RECOVERY: WORK IN PROGRESS (2021).

[233] OFF. OF GOV., Wash. Proclamation No. 20-19.1 (Apr. 16, 2020).

[234] *Id.*

[235] PACIFICA L. GRP., WASHINGTON ENDS COMMERCIAL EVICTION RESTRICTION & ISSUES NEW HOUSING STABILITY "BRIDGE" PROCLAMATION FOR RESIDENTIAL RENTALS; SEATTLE EXTENDS EXISTING

An association of landlords impacted by the proclamation sued Governor Inslee in federal court.[236] The original complaint and the subsequent opinion did not distinguish between the residential or commercial properties impacted by the legislation.[237] Plaintiffs asserted violations of the Contracts Clause, the Takings Clause, and the Due Process Clause.[238] The court rejected the challenge on all counts.[239] With regards to the Contracts Clause, the court relied on *Blaisdell* to hold that temporary limitations on leases are not substantial impairments under the Contracts Clause.[240] The court also held that the Takings Clause claim was inapplicable, rejecting an argument of permanent occupation and relying on *Yee*'s regulatory taking framework to uphold the law.[241] Lastly, the court dismissed the Substantive Due Process Clause claim as functionally identical to the Contract Clause claim.[242] As in Puerto Rico and New York, commercial rent regulations were upheld on all counts by the court.

In parallel with the actions taken by Governor Inslee, the City of Seattle was also concerned that unplanned rent increases would threaten the viability of already struggling businesses and not-for-profits.[243] As such, the City Council unanimously passed Council Bill 119766, a commercial rent control measure which prohibited rent increases during the period of emergency except where such increases

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RESIDENTIAL AND SMALL BUSINESS EVICTION MORATORIUM (Jun. 30, 2021), https://www.pacificalawgroup.com/wp-content/uploads/2021/06/COVID-19-Extension-of-Emergency-Moratorium-E-Alert-6-30-21.pdf.

[236] Jevons v. Inslee, 561 F. Supp. 3d 1082 (E.D. Wash. 2021).

[237] *See generally, id.*

[238] *Id.* at 1092-93.

[239] *Id.* at 1082.

[240] *Id.* at 1097 (citing Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)).

[241] *Jevons*, 561 F. Supp. 3d at 1107 (citing Yee v. City of Escondido, 503 U.S. 519, 527 (1992)).

[242] *Id.* at 1112.

[243] SEATTLE, WASH., ORDINANCE No. 119766 (Apr. 17, 2020).

were already signed into the lease before the emergency period began.[244] The bill was signed into law on April 17, 2020. Unlike the State proclamation, the Seattle ordinance remains in effect until the city government determines the COVID-19 emergency has ended.[245] This legislation does not appear to have faced a serious constitutional challenge.

V. ANALYZING NEW YORK CITY'S COMMERCIAL RENT STABILIZATION PROPOSAL

With the experience of historic examples of commercial rent regulation challenges, NYC Commercial Rent Stabilization would likely face suits alleging violations of the Takings and Contract Clauses, as well as preemption. However, NYC Commercial Rent Stabilization was crafted without the most legally complicated aspects of rent regulation. Unlike other historic rent regulations and proposals, it does not include a right-to-renew, good cause eviction, or other limitation on the right of possession.[246] It does not fix rent levels at a certain point in time.[247] Instead, NYC Commercial Rent Stabilization was consciously modeled on the residential rent guidelines scheme which had been upheld in court.[248]

Similar to the residential model, NYC Commercial Rent Stabilization would create a Commercial Rent Guidelines Board

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[244] *Id.*

[245] SEATTLE OFF. OF ECON. DEV., *COVID-19 Lease Amendment Toolkit*, https://www.seattle.gov/office-of-economic-development/covid-19/covid-19-commercial-lease-amendment-toolkit (last accessed Mar. 6, 2022).

[246] *See generally* N.Y.C. Council Intro. No. 0093 (N.Y.C. 2022); *cf*. Ross v. Berkeley, 655 F. Supp. 820, 844 (N.D. Cal. 1987); Rivera v. R. Cobian Chinea & Co., 181 F.2d 974, 978 (1st Cir. 1950), *abrogated by* Gilbert v. Cambridge, 932 F.2d 51, 67 n.19 (1st Cir. 1991) (preventing owner from taking possession implicates Takings Clause).

[247] *See generally* N.Y.C. Council Intro. No. 0093 (N.Y.C. 2022); *cf*. *Ross*, 655 F. Supp. at 844 (preventing owner from taking possession implicates Takings Clause); *Rivera*, 181 F.2d at 978 *overruled by Gilbert*, 932 F.2d at 67 n.19.

[248] *See, e.g.,* Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626, 634 (1993).

("Board") that would limit rent adjustments annually for regulated spaces.[249] The Board would be composed of two members representing commercial tenants who are not chain businesses, two members representing commercial landlords, and five other public members with backgrounds in finance, economics, real property management, or community development.[250] Each year, after a public hearing, the Board would adopt a maximum rate of rent increase for any commercial space covered by the legislation.[251] To aid in enforcement, landlords would be responsible for registering rents charged with the Board.[252] In cases where extraordinary circumstances have led to a rent substantially below other similar spaces in the same area, the landlord could file for relief with the Board.[253]

As previously outlined, landlords are likely to raise several challenges to the regulation, following the well-trod path of other suits opposing rent regulations. Landlords will likely allege violations of the Contracts and Takings Clauses, as well as pre-emption by state law. As discussed previously, a Substantive Due Process challenge on economic grounds would either be dismissed outright or subsumed into the analysis of the Contracts and Takings clauses, and thus is not discussed separately. NYC Commercial Rent Stabilization is likely to survive all challenges.

First, challenges based upon the Contract Clause will likely fail. Plaintiffs would have the burden to prove that NYC Commercial Rent Stabilization substantially impairs the contractual relationship and that the measures taken are not appropriate for the significant public purpose. One persuasive reason why NYC Commercial Rent Stabilization does not substantially impair contracts is that it does not apply retroactively—the law treats the rent charged by the landlord at

[249] N.Y.C. Council Intro. No. 0093 §§ 22-1302, 22-1303(i) (N.Y.C. 2022).
[250] *Id.* § 22-1302, 22-1303(a).
[251] *Id.* § 22-1303(f), (h).
[252] *Id.* § 22-1306.
[253] *Id.* § 22-1308.

the law's effective date as the "initial regulated rent" and merely restricts future increases.[254] The Second Circuit held that contracts cannot be impaired by laws in effect at the time the contract was made.[255] This is contrasted with cases where substantial impairment was found for commercial lease regulations applied retroactively.[256] The retroactive effect is key because courts are concerned as to whether the limitations are foreseeable, giving parties the opportunity to negotiate with full knowledge of the law.[257] This accords with the Supreme Court's analysis that regulation that a party is not necessarily substantially impaired when the regulation limits the party to gains it reasonably expected from the contract.[258] For this reason, the foreseeability of regulation is often cited in analyses of substantial impairment. Unlike the court in the Elmwood and Telegraph Avenue case,[259] the Second Circuit recognized that New York has validly implemented commercial rent control in the past.[260] Although this did not serve to put landlords on notice that other contract rights might also be regulated, it certainly can provide notice that rents may be regulated.[261] Furthermore, proposals to regulate commercial rents have been publicly debated at City Council for over thirty years,[262] and

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[254] *Id.* § 22-1304(a), (b).

[255] Harmon v. Markus, 412 F. App'x 420, 423 (2d Cir. 2011).

[256] Melendez v. City of New York, 16 F.4th 992, 1005 (2d Cir. 2021) (nullifying personal guarantees in commercial leases retroactively); Ross v. Berkeley, 655 F. Supp. 820, 831 (N.D. Cal.1987) ("retroactively and severely upset[ing] the contractual expectations").

[257] *See* Rue-Ell Enters. v. City of Berkeley, 194 Cal. Rptr. 919, 922-23 (Cal. Ct. App. 1983); *Ross*, 655 F. Supp. at 831.

[258] Energy Reserves Group v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983).

[259] *Ross*, 655 F. Supp. at 831, 835, 843.

[260] *Melendez*, 16 F.4th at 1034 (citing Twentieth Century Assocs. v. Waldman, 63 N.E.2d 177 (N.Y. 1945)).

[261] *Melendez*, 16 F.4th at 1034-35.

[262] Tanay Warerkar, *City Council Debates Small-Biz Bill at Heated Hearing*, CURBED (Oct. 23, 2018, 9:11 AM)

the court may follow precedent that considered residential rent regulations as notice for commercial landlords.[263] The First Circuit also found no significant impact in a rent regulation law because the law's impact was limited to price controls.[264] As the Supreme Court noted in *Block v. Hirsch*, such rent controls are merely a type of rate regulation, which are historically permissible.[265] NYC Commercial Rent Stabilization, as contrasted with historical rent regulations like those in Puerto Rico or Berkeley, does not go beyond price regulation into limiting rights of eviction or possession.[266] For these reasons, NYC Commercial Rent Stabilization would not be found to substantially impair rental leases.

Even if substantial impairment were found, the regulation appropriately and reasonably advances a pressing public need. In *Pennell v. San Jose*, the Supreme Court upheld the public purpose of rent regulation that reduced rent where tenants demonstrated

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https://ny.curbed.com/2018/10/23/18013348/small-business-jobs-survival-act-mom-pop-nyc-council.

[263] *See* Rue-Ell Enters. v. City of Berkeley, 194 Cal. Rptr. 919, 920-21 (Cal. Ct. App. 1983).

[264] Kargman v. Sullivan, 582 F.2d 131, 132 (1st Cir. 1978) (Contract Clause did not protect right to charge 6% rents under FHA contracts).

[265] Block v. Hirsh, 256 U.S. 135, 158 (1921); *see also* Brown v. Legal Found., 538 U.S. 216, 234 (2003).

[266] *Compare* N.Y.C. Council Intro. No. 0093 (N.Y.C. 2022) (no limitation on eviction or right to renewal), *with* Ross v. Berkley, 655 F. Supp. 820, 834 (N.D. Cal.1987) (rent regulation invalid due to "permanent prohibition of owner occupancy"). As discussed in the survey of historic rent regulations, restrictions on the right of eviction can be valid so long as they do not permanently erase the owner's right to occupy their own property, but this legal analysis is not required to uphold Commercial Rent Stabilization. *See, e.g.,* Rivera v. R. Cobian Chinea & Co., 181 F.2d 974, 977 (1st Cir. 1950) (limitation on possession facially valid; invalid as applied), *abrogated by* Gilbert v. Cambridge, 932 F.2d 51, 67 n.19 (1st Cir. 1991) (holding limitation on possession should have been upheld).

hardship.[267] The Court reasoned that such regulation was a standard price control.[268] The challengers could not dispute the purpose of "preventing excessive and unreasonable increases" caused by a shortage of available real estate.[269] The Court held that the regulation reasonably balanced protecting tenants from burdensome rent increases against minimally interfering with the landlord's right to realize a reasonable return.[270] Lower courts have echoed this analysis, even where landlords claimed significant impacts on economic returns.[271]

Here, the proposed NYC Commercial Rent Stabilization engages in a similar balance. It limits rent increases based on factors that consider the landlord's rate of return, including costs like maintenance, financing, and real estate taxes.[272] Commercial landlords would be represented in the guidelines board, and thus advocate to protect their rate of return.[273] Further, the law only applies prospectively to future leases,[274] allowing landlords to build such limitations into their economic expectations.[275] In cases where

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[267] Pennell v. San Jose, 485 U.S. 1, 13 (1988).

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] Kargman v. Sullivan, 582 F.2d 131, 132-33 (1st Cir. 1978) (upholding law despite a claim that landlords "received significantly less" rents than allowable under federal law); Nekrilov v City of Jersey, 45 F.4th 662, 671 (3d Cir. 2022) (upholding law banning short-term leases despite a claim that long-term rental income is "much lower than short-term rental income" and does not allow for profitable enterprise).

[272] N.Y.C. Council Intro. No. 0093 § 22-1203(f) (N.Y.C. 2022).

[273] *Id.* § 22-1203(a)(3).

[274] *Id.* § 22-1204.

[275] *See, e.g.*, Harmon v. Markus, 412 F. App'x 420, 423 (2d Cir. 2011). However, even if the legislation was construed to apply retroactively or amended to apply retroactively, the New York Court of Appeals has upheld retroactive commercial rent controls. Twentieth Century Assocs. v. Waldman, 63 N.E.2d 177 (N.Y. 1945).

specific landlords would be denied a reasonable rate of return, a process for adjusting the rent is provided.[276] This last factor is key; challenges to the residential Rent Stabilization Law fail so long as a reasonable rate of return is available under any avenue of the legislation.[277]

Unlike NYC Commercial Rent Stabilization, other rent regulations have raised issues of inappropriateness where they were either under- or over-inclusive. For example, the Elmwood and Telegraph Avenue rent ordinances were struck down because they only benefitted a small subset of businesses for large benefits.[278] The Second Circuit in *Melendez* raised questions about the cancellation of the personal guarantee at issue because the legislation's purpose was to aid businesses impacted by COVID but was not limited to businesses in need.[279] Yet the court left open the possibility that such measures could be justified with additional evidence,[280] and the dissent reasoned that the City had justified its acts because of a broader purpose of supporting small businesses that suffered indirect economic consequences of the pandemic.[281]

NYC Commercial Rent Stabilization does not have the same issue of under- or over-inclusion. The legislation does not protect businesses based on location, rather, its aim is to protect all commercial tenants.[282] The five public interests of commercial rent regulation discussed above are likely to be held to be valid public

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[276] N.Y.C. Council Intro. No. 0093 § 22-1308 (N.Y.C. 2022).

[277] *See, e.g.*, Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 595 (2d Cir. 1993) (upholding Rent Stabilization Law because a reasonable rate of return is available under hardship appeal provision).

[278] RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1169-70 (9th Cir. 2004) (Bybee, J., dissenting) (citing Ross v. Berkeley, 655 F. Supp. 820, 835 (N.D. Cal. 1987)).

[279] Melendez v. City of New York, 16 F.4th 992, 1043 (2d Cir. 2021).

[280] *Id.* at 1045.

[281] *Id.* at 1062 (Carney, J., dissenting).

[282] N.Y.C. Council Intro. No. 0093 § 22-1301 (N.Y.C. 2022).

interest: (1) preventing the closure of small businesses, (2) reducing barriers to the creation of new small businesses, (3) protecting wages and preventing layoffs, (4) protecting vibrant street life, and (5) preserving safe streets by preventing street blight. For example, New York courts have recognized that "[c]ommercial space to earn a livelihood is a necessity of life . . . as essential to the well-being of the citizens of this State as is dwelling space"[283] because small businesses "represent 98% of New York City's employers and provide employment for . . . about half of the city's workforce," aligning with two of the reasons listed above.[284] Historically, past commercial rent regulation in New York has also been upheld because of many documented examples of "exorbitant and unjust and unreasonable increases of rent."[285] As NYC Commercial Rent Stabilization balances the need to protect these critical small businesses from financial ruin against the landlord's ability to realize a reasonable return, the legislation would likely survive a Contracts Clause challenge.

Further, NYC Commercial Rent Stabilization would also likely survive a challenge under the Takings Clause. Rent regulations like NYC Commercial Rent Stabilization are analyzed under *Penn Central*'s balancing test.[286] In order to violate the Takings Clause, regulation of rent increases must so completely deprive the landlord of their economic benefit that the property is economically idle.[287] Here, as in the Contracts Clause analysis, NYC Commercial Rent Stabilization prevails as it provides at the very least an adjustment

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[283] Twentieth Century Assocs. v. Waldman, 53 N.Y.S.2d 612, 614 (N.Y. Mun. Ct. 1945), *aff'd*, 294 N.Y. 571 (1945)).

[284] Melendez v. City of New York, 503 F. Supp. 3d 13, 33 (S.D.N.Y. 2020), *vacated on other grounds*, 16 F.4th 992 (2d Cir. 2021).

[285] *Twentieth Century Assocs.*, 294 N.Y. at 578-79.

[286] Yee v. City of Escondido, 503 U.S. 519, 531 (1992).

[287] Rent Stabilization Ass'n v. Higgins, 630 N.E.2d 626, 633 (N.Y. 1993) (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992)).

process if the rent restrictions deprive a reasonable rate of return.[288] Legislation must also show a close causal nexus between the regulation and the public benefit.[289] As discussed previously, courts have recognized the public benefits of maintaining small businesses as significant employers in the city economy,[290] and significant evidence exists that rapidly increasing rents threaten such public benefit.[291] NYC Commercial Rent Stabilization tackles the problem directly by limiting the degree to which those rents can rise.[292] This direct relationship between problem and solution is likely to establish a causal nexus – especially given courts' deference to the legislature on whether challenged legislation is a wise solution to the problem.[293] Thus, NYC Commercial Rent Stabilization is likely to prevail over a Takings challenge.

Finally, NYC Commercial Rent Stabilization is likely to be sustained as not preempted by state law. Local statutes are preempted if they expressly conflict with existing state law, limit or modify rights granted in state statutes, or act in an area where the state has clearly expressed or implied an intent to preempt local legislation. Here, NYC Commercial Rent Stabilization cannot be preempted due to express conflict because there are no existing commercial rent

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[288] N.Y.C. Council Intro. No. 0093 § 22-1308 (N.Y.C. 2022).

[289] *Rent Stabilization Ass'n*, 630 N.E.2d at 634 (citing Nollan v. Cal. Coastal Com, 483 U.S. 825, 836 (1987); *see also* Seawall Assocs. v. New York, 542 N.E.2d 1059, 1068 (N.Y. 1989)).

[290] Twentieth Century Assocs. v. Waldman, 53 N.Y.S.2d 612, 614 (N.Y. Mun. Ct. 1945), aff'd, 294 N.Y. 571 (1945)); Melendez v. City of New York, 503 F. Supp. 3d 13, 33 (S.D.N.Y. 2020), *vacated on other grounds*, 16 F.4th 992 (2d Cir. 2021).

[291] Wu, *supra* note 1.

[292] N.Y.C. Council Intro. No. 0093 § 22-1304 (N.Y.C. 2022).

[293] *Rent Stabilization Ass'n*, 630 N.E.2d at 634 (holding the residential Rent Stabilization Law has causal nexus to preventing homelessness and eviction, and the wisdom of the law is not before the court).

regulations at the city, state, or federal level.[294] For the same reason, commercial rent stabilization does not suffer the same issue as local good cause eviction ordinances that limit the landlord's right to evict under the State: no statute gives landlords an unlimited right to increase rents.[295] Although New York State has expressly stated that it preempts the field of "regulation and control of residential rents and evictions" as part of the Urstadt Law, no equivalent regulation applies to commercial rents.[296] The explicit limitation of preemption to the field of residential rents and evictions implies no such preemption in commercial regulations.[297] Further, even where the Ursdtadt Law applies, courts allow local jurisdictions to apply other regulations that do not conflict with state rent regulations – and since the Ursdadt Law is silent on the subject of commercial rents, NY Commercial Rent

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[294] N.Y.C. SMALL BUS. SERVS., COMPREHENSIVE GUIDE TO COMMERCIAL LEASING IN NEW YORK CITY 29, https://www1.nyc.gov/assets/sbs/downloads/pdf/about/reports/commercial-lease-guide-accessible.pdf (last visited Mar. 6, 2022); STEPHEN FALLA RIFF & ROLANDO GONZALEZ, N.Y.C. SMALL BUS. SERVS., COMMERCIAL LEASES: LEASE STRATEGIES FOR TOUGH TIMES (OR ANY TIME), http://www.nyc.gov/html/sbs/downloads/pdf/presentation_commercial_leases_strategies_during_tough_times.pdf (last accessed Mar. 6, 2022) [hereinafter RIFF & GONZALEZ].

[295] *Compare* N.Y. C. Council Intro. 0093 (N.Y.C. 2022), *with* Pusatere v. City of Albany, No. 909653-21, slip op. at 4-7 (N.Y. Sup. Ct. June 30, 2022); *see also* RIFF & GONZALEZ, *supra* note 294.

[296] *See* N.Y. UNCONSOL. LAW Ch. 249-A, § 1 (LexisNexis 2022).

[297] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107-11 (2012); *see, e.g.,* Ins. Co. of Pa. v. Corcoran, 850 F.2d 88, 91 (2d Cir. 1988) (express preemption of one areas of specific state laws "leads directly to the conclusion that regulation not mentioned remains in force."), *and e.g.*, Campo v. Allstate Ins. Co., 562 F.3d 751, 757 (5th Cir. 2009) (limited statement of preemption indicates legislative lack of intent to preempt more broadly).

Stabilization cannot conflict with it.[298] The most recent regulation in this area expired pursuant to a sunset provision in 1963, and the State Legislature has taken no actions in the area since.[299] With no conflicting state action, New York City is free to regulate in this arena and would likely prevail over preemption challenges.

VI. Conclusion

NYC Commercial Rent Stabilization is therefore likely to survive court challenges. Because the legislation focuses on an important public benefit without depriving landlords of a reasonable rate of return, it has a strong case for surviving Constitutional scrutiny under the Takings and Contracts clauses. Because the bill acts in an area where New York State has remained silent for a half century, it is unlikely to be disturbed on grounds of preemption. Therefore, NYC Commercial Rent Stabilization is on solid legal footing as it approaches passage through New York City Council.

[298] *See, e.g.*, Seawall Assocs. v. New York, 510 N.Y.S.2d 435, 445-46 (N.Y. Sup. Ct. 1986).

[299] Keating, *supra* note 194, at 125.