

I. IMPLIED WARRANTY OF HABITABILITY

1. *Lemle* reviewed—basically a contractual case
2. *Javins* reviewed—basically not a contractual case
3. Now what the above analysis suggests is not that *Javins* is wrong, but that *Javins* isn't contract, at least it's not contract as that term is traditionally understood. This is important, however, because if it's not contract, then we are deprived of the justification that we traditionally give for enforcing contracts: this is what the parties agreed to. This is not what the parties agreed to; they agreed to something else, but we're going to treat them as if they agreed to this.
 - a. There is no justification, some would argue, for imposing contractual terms on people
 - b. Courts should not make changes like *Javins*
4. Why should we upset the conclusions that the market has reached? To bring the premises "up to code." This is a policy argument in the technical sense of the word 'policy'. The classic argument is if you raise the costs of supplying any good by regulation, those costs will get passed on to the consumer if the market is even vaguely competitive. This will cause some consumers to drop out of the market. It has, however, been argued that such is not the case in the case of low-income housing.
5. The conditions under which it is not the case:
 - a. Inelastic supply of housing at the margin
 - b. Elastic demand at the margin
 - c. There are a significant number of marginal tenants
 - d. All units are earning rents
 - e. Code enforcement does not improve landlords' ability to price discriminate
 - f. Code enforcement will not shift the demand curve
 - g. Transactions costs are relatively low
6. Results and some thoughts
 - a. the empirical evidence is mixed—largely ineffective, probably because most low-income tenants don't know about it. There are also cases where it has been too effective. The revamping of Clifton Terrace. Key language: "Of the building's original 289 apartments, 23 households that receive Section 8 housing vouchers remain."
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 - b. the moral point—one can favor this approach even if it's not effective.

- c. the racial point—a substantial number of tenants of slum housing are racial minorities.
- d. poor people are poor.

II. RENT CONTROL

- 1. *Pennell* — This case is the first “takings” case that we have considered. There will be more.

- a. What does the case hold? We’re not going to deal with the “taking” question, but the statute not facially unconstitutional under either due process or = protection clauses.
- b. What does the dissent want to hold? By limiting the purposes under due process to preventing supracompetitive profits, this one is no good.
- c. Rent control before the Supremes. Compare *Yee v. City of Escondido*, 503 U.S. 519 (1992) (S547):

In the same term in which it decided *Lucas v. North Carolina Coastal Council* (a case that we will reach toward the end of the course), the Court held in *Yee v. City of Escondido*, that the plaintiff had no valid claim of a physical taking, where the city had fixed the rental rates for mobile home pads at below the market rate and the state had made it difficult—the plaintiff claimed virtually impossible—to evict such tenants, even when the tenant had sold his mobile home to someone else. In doing this the Court disapproved the rulings to the contrary of two federal circuit courts of appeal and affirmed the holding of the California Court of Appeal. The Court was at pains, however, to point out that the plaintiff might have a valid claim of regulatory taking, but did not consider this claim because it had not been raised in the petition for certiorari. The judgment was unanimous. Justices Blackmun and Souter concurred, both, in different ways, refusing to join in the Court’s statements about regulatory takings.

- d. Can you think of an argument for the proposition that rent control statutes are unconstitutional? Think about eviction control.

- 2. *Braschi*

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- a. What is the argument about? courts vs. legislatures? What happened with *Hudson View Properties*? [heterosexual partner of resident not immediate family within the meaning of the lease]? The legislature overrules the court [so long as tenant resides there, LL may not exclude in rent controlled or stabilized apartment].
- b. Is *Sullivan* (p. S344) well distinguished? [sister not entitled to live in a rent-stabilized apartment, when the sister tenant who was the named

tenant moved out] well distinguished? Once more, the legislature overrules the court.

- c. Suppose that a married couple didn't do any of the things that Blanchard and Braschi did, would the survivor not be entitled under the statute? (Not even clear that the surviving spouse has to live with the deceased tenant of record.)
- d. New York amended the code to comply with *Braschi*. 9 NYCRR 2204.6(d)(3). Similar amendments were made in the Rent Stabilization Law. 9 NYCRR 2506(o). The regulations are really complicated, and, hence, not particularly easy to apply. It is possible that the problem has been solved by the SCOTUS decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015). It is possible that it has not.