

Towards a Definable Body of Legal Requisites for Rent Control*

TOWARDS A DEFINABLE BODY OF LEGAL REQUISITES FOR RENT CONTROL analyzes the development of state and federal rent control litigation. It focuses on the gradual erosion of a multitude of legal requisites for valid enactments and scrutinizes courts' attitudes towards rent control. The article examines recent state court decisions and summarizes the present legal requirements for valid rent controls.

WHY RENT CONTROL SHOULD END

1. Because it is unchristian, un-American, and unconstitutional.
2. Because it is against God and the Bible.
3. Because it is atheist and Communist in origin.
4. Because it is unfair, unjust, and discriminatory.
5. Because it is arbitrary and unprincipled and unbusinesslike.
6. Because it is dictatorial and tyrannical.
7. Because it is basically and fundamentally wrong. It makes orphans out of tenants and slaves out of owner [sic] . . .
15. Because it gives more money to the tenant to buy whiskey, to gamble, and to throw to the wind . . .¹

Rent control often evokes strong visceral reactions, as the preceding passage attests.² Praise or blame, hostility or applause predictably follow the economic self-interest and social philosophy of the individual. Debates over rent control carry both its proponents and its detractors into complex issues of economics, housing, and taxation. Though there may never be an ultimate resolution of these issues,³ rent control has existed in one form or another for centuries,

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¹(Statement by the Property Owners Council, Nashville, Tenn. by Rep. Rich of Pa.) (95 CONG. REC. A1469 (1949)) *quoted in* Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54, 87-88 (1950).

²"Rent control has been blamed for the fall of France, the fall of the democratic government of Austria, the decrease in the birth rate, and a good many other things." *Id.* at 87 (citations omitted).

³For discussions favorable to rent control, see H. SELESNICK, *RENT CONTROL* (1976); Achtenberg, *The Social Utility of Rent Control*, in *HOUSING URBAN AMERICA* 434 (J. PYNOOS, R. SCHAFFER, & C. HARTMAN eds. 1973);

in countries ranging from Albania to Zanzibar.⁴ Some sources suggest rent controls may have been used in ancient Rome about 150 B.C. though reliable documentation of its existence dates from the Middle Ages in Europe.⁵ Rent control started in the United States⁶ on a limited basis around the time of World War I.⁷ "Emergency" rent controls were enacted during World War II and temporarily renewed by Congress until 1954.⁸ New York has had local and state rent controls since the mid-1950's, despite repeated legal challenges.⁹

The 1970's marked a new era in the history of American rent controls. Following the severe economic inflation of the late 1960's, many "second generation" rent control measures were enacted at the local, state, and federal levels.¹⁰ In 1970, Massachusetts enacted enabling legislation,¹¹ expanding its municipalities' home rule power¹² to include passage of rent control at local option.¹³ The Florida

and URBAN PLANNING AID, LESS RENT, MORE CONTROL (Boston, Mass., 1973). For discussions unfavorable to rent control, see G. STERNLIEB, THE URBAN HOUSING DILEMMA-THE DYNAMICS OF NEW YORK CITY'S RENT CONTROLLED HOUSING (Center for Urban Policy Research, Rutgers University) (1972); G. STERNLIEB & BURCHELL, RESIDENTIAL ABANDONMENT (1973); G. STERNLIEB THE TENEMENT LANDLORD (1969); G. STERNLIEB & BRODY, PROBLEMS OF RENT CONTROL (1973); and W. Schenkel, *Rent Control A Critical Review*, 39 J. PROPERTY MANAGEMENT 101-10 (May-June 1974).

An overview of rent control issues and arguments for and against controls is contained in R. FRANKEN & C. ASHMUN, RENT CONTROL: AN INTERIM REPORT TO THE ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT, (Ca., Sept. 1975). For a comprehensive survey of rent control issues, see M. LETT, RENT CONTROL (1976).

⁴Willis, *supra* note 1, at 93-94. Rent controls have been adopted in scores of countries all over the world, including Europe, Asia, U.S.S.R., Asia, North and South America, Africa, and Australia.

⁵*Id.* at 59-60. See also, N.Y. Times, May 27, 1923, § 8, at 13, col. 3 (cited in Willis, *supra* note 1, at p. 60 n.10).

⁶Rent control emerged into the twentieth century in Australia in 1910 and gained widespread acceptance during World War I. Willis, *supra* note 1, at 67-70.

⁷For a thorough analysis of rent control efforts during World War I, see Schaub, *Regulation of Rentals During the War Period*, 28 J. POL. ECON. 1 (1920). See also, E. DRELLICH & A. EMERY, RENT CONTROL IN WAR AND PEACE 11 (Nat. Muni. League, 1939).

⁸Barr & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control*, 7 URB. LAW. 447, 474-75 (1975).

⁹*Id.* at 481. See also, Comment, *Residential Rent Control in New York City*, 3 COLUM. J. L. AND SOC. PROB. 30 (1967).

¹⁰For an excellent overview of this development, see Blumberg, Robbins, & Barr, *The Emergence of Second Generation Rent Controls*, 8 CLEARINGHOUSE REV. 240 (Aug. 1974).

¹¹Massachusetts Rent Control Enabling Law, MASS. GEN. LAWS ANN., ch. 842 (West 1970). This law has lapsed, see note 13 *infra*.

¹²The Massachusetts Supreme Judicial Court had previously struck down two local ordinances based on lack of municipal home rule power to enact rent control in *Marshall House, Inc. v. Rent Review & Grievance Bd.*, 260 N.E. 2d 200, 207-08 (1970). The state enabling legislation followed.

¹³The Massachusetts Legislature let the law expire in the spring of 1976. Rent controlled cities may, however, obtain special legislation from their city councils to continue rent controls. Boston, for example, has continued controls, but

Supreme Court twice invalidated rent control measures in Miami Beach¹⁴ before upholding re-written ordinances.¹⁵ The Miami Beach City Council let the judicially approved rent controls lapse in 1976, but a voter initiative on the matter is forthcoming.¹⁶ Over 100 New Jersey municipalities adopted rent control during the 1970's and their validity has been upheld both as written¹⁷ and as applied.¹⁸ Connecticut,¹⁹ Maryland,²⁰ Maine,²¹ Alaska,²² and Washington, D.C.,²³ have also enacted various forms of rent controls during the 1970's. Federal rent controls were implemented for a period under the Nixon Administration's price and wage stabilization program.²⁴ Berkeley, California enacted rent controls in 1972²⁵ through the initiative process.²⁶ The case of *Birkenfeld v. City of Berkeley* resulted in decisions by the trial,²⁷ appellate,²⁸ and Supreme Court²⁹ of California levels, each invalidating the rent control law, each for different reasons. Consistency is not often a hallmark of rent control decisions.

allows rents to rise whenever tenants vacate. San Francisco Sunday Examiner-Chronicle, Dec. 12, 1976, § B, at 7, col. 1 (Preview Ed.).

¹⁴*City of Miami Beach v. Forte Towers, Inc.* 305 So. 2d 764 (Fla. 1974); *City of Miami Beach v. Fleetwood Hotel, Inc.* 261 So. 2d 801 (Fla. 1972).

¹⁵*Lifschitz v. City of Miami Beach*, 339 So. 2d 232 (3rd. Dist. 1976); *Muss v. City of Miami Beach*, 339 So. 2d 236 (3d Dist. 1976). The *Muss* case seeks to exempt luxury rental units from rent controls. *Certiorari* is presently pending before the Florida Supreme Court, though the decision will only concern itself with the status of luxury rentals since the constitutionality of rent controls was sustained in *Lifschitz*.

¹⁶LAW PROJECT BULLETIN 9, HOUSING SECTION (Jan.-Feb. 1977) (Published at the National Housing and Economic Development Law Project).

¹⁷*Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973).

¹⁸*Troy Hills Village v. Township Council*, 68 N.J. 604, 350 A.2d 34 (1975); *Brunetti v. Borough of New Milford*, 68 N.J. 576, 350 A.2d 19 (1975); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1 (1975).

¹⁹CONN. GEN. STAT. ANN. §§ 7-148f (West 1969).

²⁰MD. ANN. CODE, art 53, § 45 (1973) (This law expired in 1974.).

²¹ME. REV. STAT. ANN. tit. 30, § 5371-6576, ch. 244.

²²ALASKA STAT. § 34.06.010 (1974).

²³District of Col. Rent Control Act of 1973, Pub. L. No. 93-157, 87 Stat. 623. This law was enacted by Congress authorizing Washington, D.C. to adopt rent controls.

²⁴Exec. Order No. 11615, 36 Fed. Reg. 15,727 (1971). See note 179 *infra*.

²⁵CHARTER OF THE CITY OF BERKELEY, CA., art 17 (1972).

²⁶The initiative power is the power of the people, independent of a legislative body, to propose laws and to enact them at the polls. *City of Litchfield v. Hart*, 306 Ill. App. 62, 29 N.E. 2d 678, 679 (1940). A minority of state governments have adopted use of the initiative. See, Comment, *The Local Initiative—A Proper Sounding Board for National Issues?*, 1968 UTAH L.R. 464 (1968).

²⁷*Birkenfeld v. City of Berkeley*, No. 428971 (Alameda Co. Cal., Super. Ct., filed June 22, 1973), *aff'd on other grounds*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) (on file with the U.C. Davis L. Rev.) (page numbers supplied by the authors).

²⁸*Birkenfeld v. City of Berkeley*, 49 Cal. App. 3d 464, 122 Cal. Rptr. 891, (1st Dist. 1975) (vacated by the Cal. Sup. Ct.), *aff'd on other grounds*, see note 29 *infra*.

²⁹*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

During this period of dramatic expansion in rent control legislation in this country, a pattern has emerged. Legislation is enacted and a court challenge ensues. If the law is upheld as written, it is later challenged as applied. If the law is struck down, it is re-written to avoid the prior legal problems, and efforts to pass the measure are reinstated.³⁰ This often lengthy dialectic of legislation, litigation, and ultimate resolution has distilled a definable group of legal requisites for rent control laws. Prior to the 1970's, the legal requirements for rent controls were as numerous as they were confusing.

A major problem frequently confronting rent control legislation is the judicial tendency to inject extra-legal policy judgments into the legal decision-making process regarding rent controls. This is done without duty or right, and seldom with competence. However, it is anticipated that as the legal requisites for rent controls become more clear, both in definition and application, the judgment of courts regarding the policy or wisdom of rent control legislation will play a correspondingly diminished role.

The purpose of this article is two-fold: (1) to summarize the present legal status of rent control, and (2) to provide legislators, lobbyists, and other interested parties with a clearer notion of the legal 'building blocks' required for valid, constitutional rent control. The first section covers the federal constitutional limitations on rent control. The second section explores the limits imposed by the states on rent control.

I. FEDERAL CONSTITUTIONAL DUE PROCESS LIMITATIONS ON RENT CONTROLS

Opponents of local rent control have found the Due Process Clause of the fourteenth amendment to be a fertile source of limitations on rent control measures.³¹ Three theories have been used to attack rent control enactments under the Due Process Clause: (1) due process requires an imminent emergency as a prerequisite to valid rent control; (2) use of the initiative process to enact rent control denies property owners the opportunity of notice and a hearing; and (3) the procedures used to implement rent controls result in confiscatory rents.

³⁰ A re-written rent control initiative was defeated by Berkeley voters on April 19, 1977, *San Francisco Examiner*, April 20, 1977, at 1, col. 4. Another rent control initiative awaits Miami Beach, Florida voters, *see* text accompanying note 16 *supra*.

³¹ Rent controls that treat various classes of property differently have been attacked under the Equal Protection Clause of the 14th amendment. A common example of such differential treatment is the exclusion of luxury apartments from the rent control scheme. This argument has been rejected repeatedly by the courts. *See Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Marshal House, Inc. v. Rent Review & Grievance Bd.*, 260 N.E. 2d 200 (Mass. 1970); *Russell v. Treasurer & Receiver Gen.*, 120 N.E. 2d 388 (1948).

A. *The Emergency Requirement*

Under contemporary constitutional theory, the courts will sustain state economic regulation if a reasonable relationship exists between the legislation and its objective.³² When the economic regulation takes the form of a rent control measure, however, the cases are inconsistent in the standard of review used. Although a few contemporary courts have employed the reasonable relationship test, most apparently adhere to the vestigial exceptional circumstance standard.³³ Some courts have attempted to justify this stricter standard of review for rent controls on economic and public policy grounds. Chiefly, however, the use of this outdated standard stems from the failure of the United States Supreme Court to articulate adequately the bases on which rent control measures may be sustained.

Historically, the Due Process Clause, as applied to economic regulations, has been interpreted inconsistently. During the period of economic substantive due process, it was generally held that economic regulations constituted a denial of due process unless an exceptional circumstance could be shown.³⁴ This was an unworkable rule because only the Supreme Court could determine with certainty whether the exceptional circumstances test had been met.³⁵ Thus,

³²*Nebbia v. New York*, 291 U.S. 502 (1934).

³³The exceptional circumstance standard, once an adjunct of substantive due process, continues to plague advocates of rent control even today. In *Warren v. City of Philadelphia*, 387 Pa. 362, 127 A.2d 703 (1956), the Supreme Court of Pennsylvania invalidated a local rent control ordinance and stressed that since rent control impinges upon the constitutional rights of the owners of property, it must be based upon a public exigency or emergency, such as a grave housing shortage. Similarly, the Supreme Court of Florida in *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972) asserted that the only justification for the utilization of rent control is an emergency. In *Birkenfeld v. City of Berkeley*, No. 438971, (Alameda Co., Cal., Super. Ct., filed June 22, 1973), *aff'd on other grounds*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976), the court invalidated a local rent control measure principally upon the absence of an emergency. On appeal, a California court of appeal cited *Lincoln Bldg. Assocs. v. Barr*, 1 N.Y. 2d 413, 420, 135 N.E. 2d 801, 806 (1956), *appeal dismissed*, 355 U.S. 12 (1957) and agreed that rent control has "no justification except during periods of emergency." 49 Cal. App. 3d 464, 122 Cal. Rptr. 891, 899 (1st Dist. 1975) (vacated by Cal. Sup. Ct.) *aff'd on other grounds*, 17 Cal. 3d 129, 500 P.2d 1001, 130 Cal. Rptr. 465 (1976).

³⁴For an excellent discussion of the early application of economic substantive due process and its impact on rent control, see Baar and Keating, *supra* note 8.

³⁵See Brown, *Due Process of Law, Police Power and the Supreme Court*, 40 HARV. L. REV. 943 (1927). After considering nearly 250 United States Supreme Court cases dealing with due process limitations on the police power, the author concluded:

The opinions of the Supreme Court on due process of law and the police power have confused rather than clarified the subject. From the words "nor shall any state deprive any person of life, liberty, or property without due process of law" have come no rules, standards or principles capable of certain applications to concrete cases. It is declared that the police power has its boundaries, but their limit and course have never been staked. The Court has professed to regard

economic regulation was sometimes allowed if the business involved was affected with a public interest,³⁶ provided a benefit,³⁷ or if the Court decided to classify the regulation as an exercise of police power.³⁸ In 1917, the United States Supreme Court held that economic legislation would be upheld as a legitimate exercise of police power if it were designed to prevent an imminent emergency.³⁹ Thus, another circumstance which would warrant economic regulation was recognized.⁴⁰

In the 1920's, rent control measures were upheld only if the Court could justify them by exceptional circumstances. During this period, the United States Supreme Court sustained rent control measures on the basis of wartime⁴¹ and social⁴² emergencies. The Court later reaffirmed the emergency requirement for constitutionality under the Due Process Clause and defined emergency restrictively.⁴³ The Court also made it clear that it would examine state legislative findings very carefully in order to determine if there was in fact an emergency.⁴⁴

In 1934, the United States Supreme Court decided *Nebbia v. New York*.⁴⁵ In upholding a New York statute controlling milk prices, the Court departed from its previously strict application of due process to legislative economic regulation. A much quoted portion of the opinion marked the beginning of an era in which the Supreme Court sustained legislative action under the police power so long as a rational basis for the regulation could be adduced:

So far as the requirement of due process is concerned . . . a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adopted to its purpose.⁴⁶

After *Nebbia*, legislative attempts at economic regulation including the fixing of prices were, for the most part, upheld.⁴⁷ In 1941 the

each case as unique, unsolvable by legal precept, but it overthrows legislation by postulating fundamental and immutable principles of law, which it, however, neglects to define.

Id. at 966.

³⁶ *Munn v. Illinois*, 94 U.S. 113 (1877).

³⁷ *Davidson v. New Orleans*, 96 U.S. 97 (1878).

³⁸ *Mugler v. Kansas*, 123 U.S. 623 (1887).

³⁹ *Wilson v. New*, 243 U.S. 332 (1917).

⁴⁰ Despite the willingness of the Court to uphold economic regulation if it could find an adequate exceptional circumstance, most legislative attempts to fix prices prior to 1934 were held invalid. See *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) and cases cited therein.

⁴¹ *Block v. Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

⁴² *Edgar A. Levy Leasing Co. v. Siegal*, 258 U.S. 242, 245 (1922).

⁴³ *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

⁴⁴ *Id.* at 548.

⁴⁵ 291 U.S. 502 (1934).

⁴⁶ *Id.* at 537.

⁴⁷ See *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (expressly overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)). See also *Olsen v. Nebraska*,

Court unanimously upheld a state price fixing statute and expressly overruled prior cases which limited price regulation to emergency situations and businesses affected with a public interest.⁴⁸

The proponents of rent control in this period must have anticipated that rent control measures would be accepted by the courts as just another form of economic regulation. This, however, was not to be the case. Theoretically, the earlier cases which required an emergency for constitutional rent control had been overruled by *Nebbia*. It seems, however, that the strong language used in these early cases left an indelible impression upon the courts.

The early cases continue to influence rent control decisions because the United States Supreme Court has failed to clarify the issue. The Court decided two rent control cases after *Nebbia*, but in neither case did it clearly indicate that the emergency requirement was no longer applicable. In *Bowles v. Willingham*,⁴⁹ the Court cited *Nebbia*, but failed to declare that the *Nebbia* reasonable relationship test controls when rent control legislation is involved. Instead, the Court sustained the rent control legislation under a war powers theory and admittedly evaded the issue.⁵⁰

In *Woods v. Cloyd W. Miller Co.*,⁵¹ the latest consideration of rent control by the Supreme Court, the court sustained rent control legislation on the basis of the war power, despite the fact that the war had ended. The Court did not discuss *Nebbia*, but after comparing the extent of war powers to police powers, the Court cited the early rent control cases which required an exigent circumstance as a constitutional prerequisite.⁵²

After *Nebbia*, *Bowles* and *Woods*, state courts are understandably confused. Many recent state court decisions cite the Supreme Court rent control cases for the proposition that an emergency is still constitutionally required.⁵³ Other courts attempt to justify the emer-

313 U.S. 236 (1941) and cases cited therein.

⁴⁸Olsen v. Nebraska, 313 U.S. 236, 245-46 (1941).

⁴⁹321 U.S. 503 (1944).

⁵⁰*Id.* at 519. The Court declared, "We need not determine what constitutional limits there are to price fixing legislation."

⁵¹333 U.S. 138 (1948).

⁵²Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924); Block v. Hirsh, 256 U.S. 135 (1921); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

⁵³See Birkenfeld v. City of Berkeley, 49 Cal. App. 3d 464, 122 Cal. Rptr. 891, 898, (1st Dist. 1975) (vacated by Cal. Sup. Ct.), *aff'd on other grounds* 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) (citing Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921), Edgar A. Levy Leasing Co. v. Siegal, 258 U.S. 242 (1922), Block v. Hirsh, 256 U.S. 135 (1921), Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924), and Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948)); City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) (citing *Marcus Brown*, *Chastleton*, and *Levy*); Warren v. City of Philadelphia, 387 Pa. 382, 127 A.2d 703 (1956) (citing *Marcus Brown*, *Woods*, and *Block*).

gency requirement on policy grounds,⁵⁴ a forbidden practice under contemporary constitutional theory. Opponents of rent control have also argued that the stricter standard is required because of the historic preference for real property.⁵⁵

Still other state courts have followed the *Nebbia* test and held that the existence of an emergency is no longer required as a constitutional prerequisite to the enactment of rent control.⁵⁶ Although the

⁵⁴A California court of appeal in *Birkenfeld v. City of Berkeley*, 49 Cal. App. 3d 464, 122 Cal. Rptr. 891 (1st Dist. 1975) (vacated by Cal. Sup. Ct.), *aff'd on other grounds*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976), for example, explained that there are good reasons for treating rent controls as emergency measures:

[R]ent controls tend to exacerbate a shortage of rental housing. Uncertainty about receiving a fair return on capital investment tends to discourage the construction of new rental units and the replacement of old, deteriorated rental units. Thus in contrast to the myriad of regulations of businesses and use of property under the police power, rent control regulations adversely affect not only the owners of the regulated property, but also the community at large.

These are the principle reasons why state legislatures, governing bodies of municipalities, and the courts have treated rent control measures as only temporary measures necessary to deal with a serious public emergency . . .

122 Cal. Rptr. 891, 899.

Another example is Florida Supreme Court Justice Roberts' opinion in *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 770 (Fla. 1974). Concurring in part and dissenting in part, Justice Roberts cited the earlier decision of *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972) for the proposition that an emergency is constitutionally required for valid rent control. He then went on to provide some insight as to what he considers to be the real basis for the emergency requirement. He quoted with approval the following passage from a treatise on rent control:

The American people dislike government regulation of their business affairs and tolerate it only when they believe it to be justified by compelling considerations of public good. Accordingly, there is general agreement that the landlord-tenant relationship should be freed from rent controls at all government levels at the earliest time consistent with the public welfare.

305 So. 2d at 771 (quoting FRIELAND AND CURRERI, RENT CONTROL (1948)).

He concluded his opinion by saying, "Unless government is to assume the total responsibility for low cost housing, private investors should be *encouraged* and not discouraged in making investments in additional housing units." *Id.* at 772 (emphasis in original).

⁵⁵The California Supreme Court found this argument without merit, citing numerous situations in which restrictions on the use of real property have been held to be proper exercises of police power. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 159, 550 P.2d 1001, 1022-1023, 130 Cal. Rptr. 465, 486-487 (1976). The court also noted the "virtual equivalence under modern conditions between the renting of property for residential purposes and the purchase of consumer goods and services." *Id.* at 159, 550 P.2d at 1023, 130 Cal. Rptr. at 487.

⁵⁶Maryland, New Jersey and California have adopted the *Nebbia* reasonable relationship test to determine if the rent control measure in question is a legitimate exercise of police power under the Due Process Clause. The language used to describe this test as it relates to rent control differs slightly in each state, but one common point stands out: it is far less burdensome to prove a reasonable relationship than to prove an emergency of the magnitude formerly required to

United States Supreme Court has not expressly overruled the early Supreme Court rent control cases,⁵⁷ these state courts conclude, as did the California Supreme Court in *Birkenfeld*,⁵⁸ that rent control is indistinguishable from other types of governmental price regulation.⁵⁹ This position has received clear support from the U.S. Court of Appeals for the Second Circuit, which declared that the United States Supreme Court would no longer require an emergency in order to sustain the validity of rent control legislation.⁶⁰ Thus, even without clear guidance by the Supreme Court, the trend is toward non-recognition of an emergency requirement for rent control.

Despite this trend, a United States Supreme Court decision is essential to assure consistency in the application of due process to rent controls. Until such a decision is rendered, the model of constitutionally acceptable rent control legislation will continue to vary from state to state. In view of recent state decisions eliminating the emergency requirement, courts in states which have not yet adopted the pure reasonable relationship test for rent control may be amenable to a change in their approach. If the highest state court continues to require an emergency for constitutional rent control, the rent control legislation should include an emergency clause, supporting evidence for the emergency, and, in some states, an expiration date to insure its validity.⁶¹

In states which have adopted the pure reasonable relationship test for rent control, the existence of an emergency should not be declared in the legislation. If it is declared, the existence of an emer-

warrant rent control. Thus, in *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976), the California Supreme Court describes its duty as being, "to sustain the propriety of rent controls under the police power unless the findings establish a complete absence of even a debatable rational basis for the legislative determination by the Berkeley electorate that rent control is a reasonable means of counteracting harms and dangers to the public health and welfare emanating from a housing shortage." *Id.* at 161, 550 P.2d at 1024, 130 Cal. Rptr. at 488.

In response to evidence presented denying the existence of a housing emergency in Berkeley, the California Supreme Court noted that "[w]hile all these facts are encouraging they do not push beyond the pale of rational debate the existence of a housing shortage and accompanying excessive rents serious enough to warrant the imposition of rent controls." *Id.* at 163, 550 P.2d at 1025, 130 Cal. Rptr. at 489.

⁵⁷This fact was expressly recognized in *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970), yet the court went on to uphold the rent control measure.

⁵⁸*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

⁵⁹*Westchester West No. 2 Ltd. Partnership v. Montgomery County*, 276 Md. 448, 348 A.2d 856 (1975); *Hutton Park Gardens v. Town Council* 68 N.J. 543, 350 A.2d 1 (1975).

⁶⁰*Eisen v. Eastman*, 421 F.2d 560, 567 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

⁶¹For an exhaustive account of what has been used to constitute an emergency see *Baar & Keating*, *supra* note 8.

gency might be considered a necessary prerequisite to the continuing validity of that particular rent control measure.⁶² Thus, if the emergency were cured through social remedies or lapse of time, the rent control measure would no longer be valid.

B. Notice and Hearing

Typically, rent control legislation is the product of city council ordinances, often based on state enabling acts. In addition, local initiatives can be used to enact rent controls directly by popular vote. This process can be especially useful when city councils are unwilling to enact rent controls. Of course, use of the initiative by no means assures passage of rent control⁶³ even where the economic self-interest of renters is strongest, such as in areas of low vacancy and high rents. Even when voter approval is obtained, the validity of the measure is not assured. The experience of one California city illustrates this point.

The Berkeley, California rent control measure, enacted in 1972 by voter initiative, was held constitutionally deficient at the trial court level.⁶⁴ Since no precedent existed for enactment of rent control measures by initiative, the trial court reasoned by an analogy to prior zoning cases. These cases held that the initiative process cannot be used to effect substantial zoning changes without violating the procedural due process requirements of notice and hearing.⁶⁵ The trial court concluded that the economic self-interest of voters automatically vitiated the validity of the measure,

[T]he initiative process resulted in the pitting of two groups having a direct monetary interest in the outcome against each other. The result was forgone . . . it is difficult to imagine a tenant who would vote against Charter Amendment I (the rent control measure) or a landlord for it.⁶⁶

⁶²But see the California Supreme Court's conclusion in *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 163-64, 130 Cal. Rptr. 465, 490, 550 P.2d 1001, 1026 (1976).

⁶³The re-written Berkeley rent control initiative was defeated by voters, see note 30 *supra*. Rent control initiatives have been defeated in Ann Arbor, Michigan, Palo Alto and San Francisco, California. Rent control lobbying efforts by tenants in Milwaukee, Wisconsin and Philadelphia, Pennsylvania have been unsuccessful. W. KEATING, *RENT AND EVICTION CONTROLS: A SELECTED BIBLIOGRAPHY* 1 (June 1976).

⁶⁴*Birkenfeld v. City of Berkeley*, No. 428971, (Alameda Co., Cal., Super. Ct. filed June 22, 1973) at 13-14, *aff'd. on other grounds*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

⁶⁵*E.g.*, *Taschner v. City Council*, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (4th Dist. 1973), and *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 99 Cal. Rptr. 745 (1972). This line of cases has been effectively overruled. See text accompanying note 67 *infra*.

⁶⁶*Birkenfeld v. City of Berkeley*, No. 428971, (Alameda Co., Cal., Super. Ct., filed June 22, 1973) at 15, *aff'd. on other grounds*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

After this decision, but before the case came before the California court of appeal, the California Supreme Court effectively overruled the zoning cases on which the trial court relied. In *San Diego Building Contractors Association v. City Council*,⁶⁷ the California Supreme Court distinguished between legislative and quasi-legislative enactments (such as rent control) and quasi-judicial and adjudicatory proceedings, and held that notice and hearing requirements attach only to the latter group.⁶⁸ Thus, the alleged constitutional deficiency of enacting rent control by initiative was removed.

C. Confiscatory Rents and Procedural Implementation

Rent control consists basically of the economic regulation of rental units. Courts are quite sensitive to the possibility that such regulation might result in confiscation of landlords' property, thus contravening their due process rights.⁶⁹ Since due process considerations are at the core of judicial considerations of rent control, they deserve close scrutiny. The Berkeley rent control measure is an instructive example of how courts analyze four major aspects of rent control enactments: (1) the courts' mandated duty to presume rent control measures valid; (2) the possibility of facial invalidity of rent controls; (3) judicial willingness to "wait and see" the effect of rent controls rather than pre-judge the anticipated results; and (4) judicial willingness to sever and alter provisions of rent control measures in order to preserve their validity and constitutionality.

1. The Duty to Presume Validity

A general presumption favors the validity of legislative acts,⁷⁰ as well as initiative measures,⁷¹ such as the Berkeley charter amendment. Thus anyone challenging the validity of the measure must sus-

⁶⁷13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974). This case held that local voters could, by initiative, adopt an ordinance prohibiting land owners with lots near the water from building high rise structures blocking the views of larger inland areas.

⁶⁸California, some other states, and the U.S. Supreme Court have held there is no constitutional requirement for a hearing in a legislative or quasi-legislative proceeding. See, e.g., *Franchise Tax Board v. Superior Court*, 36 Cal. 2d 538, 225 P.2d 905 (1950); *Brunetti v. Borough of New Milford*, 68 N.J. 576, 350 A.2d 19, 28 (1975); *Bi-Metallic Investment Co. v. Colorado*, 239 U.S. 441, 444-45 (1915).

⁶⁹Related to the confiscation issue are rent control rollbacks to a base date and the various formulas for setting and adjusting rents. They are not treated in this article. For a helpful discussion of these issues, see generally M. LETT, *RENT CONTROL* (1976); R. FRANKEN & C. ASHMUN, *RENT CONTROL: AN INTERIM REPORT TO THE ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEV.*, 18-25 (Ca., Sept. 1975), *URBAN PLANNING AID, LESS RENT, MORE CONTROL* 57-58 (Boston, Mass. 1973).

⁷⁰E.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Dribin v. Superior Court*, 37 Cal. 2d 345, 351, 231 P.2d 809, 813 (1951).

⁷¹*Commonwealth v. Higgins*, 277 Mass. 191, 192, 178 N.E. 536, 537 (1931).

tain the burden of proof,⁷² and courts must resolve any doubts in favor of the validity of the measure.⁷³ This presumption is a foundation that runs through all judicial analysis of rent control legislation.

2. Facial Invalidity

Courts usually find that rent controls are invalid on their face when rents are set so low that a property owner is forced to operate at a loss.⁷⁴ When rent rates or formulas for setting rents are included in the challenged legislation, courts can presumably determine from the face of the legislation whether these rents are confiscatory. The California Supreme Court appears to be the first court to have ever decided that the procedure of setting rents, and not the rental rates themselves, could prove inherently and necessarily confiscatory.⁷⁵

The California Supreme Court accepted as fact that there were at least 16,000 rental units in Berkeley.⁷⁶ The court found that the procedures⁷⁷ set out by the initiative required the five member Rent Control Board to hear each adjustment petition at a separate, full scale hearing. The court judged that this unit-by-unit adjustment process necessarily and inevitably would result in delays of such length as to confiscate landlords' property.⁷⁸

The court's decision was based on two conclusions: (1) that con-

⁷²A challenger bears "the heavy burden of making a convincing showing that it [the legislation] is invalid because it is unjust and unreasonable in its consequences." *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). See generally Comment, *Rebuttable Criminal and Civil Presumptions: California's Statutory Dichotomy*, 9 U.C. DAVIS L. REV. 647 (1976).

⁷³*E.g.*, *United States v. Harriss*, 347 U.S. 612, 618 (1954); *Rainey v. Michel*, 6 Cal. 2d 259, 272, 57 P.2d 932, 938 (1936).

⁷⁴Examples of facial invalidity of rent controls and other analogous economic regulations are set forth at note 87 *infra*.

⁷⁵The case cited by the California Supreme Court in *Birkenfeld* to support holding the rent adjustment procedures confiscatory and unconstitutional, *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587 (1926), involved unreasonable long delays in adjusting upwards telephone rates that had been determined confiscatory. The delays were not procedural, but rather resulted from the inattention or negligence of the regulatory agency with rate adjustments. Thus, the procedures of setting rates did not result in unreasonable delays or confiscation. The rates themselves were confiscatory and the regulatory agency refused to adjust them over a period of several years.

⁷⁶*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 167-70, 550 P.2d 1001, 1030, 130 Cal. Rptr. 465, 494 (1976).

⁷⁷The procedures held confiscatory in the Berkeley charter amendment included: (1) that petitions for rent adjustments must be filed and consideration of the petitions made at an adjustment hearing (§ 6a); (2) that the public hearing record of adjustment hearings must include the full evidentiary record of the proceedings (§ 6f); (3) that the Rent Control Board shall make all final decisions regarding rent adjustments (§ 6a); and (4) that the Board may consolidate into a single hearing petitions from tenants in the same building if they agree to such action in writing (§ 6h).

⁷⁸*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 169, 550 P.2d 1001, 1030, 130 Cal. Rptr. 465, 494 (1976).

solidation of rent adjustment petitions is disallowed by the charter amendment except in the case of willing tenants in the same building; and (2) that the delays in the Board's hearings procedures are inevitable and inherent. Both of these conclusions are subject to challenge. If either conclusion is unsound, confiscatory delays would not result, and the rent control measure should be held constitutional.

The defendants argued in *Birkenfeld* that there was no prohibition against consolidation of petitions into a single hearing.⁷⁹ The court disagreed, stating that "the requirement of written consent of tenants in the same building (to consolidate hearings) evinces a policy of prohibiting the Board from consolidating petitions that are *less* related in that they pertain to separate buildings."⁸⁰ The court admitted that there was no statutory prohibition against consolidation, but based its finding on an interpretation of section 6h of the charter amendment. This interpretation does not seem consistent with the court's duty to give the measure every reasonable interpretation to favor validity. The disputed words in section 6h could reasonably evince a legislative intent to require a signed agreement for consolidation of petitions only in one situation, when tenants reside in the same building. In other situations, the act could reasonably be read to allow consolidation without tenants' assent at the Board's discretion. Had the Court viewed consolidation of petitions as allowable under the charter amendment, presumably the alleged delays and attendant unconstitutionality would have disappeared.

Even if it were conceded, however, that consolidation of petitions was disallowed by the charter amendment, the result is not necessarily inherently confiscatory. Routine and ordinary administrative procedures available to the Board could have greatly speeded up adjustment decision-making. While the court was correct in stating that only the Board itself can hold "adjustment hearings," it does not follow that the Board could not use hearing officers, standardized criteria for making adjustments, and a rent control adjustment formula which would define for both landlords and tenants when they could and could not obtain an adjustment. In fact, the Rent Control Board was in the process of establishing these very administrative procedures when the trial court halted its operations.⁸¹

In the proposed procedures, all landlords were required to register their rental units, base rents, and services provided with the Board.⁸² With this information, the vast majority of rent adjustments could have been predetermined in advance of "adjustment hearings" by

⁷⁹*Id.* at 170 n.33, 550 P.2d 1001, 1031 n.33, 130 Cal. Rptr. 465, 495 n.33.

⁸⁰*Id.* (emphasis in original).

⁸¹*Id.* at 172-73 n.36, 550 P.2d 1001, 1032-33 n.36, 130 Cal. Rptr. 465, 496-97 n.36.

⁸²CHARTER OF THE CITY OF BERKELEY, CA., art. 17, § 4b (1972).

simply using the base rents, housing services, and other data in the standardized formulas and criteria. Hearing officers could have examined additional mitigating or extenuating circumstances as needed. The Board would have reviewed and officially passed on each adjustment. The vast majority of the Board's reviews would have been merely perfunctory.

The California Supreme Court had received a declaration by the Berkeley Rent Control Board's Administrative Officer stating that the Board planned "[s]tandardized formulas and procedures . . . virtually automatic decisions in cases . . . [and that] hearings would be held by hearing officers with final decisions made by the Board."⁸³ In a salute to legalism, the court replied that these plans "were beyond the Board's powers . . . hearings could not be held by 'hearing officers' but only by the Board itself."⁸⁴ While only the Board could conduct the official "adjustment hearings," the use of hearing officers for preliminary hearings, investigations, recommendations, etc. is ordinary and routine administrative procedure in rent control.⁸⁵ The charter amendment does not prohibit their use. The Supreme Court appears to lack a factual or legal basis for denying the use of such routine procedures. Despite the court's duty to favor validity by every reasonable interpretation, the court appears to have favored invalidity by an untenable interpretation.

In summary, delays were not a necessary part of the Berkeley charter amendment if the adjustment petitions could have been consolidated into single hearings. But even if petitions could not have been consolidated, the use of ordinary, routine administrative procedures such as preliminary hearings, by hearing officers, and rent formulas would likely have reduced delays to reasonable levels. With these lengthy delays eliminated, rent controls would not be confiscatory.

3. Postponed Judicial Inquiry

If a rent control statute is not yet operational, challenges to its validity are often countered with the argument that it would be premature to render any decision until the courts can see how it actually operates. The *Birkenfeld* court agreed with the U.S. Supreme Court that, "[i]t is true that whether a regulation of prices is reasonable or confiscatory depends ultimately on the result reached."⁸⁶ The Cali-

⁸³*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 172-73 n.36, 550 P.2d 1001, 1032-33 n.36, 130 Cal. Rptr. 465, 496-97 n.36 (1976).

⁸⁴*Id.*

⁸⁵*E.g.*, H. SELESNICK, RENT CONTROL 53-54 (1976), describes some of these procedures in Massachusetts municipalities.

⁸⁶*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 165, 550 P.2d 1001, 1027,

ifornia Supreme Court, however, found confiscatory delays inevitable and inherent on the face of the charter amendment. Hence, it declined the defendants' invitation to "wait and see" whether such delays were in fact inescapable results of the rent control scheme.

If the courts must resolve all doubts in favor of the validity of legislative enactments, *a fortiori*, they should do so when the legislation has not even been implemented or tested.⁸⁷ The Berkeley rent law did not contain a rent control formula at all, much less one so "drastic" as to constitute an ordinance that could be characterized as confiscatory in the abstract.⁸⁸ There were no unreasonably long delays in rental adjustments.⁸⁹ Neither the plaintiffs nor the court even attempted a careful, mathematical analysis of the time frames and anticipated delays the charter amendment would create. Further, the plaintiffs never carried their burden of proof⁹⁰ by any detailed showing that the five Board members and their supporting staff could not adjust rents within a non-confiscatory time period. Moreover, the court record included a study based on the Massachusetts rent control procedures which indicated that rental adjustments would be acted on within two to three months.⁹¹ The Berkeley measure was modeled after that law, though the California Supreme Court contended the procedures differed significantly.⁹² If the court had been willing to await implementation of rent control procedures, an accurate judicial determination of the law's results could have been made.

130 Cal. Rptr. 465, 491. *See also* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

⁸⁷Procedural delays so long as to be confiscatory are only speculative with a non-functioning enactment; they would be realities or fictions with a fully operational law. The New Jersey Supreme Court recently wrote in *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1, 16 (1975), that while it is possible to write economic regulation legislation that is facially unconstitutional and confiscatory, only rare and "drastic" ordinances actually are. Examples of ordinances that courts have held too "drastic" can be found in: *Mora v. Mejias*, 223 F.2d 814 (1st Cir. 1955) (rice prices so low that all industry members would have to operate at a loss); *Kress, Dunlop, & Lane, Ltd. v. Downing*, 193 F. Supp. 874 (D.V.I. 1961) (rent control ordinance operated for fourteen years without any provision for rent increases); *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 768-69 (1974) (a rent control formula written into an ordinance that allegedly precluded a fair rate of return). Even in the latter example, three judges argued, "It is hardly judicial to conclude blanketly that confiscation will ensue as to all rental property in advance of a conclusive evidentiary demonstration to that effect." *Id.* at 772-73 (Ervin, J. concurring and dissenting).

⁸⁸*See generally* cases cited in note 87 *supra*.

⁸⁹*Kress, Dunlop & Lane, Ltd., v. Downing*, 193 F. Supp. 874 (D.V.I. 1961).

⁹⁰*See* notes 72 and 73 *supra*.

⁹¹*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 172-73 n.36, 550 P.2d 1001, 1032-33 n.36, 130 Cal. Rptr. 465, 496-97 n.36.

⁹²*Id.* The Massachusetts law provided for both individual adjustment hearings and general adjustments by percentage. MASS. GEN. LAWS ANN., ch. 842 §§8a-8b (West 1970). The Berkeley law was silent on the issue of general rental adjustments.

4. Severability

The *Birkenfeld* decision held that the charter amendment was procedurally confiscatory. The court dealt the death blow to the measure by determining it could not, or would not, sever the constitutionally defective adjustment procedure despite the existence of a severability clause.⁹³ The court cited authority for the proposition that the defect could not be resolved by removing portions of the law, but only by adding provisions to it, which was beyond its power.⁹⁴ This position is subject to criticism on several grounds. The assertion that here the court was required to exceed its authority and *add* provisions to validate the law appears patently false. The court only needed to resolve the disputed interpretation of the consolidation of adjustment hearing provision to allow consolidation of petitions. No language needed to be added, severed, or altered. In the alternative, the court could merely have exercised its authority to sever a few words from that section to make its meaning abundantly clear. The section thus changed would have read: "6h. Consolidation. The Board may consolidate petitions relating to rent controlled units in the same building with the written consent of a majority of the tenants and all such petitions may be considered at a single hearing."⁹⁵

On determining whether to sever portions of the rent control law, the California Supreme Court cited as controlling authority a case which included this standard: "The test for the severability of an invalid part of a statute from the remainder is whether the invalid part can be severed without destroying the statutory scheme, or the utility of the remaining provisions."⁹⁶ In *Birkenfeld*, the court admitted that the individual, unit-by-unit adjustment procedure was not necessary nor essential to the legislative scheme or purpose.⁹⁷ Moreover, the existence of a severability clause in the law demonstrated a legislative intent to allow excision of invalid portions. The

⁹³CHARTER OF THE CITY OF BERKELEY, CA., art. 17, § 12 (1972). A severability clause allows the courts to excise invalid parts of legislation while retaining valid portions.

⁹⁴*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 173, 550 P.2d 1001, 1033, 130 Cal. Rptr. 465, 497, citing *Dillon v. Municipal Court* 4 Cal. 3d 860, 871, 484 P.2d 945, 952-53, 94 Cal. Rptr. 777, 784-85 (1971).

⁹⁵The court was willing to excise the term "emergency" from the very statement of purpose of the charter amendment, and the emergency issue was probably more dramatic and determinative to those who voted on the rent control measure than whether rent adjustment hearings would be consolidated. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 164 n.29, 550 P.2d 1001, 1026 n.29, 130 Cal. Rptr. 465, 490 n.29 (1976).

⁹⁶*Dillon v. Municipal Court*, 4 Cal. 3d 860, 872, 484 P.2d 945, 953, 94 Cal. Rptr. 777, 785 (1971).

⁹⁷"A different question would be presented if the delays inherent in the charter amendment's requirement that rents be adjusted only on the basis of unit-by-unit hearings before a single tribunal were essential to its purpose." *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 173, 550 P.2d 1001, 1033, 130 Cal. Rptr. 465, 497 (1976).

severed, non-essential portion would have left intact a workable, constitutional rent control law. Nevertheless, in applying the severability standard, the court appears to have overlooked the possibility of severing words from the above section. If they were unwilling to excise words within a section, excising the entire section would accomplish the same result—allowing for consolidation of petitions at adjustment hearings, and eliminating any confiscatory delays in hearing rent adjustments.

Since the spectre of confiscation is constantly a legitimate judicial concern, a clear statement of legislative purpose not to confiscate can help alleviate the possibilities of finding a confiscatory rent control scheme. It seems wise to include in rent control legislation a provision assuring landlords a fair net operating income, such as was contained in the lapsed Massachusetts law.⁹⁸ While such provisions are not legally required,⁹⁹ nor are they guarantees of validity, they are helpful in establishing a legislative intent not to confiscate. Establishing this intent should render courts more benign in construing the statute to be non-confiscatory.

The *Birkenfeld* case presents an instructive example of judicial treatment of rent control at various court levels. While the trial court in the Berkeley rent control case based its decision on due process and other considerations,¹⁰⁰ the judge's dislike of the public policy of rent control was not concealed. The entire opinion is replete with negative comments about rent control, referring to it as a "Draconian measure,"¹⁰¹ a "palliative"¹⁰² and "a measure unable to care for the poor while tightening an already tight (housing) market."¹⁰³ The California court of appeal also exhibited a similar if somewhat less blatant dislike of rent control as public policy.¹⁰⁴ The California

⁹⁸Mass. Rent Control Enabling Law, MASS. GEN. LAWS ANN., ch. 842, § 7 (West 1970).

⁹⁹The California Supreme Court was willing to infer in the rent law a standard of permitting landlords to charge a just and reasonable rent. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 168, 550 P.2d 1001, 1029, 130 Cal. Rptr. 465, 493 (1976). *Accord*, *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1, 16 (1975).

¹⁰⁰The court also held that no housing emergency existed, no date for termination of controls was set, and the eviction sections were preempted by state law. *Birkenfeld v. City of Berkeley*, No. 438971 (Alameda County, Cal., Super. Ct., filed June 22, 1973) *aff'd on other grounds*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

¹⁰¹*Id.* at 16. BLACK'S LAW DICTIONARY 582 (Revised 4th ed. 1968) defines Draconian laws as "a code of laws prepared by Draco, the celebrated lawgiver of Athens. These laws were exceedingly severe and the term is now sometimes applied to any laws of unusual harshness."

¹⁰²*Birkenfeld v. City of Berkeley*, (Alameda Co., Cal., Super. Ct., filed June 22, 1973), *aff'd on other grounds*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976). No. 428971, at 14.

¹⁰³*Id.*

¹⁰⁴For example, the court stated without support that "rent controls tend to exacerbate a shortage of rental housing . . . and adversely affect not only the

Supreme Court abstained from policy judgments and noted “[O]ur sole concern is whether the measure reasonably related to a legitimate government purpose and we must not confuse reasonableness in this context with wisdom.”¹⁰⁵ The court went on to invalidate the measure on an issue not even discussed in the lower courts. As has been demonstrated, the California Supreme Court’s invalidation of the measure was based on some questionable findings regarding the rent control law’s provisions. While the court nowhere expressly disapproves of the policy of rent control, it seemed to strain and stretch in order to invalidate the measure. From such decisions emerges the irresistible yet unprovable inference that the higher and more sophisticated the court, the more veiled and hidden are the extra-legal policy considerations influencing rent control decisions.

Whatever the biases of courts, increased litigation results in a clearer definition and narrowing of the legal requisites for valid rent control. This is true whether courts uphold or invalidate rent controls, as the *Birkenfeld* case illustrates. The doom of Berkeley’s rent controls based on due process confiscation difficulties is not the whole view. Ironically, the California Supreme Court in *Birkenfeld* joined the “liberal” minority view regarding rent controls spearheaded by the New Jersey Supreme Court. California does not require a rent control emergency, nor state enabling legislation. The court was willing to sever selected portions from the rent control law and upheld the validity of some eviction controls. Despite the court’s willingness to divest rent controls of a myriad of legal burdens, it nonetheless found the measure invalid. In denying Berkeley’s rent control in legal fact, the court’s impact on rent control legal theory should prove significant.

II. LIMITATIONS IMPOSED BY THE STATE

Unlike the federal constitutional limitations discussed above, the final interpreter of a state imposed limitation is generally the highest court of the state involved. Despite the fact that state courts are free to reach their own conclusions as to the application of their state law, decisions from sister states may be used as persuasive authority in many cases. Additionally, an analysis of the various state court decisions in some areas suggests the existence of underlying, common principles which individual state courts may find difficult to ignore. If proponents of rent controls apply these common principles in the

owners of regulated property but also the community at large.” *Birkenfeld v. City of Berkeley*, 49 Cal. App. 3d 464, 122 Cal. Rptr. 891, 899 (1st Dist. 1975).

¹⁰⁵*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 159, 550 P.2d 1001, 1023, 130 Cal. Rptr. 465, 487 (1976), quoting *Wilke and Holzheiser, Inc. v. Department of Alcoholic Bev. Control*, 65 Cal. 2d 349, 359, 420 P.2d 735, 742, 55 Cal. Rptr. 23, 30 (1964).

drafting of constitutional and legislative provisions, the discretion that courts have traditionally employed to invalidate rent controls will be limited further.

A. *State Delegation of Police Power*

Opponents of rent control have successfully attacked local measures on the ground that the state's delegation of police power is insufficient to allow such local enactments.¹⁰⁶ Under the common law rule of municipal corporations, the state possesses all police power relating to any municipal affair, subject only to the federal or state constitutions.¹⁰⁷ Thus, before a locality can enact rent control, the state must sufficiently delegate its police power to the municipality.

Analysis of sister state decisions dealing with local rent control indicates that three factors play a role in determining whether a court will find a sufficient delegation of police power: (1) the source of the police power; (2) the language used in the delegation of police power; and (3) the judicial attitude towards rent control. The sources of the police power and the language used in the delegation are legal factors and courts must consider legal principles in their analyses of them. The judicial attitude towards rent control is a non-legal factor and should not influence a court's decision on the validity of a rent control enactment. As legal principles develop with regard to the source of the police power and the language used in the delegation, the impact of these two factors will increase and the results in any given case will thus be more predictable. In contrast, the development of these legal principles will lessen the impact of the courts' attitude towards the measure.

1. The Source of the Police Power

Four sources of police power exist as possible bases for valid local rent control: the city charter, constitutional home rule,¹⁰⁸ legislative home rule, and specific enabling legislation.

a. *The City Charter*

Charters may constitute a source of police power in cities which have adopted them. A city charter may be adopted in one of two

¹⁰⁶See *Old Colony Gardens, Inc. v. City of Stamford*, 147 Conn. 60, 156 A.2d 515 (1959); *City of Miami Beach v. Fleetwood Hotel, Inc.*, 621 So. 2d 801 (Fla. 1972); *Ambassador East, Inc. v. City of Chicago*, 399 Ill. 359, 77 N.E. 2d 803 (1948); *Tietjens v. City of St. Louis*, 222 S.W. 2d 70 (Mo. 1949).

¹⁰⁷1 J. DILLON, MUNICIPAL CORPORATIONS, § 237 (5th ed. 1911).

¹⁰⁸Home rule might be defined as a system whereby a municipality is empowered to determine its own course of action with regard to certain activities; usually activities which are purely municipal in character. In states which have adopted home rule, an understanding of the doctrine is essential to any correct finding with regard to the extent of a municipality's powers. The underlying rule that the state and not the municipality possesses all police power is well

ways—it may be created by state statute and passed upon by the legislature or it may be created and adopted by the voters of the municipality pursuant to some delegation of the power by the state to do so.¹⁰⁹

Valid provisions in city charters are considered laws of the state and have the force and effect of any law directly enacted by the legislature.¹¹⁰ When the state legislature adopts a charter and expressly incorporates it as part of the general law, there is no problem in sustaining the validity of the charter provisions. Provisions specifically allowing rent control, however, are rarely found in city charters expressly adopted by the legislature. Most cities which have amended their charters to include the power to enact rent control have done so pursuant to a general delegation of police power. In these cities, the validity of the charter provision allowing rent control depends upon whether the legislature granted sufficient police power in its general delegation. Many courts have considered charters in their analyses without realizing that the effect of a charter may vary depending upon where the general delegation of power is found.¹¹¹ This refusal to consider the nature of the general delegation as an essential element of charter interpretation has resulted in the invalidation of some rent control measures.¹¹²

b. Constitutional Home Rule

A constitutional home rule provision usually delegates certain police powers to a municipality without reserve. Typically, if a purely local activity is regulated pursuant to a constitutional home rule provision, the municipality's regulations will control, even over conflict-

established. *See id.* at 448-49. The concept of home rule was developed to free the municipality from such complete state control and to provide the state legislature with more time to spend on matters of statewide concern.

¹⁰⁹*See generally* 2 E. MCQUILLAN, MUNICIPAL CORPORATIONS §§ 9.07-9.08 (3d ed. 1966). The relevant California Constitutional provisions are Art. XI, §§ 2-7.

¹¹⁰2 E. MCQUILLAN, *supra* note 109, at § 9.07.

¹¹¹*See* text accompanying notes 113-126 *infra*.

¹¹²*See* text accompanying notes 115 and 116 *infra*. In *Tietjens v. City of St. Louis*, 222 S.W. 2d 70 (1944), the Supreme Court of Missouri found no specific state delegation of the power to enact rent control. Despite the existence of a constitutional home rule provision, the court looked to the charter as the source of local police power and found no language specific enough to permit rent control. In response to the Missouri Supreme Court's restrictive interpretation of home rule charters, a home rule amendment was adopted in 1971. MO. CONST. art. VI § 19(a). Proponents hoped that this amendment would force the courts to construe municipal home rule charters as limitations on authority only. With the broad language of the constitutional home rule provision as the source of local power, it was hoped that home rule cities would obtain greater autonomy with respect to municipal affairs. *See generally* Euston and Johnson, *The Status of Municipal Home Rule Charters in Missouri: Analysis of the Effect of the 1971 Constitutional Amendment*, 30 JOURNAL OF THE MISSOURI BAR 280 (1974). *See also* *City of Miami Beach v. Fleetwood Hotel*,

ing general state legislation.¹¹³ When the activity is not purely local, a municipality in a home rule state still may regulate the activity, but if there is any conflict with state legislation, the state legislation will prevail. Rent control falls within this second category.¹¹⁴ Thus, in all cases, local rent control legislation must be consistent with general state legislation. The issue, then, is whether this constitutional delegation of police power includes the power to regulate rents in the absence of conflicting state legislation.

When constitutional home rule is the source of local police power, it is essential that the home rule provision be self-executing if an immediate delegation of power is intended. A self-executing constitutional delegation¹¹⁵ is one which enables municipalities to act pursuant to that delegation without the need for any other authority. In self-executing constitutional home rule states, the source of the

Inc. 261 So. 2d 801 (Fla. 1972).

Legislative home rule provisions should also be considered in the interpretation of city charters. *See* text accompanying notes 119-22 *infra*.

¹¹³Some constitutional provisions allow the state legislature to retain its supremacy in certain purely local areas and such exceptions are enforced. Others require that city charters be entirely consistent with state law. *See generally* 1 C. ANTEAU, MUNICIPAL CORPORATION LAW §§ 3.17-3.18 (1975). 2 E. MCQUILLAN, *supra* note 109, at § 9.08(b). California is a constitutional home rule state but Art. XI, § 7 of the California Constitution seems to require consistency. In *Bishop v. City of San Jose*, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1959), however, the court held that a city which adopts home rule amendments is exempt from the "conflict with general laws" exception insofar as the local enactment deals with purely municipal affairs. *Id.* at 61, 460 P.2d at 140, 81 Cal. Rptr. at 468. When there is no consistency requirement for city regulation of purely local affairs and doubt exists as to whether an activity is purely local, courts have favored limiting the local power. 1 C. ANTEAU, *supra* at § 3.59. *But see* text accompanying note 135 *infra*.

¹¹⁴Most contemporary courts accept without question that rent regulation is not a purely local activity. In *Marshal House, Inc. v. Rent Review and Grievance Bd.*, 260 N.E. 2d 200 (Mass. 1970), the Supreme Judicial Court provided its rationale for this conclusion:

Regulation of rents in one community may have impact elsewhere on land use, new housing construction, the mortgage market, conveyancing practices, the adequacy and use of recording systems, and other similar matters. Various considerations might reasonably lead the Legislature, if it deals with rent control, (a) to impose general restrictions and conditions on local rent control, and (b) to take into account circumstances in more than one community in determining the existence of an emergency permitting legislation and the form of such legislation.

Id. at 107 n.6.

See also *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 141, 550 P.2d 1001, 1010, 130 Cal. Rptr. 465, 474 (1976). Thus, the presence of a consistency requirement (*see* note 113 *supra*) is not likely to affect whether the power to enact rent control exists.

¹¹⁵A constitutional provision may be held self-executing by its terms. *Cook v. City of Delta*, 64 P.2d 1257, 1260 (Colo. 1937). Most states with constitutional home rule provisions have in fact found them to be self-executing. 1 C. ANTEAU, *supra* note 113, at § 3.01. An express declaration that the provision is self-executing would be more reliable, however.

municipalities' police power is the state constitution, not the city charter. Since the charter is not the source of local police power, it need not specifically authorize any activity if sufficient police power is delegated by the constitutional grant. Generally, city charters enacted under the authority of a self-executing constitutional home rule provision should be examined only for limitations upon the exercise of power, since the true source of power is the constitutional provision.¹¹⁶

Under a non-self-executing constitutional delegation, however, the municipality must receive a further delegation of power from the state legislature.¹¹⁷ A non-self-executing constitutional provision alone will not serve as a source of local police power. Thus, by interpreting a constitutional home rule provision as being non-self-executing, a court may deny a municipality the power to enact rent control pursuant to that provision.¹¹⁸

¹¹⁶ See *id.* at §§ 3.06-3.07.

¹¹⁷ Mandatory provisions require the state legislature to provide for the delegation whereas permissive provisions allow the state to grant the delegation within its discretion. When the constitutional provision is non-self-executing, and especially if it is permissive, one might question its necessity. Since the state legislature must act before the power can be exercised by the municipality anyway, it would seem that the constitutional provision is totally ineffective in that it has no legal impact on the city's police power. Even permissive constitutional provisions, however, are significant in at least three ways. First, the constitutional provisions as a statement of policy may encourage the legislature to delegate some police power to localities. Although any legislative delegation could be revoked in this situation, the constitutional provision supporting a broad grant of power to municipalities would not be subject to such easy removal. Second, the existence of the constitutional provision may save the state's legislation from constitutional attack. Absent a constitutional home rule provision, legislative home rule has been held unconstitutional as an unlawful delegation of legislative authority. *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E. 2d 723 (1953); *Mooney v. Cohen*, 272 N.Y. 33, 4 N.E. 2d 73 (1936). Third, a constitutional provision may aid in the interpretation of a legislative delegation. For constitutional attacks on home rule on the basis that it is a departure from a republican form of government, see 2 E. MCQUILLAN, *supra* note 109, at § 9.08(a). Delays and failures to act under both the mandatory and permissive provisions have led to a preference for self-executing constitutional provisions when a delegation of power is desired.

¹¹⁸ *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972) provides an example. The 1885 FLA. CONST. art. VIII, § 8 provided as follows:

The legislature shall have power to establish, and to abolish, municipalities to provide for their government . . .

The 1968 Florida Constitution adopted home rule in article VIII, § 2(b):

(b) POWERS: Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government functions and render municipal services and may exercise any power for municipal purposes except as otherwise provided by law.

The change was intended to give municipalities the power to enact municipal legislation unless otherwise provided by state law. See dissent of Justice Ervin, *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 807 (Fla. 1972).

Without using precise terminology or explaining its rationale, the Supreme Court of Florida in *Fleetwood* read this constitutional home rule provision as being non-self-executing. The opinion made clear that the constitutional provi-

c. Legislative Home Rule

Although a self-executing constitutional provision is the preferred vehicle for delegating home rule police powers to municipalities,¹¹⁹ a legislative home rule provision can provide a similar result. One important distinction between these two sources of police power is that there is generally much more legislative control over the contents of city charters in legislative home rule cities than in constitutional home rule cities.¹²⁰ This should result in a more liberal interpretation of general clauses found in the legislation or charter.¹²¹ Because of the unclear status of the law in this area and the common judicial hostility towards rent controls, however, legislative home rule as a source of police power will be consistently effective only when the legislative language clearly establishes the extent of the power. If the legislative delegation is not specific, a court is likely to deny the city the power to enact rent control.¹²²

d. Specific Enabling Legislation

The police power to enact local rent control is most clearly delegated when the state legislature passes specific enabling legislation. When specific enabling legislation is the source of local police power, the legislature specifically provides that certain or all municipalities have the power to enact rent control. Such express grants are difficult to enact and subject the cities directly to the whim of the legislature. Still, this type of express grant is the safest delegation of police power for proponents of rent control.¹²³ In view of its effectiveness, it is not surprising that several states have recently enacted specific

sion would not permit the enactment of rent control without specific authorization from the state. One commentator preferred to describe this—a non-self-executing provision that enables the legislature to enact home rule—as a hybrid form of home rule. Herman, *City of Miami Beach May Enact Rent Control Ordinance Under Municipal Home Rule Powers Act*, 3 FLA. ST. U. L. REV. 137, 139-40 n.19 (1975). *But see* text accompanying note 141 *infra*.

The Florida Legislature responded to this decision by passing an act which basically repeats the language of the 1968 constitutional home rule provision (legislation quoted in text at note 131 *infra*). In this new context, the Florida Supreme Court read the language as a broad grant of power to municipalities and held that the city of Miami Beach does have the power to enact rent control. *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 766 (Fla. 1974).

¹¹⁹See note 117 *supra*. Even though the legislature may pre-empt areas which are of both local and state-wide concern, a constitutional amendment establishes a policy in favor of allowing local measures when possible and, arguably, precludes state legislation which merely prohibits regulation in an area. See *Ex Parte Daniels*, 183 Cal. 636, 641, 192 P.442, 445 (1920) and text accompanying notes 164-169 *infra*.

¹²⁰1 C. ANTIEAU, *supra* note 113, at § 3.37.

¹²¹*Id.* at 3-37, 3-38.

¹²²See *Ambassador East, Inc. v. City of Chicago*, 399 Ill. 359, 77 N.E. 2d 803 (1948). See text accompanying notes 134-143 *infra*.

¹²³Specific enabling legislation is a difficult target for courts and, in fact, no court has as yet invalidated a rent control provision on the basis of insufficient

enabling legislation for local rent control.¹²⁴

If a state constitutional or legislative provision has delegated general police powers sufficient to allow local rent control, the enactment of specific enabling legislation merely confers an additional basis for the exercise of power. Thus, specific enabling legislation will pre-empt the exercise of home rule powers only when the local enactment of rent control pursuant to a home rule provision would be in conflict with state law.¹²⁵ Additionally, once repealed, specific enabling legislation should have no impact on whether other sources of police power are sufficient to allow the local enactment of rent control. Thus, in Maryland, the fact that the legislature enacted specific legislation and later repealed it did not affect the power of municipalities to enact rent control under their own home rule powers.¹²⁶

In summary, to determine whether a locality has sufficient police power to enact rent control, the first step should always be to note the source of the police power. A sufficient delegation of power will surely be found if the measure is enacted pursuant to specific state enabling legislation or a specific charter provision passed upon by the legislature. The more common and troublesome situation, however, occurs when a municipality attempts to enact rent control legislation pursuant to a broad grant of police power. In these cases, the language used in the delegation may be critical to the court's determination regarding the extent of municipal power.

2. The Language Used in the Delegation of Police Power

An analysis of how state courts have interpreted the language used in various delegations of power is helpful in providing some guidelines as to when a delegation is likely to include the power to enact

state delegation when such legislation has been used. See text accompanying note 124 *infra*.

¹²⁴In *Marshal House, Inc. v. Rent Review & Grievance Bd.*, 260 N.E. 2d 200 (Mass. 1970), the Supreme Judicial Court of Massachusetts determined that the City of Brookline could not enact rent control under powers given by the state constitution. Thereafter, the state passed legislation enabling municipalities to provide for rent control. 1970 Mass. Acts ch. 842 was entitled, "An Act Enabling Certain Cities and Towns to Control Rents and Evictions" and was to apply in "any city and in any town with a population of fifty thousand or over." Under its terms, a city or town adopting the Act could in like manner revoke it. 1970 Mass. Acts ch. 842, § 2. 1970 Mass. Acts ch. 843 was entitled "An Act to Provide For the Establishment and Administration of Rent Regulation and the Control of Evictions in the Town of Brookline." Four other states presently have specific enabling legislation. See ALASKA STAT. § 34.06.010 (1974), CONN. GEN. STAT. ANN. § 7-148 (West 1969), ME. REV. STAT. tit. 30, ch. 2114, § 5373 (1973) and N.Y. UNCONSOL. LAWS § 8602 et seq. (McKinney 1962).

¹²⁵See text accompanying note 114 *supra* and notes 157-161 *infra*.

¹²⁶*Heubeck v. City of Baltimore*, 205 Md. 203, 107 A.2d 99 (1954). *But see Old Colony Gardens, Inc. v. City of Stamford*, 147 Conn. 60, 156 A.2d 515 (1959).

rent control.¹²⁷ It will also aid legislators and lobbyists in drafting home rule provisions which will accomplish what they desire.

All broad delegations of power seem to fit into one of two categories: definitive grants or ambiguous grants. A definitive grant of power is one which will force a court to a predictable conclusion. Pennsylvania's Home Rule Act of 1949 provides a good example. It provides that:

The charter of any city . . . may provide . . . for the exercise of any and *all powers relating to its municipal functions, . . . , to the full extent that the General Assembly may legislate in reference thereto . . . and with like effect*, and the city may enact ordinances, rules and regulations necessary and proper for carrying into execution the foregoing powers and all other powers vested in the city by the charter it adopts or by this or any other law.¹²⁸

The Supreme Court of Pennsylvania held that under this language, the city of Philadelphia, by adopting its charter, acquired police power equivalent to the state's in areas relating to municipal affairs.¹²⁹ Thus, rent control legislation was deemed a legitimate exercise of this grant of police power.

The state of Florida¹³⁰ adopted what might be classified as a definitive grant of power when its legislature enacted the following legislation:

- (1) As provided in § 2(b), Art. VIII of the state constitution, municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except when expressly prohibited by law.
- (2) "Municipal purpose" means *any activity which may be exercised by the state or its political subdivisions*.¹³¹

At least in the context of a legislative act, the Supreme Court of Florida held that this was a sufficiently broad grant of power to allow the City of Miami Beach to enact rent control.¹³² The same language in a state constitution, however, may be too ambiguous to allow rent control because a court hostile to the legislative scheme might treat the clause as non-self-executing.¹³³

Most grants of power reviewed in rent control cases fit into the category of ambiguous grants. Ambiguous should be considered a

¹²⁷Courts in home rule states are becoming increasingly receptive to decisions from other home rule jurisdictions. See 1 C. ANTIEAU, *supra* note 113, at § 3.00.

¹²⁸First Class City Home Rule Act of 1949, 53 PA. CONS. STAT. § 3421.17 (PA. STAT. ANN. tit. 53, § 13131 (Purdon)) (emphasis added).

¹²⁹Warren v. City of Philadelphia, 382 Pa. 380, 115 A.2d 218 (1955).

¹³⁰Florida decisions provide some interesting examples of unique statutory and constitutional interpretation. See note 118 *supra*.

¹³¹Florida Municipal Home Rule Powers Act. FLA. STAT. § 166.021 (1973) (emphasis added).

¹³²City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 766 (Fla. 1974).

¹³³See text accompanying note 118 *supra*.

term of art in this context. Legislative language will be classified as ambiguous whenever it is not precise enough to force a court to a predictable result.

On their faces many of the provisions that fall within this category seem unambiguous and in support of the local power to enact rent control regulations. These provisions usually contain language purporting to give a municipality full police power, powers for municipal purposes, or the power to protect the public health, safety, and welfare. Charter provisions with such general welfare clauses alone are uniformly held an insufficient source of power to allow local rent control.¹³⁴ Perhaps the lack of specificity in the language results in uncertainty as to the extent of delegation intended. If uncertainty exists, most courts deny the municipality the power.¹³⁵ When similar general welfare clauses are found in the state constitution or legislation, however, the courts have gone both ways in deciding whether rent control is permissible.¹³⁶

¹³⁴The City Charter of Stamford contained a grant of power to *protect the public health, safety and welfare* and all powers incidental and necessary for the powers expressly given. In *Old Colony Gardens, Inc. v. City of Stamford*, 147 Conn. 60, 156 A.2d 515 (1959), the Supreme Court of Errors of Connecticut held that a broad delegation does not necessarily include the power to enact rent control and, relying on a theory of legislative intent, struck down the Stamford rent control ordinance.

The City Charter of St. Louis provided for powers to "license and regulate business" and "to do *all things expedient to the health and welfare of its citizens*" (emphasis added). The Supreme Court of Missouri held that the general welfare clause in the charter did not confer sufficient police power to allow St. Louis to enact rent control. *Tietjens v. City of St. Louis*, 222 S.W. 2d 70, 73 (Mo. 1949). See also *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 803 (Fla. 1972).

¹³⁵This has always been the case under the Dillon Rule, but when a home rule provision is in operation, perhaps the presumption should lean toward a contrary result. See 1 C. ANTIEAU, *supra* note 113, at § 3-21.

¹³⁶Courts have determined that the following grants include the power to enact rent control legislation:

- (a) A county or city may make and enforce *all local, police, sanitary and other ordinances and regulations* not in conflict with general law . . . [W]ith respect to municipal affairs (charters) shall supersede all laws inconsistent therewith (emphasis added).

CAL. CONST. art. XI, §§ 7 and 5. The California Supreme Court in *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 140, 550 P.2d 1001, 1009, 130 Cal. Rptr. 465, 473 (1976) classified this as a broad grant of police power sufficient to allow local enactment of rent control.

- (b) Every city shall have power to adopt and amend local laws . . . *relating to its property, affairs or government*. Every city shall also have the power to adopt and amend local laws . . . , and *whether or not such local laws relate to its property, affairs or government* in respect to the following subjects: . . . the government and regulation of the conduct of its inhabitants and *the protection of their property, safety and health* (emphasis added).

N.Y. CONST. art. IX, § 12. This language was held sufficient to allow rent control in *F.T.B. Corp. v. Goodman*, 300 N.Y. 140, 89 N.E. 2d 865 (1949).

- (c) "[City] . . . shall have *full power to enact local laws* of said City . . ." (emphasis added).

Massachusetts' delegation of power represents a unique sub-category of ambiguous grants. The initial language of the constitutional home rule provision resembles a definitive grant, but the definitive language is qualified by an ambiguous limitation.¹³⁷ Thus, the constitutional language would allow a court to decide either way on the issue of whether rent control is a properly delegated police power.¹³⁸

A hybrid grant of power might constitute another sub-category of ambiguous grants. Under this sub-category, the court relies on or looks to a secondary source in its decision-making process. The Supreme Court of New Jersey considered the validity of a local rent control measure enacted pursuant to a typical ambiguous grant of power.¹³⁹ The court considered a state constitutional provision

MD. CONST. art. XI A, § 3. This language was held to allow the enactment of a charter provision broad enough to encompass rent control in *Heubeck v. City of Baltimore*, 205 Md. 203, 107 A.2d 99 (1954).

The following grants of power have been held not to include the power to enact rent control:

- (a) Regarding health: "... all acts and make *all regulations necessary and expedient for promotion of health or suppression of disease.*" Regarding police powers: "... pass *all necessary police powers*" (emphasis added).

ILL. REV. STAT. ch. 24, §§ 23-81 and 23-105 (1947). Repealed. Laws 1961, May 29, Laws 1961, p. 576, § 1-9-8. The provisions were held not to be a source of independent police power. Consequently, Chicago did not have the power to enact rent control. *Ambassador East v. City of Chicago*, 399 Ill. 359, 77 N.E. 2d 803 (1948).

- (b) "[T]o enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise *any power for municipal purposes . . .*" (emphasis added).

FLA. CONST. art. VIII § 2(b).

"[T]o adopt . . . [provisions] necessary or expedient for *promoting or maintaining the general welfare, comfort, . . . health and convenience of said city of its inhabitants . . .*" (emphasis added).

CHARTER OF CITY OF MIAMI BEACH, FLA. § 6(X). The Florida Supreme Court held that the constitutional provision did not empower a city to enact rent control, nor did the general welfare clause in the city charter. *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972). See note 118 *supra*.

¹³⁷MASS. CONST. art. 81, §§ 6-7 provide:

Any . . . town may, by the adoption . . . of local . . . by-laws, exercise any power . . . which general court [legislature] has power to confer upon it.

Nothing [here] shall be deemed to grant any . . . town the power . . . to enact private or civil law governing civil relationships except as incident to an exercise of an independent municipal power; . . . (emphasis added).

¹³⁸In *Marshal House v. Rent & Review Grievance Bd.*, 260 N.E.2d 200 (Mass. 1970) the Supreme Judicial Court of Massachusetts found, with some difficulty, that Brookline's rent control enactment constituted a private or civil law governing civil relationships and was not incident to an exercise of an independent police power.

¹³⁹*Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973). N.J. STAT. ANN. § 40:48-2 provides:

Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws . . . as it may deem necessary and proper for the good of government, order and protection of

which required liberal construction in favor of the locality,¹⁴⁰ and held that sufficient police power had been delegated. This constitutional provision is not a grant of power per se but it may have been essential to the liberal interpretation of the statute adopted by the court.¹⁴¹

The preceding discussion illustrates that if local rent controls are enacted pursuant to a grant containing a general welfare clause, the ultimate result is unpredictable.¹⁴² The rent control cases show that regardless of how broadly the powers of the city are defined in terms of enumerated powers, the courts will be able to find the delegation insufficient. Therefore, if the framers intend to delegate police power sufficient to allow the local enactment of rent control, the delegation of power must be definitive. The key language for drafting a definitive grant of power which provides sufficient local police power to enact rent control is "to the full extent that the state legislature may legislate thereto."¹⁴³

The use of precise legislative language is especially significant in the area of delegation and legislators should draft grants of power accordingly. It is essential that courts not be allowed to make public policy decisions or errors in interpretation because of poorly drawn provisions.

persons and property, and for the *preservation of the public health, safety and welfare of the municipality and its inhabitants* and as may be necessary to carry into effect the powers and duties conferred . . . (emphasis added).

¹⁴⁰N.J. CONST. art. IV, § VII, para. 11 provides:

The provisions of this Constitution and of *any law concerning municipal corporations formed for local government or concerning counties shall be liberally construed in their favor* . . . [P]owers shall include . . . those of necessary or fair implication, or incidental to the powers expressly conferred, or essential thereto . . . (emphasis added).

¹⁴¹See note 118 *supra*. This New Jersey delegation more accurately exemplifies a hybrid form of grant than does the Florida delegation, discussed in text at notes 130-133 *supra*. Arguably, the New Jersey constitutional provision was necessary to the finding that the statute delegates broad powers. In the Florida situation, however, the broad delegation of police power would have been accorded by virtue of the legislation, even without the constitutional provision. The constitutional provision added nothing to the statutory grant of power. Indeed, the statutory language granting the power was identical to the Florida constitutional provision.

¹⁴²See text accompanying notes 134-141 *supra*. Justifying a local enactment of rent control under an ambiguous grant of power may prove a difficult task absent evidence of legislative intent. Although state court decisions in the aggregate provide few principles for interpreting ambiguous language, individual decisions from sister states provide persuasive authority for the interpretation of similar language. See note 127 *supra*. Language in delegations of police power should be construed in light of the source of the power. See text accompanying notes 108-126 *supra*.

¹⁴³Compare First Class City Home Rule Act of 1949, 53 PA. CONS. STAT. § 3421.17 (PA. STAT. ANN. tit. 53 § 13131 (Purdon)), cited in *Warren v. City of Philadelphia*, 382 Pa. 380, 115 A.2d 218 (1955).

3. The Judicial Attitude Towards Rent Control

Historically, the judicial attitude towards rent control has played a significant role in the invalidation of local measures. As noted, rent control has not enjoyed a favored position with the judiciary. It is conceded that some ambiguous grants of police power would support a conclusion that the power to enact rent control was not intended as part of the delegation.¹⁴⁴ The vast majority of rent control measures, however, are enacted pursuant to delegations which logically should compel a finding that there is sufficient local police power to support the local enactment. Yet some state courts continue to deny cities the power to enact rent control under such delegations. It is suggested here that state courts have capitalized on imprecise language to invalidate rent control measures for policy reasons.¹⁴⁵

The language adopted by the people of Florida in 1968 to replace a prior constitutional provision was intended to increase municipal power. On its face, the amendment empowered municipalities "to conduct municipal government, perform municipal functions and . . . exercise any power for municipal purposes."¹⁴⁶ The Florida court, however, decided that this language bestowed no new powers upon the municipalities and denied a city the power to control rent.¹⁴⁷ Later, the legislature passed an act virtually identical to the constitutional provision, indicating dissatisfaction with the judicial construction of the state constitution. Faced with the obvious legislative intent to allow municipalities to enact rent control,¹⁴⁸ the Florida Supreme Court finally agreed that municipalities have the power under the legislation.¹⁴⁹ It is noteworthy, however, that the court found another way to invalidate the rent control provision.¹⁵⁰

¹⁴⁴See note 114 *supra*. Since rent control is of both state and local concern, reasonable persons might disagree as to whether it constitutes an "exercise for a municipal purpose" (FLA. CONST. art VIII, § 2; FLA. STAT. § 166.021 (1973)); "a local law" (MD. CONST. art XIA, § 3); "a municipal function" (FLA. CONST. art. VIII, § 2); or a "police ordinance" (ILL. REV. STAT. ch. 24, § 23-81 (1947), Repealed. Laws 1961, May 29, Laws 1961, p. 576, § 1-9-8. The Supreme Judicial Court of Massachusetts had the equally difficult task of determining whether rent control constituted "a private or civil law governing relationships except as incident to an exercise of independent police power." *Marshal House v. Rent Review & Grievance Bd.*, 260 N.E. 2d 200 (Mass. 1970). See notes 137-138 *supra* and accompanying text. In the four states represented above, the issue was resolved on the basis of the definitional determination by the court.

¹⁴⁵Limiting the extent of a municipality's police power is but one method by which state courts have made public policy decisions regarding rent control. See text accompanying notes 31-105 *supra*.

¹⁴⁶See note 118 *supra* and accompanying text.

¹⁴⁷*City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972).

¹⁴⁸*City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 767 (Fla. 1974).

¹⁴⁹*Id.*

¹⁵⁰*Id.* at 765. Some objection may have been warranted here, and it appears that some of the justices examined the measure impartially. See concurring opinions commencing at page 765.

In Connecticut, the state legislature adopted the city charter of Stamford.¹⁵¹ The charter conferred in general terms "the power to protect the public health, safety and welfare."¹⁵² Other state courts have interpreted roughly equivalent language to allow local rent control when the delegation containing the language has received express state-wide approval.¹⁵³ Arguably, the adoption of the charter by the legislature would have supported a more liberal interpretation of the grant and allowance of the local measure. The Connecticut Supreme Court of Errors, however, determined that this language did not permit the local enactment of rent control.¹⁵⁴ The rationale was that since the state legislature had adopted and then terminated state-wide enabling legislation, the legislature intended that cities not have the power.¹⁵⁵ This was not a necessary conclusion, and in fact, this rationale was without precedent in the area of rent control.¹⁵⁶

Proponents of local rent controls must recognize that some courts will use whatever means are available to invalidate rent control measures. In the area of state delegation of police power, many problems can be avoided by careful legislative drafting. In litigation, advocates must stress the significance of developing legal principles as the bases for the court's decision. These developing legal principles should ultimately lessen the impact of hostile judicial attitudes toward rent control.

B. Pre-emption

1. General Principles

Even if a local rent control measure meets all constitutional requirements and appears to be within the scope of delegated police power, it still may be invalid under the theory of pre-emption. Generally, under this doctrine, a local enactment is invalid to the extent

¹⁵¹Cited in *Old Colony Gardens, Inc. v. City of Stamford*, 147 Conn. 60, 156 A.2d 515 (1959).

¹⁵²*Id.*

¹⁵³*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 140, 550 P.2d 1001, 1009, 130 Cal. Rptr. 465, 473 (1976) ("may make and enforce all local, police, sanitary and other ordinances" held to allow local rent control); *F.T.B. Corp. v. Goodman*, 300 N.Y. 140, 147, 89 N.E. 2d 865, 868 (1949) ("power to adopt and amend local laws . . . in respect to . . . the conduct of its inhabitants and the protection of their property, safety and health" held a sufficient grant to allow local rent control). *Accord*, *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973).

¹⁵⁴*Old Colony Gardens, Inc. v. City of Stamford*, 147 Conn. 60, 156 A.2d 515 (1959).

¹⁵⁵*Id.*, 156 A.2d at 516.

¹⁵⁶In *Heubeck v. City of Baltimore*, 205 Md. 203, 107 A.2d 99 (1954), the court declared, "The enactment of the enabling act . . . did not in any manner impair the police powers of the city" and "the enabling act did not impliedly repeal such police powers because the State Legislature pre-empted the rent control field." *Id.* at 101-02.

that it conflicts with state law, either directly or by implication.¹⁵⁷ In order to invalidate a local rent control enactment on this basis, opponents of the measure must show (1) that the local enactment or an unseverable portion of it conflicts directly with a general state law or (2) that the legislature intended to occupy the entire area to the exclusion of local government.¹⁵⁸ Whether a particular rent control measure conflicts with general state law is a matter for the state courts. Since the deciding factor is often legislative intent, it is not surprising to find similar situations treated differently by the states.¹⁵⁹

Since rent controls are not considered a purely municipal affair, cities do not have complete autonomy in the area.¹⁶⁰ Thus, the important issue is how to determine when a local enactment is in conflict with state law. The rent control provision must be considered in light of the individual state's legislation and applying that state's test.¹⁶¹ Although the doctrine of pre-emption has been used successfully to knock out some segments of rent control measures, it has not been used extensively to invalidate rent controls in their entirety.¹⁶² As other grounds for attack are removed from the challenger's arsenal,¹⁶³ however, pre-emption may become an increasingly

¹⁵⁷Galvan v. Superior Court, 70 Cal. 2d 851, 859, 452 P.2d 930, 935, 76 Cal. Rptr. 642, 647 (1969). Local rent controls also may be pre-empted by federal legislation if the measure involves federally insured or subsidized units. For a discussion of the recent developments in this area, see Wirth, *Pre-emption of Local Rent Control Laws by HUD Regulation*, 45 FORDHAM L. REV. 651-70 (1976).

¹⁵⁸Pipoly v. Benson, 20 Cal. 2d 366, 371, 125 P.2d 482, 485 (1942).

¹⁵⁹Compare Old Colony Gardens, Inc., v. City of Stamford, 147 Conn. 60, 156 A.2d 515 (1959) with Heubeck v. City of Baltimore, 107 A.2d 99 (Md. 1954). Home rule enactments may have a significant impact here. See text accompanying notes 113-122 *supra*.

¹⁶⁰See note 114. *supra*.

¹⁶¹For a discussion of the pre-emption doctrine in California, see generally McLeod, *The California Preemption Doctrine: Expanding the Regulatory Power of Local Governments*, 8 U.S.F.L. REV. 728 (1973-74). *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964) established three situations in which a charter city may not enact legislation in California:

(1) when the subject matter has been so fully and completely covered by general law as to indicate clearly that it has become exclusively a matter of state concern, (2) when the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action, and (3) when the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality. 62 Cal. 2d at 128, 396 P.2d at 402, 41 Cal. Rptr. at 399. Whether this test helps determine the existence of a pre-empted area has been debated. See Sato, "Municipal Affairs" in California, 60 CAL. L. REV. 1055 (1972) which criticizes the *Hubbard* decision.

¹⁶²See Appendix.

¹⁶³Federal constitutional due process limitations may be eliminated or at least clarified by United States Supreme Court decisions. See text accompanying notes 56-61 *supra*. State limitations may be anticipated and remedied prior to attack in court by the recognition and application of developing legal principles

important issue in determining the validity of a given rent control enactment.

2. State Legislation and the "Naked Prohibition" of Rent Controls at the Local Level

Legal challenges to rent controls have not been restricted to the courts. Recently vetoed California legislation¹⁶⁴ attempted to preempt all powers to enact rent controls from local levels and place them exclusively at the state level, thus allowing rent control only on a state-wide basis. This would have pre-empted any action by local governments. Politically, this would have foreclosed rent controls altogether since statewide controls would be nearly impossible to enact.

California or other states¹⁶⁵ may move to adopt similar legislation in the future. Such pre-empting legislation, though, presents serious legal questions. California does not permit the Legislature to enact a "naked prohibition" on local powers without some affirmative legislation¹⁶⁶ of its own on the subject.¹⁶⁷ Presently, since no affirmative California laws exist in the area of rent controls, the state cannot be said to have occupied the field.¹⁶⁸ While some authority allows state prohibition of local measures without substantial state law on the matter,¹⁶⁹ a mere prohibition by the state legislature of local power to enact rent control is of dubious legality. It would set the stage for strong legal challenge of the state's authority to usurp local powers in the absence of positive state legislation on rent control.

3. Evictions

State legislation regarding evictions typically pre-empts almost all local enactments on the subject. Nonetheless, eviction provisions are

in this area. See text accompanying notes 106-156 *supra*.

¹⁶⁴A.B. 3788 (1976), introduced by Assemblyman William Campbell during the 1975-76 Regular Session of the Assembly, was vetoed by Governor Brown September 30, 1976. *Sacramento Bee*, Oct. 1, 1976, A24, col. 3.

¹⁶⁵In events closely paralleling California developments, the Governor of Florida recently vetoed a state legislature bill designed to prevent municipalities from enacting local price controls and was specifically designed to disallow localities from passing rent control laws. Letter from Stanley Kaufman, former Rent Director of Miami Beach, to Robert Curran (April 25, 1977) (on file with U.C. DAVIS L. REV.).

¹⁶⁶*E.g.*, a state rent control statute. The state cannot simply prohibit localities from doing what it refuses to do. It can, however, prohibit localities from enacting rent controls if it has some positive laws on the subject.

¹⁶⁷*Ex Parte Daniels*, 183 Ca. 636, 641, 192 P.442, 445 (1920).

¹⁶⁸*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 141-42, 550 P.2d 1001, 1010-11, 130 Cal. Rptr. 465, 474-75 (1976).

¹⁶⁹*Sippel v. Nelder*, 24 Cal. App. 3d 173, 101 Cal. Rptr. 89 (1st. Dist. 1972). This case held that the state could occupy the *whole* field of firearms registration even though such state registration laws were far from comprehensive. The case, however, did not overrule *Daniels*, note 167 *supra*.

frequently included in rent control legislation to serve at least two functions. The first function is to limit and define the grounds on which a landlord can evict a tenant in a rent-controlled unit. The purpose is to prevent "retaliatory evictions" of tenants who refuse to pay more than the legally controlled rent, or who complain to the rent board about lack of services, and so on. The second function is to demand that landlords obtain a certificate of eviction from rent control agencies as a first step toward the eviction of tenants. This is done to place the primary legal authority for evictions at the rent agency level, while courts retain ultimate review powers. Rent control proponents seemingly believe that politically elected or appointed rent control boards will possibly be more favorable toward tenant rights. And even if they are not, at least they will slow down the rapid judicial eviction process typical of summary proceedings of unlawful detainer statutes.

The Berkeley charter amendment contained these two major eviction provisions, landlords' grounds for repossession and the requirement of an eviction certificate by the rent control board.¹⁷⁰ The plaintiffs in *Birkenfeld* alleged that general state law pre-empted the charter amendment's ability to limit grounds for eviction of tenants. This argument was based on the California unlawful detainer statutes which regulate evictions and, they urged, pre-empted the field.¹⁷¹ While both the trial court and the appellate court found this section pre-empted, the California Supreme Court did not.¹⁷² The supreme court cited a test that looks to the "whole purpose and scope of the legislative scheme"¹⁷³ to determine whether the two statutes are in conflict. The court noted that the purpose of the unlawful detainer statutes is procedural. The purpose of the rent control grounds for eviction is to provide a substantive defense in unlawful detainer proceedings. Unlawful detainer statutes merely state when a landlord may repossess his property *if* the landlord has a right to evict the tenant. The substantive law as to when that right is triggered is not even addressed. Thus, because local regulation of tenant's defenses to evictions is not contrary to the purpose or scope of unlawful detainer statutes, they are not pre-empted by them.

The provisions of the Berkeley charter amendment requiring prior issuance of an eviction certificate by the Rent Control Board were struck down by all levels of California courts as being in conflict with and pre-empted by state unlawful detainer statutes. Since

¹⁷⁰CHARTER OF THE CITY OF BERKELEY, CA. art. 17, § 7a-7b (1972).

¹⁷¹*Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 148-49, 550 P.2d 1001, 1015, 130 Cal. Rptr. 465, 479 (1976).

¹⁷²*Id.* at 149, 550 P.2d at 1015, 130 Cal. Rptr. at 479.

¹⁷³*Galvan v. Superior Court*, 70 Cal. 2d 851, 859, 452 P.2d 930, 935, 76 Cal. Rptr. 642, 647 (1969), citing *In re Lane*, 58 Cal. 2d 99, 102-03, 372 P.2d 897, 899, 22 Cal. Rptr. 857, 859 (1962).

the very purpose of these statutes is a summary eviction procedure, the conflicting local provisions were pre-empted by state laws.

The validity of the entire rent control measure can sometimes depend on the eviction provisions. Two courts have held eviction certificates invalid as in conflict with state law, and then proceeded to invalidate the entire rent control law on the basis of the invalid eviction sections.¹⁷⁴ In both cases, the courts found a legislative intent that rent and eviction controls were integral to the entire scheme and purpose of the legislation, and that they should not exist separately. A severability clause, though no cure-all, would help alleviate the problem of invalidity of the whole because of invalidity of the part.

C. *Excessive Delegation of Legislative Authority*

Rent control laws invariably empower an administrator or board, or both, to execute the legislators' intentions in controlling rents. California law is typical of virtually all states and the federal government in interpreting its constitution to preclude uncontrolled delegation of legislative authority.¹⁷⁵ While state and municipal bodies may not delegate their authority to formulate legislative policy, they may declare a policy, establish guidelines for its implementation, and then allow administrators to execute that policy.¹⁷⁶ Limitations of time and resources demand as much. In the absence of a "total abdication of its legislative power, through failure either to render basic policy decisions or to assure that they are implemented as made,"¹⁷⁷ the supreme court will not intrude on legislative enactments for being an unlawful delegation of their powers. The rule against excessive delegation is diminishing in importance in rent control cases¹⁷⁸ as courts employ more flexible standards in reviewing such cases¹⁷⁹ and look to safeguards against abuse of delegation rather than strict apportionments of authority.¹⁸⁰

¹⁷⁴ *F.T.B. Corp. v. Goodman*, 300 N.Y. 140, 89 N.E. 2d 865, 867-69 (1949); *Heubeck v. Baltimore*, 205 Md. 203, 107 A.2d 99, 103-04 (1954).

¹⁷⁵ WITKIN, *SUMMARY OF CALIFORNIA LAW*, 3326-3331 (8th ed. 1974).

¹⁷⁶ *Kugler v. Yocum*, 69 Cal. 2d 371, 375-76, 445 P.2d 303, 306, 71 Cal. Rptr. 687, 690 (1968).

¹⁷⁷ *Id.*

¹⁷⁸ *But see Miami Beach v. Forte Towers, Inc.*, 306 So. 2d 764, 768 (Fla. 1974). The Florida Supreme Court does cite the rubric of excessive delegation of legislative authority in invalidating that rent control measure. However, the court seems to have misapplied the doctrine since it locates the defect not in too vague or broad a standard, but in one too specific and exact: "[P]erhaps the City Council has been overly conscientious in its effort to spell out everything."

¹⁷⁹ *Amalgamated Meatcutters & Butcher Workmen v. Connolly*, 337 F. Supp. 737 (D.D.C. 1971) involved the Nixon Administration's stabilization of rents, prices, and wages pursuant to the Congressional Economic Stabilization Act of 1970. The court found this a lawful delegation of legislative authority even though the Congressional grant to the President was broad and relatively non-specific in defining criteria for economic stabilization.

¹⁸⁰ DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 2.15 (1958). *See Kugler v.*

Rent control legislation can avoid most problems of excessive delegation by mandating clear standards, policies, and guidelines to be used in making rent adjustments. A non-exclusive list of factors to be considered in setting rents¹⁸¹ and a statement of legislative purpose should be sufficient to avoid excessive delegation of legislative power in most jurisdictions.

CONCLUSION

Traditionally, state courts have scrutinized rent control measures far more severely than other forms of economic regulation and they have ignored constitutional and legal mandates in the process. The unclear status of due process limitations and the abuse of judicial discretion in construing state limitations have both contributed to the inconsistent and often erroneous treatment of rent control by the courts.

Most courts have accepted rent control as a proper legislative activity in theory. In practice, however, courts have frequently denied the validity of individual measures. Despite the existence of this judicial hostility towards rent control, it is now becoming more difficult for courts to invalidate local measures absent a sound legal basis. Even without a United States Supreme Court decision prescribing the application of the Due Process Clause to rent control, many state courts have been compelled to apply due process in a manner consistent with other areas of economic regulation. In the area of state imposed limitations, a body of legal principles is developing which should bind the courts in the absence of controlling local authority. With each new decision, the legal building blocks required for valid, constitutional rent control are more precisely defined. The continuing clarification of these legal issues is narrowing the discretion which courts have traditionally enjoyed—the discretion to choose freely from a myriad of possible bases in order to invalidate local rent control enactments.

Steven R. Andrade
Robert F. Curran

Yocum, 69 Cal. 2d 371, 381, 445 P.2d 303, 309, 71 Cal. Rptr. 687, 692 (1968).

¹⁸¹For example, the City Charter for Berkeley, California, contains a non-exclusive list of factors for consideration in determining rents: property, taxes, capital improvements, changes in living space, equipment, etc., substantial deterioration, and inadequate housing services. CHARTER OF THE CITY OF BERKELEY, CAL. art. 17, § 5 (1972).

APPENDIX

A MYRIAD OF BASES: SELECTED EXAMPLES OF
STATE COURT INVALIDATION OF RENT CONTROLS

STATE	REASONS FOR INVALIDATION					
	DUE PROCESS			Separation of Powers: Excessive Delegation	Insufficient Delegation of Police Power	Pre-empted Area
	Emergency Requirement	Notice and Hearing	Confiscatory Effect			
CALIFORNIA (Birkenfeld) Trial Court ^a	X	X				X*
Court of Appeal ^b	X					X*
Supreme Court ^c			X			X*
CONNECTICUT (Old Colony) ^d					X	
FLORIDA (Fleetwood) ^e					X	
(Forte Towers) ^f	X (cited in concurrence)		X	X		
ILLINOIS (Ambassador East) ^g					X	
MARYLAND (Heubeck) ^h						X*
MASSACHUSETTS (Marshal House I) ⁱ					X	
MISSOURI (Tietjens) ^j					X	
NEW YORK (F.T.B. Corporation) ^k						X
PENNSYLVANIA (Warren I) ^l Trial Court					X	
(Warren II) ^m	X					

*Only partially invalidated by reason of pre-emption.

^aBirkenfeld v. City of Berkeley, No. 428971, (Alameda Co., Cal., Super Ct. filed June 22, 1973).

^bBirkenfeld v. City of Berkeley, 49 Cal. App. 3d 464, 122 Cal. Rptr. 891, 898 (1st Dist. 1975).

^cBirkenfeld v. City of Berkeley, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

^dOld Colony Gardens, Inc. v. City of Stamford, 147 Conn. 60, 156 A.2d 515 (1959).

^eCity of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972).

^fCity of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (1974).

^gAmbassador East, Inc. v. City of Chicago, 399 Ill. 359, 77 N.E.2d 803 (1948).

^hHeubeck v. City of Baltimore, 205 Md. 203, 107 A.2d 99 (1954).

ⁱMarshal House, Inc. v. Rent Review and Grievance Board of Brookline, 357 Mass. 709, 260 N.E.2d 200 (1970).

^jTietjens v. City of St. Louis, 359 Mo. 439, 222 S.W.2d 70 (1949).

^kF.T.B. Corporation v. Goodman, 300 N.Y. 140, 89 N.E.2d 865 (1949).

^lWarren v. City of Philadelphia, 382 Pa. 380, 115 A.2d 218 (1955).

^mWarren v. City of Philadelphia, 387 Pa. 362, 127 A.2d 703 (1956).