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COMMENTARY ON *RENT CONTROL AND THE THEORY OF EFFICIENT REGULATION*

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Professor Epstein's polemic against rent control begins with the classic anecdote — a tale of the black market in rent controlled apartments in New York City, a favorite target of rent control opponents, featuring the author as a college senior. While confessing that as a student tenant he luckily enjoyed the protection and benefits of rent control, he explains that his initial skepticism "ripened into overt hostility."[1]

Epstein's hostility toward rent control is grounded in his view that rent control, as well as other forms of regulation, is unconstitutional because it amounts to confiscation of private property without the just compensation required by the fifth and fourteenth amendments. The enactment of rent control is based upon the exercise of the police power, typically by a municipality, to protect the general welfare. The police power authorization for controlling rents charged by private landlords is based upon legislative findings of a serious housing shortage.[2]

The basic fallacy of Epstein's radically conservative view of American constitutional law is his refusal to recognize that the exercise of the police power is not a per se taking. He notes that the police power must be read into the Constitution. Of course, courts have done exactly that for decades and have frequently distinguished between the legitimate exercise of the police power and a regulatory taking. Despite a long line of state and federal precedents dating from the original rent cases of 1921,[3] which contradict him, Epstein claims that the state intervention that

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[1] Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOKLYN L. REV. 741, 742 (1988).

[2] Baar & Keating, *The Last Stand of Economic Substantive Due Process — The Housing Emergency Requirement for Rent Control*, 7 URB. LAW. 447, 448, 465-66 (1975).

[3] Block v. Hirsh, 256 U.S. 134 (1921); Marcus Brown Holding Co., Inc. v. Feldman, 256 U.S. 170 (1921).

transforms private leases by regulating rents and evictions amounts to a taking for a public purpose, therefore triggering the just compensation requirement of eminent domain. This view has been rejected since the time rent control was first challenged. The same argument was mounted against land use controls and has been repeatedly rejected by many courts.[4] In Epstein's view, most regulations are simply disguised taxation. Carried to its logical conclusion, his view would result in the inability of government to protect citizens against conditions threatening the public welfare without either compensating those owners of private property adversely affected by its actions, or imposing taxes to fund the protective policy which it adopts. Of course, this would quite often prove to be fiscally impractical and politically impossible.

What is the public necessity that requires the imposition of rent control? According to Epstein, no social case can be made to justify rent regulation. Epstein chooses to ignore the housing problems that have given rise to rent control. For example, in its 1988 report to Congress, the National Housing Task Force cited such serious problems as the declining stock of affordable housing and the increasing number of tenants, millions, mostly poor, living in substandard housing and paying very high proportions of their income for rent.[5] These conditions preceded rent control in New York City and they remain very serious problems.[6] Of course, rent control protects not only poor but also moderate and middle-income tenants, most of whom would otherwise be subject to extreme rent fluctuations in tight housing markets.

What Epstein does address is the justification offered by Justice Holmes in *Block v. Hirsh*[7] to uphold the 1919 Washington, D.C. rent regulations, which attempted to redress the hous-

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[4] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-90 (1926). In its most recent decisions, the United States Supreme Court has made it more possible for landowners to challenge land use controls on the theory that they amount to regulatory takings. However, the Court has not equated land use controls based upon the exercise of the police power with unconstitutional takings requiring the payment of just compensation. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2381, 2389 (1987); and Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

[5] NATIONAL HOUSING TASK FORCE, A DECENT PLACE TO LIVE (1988) [hereinafter HOUSING TASK FORCE].

[6] *See, e.g.*, M. STEGMAN, HOUSING IN NEW YORK: STUDY OF A CITY 1984 (1984).

[7] 256 U.S. 134 (1921), discussed in Epstein, *supra* note 1, at 751, 770 & n.67.

ing shortage produced by the temporary population influx of World War I. Comparing this to the aftermath of the 1906 San Francisco earthquake, Epstein offers two solutions other than rent control. First, he suggests that the increase in unregulated rents would have produced more rental units and reduced tenant demand. This neat supply-demand equilibrium solution is the textbook solution of market economists but would hardly have protected many tenants during that period. It is unlikely that sufficient new or converted housing would have been produced quickly enough to satisfy demand. In addition, those tenants unable to pay the rising market rents attributable to the war induced shortage would have been forced into crowded and often substandard housing. This does not seem to concern Epstein, but it is exactly why the federal government introduced temporary rent control nationally during World War II.

Second, Epstein explains that the "right" response would have been rental allowances to federal employees unable to afford market rents funded by general revenues. Housing advocates have often argued for housing allowances, as have landlords opposing rent control. The federal government did conduct a national housing allowance experiment in the 1970s,[8] and the Reagan administration has supported housing vouchers (as an alternative to public housing).

However, no local government could itself afford to provide housing allowances to all those in need. For example, the District of Columbia has its own version of the federal section 8 rent subsidy program. The District's tenant assistant program (TAP), enacted in 1985, is designed to keep the housing payments of low- and moderate-income tenants at a maximum of 30 percent of their income. As of January 1988, although $15 million had been allocated annually, only 2,581 TAP certificates had been issued and only 1,095 households had actually been able to use them. Yet, TAP has a waiting list of more than 10,000 households, and it is estimated that 55,000 households are eligible while there is only enough funding for a maximum of 3,500 households.[9]

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[8] *See, e.g.*, R. STRUYK & M. BENDICK, HOUSING VOUCHERS FOR THE POOR: LESSONS FROM A NATIONAL EXPERIMENT 57 (1981).

[9] M. TURNER, RENT CONTROL AND THE AVAILABILITY OF AFFORDABLE HOUSING IN THE DISTRICT OF COLUMBIA: A DELICATE BALANCE 47-50 (1988).

There is no real prospect that the federal government, particularly since the abandonment of our national housing production goals in the 1970s and the Reagan era housing subsidy cutbacks and budget deficit, can or will attempt to provide either adequate demand or supply housing subsidies. According to the National Housing Task Force, in 1987 there were 7.8 million renter households with annual incomes of less than $10,000 eligible for federal housing assistance that were not receiving assistance.[10] Epstein does not discuss the reality of the housing situation in which the market does not provide affordable housing and the government does not provide adequate housing subsidies. The reality is that many citizens, especially lower income tenants, must pay dearly for what is all too often substandard housing.

An alternate view is that housing, like other necessities, should be viewed as a fundamental right or entitlement. Indeed, Justice Holmes argued that housing was clothed with a public interest because it "is a necessary of life."[11] Although the Supreme Court rejected the argument that housing is a constitutionally protected fundamental right in *Lindsey v. Normet*,[12] the effort continues to legislate this concept in the form of an entitlement. The most notable recent example has been the legal, political, and moral efforts of the advocates of the homeless to guarantee at least minimal shelter to the most deprived segment of our population.[13] Professor Epstein rejects this concept as "communitarian cant" which offends the social welfare standards of economists.

Epstein does not recognize a right to security of tenure unless it results from private negotiations between landlord and tenant in the form of a lease. However, for many tenants the right to negotiate such protection is illusory since they lack the individual or organized power to obtain much protection against displacement. Most residential leases are short-term. In those housing markets with low vacancy rates, high demand for apart-

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[10] HOUSING TASK FORCE, *supra* note 5, at 7.

[11] *Hirsh*, 256 U.S. at 156.

[12] Lindsey v. Normet, 405 U.S. 56, 74 (1972). For the best explanation of the right to housing, see Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207, 209-11 (1970).

[13] *See, e.g.*, Note, *Establishing a Right to Shelter for the Homeless*, 50 BROOKLYN L. REV. 939, 940 n.5 (1984).

ments and condominiums, and wide income differences, the housing market frequently leads to gentrification which displaces those lower-income tenants unable to compete economically.[14]

Eviction controls serve the purpose of preventing landlord evasion of rent controls through the threat of evicting protesting tenants and also provide the security of tenure that prevents arbitrary displacement. Of course, tenants must still pay the regulated rents and otherwise comply with the terms of their statutory leases. Although Epstein is correct that this can distort tenant mobility patterns, a greater distortion occurs if vacancy decontrol exists. This encourages landlords to harass tenants into vacating the apartment so it can be rerented at market rents. Vacancy decontrol may undercut the protection of "sitting" tenants unless eviction controls are strictly enforced. Epstein argues that rent control generally increases landlords' incentives for eviction if a vacated unit can be deregulated or converted to another use. However, well-organized and well-informed tenants are not so easily intimidated, especially where rent control is strictly enforced. In many localities with rent controls, there are also condominium conversion and demolition controls in existence to prevent the loss of these units.[15]

Although Epstein concedes that rent control legislation differs considerably in its form and administration, he argues that this is of little importance since all are per se unconstitutional. Epstein directs his analysis to two recent decisions: *Hall v. City of Santa Barbara*[16] and *Pennell v. City of San Jose*.[17] The former case involved mobile home rent control. Epstein agrees with the court's decision, which allowed the landlord (the mobile home park owner) to pursue a takings claim by reasoning that the law provided compensation for a physical invasion of the landlord's property by the occupying tenants, and by concluding

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[14] C. HARTMAN, D. KEATING & R. LEGATES, DISPLACEMENT: HOW TO FIGHT IT (1982). For a positive evaluation of the impact of rent control in a gentrifying market, see Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988).

[15] Bryant & McGee, *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U.J. URB. & CONTEMP. L. 43 (1983).

[16] 813 F.2d 1270 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 1120 (1988).

[17] 108 S. Ct. 849 (1988). These cases are analyzed in Epstein, *supra* note 1, at 750-59.

that the owner's property interests had been transferred to the tenant. Epstein applauds this interpretation of the effect of rent control. He also agrees that the landlord can contest whether the regulated rents constitute just compensation. However, he disagrees with the reasoning that a taking occurred based on the physical invasion theory because he believes that rent control should be considered unconstitutional per se.

Chief Justice Rehnquist specifically declined to consider this issue in *Pennell*.[18] Epstein agrees with Justice Scalia's dissent that consideration of tenant as well as landlord hardship amounts to disguised taxation of landlords (or other tenants) for the benefit of poorer tenants.[19] Epstein rejects the adequacy of the fair return on investment requirement as a guarantee against depriving landlords of due process protection. Epstein first dismisses established law that rejects landlords' contentions that a regulated return must be based upon market value. This circular reasoning, which undermines the very purpose of rent control, has been correctly rejected by the California and New Jersey Supreme Courts.[20] Epstein fails to note that the courts have found that the Constitution does not require that landlords be guaranteed positive cash flow and a particular level of return. Epstein offers no evidence that landlords have not received a fair return under rent control but simply asserts that this is so.

Instead of empirical evidence, Epstein relies upon the arguments of economists, whom he states are united in their condemnation of rent control. However, as Weitzman documents, this concurrence is based mostly on theory, rather than on much empirical evidence.[21] Typical examples appear in Epstein's critique. He assumes, for example, that rental housing markets are generally competitive. This is not necessarily the case at all. There is evidence suggesting that, because such competition is nonexistent, rising rents do not necessarily lead to supply in-

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[18] *Pennell*, 108 S. Ct. at 858 n.6.

[19] *Id.* at 863-64 (Scalia, J., dissenting).

[20] Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 797-803 (1983). *See also* Drobak, *Constitutional Limits on Price and Rent Control: The Lessons of Utility Regulation*, 64 WASH. U.L.Q. 107, 141-42 & n.158 (1986).

[21] Weitzman, *Economics and Rent Regulation: A Call for a New Perspective*, 13 N.Y.U. REV. L. & SOC. CHANGE 975, 975-76 (1984-85).

creases.[22] Epstein argues that, even though rent controls exempt new construction, rent controls will act as a disincentive to new construction. Empirical evidence indicates that the level of new construction does not necessarily vary between similar rent controlled and non-rent controlled jurisdictions.[23] Epstein argues that draconian New York City rent controls led to massive abandonment of housing by regulated landlords. He ignores data that cites factors other than rent control to explain this widespread phenomenon.[24]

Epstein presents neither convincing arguments — legal, economic, political, or moral — nor empirical evidence to support his absolutist position that the regulation of rental housing through the police power to deal, at least temporarily, with serious housing problems must be characterized as a taking of private property. The courts have correctly upheld the right of government to regulate the private market where the public welfare requires that tenants be protected amidst a housing shortage. Landlords' rights to due process and fair return on their investment have been protected. The courts have often intervened where rent control legislation or its administration have violated the rights of property owners. The courts must balance the competing interests of landlords and tenants.[25]

Professor Epstein seems most disturbed by rent control because it offends his views about economic efficiency and good public policy. He is certainly entitled to his view, as are landlords opposed to rent regulation. However, this does not mean that the courts should, therefore, intervene to impose these views of public policy. The Supreme Court rejected this doctrine

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[22] *See* J. GILDERBLOOM & R. APPELBAUM, RETHINKING RENTAL HOUSING 57-67 (1988), which empirically studies landlord behavior and rental housing markets, rejects conventional theories of the determinants of rents, and critiques the failure of market allocation of rental housing.

[23] *See* Baar, *Facts and Fallacies in the Rental Housing Market*, 62 W. CITY 47 (1986) and Gilderbloom, *The Impact of Moderate Rent Control in New Jersey: An Empirical Study of 26 Rent Controlled Cities*, 7 URB. ANALYSIS 135 (1983).

[24] *See* Bartelt & Lawson, *Rent Control and Abandonment in New York City: A Look at the Evidence*, in CRITICAL PERSPECTIVES ON HOUSING (R. Bratt, C. Hartman & A. Meyerson eds. 1986).

[25] *See* Note, *The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 HARV. L. REV. 1067, 1078-79 (1987). The author argues that the courts must take into consideration the liberty interests of tenants as well as the dominion interests of landlords.

in the 1930s.[26] *Pennell* is a sign that the Court is not prepared to return to the use of the doctrine of economic substantive due process to invalidate legislation that does not comport with its views on social policy.

I, too, believe, along with Professor Epstein and Justice Scalia, that rent control should be subject to the democratic process. Rent controls have been enacted democratically, either by state and local legislative bodies or by the initiative and referendum. Landlords have participated in this process and have exercised great influence by defeating, amending, and repealing rent control.[27] The political rather than the judicial forum is the proper place for this debate over economic regulatory policy.

[26] Baar & Keating, *supra* note 1, at 470-72.

[27] *See* Keating, *Dispersion and Adaptation: The California Experience*, in THE RENT CONTROL DEBATE 65 (P. Niebanck ed. 1985).