

COMMERCIAL RENT STABILIZATION: ONE LOCAL RESPONSE TO SKYROCKETING RENTS

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Rent hikes have displaced Black- and immigrant-led small businesses and nonprofits for years at alarming rates, and COVID-19 accelerated the trend. Recognizing the ripple effects on owners, community leaders, employees, and underserved communities, several organizers, activists, lawyers, and local legislators around the country are revisiting commercial rent control.

This Article uses the commercial rent stabilization bill introduced in New York City in 2019 as a case study to argue that commercial rent control can advance worthwhile interim goals in New York City and elsewhere. First, commercial rent control would help level the exploitative landlord-tenant playing field. Further, it would promote predictability and stability, which would allow Black- and immigrant-led businesses to thrive and serve their diverse communities' needs. Finally, this Article contributes to the commercial rent control scholarship by discussing its policy advantages for small, Black- and immigrant-led commercial tenants, as well as responding to the common mischaracterization of state and federal law that views them as obstacles to commercial rent control.

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Image Description: New York City corner store, or bodega. “Angelica” is in blue text to the left, and “Super Market,” capitalized, is in orange text against a yellow background above a red awning. Below the canopy are signs that say “Grocery,” “EBT,” “WIC,” “ATM,” and “Boars Head,” and on the window are ads for different cigarette brands.

Source: ny.curbed.com

*It's like this place has lost the essence of the place I'm from
Went to the barbershop I used to frequent, place is run
out of business and everyone I knew is straight just gone
Feel I should take the bong and hit it to escape the somber feeling
that you feel when those in power take your home
That feeling is exactly why I had to write this song
- Gift of Gab, The Gentrification Song*

INTRODUCTION

They were pricing him out. Mustafa,¹ an immigrant in New York City, stewed in silence as he considered closing his family's fifty-year-old business. Despite a dozen years of timely rent payments and thousands of dollars invested, Mustafa's landlord refused to renew his lease unless he agreed to increase payments by over one-hundred fifty percent. "But . . . I had invested so much in the wood moldings. No one has anything like it," I recall him weakly saying on the phone. Yet, there was nothing he could do about it.

Mustafa was among dozens of low-income small business owners or nonprofit leaders I advised between 2018 and 2020 as an attorney with a New York City-based nonprofit, TakeRoot Justice.² In addition to lease renewals, I negotiated new leases, lease amendments, lease terminations, and remedies to landlord harassment. My colleagues from three legal service organizations and I averaged six hundred commercial tenant clients annually.³ Whether through my representation, attendance of monthly legal team meetings, or conversations with community organizers supporting small businesses and nonprofits, rising rents continued to be a common refrain when discussing commercial displacement.

For small businesses⁴ and nonprofits displaced by excessive rent increases, finding new spaces to re-establish their ventures is easier said than done. Ask Zandra, a Black owner of a medical equipment

1. A fictitious person based on a real situation.

2. *See Capacity Building*, TAKEROOT JUSTICE, <https://takerootjustice.org/areas/capacity> (last visited Aug. 31, 2023).

3. Press Release, United for Small Business NYC, USBnyc: The Elimination of the Commercial Lease Assistance Program Will Accelerate Displacement (July 9, 2020), <https://anhd.org/press-release/usbnyc-elimination-commercial-lease-assistance-program-will-accelerate-displacement> [<https://perma.cc/U8FE-4TZV>].

4. OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., 2019 SMALL BUSINESS PROFILE 1 (2019), <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142610/2019-Small-Business-Profiles-States-Territories.pdf> [<https://perma.cc/29K3-UJZR>] (defining small businesses as "firms employing fewer than 500 employees").

company in Charlotte.⁵ Her building's owner evicted her business to redevelop the building. She quickly learned that, despite being in that location for five years, the cheapest alternative in the neighborhood was five times the rent she had been paying. Her only choice was to move to a new area and start over.



Image Description: On the left is a photo of someone walking on the sidewalk in front of several closed businesses. On the right, someone is walking along a street corner in front of several closed companies.

Source: nydailynews.com

Mustafa's and Zandra's stories were routine before the COVID-19 pandemic and are even more common now. For years, small commercial tenants have been vulnerable to and have experienced substantial rent increases in New York City⁶ and across the country.⁷

5. Danielle Chemtob & Katherine Peralta, *It's Not Just Charlotte Homeowners: Small Businesses Are Being Squeezed Out, Too*, CHARLOTTE OBSERVER (May 23, 2019), <https://www.charlotteobserver.com/news/business/article229594389.html> [<https://perma.cc/4XDK-J6PV>].

6. See OFF. N.Y.C. COMPTROLLER, BUREAU OF BUDGET, RETAIL VACANCY IN NEW YORK CITY: TRENDS AND CAUSES, 2007-2017 4 (2019), https://comptroller.nyc.gov/wp-content/uploads/documents/Retail_Vacancy_in_NYC_2007-17.pdf (noting that commercial "retail rent rates rose 22% on average between 2007 and 2017"); OLIVIA LAVECCHIA & STACY MITCHELL, INST. FOR LOC. SELF-RELIANCE, AFFORDABLE SPACE: HOW RISING COMMERCIAL RENTS ARE THREATENING INDEPENDENT BUSINESSES, AND WHAT CITIES ARE DOING ABOUT IT 8 (2016), <https://ilsr.org/wp-content/uploads/downloads/2016/04/ILSR-AffordableSpace-FullReport.pdf> (reporting that commercial retail rents in Manhattan alone rose ten percent, increasing as high as thirty-seven percent on the Upper West Side); LENA AFRIDI & DIANA DROGARIS, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., THE FORGOTTEN TENANTS: NEW YORK CITY'S IMMIGRANT SMALL BUSINESS OWNERS 6 (2019), <https://anhd.org/report/forgotten-tenants-new-york-city-immigrant-small-business-owners> [<https://perma.cc/BY4Y-4655>] (confirming that the vast majority of nearly one-hundred immigrant-owned small businesses reported rising commercial rents as their most pressing concern). *But see* N.Y.C. DEPT. CITY PLAN., ASSESSING STOREFRONT VACANCY IN NYC: 24 NEIGHBORHOOD CASE STUDIES 5 (2019), <https://www1.nyc.gov/assets/planning/download/pdf/planning-level/housing-economy/assessing-storefront-vacancy-nyc.pdf> (noting that, although high rents contribute, "many other factors influence local vacancy conditions, such as: industrywide shifts in retail[;] ability to attract shoppers and competition between corridors[;] condition of building stock and perception of

Consequently, many have struggled to stay open.⁸ Between April and June 2020, as the COVID-19 pandemic settled in the United States, nearly 1.4 million small businesses across the United States either closed or suspended operations.⁹ By February 2021, one in three companies and nonprofits reported that they might close without more government help.¹⁰ Only twenty-five percent of the one-hundred thou-

neighborhood[;] regulations such as zoning and landmark designations[; and] redevelopment plans for properties”).

7. See LAVECCHIA & MITCHELL, *supra* note 6, at 4 (noting that “[i]n cities as diverse as Oakland and Nashville, Milwaukee and Portland, Maine, retail rents have shot up by double-digit percentages over [2015] alone”); Alexander W. Bartik, Marianne Bertrand, Zoë B. Cullen, Edward L. Glaeser, Michael Luca & Christopher Stanton, *A Way Forward for Small Businesses*, HARV. BUS. REV. (Apr. 13, 2020), <https://hbr.org/2020/04/a-way-forward-for-small-businesses> [<https://perma.cc/7BBV-8YDN>] (noting that most small businesses in a study of thousands of businesses have insufficient cash to cover an economic shock lasting more than two months); CARLOS GRANDET, CHRIS WHEAT & DIANA FARRELL, PLACE MATTERS: SMALL BUSINESS HEALTH IN URBAN COMMUNITIES (2019), <https://www.jpmorganchase.com/institute/research/small-business/place-matters-small-business-financial-health-in-urban-communities> [<https://perma.cc/4DX4-C3P5>] (noting that almost half of small businesses in a 2019 study of half a million firms had “two weeks or less of cash liquidity”).

8. See JEREMIAH’S VANISHING NEW YORK, <http://vanishingnewyork.blogspot.com> (last visited Aug. 31, 2023) (chronicling the stories of New York City small businesses that have closed, often due to rent hikes); Map of Vacant Storefronts in N.Y.C., VACANT NEW YORK, <http://map.vacantnewyork.com> (last visited Aug. 31, 2023) (showing, via an interactive map, the scope of small business closures throughout New York City); Tim Wu, *Why Are There So Many Shuttered Storefronts in the West Village?*, NEW YORKER (May 24, 2015), <https://www.newyorker.com/business/currency/why-are-there-so-many-shuttered-storefronts-in-the-west-village> [<https://perma.cc/Z9XG-7FMU>] (discussing rampant vacancies in the West Village in New York City).

9. See Gretchen Morgenson, Didi Martinez, Kenzi Abou-Sabe & Cynthia McFadden, *Misery on Main Street: COVID-19 Takes a Grim Toll on America’s Small Businesses*, NBC NEWS (Sept. 23, 2020), <https://www.nbcnews.com/business/economy/misery-main-street-covid-19-takes-grim-toll-america-s-n1239524> [<https://perma.cc/G8E5-45U4>]; see also YELP: LOCAL ECONOMIC IMPACT REPORT (Sept. 2020), <https://www.yelpeconomicaverage.com/business-closures-update-sep-2020> [<https://perma.cc/6852-2C6X>] (noting that over 163,000 U.S. businesses listed on Yelp closed their doors within six months of the start of the COVID-19 pandemic, and estimating that sixty percent of them will never reopen); Julie Littman, *Nearly 1 in 6 Restaurants Have Closed, Says NRA*, RESTAURANT DIVE (Sept. 14, 2020), <https://www.restaurantdive.com/news/nearly-1-in-6-restaurants-have-closed-says-nra/585151/> [<https://perma.cc/UBD3-27Q4>] (noting that one in six restaurants has already closed its doors permanently as of September 2020).

10. Gina Heeb, *A Third of Small Businesses Say They Won’t Survive Without More Government Help*, FORBES (Feb. 3, 2021), <https://www.forbes.com/sites/ginaheeb/2021/02/03/a-third-of-small-businesses-say-they-wont-survive-without-more-government-help> [<https://perma.cc/RYL9-TDUJ>]; Glenn Gamboa, *Pandemic Puts 1 in 3 Nonprofits in Financial Jeopardy*, ROCKET MINER (Mar. 4, 2021), https://www.wyomingnews.com/rocketminer/coronavirus/pandemic-puts-1-in-3-nonprofits-in-financial-jeopardy/article_b21753cc-9663-54c5-a361-0ee622697140.html [<https://perma.cc/5TB9-FM9Z>].

sand businesses temporarily closed in September 2020 were operating at full capacity by February 2021.¹¹ Whether small businesses and nonprofits are in Los Angeles,¹² Phoenix,¹³ Chicago,¹⁴ or Pittsburgh,¹⁵ they have suffered—particularly those run by Black people.¹⁶ The Comptroller for New York City reported that between the fourth quarter of 2019 and 2021, Manhattan lost over four thousand private establishments, an undeterminable amount of which were small businesses.¹⁷

Commercial rents remain a significant obstacle to the survival of small businesses and nonprofits. Though commercial rents during the pandemic dipped in many places like New York City, a leading commercial real estate firm projected that “[t]he average asking rent is expected to end [2022] at \$58.45 per square foot, levels last reported

11. Andrew Lisa, *How Small-Business Struggles Hurt All Americans*, MSN (June 22, 2021), <https://finance.yahoo.com/news/small-business-struggles-hurt-americans-202822855.html> [<https://perma.cc/DWJ9-NC56>].

12. See Kevin Smith, *LA County's Pandemic Toll: 7,500 Small Business, 400,000 Jobs Lost in 2020*, L.A. DAILY NEWS (Feb. 11, 2021), <https://www.dailynews.com/2021/02/11/la-countys-pandemic-toll-7500-small-business-400000-jobs-lost-in-2020/> [<https://perma.cc/W9UM-336J>].

13. See Josh Frigerio, *At Least 50 Bars and Restaurants in Phoenix Have Closed amid the COVID-19 Pandemic*, ABC 15 ARIZ. (Oct. 4, 2020), <https://www.abc15.com/entertainment/events/at-least-45-bars-and-restaurants-in-phoenix-have-closed-amid-the-covid-19-pandemic> [<https://perma.cc/5J59-6ZC7>].

14. See Ally Marotti, *An Estimated 4,400 Chicago-Area Businesses Have Closed During the Pandemic. 2,400 Say They'll Never Reopen*, CHI. TRIB. (July 22, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-business-closures-yelp-20200722-nmhvpmv72fdydzjgvzoun7rima-story.html> [<https://perma.cc/8NXA-MH4D>].

15. See Nate Doughty, *These Pittsburgh Restaurants and Bars Permanently Closed in 2020*, PITTSBURGH BUS. TIMES (Dec. 24, 2020, 7:56 AM) [<https://perma.cc/BJG8-YTVN>]; see also Rick Earle, *Pittsburgh Mayor Peduto Blames Lack of Leadership for Small Businesses Closing*, WPXI (Sept. 25, 2020), <https://www.wpxi.com/news/top-stories/pittsburgh-mayor-peduto-blames-lack-leadership-small-businesses-closing/FW4FRWN7E5FSFPU6FVC6FANQUE/> [<https://perma.cc/C7GM-B59A>].

16. See Chauncey Alcorn, *Black-Owned Companies Are Shutting Down Twice as Fast as Other Businesses*, CNN (Aug. 4, 2020), <https://www.cnn.com/2020/08/04/economy/black-business-coronavirus-study/index.html> [<https://perma.cc/H8QF-3VN6>] (noting that “41% of Black-owned businesses across the country shut down between February and April [of 2020]”); NOR. CALIF. GRANTMAKERS, COVID-19 IMPACTS ON NON-PROFIT REAL ESTATE 22 (2021), <https://fliphtml5.com/mrefx/vsqz/> [<https://perma.cc/9YSK-WPNN>] (noting that, in the San Francisco area, Black-led nonprofits had a higher likelihood of having unforgivable PPP loans and being concerned about eviction).

17. Brad Lander, *New York by the Numbers Monthly Economic and Fiscal Outlook*, OFF. N.Y.C. COMPTROLLER (July 11, 2022), <https://comptroller.nyc.gov/newsroom/new-york-by-the-numbers-monthly-economic-and-fiscal-outlook-no-67-july-11th-2022/> [<https://perma.cc/2XZG-ZBCP>].

in 2019.”¹⁸ According to the New York City storefront registry, the districts experiencing the highest rent increases from December 2019 to December 2020 were majority low-income communities of color.¹⁹ For example, “[c]ommercial rents increased over 33% in the South Bronx (Community Districts (“CDs”) 15 and 16), 25% in Far Rockaway (CD 31), and almost 19% in Bay Ridge (CD 43).”²⁰ In CDs 15, 16, and 31, around ninety percent of residents identify as people of color.²¹

Landlords, often repeat players in negotiating leases and armed with skilled lawyers, maintain a fundamentally unequal relationship that encourages profit maximization at all costs.²² These dynamics have particularly burdened Black- and immigrant-led enterprises in disproportionately disinvested communities.²³ Moreover, Black-led small businesses and nonprofits lack accessible capital to cover rent increases due primarily to histories of Black communities being underbanked or unbanked, redlined, and otherwise discriminated against by financial institutions, often at the government’s encouragement.²⁴

18. Marcus Millichap, *New York City Retail Market Report, Quarter 2 (2022)*, <https://www.marcusmillichap.com/research/market-report/new-york-city/new-york-city-2q22-retail-market-report>.

19. GINA LEE, SARAH INTERNICOLA, & KAREN YAO, ASS’N FOR NEIGHBORHOOD & HOUS. DEV., *THE STATE OF STOREFRONTS: ALARMING VACANCY RATES AND RISING RENTS DURING THE PANDEMIC 8 (2022)*.

20. *Id.* at 7.

21. *Id.*

22. See Tyler J. Zimmer, *Gentrification as Injustice: A Relational Egalitarian Approach to Urban Housing*, 31 PUB. AFFS. Q. 51, 52 (2017) (arguing that the typical landlord-tenant relationship is one that involves “objectionable forms of economic subordination—more specifically, relations that involve exploitation and marginalization—as well as political inequality”); Wu, *supra* note 8 (discussing potential reasons for which the increases in commercial rent prices in New York City have defied typical market assumptions related to supply and demand).

23. Robert W. Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence of Early-Stage Losses from the April 2020 Current Population Survey* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27309, 2020), https://www.nber.org/system/files/working_papers/w27309/w27309.pdf (finding that forty-one percent of African-American-owned businesses and thirty-two percent of Latinx-owned businesses closed between February and April 2020); Alcorn, *supra* note 16 (noting that “41% of Black-owned businesses across the country shut down between February and April [of 2020]”).

24. See, e.g., JUSTIN HANSFORD, TANSIM MOTALA, CHIJINDU OBIOFUMA & NATALIE LAROCHE, *THE CONTRADICTION OF COLOR-BLIND COVID-19 RELIEF: BLACK AMERICA IN THE AGE OF THE PANDEMIC 11–12 (2020)* (referencing survey of the five-hundred Black-owned businesses by Color of Change and UnidosUs where twelve percent received the full amount of the Small Business Administration (“SBA”) loans that they applied for while twenty-six percent received a fraction of their request). See generally MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 1 (2017)* (challenging the myth that Black-owned banks are the

Displacement due to rent hikes harms commercial tenants' leaders, employees, and communities.²⁵ For small business owners, particularly immigrants,²⁶ their sole source of income is often their business, whether a sole proprietorship or a formal legal entity (e.g., a limited liability company).²⁷ Many such owners are also personally liable for outstanding commercial rent or business loans.²⁸ For employees, often women and people of color, commercial displacement hampers their ability to cover necessary expenses such as rent and food.²⁹ Further, the potential loss of employment due to such organizations closing threatens an employee's ability to maintain health insurance, a sense of self-worth, and stable social networks.³⁰ Already-

sole answer to generations of policies designed to undercapitalize Black communities).

25. Small businesses play a significant role in the U.S. economy. *See* OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., *supra* note 4, at 1 (reporting that, in 2018, small businesses (1) employed nearly half (47.3%) of United States employees and (2) accounted for 99% of U.S. businesses).

26. Press Release, New Am. Econ., New Data Shows Immigrant-Owned Businesses Employed 8 Million Americans; Immigrants Wield \$1.1 Trillion in Spending Power (Mar. 12, 2019), <https://www.newamericaneconomy.org/uncategorized/new-data-shows-immigrant-owned-businesses-employed-8-million-americans-immigrants-wield-1-1-trillion-in-spending-power> [<https://perma.cc/VX2F-YZQM>] (highlighting a 2017 study indicating that one in five small business owners was an immigrant); N.Y.C. MAYOR'S OFF. IMMIGRANT AFF., STATE OF OUR IMMIGRANT CITY: ANNUAL REPORT FOR CALENDAR YEAR 2019 29 (2020), <https://www1.nyc.gov/assets/immigrants/downloads/pdf/MOIA-Annual-Report-for-2019.pdf> (noting that over half of small businesses in New York are immigrant-owned).

27. Ass'n for Enter. Opportunity, Nat'l Ass'n for Self-Employed & Small Bus. Majority, Opinion Poll: The Role of Micro Businesses in Our Economy (Oct. 9, 2012), <https://smallbusinessmajority.org/our-research/entrepreneurship-freelance-economy/opinion-poll-role-micro-businesses-our-economy> [<https://perma.cc/G5ET-5RYS>] (noting that "nearly three-quarters of those surveyed report that their micro business is their sole source of income").

28. Commercial bank loans commonly require that the owner(s) of the borrower agree that, if the business does not have the money to repay a loan, the bank can go after that owner's personal assets, such as their checking accounts, investment accounts, or physical property. The mechanism through which this is done is called a "personal guaranty." Personal guaranties are often used in the context of commercial leases, where the owner of the tenant-business provides a personal guaranty for the benefit of the property owner if the business gets behind on its obligations under the lease, such as rent or other additional costs. Julia Kagan, *Personal Guarantee: Definition and Role in Loan Requirements*, INVESTOPEDIA (Nov. 30, 2020), <https://www.investopedia.com/terms/p/personal-guarantee.asp> [<https://perma.cc/ZW6M-BCEF>].

29. *Cf.* Jason DeParle, *Eight Million Have Slipped into Poverty Since May as Federal Aid Has Dried Up*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/2020/10/15/us/politics/federal-aid-poverty-levels.html> [<https://perma.cc/2VY8-KVKP>] (reporting how people experiencing layoffs are sliding into poverty across the country).

30. *See* D. Laverne O'Neal, *The Impact of Business Closures on Employees*, CHRON., <https://smallbusiness.chron.com/impact-business-closures-employees->

marginalized communities lose spaces that hold memories, create and maintain connection, provide safety, ritualize local cultural practices, and employ local residents.³¹ The displacement of the local independent theater, family-owned bar, bookstore, or tea shop due to high rents is not just an accelerator and product of gentrification—it is a type of economic violence for which property owners are rarely held accountable.³² The COVID-19 pandemic has only made the ability of small businesses and nonprofits to cover expenses like rent even harder.

This Article argues that commercial rent control can be an effective and constitutional response to the sea of commercial tenant closures due to high rents, specifically examining New York City's commercial rent stabilization bill (the "CRS Bill").³³ First introduced in 2019, the bill would establish a commercial rent guidelines board to regulate the rate at which commercial property owners can increase their tenants' rent year to year.³⁴ Proponents see it as a salve for long-ignored manipulation by some influential commercial owners, whereby owners increase rents as high as possible to maximize profits while ignoring existing tenants and surrounding communities. This Article argues that the CRS Bill could help small commercial tenants, particularly Black-led ones, and the neighborhoods they inhabit within and potentially outside New York City. Further, it argues that with

42056.html [<https://perma.cc/BDD2-5GGA>]. The author of this Article does not subscribe to the idea that people *should* see their jobs as proof of self-worth, notwithstanding this being the case for many.

31. See, e.g., ASHANTÉ M. REESE, *BLACK FOOD GEOGRAPHIES: RACE, SELF-RELIANCE, AND FOOD ACCESS IN WASHINGTON, D.C.* 93–100 (2019) (discussing how corner stores in many Black communities, like Ward 7 in Washington, D.C., serve as history holders, markers of community stability, sources of community pride, safe spaces for youth, beacons of moral authority, and models for Black entrepreneurship and economic opportunities); Yxta Maya Murray, *The Takings Clause of Boyle Heights*, 43 N.Y.U. REV. L. & SOC. CHANGE 109, 125–27 (2019) (interviewing someone who worked for an organization supporting small businesses in Boyle Heights, Los Angeles, who noted that businesses were part of larger "social networks" and "culture[s] within the community" where they "tailored to neighborhood needs" and developed deep resident trust).

32. Though typically associated with a form of violence where a powerful party preys on economically marginalized individuals, economic violence here is used, in conversation with Johan Galtung's concept of structural violence, to speak to the outcomes of an environment and system that harms economically marginalized communities. Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167, 171–72 (1969).

33. N.Y.C. City Council Int. No. 1796-2019, 2019 Leg., Sess. 7400 (N.Y.C., N.Y. 2019).

34. *Id.*

specific improvements, the CRS Bill is a constitutional exercise of local police power.³⁵

In entering this re-emerging debate, this Article aims to make three contributions to the literature. First, it situates the discussion within the scholarship on municipal home rule, specifically the frameworks that states use to determine how much autonomy to grant local governments. Second, this Article explicitly includes small non-profits as commercial tenants worthy of concern in addition to for-profits. Finally, it combines a policy and constitutional analysis of a relatively under-analyzed commercial rent control bill, unlike many of those that are or have been in effect.

Section I summarizes the history of rent control. Section II lays out the primary goals of commercial rent control and the CRS Bill and responds to its most robust critiques. I introduce and respond to expected legal challenges to commercial rent control in Section III. Section IV explores how legislators could improve the CRS Bill and introduce other legislation that could supplement it. I conclude by considering the implications of this Article and the CRS Bill for commercial space in New York City and elsewhere.

I.

BRIEF HISTORY OF COMMERCIAL RENT CONTROL

This Section lays out a brief history of commercial rent control to make two points. The first point is that commercial rent control becomes possible within a society that commodifies land. However, before European arrival, Indigenous people in the Americas had a markedly different relationship with the Earth. The second point is that countries worldwide used commercial rent control as a practical policy before and even after European colonization. The near-universal use of commercial rent control exposes the reality that capitalist countries understand the risk of a completely unregulated retail real estate sector.

35. “Police power” here refers to state and local governments’ power to exercise control over people or property. Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 URB. L. 625, 631 (2015) (noting that “[w]hile the police power is commonly referred to as the [state’s] power to protect public health, safety, morals, and general welfare, it has long been conceived to be a much broader power”); *Bond v. United States*, 572 U.S. 844, 854 (2014) (defining police power broadly as a state’s “broad authority to enact legislation for the public good”).

A. *European and Indigenous Conceptions of Land*

Before European settlers' genocide of Indigenous North American tribes, collective land use norms would have rendered the idea of "rent control" incomprehensible.³⁶ Professor Eve Tuck and others note that Indigenous stewards of Turtle Island (i.e., the United States) largely viewed themselves as in joint possession of "Land," a term which speaks "not just to the materiality of land, but also its 'spiritual, emotional, and intellectual aspects.'"³⁷ Indigenous ways of relating with others and things (i.e., Indigenous ontologies) commonly view inanimate objects, such as rocks, and animate objects, such as plants, as in a reciprocal relationship.³⁸ Thus, land is more than a means to gather and use the Earth's resources for material survival.³⁹

By the seventeenth century, Europeans had transformed cooperative conceptions of land into a capitalist notion of land as an exploitable commodity.⁴⁰ As such, the European system facilitated the transfer of the right of possession from an owner (i.e., a landlord) to a renter (i.e., a tenant) in exchange for a tenant's promise to periodically pay the landlord (i.e., rent) over a definite (or indefinite) time.⁴¹ American laws and jurisprudence codified this Euro-centric view of land and the process of dispossessing Indigenous tribes of it.⁴²

Like elsewhere, European colonizers violently displaced New York City's Lenni-Lenape, an indigenous Algonquin tribe who inhab-

36. See Eve Tuck, Marcia McKenzie & Kate McCoy, *Land Education: Indigenous, Post-Colonial, and Decolonizing Perspectives on Place and Environmental Education Research*, 20 ENV'T EDUC. RES. 1, 6 (2014) (defining "settler colonialism [as] a form of colonization in which outsiders come to land inhabited by Indigenous peoples and claim it as their own new home").

37. *Id.* at 9. See also Peter G. Stillman & Justin Mahoney, *Rights, Property*, in BERKSHIRE ENCYCLOPEDIA OF WORLD HISTORY 2178 (William H. McNeill ed., 2d ed. 2011) (noting that "Native Americans did not treat land and possessions as commodities to be traded in a marketplace. So land transactions between Native Americans themselves—in comparison to transactions between Europeans—'had more to do with sharing possessions than alienating it'").

38. Clint Carroll, *Native Enclosures: Tribal National Parks and the Progressive Politics of Environmental Stewardship in Indian Country*, 53 GEOFORUM 31, 32 (2014) (describing the "spiritual connection" Indigenous communities have with the Land).

39. See *id.* at 33. See also JOSEPH SINGER, PROPERTY 2 (5th ed. 2017) (clarifying that "property . . . is about relations among people with regard to things").

40. See SINGER, *supra* note 39, at 432 (noting that the "modern practice [of leaseholds] has its origins in feudal tenures . . .").

41. *Id.*

42. See generally Jen Camden & Kathryn E. Fort, "Channeling Thought": *The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77 (2008) (discussing the role that conquest played in the context of creating America's conception of property).

ited Manahatta, or Manhattan, for thousands of years.⁴³ Despite an Italian first settling Manhattan,⁴⁴ a Dutch governor, Peter Minuit, allegedly “purchased” Manhattan in 1624 for U.S. \$24, or around \$708 in 2022 dollars.⁴⁵ The Dutch, who renamed the island New Amsterdam, massacred Lenni-Lenape members in the surrounding area during the 1640s.⁴⁶ The British replaced the Dutch in 1664, renaming the island New York City the following year.⁴⁷

B. Industrialization and Urbanization

The growth of New York City in the 1700s, fueled in part by enslaved Black labor commodified to support industrialization, led to the establishment of a regulatory framework for managing land in the 1800s. The New York State Commissioner’s Plan of 1811 included a grid system to coordinate land provision.⁴⁸ At the time, the area around Wall Street was a mix of residential and commercial spaces, while the area to the north was agricultural. In the mid- and late-1880s, two predominantly Black neighborhoods—Seneca Village and Little Africa—experienced displacement due to eminent domain (in connection with building Central Park) and rising real estate prices,

43. *Our History*, NANTICOKE LENNI-LENAPE TRIBAL NATION, <https://nltribe.com/our-history/> (last visited June 20, 2021).

44. JOHN R. NORWOOD, *WE ARE STILL HERE! THE TRIBAL SAGA OF NEW JERSEY’S NANTICOKE AND LENAPE INDIANS* 10 (2007), https://nanticoke-lenape.info/images/We_Are_Still_Here_Nanticoke_and_Lenape_History_Booklet_pre-release_v2.pdf; Dominic R. Massaro, *Taking Title to New York: The Enduring Authority of Roman Law*, 72 N.Y. ST. B.A. J. 44, 49 n.10 (2000) (noting that “the Florentine navigator, Giovanni da Verrazzano, sailing for France . . . entered New York bay and the mouth of the Hudson, in 1524.”).

45. Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of “Universal Recognition” of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 519 (2006); Matt Soniak, *Was Manhattan Really Bought for \$24?*, MENTAL FLOSS (Oct. 24, 2012), <https://www.mentalfloss.com/article/12657/was-manhattan-really-bought-24> [<https://perma.cc/F7X6-JWKA>] (referencing historical price calculator at *Value of Guilder Versus Euro*, INT’L INST. OF SOC. HIST. BLOG (June 14, 2021), <https://iisg.amsterdam/en/research/projects/hpw/calculate.php>). *Contra Teaching Lenape History: An Interview with Pilar Jefferson*, GOTHAM CTR. FOR N.Y.C. HIST. BLOG (Feb. 28, 2019), <https://www.gothamcenter.org/blog/teaching-lenape-history-an-interview-with-pilar-jefferson> (arguing that there is no actual record of the sale to confirm the value of the sale).

46. Allen W. Trelease, *Kieft’s War (1643-45)*, in *NEW ENCYCLOPEDIA OF THE AM. W.* (Howard R. Lamar, ed., 1998).

47. Gerald Benjamin, *Home Rule: Elusive or Illusion?*, 89 N.Y. ST. BAR ASS’N J. 25, 25 (2017). *See also* GERALD HORNE, *THE APOCALYPSE OF SETTLER COLONIALISM: THE ROOTS OF SLAVERY, WHITE SUPREMACY, AND CAPITALISM IN SEVENTEENTH-CENTURY NORTH AMERICAN AND THE CARIBBEAN* 26 (2018).

48. Robert C. Ellickson, *A Hayekian Case Against Anarcho-Capitalism: Of Street Grids, Lighthouses, and Aid to the Destitute*, 11 N.Y.U. J. L. & LIBERTY 371, 383 (2017).

respectively, signaling trends to come for Black and other marginalized communities.⁴⁹ By 1916, the City of New York passed a zoning resolution that applied to all land within the City's boundaries, designating residential, commercial, and unrestricted districts. The goal of this regime, at least partly, was to manage urban development.⁵⁰

State legislatures, like New York's,⁵¹ enacted residential rent control "in response to housing shortages during World War I."⁵² Before legislatures passed these laws, building owners in New York City and elsewhere took advantage of the increased housing demand and short housing supply by excessively increasing rents to capture significant profits. In New York City, the Mayor's Committee suggested that profiteering off of a housing shortage warranted a suspension of the laws of supply and demand.⁵³ The government looked to rent control as part of the answer.

C. Types of Rent Regulation

Rent control laws most commonly regulate how landlords increase tenants' rent.⁵⁴ Some historians trace the practice back to a group of tenants displaced by monopolistic landlords in Ancient Rome; the local government intervened.⁵⁵ Unfortunately, these tenants were powerless.⁵⁶ They were an underrepresented and resented group, easily exploited by a powerful ownership class.⁵⁷

Contemporary U.S. legislators have used one or more of six common approaches to rent regulation, two focusing directly on the total rent paid by a tenant. One approach, "controlled escalation," imposes a maximum percentage rate at which an owner can increase rent. For example, a controlled escalation of one percent per year would mean

49. Diana diZerega Wall, Nan A. Rothschild & Cynthia Copeland, *Seneca Village and Little Africa: Two African American Communities in Antebellum New York City*, 42 HIST. ARCHEOLOGY 97, 99 (2008).

50. *City Planning History*, N.Y.C. DEP'T CITY PLAN. <https://www1.nyc.gov/site/planning/about/city-planning-history.page> (last visited June 22, 2021); *Zoning Background*, N.Y.C. DEP'T OF CITY PLAN. <https://www.nyc.gov/site/planning/about/city-planning-history.page> [<https://perma.cc/53X5-84TX>].

51. *See Twentieth Century Assocs., Inc. v. Waldman*, 63 N.E.2d 177 (N.Y. 1945) (discussing New York's state-level rent regulation).

52. 5 N. GREGORY SMITH, THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 43.04 (2021).

53. 110 AM. JUR. PROOF OF FACTS 3D 113, § 3 (2009).

54. SMITH, *supra* note 52.

55. John W. Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54, 59 (1950).

56. *Id.*

57. *Id.*

that if a tenant is currently paying \$10,000 for rent, the owner can increase the rent by up to \$100, for a total of \$10,100 the following year. A second related approach, “rent capping,” is where the rent cannot exceed a fixed amount. In the preceding example, a rent cap could be a flat \$11,000 instead of a percentage increase from the prior period.

A third approach, “tax rebate,” provides tenants with a rebate representing some portion of a commercial owner’s savings from property tax cuts.⁵⁸ For example, if a property owner with multiple commercial or residential units receives a ten percent reduction of their property tax bill of \$20,000 (\$2,000), a tax rebate for the commercial tenant in that property would be a share of the \$2,000. Such a share is often proportionate to the portion of the owner’s space that the tenant rents and takes the form of a credit from the owner. The tax rebate approach promotes the idea that the owner should pass on to the tenant certain government benefits the owner receives.

“Eviction protection,” a fourth approach, limits the grounds upon which an owner may evict a tenant to a specific list of scenarios. Only when one of these scenarios comes to fruition may an owner evict or refuse to renew a tenant’s lease. Another common name for this approach is a “good guy” eviction. An example is New York City’s pending Small Business Jobs Survival Act (“SBJSA”), which enumerates eight reasons an owner may evict a commercial tenant.⁵⁹

A fifth option, the “fair negotiations” approach, typically requires parties to a commercial lease that disagree on a rent increase while negotiating a lease renewal to engage in mediation and arbitration, as necessary.⁶⁰ For example, when negotiating a renewal of an existing lease, such an approach might require that (1) an owner make an offer, (2) the tenant have an opportunity to reject the offer, (3) if the tenant rejects the offer, the parties engage in mediation, and, (4) if mediation fails, the parties engage in binding arbitration to determine the final rent rate. The SBJSA would also utilize this approach if passed.⁶¹

Finally, a sixth approach, the “emergency response” approach, typically responds to an emergency, such as a war or pandemic. This

58. *See, e.g.*, *Ross v. City of Berkeley*, 655 F. Supp. 820, 823 (N.D. Cal. 1987) (referring to the 1978 bill passed in Berkeley, through a ballot initiative, that “required a partial rebate to . . . commercial renters of the property tax reductions received by the City’s landlords as a result of the passage of Proposition 13”).

59. N.Y.C. City Council, 0737-2018, 2018 Leg., Sess. 5484, § 22-1205(d)(1)-(8) (N.Y.C., N.Y. 2018).

60. *See, e.g.*, N.Y.C. City Council, 0737-2018, 2018 Leg., Sess. 5484, § 22-1205(e) (N.Y.C., N.Y. 2018).

61. *See* N.Y.C. Council 0737, 2018 Leg., 5484 Sess. (N.Y. 2018).

approach often permits a tenant to delay rent payments through a payment plan and combines with some of the abovementioned approaches.⁶² Below is an abbreviated description of each commercial rent control method:

<i>Approach</i>	<i>Description</i>
1. <i>Controlled Escalation</i>	Rent cannot increase above specific percentage of the current rental rate
2. <i>Rent Capping</i>	Rent cannot increase above a specific amount
3. <i>Tax Rebate</i>	Tenant receives portion of an owner's savings from government's property tax cuts
4. <i>Eviction Protection</i>	Tenant can only be evicted on limited grounds
5. <i>Fair Negotiations</i>	Requires parties to participate in mediation and/or arbitration to determine the rent
6. <i>Emergency Response</i>	Temporary response to an emergency that often permits tenant to delay fulfilling certain obligations

Regardless of the approach, “almost every civilized community on the [E]arth [has] found rent control advisable, if not unavoidable” since the turn of the fifteenth century.⁶³ National and local governments across the globe have enacted residential, and sometimes commercial, rent control.⁶⁴ The reasons for instituting rent control have varied, ranging from “war, depression, earthquake, fire, plague, or some other vagary of history which either destroys the balance of supply and demand . . . or makes it impossible for tenants to continue to pay their contractual rents.”⁶⁵

62. For an example, look at Seattle’s commercial rent control ordinance, passed in April 2020. Seattle, Wash., Ordinance 126066 (Apr. 17, 2020).

63. See Willis, *supra* note 55, at 57; see also *The Pros and Cons of Rent Control*, GLOBAL PROPERTY GUIDE: INV. ANALYSIS BLOG (Jan. 19, 2009), <https://www.globalpropertyguide.com/investment-analysis/the-pros-and-cons-of-rent-control> (noting that, despite Abu Dhabi doubling down on rent control in 2005, “[e]lsewhere, rent control regimes have generally been dismantled or softened since the mid-1990s . . . removed in most of Eastern and Central Europe . . . and lifted . . . since the early 2000s [throughout Asia]”).

64. See Willis, *supra* note 55, at 55–59 (listing many local governments, including Rome, Mexico City, Hong Kong and Paris, and national governments, such as the then-British Military Administration in Eritrea, Cuba, Saudi Arabia, Argentina and Portugal, that each enacted some form of residential, and sometimes commercial, rent control laws).

65. *Id.* at 54.

D. Rent Regulation in the 20th Century

As local jurisdictions initiated rent control, the federal government legitimized these policies through the courts in the 1920s and Congress in the 1940s. In 1921, the Supreme Court upheld residential rent control laws passed by local legislatures during World War I: *Block v. Hirsch*⁶⁶ (District of Columbia) and *Marcus Brown Holding Co. v. Feldman*⁶⁷ (New York). Congress passed the Federal Emergency Price Control Act of 1942 in light of extreme housing shortages and market manipulation by landlords, which warranted a wartime price control program.⁶⁸ After several renewals, the law expired in 1952 and local governments picked up the mantle.⁶⁹

In 1943, New York State revisited rent control, focusing on residential space. It initially adopted the federal residential rent control approach before eventually empowering localities, such as New York City, to regulate residential rents themselves. Despite interim laws and attempts to deregulate rent, the state legislature passed the Emergency Tenant Protection Act of 1974 to stabilize rents again.⁷⁰ After sustained tenant organizing against continued shortages and market exploitation, the legislature amended and bolstered residential rent control through subsequent legislation.⁷¹ As of today, New York State still authorizes New York City to regulate residential rent.

Rent control for years focused on residential rent tenancies, which the law and courts treat differently from commercial tenancies. One difference is that commercial tenants generally provide services and products to the public, and residential tenants do not. As a result, the government may regulate where commercial tenants can operate, whom they can exclude, the quality of their services and products, and accessibility, among other features. In addition, commercial spaces can more drastically change the nature of a neighborhood than residential ones (e.g., foot traffic, noise, parking availability).⁷² A second difference is that some courts and scholars assume that commercial

66. *Block v. Hirsh*, 256 U.S. 135 (1921).

67. *Marcus Brown Holding Co., Inc. v. Feldman*, 256 U.S. 170 (1921).

68. SMITH, *supra* note 52.

69. *Id.*

70. N.Y. UNCONSOL. LAW § 8605 (McKinney 2019); see W. DENNIS KEATING ET AL., RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET 160–61 (1998).

71. KEATING ET AL., *supra* note 70, at 74, 160–62.

72. See 12 ERIC DAMIAN KELLY, POWELL ON REAL PROPERTY § P9.03 (Michael Allen Wolf ed., 2021) (noting that zoning—rooted in Germanic law—made its debut in New York state in the early twentieth century, and a key motive for zoning is the impact commercial uses can have on various aspects of a neighborhood’s culture).

tenants and owners are sophisticated actors with equal bargaining power, which is often not the case for smaller tenants who cannot afford specialized counsel.⁷³ As a result, judges frequently decline to read inherent residential tenant protections, such as a warrant of habitability,⁷⁴ into commercial leases. Instead, courts often reason that the commercial tenant should “know better.” Third, unregulated commercial tenancies are usually longer, sometimes ten years for smaller tenants, instead of one year with unregulated residential leases. Further, commercial leases frequently allocate to tenants costs that residential landlords typically bear, such as property taxes and sewage, and commercial tenants are often responsible for maintaining all non-structural and sometimes structural components of the space. Finally, residential leases provide a more central resource for survival—shelter—than commercial leases.

Some may assume small business owners are wealthier than they are, making them a less sympathetic group. This Article contests that notion. Indeed, in 1945, the New York state legislature determined that they were worthy of statutory protection, passing the nation’s first commercial rent control laws—the Emergency Business Space Rent Control Law (for stores and offices), and the Emergency Commercial Space Rent Control Law (for other commercial spaces).⁷⁵ These laws excluded businesses based on type (e.g., companies that operate in ports), lease term, or property status (e.g., new, vacated), but not

73. Daniel B. Bogart, *Good Faith and Fair Dealing in Commercial Leasing: The Right Doctrine in the Wrong Transaction*, 41 J. MARSHALL L. REV. 275, 277, 300–01 (2008). See also *Henry Heide, Inc. v. WRH Prods. Co., Inc.*, 766 F.2d 105, 109 (3rd Cir. 1985) (observing that, whereas consumers and manufacturers have unequal resources and bargaining positions, commercial parties have equal bargaining power); *Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 762 (5th Cir. 1989) (“contract law provides adequate remedies in a commercial setting where the parties are generally of equal bargaining power”); but see Holly P. Constants, *Freedom to Contract Injunction Waivers in Commercial Leases*, PROB. & PROP., July/August 2022, at 44, 46 (noting that “[i]n a commercial landlord-tenant relationship, the landlord traditionally is viewed as the more powerful party, particularly during a lease negotiation”).

74. This is a commitment by the landlord to ensure the tenant that the space is habitable, subject to certain rent abatement if the landlord fails to do so. Different jurisdictions come out differently on this question. See, e.g., *Kachian v. Aronson*, 475 N.Y.S.2d 214, 218 (Civ. Ct. 1984) (stating that “the warranty [of habitability] is not applicable to premises occupied for commercial purposes”). But see *Davidow v. Inwood N. Pro. Grp.—Phase I*, 747 S.W.2d 373, 376 (Tex. 1988) (naming various jurisdictions who “apply residential property warranties to commercial tenancy situations”).

75. W. Dennis Keating, *The Elmwood Experiment: The Use of Commercial Rent Stabilization to Preserve a Diverse Neighborhood Shopping District*, 28 WASH. U. J. URB. & CONTEMP. L. 107, 125 (1985).

size.⁷⁶ The laws employed rent capping to freeze rents based on the amounts charged on a specific, previous date (e.g., for the commercial law, March 1, 1943). They also used controlled escalation to allow landlords to increase rents by no more than fifteen percent through agreement, arbitration, or court order.⁷⁷ Where there were disputes, the laws established a set of factors for determining a reasonable rent increase.⁷⁸ Relatedly, the regulations included a formula for calculating a fair return.⁷⁹ In addition, they utilized the eviction protection approach, listing instances in which landlords could evict their tenants.⁸⁰ Finally, legislators set the law to expire a year after its creation.⁸¹

Despite the laws' temporary nature, the New York state legislature renewed them for almost two decades.⁸² At their passage, the commercial and business rent control laws were the only state laws covering commercial rents in New York City. Further, the laws were not general laws that applied to New York State—they were special laws specific to New York City. Three years after the state legislature passed these laws, it enacted the Albany Business Rent Control Law of 1948.⁸³ That law expired in 1953, while the New York City laws expired later in 1963.⁸⁴ Since the emergency commercial and business rent control laws expired, the New York state legislature has not passed commercial rent control.

Other jurisdictions adopted commercial rent control policies between the 1970s and the 1990s. For example, the City of Berkeley, California, passed four commercial rent control laws between 1978 and 1987.⁸⁵ In 1987, a federal court partially struck down the third effort because it restricted the landlords' ability to retake the space for their use. However, the court refused to invalidate the city's right to impose a rent ceiling outright.⁸⁶ Instead, later that year, the California state legislature passed a law preempting local governments from reg-

76. *Id.* at 126.

77. *Id.*

78. *Id.* at 127.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *See, e.g., J. & S. Operating Corp. v. Swire Appliance Co., Inc.*, 85 N.Y.S.2d 164, 165 (Albany City Ct. 1948).

84. *Lincoln Bldg. Assoc. v. Barr*, 355 U.S. 12, 13 (1957); Keating, *supra* note 75, at 127.

85. Margot A. Rosenberg, *Commercial Rent Regulation: Preserving Diversity of Neighborhood Commercial Districts*, 15 *ECOLOGICAL L.Q.* 281, 282, 287 (1988).

86. *Ross v. City of Berkeley*, 655 F. Supp. 820, 833–34 (N.D. Cal. 1987).

ulating commercial rents, invalidating Berkeley's laws.⁸⁷ In 1997, the State of Hawaii passed a narrow commercial rent control bill that applied to oil companies' leasing of service stations.⁸⁸

New York City contemplated commercial rent control independent from the state government in 1988. That year, New York City Council held a hearing for the SBJSA. Councilmembers designed the bill to support small businesses in their dealings with landlords, utilizing fair negotiations and eviction protection approaches.⁸⁹ Despite this early effort, it took nearly thirty years for the New York City Council to convene a second hearing for the SBJSA; it has yet to become law.⁹⁰

E. *The New York City CRS Bill*

Some policymakers, community organizers, and tenants in New York City believe commercial rent control is an effective, constitutional policy. Though the COVID-19 pandemic has devastated small commercial tenants and commercial corridors, particularly in Black and other marginalized communities, they were already vulnerable before the pandemic.⁹¹ In November 2019, a New York City Council

87. CAL. CIV. CODE § 1954.25 (West 1987).

88. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 533 (2005) (referring to the Petroleum Industry Information Reporting Act, § 3, 1997 Haw. Sess. Laws 257 (current version at Haw. Rev. Stat. Ann. § 486H-10.4 (West)), a law passed by the Hawaii state legislature in 1997).

89. N.Y.C. Council 0737, 2018 Leg., 5484 Sess. (N.Y. 2018).

90. Sadeq Ali Kully, *Council Bill on Commercial Leases in Limbo as Evidence of Vacancy Problem Grows*, CITY LIMITS (Oct. 11, 2019), <https://citylimits.org/2019/10/11/council-bill-on-commercial-leases-in-limbo-as-evidence-of-vacancy-problem-grows/> [<https://perma.cc/6A77-N24P>] (noting that “[t]here’s been no action on the SBJSA since last October [2019], when the Council held a public hearing”).

91. See, e.g., Lorraine Mirabella, *JPMorgan Chase Invests \$3 million in UMD Initiative to Prevent Small Business Displacement*, BALT. SUN (Apr. 9, 2021) <https://www.baltimoresun.com/business/bs-bz-jpmorgan-chase-investment-umd-prevent-small-business-displacement-20210409-z7b2prc6nnd2hffkacbohvw7m4-story.html> [<https://perma.cc/5MB4-WT78>] (reporting that a Maryland anti-small business displacement initiative is considering commercial rent control); Sarah Lehr, *What MIT Researchers Learned About Helping Downtowns Like Lansing’s Get Through COVID-19*, LANSING ST. J. (Jan. 3, 2021), <https://www.lansingstatejournal.com/story/news/2021/01/04/study-how-lansings-downtown-can-weather-coronavirus-pandemic/4059840001/> [<https://perma.cc/FR9S-8MCD>] (discussing an MIT research study that, at its end, recommended commercial rent control as among the remedies for small businesses in Lansing, Michigan); Olivia Moore, *Berkeley City Council District 6 Candidates Speak at Town Hall*, DAILY CALIFORNIAN (Oct. 26, 2020), <https://www.dailycal.org/2020/10/26/berkeley-city-council-district-6-candidates-speak-at-town-hall/> [<https://perma.cc/GTD5-88HD>] (discussing city council election in Berkeley, California, where one candidate, Richard Illgen, proposed commercial rent control as potential legislation that he would consider in support of small businesses); Allison Smith, *Democratic Mayoral Candidates Talk Tenants and Housing*, GOTHAM

member introduced Intro. 1796, or the CRS Bill, which would create a law to regulate commercial rents.⁹² Grassroots organizers and organizations, such as United for Small Business New York City (USBnyc),⁹³ welcomed the bill amid reports of the plight of small businesses throughout the city.⁹⁴

New York City's CRS Bill has several key features. It empowers the mayor to appoint a nine-person commercial rent guidelines board (the "CRGB"). The board's membership would be a mix of commercial tenants, commercial landlords, and public members with significant finance, economics, property management, or community development experience. The CRGB would create guidelines and use those guidelines to set the ceiling on the percentage by which tenants' rent can increase annually.⁹⁵ The board could use several factors, such as economic conditions and property market values, to differentiate the rate of rent escalation among the city's different neighborhoods.⁹⁶ The underlying law would apply to leases, signed after the bill becomes a law, involving: (1) manufacturing establishments with 25,000 square feet or fewer; and (2) retail stores or professional, services, or other offices with 10,000 square feet or fewer. At the time the bill is passed, the initial rent for such covered space (1) without a lease would be whatever the parties to the first lease negotiate and (2) with a lease would be the rental amount at the time at the end of the lease had the annual escalations applied. Further, the CRS Bill aims to prevent landlords from adding non-rent charges by consolidating all non-rent charges (e.g., taxes, sewer fees, water fees) in the term "rent." The CRS Bill lists an unnamed city agency to oversee the law's implementation.

GAZETTE (Mar. 4, 2021), <https://www.gothamgazette.com/city/10217-democratic-mayoral-candidates-tenants-housing-nycha-homelessness> [<https://perma.cc/8XCR-8RFM>] (reporting on New York City's mayoral candidates' take on commercial rent control).

92. N.Y.C. Council 1796-2019, 2019 Leg., 7440 Sess. (N.Y. 2019).

93. *United for Small Business NYC*, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., <https://anhd.org/project/united-small-business-nyc-usbnyc> (last visited June 13, 2021). See also Elizabeth Kim, *Facing Retail Vacancy Crisis, City Council To Consider Plan For Commercial Rent Stabilization*, GOTHAMIST (Nov. 6, 2019), <https://gothamist.com/news/facing-retail-vacancy-crisis-city-council-consider-plan-commercial-rent-stabilization> [<https://perma.cc/YL5B-BBKS>] (discussing USBnyc's advocacy efforts around the CRS Bill).

94. AFRIDI & DROGARIS, *supra* note 6.

95. N.Y.C. Council 1796-2019, 2019 Leg., 7440 Sess., § 22-1203 (N.Y. 2019). The CRGB would have many of the attributes of the residential rent guidelines board described in the New York City Rent Stabilization, including number of members, types of relevant experience, mayoral appointment and staggered terms.

96. *Id.* at § 22-1203(f)(1).

Despite the CRS Bill stalling in New York City, the Seattle City Council passed a commercial rent control law (the “Seattle CRC Law”) in April 2020 in response to the pandemic.⁹⁷ The New York City Council convened a hearing on the CRS Bill in September 2021, but with the election of the new mayor, Eric Adams, and one of New York City’s most diverse city councils, the prospects of the bill are up in the air.⁹⁸ The Seattle CRC Law expired with the end of the Seattle COVID Emergency Proclamation in October 2022.⁹⁹

The history of commercial rent control is still unfolding. However, below is a timeline of these selected commercial rent control efforts so far:

<i>Introduced</i>	<i>Commercial Rent Control Law</i>	<i>Expired</i>
1945	Emergency Business Rent Control Act (passed by New York state legislature)	1963
1945	Emergency Commercial Rent Control Act (passed by New York state legislature)	1963
1948	Albany Business Rent Control Law (passed by New York state legislature)	1953
1978	Renter Property Tax Relief (passed by Berkeley, CA as ballot initiative)	1987
1982	Elmwood Commercial Rent Stabilization and Eviction Protection Ordinance (passed by Berkeley, CA city council)	1987
1985	Telegraph Avenue Commercial Rent Mediation and Arbitration Ordinance (passed by Berkeley, CA city council)	1987
1997	Petroleum/Energy Industry Information Reporting Act (passed by Hawaii state legislature)	No
1988	Small Business Jobs Survival Act (pending before New York, NY city council)	N/A
2019	Commercial Rent Stabilization Bill (pending before New York, NY city council)	N/A
2020	Seattle Commercial Rent Control Law (passed by Seattle, WA city council)	2022

97. Seattle, Wash., Ordinance 126066 (Apr. 17, 2020).

98. *Transcript: Mayor Eric Adams Announces Reduced Burdens on NYC Small Businesses, Jumpstarts City’s Economic Recovery*, N.Y.C., (May 15, 2022), <https://www1.nyc.gov/office-of-the-mayor/news/305-22/transcript-mayor-eric-adams-reduced-burdens-nyc-small-businesses-jumpstarts-city-s> [https://perma.cc/2YYW-PGAK].

99. Press Release, Jamie Housen, Office of the Mayor, Seattle COVID Emergency Proclamation to End After October 31, (Oct. 11, 2022). <https://harrell.seattle.gov/2022/10/11/seattle-covid-emergency-proclamation-to-end-after-october-31/> [https://perma.cc/EXV9-P9L7].

II.

GOALS AND CRITIQUES OF COMMERCIAL RENT CONTROL

For small New York City commercial tenants and community organizers, commercial rent control can address power imbalances in commercial leasing. This section takes a Keynesian approach that acknowledges the widespread presence of market failure throughout the economy.¹⁰⁰ Under this theory, leaving the market to self-correct and pushing further de-regulation is precisely why cyclical busts like recessions, extractive monopolies, and worker exploitations happen.¹⁰¹ Rather than accepting the myriad problems that market failure causes, the public sector can intervene to promote efficiency, fairness, and a broad distribution of opportunity. The CRS Bill is one such intervention.

However, some property owners, real estate lobbyists, economists, and lawyers, rooting their arguments in neoclassical economics, believe that the commercial real estate market is functioning well enough on its own, and the laws of supply and demand should drive production without government interference.¹⁰² In their eyes, commercial rent control would lower the quality and decrease the availability of commercial spaces, negatively impacting property owners, tenants, communities, and local governments.

The debate over the CRS Bill provides a rich case study through which to explore the policy's intended goals, positive impacts, and shortcomings. This Section arms legislators across the country with information for considering whether commercial rent control is an appropriate response to rent spikes and the displacement they cause. It discusses why the CRS Bill can be an effective policy while also responding to common critiques from free market adherents.

A. *Impact on Commercial Tenants*

Commercial rent control's purpose is to protect small commercial tenants from displacement resulting from commercial gentrification.¹⁰³ Gentrification, generally, is a process by which the essential

100. See generally RICHARD D. WOLFF AND STEPHEN A. RESNICK, *CONTENDING ECONOMIC THEORIES: NEOCLASSICAL, KEYNESIAN, AND MARXIAN* (2012).

101. See *id.* at 17–18.

102. See KEATING ET AL., *supra* note 70, at 41–43.

103. See Bridget Bartolini, *City's Small Businesses Need Rent Stabilization to Survive COVID-19, Advocates Say*, CITY LIMITS (Apr. 6, 2020), <https://citylimits.org/2020/04/06/citys-small-businesses-need-rent-stabilization-to-survive-covid-19-advocates-say/> [<https://perma.cc/7CML-Y7NV>] (quoting New York City organizer, Karen Narefsky, a senior organizer for equitable economic development at Association for Neighborhood & Housing Development (ANHD), which convenes a coalition of com-

character of low-income neighborhoods changes as higher-income households move in, housing values (and costs) rise, and new, more expensive businesses take over commercial spaces.¹⁰⁴ Commercial gentrification focuses on how small commercial tenants in those same neighborhoods are displaced, often as new investment pours into an area and disrupts local commercial corridors.¹⁰⁵ One byproduct of commercial gentrification is higher commercial rent.¹⁰⁶ Small businesses and nonprofits alike have had to close their doors due to their inability to predict or afford rent hikes.¹⁰⁷ Rent for commercial units has been climbing at increasingly unaffordable rates all across the country over the past several years, starting well before the COVID-19 pandemic.¹⁰⁸

munity-based organizations in NYC working to protect small businesses (United for Small Business NYC, or USBnyc), who argues that “[r]emoving the ability of speculative landlords to implement outrageous rent increases is really important to prevent displacement”); Natalie Bicknell, *What Could Rapidly Growing Seattle Do to Reduce Small Businesses Displacement?*, URBANIST (Aug. 2, 2019), <https://www.theurbanist.org/2019/08/02/what-could-rapidly-growing-seattle-do-to-reduce-small-businesses-displacement/> [<https://perma.cc/8GEL-FRLF>]; see Geoffrey Propher, *Estimating the Effect of Sports Facilities on Local Area Commercial Rents: Evidence From Brooklyn’s Barclays Center*, 20 J. SPORTS ECON. 91, 108 (2019) (noting in a study of the impacts of the building of the Barclay’s Center in Brooklyn, New York that, despite “concluding that stadiums can positively impact real estate prices . . . commercial landowners may be the primary benefactors rather than businesses [because] they may also realize higher rents”).

104. See Rachel Meltzer, *Gentrification and Small Business: Threat or Opportunity?*, 18 CITYSCAPE: J. OF POL’Y. DEV. & RSCH. 57, 57–58 (2016), <https://www.huduser.gov/portal/periodicals/cityscpe/vol18num3/ch3.pdf>. See generally Miriam Zuk, Ariel H. Bierbaum, Karen Chapple, Karolina Gorska, Anastasia Loukaitou-Sideris, Paul Ong & Trevor Thomas, *Gentrification, Displacement and the Role of Public Investment: A Literature Review* 11–13 (Fed. Rsv. Bank S.F. Working Paper No. 2015-05, 2015), https://www.buildhealthyplaces.org/content/uploads/2018/04/Urban-Displacement-Project_Zuk-et-al_Gentrification_Lit_Review_2015.pdf (discussing the gentrification literature).

105. Bahar Sakızlıoğlu & Loretta Lees, *Commercial Gentrification, Ethnicity, and Social Mixedness: The Case of Javastraat, Indische Buurt, Amsterdam*, 19 CITY & COMMUNITY 870, 870–71 (2020); Meltzer, *supra* note 104, at 58–60. See generally KAREN CHAPPLE, ANASTASIA LOUKAITOU-SIDERIS, SILVIA R. GONZÁLEZ, DOV KADIN & JOSEPH POIRIER, *TRANSIT-ORIENTED DEVELOPMENT & COMMERCIAL GENTRIFICATION: EXPLORING THE LINKAGES* 11–14 (2017) (describing four ways in which commercial gentrification often happens: retail (a) retail upscaling, described here; (b) general corporate commodification; (c) art district commodification; and (d) transit-oriented development).

106. See sources cited, *supra* notes 6 and 7.

107. See sources cited, *supra* note 8.

108. See sources cited, *supra* notes 6 and 7.

Critics argue that the CRS Bill's fundamental unfairness to property owners outweighs its benefits to commercial tenants.¹⁰⁹ First, critics opine that capping annual rent forces owners to forgo profits and provide a complimentary benefit to the public through reduced rent.¹¹⁰ Further, they argue that profit losses from the indiscriminate cap will lead owners to a precarious situation in which mortgage payments and other expenses outpace incoming rent payments.¹¹¹ Third, they say these profit cuts would significantly impact smaller landlords, such as housing cooperatives, whose residents may see their mixed-use buildings as a crucial investment.¹¹² Fourth, they argue the CRS Bill ignores the fact that owners do not benefit from vacancies and, on the contrary, have an incentive to lower rents to respond to market conditions. As evidence of this point, critics cite the large number of landlords that reduced rents or negotiated payment plans to help their tenants during the COVID-19 pandemic.¹¹³

However, the common harms small tenants experience at the hands of property owners with the unregulated power to increase rents strongly outweigh commercial rent control's potential adverse impacts on property owners. Retail property owners have significantly more power than small tenants, even though commercial tenancies technically confer possessory rights to tenants. Through commercial tenancies, owners have a future interest or reversion right to their property, while tenants have a period tenancy. A commercial tenancy is similar

109. See Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 *BROOK. L. REV.* 741, 761–67 (1988) (arguing that rent control as a general matter is inefficient for a number of the reasons that will be discussed below); *Commercial Rent Control's Fundamental Flaws*, *CRAIN'S N.Y. BUS.* (Sept. 20, 2018), <https://www.craainsnewyork.com/greg-david-new-york/commercial-rent-controls-fundamental-flaws> (referring to John J. Powers, *New York Debates Commercial Rent Control: Designer Ice Cream Stores Versus the Corner Grocer*, 15 *FORDHAM URB. L.J.* 657, 681–94 (1987)) (listing three arguments against proposed commercial rent control laws in the 1980s, namely that such laws would: (1) cause the physical degradation of commercial space; (2) stunt economic growth and desired change; and (3) entrench fundamental inequities).

110. See, e.g., John J. Powers, *New York Debates Commercial Rent Control: Designer Ice Cream Stores Versus the Corner Grocer*, 15 *FORDHAM URB. L.J.* 657, 692 (1987).

111. *Id.*

112. *Id.*

113. Claude Solnik, *Commercial Landlords' Rent Concessions Ease Pandemic Pain for Businesses*, *LONG ISLAND PRESS* (Oct. 13, 2020), <https://www.longislandpress.com/2020/10/13/commercial-landlords-rent-concessions-ease-pandemic-pain-for-businesses/> (noting that the “[n]et effective office rent, calculated including the cost of concessions, for the second quarter [of 2020] dropped 6.6 percent in the 15 largest U.S. markets,” according to the Los Angeles-based commercial real estate firm CBRE).

to homeownership involving a mortgage whereby the bank retains title to the home and can retake the property if the homeowner (and not the home renter) gets behind on payments. Commercial rent control aims to distribute the benefits and burdens of commercial property between owners and tenants to mirror the intended relationship. The policy likely would not eliminate *all* or *most* owner profits. Instead, it balances the profit motive with the long-term needs of communities and anchor institutions. Rent regulation can also be coupled with provisions that protect landlords at risk of default; the CRS Bill, or another bill, could provide some relief for property owners that can demonstrate that mortgage payments or other costs outpace rental income.

Though some retail property owners relaxed the financial obligations of their tenants for mutual survival during the pandemic, there is little evidence of ongoing benevolence or a new norm. Despite the pandemic being in full swing in December 2020, predominately Black and brown neighborhoods in New York City saw comparatively large increases in both commercial rents and vacancies.¹¹⁴ Data from the New York City storefront registry suggest that commercial landlords in communities of color were reverting to their pre-pandemic behavior, eagerly taking advantage of tenants or waiting out for national chains and franchises.¹¹⁵ CRS Bill opponents claim that if passed, it will lead commercial owners to pursue franchises as tenants—but this is already the overwhelming preference of commercial landlords.

A second criticism of the CRS Bill is that its poor drafting would result in obscure and counterproductive mechanics. For example, the CRS Bill ignores property owner expertise, empowering a board full of people with no practical understanding of the wide range of factors which affect commercial rents, such as local markets, space location, number of floors, and lighting, among others.¹¹⁶ In addition, there are concerns that as in the residential rent control context, the CRGB would fail to ensure that rent increases cover rising expenses due to flawed methodologies, obsolete data, and political interference. Further, the mechanism allowing owners to adjust initial rents may be

114. GINA LEE, SARAH INTERNICOLA & KAREN YAO, *THE STATE OF STOREFRONTS: ALARMING VACANCY RATES AND RISING RENTS DURING THE PANDEMIC* (2022), <https://anhd.org/report/state-of-storefronts>.

115. *Id.*

116. Lois Weiss, *Commercial Rent ‘Stabilization’ Bill Terrifies Real Estate Industry*, N.Y. POST (Nov. 19, 2019), <https://nypost.com/2019/11/19/commercial-rent-stabilization-bill-terrifies-real-estate-industry/> [<https://perma.cc/7525-SPX7>].

overwhelmed by thousands of petitions requiring individual assessments.¹¹⁷

Contrary to these critiques, the mechanics of the CRS Bill may not lead to the same adverse outcomes flowing from the residential rent control process. First, along with non-property owners, the CRGB would include property owners to ensure that their experience and expertise are part of rent increase deliberations. Though legislators are not always subject matter experts, the public trusts them to draft legislation regulating commercial properties and addressing other issues. Even so, in the CRS Bill, all of the board members will have some relevant experience. Further, the CRGB must track the interests of multiple stakeholders—not just those of property owners. Second, instead of blindly replicating the failures of the residential rent control board, the CRGB could alternatively incorporate lessons from shortcomings of the residential model and avoid similar pitfalls, such as underestimating costs. There is also an opportunity for supplementary legislation that provides relief for property owners in situations where their costs outpace the annual rent increases. Finally, there is still space in implementing the CRS Bill to develop methods, including certain technologies, for ensuring initial rent disputes do not overwhelm the board. The possibility of poorly executed rent control does not mean the intervention is inherently bound to fail.

The third common objection to commercial rent control is that contrary to its intent, it will actually worsen small businesses' and nonprofits' outlooks. Restricting owners' profits would disincentivize their reinvestment in infrastructure critical to commercial tenant operations, such as heating systems, insulation, and roofing. Additionally, the policy would disincentivize small businesses from growing—it would stifle their ability to move to larger, less regulated real estate units. Further, by applying to all businesses in covered commercial locations, not just small businesses or nonprofits, chain stores and franchisees that choose commercial locations covered by the bill would benefit at the expense of smaller tenants.¹¹⁸ For example, national banking institutions regularly use smaller spaces for ATM locations and branches. A local branch of such a bank could benefit from this bill, even though it targets less-resourced commercial tenants. At

117. *Hearing on Intro 1796-2019 and Intro 2299-2021 before the N.Y.C. Council Committee on Small Business* (N.Y.C. 2019) (testimony by New York Building Congress), https://www.buildingcongress.com/uploads/Intro_1796_and_2299_Commercial_Rent_Control_Testimony_09_17_21_FINAL96.pdf.

118. See Powers, *supra* note 110, at 688.

the same time, the bill would exclude a sizeable, locally-owned food cooperative or manufacturing company.

Some concerns regarding the negative impact of commercial rent control on small businesses and nonprofits are exaggerated or misplaced. My experiences and the experiences of my former colleagues representing dozens of New York City small businesses in lease negotiations suggest that the theory that “a penny taken now is a penny that would have been invested later” is wishful thinking. In other words, limiting the earning potential of landlords is not likely to backfire on small commercial tenants. This is because at a broader level, the incentive of capital owners is to maximize their own profits, and they frequently do so in ways that do not necessarily benefit their customers or their employees. Reports of companies incurring debt to pay dividends,¹¹⁹ political and economic critiques of raising the minimum wage,¹²⁰ and the profit-hoarding of billionaires during the pandemic¹²¹ are examples of the flaws of this assumption. Aside from increasing the fair market value of a property for a future sale, real estate owners lack the incentives to invest their money in properties of their small business and nonprofit tenants instead of reserving them as profits for their shareholders. Though there may be a risk that small commercial tenants benefiting from the CRS Bill will stay in one location for a longer time, this dynamic is far less problematic in a commercial context than a residential one. Small commercial tenants providing meaningful community services or products benefit from established customer loyalty in ways that can sustain their operations. In other words, this can be a mutually beneficial arrangement that recognizes that constant growth does not have to be the goal and aspiration of every organization. Although national chains may benefit from the CRS Bill, proponents argue that this mechanism ensures that owners cannot benefit from picking and choosing tenants and may prefer, the price being equal, working with smaller tenants that may be less demanding. However, in Section IV, I propose that the CRS Bill could be (i) revised to carve out national or large businesses, such as with

119. Matthew Goldstein, *Private Equity Firms Are Piling On Debt to Pay Dividends*, N.Y. TIMES (Feb. 19, 2021), <https://www.nytimes.com/2021/02/19/business/private-equity-dividend-loans.html> [https://perma.cc/7CLF-9S86].

120. Paul Constant, *How to Respond to the Five Most Tired, Trickle-Down Arguments Against the \$15 Minimum Wage*, BUS. INSIDER (Feb. 20, 2021, 8:00 AM), <https://www.businessinsider.com/debunking-common-arguments-against-15-minimum-wage-2021-2> [https://perma.cc/4K56-RC2E].

121. ‘Wealth Increase of Ten Men During Pandemic Could Buy Vaccines for All’, BBC NEWS (Jan. 25, 2021), <https://www.bbc.com/news/world-55793575> [https://perma.cc/D2Q9-3K5V].

the Seattle CRC Law, and (ii) accompanied by other legislation to address this issue.

B. Impact on Owners, Leaders, Employees, and Communities

The CRS Bill recognizes that there is much at stake for small businesses and nonprofits, but there are at least three other stakeholders that may suffer from rent-related displacement of small businesses and nonprofits. First, closures can create immense pressure on their leaders. In the context of for-profits, as many as eighty-five percent of U.S. small business owners either had no plans for their business after they retired, decided to discontinue their business, or closed due to economic conditions or business viability.¹²² Additionally, most small firm owners operate with only enough cash to survive a complete disruption in their operations for two weeks.¹²³ Historically, Black-owned businesses have had trouble receiving loans and are relatively cash-strapped.¹²⁴ Such financing can be vital to covering an assortment of expenses, including rent.

These institutional pressures sometimes translate into personal liability for entrepreneurs. For example, with some exceptions, many loans require that the owner provide a personal guarantee. These guarantees allow a creditor (e.g., the bank) to take money from the business owner's personal assets if the business cannot cover loan payments. As a result, the closure of a small business could thrust the owner into mounds of personal debt. Based on my experience, commercial leases often require a personal guarantee for rent payments. They often also had stringent requirements for early termination. For example, commercial leases often require tenants to pay all the rent owed for the entire term when tenants terminate the lease early, regardless of the reason. Such a clause would require a tenant to pay for rent owed for all ten years in a ten-year lease, even if it leaves the space in its fourth year and the owner finds another tenant. Another

122. SMALL BUSINESS CLOSURE CRISIS, PROJECT EQUITY, <https://project-equity.org/communities/small-business-closure-crisis/> (last visited Aug. 31, 2023); *Silver Tsunami: CT Biz Unprepared for Succession*, HARTFORD BUS. J., Aug. 7, 2015, <https://www.hartfordbusiness.com/article/silver-tsunami-ct-biz-unprepared-for-succession> [<https://perma.cc/LL9N-KTMM>].

123. DIANA FARRELL, CHRIS WHEAT & CHI MAC, JPMORGAN CHASE & Co., SMALL BUSINESS FINANCIAL OUTCOMES DURING THE ONSET OF COVID-19 (2020), <https://www.jpmorganchase.com/institute/research/small-business/small-business-financial-outcomes-during-the-onset-of-covid-19>.

124. Julia Falcon, *Why Black-Owned Businesses Have Been Hit Hardest by COVID-19*, HOUSING WIRE (Aug. 25, 2020), <https://www.housingwire.com/articles/why-black-owned-businesses-have-been-hit-hardest-by-covid-19/> [<https://perma.cc/W5K8-Q6QS>].

common requirement is that a business provides the commercial building owner several months' notice of an intended departure. In each scenario, the owner's assets are subject to seizure where the company has failed to earn income to cover such expenses.

A second directly-impacted stakeholder when small businesses and nonprofits close is their employees. In 2021, small businesses employed just over sixty million people, or close to forty-seven percent of all employees.¹²⁵ Nonprofits, as of December 2021, provided around twelve million additional jobs.¹²⁶ Women, people of color, and immigrants are likelier to operate small businesses.¹²⁷ When small businesses and nonprofits close, more Black people and other people of color become unemployed.¹²⁸ One 2017 study suggested that half of small companies provided their employees with health insurance, meaning that job loss likely leads to a loss of insurance for employees and their dependents.¹²⁹ Losing health insurance has been a particularly acute harm during the COVID-19 pandemic, which disproportionately impacts Black people and other marginalized groups.¹³⁰ In addition, job loss can trigger pre-existing mental and physical health conditions.¹³¹ Without health insurance, employees must independently manage health issues that could lead to even more expenses and debt. Relatedly, business and nonprofit closures can “pose a major

125. U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, 2021 SMALL BUSINESS PROFILE 1 (2021), <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30144808/2021-Small-Business-Profiles-For-The-States.pdf>.

126. See CENTER FOR CIVIL SOCIETY STUDIES ARCHIVE, JOHNS HOPKINS UNIVERSITY, COVID-19 JOBS UPDATE, DECEMBER 2021: A FINAL UPDATE ON THE NONPROFIT JOBS RECOVERY (2022), <http://ccss.jhu.edu/december-2021-jobs/>.

127. JPMORGAN CHASE & CO., DIVERSE OWNERSHIP, SMALLER BUSINESSES ARE MORE LIKELY TO BE OWNED BY WOMEN AND MINORITIES (2014), <https://www.jpmorganchase.com/institute/research/small-business/small-business-dashboard/diverse-ownership>.

128. Don Mar, Paul Ong, Tom Larson, & James Peoples, *Racial and Ethnic Disparities in Who Receives Unemployment Benefits During COVID-19*, 2 SN BUSINESS & ECONOMICS 102, 14 (2022) (noting “that Blacks, Hispanics and non-Hispanics Other workers in particular face a greater labor market impact as a result of the pandemic”).

129. Tom Murphy, *Health Benefit Offers from Small Businesses Keep Vanishing*, ASSOCIATED PRESS (Sept. 19, 2017), <https://apnews.com/article/70d74a8a0e4e4339ade68621a0823c66>.

130. Mary Van Beusekom, *Studies: People of Color Bear Larger Share of COVID-19 Burden*, CTR. FOR INFECTIOUS DISEASE RES. & POL'Y, UNIV. MINNESOTA (July 28, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/07/studies-people-color-bear-larger-share-covid-19-burden>.

131. O'Neal, *supra* note 30 (citing several studies showing that people who lost their jobs are 83% more likely to end up with “stress-related psychiatric problems” and “stress-related diabetes or arthritis,” 200% more likely to experience a stroke or heart attack and, for high-ranking men, have a 50-100% higher likelihood of death within a year of losing their job as compared to their employed peers).

shock to one's social status [and] disrupt social connections."¹³² Folks who lose their jobs can also "feel scared, vulnerable [and] lonely, [and] [f]eelings of uselessness and hopelessness can ensue."¹³³ In looking for new employment, the alternatives are increasingly low-paying jobs in the service sector.¹³⁴

Finally, communities often lose out when small businesses and nonprofits close due to rent hikes. Though not uniformly the case, these organizations provide vital, culturally relevant services and products to their communities and the stability necessary for economic autonomy, civic engagement, and community relationships.¹³⁵ One study noted that businesses in gentrifying neighborhoods in New York City were more likely to be replaced by chain stores.¹³⁶ Commercial gentrification decreases the likelihood that dollars spent or donated by community members at their local institutions will continue circulating in their communities instead of being extracted by large national and multi-national corporations. Professor Ashanté Reese, in her study of food pathways in Washington, D.C., discusses the role of small businesses in a predominately Black community in Washington D.C., Ward 7. She notes that small businesses can serve as history holders, markers of community stability, sources of community pride, safe spaces for local youth, beacons of culturally-accepted moral authority, and models for Black entrepreneurship and economic opportunities.¹³⁷ The website *Vanishing New York* is replete with personal stories from community members about small businesses that have closed, many due to rent hikes, and the meaning those businesses had to their local communities.¹³⁸ The issue of communities losing access to relevant products and services for periods after small companies or nonprofits close is worse in low-income neighborhoods where gentrification is already in motion.¹³⁹

Commercial rent control objectors argue that the policy hurts communities in several ways. For one, it would empower local politicians to use appointments as a bargaining chip to influence commercial rent control policy. This misuse of power could result in

132. Kate W. Strully, *Job Loss and Health in the U.S. Labor Market*, 46 *DEMOGRAPHY* 221, 222 (2009).

133. O'Neal, *supra* note 30.

134. CHAPPLE, *supra* note 105, at 15.

135. AFRIDI & DROGARIS, *supra* note 6.

136. Meltzer, *supra* note 104, at 70.

137. See ASHANTÉ M. REESE, *BLACK FOOD GEOGRAPHIES: RACE, SELF-RELIANCE, AND FOOD ACCESS IN WASHINGTON, D.C.* 93–100 (2019).

138. JEREMIAH'S VANISHING NEW YORK, *supra* note 8.

139. Meltzer, *supra* note 104, at 70, 79–80.

corruption and negative externalities for communities. Further, when property owners cannot seek higher rents, the neighborhoods where their properties sit receive “less property tax revenue and [suffer from] lower property values.”¹⁴⁰ Low tax revenue is an especially acute concern today, as the COVID-19 pandemic has already gutted the tax revenues of cities like New York City.¹⁴¹ It would “keep depressed areas or areas in need of revitalization in their current state,” and lead to an exodus of owners from New York City and other cities to greener pastures to increase profits.¹⁴² Instead of attracting entrepreneurs with fresh product and service ideas for communities already experiencing transformation, commercial rent control would disadvantage aspiring business owners by keeping commercial space in the hands of older businesses with no incentive to improve the quality of their products and services. Traditional capitalists further argue that one need only look to the recent slide in multi-family unit sales to understand how much of a failure rent control has been in the residential context.¹⁴³ Commercial rent control may also incentivize mixed residential-commercial space owners, with regulated commercial space and unregulated residential units, to exploit their residential tenants to compensate for the losses suffered on their retail space.¹⁴⁴

Notwithstanding these criticisms, it is unlikely that commercial rent control alone would harm communities as much as the status quo does. Moreover, each of these can be addressed without abandoning rent regulation altogether. To mitigate the likelihood of corruption, council members could select board members instead of the mayor, since it would be harder to capture multiple decision-makers. Section IV contemplates amendments to the CRS Bill and supplemental laws that could address this issue, as well as the risk that mixed-use property owners pass on losses from regulated commercial spaces to residential tenants.

140. *NYC Real Estate Industry Grapples with Broker Fees, Commercial Rent Control*, REAL ESTATE MONITOR WORLDWIDE, Feb. 19, 2020, PROQUEST.

141. Dana Rubenstein & Jesse McKinley, *Virus Siphons \$2.5 Billion in N.Y.C. Property Tax Revenue*, N.Y. TIMES (Jan. 17, 2021) <https://www.nytimes.com/2021/01/14/nyregion/budget-coronavirus-nyc.html> [<https://perma.cc/7L5P-QTK6>].

142. Powers, *supra* note 110, at 691.

143. Weiss, *supra* note 116; Press Release, Real Estate Board of New York, New York City Business Leaders Join Forces in Opposition to City Council’s Proposed Commercial Rent Control Legislation (Nov. 14, 2019) <https://www.rebny.com/press-release/new-york-city-business-leaders-join-forces-in-opposition-to-city-councils/> [<https://perma.cc/4XKU-WFWA>].

144. Janet Tu, *Mayor’s Group Rejects Commercial Rent Control*, SEATTLE TIMES (Sept. 28, 2016), <https://www.seattletimes.com/business/retail/mayors-group-rejects-commercial-rent-control/> [<https://perma.cc/XYY4-5RG5>].

Further, despite lower property tax revenues caused by lower rents, communities benefit from businesses and nonprofits saved by rent control and a reduction in vacancies. At the same time, owners generate income to support tax payments they would otherwise have to pay alone. Though not a replacement, some sales tax would be better than no property tax revenue. Replacing commercial spaces in gentrifying neighborhoods takes longer than in non-gentrifying areas.¹⁴⁵ It is not inevitable that a property owner evicting a small tenant will be able to replace that tenant with one that will pay higher rents. Framing progress as synonymous with increasing property values, owner profits, and property sales may make sense if you believe the influx of wealthier, often whiter, new residents—along with their tastes—always benefits communities. Unfortunately, this vision ignores the racist and classist structures that encourage gentrification by newcomers. Further, it underappreciates the inherently violent nature of commercial displacement for impacted Black and brown communities. The market “self-correction” theory that supports these “transitions” presumes that economic cycles, such as boom and bust and capital flight,¹⁴⁶ are inevitable and represent the best way to organize an economy.

III.

LEGAL CHALLENGES TO COMMERCIAL RENT CONTROL

Though commercial rent control has a relatively short history compared to residential rent control, the evidence is clear that it can survive challenges in state and federal courts. Nonetheless, critics of commercial rent control have consistently challenged its constitutionality. First, they often believe state law does not authorize local governments to regulate commercial rent.¹⁴⁷ The CRS Bill faces this critique, despite successful attempts in localities like Seattle, Washington, and Berkeley, California, to implement the policy. Second, even if local governments have this power, opponents often argue that its enactment would violate the federal Constitution, including the Contracts, Takings, Equal Protection, and Due Process clauses.

145. Meltzer, *supra* note 104, at 70.

146. This is meant to refer to the idea that the economy will continue to experience cycles where it is booming before it crashes, only to repeat itself again. Adam Hayes, *Boom and Bust Cycle*, INVESTOPEDIA (Sept. 5, 2020), <https://www.investopedia.com/terms/b/boom-and-bust-cycle.asp> [<https://perma.cc/L8BM-JE66>].

147. See, e.g., *Not So Fast: NY Bar Says City Has No Authority to Introduce Commercial Rent Control*, THE REAL DEAL (Sept. 12, 2018), <https://www.nycbar.org/media-listing/media/detail/not-so-fast-ny-bar-says-city-has-no-authority-to-introduce-commercial-rent-control-the-real-deal> [<https://perma.cc/PUU3-3YB3>].

This Section responds to several legal challenges to commercial rent control, starting with state law challenges and moving to federal law challenges. It concludes that the law proposed by the CRS Bill would survive state and federal court scrutiny. This analysis empowers local legislators and lawyers to consider commercial rent control as a potential tool for addressing commercial displacement.

A. *State Constitutionality*

Opponents of city-enacted commercial rent control often dispute city governments' authority under what is known as municipal home rule.¹⁴⁸ Often codified in state constitutions and supplemented by state legislation and local charters, home rule is a legal framework that clarifies the nature of police powers state legislatures confer to local governments to govern local affairs.¹⁴⁹ State legislatures often reserve specific issues to their locus of concern, such as tax and court procedures, and one argument is that commercial rent control is among those specified topics.

The home rule movement, which denounced the pre-existing view of cities and towns as “mere creatures, agents, or subdivisions of the state,” started in the late nineteenth century.¹⁵⁰ Before the home rule framework emerged, Iowa Supreme Court Chief Justice John F. Dillon championed the then-existing, much narrower view of local autonomy. Dillon once wrote, “[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature.”¹⁵¹ In effect, “local governments were powerless to act” without state legislators expressly giving them specific powers, according to the “Dillon rule.”¹⁵² The first wave of reformers forwarded three slightly competing conceptions of the local legislature's role in handling local

148. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1347, 1358 (2009) (Appendix A lists the municipal home rule frameworks then present in each state in the United States); see also Barron, *infra* note 150, at 2260 (noting that “all but two states now have express constitutional or statutory home rule provision”).

149. See Barron *infra* note 150, at 2257 (defining home rule as “the autonomy that state law supposedly now confers on cities and suburbs”); *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145 (1966). See also Patricia J. Thompson, *Municipal Cooperative Purchasing Arrangements in Home Rule States: The Maine Example*, 54 PROCUREMENT L. 8 (2018).

150. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2278 (2003).

151. *Id.* at 2281; see also Baker & Rodriguez, *supra* note 148, at 1340.

152. Barron, *supra* note 150 at 2285.

affairs.¹⁵³ Professor David Barron notes that following the Second World War, second-wave home rule reformers pushed for a system that empowered local governments “to exercise control over matters of local concern.”¹⁵⁴ Though liberally construed, the modified rule permitted the state unlimited power to preempt local laws. Since the 1960s, scholars have espoused a wide range of views on how modern formulations of home rule have played out. For our purposes, we focus on a state, New York, that has adopted the modern approach shared by many other states.¹⁵⁵

The New York state legislature established its initial home rule framework by amending its constitution in 1894.¹⁵⁶ State legislators clarified the rule in 1923, followed by subsequent amendments and related statutes.¹⁵⁷ The New York Bill of Rights enshrines home rule in Article IX of the state constitution and permits New York City to adopt its own laws.¹⁵⁸ The state legislature passed the first New York City Charter (the “NYC Charter”) in 1897.¹⁵⁹ City charters have their origin in British law, evoking a principle of inviolability and giving municipalities a combination of public and private powers.¹⁶⁰ In the NYC Charter, the state legislature specifically empowered the New York City Council as the legislative body of New York City to adopt such local laws.¹⁶¹ In 1963, the New York legislature further amended the New York constitution.¹⁶² However, the New York home rule regime is not without criticism.¹⁶³

153. *See id.* at 2321 (explaining that the three competing visions of home rule centered around (1) the arousal of the public realm, (2) a non-political, administrative efficiency and (3) stable authority).

154. *Id.* at 2327. Comm. on the N.Y. State Constitution, N.Y. State Bar Ass’n, *Report and Recommendations Concerning Constitutional Home Rule*, 30 MUNICIPAL LAWYER 40 (2016). *See also Home Rule and the New York Constitution*, *supra* note 149, at 1149.

155. *See Baker & Rodriguez*, *supra* note 148.

156. W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 320 (1954).

157. *Home Rule and the New York Constitution*, *supra* note 149.

158. N.Y. CONST. art. IX, § 1. *See* N.Y.C., N.Y. CHARTER ch. 2, §§ 21, 32 (2021) (stating that “[e]xcept as otherwise provided by law, all legislative action by the council shall be by local law.”).

159. Richard Briffault, *The New York City Charter and the Question of Scale*, 42 N.Y.L. SCH. L. REV. 1059, 1062 (1998).

160. Gerald Benjamin, *Home Rule: Elusive or Illusion?*, 89 N.Y. ST. B. A. J. 25, 25 (2017).

161. N.Y.C., N.Y. CHARTER ch. 2, §§ 21, 32 (2021); *See* Briffault, *supra* note 159 at 1061.

162. *Home Rule and the New York Constitution*, *supra* note 149 at 1151–52.

163. *Id.* at 1162–63 (arguing that New York’s home rule regime needs to eliminate “the antiquated notion that local power must be carefully constrained”).

Under New York's home rule framework, New York City can adopt laws related to (1) its property, affairs, or government that are not inconsistent with state law or the constitution and (2) ten other enumerated matters, including the protection, conduct, safety, health and well-being of its residents or property.¹⁶⁴ In addition, the NYC Charter restates the city council's power to adopt laws in connection with "the order, protection and government of persons and property [and] . . . the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants."¹⁶⁵ These powers are collectively known as the city's "police powers."

However, the New York state legislature can (1) override the city council's proper exercise through its local laws passed and (2) intervene in the city's property, affairs, or government.¹⁶⁶ Overriding or intervention can occur through (a) general statewide laws and (b) special, local laws requested by the city government.¹⁶⁷ General statewide laws have general application in all jurisdictions (i.e., cities, towns, villages) within New York.¹⁶⁸ A special local law is one that a local government might request that has specific application only to that jurisdiction.¹⁶⁹ New York's legislature considers a facially special law to be general (1) under the classification doctrine, even if it only applies to a limited number of localities, and (2) where the law serves a substantial state concern.¹⁷⁰ Though some scholars¹⁷¹ have suggested improvements to municipal home rule regimes nationally and locally, including broadening it, this Article does not aim to contribute to that debate. Instead, this brief explanation of the New York State home rule provides the necessary context to evaluate the legality of commercial rent control under this or similarly situated regimes.¹⁷²

164. N.Y. CONST. art. IX, § 2(c).

165. N.Y.C., N.Y. CHARTER ch. 2, § 28(a) (2021).

166. See N.Y. CONST. art. IX, § 2(b)(2).

167. See *id.*

168. *Id.* art. IX, § 3(d)(1).

169. *Id.* art. IX, §§ 2(b)(2), 3(d)(1).

170. Michael A. Cardozo & Zachary W. Klinger, *Home Rule in New York: The Need for a Change*, 38 PACE L. REV. 90, 93 (2017).

171. See *Home Rule and the New York Constitution*, *supra* note 149 at 1158–60; Gerald Benjamin, *The Chassidic Presence and Local Government in the Hudson Valley*, 80 ALB. L. REV. 1383, 1460–64 (2017); Cardozo & Klinger, *supra* note 170, at 110–120.

172. While almost thirty-five states preempt localities from legislating *residential* rent control, less than half statutorily preempt local commercial rent control. This latter group of states, which include states with concentrations of Black and/or immigrant communities like Michigan, Georgia, and Maryland, are ripe for considering this policy. See *Rent Control Laws*, iPROPERTY MANAGEMENT, <https://ipropertymanagement.com/laws/rent-control> (last visited June 15, 2021).

This Article now turns to whether commercial rent control is constitutional under New York State law, using the CRS Bill as a case study. In doing so, this Article addresses two sub-questions. The first question is whether the New York City Council has the police power to legislate commercial rent control. Even if New York State grants the city the authority to regulate commercial rents, the second question is whether the state legislature has preempted the City Council from passing commercial rent control.

1. *Police Power*

As codified in state constitutions and laws, municipal home rule lays out the contours of the police powers exercisable by local governments, including municipalities, counties, and villages. In evaluating whether local legislatures appropriately exercise their police powers, New York state courts conduct a two-step test. First, courts ask whether state law confers such powers (i.e., “police powers”) to the local government.¹⁷³ Second, courts evaluate whether the law’s application reasonably relates to its proposed purposes.¹⁷⁴ In most cases, New York’s highest court, the Court of Appeals, views local laws with “an exceedingly strong presumption of constitutionality.”¹⁷⁵ However, determining what police powers are appropriate in scope is challenging. Though different jurisdictions interpret police powers inconsistently, New York’s approach may prove illustrative for practitioners and legislators interested in protecting and reviving thriving, diverse, small business communities “after” COVID-19.

New York’s Court of Appeals previously held that “the leading New York cases interpreting the police power of municipalities support the validity of municipal price regulation in certain instances.”¹⁷⁶ Relatedly, in New York, “[a]ll contracts are subject to the police power.”¹⁷⁷ In determining how courts would evaluate commercial rent control, it is essential to see how they have viewed other price controls.

In *People v. Cook*, the Court of Appeals upheld a local law that increased the price of cigarette brands with higher tar and nicotine

173. *New York State Club Ass’n, Inc. v. City of New York*, 505 N.E.2d 915, 917 (N.Y. 1987), *aff’d*, 487 U.S. 1 (1988).

174. *People v. Cook*, 312 N.E.2d 452, 456 (N.Y. 1974).

175. *McDonald v. New York City Campaign Fin. Bd.*, 965 N.Y.S.2d 811, 823 (N.Y. Sup. Ct. 2013), *aff’d as modified*, 985 N.Y.S.2d 557 (N.Y. App. Div. 2014).

176. *Cook*, 312 N.E.2d at 456.

177. *Twentieth Century Assocs. v. Waldman*, 63 N.E.2d 177, 179 (N.Y. 1945) (internal citations omitted).

content, which correlated with higher health risks.¹⁷⁸ In intent and impact, the law aimed to dissuade consumers from purchasing those brands. In evaluating whether the statute fell within New York City's police powers, the Court found, and both parties conceded, that the law's goal was "to improve the public health by reducing the quantity of high tar and nicotine cigarettes smoked by the public."¹⁷⁹ Both parties agreed that preserving "the public health . . . of the city and its inhabitants" falls squarely within the city's police powers outlined in the New York City Charter.¹⁸⁰ In the second step of the analysis, the Court held that New York City Council reasonably believed that increasing the prices for more harmful cigarettes would discourage the public from buying them and, consequently, improve relative health outcomes from smoking.

New York courts have also held that it is "a proper exercise of the City's police power to regulate . . . businesses in the public interest."¹⁸¹ For example, a lower court upheld restrictions on the number of food vendor permits, stating that "[t]he prohibition is a logical and reasonable outgrowth of the limitation placed on the maximum number of permits the New York City Department of Health is authorized to issue."¹⁸² Where the behaviors of specific businesses or industries infringe on the welfare of New York citizens, local legislators can intervene. The city here determined, and the Court agreed, that it could improve health outcomes for residents by ensuring that a "broader spectrum" of people can obtain food vending permits in a legitimate, and not an illegal, black market.¹⁸³

Where the New York Supreme Court did strike down a price control provision, it did so for reasons unrelated to the local authority's police powers.¹⁸⁴ For example, in *Wholesale Laundry v. City of New York*, the court struck down a local minimum wage law because a then-existing state law that permitted employers to pay employees a lower minimum wage preempted the local law.¹⁸⁵ This Article will discuss preemption in more depth further below.

178. *Cook*, 312 N.E.2d at 456.

179. *Id.* at 455–56.

180. *Cook*, 312 N.E.2d at 455; N.Y.C., N.Y. CHARTER ch. 2, § 28 (2021).

181. *Short Stop Indus. Catering Corp. v. City of New York*, 485 N.Y.S.2d 921, 924 (N.Y. Sup. Ct. 1985).

182. *Big Apple Food Vendors' Ass'n v. City of New York*, 644 N.Y.S.2d 216, 217 (1996).

183. *Id.* at 282.

184. *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 234 N.Y.S.2d 862 (1962), *aff'd*, 12 N.Y.2d 998 (1963).

185. *Id.* at 329.

Regarding the law proposed by the CRS Bill, New York courts would likely uphold it as a proper exercise by New York City of its police powers. This conclusion is consistent with prior case law recognizing local government authority to regulate prices on behalf of residents. Moreover, the CRS Bill's author designed it "to allow smaller businesses to compete for their existence" in a city where commercial spaces represent a significant source of income, economic vitality, and communal social fabric. Suppose the CRS Bill passes, and the New York state legislature wants to take away New York City's power to regulate commercial rents. In that case, it could do as California's state legislature did in response to Berkeley's commercial rent control law and pass a subsequent state law stripping municipalities of that power.¹⁸⁶

Some inaccurately look to residential rent and taxation to argue that the City of New York needs "enabling legislation" from the state that would permit the city to regulate commercial rents.¹⁸⁷ Indeed, residential rent and taxation are areas of law requiring specific authorization by the state legislature for local governments to legislate. Regarding residential rent, the Emergency Tenant Protection Act of 1974, as amended, established a statewide framework for residential rent control and permitted New York City to regulate residential rents through local laws.¹⁸⁸ However, Article XVIII of the New York Constitution focuses exclusively on housing policy. Regarding taxation, Article XVI of the New York Constitution governs taxation and permits the state legislature to delegate taxing power through an enabling statute.¹⁸⁹ Some examples include sales tax, property tax, and franchise tax.¹⁹⁰

Despite doing so with taxation and residential rents, the state legislature did not deem commercial rent control outside local police powers. As a result, neither the residential rent laws nor any other law currently applies to commercial rent. Absent a limitation by the state, there is no compelling reason to narrow what is supposed to be a relatively broad local power given to the city.

Moving to the second step of the police powers test, a court would likely find that commercial rent control reasonably carries out its intended purpose. Many of the same policy considerations essential for upholding commercial rent control in and around World War II

186. CAL. CIV. CODE § 1954.27 (West).

187. *See also* N.Y. CONST. art. IX, § 2.

188. N.Y. UNCONSOL. § 8624(a-1); § 8624(b) (McKinney 1974).

189. N.Y. CONST. art. XVI, § 1.

190. *See generally* N.Y. TAX LAW § 1201(a); § 1201(b)(1) (McKinney 2020).

have motivated lawmakers since the city council introduced the CRS Bill in 2019. Lawmakers proposed the CRS Bill to respond to local community organizing and various reports by city and non-state agents, highlighting unregulated commercial rents as exacerbating the crisis of small business and nonprofit displacement. I, along with other legal practitioners taking leadership from small businesses, small nonprofits, and community organizers, participated in town halls and interviews and testified at the city- and state-level hearings regarding the impact of unregulated commercial rents on small businesses and nonprofits.

Unsurprisingly, the New York City Council introduced several other bills designed to support small commercial tenants in the year leading up to the introduction of the CRS Bill. Some bills passed into law prohibited commercial tenant harassment,¹⁹¹ provided for free legal services,¹⁹² and established a storefront commercial tenant database.¹⁹³ As was the case in Berkeley, which passed commercial rent control in the 1970s and 1980s, and Seattle, which passed commercial rent control in April 2020, New York lawmakers have approached the problem of commercial displacement from multiple angles. There is no silver bullet to this issue. Still, it is unlikely that a court would strike down this commercial rent control law as being unreasonably responsive to issues raised by various stakeholders, as has been amply demonstrated.

2. *Field and Conflict Preemption*

Even if the CRS Bill falls under New York City's police powers, the state legislature could prohibit New York City from regulating commercial rent through what are known as (1) field preemption or (2) conflict preemption.¹⁹⁴ Local laws are unconstitutional due to field preemption if the state legislature occupies the "field," or the legal subject matter covered by those laws. Field preemption may be either (1) implied or (2) express.¹⁹⁵

The New York state legislature may imply its intentions to preempt a policy area by (1) declaring a state policy or (2) enacting a comprehensive and detailed regulatory scheme in a particular legal

191. 2016 N.Y.C., *Local Law No. 152*.

192. 2016 N.Y.C., *Local Law No. 90*.

193. 2019 N.Y.C., *Local Law No. 185*.

194. *Garcia v. New York City Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 617, 106 N.E.3d 1187, 1199 (2018).

195. *Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 466 (E.D.N.Y. 2012), *vacated and remanded*, 796 F.3d 171 (2d Cir. 2015).

subject matter.¹⁹⁶ In *Eric M. Berman, P.C. v. City of New York*, the state legislature failed to adequately declare a state policy on a topic, specifically debt collection.¹⁹⁷ There, a New York federal district court upheld a local law expanding the definition of “debt collector” (i.e., individuals authorized to collect from debtors what they owe to their creditors), even though there was already a state law on debt collection.¹⁹⁸ Though the state law defined “creditor” and prohibited certain activities by them and their agents, such as debt collectors, the law neither purported to present an exhaustive definition of who could qualify as debt collectors nor declared a “legislative policy to occupy the entire field of debt collection.”¹⁹⁹

In *Givens v. City of New York*, the New York State Supreme Court also held that a state law failed to preempt a local ordinance by declaring a state policy.²⁰⁰ The court determined that the general state law on process servers did not imply the state’s preemption of a local law requiring that process servers (i.e., people authorized to deliver warrants, subpoenas, or the like to other individuals²⁰¹) obtain a license.²⁰² The state law specified that process servers must be third-party individuals at least eighteen years old.²⁰³ Further, it established that it would “not annul, alter, affect or exempt any person . . . subject to the provisions of this Article from complying with any local law, ordinance or regulation with respect to process servers.”²⁰⁴ The court reasoned that neither the law nor the actual regulatory scheme of the state law implied that state legislatures intended to preempt the entirety of the process server legal regime.²⁰⁵

Conversely, the New York court in *Consol. Edison Co. of New York v. Town of Red Hook* held that the state’s declaration of consolidating the field of electricity generation licensing preempted a local

196. *Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 456 N.E.2d 487 (1983).

197. *Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 465–66 (E.D.N.Y. 2012), *vacated and remanded*, 796 F.3d 171 (2d Cir. 2015).

198. *Id.* at 466, 471–72.

199. *Id.* at 467.

200. *In re Givens v. City of New York*, 177 A.D.3d 532, 113 N.Y.S.3d 687 (2019), *leave to appeal denied sub nom.* *Givens v. City of New York*, 35 N.Y.3d 903, 148 N.E.3d 522 (2020).

201. *Id.*

202. *Id.* at 532.

203. *Id.* at 533 (internal citations omitted).

204. *Givens v. City of New York*, 61 Misc. 3d 200, 205, 76 N.Y.S.3d 355, 359 (N.Y. Sup. Ct. 2018), *aff’d sub nom.*, *In re Givens v. City of New York*, 177 A.D.3d 532, 113 N.Y.S.3d 687 (2019), *leave to appeal denied sub nom.*, *Givens v. City of New York*, 35 N.Y.3d 903, 148 N.E.3d 522 (2020).

205. *Id.* at 205.

law.²⁰⁶ In that case, the court stated that “the history and scope” of the state law was to “replace the [then] uncoordinated welter of approvals, procedures and agencies that have virtually paralyzed construction of needed new power plants” with a “one-stop certification” procedure.²⁰⁷ This intent to create a holistic process suggested to the court that the state legislature wanted to preempt the field of electricity generation licensing to avoid the lack of coordination that preceded the passage of the state law. The local law in controversy required that all power plants obtain a license from the local town board. In contrast, the state law had already contemplated that state Siting Boards conduct such reviews. Because the local legislators were creating an extra hurdle in a process that state legislators intended to streamline, the court found that the state legislature preempted the local law.

The Court of Appeals also found field preemption present in *Albany Area Builders Ass’n*, where the state had created a comprehensive regulatory scheme for local transportation systems. A local law created a separate fund supporting local transportation system construction. The Court held that state law preempted the local law because the former already contemplated highway funding, fundraising mechanisms for local towns, and oversight mechanisms that the local law would bypass.²⁰⁸

In light of the current condition of the law, the CRS Bill would easily overcome a challenge based on field preemption. Nearly all field preemption cases deal with conflicts between city- and state-level laws in effect. No current New York state law has declared an intention to regulate commercial rents. Further, no state law enacts a comprehensive regulatory scheme on the subject. The inquiry into field preemption focuses on what an observer can imply based on the legislature’s actions. Here, it is clear that the New York state legislature has demonstrated no current intention to regulate commercial rent.

Some believe that New York state law preempts any local commercial rent control because the state had previously comprehensively regulated the area through the Emergency Business Rent Control Act and the Emergency Commercial Rent Control Act, and had allowed these laws to expire. Support for this proposition comes from a decision from 1929, *Gennis v. Milano*, wherein the New York Supreme Court, a lower court, held that the state legislature intended to preempt

206. *Consol. Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 106, 456 N.E.2d 487 (1983).

207. *Id.* (internal citations omitted).

208. *Albany Area Builders Ass’n v. Town of Guilderland*, 74 N.Y.2d 372, 377–78, 379, 546 N.E.2d 920, 922 (1989).

a law that was “a re-enactment of the State Housing Laws as they [previously] existed.”²⁰⁹ Writing for the court, Judge Bijur noted the fact that a previous court decision declared contracts between landlords and tenants matters of state concern as opposed to a local or municipal one.²¹⁰ In *Gennis*, the City of New York passed a law that provided “that[,] because of an existing emergency[,] a tenant of premises . . . occupied for dwelling purposes may plead as a defense to an action for rent that the rent demanded is unjust and unreasonable and thereupon the just rent shall be determined by the court.”²¹¹ Quoting Judge Pound’s concurrence in *Adler v. Deegan*, the *Gennis* court noted that contracts are among the affairs strictly of state, not local, concern.²¹² Though seemingly substantial, the decision predates the most recent iteration of New York’s municipal home rule regime, updated in 1963. Still, some would argue that there have not been substantive changes to the actual application of the rule and that the latest amendment is more of a restatement of the narrow Dillon approach to local power under which the state maintains significant control.

Gennis, which some incorrectly believe stands for the proposition that previously expired state laws preempt local laws from the field by implication, would not invalidate the CRS Bill. First, in the *Gennis* case, the local regulation in question amended existing enforceable contracts, which is not the case with the law proposed by the CRS Bill. Instead, the law would apply to new leases signed after the bill is signed. Second, the law in *Gennis* was related to a frequently regulated subject matter, residential leases, while the law underlying the CRS Bill would regulate commercial leases. This distinction is vital given the different legal approaches that New York, and most states, take in specifically carving out residential space. Third, the fatal feature of the law in *Gennis* was its infringement on owners’ procedural rights to repossess under the Civil Practice Act—not that it involved a contract. In fact, only three cases have cited *Gennis*.²¹³ Two cases cited *Gennis*’ holding that local laws cannot violate procedural state laws,²¹⁴ and a third case cited the court’s contention that contracts are

209. *Gennis v. Milano*, 237 N.Y.S. 432, (App. Term 1929).

210. *Id.* at 212.

211. *Id.*

212. *Id.* at 211, citing *Adler v. Deegan*, 167 N.E. 705 (1929), amended, 170 N.E. 164 (1930).

213. See *749 Broadway Realty Corp. v. Boyland*, 140 N.Y.S.2d 766 (Sup. Ct. 1955), aff’d, 148 N.Y.S.2d 741 (1956), aff’d, 3 N.Y.2d 737, 143 N.E.2d 519 (1957); *Olsen v. Ross*, 77 N.Y.S.2d 536 (Sup. Ct.), rev’d, 79 N.Y.S.2d 889 (App. Div. 1948); *Tartaglia v. McLaughlin*, 77 N.Y.S.2d 31 (Sup. Ct. 1947), aff’d, 273 A.D. 821, 76 N.Y.S.2d 305 (App. Div. 1948), rev’d, 79 N.E.2d 809 (1948).

214. *Olsen*, 77 N.Y.S.2d 536; *Tartaglia*, 77 N.Y.S.2d 31.

only state concerns (a higher court later reversed this decision).²¹⁵ A fourth problem with the *Gennis*-based argument is that New York courts have affirmed local laws for doing what *Gennis* claimed to dissuade—imposing on pre-existing contracts, as was discussed earlier in this Section.²¹⁶ The fifth issue with expired law preemption is that it would drastically undercut home rule. Local officials could not legislate around local issues, keeping them dependent on state politicians whom their constituents can less effectively hold accountable. Finally, the CRS Bill has several significant differences from the expired commercial and business space laws, which have already been discussed elsewhere in this Article, making it less of a replacement for previous state law.

Aside from finding implied field preemption, courts may find that state law expressly preempts an area of policy. “A state statute may expressly prohibit a locality from legislating in an area by the words of a statute.”²¹⁷ This type of clearly defined intention gives rise to express field exemption. For example, in *Gallagher*, the court held a state law regulating the New York City Transit Authority (the “NYCTA”) did not expressly field preempt “the NYCTA from almost any local law so long as the ordinance has some arguable effect on the authority.” In coming to this conclusion, the Court referenced the Public Authorities Law Sec. 1204(5-a), wherein the NYCTA is given the power to:

make, amend and repeal rules governing the conduct and safety of the public as it may deem necessary, convenient or desirable for the use and operation of the transit facilities under its jurisdiction, including without limitation rules relating to the protection or maintenance of such facilities, the conduct and safety of the public, the payment of fares or other lawful charges for the use of such facilities, the presentation or display of documentation permitting free passage, reduced fare passage or full fare passage on such facilities and the protection of the revenue of the authority (emphasis added).²¹⁸

Absent language limiting the ability of local legislators to enact laws on matters related to the NYCTA, the Court refused to attribute such an intent, particularly where the local law did not infringe on the NYCTA’s existing authority. In *People v. Weckworth*, the defendant similarly, and unconvincingly, argued the same law expressly ex-

215. See *749 Broadway Realty Corp.*, 140 N.Y.S.2d, at 769.

216. See *supra* Section III.A.1.

217. *People v. Gallagher*, 18 N.Y.S.3d 280, 285 (N.Y. Crim. Ct. 2015).

218. *Id.*

empted the local agency's ability to legislate in connection with NYCTA-related matters.²¹⁹

Based on the express language of state law, the New York Supreme Court struck down a local law penalizing tax filers for failure to submit documentation to local authorities.²²⁰ The law prohibited such tax filers from the right to appeal the local authorities' fines by using the courts.²²¹ The Court looked to the text of Article 16 of the New York Constitution, which stated that "[t]he legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation."²²² The Court determined that this language connoted the state's express intent to process tax assessments.²²³

As with implied field exemption, the CRS Bill would likely withstand arguments that the state legislature expressly occupies the field of commercial rent. Some may argue that the absence of an express enabling statute is grounds enough to undermine the CRS Bill's constitutionality. However, "[i]t is well settled that, if a town or other local government is otherwise authorized to legislate, it is not forbidden to do so unless the State, expressly or impliedly," has communicated a desire to preempt the field.²²⁴ Given the set of powers reserved for cities in New York, challengers of the CRS Bill shoulder the burden of showing state law expressly preempts it.²²⁵ Simply put, the type of field occupation exemplified by residential rent and taxation in New York's constitution is non-existent concerning commercial rent.

Even if the CRS Bill survives claims of implied and express field exemption, it must withstand claims of conflict preemption. "[C]onflict preemption occurs [(1)] when a local law prohibits what a state law explicitly allows, or [(2)] when a state law prohibits what a local law explicitly allows."²²⁶ Courts look beyond similar language in their deliberations to the "direct consequences" of implementing the local law.²²⁷ There must be a direct collision between local and state law where an activity specifically allowed by state law, for example, is illegal under the local ordinance.

219. *People v. Weckworth*, 58 N.Y.S.3d 875 (N.Y. Crim. Ct. 2017).

220. *749 Broadway Realty Corp.*, 140 N.Y.S.2d 766.

221. *Id.* at 767.

222. *Id.* at 768.

223. *Id.*

224. *MVM Constr., LLC v. Westchester Cty. Solid Waste Comm'n*, 81 N.Y.S.3d 67, 70 (2018) (quoting *People v. New York Trap Rock Corp.*, 456 N.Y.S.2d 711(1982)).

225. *See Hunters for Deer, Inc. v. Town of Smithtown*, 129 N.Y.S.3d 463, 465 (N.Y. App. Div. 2020).

226. *Matter of Highway Superintendent Ass'n of Rockland, Inc. v. Town of Clarkstown*, 54 N.Y.S.3d 60, 62 (2017).

227. *Id.*

Citing conflict preemption, a court struck down a local law that prohibited activity that the state legislature permitted in *Highway Superintendent Ass'n of Rockland, Inc. v. Town of Clarkstown*. In *Town of Clarkstown*, the New York State Supreme Court declared that a local law empowering a local agency to hire and supervise personnel maintaining state highways conflicted directly with state law. The state law authorized a state agency to maintain and provide highway care. The court held that the local law unconstitutionally took away the state agency's power to hire mechanics whose work (i.e., highway maintenance) the state, not the local town board, directly supervised.²²⁸

The opposite dynamic was present in *Hunters for Deer, Inc. v. Town of Smithtown*, in which a local law permitted activity that state law prohibited.²²⁹ The New York Supreme Court struck down a local ordinance that included “bows and arrows” in its definition of “firearm,” while state law explicitly excluded them from the definition.²³⁰ The result was a direct conflict where “the [local] ordinance [sought] to prohibit the discharge of a bow and arrow in circumstances where, under State law, discharge of a bow and arrow is allowed.”²³¹

Conversely, courts denied claims of conflict preemption where local laws expanded state law penalties for negligent driving²³² and required process servers to have a license.²³³ In both instances, the regulations did not prohibit anything allowed by state law or allow anything forbidden by state law. Instead, they provided additional guidance on what state law already contemplated, avoiding a head-to-head collision necessary for conflict preemption claims.

It is unlikely that the CRS Bill, were it to pass, would be unconstitutional based on conflict preemption. The CRS Bill is distinct from the line of cases in which courts struck down local laws challenged under state law. First, no current law regulates commercial rent. Second, the CRS Bill would not modify any court proceedings, real property laws, or any civil and criminal procedures in the ways that many other unconstitutional local laws have. Such instances would lead to state law collisions that the municipal home regime framers intended

228. *Id.* at 63.

229. *Hunters for Deer*, 129 N.Y.S.3d at 465.

230. *Id.*

231. *Id.*

232. *People v. Torres*, 108 N.Y.S.3d 269, 271 (N.Y. App. Term. 2019), *leave to appeal granted*, 142 N.E.3d 1158 (2020).

233. *Givens v. City of New York*, 76 N.Y.S.3d 355, 358 (N.Y. Sup. Ct. 2018), *aff'd sub nom. In re Givens v. City of New York*, 113 N.Y.S.3d 687 (2019), *leave to appeal denied sub nom. Givens v. City of New York*, 148 N.E.3d 522 (2020).

to avoid. Finally, the CRS Bill would not allow behavior that state law explicitly prohibits with respect to commercial tenancies.

B. Constitutionality under Federal Law

On top of its ability to overcome state law challenges, the CRS Bill would likely survive federal law challenges.²³⁴ Rent control critics have argued that residential and commercial control violates the U.S. Constitution. Four of the most likely critiques of the CRS Bill would be that it violates the Contracts Clause, the Takings Clause, the Due Process Clause, and the Equal Protection Clause of the U.S. Constitution.²³⁵ This Section argues that the CRS Bill would be able to withstand each of these four challenges, starting with the Contracts Clause.

1. Contracts Clause

The Contracts Clause in Section 10 of the U.S. Constitution forbids the passage of any “law impairing the obligation of contracts.”²³⁶ This clause includes both substantive and temporal dimensions. From a substantive standpoint, the Contracts Clause encompasses “any kind of contract.”²³⁷ Commercial leases are but one type of contract. From a timing standpoint, “it is the retroactive application of a statute which gives rise to questions of unreasonable impairment of contract obligations and remedies.”²³⁸ The Supreme Court strongly discourages government meddling in the affairs of private parties that have mutually agreed to an arrangement by contract. However, “not all laws affecting pre-existing contracts violate the Clause.”²³⁹ Where a law applies to an existing agreement retroactively and, therefore, falls under the scope of the Contracts Clause, the Court employs a two-part test: (1)

234. *New Orleans Waterworks Co. v. Louisiana Sugar-Ref. Co.*, 125 U.S. 18, 31 (1888) (confirming that an “ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this Article of the constitution of the United States.”).

235. *But see* R. S. Radford, *Regulatory Takings Law in the 1990’s: The Death of Rent Control?*, 21 *Sw. U. L. REV.* 1019 (1992) (naming other grounds for challenging commercial rent control, including “equal protection. . . , exceeding the war powers of Congress, and violating the doctrine of separation of powers; as a form of involuntary quartering of troops . . .”).

236. U.S. CONST. art. I, § 10, cl. 1.

237. *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018).

238. *Cenvill Inv’rs, Inc. v. Condo. Owners Org. of Century Vill. E., Inc.*, 556 So. 2d 1197, 1200 (Fla. Dist. Ct. App. 1990).

239. *Sveen*, 138 S. Ct. at 1821.

does the state law impose a “substantial impairment on the contractual relationship” and, if so, (2) is the state law “an ‘appropriate’ and ‘reasonable’ way to advance ‘a significant and legitimate public purpose’” of the state.²⁴⁰

If the CRS Bill passes and a commercial lease is already in effect, the CRS Bill would leave the existing contract intact and only impact future contract renewals. For such leases, the rent on the CRS Bill’s passage date would be the baseline rent when determining rent increases after the lease expires.²⁴¹ For example, the third-year rent of a lease in its third of a five-year term at the time of the CRS Bill’s passage would be the base rent used to determine rent in year six—whether a renewal with the same tenant or a lease with a new tenant. Therefore, if the annual rent under the first lease was \$5,000 by the end of the fifth year, but the application of the annual rent increases of the CRGB starting during the third year would have led to the rent only being \$4,500 by the fifth year, the new lease would have to start at \$4,500. However, the tenant was paying the landlord \$5,000 during the previous year, subject to the terms of the then unexpired lease.

If the CRS Bill passes and a commercial space does not have a tenant or an active lease, tenants and landlords will negotiate the first rent (i.e., the “initial regulated rent”).²⁴² The City of New York would not impose the “initial regulated rent” onto the parties based on fair market value or other factors. Instead, the CRGB would regulate the subsequent rent increases to the previously privately negotiated terms among the tenant and landlord.

The CRS Bill would not be subject to Contracts Clause analysis because the underlying law would not alter party obligations under pre-existing contracts. In addition, the law proposed by the CRS Bill would not apply retroactively to executed contracts. As a result, the law would not impair contractual rights and, therefore, would not violate the Contracts Clause of the Constitution.

2. Takings Clause

The Fifth Amendment of the U.S. Constitution, which contains the Takings Clause, prohibits that “private property be taken for public use, without just compensation.”²⁴³ The Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

240. *Id.* at 1821–22.

241. *See supra* note 33, § 22-1204(b).

242. *See supra* note 33, § 22-1204(c).

243. U.S. CONST. amend. V.

the public as a whole.”²⁴⁴ Further, it applies to state laws under the Constitution’s Fourteenth Amendment.²⁴⁵ Its scope includes all branches of state government.²⁴⁶ “[A] party challenging governmental action as an unconstitutional taking bears a substantial burden.”²⁴⁷ The Supreme Court has repeatedly noted since the 1970s that there are two categories of takings: (1) per se, or categorical, takings, whereby the government directly appropriates a plaintiff’s physical property, and (2) regulatory takings, whereby a government goes too far in restricting a plaintiff’s use of property.²⁴⁸ It is unlikely that the CRS Bill could be considered a per se or regulatory taking.

Categorical Takings. Categorical, per se, takings manifest themselves in two ways, including the government’s “permanent physical invasion.”²⁴⁹ Any “government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.”²⁵⁰ In *Block v. Hirsh*, the Court upheld a Washington, D.C. residential rent control law limiting an owner’s ability to raise the rent or evict a tenant.²⁵¹ Though rent controls could amount to a taking, the Court did not find one in this instance in light of Congress declaring a housing emergency and the owner retaining the right to move into the location.²⁵² In *Yee v. City of Escondido*, the Court upheld the law in California that restricted an owner’s ability to evict mobile home tenants.²⁵³ The Court noted that where “[owners] voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals.”²⁵⁴ Further, the Court deemed that the rent control law was “a regulation of petitioners’ use of their property, and thus [did] not amount to a per se taking.”²⁵⁵

The CRS Bill would not constitute a “permanent physical invasion” of an owner’s commercial space. In *Hirsch* and *Yee*, the Court ruled that rent control did not mirror other common physical inva-

244. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

245. U.S. CONST. amend. XIV; *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

246. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 715 (2010).

247. *E. Enterprises v. Apfel*, 524 U.S. 498, 523 (1998).

248. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

249. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528 (2005).

250. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

251. *Block v. Hirsh*, 256 U.S. 135, 155–56 (1921).

252. *Id.* at 156–58.

253. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 524 (1992).

254. *Id.* at 531.

255. *Id.*

sions, such as permanent flooding.²⁵⁶ The CRS Bill is similar. Despite capping rent, the CRS Bill mirrors the laws in the *Hirsch* and *Yee* cases, which show that, even with eviction protection, rent control could survive a takings challenge.

The second categorical taking type denies an owner of “all economically beneficial or productive use of land.”²⁵⁷ For example, in *Lucas v. South Carolina Coastal Council*, the plaintiff purchased land on which he planned to build single-family homes. However, the state legislature later passed a zoning law forbidding the plaintiff from constructing such housing.²⁵⁸ Given that the plaintiff only bought the land to build a home, the Court reasoned that he lost the economic benefit and the utility of the land he purchased due to the state law forbidding the one thing he bought the land to do.

The CRS Bill would not deny owners all economic benefits from their purchase. Owners of commercial spaces impacted by the bill bought their spaces to have the option to extract value from the property by collecting rent from tenants. Though the CRS Bill proposes regulations on rent increases, it does not deny owners the ability to lease their space and collect rent. Because that fundamental activity would still be possible, it is hard to imagine that a court would determine that an owner would lose all economically productive use of the space due to lower profits.

Aside from the two types of categorical takings above, Professor Joseph Singer suggests two additional classes, one being the “deprivation of a core property right.”²⁵⁹ Among those core rights are the rights to (1) pass on a property at death; (2) earn interest on one’s principal; and (3) recover land free of an easement at the natural termination of the easement.²⁶⁰ However, commercial rent control, specifically the CRS Bill, would not infringe on any of these. For example, the CRS Bill would not grant tenants the right to pass on the property at death or otherwise deny that right to owners. Neither would the CRS Bill allow for an arrangement where the government receives funds from the owner and retains the accrued interest.²⁶¹ There would be no exchange of funds from owners to the city government that would make such an arrangement possible. Finally, because easements are entirely different creatures of law from leases, courts

256. *See, e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179–80 (1872).

257. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

258. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006–07 (1992).

259. SINGER, *supra* note 39 at 727.

260. *Id.*

261. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

likely would not find that the CRS Bill creates any easement at all, let alone restricts an owner's ability to recover their property free of one.

The fourth type of categorical, per se taking, also proposed by Professor Singer, is "governmental interference with a property owner's 'vested rights.'"²⁶² One case from which this form of taking derives is *Kaiser Aetna v. United States*.²⁶³ In *Kaiser Aetna*, a Hawaiian law permitted an organization to charge fees to access its private marina.²⁶⁴ After the ownership connected the marina to the bay, making it a "navigable water of the United States" under federal law, the U.S. government demanded that Kaiser Aetna make the waterway "free to public access."²⁶⁵ In part, the Court upheld Kaiser Aetna's right to charge for access because an owner's ability to exclude "falls within this category of interests that the Government cannot take without compensation."²⁶⁶ In the context of zoning laws, the government can neither retroactively downsize a building nor rescind a building permit following a zoning law without impeding an owner's vested rights.²⁶⁷

In the case of the CRS Bill, critics could argue that it impedes an owner's vested right to exclude others. These cases are inapplicable because the CRS Bill pertains to a commercial lease and not rights under an easement (e.g., non-exclusive right to access the pond) or zoning laws (e.g., specification of how an owner can use a building). Further, a tenant would still be paying rent, albeit at a below-market rate. Unlike the law in *Ross v. Berkeley*,²⁶⁸ in which the owner had no right to evict a tenant for their personal use, the owner would still be able to forego renewing a tenant's lease after its termination under the CRS Bill. Even if the CRS Bill were to adopt an "eviction protection" approach in the form of a "good guy" eviction, it is uncertain that it would violate the vested interest of the owner. As leases aim to balance competing property rights that both tenants and owners have to commercial spaces, it would be unrealistic to believe that owners have a vested right to be free of regulation and any form of rent control. Notwithstanding the above, a regulatory takings challenge would be more robust.

Regulatory Takings. Were the CRS Bill to overcome challenges as a categorical taking, its critics would argue that it separately consti-

262. SINGER, *supra* note 39, at 702.

263. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

264. *Id.* at 168.

265. *Id.* at 165–68.

266. *Id.* at 180.

267. See SINGER, *supra* note 39, at 735.

268. *Ross v. City of Berkeley*, 655 F. Supp. 820, 837 (N.D. Cal. 1987).

tutes a regulatory taking. The Court looks to three factors, an ad hoc test from the *Penn Central* case, to determine whether a government's actions go too far and rise to the level of a regulatory taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.²⁶⁹ The test attempts to balance property rights preservation with the public good.²⁷⁰ Courts treat an owner's land interests as bundled up in one parcel and do "not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."²⁷¹ However, "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land" could lead a court to determine that a reasonable landlord would treat their ownership as separate tracts.²⁷² Deciding whether the totality of the land in question (i.e., the "denominator") is the whole of a parcel or some part can significantly influence the impact analysis. If the denominator is larger, the impact may be less significant; however, if the denominator is smaller, the impact of a policy on a given property interest could be substantial.

The first factor examines whether a law causes too significant of an economic loss in value to an owner. The Court has consistently refused to find a taking in several residential rent control cases. In *Yee v. City of Escondido*, the Court reiterated that "the government may place ceilings on the rents the landowner can charge" and "require the landowner to accept tenants he does not like."²⁷³ In light of the pressures created by World War II and the need for a policy response, in *Bowles v. Willingham*, the Court noted:

There is no requirement that the apartments in question be used for purposes which bring them under the Act. Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But, as we have pointed out in the *Hope Natural Gas Co.* case (320 U.S. page 601, 64 S.Ct. 281), that does not mean that the regulation is unconstitutional.²⁷⁴

Plaintiff-owners challenging the CRS Bill would argue that annual rent caps would destroy a significant percentage of their property's market value. Unfortunately, there is no bright line test for what a threshold percentage constituting a "severe" diminution in value

269. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

270. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1937 (2017).

271. *Penn Cent. Transp. Co.*, 438 U.S. at 130–31.

272. *Murr*, 137 S. Ct. at 1945.

273. *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992).

274. *Bowles v. Willingham*, 321 U.S. 503, 517 (1944).

would be. However, several circuit courts “have found no regulatory taking when presented with diminutions in value of 75 percent and 92.5 percent.”²⁷⁵ More recent cases, including one before the United States District Court in the Eastern District of New York, had similar skepticism for losses amounting to fifteen percent. Absent an ability to make economic use of their property, owners will find it challenging to show an economic impact that rises to the level of a regulatory taking.

Looking at the second factor of the regulatory takings analysis, it is unlikely that the CRS Bill would significantly interfere with an owner’s investment-backed expectations. Owners will argue that they relied on anticipated rent increases from increasing property value, and the CRS Bill is an unexpected state intervention that undermines that expected return on investment. The CRS Bill would neither undermine an owner’s vested interests in their property nor significantly impact their use. Commercial space owners would still be able to lease their property after the passage of the CRS Bill. The loss of future profits does not constitute a taking. Commercial real estate markets, like many industries, can change in unexpected ways for many reasons, including natural disasters, capital market dips, new zoning laws, pandemics, or new government regulations.²⁷⁶ A plaintiff-owner will have difficulty convincing a judge that commercial rent materially imposes on their expectations when purchasing their property.

The final and third *Penn Central* factor is the character of governmental action. The “severity of the burden that government imposes upon private property rights” is at the heart of this part of the inquiry.²⁷⁷ As noted by the United States District Court for the Eastern District of New York, this factor “does not incorporate ‘a means-ends test [that] asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose.’”²⁷⁸ Neither is the “regulation’s underlying validity” in question.²⁷⁹

Courts would likely favor the New York City Council in evaluating the burden the CRS Bill would impose on property owners. There

275. *Clayland Farm Enterprises, LLC v. Talbot Cnty.*, Maryland, 987 F.3d 346, 354 (4th Cir. 2021).

276. *See Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015) (holding that, in respect of mobile homeowners, “when buying a piece of property, one cannot reasonably expect that property to be free of government regulation such as zoning, tax assessments, or, as here, rent control”).

277. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

278. *S. Nassau Bldg. Corp. v. Town Bd. of Town of Hempstead*, No. 21CV00715ERKAYS, 2022 WL 3446317, at *12 (E.D.N.Y. Aug. 17, 2022) (quoting *Lingle*, 544 U.S. at 542).

279. *Id.*

is a spectrum of ways to characterize the nature of the obligations that policies may impose on property owners. On one extreme, critics of the CRS Bill will argue that the policy would amount to something close to a physical invasion of their property that guts their property rights. On the other end, proponents will characterize the CRS Bill as a minor adjustment to “the benefits and burdens of economic life to promote the common good.”²⁸⁰ City Council’s intent in proposing, and the actual mechanics of, the CRS Bill indicates an attempt to balance perceived power imbalances in the commercial leasing sector. Owners can still collect rent and lease their space to whichever tenants they choose. The CRS Bill ensures owners do not exploit their tenants through manipulative rent hikes. Absent actual physical invasion or property destruction, the CRS Bill should survive scrutiny under the “character of government action” prong of the *Penn Central* ad-hoc test for regulatory takings.

3. *Due Process Clause*

The Due Process Clause of the Fourteenth Amendment prohibits the government from depriving owners of their property “without due process of the law.”²⁸¹ In evaluating due process violations of price control laws, the Supreme Court often asks whether such laws are “arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt”²⁸² For example, if there are signs of artificially inflated prices, “the government may intervene in the marketplace to regulate rates or prices.”²⁸³ However, the fact that a price control law lowers the value of the owner’s property alone does not make the law unconstitutional.²⁸⁴

The CRS Bill would likely survive challenges that it violates owners’ right to due process on procedural grounds. A plaintiff-owner could argue that they did not receive sufficient notice or ability to amend this legislation. The lack of notice or ability to challenge this bill would result in unconstitutionally diminished rights to contest the law underlying the bill. In *Bowles v. Willingham*, the Supreme Court upheld a residential rent control law that allowed an administrative agency to review disputes regarding rental rates, noting that this form of judicial review was sufficient from a procedural due process stand-

280. *Lingle*, 544 U.S. at 539 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

281. U.S. CONST. amend. XIV.

282. *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988).

283. *Id.*

284. *See Bowles v. Willingham*, 321 U.S. 503 (1944).

point.²⁸⁵ CRS Bill critics have three opportunities to protest it. First, the bill approval process requires notice and an opportunity for a hearing where proponents and critics can voice their opinions. Second, the board must host public hearings, where critics can raise concerns, before any annual rent adjustment.²⁸⁶ Finally, owners can apply to the administering agency's commissioner when they believe the CRS Bill would result in an unfair initial rental rate.²⁸⁷ A federal court would likely determine that the CRS Bill provides sufficient procedural mechanisms to survive a procedural due process challenge.

Similarly, a court is unlikely to find that the CRS Bill violates substantive due process. Here, the central question is "whether the enacting body [the New York City Council] could have rationally believed at the time of enactment that the law would promote its objective."²⁸⁸ Rent control laws must be "designed to accomplish an objective within the government's police power," and their provisions must relate to their purpose.²⁸⁹ CRS Bill critics argue that commercial rent control would worsen matters, increasing small businesses' regulatory burden and reducing owner incentives to improve their commercial spaces. However, when assessing a substantive due process challenge, "[h]ow well the ordinance serves [its] purpose[s] is a legislative question, one the court will not consider."²⁹⁰ The CRS Bill aims to protect small businesses and nonprofits by stabilizing rental prices, ensuring access to affordable goods and services, and preserving neighborhood identity. The bill's goals are similar to those described in *Levald, Inc. v. City of Palm Desert*²⁹¹ and *Carson Harbor Village Ltd. V. City of Carson*,²⁹² both of which courts upheld against substantive due process challenges. Courts even upheld a rent control law with an eviction protection provision.²⁹³ In the state court context, the New York State iteration of commercial rent control in 1945, which included a rent cap and eviction protection, withstood a due process

285. *See id.* at 516.

286. N.Y.C., N.Y., REGULATION OF COMMERCIAL RENT, Int. 1796-2019, § 22-1203(h) (2019).

287. *Id.* at § 22-1208.

288. *Carson Harbor Vill. Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994), *overruled on other grounds by* *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

289. *Id.*

290. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993).

291. *Id.* at 683 (noting that the law was designed to combat high costs related to the moving of mobile homes).

292. *Carson Harbor Vill. Ltd.* 37 F.3d at 471 (noting that the local rent control law was designed "to mitigate rising rents and to protect tenants from losing their investments if they sell their mobile homes").

293. *See Schnuck v. City of Santa Monica*, 935 F.2d 171, 175 (9th Cir. 1991).

challenge under the U.S. Constitution.²⁹⁴ Given this historical and judicial context, the CRS Bill would likely survive a substantive due process challenge.

4. *Equal Protection Clause*

The Equal Protection Clause of the U.S. Constitution prohibits the government from denying property owners “equal protection of the laws.”²⁹⁵ Plaintiff-owners would argue that the CRS Bill denies equal protection of the law to benefit commercial tenants. However, the “equal protection clause does not forbid classifications.”²⁹⁶ Further:

the clause “keeps governmental decision makers from treating differently persons who are in all relevant respects alike.” *Id.* As a general rule, “legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.”²⁹⁷

Absent a classification that “jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the equal protection clause requires only that the classification rationally further a legitimate government interest.”²⁹⁸

The courts’ standards in reviewing equal protection and due process challenges are similarly deferential to lawmakers. Courts “will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [courts] can only conclude that the legislature’s actions were irrational.”²⁹⁹

Courts would likely uphold the CRS Bill against an equal protection challenge, as has been the case with mobile home rent control,³⁰⁰ residential rent control,³⁰¹ and commercial rent control.³⁰² For example, the previous iteration of commercial rent control in New York addressed the “disparity in bargaining powers between landlords and

294. *Twentieth Century Assocs. v. Waldman*, 63 N.E.2d 177, 180 (N.Y. 1945).

295. U.S. CONST. amend. XIV.

296. *Adamson Companies v. City of Malibu*, 854 F. Supp. 1476, 1495 (C.D. Cal. 1994).

297. *Id.*

298. *Id.*

299. *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

300. *See Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083 (9th Cir. 2015).

301. *Pennell*, 485 U.S. at 14.

302. *See Twentieth Century Assocs. v. Waldman*, 63 N.E.2d 177 (1945).

commercial tenants” resulting from World War II.³⁰³ Despite shifting burdens between two parties, the law had goals and impacts that satisfied courts in their equal protection analysis. The CRS Bill is quite similar. It aims to stabilize unstable commercial real estate markets wherein landlords have significant power, which has only increased during the pandemic.³⁰⁴

IV.

COMMERCIAL RENT CONTROL AND BEYOND

Despite the CRS Bill likely being lawful under state and federal law, there are two remaining questions to discuss. First, can legislators improve the bill through amendments? Second, since commercial rent control is not a panacea for the difficulties facing small businesses and nonprofits, are there supplemental policies worth considering? This Section analyzes both of these questions.

Inspired by small commercial tenants, community organizers, and movement lawyers in New York, this Section argues that several amendments could help the CRS Bill meet its intended goals. Such modifications would account for many of the bill’s most substantial critiques while empowering small commercial tenants. Further, this Section suggests that the New York City Council consider supplemental policies. The council has already taken a holistic approach, passing other legislation to protect small commercial tenants in the past few years. Councilmembers should continue and expand this approach to ensure stability both now and in the future. Undoubtedly, only strategic organizing can ensure that the most marginalized communities have leadership roles in determining their futures.

A. *Improvements to the CRS Bill*

Despite being a constitutional bill that, if passed, can effectively protect small commercial tenants, the CRS Bill does not go far enough. There are still open questions, complicated power dynamics, and a lack of clarity to protect marginalized, Black- and immigrant-led organizations. If passed into law, the CRS Bill would inadequately address the racial and class dynamics in the commercial real estate

303. John J. Powers, *New York Debates Commercial Rent Control: Designer Ice Cream Stores Versus the Corner Grocer*, 15 *FORDHAM URB. L.J.* 657, n.23 (1987).

304. See NYC Hearing Transcript on Intro 1796, 12-15 (Sep. 17, 2021), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4230081&GUID=B2FF2D24-F642-42A1-BEBB-D8D59E079D99> (statement of Council Member Stephen Levin)(noting that the CRS Bill’s goal is to address rent, “the biggest challenge that [small businesses] face in staying business,” by creating “stability for small businesses in a time of so much instability.”).

markets that disproportionately displace Black- and immigrant-led small businesses and nonprofits. At least five modifications to the CRS Bill could enhance its ability to achieve its goals, as discussed in Section II above. The CRS Bill could become a model for other jurisdictions with these fixes.

First, the CRS Bill could increase the proportion of community-oriented members on the nine-person CRGB. While reserving two seats for commercial tenants, the bill requires two seats for commercial landlords and the rest for finance, economics, real property management, or community development experts.³⁰⁵ There are two problems here. First, the economics and finance fields notoriously lack diversity, a metric for diverse perspectives.³⁰⁶ Second, they are disciplines rooted in the same neoliberal market-first approach that has caused the displacement that the CRS Bill intends to address. Commercial landlord representatives should own fewer than three properties. They should also be required to certify they will avoid any personal benefit from their board role and notify the CRGB of any conflicts of interest. The bill should reserve at least three of the five public member seats for people with community organizing, urban planning, and similar experience championed by local advocates.

Second, the CRS Bill should permit the public to vote on board members instead of leaving them up to mayoral appointments. The Berkeley commercial rent law had the same process, limiting the mayor's power while encouraging civic engagement. If there is an appointment mechanism, those appointing board members should be advocates with an understanding of the issues facing marginalized communities (from an intersectional perspective) and should receive compensation if low-income.

A third feature the CRS Bill should adopt would be clarifying the enforcement process. The second Berkeley commercial rent law, limited to a specific neighborhood, struggled with the breakdown of the enforcement mechanism that ultimately undermined operations.³⁰⁷ A particular city agency, such as the Housing Preservation & Development or Small Business Services, or a state agency, such as Taxation

305. See N.Y.C. City Council, 1796-2019, 2019 Leg., Sess. 7440, § 22-1203(a) (N.Y.C., N.Y. 2019).

306. See Greg Rosalsky, *Economics Still Has a Diversity Problem*, NPR: PLANET MONEY (Jan. 7, 2020) <https://www.npr.org/sections/money/2020/01/07/793855832/economics-still-has-a-diversity-problem> [<https://perma.cc/TE6M-XDVU>]; U.S. EQUAL EMP'T OPPORTUNITY COMM'N, DIVERSITY IN THE FINANCE INDUSTRY (2006), <https://www.eeoc.gov/special-report/diversity-finance-industry> [<https://perma.cc/SSF7-J68A>].

307. Keating, *supra* note 75, at 137.

and Finance or the Department of State, should hold owners responsible for abiding by the law. Further, landlords should be required to submit foundational documentation to such agencies, including the lease, riders to the lease, proof of service of the registration statement to the tenant, and the actual rent charged, among others. In addition, the agency should provide tenants with certain information that would be helpful to them, such as rental rate history, in the tenant representative's native language, when translation is possible. However, the enforcement mechanisms should avoid other agencies' mistakes and punitive approaches and use strategies that humanize, and not criminalize, low-income, Black, and marginalized people. Many Black and other marginalized people have trauma around engaging with courts, often seeing them as sites of oppression, so it is essential to ensure that those who are most likely to be exploited are most likely to access the requisite support. Some considerations could include restorative justice circles, freezing rent, or civil penalties for owners failing to register their spaces or overcharging tenants.

A fourth tweak to the CRS Bill could be to adopt an eviction protection approach that keeps tenants from displacement if they avoid specific actions. One of those causes could be the owner deciding to occupy the space, a missing factor the court considered in overturning commercial rent control in Berkeley. An eviction protection mechanism would protect tenants who are otherwise following the procedures of their lease. Further, such a mechanism would appease SBJSA advocates who believe that a "good cause" eviction is vital. Though among the most controversial features of the SBJSA, eviction protection could be handy to small commercial tenants facing arbitrary displacement.

A final, fifth modification could be to require that a property owner requesting to adjust their rent higher than allowed by the CRGB first register their space. The CRS Bill would require landlord registration within four months of the bill's passage, but this is unrelated to the owner's ability to ask for the CRGB to consider a readjusted, higher rent. Tying the benefit of requesting more to an obligation of registering space increases the likelihood of owner compliance. Further, it protects tenants from landlords gaming the system.

The CRS Bill would more closely meet its goals with these five modifications. Other considerations could include incentives for tenants that have been in a space for a certain period and intentional recording and tracking of the race and income of tenant representatives. However, rent control has limits. As a result, legislators should

consider supplementing the CRS Bill with other initiatives, such as those discussed in the following subsection.

B. Beyond the CRS Bill

Commercial rent stabilization alone will not protect Black- and immigrant-led small businesses and nonprofits from displacement. For some, commercial rent control fits a larger vision rooted in solidarity, making community control of retail space possible. This dream contemplates neighborhood blocks lined with cooperatively owned businesses, credit unions, food cooperatives, community centers, and green space. Asian, gender non-conforming immigrants, Black trans women, Latinx folks, and disabled people returning from the criminal punishment system abound. The profit model is no longer the sole motivation for allocating resources—communities engage in serious, transformative conversations about and beyond tax, zoning, and anti-trust laws. The moment requires more from us all.

On a city level, New York City should expand at least four existing initiatives. First, increased funding for short-term needs, such as rent, should prioritize oft-ignored Black- and immigrant-led small businesses.³⁰⁸ Relevant agencies could provide funds directly or indirectly by expanding loan options under minority- and women-owned business certificate programs.³⁰⁹ Second, the city should expand language justice by increasing translation and interpretation services.³¹⁰ Language access ensures that non-English speaking small tenants enjoy the city's resources. Third, policymakers should invest in further analysis of data collected by the storefront registry.³¹¹ Strategic expansion of the scope of the information collected from commercial spaces could more effectively inform city policy to reduce displacement. Finally, the city should continue to fund efforts that provide legal services and resources to small tenants seeking support with leases and harassment.³¹²

308. See N.Y.C. Comptroller, *Department of Small Business Services' COVID-19 Loans and Grants Underserved the Bronx*, (Dec. 9, 2022), <https://comptroller.nyc.gov/newsroom/department-of-small-business-services-covid-19-loans-and-grants-underserved-the-bronx/> [<https://perma.cc/3DVD-KEUK>] (noting in a post-hoc audit that 2.2% of COVID-19-related loans and 3% of grants went to businesses in the Bronx, New York's poorest borough, while a disproportionate amount went to Manhattan businesses).

309. See United for Small Business NYC, *USBNYC PLATFORM* (2021) 5, https://anhd.org/sites/default/files/usbnyc_2021_platform_april2021.pdf.

310. See *id.* at 7.

311. See *id.*

312. See *id.* at 11.

Beyond what they are already doing, municipalities like New York City can implement new policies. First, the city should invest in building merchant power, which could look like funding existing efforts or reforming Business Investment Districts (BIDs) to ensure more local control.³¹³ Second, the city could create new programs to provide affordable commercial space.³¹⁴ For example, two ways to increase accessible commercial spaces for small tenants are to require their inclusion in city-owned buildings and future rezoning plans.³¹⁵

State governments can also create enabling legislation to expand small tenant and community control of commercial spaces. Initiatives like the New York City Real Estate Investment Cooperative (“NYREIC”) already exist to allow communities to invest in and co-steward commercial spaces.³¹⁶ Through a fiscally sponsored nonprofit and various limited liability companies, NYREIC facilitates community investment in commercial property acquisition, removing it from the speculative market to become deeply affordable. Though the New York State Attorney General approved NYREIC’s investment model, state agencies can do more to make the model sustainable and scalable. However, other examples abound throughout the country. For example, the East Bay Real Estate Cooperative in the Bay Area uses a multi-stakeholder consumer cooperative model to achieve similar goals.³¹⁷ Likewise, The Guild, located in Atlanta, Georgia, uses a co-living model to create communal spaces for entrepreneurs and their businesses.³¹⁸ The East Portland Community Investment Trust uses a trust structure to allow community members to invest in and steward large commercial real estate. Whether through community land trusts, retail cooperatives, or other creative designs, cities like New York can learn from and create the legal infrastructure to support community ownership of commercial space. The Co-City Project, under the leadership of Professor Sheila Foster, has documented additional models of state actors enabling co-ownership and cooperation.³¹⁹

Additionally, state legislatures can provide funding should remove existing tax breaks for wealthy individuals and large companies

313. *See id.* at 5.

314. *See id.*

315. *See id.*

316. N.Y.C. Real Estate Investment Cooperative, *About NYC REIC*, <http://nyreic.com/about/> [<https://perma.cc/MEY6-GPZV>].

317. *See* East Bay Permanent Real Estate Cooperative, *About Us*, <https://ebprec.org/about-us> [<https://perma.cc/CKR5-BR5M>].

318. *See* The Guild, *About*, <https://ebprec.org/about-us> [<https://perma.cc/6F3U-YWNT>].

319. *See* Georgetown University, *About the Co-Cities Project*, https://labgov.georgetown.edu/co-cities_project/ [<https://perma.cc/U43M-UJ3M>].

to offset the costs of supporting small commercial tenants.³²⁰ Given the difficulties of Black- and immigrant-led small tenants receiving private bank financing, public banks should also be a part of the regulatory framework.³²¹ If New York state decides to continue direct funding, create additional programming, or cut certain taxes or fees to small retail tenants, new revenue streams from well-endowed institutions may prove critical.

CONCLUSION

America's elites displacing, directly and indirectly, marginalized groups from residential and commercial property is part and parcel of this country's fabric. Property owners justify this phenomenon, pointing to the capitalist market's benevolence in promoting land's best use. No regulation is good regulation. Meanwhile, small business owners and nonprofit leaders regularly point to unabated commercial rent hikes as detrimental to their survival. Unfortunately, the landlord-tenant relationship's unjust power dynamic allows owners to ignore the negative externalities of pushing out oft-considered neighborhood institutions.

Commercial rent stabilization counterbalances this injustice by helping small tenants catch up to runaway rents and avoid displacement. In presenting the CRS Bill to the New York City Council in 2019, city policymakers desired stability in the commercial real estate rental market for small tenants. Through a rent guidelines board, the CRS Bill would permit an annual cap on the percentage increase owners can impose on their tenants. If implemented, the policy would adequately balance the needs of property owners with those of individual business owners, nonprofit leaders, employees, and communities that nearly always suffer from displacement.

Despite inevitable challenges, the CRS Bill would survive a constitutional challenge on state and federal grounds. On state grounds, the CRS Bill is an appropriate use of state power that would not violate existing state laws or the state constitution. Regarding federal law, the Supreme Court has consistently upheld price control laws, including commercial rent control, with substantially more prohibitive language and triggers.

320. Carl Campanile & Kate Sheehy, *NY Legislature Proposes Nearly \$7 Billion in New Taxes on Wealthy*, N.Y. POST (Mar. 14, 2021) <https://nypost.com/2021/03/14/ny-legislature-proposes-nearly-7b-in-new-taxes-on-wealthy/> [<https://perma.cc/F9LT-PKHV>].

321. See Public Bank NYC, *Mission and Vision*, <https://www.publicbanknyc.org/about> [<https://perma.cc/7CD5-X5QV>].

This Article aims to be instructive for movement lawyers and courageous legislators in New York City and elsewhere concerned with the vanishing of commercial corridors and their attending cultures. It joins commercial rent control and municipal home rule literature, providing a relatively extensive review. Though commercial rent control is far from a silver bullet, it is mistaken to believe that not addressing rent will make this problem magically go away without regulation and several other supplementary policies. Long term, however, the commodification of land is unsustainable. To create belonging in inclusive ways for Black and other marginalized people, we need new relationships among ourselves and between us and the land. Commercial rent control is merely a tiny step toward remembering what our connection to the Land once was, remembering what it still is, and, together, figuring out what it will be in the future.