

IN DEFENSE OF RENT CONTROL AND RENT CAPS

*Duncan Kennedy**

On January 20, 2020, I testified before the Massachusetts legislature's Joint Committee on Housing in favor of two bills then being considered that would have revived rent control in the Commonwealth. My testimony was a head-on attack on the industry arguments against the bills. Their arguments are of course rationalizations of their economic interest. But they make serious wrong and misleading claims about consequences of rent control for the public interest and for its intended beneficiaries. Elected legislators, alas, are responsive both to the massive money spent lobbying against rent control and to some extent in good faith to the industry arguments. My goal, as laid out in the edited testimony [published on the LPE Project Blog](#) was to supplement not to displace the narration of blatant injustice and the invocation of a human right to decent housing with arguments in the policy language of the policy makers. The post also includes brief preliminary and concluding comments on the law and political economy approach as I understand it and as it relates to the testimony.

* Carter Professor of General Jurisprudence, Emeritus, Harvard Law School.

The Massachusetts State Legislature's Joint Committee on Housing is currently considering two bills that would revive rent control in the state. The first bill caps rent increases for not-owner-occupied residential housing at the CPI not to exceed 5%, with an income eligibility proviso. The second much more ambitious bill authorizes localities to choose among a menu of options to create their own version of full rent control. The options included fixing rents subject to increases for capital improvements, controlling condo conversion, good faith eviction requirement and zoning to deal with market variation within the locality.

On January 14, 2020, I offered testimony in support of the bills. Rent control has [already been revived](#) in Oregon, California and New York and in Massachusetts it is the focus of intense grass roots neighborhood activism particularly among the low income East Asian and Latina/o communities. At the hearing, they showed up in mass and testified in moving detail to the devastating effects of the crisis on individuals and neighborhoods.

What was absent, and the gap I tried with a fellow academic to fill, was a head-on attack on the industry arguments against the bills. Their arguments are of course rationalizations of their economic interest. But they make serious claims about consequences for the public interest and for supposed beneficiaries as well. Elected legislators, alas, are responsive both to the massive money spent lobbying against rent control and to some extent in good faith to the industry arguments. My goal, as laid out in the edited testimony we're publishing today and tomorrow was to supplement not to displace the narration of blatant injustice and the invocation of a human right to decent housing with arguments in the policy language of the policy makers.

I wanted to post my testimony here because I think of it as law and political economy, in the particular tradition I work in, which might be called post-Marxist critical legal studies. It starts with groups led by elites, with strategies based on shared material and ideological, or "ideal" interests. They co-operate in social production and reproduction and compete over the distribution of stakes that are both material and "ideal." Relations of domination and subordination are pervasive. The stakes of the game include the rules of the game, including prominently law. In this tradition the goal is not just to grasp the way law functions in struggles but also to push (humbly, uncertainly) on the side of emancipation or liberation or social justice.

Claim 1: Economic theory and empirical studies both prove that rent control can't work.

Studies purporting to show that it never works in practice are obviously flawed because every scheme is different and the result depends on the particular market conditions. Rent control worked well for years right here in

Massachusetts, in Boston, Brookline and Cambridge. Industry advocates predicted all the bad things they are predicting today for H3924. None of them happened. It was intended to counter displacement and squeezing in place, either because of local pressure for gentrification or area-wide market pressure. It did. These towns all voted to keep it because it worked! The vast majority of the studies cited for the “won’t work claim” are of types of rent control long since abandoned and studies of the “new model” now being proposed, including the [one recently adopted](#) in Oregon reach positive conclusions.

At the theory level as well, the economics depend on the scheme and the market. For example, gentrification is by definition something that happens in a particular geographic market. Simple neo-classical economic analysis [shows why](#) a local option law specifically tailored to prevent displacement works in theory as well as in practice. A local option policy aimed at across the board speculatively driven rent increases, for example a cap, works in a different way than rent control aimed at gentrification. Localities facing [homelessness and rent gouging](#) will modify their schemes accordingly, with eviction controls [a key policy tool](#).

Claim 2: Rent control will cripple, chill, discourage, or eliminate new construction, and production of new market rate housing alleviates the housing crisis for low and moderate income neighborhoods.

The claim that market rate production is the cure for the crisis was discredited years ago and survives only as an industry talking point. In the unregulated market, profit-maximizing developers build new residential units only for upper income buyers, and a few luxury renters. These units do not lead to “trickle down” of existing upper income units to middle or low income residents. New construction is absorbed in upper income neighborhoods as they expand at the expense of middle and lower income areas. The claim that excess regulation is a cause of the crisis ignores the fact that the predicted new housing would still be overwhelmingly upper income—that’s where the money is—and a lot of it would be on the sites made available by displacing residents in lower tiers.

Rent control encourages new construction. H3924 does not cover new construction or owner occupied units. Gentrifying demand, that without rent control would displace lower income residents who are now protected, now has a powerful incentive to create new units and upgrade exempt units. Like all new construction, new units will be upper income and unaffordable. This kind of new construction, *when a rent control scheme prevents displacement*, can be a major benefit to the locality. Large amounts of new construction of this type occurred in Boston, Cambridge and Brookline under rent control.

No credible expert believes the claim that rent control that exempts new construction reduces investment for fear that the exemption will be revoked at some time in the future. The chance in the present to take advantage of pent-up gentrifying demand (denied the chance to displace lower income residents) should more than compensate for the trivial impact of possible future controls on profit calculations in the present.

Claim 3: State provision of more section 8 certificates and subsidized affordable projects can resolve the housing crisis.

More section 8s and more rent-restricted affordable subsidized units could in theory have a major impact on the housing crisis. But there is no conceivable way that can happen in practice. Growing income inequality means upper income demand for housing grows much more quickly than lower income. Upper income buyers bid up prices in order to expand their share of the available stock. Exclusionary zoning closes both upper income and affordable units out of the suburbs (in spite of our ineffectual inclusionary regime). At the same time, it shifts upper income demand back toward the older inner ring city neighborhoods.

The crisis generates displacement and shelter impoverishment (skyrocketing rent/income ratios) through a downward squeeze. The rich expand their neighborhoods to adjacent less wealthy areas pushing residents into the next area down the chain. Or they jump into well located lower income inner city areas forcing residents to crowd into adjacent low rent areas. The crisis now affects the whole lower half of the income distribution.

To reverse the crisis, even just to stabilize the current disastrous situation, would require subsidies, section 8s and affordable construction, to the tune of hundreds of millions or even billions of tax-payer dollars directed at the middle and no longer just the lower end of the chain. Rent control, either caps or a full regulatory program, allows localities to defend themselves against these market forces. They can tailor their response to their local market conditions and in many situations turn them to their advantage. No new taxes required. The innovative legislation being considered in Massachusetts permits them to increase the supply of affordable housing targeted to their local conditions without calling for massive new subsidies from the state.

Claim 4: Income eligibility tests for rent controlled and capped units are a good idea.

Requiring proof of low income status for eligibility to have rent capped would be counterproductive because it would cause landlord discrimination against the very people the bills area trying to help. It is already documented

that a large percentage of section 8 certificate holders, and disproportionately African Americans, [experience discrimination from landlords](#) who don't want to rent to them at uncapped fair market value rents. In the midst of a crisis of escalating rents, a tenant who qualifies for the cap is obviously not as good a bet for the landlord as a tenant who does not.

In building-based rent control, an income eligibility requirement would mean more units available for income qualified applicants but it would also risk stigmatizing residents and whole buildings. The better response of H3924 is to authorize [anti-displacement zoning](#) so that localities can exclude upper income neighborhoods. The remaining reduction in units going to low income tenants serves the by the now universally recognized policy goal of mixing income groups rather than concentrating poverty.

Claim 5: Responding to the housing crisis is a private responsibility.

Opponents argue as though landlords have a natural right to unlimited windfall profit from the housing crisis when they increase rents without increased costs or capital improvements or neighborhood upgrading. They also deny that landlords and developers have any responsibility for displacement they cause when they raise rents to shift their properties to higher income use. *Giant rent increases with no equivalent improvement in housing conditions, along with displacement, represent a gigantic forced transfer of wealth from middle and low income tenants to landlords and developers.* Upper income home buyers benefit as displacement keeps down the price of land for their increased consumption. It is ironic to say the least for the industry to argue that the public should respond first by compensating their victims with subsidies and then by deregulating the industry so they can build more luxury units for the rich.

The new national mobilization for rent control is exciting, even if the arguments haven't advanced much if at all since the last round during the 1980's and early 90's. The main failing of liberal sentiment, it seems to me, has been to focus too much on "the housing crisis," which appears as something like earthquakes in the Caribbean, a disaster caused by natural forces ("demand" "supply") against which the only hope is palliative gestures, like disaster relief. It makes more sense to me to see it as just one of the perennial phases of the class conflict between upper and lower income groups, with the middle siding first one way then the other. The industry interest is parasitic on the aggression of the top. Landlords and developers profit by arbitraging housing and neighborhood amenity into the hands of a specific upper social stratum that is the highest bidder. A housing crisis of inflation displaces and impoverishes the losers because the legal rules of the game, mainly controlled by the wealthy, permit or encourage it, sweetening

the bitter pill with some subsidies and lots of bogus policy arguments. Full bore anti-gentrification rent control is more than a palliative, since it aims to create permanent enclaves of shelter security that can be bases for other kinds of left policy initiatives. The Boston towns that had rent control voted by massive majorities to retain it against the industry's state-wide referendum campaign to ban it. I think there is hope that the new wave of more radical left analysis represented by LPE will give this kind of analysis a better chance of traction today than it has ever had before, in all the long history of rent control as hot button issue.